

**Law and Violence**  
**Alexander Guerrero**  
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**I.**

The criminal law, legal and political institutions, and efforts aimed at reforming those institutions all mark a significant difference between violent and non-violent criminal actions. Violent crimes are typically met with more severe punishments and more extensive collateral consequences than non-violent crimes—even when the violent crimes cause less harm. Advocates for criminal justice reform make their case by pointing to the high numbers of people incarcerated for non-violent offenses and offering reform proposals that would significantly alter the treatment of non-violent offenders—with the implicit or explicit suggestion that this is the heart of the injustice, and that things should stay as they are for those convicted of violent offenses.<sup>1</sup> The 2016 United States Sentencing Commission Report to Congress on Career Offender Sentencing Enhancements made the case that sentencing enhancements should only be triggered by crimes of violence, and that they should no longer be triggered by convictions for drug trafficking.<sup>2</sup> Recent state efforts to re-enfranchise those convicted of felonies and to make record expungement easier have been barred to those convicted of a violent crime.<sup>3</sup> And in the midst of the COVID-19 pandemic, calls to release people in jails and prisons have focused almost entirely on “non-violent” offenders.<sup>4</sup> David Sklansky argues in impressive detail in his recent book that “[n]o distinction plays a larger role in contemporary American criminal law than the line between violent and non-violent offenses.”<sup>5</sup> Despite a decade of significant discussion of criminal justice reform, the refrain remains: violent crime is different; those convicted of violent crimes are different; and it is appropriate to punish and respond to violent crime differently.

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<sup>1</sup> For example, see Lanhy R. Silva, “Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders,” *Cincinnati Law Review*, 79 (2010); Lucius Outlaw III, “Time for a Divorce: Uncoupling Drug Offenses from Violent Offenses in Federal Sentencing Law, Policy, and Practice,” *American Journal of Criminal Law* 49 (2016).

<sup>2</sup> Report at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf#page=5](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf#page=5)

<sup>3</sup> For example, the 2019 New Jersey criminal justice reform act allows for easier record expungement, except for those convicted of a violent criminal offense. Discussion at: [https://nj.gov/governor/news/news/562019/approved/20191218a.shtml?fbclid=IwAR1cAFJRKRW4odOjuVxeFTD8zHlJTDB8Wnk4kHJkXw-sToDjn0b2\\_lehqmk](https://nj.gov/governor/news/news/562019/approved/20191218a.shtml?fbclid=IwAR1cAFJRKRW4odOjuVxeFTD8zHlJTDB8Wnk4kHJkXw-sToDjn0b2_lehqmk) An executive order in Kentucky restored voting rights to 140,000 convicted felons, but limited to those convicted of non-violent offenses. Michael Wines, “Kentucky Gives Voting Rights to Some 140,000 Former Felons,” *The New York Times* (Dec. 12, 2019). <https://www.nytimes.com/2019/12/12/us/kentucky-felons-voting-rights.html?smid=nytcore-ios-share>

<sup>4</sup> Reported, with other examples, in Catherine Kim, “Why people are being released from jails and prisons during the pandemic,” *Vox* (Apr. 3, 2020).

<sup>5</sup> David Alan Sklansky, *A Pattern of Violence: How the Law Classifies Crimes and What It Means for Justice* (2021), 41.

In this article, I argue that the violent/non-violent distinction cannot bear the normative weight currently placed on it and that we should jettison thinking in terms of violent crime and move to thinking in terms of wrongful harm caused and risked. I argue that, if we do this, our current practices of sentencing and punishment require revision, and that we should make those revisions. The basic argument is that there are moral constraints on punishment; that these are provided by (a) the amount of wrongful harm caused or risked and (b) facts about agent culpability; and that there is no consistent relationship between a crime being violent and how much wrongful harm was caused or risked by that crime; nor is there a close relationship between whether a crime involves violence and the degree of culpability of the agent committing the crime. In the conclusion of the article, I offer an error-theory concerning our commitment to treating violent crime differently than non-violent crime, attempting to explain why we see this distinction as important in the criminal law and suggesting that morally better categorizations are available to us.

It is worth stressing that I am not arguing that violent crime is not incredibly harmful in some cases, or that all violent crime should be punished less than it currently is. The right response could be—and in some cases probably will be—to increase penalties for very harmful non-violent crime, rather than to lessen penalties for very harmful violent crime. Nor is the suggestion that it is never appropriate to pay attention to the specific nature of the criminal offense in terms of the kind of wrongful harm that is caused or risked. It might be appropriate, for example, to have greater restrictions on future gun ownership for those who are convicted of a weapons offense. That is very different than the categorical difference in treatment that we currently see in the United States.

If successful, this argument would have substantial implications for current law and policy.<sup>6</sup> The differential punishment of violent crime is central to the mass incarceration crisis in the United States. Michelle Alexander suggests that “the uncomfortable reality is that arrests and convictions for drug offenses—not violent crime—have propelled mass incarceration.”<sup>7</sup> John Pfaff labels this the “Standard Story” regarding mass incarceration. His recent book makes a powerful case that this story is not the full story. Through analysis of state and federal data, Pfaff demonstrates that more than half of the increase in state prison growth in the 1980s through 2010 came from people serving time for violent offenses.<sup>8</sup> If we are serious about addressing mass incarceration and rethinking the role prisons are playing in our society, we must also reconsider the way we are responding to violent crime and to those convicted of violent offenses. We must not shy away from talking about violent offenses—what Pfaff calls the “third rail” of criminal justice reform. Questioning the normative weight currently placed on violence as a category in law must be a central part of that conversation.

## II.

Let me provide an overview of the central argument of the article. The argument begins with an empirical fact about the significance of being convicted of a violent crime in the United States:

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<sup>6</sup> My focus throughout is on the U.S. context. Although the argument applies more broadly, the issues are of perhaps distinctive importance in the U.S.

<sup>7</sup> Michelle Alexander, *The New Jim Crow* (2010), 102.

<sup>8</sup> John Pfaff, *Locked In* (2017), 31-36, 187-190.

(1) Violence and law: the United States legal system marks a categorical difference between violent crime and other crime that is materially significant in terms of sentencing and punishment, including: sentence length; eligibility for probation and parole; eligibility for government-provided benefits, employment opportunities, and civic roles; and eligibility for alternatives to incarceration including probation, and diversion from incarceration into substance abuse or mental health treatment.

The moral significance of this writing of violence into the law is evident if we attend to some general claims about the morality of punishment. In particular, consider the following four claims:

(2) Proportionality: a necessary condition of a punishment being permissibly exacted upon S is that the severity of the punishment is proportional to the crime for which S has been convicted.

(3) Equality: two people should not be punished substantially differently unless there is a morally significant difference between them in terms of (a) their culpability for committing the crimes or (b) the crimes for which they have been convicted.

(4) Proportionality and harm: assuming two equally culpable offenders, proportionality of punishment for an action should be tied to the wrongful harm caused or risked by that action: the greater the wrongful harm caused or risked, the greater the maximum permissible severity of punishment.

(5) Equal harm, equal punishment: assuming two equally culpable offenders, the quantity of punishment for two crimes, C1 and C2, should not differ substantially unless C1 and C2 differ substantially in wrongful harmfulness caused or risked.

These claims about the morality of punishment have significant implications for the use of violence as a significant legal category, which we can see by noticing important, under-appreciated facts about violence and all the actions that are included in that category.

(6) Wide variation in harmfulness of violence: violent criminal action is not a uniform category such that all or most actions in that category cause or risk causing a similar amount of wrongful harm.

(7) Violent action not systematically more harmful than non-violent action: it is not true that all or almost all violent criminal actions are more wrongfully harmful than non-violent criminal actions.

(8) No positive correlation between violence and culpability: those who commit violent offenses are no more likely to be culpable for offending, nor are they likely to be more culpable, than those who commit non-violent offenses.

And we are not forced to use the category of violence as a matter of administrative convenience.

(9) Better categories possible: there are usable categorizations of actions that do a better job sorting actions by their wrongful harmfulness than the violent/non-violent categorization.

Taken together, with some details filled in, we reach the following:

(Conclusion) We should jettison the use of the category of violent crime for purposes of punishment—including the assignment of collateral consequences and the availability of parole and diversion from incarceration—and instead use categorizations that better track wrongful harm caused and risked.

The rest of the article explains and defends these claims.

### III.

Although a philosophical discussion of the concept of violence might be of interest, I will focus on the ordinary conception of violence that figures into actual law, as it is that conception that is used to sort crimes into categories, and it is that conception which I argue cannot bear the normative weight currently placed on it.<sup>9</sup> Although jurisdictions differ in the details, a basic characterization of violence is found in U.S. federal law (which influences most specific sub-jurisdictions within the U.S.), which defines a “violent felony” as any crime punishable by imprisonment of greater than one year that “has as an element the use, attempted use, or threatened use of physical force against the person of another; or... burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”<sup>10</sup> Violent crimes other than felonies are just those that are otherwise similar but which have shorter sentences attached to them. Notably, this definition includes physical force against persons, attempts and threats, and both intentional and reckless action.<sup>11</sup> In Part VI, I enumerate and discuss the main categories of violent and non-violent crime at greater length.

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<sup>9</sup> For a helpful discussion of the understanding of “violence” in law, and the changing understanding of violence over time, see Alice Ristroph, “Criminal Law in the Shadow of Violence,” *Alabama Law Review*, Vol. 62 (2011).

<sup>10</sup> 18 U.S.C. § 924(e). The last clause, known as the “residual” clause, has proven difficult for courts to interpret and apply. In *Johnson v. United States*, the Supreme Court declared it unconstitutionally vague. 135 S.Ct. 2551 (2015).

<sup>11</sup> The recent law in the United States has focused on trying to interpret a particular string of language, which appears in a number of different places in federal law definitions of what constitutes a “violent felony”: “a crime.... that has as an element the use, attempted use, or threatened use of physical force against the person of another; or... burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” This provides a rough guide to how to think about “violence” in law, but it leaves a number of questions unclear, as the Supreme Court itself has said.

In *Begay v. United States*, 553 U.S. 137 (2008), the Supreme Court explained that “the provision’s listed examples illustrate the kinds of crimes that fall within the statute’s scope. Their presence indicates that the statute covers only similar crimes.” The Supreme Court further

There are many ways in which whether a crime is classified as violent or non-violent can make a difference to the sentencing and punishment of those convicted of that crime. For the purposes of this article, I include under the heading of “punishment” all of the following: initial sentence length, total time-served for the offense (not just the initial sentence, but also factoring in the availability or likelihood of parole), legally mandated collateral consequences of the conviction, and facts about the nature of the legal punishment, including whether one is incarcerated or is instead permitted to be on probation or enter an alternative diversion kind of program.<sup>12</sup> Being convicted of a violent offense can affect severity of sentencing and direct punishment, resulting in longer sentences and serving as a distinctive kind of trigger for mandatory

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reasoned that the listed crimes “all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.” Importantly, the Supreme Court also stressed that the correct way to discern whether a crime was “violent” or not was to look (somehow!) at “ordinary” instances of that crime, not at the particular facts in a particular case. The Court used this reasoning to find that felony driving while intoxicated is not a “violent felony” for purposes of the Armed Career Criminal Act.

As noted above, the clause in the ACCA and other similar statutes that states that violent felonies will include those crimes that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another” has come to be known as the “residual” clause. This clause has proven particularly difficult to interpret and apply. Many crimes can arguably fit under the “serious potential risk of physical injury” standard, and so federal courts were frequently divided over which crimes were covered by the residual clause. Additionally, courts were instructed to consider an “ordinary” case of a crime, although they do not have any evidence about whether “ordinary” or typical versions of these crimes look like. So, it is no surprise that the Supreme Court has had to struggle with the residual clause. In *Johnson v. United States* (2015), the Supreme Court finally declared ACCA’s residual clause unconstitutionally vague. 135 S.Ct. 2551 (2015). In *Welch v. United States* (2016) the Supreme Court made the decision retroactive, potentially putting many sentences into question if they relied on convictions under the residual clause. The Supreme Court has found other incorporations of this clause, as in the Immigration and Nationality Act, also unconstitutionally vague. *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). To my mind, the difficulty in codifying a precise definition of “violence,” as well as discerning how courts should decide whether a particular instance of a crime was “violent,” provides just one more reason to jettison the significance of this category. It should at least rebut worries that it is considerably easier to do this than to engage in what I will later recommend: analysis of the wrongful harm caused or risked.

<sup>12</sup> Some of these are perhaps controversial as “punishment” for theories of punishment that focus on what the State is trying to express or communicate through punishment (such as William Wringe, *An Expressive Theory of Punishment* (Palgrave Macmillan, 2016)), although even for those theories, there is a plausible case that there are expressive dimensions to these other components. Making that case in full would require more discussion, but I will suggest later in the paper that our differential attitudes toward violence are a significant part of the explanation of the use of violence as a distinctive category in law, and we are plausibly communicating a message about the nature of an offenders’ wrongdoing to society at large when we treat those convicted of a violent crime differently in all of these ways. The argument of the article is at least partly that this message is inapt and misplaced.

minimum or repeat offender extended sentences.<sup>13</sup> It can affect whether a person will be eligible for various government-provided benefits, employment and volunteer opportunities, and civic roles—even after the completion of their sentence.<sup>14</sup> Perhaps most significantly, it can affect an individual’s eligibility for alternatives to incarceration: probation and parole and various other forms of diversion from incarceration into substance abuse or mental health treatment. Here I will canvas some of these, to highlight some of the more significant examples in support of (1).

People convicted of violent crimes serve more time in prison than those convicted of non-violent offenses. Those convicted of violent offenses (roughly 30% of people admitted to state prisons) spend an average of 3.2 years in prison, whereas the overall average (including those convicted of a violent offense) is only 1.7 years.<sup>15</sup> Additionally, although people convicted of a violent crime make up only a third of prison admissions, they make up more than half of the people in prison at any moment in time. As Pfaff puts it, “violent offenders take up a majority of all prison beds, even if they do not represent a majority of all admissions.”<sup>16</sup>

Why is this? Some of this difference is a function of initial sentence length (sometimes due to enhancements and mandatory minimums). But a significant component is the expanded use of parole for everyone *except* those convicted of a violent crime. Pfaff notes that of the 300,000 people admitted to prison in 2003 in 17 states, only 3% had not yet been released or paroled by the end of 2013.<sup>17</sup> And of that 3%, almost 85% had been convicted of a violent crime. Some of this is because of a difference in average initial sentence length. But there is also this significant factor: parole is rarely granted to those who have been convicted of a violent crime. And this is despite a general trend toward an increased use of parole. As Pfaff summarizes the situation:

“After years of limiting and restricting [parole], states have started to rely on parole more extensively. Such reforms are in fact perhaps the most widely adopted type of prison reform to date. In almost all cases, however, these changes have been limited to people convicted of nonviolent crimes.”<sup>18</sup>

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<sup>13</sup> The ACCA, passed in 1984, imposes a mandatory minimum sentence of 15 years for any person illegally possessing a firearm who has three prior convictions for violent felonies. 18 U.S.C. § 924(e). The United States Sentencing Guidelines career offender enhancement applies when a defendant is facing prosecution for either a serious drug crime or a crime of violence, and has at least two prior convictions for either serious drug crimes or crimes of violence. If these conditions are met, then USSG §4B1.1 provides for a guideline range “at or near the maximum [term of imprisonment] authorized.”

<sup>14</sup> In many jurisdictions, all people convicted of a felony—non-violent or violent—lose civic rights, including the right to vote or serve on a jury. There are also collateral consequences that apply specifically to those who are convicted of violent crimes. Under U.S. law, those convicted of violent felonies receive lifetime bans on Section 8 and other federally subsidized housing, and local housing authorities are authorized to refuse housing to individuals who have “engaged in any ... violent criminal activity.” 42 U.S.C. § 13661(c) (2006); 24 C.F.R. § 906.203(c) (2010). And there are similar barriers to those convicted of violent crimes in terms of federal and state employment and licensing permits. See 45 C.F.R. 2522.205, 2540.200.

<sup>15</sup> Pfaff (2017), 188.

<sup>16</sup> *Id.*

<sup>17</sup> Pfaff, 188-89.

<sup>18</sup> Pfaff, 198.

Marc Morjé Howard makes a similar point. He argues that parole could be safely expanded to those who have been convicted of violent crime, but State legislators and parole board members (typically political appointees) are unwilling to risk implementing reforms or make parole decisions that might result in a person convicted of a violent crime then committing a violent crime while on parole.<sup>19</sup>

An additional explanation comes from the costs of mass incarceration more directly. The Violent Crime Control and Law Enforcement Act of 1994 included many provisions that contributed to the mass incarceration crisis, one of which was the creation of the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants Program. This program provided millions of federal dollars in grants to states to build or expand correctional facilities, provided that those states had sentencing guidelines in place that required those convicted of *violent* crimes to serve no less than 85 percent of their sentences. As a result of this program, by 1999, 28 states and the District of Columbia had adopted sentencing guidelines forcing those convicted of violent crimes to serve no less than 85% of their sentences, and 3 states required such people to serve 100% of their sentences.<sup>20</sup>

As mass incarceration has come under more widespread criticism on moral and economic grounds, a wide variety of alternative courts and alternatives to incarceration have been created or expanded, in addition to the expanded use of parole. Many of these alternatives are foreclosed to people charged with or convicted of a violent crime.

One of the most common alternatives comes in the form of drug courts. There are now over 3000 drug courts in the United States, with drug courts in all 50 states.<sup>21</sup> These courts aim to divert people into substance abuse treatment, rather than incarceration, as an acknowledgment that many people who engage in crime have significant substance abuse problems, and that these problems often are at the root of their criminal conduct. These courts have a range of criteria for eligibility, but most have a requirement that people not be charged with or have a conviction for a violent crime.<sup>22</sup> This is due largely to the aforementioned Violent Crime Control Act of 1994, which authorized billions of dollars for anticrime programs with specific funds allotted for the implementation of drug court programs, but eligibility criteria limited participation in these programs to *nonviolent* drug-involved offenders.<sup>23</sup>

Along with an increasing realization that incarceration is not the best response to substance abuse problems, so, too, there is increasing awareness that mental health problems might not be best addressed by incarceration. These “diversion” programs place offenders with mental health problems in treatment programs rather than incarcerating them. The record of these programs is generally good in terms of both treating offenders with mental health issues and reducing recidivism. Unfortunately, the main legislation addressing this issue in the past 20 years offers

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<sup>19</sup> Unusually Cruel: Prisons, Punishment, and the Real American Exceptionalism (Oxford University Press, 2017).

<sup>20</sup> Paula M. Ditton and Doris James Wilson, “Truth in Sentencing in State Prisons,” Bureau of Justice Statistics (1999), available at <https://bjs.gov/content/pub/pdf/tssp.pdf>

<sup>21</sup> National Association of Drug Court Professionals Website, available at <http://www.nadcp.org/learn/about-nadcp>

<sup>22</sup> Id. at <http://www.nadcp.org/learn/drug-courts-work/what-are-drug-courts>

<sup>23</sup> C.A. Saum et al., (2001). Violent offenders in drug court. *Journal of Drug Issues*, 31(1), 107–128, p. 108.

substantial federal grant money for diversion programs, such as mental health courts, but only if they are barred to those charged with or convicted of violent offenses.<sup>24</sup> Thus, it is little surprise that many local and state diversion programs ban people with mental health problems who committed a violent offense.<sup>25</sup>

Almost every jurisdiction allows some people to be sentenced to supervised probation, rather than time in jail or prison, and almost all these jurisdictions have consideration for “public safety” as an explicit, statutorily mandated consideration. Consideration of “public safety” has almost always focused on safety with respect to threats of violence. As a result, non-violent felonies such as white-collar crimes or simple drug possession typically have a much better chance of qualifying for supervised probation than violent felonies. It is common to have an explicit bar on probation for people convicted of violent felonies.<sup>26</sup>

#### IV.

Recall two of the general claims about the morality of punishment presented above:

(2) Proportionality: a necessary condition of a punishment being permissibly exacted upon S is that the severity of the punishment is proportional to the crime for which S has been convicted.

(3) Equality: two people should not be punished substantially differently unless there is a morally significant difference between them in terms of (a) their culpability for committing the crimes or (b) the crimes for which they have been convicted.

Let me expand and clarify these claims.

Consider two different theories of the morality of punishment: hybrid theories and retributivist theories. On a hybrid theory, there are constraints on who may be punished (only those convicted of an offense), how much they can be punished (only in an amount that is proportional to the gravity of their offense), and how much punishment can differ between similarly culpable persons convicted of the same offenses (not much). Subject to those constraints, the theory says: determine who should be punished and how much they should be punished based on the consequences of punishment.

On a simple retributivist theory, punishment is justified and morally appropriate if and only if it is deserved. This view sets out moral desert of punishment as both a necessary and sufficient condition for punishment being appropriate. Thus, the answer to the targeting question is: people should be punished if and only if they deserve to be punished. To the quantity question, the answer

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<sup>24</sup> Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, 118 Stat. 2327 (2004). MIOTCRA permits a small amount of grant money to be used to address treatment for mentally ill violent offenders, but only through in-prison programs. But in-prison programs have been much less effective—little surprise given that prisons exacerbate mental illness.

<sup>25</sup> See, for example, California: Mentally Ill Offender Criminal Reduction Act 32 (MIOCR) S.B. 1485, 1997-98 Leg., Reg. Sess. §1(g) (Cal. 1998).

<sup>26</sup> See e.g. TEX. CODE CRIM. PRO. ANN. art 42.12, § 6.



is: people should receive an amount of punishment equal to what they deserve. The hard questions then become: what is the appropriate basis or bases of desert of punishment?

Both hybrid and retributivist theories make a central place for Proportionality and Equality (on some views, it may be that Equality, or a nearby variant, is just entailed by Proportionality). These are also both intuitive principles, corresponding with common judgments about cases. I won't argue for them further here.<sup>27</sup> Still, despite this, or perhaps because of it, little has been said about the details of Proportionality and Equality with respect to these two questions:

- (a) What is it that punishment should be proportional *to*?
- (b) When we maintain that like cases should be treated alike in terms of punishment, what are the relevant dimensions of similarity in the cases that matter, morally?

## V.

When thinking about proportionality and equality of punishment, we must keep two questions distinct. One: *is this person culpable or fully culpable for committing the crime?* Two: *how morally bad is the crime?* Plausibly, proportionality and equality considerations attach both to *how culpable* the person was and *how bad* the action was. I will say more about culpability later, but I mean something like “moral responsibility for acting” where (on different theories) that can include facts about an agent’s intentions, will, control, and causal responsibility. Here, I will focus on the second kind of consideration, how bad the action was, and I will assume that the offenders in question are equally culpable—both (4) and (5) have explicit clauses setting aside culpability. This might be worrying if violent offenders were always or typically more culpable for what they do than non-violent offenders. But I argue against that suggestion below, when discussing (8), and so I leave questions of culpability to the side.

I will argue that what is significant about an action for proportionality and equality analysis is the *wrongful harm* caused or risked by the action. Focus on this kind of harm analysis forces us to consider more seriously the true harmful consequences of crime. This is not easy. There are difficulties in quantifying different kinds of harm in a way that allows comparisons, for example. But this is already done in other legal contexts (torts, for example), as well as in medical contexts in which assessments must be made about the costs and benefits of interventions and allocations of limited resources. People draw on empirical surveys, studies based on revealed preferences, and other admittedly imperfect methods to do this.<sup>28</sup> Furthermore, that it is difficult does not mean that it is not what we ought to be doing, or even what we are (very roughly) trying to do when we distinguish between, say, misdemeanors and felonies, or between different sentencing guideline ranges for different crimes. We should be doing this kind of wrongful harm analysis more

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<sup>27</sup> Simple consequentialist views about punishment reject both Proportionality and Equality, but that is a significantly counter-intuitive position, and I take it that few who wish to defend the use of the category of violence do so on pure consequentialist grounds. In fact, consequentialist considerations cannot support the use of the category of violence, as follows independently from claims (6)-(9).

<sup>28</sup> See e.g. Luis Prieto and Jose Sacristán, “Problems and solutions in calculating quality-adjusted life years (QALYs),” *Health and Quality of Life Outcomes* (2003);1:80.

explicitly and we should be using this analysis to guide our thinking about proportionality and equality. Let me say more to clarify and defend this view.

### **A. Wrongful Harm Caused or Risked**

Here is an intuitive account of harm and harming: A harms B if and only if A causes B to be in a bad state—either absolutely bad, or bad relative to other relevant alternative states that B might have otherwise been in.<sup>29</sup> Non-wrongful harm cases are ones in which A causes B to be in a bad state by doing X, but B had no right or reasonable expectation that A not cause B to be in this state by doing X. Consider a case in which A rejects B's offer of going on a date, leading B to be depressed. Or a case in which A and B are both fairly competing for a job, and A gets the job, resulting in B being unemployed.

Wrongful harm comes in a wide variety, but will include, prominently, things that you might impermissibly do to cause my physical body, things that I care about, or things that I have rights over (such as property or ideas) to be destroyed or taken from me or made worse off in significant ways.

Some actions that cause wrongful harm to a primary victim also cause broader social and psychological effects constituting wrongful harms to people who might be called secondary victims. Mass public shootings, sexual assault, domestic violence, and terroristic racialized lynching all provide clear examples of this. When considering wrongful harm that is caused by an action, we should include these secondary harms, including harms to those other than the primary victim, such as psychological injuries due to increased anxiety or fear, offense, or broader effects on social position or social standing. Harm caused through these kinds of broader social effects is wrongful—it results in violations or diminutions of rights that people have to autonomy, equality, respect, social standing, and so on. Individuals have a right against intentional or terroristic infliction of emotional distress. (Some harms will not count as wrongful, because one does not have a right against being caused to suffer them in this way—say, the psychological distress gay marriage causes homophobic people.) More would have to be said to demarcate the precise contours of individual rights here, but secondary wrongful harms—either through broader social effects or through individual subjective experience and emotional and psychological distress—caused by an action should count on the ledger of that action for the purposes of proportionality judgments. Additionally, harm to secondary victims is often a foreseeable result of certain criminal actions, undercutting at least one potential objection to counting this kind of wrongful harm caused by the action for purposes of assessing proportionality and equality.

Another complication comes in countenancing not just the actual wrongful harm caused by criminal action, but also the harm that was risked. There are hard issues here about exactly how harm risked should be weighed in relation to wrongful harm caused. Some will tolerate and embrace a significant amount of moral luck on this score, others are wary of tolerating significant differences here. One possibility would be to identify ranges of likely or expected or standard consequences for various *types* of criminal actions and to treat those as the harms risked even in cases in which little or no harm materializes. But there are complications here.

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<sup>29</sup> There are cases that pose difficulties for the details of this account of harm; those details need not detain us here. For discussion, see Elizabeth Harman, "Harming as Causing Harm," in Harming Future Persons, Melinda Roberts and David Wasserman, eds. (2009); Seana Valentine Shiffrin, "Harm and Its Moral Significance," *Legal Theory* 18 (3)(2012):357-398.

## B. Wrongful Harm and Proportionality

Claims regarding criminalization and harm are familiar from debates about the so-called “harm principle” offered by Mill and refined by many. Antony Duff has put forward a version of the harm principle in criminal law discussions, suggesting that “only conduct that wrongfully harms or threatens to harm others is a suitable candidate for criminalization.”<sup>30</sup>

The fact that harm has been seen as central to questions of criminalization does not require that wrongful harm should also be morally central with respect to proportionality analysis, but it suggests that it might be a decent starting point. Most discussions of proportionality focus in a general way on the *badness* or *gravity* of the actions in question, without specifying more precisely what dimension of badness or gravity is relevant, or how those ideas are to be understood.<sup>31</sup>

Here is a hypothesis: if pressed to offer a rationale to explain “badness” or “severity” or “gravity” of offenses, most would settle on something like how much wrongful harm was caused or risked. Those theorists who have spoken to the issue usually cite harm caused or risked as a central factor in assessing moral desert and the gravity of a criminal act—the other significant factor being the agent’s culpability for performing the act. Göran Duus-Otterström states that “[c]riminal seriousness is usually taken to be a function of the harm, or risk of harm, imposed by the offender, and the culpability of his doing so.”<sup>32</sup> Antony Duff says that to rank crimes in terms of their seriousness, “we must [...] identify and rank criminal harms, identify and rank kinds of criminal culpability, and then combine these two rankings into a single scale of criminal seriousness.”<sup>33</sup> But we have not done a particularly good job of correctly ordering criminal offenses from worst to least bad in terms of the wrongful harm caused or risked—even if this is what we are roughly, imperfectly, trying to do.

If we have set offender culpability to the side, including facts about the role that the offender played in causing the wrongful harm, it becomes somewhat unclear what properties of actions could matter to proportionality analysis other than wrongful harm. Evilness? I suspect that intuitions about *evilness* of actions are really standing in for something else: *social deviance*. But there remains the question of why it would be permissible to punish actions more simply for being comparatively socially abnormal. A possibility here is that even similarly harmful actions might differ in how strongly a political community wants to punish or deter them, and this might relate to democratic or popular decisions regarding punishment. Assume that two kinds of actions cause the same amount of wrongful harm (always, or on average). Could a democratic polity permissibly decide to punish one of the two twice as severely as the other? Ten times as severely? It might be a matter of reasonable disagreement how much wrongful harm is caused by an offense or type of offense, and democratic politics might be one way of permissibly resolving such disagreements.

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<sup>30</sup> R.A. Duff, “Theories of Criminal Law,” in Stanford Encyclopedia of Philosophy (2013), <http://plato.stanford.edu/entries/criminal-law/>

<sup>31</sup> See Andrew von Hirsch, “Proportionate Sentencing: A Desert Perspective,” in Principled Sentencing, 3rd ed., eds. Andrew von Hirsch, Andrew Ashworth, and Julian Roberts (Oxford: Hart, 2009), 115–25.

<sup>32</sup> Göran Duus-Otterström, “Why retributivists should endorse leniency in punishment,” Law and Philosophy, 32(4) (2013), 459–483.

<sup>33</sup> Antony Duff, Punishment, Communication, and Community (OUP, 2001), 135.

But even there wrongful harm caused or risked seems to be the correct anchor for the discussion and disagreement.

Importantly, although it is natural to think that crimes that target or disproportionately affect certain groups—perhaps those in already marginalized social positions—or which are aimed at sustaining gender or racial hierarchy might be particularly bad and deserving of greater punishment, these broader social effects will be included in the wrongful harm analysis, as suggested in the previous section.

### C. Wrongful Harm and Equality

Proportionality identifies a limit on how much an individual can be punished. Many retributivist theorists see this as setting the exact appropriate amount: a person shouldn't be punished *more* than this, but they also shouldn't be punished *less* than this.<sup>34</sup> Hybrid theorists might see this as setting a ceiling: you can't punish a person *more* than this, given the severity of what they've done. As a result, one question that emerges for hybrid theorists is the question of fairness of punishment across a range of cases, involving different individuals. For retributivists—at least of the “mandatory” variety—if proportionality is being respected, and if people are being punished exactly as much as they deserve, then equality across cases will be assured.

But for others, the question emerges: when, and on what grounds, is it morally permissible to punish two people convicted of the same offense differently? If two agents, Smith and Jones, are equally culpable for offending, it is permissible to punish Smith and Jones different amounts only if their offenses were different in some morally significant way. The claim in (5): the only morally significant difference between offenses that might license differential punishment is the wrongful harmfulness caused or risked.

As in the case with proportionality, it is hard to imagine what other properties of offenses (evilness?) might be morally relevant in terms of licensing greater punishment. Unlike in the case of proportionality, however, here there might be a temptation to consider factors beyond either wrongful harmfulness or culpability: factors that are agent-focused, rather than offense-focused. These considerations might not affect the culpability of the agent, but might seem to permit differences in punishment. Consider, for example, the possibility that one of the two people is substantially more likely to reoffend, and this is known by the sentencing authority. This kind of forward-looking consideration veers closely into troubling pre-punishment territory. But there is much that might be said about this, and a full defense of (5) would require saying more. For our purposes, we can obviate the need for that discussion by simply noting the empirical fact—discussed below in Part VII—that those who commit violent crimes are no more likely to recidivate than those who commit non-violent crimes. If agent-focused factors do end up being appropriately considered, we could modify (5) to incorporate that fact, and then add the empirical claim regarding recidivism to the argument.

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<sup>34</sup> “Mandatory” retributivists believe that we are required to punish exactly as much as the person deserves; “permissive” retributivists maintain that we are permitted but not required to punish people in line with what they deserve (we may punish them less than that). See John Braithwaite and Philip Pettit, Not Just Deserts: A Republican Theory of Criminal Justice (1990), pp. 34-35.

In the next sections, I will consider the implications for accepting these claims regarding the morality of punishment and the significance of wrongful harm for how or whether “violent” criminal action should be treated as a distinct category. Importantly, one needn’t accept these claims to consider the implications of accepting them. And considering these claims also motivates the question: if one doesn’t embrace these claims about the morality of punishment, what are the other claims that one does accept that justify treating “violent” criminal action as a significant category within law?

## VI.

Consider the following claim:

(6) Wide variation in harmfulness of violence: violent criminal action is not a uniform category such that all or most actions in that category cause or risk causing a similar amount of wrongful harm.

This claim should be uncontroversial. All of the following count as violent crimes in U.S. jurisdictions: murder (in different degrees), manslaughter (voluntary and involuntary), rape and other forms of sexual assault, assault with a deadly weapon, kidnapping, robbery, aggravated assault, reckless endangerment, simple assault (attacks or attempted attacks without a weapon resulting in either no injury or minor injury). Jurisdictions differ with respect to how these crimes are defined and in the precise terminology used to describe them. Still, in every case, there is wide variation in how wrongfully harmful actions in this category are—either taken on a case-by-case, act-token basis, or looking at the act-types. Punching someone is much less wrongfully harmful than murdering someone.

Furthermore, although many violent offenses are very wrongfully harmful, it is not true that, as a class, they are more harmful than non-violent action. That is, we should also accept:

(7) Violent action not systematically more harmful than non-violent action: it is not true that all or almost all violent criminal actions are more wrongfully harmful than non-violent criminal actions.

Even if violent offenses varied significantly in their wrongful harmfulness, it might still be reasonable for them to be treated as a legally significant category if violent offenses were all or almost all worse than non-violent offenses in terms of wrongful harmfulness caused or risked. But that is not so.

First, consider the range of non-violent offenses: fraud, tax crime, bribery, forgery, racketeering, theft, burglary, embezzlement, cybercrime, identity theft, illegal drug manufacturing and distribution, possession and distribution of child pornography, and criminal damage to property—just to name some of the more central examples. Now, consider the categorical claim that all violent criminal action is more wrongfully harmful or risks more wrongful harm than any non-violent criminal action. This is clearly false. Irreparably defrauding a person of their life savings causes more wrongful harm than stealing that person’s car at knifepoint. Embezzlement that causes a company’s financial ruin, and the attendant loss of employment of fifty people, causes more wrongful harm than the poorly thrown punches of two drunk people in a bar fight. Non-violent crimes like those committed by former judges Michael Conahan and Mark Ciavarella, who

were convicted of fraud and racketeering for accepting money in return for imposing arbitrary and excessively harsh judgments on more than 5000 juveniles in order to increase occupancy at for-profit detention centers, can cause nearly unimaginable amounts of wrongful harm—more than all but the most horrific violent crimes.<sup>35</sup>

It is hard to see how the categorical claim could be defended. One way might be to try to argue that *physical* harm (such as might be caused directly by violent actions) is always more significant than *non-physical* harm (such as might be caused by non-violent actions). But physical harm is not always worse than non-physical harm. We can run a simple Millian argument to show this. Many of us have experienced both physical and non-physical harms. It is not the case that all those who have experienced both kinds of harms feel the physical ones always to be the worst of the two. Indeed, many would happily exchange non-physical harm for physical harm, if given the choice. I would rather be punched or have my arm broken by someone pushing me down, than to be defrauded out of my life savings.

More to the point, both physical and non-physical harm can be caused by non-violent criminal actions. It is often straightforward to determine the harm caused by a violent criminal action: a person was shot in the arm, or had his jaw broken. There are often also non-physical harms that follow from those physical ones. Physical harms caused by non-violent crimes may be more diffuse (although they may not be—consider driving under the influence, which is classified as non-violent in the United States post-*Begay*<sup>36</sup>), and there may be hard questions about exactly which harms that were in some sense caused by the action are going to count. I steal tens of thousands of dollars from you. This causes you financial devastation, you end up temporarily homeless, and this in turn contributes to serious health problems. Or I illegally operate a “pain management” clinic that is really just a supplier of illegal prescriptions for OxyContin, causing physical harm both to those addicted but also to their children (through malnourishment and neglect) and the broader community as chaos and disrepair takes over. In these cases, the physical harm is clear, although the full accounting of the wrongful harm caused by the criminal action may be complicated by the fact of intervening agency (to some degree) of those who knowingly use the drugs.

It is worth taking a brief detour to address the question regarding the extent of wrongful harm caused by an action that should count for proportionality and equality analysis. Non-violent crime might generate more questions in this regard, as it can be unclear how to delimit the full scope of harm that should be included in cases of fraud, bribery, money laundering, drug trafficking, and so on. Many views regarding the metaphysics of causation (particularly views focused on counterfactual or ‘but for’ causation) include more as caused by an action than would be counted by ordinary reflection. (There are many views on which, for example, your birth is a cause of your death.) This issue has been notoriously tricky in tort and criminal law, leading to the not unproblematic use of so-called “proximate cause” analysis. One question has been whether to see the correct causation standard as one that comes from metaphysics, or as one that comes

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<sup>35</sup> See Ian Urbina, “Despite Red Flags About Judges, a Kickback Scheme Flourished,” *New York Times* (March 27, 2009).

<sup>36</sup> See discussion *supra*, n. 9.

from normative considerations regarding moral responsibility.<sup>37</sup> One thing that seems clear: not all consequences that might in some sense be caused by a person's criminal action should count.

There are at least two kinds of potential limitations. First, there are cases in which what happened was not reasonably foreseeable as a result of an action of this kind. Second, there are cases in which the intervening agency of another person is substantial enough to render the previous person "causally innocent," even if it is true that their action was a "causally relevant condition" or a but-for cause of what transpired.

Questions regarding foreseeability and intervening agency make it difficult to provide an exact accounting of the wrongful harm caused by a particular action. Additionally, the consequences of actions and the wrongful harm they cause are ongoing, and questions of punishment have to be answered at particular moments of time, with approximations and estimations made of what wrongful harm appropriately attached to the action is still to come. There are different views one might adopt regarding how these questions should be resolved. Still, the very significant wrongful harms that result from non-violent crimes like fraud, theft, identity theft, and the illegal manufacture and trafficking of highly addictive and destructive drugs like heroin and fentanyl are both foreseeable and predictable. And in the non-drug cases, there is no question of intervening agency.

If we focus on wrongful harm caused by criminal actions, we will not see a simple, categorical sorting with all violent criminal actions rating worse than all non-violent criminal actions in terms of wrongful harm caused and risked. But consider a rejection of (7) that maintains that violent criminal action is almost always, although not uniformly, more wrongfully harmful than non-violent criminal action. What should we make of this weaker claim? There are at least two different ways of trying to evaluate this claim: at the level of act-types or at the level of act-tokens.

If we focus on action types, we might generate a list of, say, the main 100 types of criminal actions—the 50 violent ones (murder, manslaughter, rape, robbery, simple assault, etc.) and the 50 non-violent ones (fraud, espionage, theft, burglary, driving under the influence, etc.). We would then ask: do the 50 violent crimes generally cause or risk more wrongful harm than the 50 non-violent ones? To answer this, we could imagine ordering the 100 types of criminal action from most wrongfully harmful to least wrongfully harmful. One question would be how to do this. Would we somehow have in mind a 'normal' or 'prototypical' example of each of these actions?<sup>38</sup> Or the most wrongfully harmful instance of each action type? There are difficulties to both these ways of doing things. One worry is that our effort to remain at the level of types will just collapse into a token-level or token-derivative assessment. This might worry us if our motivation for going

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<sup>37</sup> See Antony Honoré, "Causation in the Law," *The Stanford Encyclopedia of Philosophy* (2010), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2010/entries/causation-law/>.

<sup>38</sup> This is basically what is required under the ACCA, which requires courts to engage in "ordinary case" analysis. See *Begay v. United States*, 553 U.S. 137 (2008). To determine whether a given crime is a "violent felony," a court is supposed to disregard the specific facts of the case it is addressing, and (somehow!) consider only an "ordinary" case of the crime of which the person was convicted. Because courts do not have empirical data to guide their assessment of what happens in an "ordinary case" of a given crime, this has produced unpredictable, confusing results.





serious violent crimes are, thankfully, relatively rare—particularly when compared with relatively less serious, much more prevalent violent crime like simple assault. By far the most common kind of violent crime is simple assault—attacks or attempted attacks without a weapon resulting in either no injury or minor injury.<sup>39</sup> And simple assault will often be less harmful than common non-violent offenses such as burglary, fraud, tax evasion, money laundering, identity theft, and drug trafficking.

## VII.

The claims so far have focused on the suggestion that violent criminal actions are more wrongfully harmful than non-violent crime. It is hard to find a claim that is both (a) strong enough to support the actual categorical violent/non-violent distinction drawn in law and (b) true.

But perhaps, although violent crime is not always or almost always more wrongfully harmful than non-violent crime, those who engage in it are categorically *more culpable* than those who engage in non-violent crime. If so, treating violent criminal action categorically differently than non-violent criminal action is morally appropriate, not because the acts are more wrongfully harmful, but because those performing them are more culpable. This view would reject the following claim:

(8) No positive correlation between violence and culpability: those who commit violent offenses are no more likely to be fully culpable for offending, nor are they likely to be relatively more culpable, than those who commit non-violent offenses.

In order to consider the plausibility of the claim that those who engage in violent action are categorically or typically more culpable than those who engage in non-violent crime, it will be useful to have two broad pictures of culpability or moral responsibility for an action.

The first picture holds that an agent is morally responsible—and correspondingly praiseworthy or blameworthy—only if, or only to the degree that, the agent’s actions are under her control. Some who hold such a view do so in an incompatibilist way, maintaining that control is incompatible with determinism.<sup>40</sup> But one might do so in a compatibilist way as well. Or it might be that some forces from the outside impinge upon us, but that these do not fully determine what we do. This would leave us less than perfectly responsible, but still responsible to some degree. More must be said about when an agent’s actions are under her control in order to fill out the picture. Call this the *agential control* view.

The second picture is concerned not with *control*, but with what the agent’s actions *reveal* about her moral beliefs, attitudes, and values. These are often described as “quality of will”

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<sup>39</sup> In the United States, of the almost 6.5 million violent crimes in 2018, there were 16,214 homicides, 734,630 rapes/sexual assaults, 573,100 robberies, 1,058,040 aggravated assaults, and 4,019,750 simple assaults. See Rachel Morgan and Barbara Oudekerk, US Department of Justice Bureau of Justice Statistics report, “Criminal Victimization, 2018” (September 2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf> and FBI UCR Program Report, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/murder>

<sup>40</sup> See, e.g., Galen Strawson, “The Impossibility of Moral Responsibility,” *Philosophical Studies* (1994).

views.<sup>41</sup> Pamela Hieronymi provides a nice statement of this kind of view: “[w]e are fundamentally responsible for a thing ... because it reveals our take on the world and our place within it—it reveals what we find true or valuable or important.”<sup>42</sup> Call this the *agential revelation* view: we are morally responsible for—and correspondingly potentially punishable and blameworthy for—those things that reveal who we are, morally speaking, or what our moral attitudes are like.

On either control or revelation views, culpability will come in degrees, as both *how much control an agent has* in performing an action and *how revealing an action is of who an agent is* are factors that plausibly come in degrees.<sup>43</sup>

We can now ask: on either the agential control or agential revelation views, are those who engage in violent criminal action categorically or almost always *more culpable* than those who engage in non-violent criminal action? Answering this question might seem to require answering questions regarding the etiology and psychology of violent and non-violent criminal action. That is a project spanning several disciplines—criminology, sociology, law, psychology—and it is not possible to say anything comprehensive here. I will, however, discuss what I take to be two widespread beliefs—I will call them dogmas—about violent crime that are relevant to the assessment of (8). I will suggest that the available evidence should undermine or at least weaken confidence in them.

Here are two common beliefs about violence and those who commit violent actions, even if they are not always formulated quite this explicitly:

Dogma of Depravity. Perpetrators of violence are morally bad people—even evil, depraved. Violent crime is perpetrated by people who have very bad moral characters; people who have disturbed, depraved moral worldviews.

Dogma of Difference. Perpetrators of violence are unusually and distinctively bad. They are different from the rest of us. Most of us might be such that we would engage in non-violent criminal action—if the circumstances were right, if we happened to be around the wrong people at the wrong time. But that isn’t true of violent criminal action. Only distinctively bad people engage in violent criminal action.

These dogmas don’t seem particularly relevant for rejecting (8) if one embraces the agential control model. Indeed, violent action often seems less under an agent’s control than non-violent criminal action; it is hard to see how the agential control picture would lend support to rejecting (8).

But if culpability and moral responsibility are construed on an agential revelation model, these dogmas, if true, might lead us to reject (8). If true, there would be a significant correlation between violent criminal action and greater culpability, relative to non-violent criminal action. On this view, the commission of violent crimes can be used as evidence connected to a characterological assessment: those who commit violent crimes are somehow in a different, and

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<sup>41</sup> For examples of views in this category, see Angela Smith, “Identification and Responsibility” in *Moral Responsibility and Ontology* (2000); Pamela Hieronymi, “Reflection and Responsibility,” *Philosophy and Public Affairs* 42 (2014); Nomy Arpaly, *Unprincipled Virtue* (Oxford University Press, 2003).

<sup>42</sup> Hieronymi (2014).

<sup>43</sup> For discussion, see Dana Kay Nelkin, “Difficulty and Degrees of Moral Praiseworthiness and Blameworthiness,” *Nous* (2014).

worse, category of people—they are bad; they have violent *natures*. That doesn't mean that violent crimes are more wrongfully harmful, but it would mean that those who commit violent crimes are in some important sense more blameworthy, more culpable, and perhaps more justifiably excluded from our broader political and social communities—because of what their violent actions reveal about who they are. We should ask, though, whether the inference from engaging in violent crime to a differentially worse characterological assessment is a good one, and whether these two dogmas are consistent with the available evidence.

There is general reason to be suspicious of characterological assessments, particularly those based on a single action or a few actions. Psychological evidence suggests that our actions are more the product of our situation and environment than we typically believe, and that we are too quick to explain actions as emanating from characterological dispositions. Psychologists have called this the “fundamental attribution error.”<sup>44</sup> This might push against the agential revelation view in general, although there are debates about the psychological evidence here.<sup>45</sup>

Less generally, we might ask whether people who commit violent crime somehow have different and morally worse characters, such that (for example) they are more likely than others to engage in other violent crime. There is little evidence for this. The eminent sociologist and criminologist Randall Collins argues that “[i]t is a false lead to look for types of violent individuals, constant across situations.”<sup>46</sup> He goes on: “I want to underline the conclusion: even people that we think of as very violent—because they have been violent in more than one situation, or spectacularly violent on some occasion—are violent only in very particular situations.”<sup>47</sup> He argues, backed by extensive empirical evidence, that many instances of individuals who engage in what to an outsider might look like particularly heinous crimes—violent elder abuse, child abuse, spousal abuse—are really quite ordinary people located in particularly difficult, emotional, isolated, stressful situations.<sup>48</sup> The suggestion is that most of us, whatever we think of our characters, might have ended up acting similarly under those conditions. This is not to cast doubt on the culpability of people in these situations (though others might push in that direction), but it is to cast doubt on the view that general character-focused considerations will single out those who have been convicted of violent crimes as particularly bad or particularly culpable. This evidence, at least, suggests that we should reject both the dogma of depravity and the dogma of difference.

Other evidence that inclines against these dogmas comes from the success of alternatives to incarceration for those convicted of violent crimes. If these two dogmas were true, we might expect that little would work to “rehabilitate” or to prevent recidivism of those who have committed violent criminal actions. But that is not what the evidence suggests. Studies have found that participants who were charged with violent crimes or had histories of violence performed as well or better in drug courts and diversion programs than those who were charged with non-violent crimes or had no such histories of violence.<sup>49</sup> Similarly with mental health diversion programs.

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<sup>44</sup> For extensive discussion, see John Doris, Lack of Character: Personality and Moral Behavior (Cambridge University Press, 2002).

<sup>45</sup> Steve Clarke, “Appealing to the Fundamental Attribution Error: Was it All a Big Mistake?” in Conspiracy Theories (David Coady, ed. Routledge, 2018).

<sup>46</sup> See Randall Collins Violence: A Micro-sociological Theory (PUP, 2008), p. 1.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* p. 137-41.

<sup>49</sup> S.M. Carey et al., “What works? The Ten key components of Drug Court: Research-based best practices,” Drug Court Review, 8(1), 6–42(2012); S.M. Carey et al., “Exploring the key

Mental health diversion programs that accept violent offenders have proven to be successful.<sup>50</sup> There is also significant evidence that people tend to “age out” of violence, based on a host of social, developmental, and neurobiological factors.<sup>51</sup> This evidence is hard to reconcile with either of the two dogmas.

Note, too, that to defend a categorical difference in treatment of violent as opposed to non-violent crime, the dogmas would have to apply categorically—to all violent criminal action, not just the very worst instances of violent criminal action.<sup>52</sup> So, even if the dogmas were true with respect to a certain kind of violent criminal action (e.g. serial rape or serial murder), they might well not be plausible when simple assault is brought into the picture.<sup>53</sup> Related to this, it is plausible that some non-violent crime is such that it seems to reveal a character that is as evil (if one wants to speak in those terms) as the perpetrators of even particularly heinous violent crime. Think of someone like Bernie Madoff, callously indifferent to the harm he causes or risks. Or think of Flint, Michigan’s former emergency managers and water plant officials who have been charged with the non-violent crimes of false pretenses, willful neglect of duty, and conspiracy for their role in misuse of public funds leading to widespread contamination of drinking water, lead poisoning of a generation of children, and at least 12 deaths from Legionnaire’s disease. Again, as in the previous section, it starts to look implausible that there will be a categorical difference here that is captured by the violent/non-violent distinction.

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components of drug courts: A comparative study of 18 adult drug courts on practices, outcomes and costs,” NPC Research (2008) at [http://www.npcresearch.com/Files/NIJ\\_Cross-site\\_Final\\_Report\\_0308.pdf](http://www.npcresearch.com/Files/NIJ_Cross-site_Final_Report_0308.pdf); C.A. Saum & M.L. Hiller, “Should violent offenders be excluded from drug court participation? An examination of the recidivism of violent and nonviolent drug court participants,” *Criminal Justice Review*, 33(3)(2008): 291–307; Saum et al. (2001).

<sup>50</sup> See, e.g., *Treatment Advocacy Center, Assisted Outpatient Treatment* (2005), available at <http://www.psychlaws.org/BriefingPapers/BP4.pdf>; Carol Fisler, “Building Trust and Managing Risk: A Look at a Felony Mental Health Court,” 11 *Psychology and Public Policy* 587, 602 (2005).

<sup>51</sup> For discussion, see Jeffrey T. Ulmer and Darrell Steffensmeier, “The Age and Crime Relationship: Social Variation, Social Explanations,” in *The Nurture Versus Biosocial Debate in Criminology* (SAGE Publications, 2014), pp. 377-396; Dana Goldstein, “Too Old to Commit Crime?,” *The New York Times* (March 20, 2015), available at: <https://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html>.

<sup>52</sup> A similar point can be made, too, against the suggestion that because violent crime can usually not be committed via negligence, whereas other kinds of crimes can be, that this would license differential treatment of those convicted of violent crimes across the board. At most this would suggest that some non-violent offenders, those who offend via negligence, might be less culpable, but that doesn’t line up with the violent/non-violent categorization generally. And it is, at any rate, controversial whether those who do things *negligently* are less culpable (in this sense of culpable as morally responsible) than those who do things *recklessly* or *intentionally*. That is not uncontroversial on either a control or agential revelation model.

<sup>53</sup> Similarly, although in some cases—think of violence or stalking targeted at a particular individual—early release or diversion programs might pose distinct concerns, that is not a reason to see these concerns as presented by every instance of violent crime. The point is not that such concerns can never be appropriately considered; to the contrary, it is that they should be appropriately considered when present, whether the crimes involve violence or not.

## VIII.

The argument I've offered suggests that we should jettison the category of "violent" crime in the criminal law and the law more generally—replacing it with an analysis that orders crimes based on the wrongful harm they cause or risk, rather than on whether they are violent, at least for the purposes of broad sentencing categories and practices of punishment more generally. But this goes against a pretty broad sensibility, which says that violent crime is worse than non-violent crime and is appropriately treated differently. Here, I want to say a few things that might explain why this sensibility is present, but in a way that suggests that it is in error.

### A. What We Think of When We Think of Violence

Here is a simple explanation for why people think violent crime should be treated differently: the worst violent crimes are truly horrifying and terrifying, in addition to being very wrongfully harmful, and these are what people think of when they think of "violent crime"—even though these are hardly a representative sample of everything that falls under the heading of "violent crime."

Some violent crime is incredibly, terribly wrongfully harmful. For example, violent actions where the person or persons doing the violence is considerably more powerful than the victim(s) of the violence can be harmful not only in the instant physical ways that violence is harmful, but also in structuring relationships of terror and domination, so that the person, the family, or even a whole community is entirely shaped and constrained by violence and the threat of violence in a host of deeply harmful ways.

For example, those who study domestic violence highlight that there are two significantly different forms of intimate partner violence—"situational couple violence" and "patriarchal terrorism"/"intimate terrorism."<sup>54</sup> The first of these is "fairly frequent, not very severe, and practiced rather equally (in modern America) by both males and females."<sup>55</sup> This kind of violence stays within certain parameters, is often symmetrical, rarely escalates over time, and results in injuries in around 3% of cases.<sup>56</sup> The second of these, patriarchal terrorism, "is violence used for purposes of control... involving serious physical injury or an ongoing atmosphere of threats; perpetrators are chiefly males, their victims chiefly females."<sup>57</sup> This second kind of domestic violence is rarer than the first, but is generally more salient when many people think of domestic violence. These are the cases that are dramatized in movies and television, and the ones that are covered in the news. Obviously, it should go without saying that all domestic violence is serious

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<sup>54</sup> For the canonical study on this, see M.P. Johnson, "Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women," Journal of Marriage and the Family, 57 (1995): 283-94. For more recent discussion, see Jessica J. Eckstein, "Intimate Terrorism and Situational Couple Violence: Classification Variability Across Five Methods to Distinguish Johnson's Violent Relationship Types," Violence and Victims 32 (2017): 955-976.

<sup>55</sup> Collins, Violence, p. 141.

<sup>56</sup> J.E Stets and M. Straus, "Gender Differences in Reporting Marital Violence," in Physical Violence in American Families, edited by Murray Straus and Richard Gelles (1990).

<sup>57</sup> Id.

and deserves a significant social and legal response; the suggestion here is only that our response ought to be more nuanced and responsive to the facts in particular instances.

Or think of the widespread portrayal of terroristic violence perpetrated by organized crime and criminal gangs. Many of the great works of film and television focus on this kind of violence—think *The Sopranos*, *The Wire*, and so on. Or think of the violent crimes depicted on the many law and crime television shows that are routinely among the highest rated shows on television (NCIS, NCIS Los Angeles, NCIS Etc., *Law and Order: SVU*...). These shows depict a lot of violent crime, but almost always on the ‘most harmful, most horrific’ end of the spectrum of violent crime. So, too, with the violent crime that makes the local or national news.

On the other side, non-violent crime is only rarely the subject of films or television, and, when it is, the focus is almost always on the wizardry involved in perpetrating the crime, rather than on the harm to victims.

This gives us a deeply misleading sense of what *most* violent crime is like, particularly in terms of how harmful it is. Instead of thinking of armed robbery or simple assault that results in little or no physical harm, we think of Jeffrey Dahmer, Tony Soprano, or the horrifying evening news report.

Related to this, Randall Collins details the ways in which we have false beliefs about what violence looks like. He notes that people are “not good at violence,” and that most of our beliefs about what violence is like are false. He writes:

“[W]e have been exposed to so much mythical violence. That we actually see it unfolding before our eyes in films and on television makes us feel that this is what real violence is like. Contemporary film style of grabbing the viewers’ attention with bloody injuries and brutal aggressiveness may give many people the sense that entertainment violence is, if anything, too realistic. Nothing could be further from the truth. The conventions of portraying violence almost always miss the most important dynamics of violence: that it starts from confrontational tension and fear, that most of the time it is bluster...”<sup>58</sup>

Collins notes that most violence is brief, incompetent, and leads to little injury of consequence. (But even this violence still results in assault convictions and violent criminal records.) This is not what we expect, having been raised on a steady diet of serial killer stories, NCISes, and *Game of Thrones* violent fantasy stories. The suggestion: as a result of the portrayals of violence that we encounter, we come to have false beliefs about what most violence and violent crime is like, about how harmful it is, and, consequently, about how appropriate it is to treat it categorically differently than non-violent crime.

## **B. The Harm We Can See**

Another possible (and non-rival) explanation for why we may feel that violent crime is different than non-violent crime: the harms from the most salient examples of violent crime are easy to see and to quantify. It is easy for us to understand the exact harm of violent crime, certainly the most proximate harms. With many kinds of non-violent crime—financial crime, cybercrime, fraud, embezzlement—it may be hard to even understand what the crime was, let alone the harms

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<sup>58</sup> Collins, *Violence*, p. 10.

that it caused. We should not infer from this, however, that these crimes are harmless. Nothing could be further from the truth.

If one wanted to consider a psychological or evolutionary story here, one could also note that violence is one of the oldest and most intimately familiar ways in which we can harm each other. We might well expect to have more deeply ingrained attitudes about violently caused harms than about harms caused in non-violent ways. In the same way that it is plausible that our ideas about morality did not originally develop to take into account the ways in which we might *help* or *save* those physically very distant from us, so, too, it is plausible that our ideas about morality did not originally form to take into account ways in which we might badly *harm* those physically very distant from us, or those who we may never see or meet.

These attitudes and intuitions about morality and harm might not have adequately updated to the modern, globally interconnected world in which we live. We may pay more attention to the local harms that might be caused through, say, physical violence, and not enough to the distant harms we can cause through, say, destroying the pensions of thousands of people through fraud and illegal market manipulation.<sup>59</sup>

### **C. Class, Race, and Violence**

A final thought about why we might see violence differently. Here we must ask who “we” are. It is plausible that many of the attitudes about how bad violence or violent crime is, or how bad those who engage in violence are, have a class and possibly racial dimension to them.

First, if one rarely encounters violence, then the myths about violence and the Hollywood portrayal of violence will more dramatically affect one’s view about what most violence and violent crime is like. And one directly encounters less violence as one moves up the socioeconomic ladder (which is not to say that it disappears). If we accept Randall Collins’s explanation that much violence is the product of situational factors like stress, powerlessness, and isolation, we should expect that those in certain socioeconomic environments may more often engage in and witness violence, without this meaning that those people are morally worse than those who, say, engage in non-violent crime. And this will be more familiar to those who have some personal experience at levels of lower socioeconomic standing.

Second, if popular views about crime and particularly violent crime are biased and warped by presentation in media and background racism and classism, they can also contribute to how violence is understood and in particular the extent to which the two dogmas discussed above are accepted. As one of the leading experts on violence and law suggests, “the racialization of violent crime has likely had more than a little to do with the increasing tendency to understand criminal

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<sup>59</sup> A related possibility, which might push back against the diagnosis that this is always a sign of error: it might be that, for some violent crimes and some non-violent crimes, the violent crimes are such that the wrongful harms are less diffuse (more concentrated on a few individuals) and the non-violent crimes have wrongful harms that are more diffuse (spread out in relatively small increments across many individuals). There are theories on which this kind of relative diffuseness might appropriately make a moral difference, even in cases in which the total wrongful harm might be equivalent or comparable. This would suggest an additional dimension to the wrongful harm analysis would be appropriate, but it wouldn’t vindicate sorting along violence/non-violence, as diffuseness of harm caused does not line up with violent or non-violent crimes, particularly once secondary harms are factored in.

violence as a product of offenders' characters, not of the situations in which they find themselves."<sup>60</sup>

Third, use of violence, even amounting to violent crime, can be defensive or protective, particularly for those who do not expect reliable police protection. Elijah Anderson discusses the "code of the street" which arises because of a lack of reliable police protection, along with the view that the police are prejudiced against everyone in particular neighborhoods and of particular races, so that a person calling the police is as likely to end up arrested as the perpetrator.<sup>61</sup> Under these circumstances, it becomes rational for individuals to demonstrate their ability to defend themselves by displaying a willingness to use violence if necessary. Engaging in violence on occasion may even be necessary, but those familiar with these environments will not see this use of violence as supporting either of the two aforementioned dogmas.

Fourth, and amplifying the first three points, if we have an elite political class of legislators (as most electoral democracies in fact have), we will have people making decisions about violent crime who are themselves largely unfamiliar with violence, and whose sense of it comes from film, television, sensationalistic news stories, and possibly racist and classist biases. They—and the prosecutors and judges who also comprise this elite political class—also have political incentives to sensationalize the danger and violent crime that exists.<sup>62</sup> And this elite political class, supported by the socioeconomic elite, will also sometimes have incentives to not want attention turned toward so-called "white collar" crimes like tax fraud, securities fraud, and other potentially very wrongfully harmful, but non-violent crime.

## IX.

Although it is difficult to offer precise quanta of the wrongful harm caused by particular crimes or by typical crimes in various categories, this is the kind of inquiry we should be engaged in—just as those involved in public health and the allocation of medical resources and interventions have to think about the harms and benefits that are likely to result from various actions and options. Rather than letting sentencing ranges be set by political whims or manipulated emotional responses, we should be having serious, evidence-based conversations about the wrongful harmfulness of crime and the morally appropriate responses to crime.<sup>63</sup>

As noted above, the felony/misdemeanor classifications, as well as intricate and complex criminal codes and sentencing guidelines, already try to categorize and distinguish tiers and categories of criminal actions. A focus on wrongful harm allows this to be done in a more principled way, allowing intelligible comparisons across kinds of crimes, including crimes across the violent/non-violent divide. A simple system might have five different categories, Category One

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<sup>60</sup> Sklansky (2021), p. 62.

<sup>61</sup> Elijah Anderson, Code of the Street: Decency, Violence, and the Moral Life of the Inner City (Norton, 1999). Lori Gruen, Clyde Meikle, and Andre Pierce develop complementary ideas and arguments in their chapter, "Destabilizing Conceptions of Violence," in The Ethics of Policing and Imprisonment (2018), 169-186.

<sup>62</sup> For classic discussion of these issues, see William J. Stuntz, "The Pathological Politics of Criminal Law," Michigan Law Review 100 (2001): 505, 510.

<sup>63</sup> Part of this conversation is already underway, as the public good/public health justification of criminal law is offered to supplant more punitive or retributive justifications. See Vincent Chiao, Criminal Law in the Age of the Administrative State (Oxford, 2018).



to Category Five (like hurricanes), corresponding with how much wrongful harm was caused or risked by the particular criminal action, or, alternatively, by a typical criminal action defined by these specific elements. Things will inevitably become more complicated and there are many questions to be addressed. But it seems that we should endorse:

(9) Better Categories Possible: there are usable categorizations of actions that do a better job sorting actions by their wrongful harmfulness than the violent/non-violent categorization.

If the argument of the article is successful, then we should embrace these categories—categories structured around the idea of wrongful harm—and jettison our misplaced focus on violence. Doing this might also result in us addressing some of the true deep roots of the problem of mass incarceration and enable a more effective, less devastating response to the problems of crime and wrongful harm. And doing so wouldn't be heading out into uncharted territory; indeed, references in law to “violent crime” or “violence” are actually a recent development, beginning in the late 1960s.<sup>64</sup> Categories in law are important and useful, but they should track what matters, morally. We can do better without “violence” as a central category in law.<sup>65</sup>

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<sup>64</sup> Sklansky (2021), 45-55. He notes that “the sharp distinction between violent and nonviolent crimes, and the great weight placed on that distinction, are modern developments, roughly half a century old.... references to “violent crime” did not become common in American discourse until the 1970s. Before the late 1960s, in fact, references to “violent crime” were less common than references to “infamous crime”—a legal category that... was never terribly important, and that in no way tracked the line now drawn between violent and nonviolent offenses” (45).

<sup>65</sup> Thanks to the many people who have helped me think through these issues and provided comments on versions of this paper over the years, including Kristen Bell, Elizabeth Harman, Thomas Hurka, Douglas Husak, Adam Kolber, Jennifer Lackey, Christopher Lewis, David Plunkett, Alice Ristroph, Patrick Tomlin, Gary Watson; audiences at Brooklyn Law School, the 2017 New Directions in Philosophy of Law Conference at Oxford, the Princeton Workshop in Normative Philosophy, the USC Conceptual Foundations of Conflict Project, and the University of Toronto; and several anonymous referees.