

# Farewell to the Felonry

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*Bastard. Idiot. Imbecile. Pauper. Felon. These terms, medieval in origin, have served as formal legal designations and also the brands of substantial social stigma. As legal designations, the terms marked persons for different sorts of membership in a political community. The rights and privileges of these persons could be restricted or denied altogether. Today, most of these terms have been abandoned as labels for official classifications. But the terms felon and felony remain central to American criminal law, even after other developed democracies have formally abolished the felon/felony category. “Felony” has connotations of extreme wickedness and an especially severe crime, but the official legal meaning of felony is a pure legal construct: any crime punishable by more than a year in prison. So many and such disparate crimes are now felonies that there is no unifying principle to justify the classification. And yet, the designation of a crime as a felony, or of a person as a felon, still carries great significance. Even beyond the well-documented “collateral” consequences of a felony conviction, the classification of persons as felons is central to the mechanics of mass incarceration and to inequality both in and out of the criminal justice system. American law provides the felonry—the group of persons convicted of felonies—a form of subordinate political membership that contrasts with the rights and privileges of the full-fledged citizenry.*

*The felon should go the way of the bastard, into the dustbins of legal history. If that outcome seems unlikely, it is worth asking why a category long known to be incoherent should be so difficult to remove from the law. This Article examines felony in order to scrutinize more broadly the conceptual structure of criminal law. Criminal laws, and even their most common critiques and arguments for reform, often appeal to the same naturalistic understanding of crime and punishment that gives felon its social meaning. When we imagine crime as a natural, pre-legal wrong and the criminal as intrinsically deserving of suffering, we displace responsibility for the law’s burdens from the community that enacts the law and the officials that enforce it. To bid farewell to the felonry could be a first step toward reclaiming responsibility for our criminal law.*

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## INTRODUCTION

“After all, ‘felony’ is . . . as bad a word as you can give to man or thing.”

~Justice Clarence Thomas, in *Staples v. United States*<sup>1</sup>

“Felony is the new N-word. . . . A felony is a modern way of saying, ‘I’m going to hang you up and burn you.’ Once you get that F, you’re on fire.”

~unidentified preacher, quoted in Sasha Abramsky, *Conned*<sup>2</sup>

We cannot think without categories. The particular categories through which we think, however, are often contingent rather than inevitable. This is especially true of the categories through which we humans divide ourselves into smaller groups and claim distinction from one another: social rankings, professional labels, bearers of supposed medical or psychological affliction, and of course, racial groups.<sup>3</sup> Over the long arc of history, humans have created new such categories and sometimes later abandoned them. In many cases, the abandonment of a category is a mark of progress toward equality.<sup>4</sup>

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<sup>1</sup> *Staples v. United States*, 511 U.S. 600, 618 (1994) (internal quotation marks omitted). In this passage, Justice Thomas was quoting from *Morissette v. United States*, 342 U.S. 246, 260 (1952), which in turn quoted from FREDERICK POLLOCK & FREDERIC W. MAITLAND, 2 *THE HISTORY OF THE ENGLISH LAW* 465 (2d ed. 1899).

<sup>2</sup> SASHA ABRAMSKY, *CONNED: HOW MILLIONS WENT TO PRISON, LOST THE VOTE, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE* 140 (2006).

<sup>3</sup> See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (3d ed. 2014) (presenting an account of how concepts of race are created and changed).

<sup>4</sup> Of course, selective or only pretended rejection of a category can serve to entrench inequality rather than eradicate it. That point underlies many critiques of “colorblind” legal standards in a world where racial identity does in fact shape individuals’ experiences and opportunities. See, e.g., Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1784 (2012) (arguing that equal protection doctrine, including invocations of “colorblindness,” “seems intentionally blind to racial context, including the persistence of racial discrimination against non-Whites”).

When confronted with profound inequalities, it is worth scrutinizing any categorical thinking that may produce or preserve those inequalities.

In American law, the designations *felon* and *felony* carry great significance, and authorize substantially disparate treatment. Felony usually designates any crime punishable by more than one year in prison, and felon designates any person convicted of such a crime, whether or not he is actually sentenced to prison time.<sup>5</sup> The noun *felonry* is almost never used today, but the term was coined to identify the group of persons classified as felons as a collective whole: the felonry, in distinction to the law-abiding citizenry.<sup>6</sup> Though it is often said, and widely believed, that a felony is a “serious crime,”<sup>7</sup> a central claim of this Article is that there is no essential attribute or internal coherence to the category felony; it is a group defined from without rather than from within. The vast array of crimes now classified as felonies includes many crimes that are not especially exciting or wicked by most measures: record-keeping violations, writing bad checks, copyright infringement, and myriad regulatory offenses.<sup>8</sup> Moreover, violations of felony statutes are so common that these violations cannot all possibly be prosecuted.<sup>9</sup> Police and prosecutors must select which violations to investigate and which defendants to make into felons. The severity of the particular defendant’s conduct sometimes guides these enforcement choices, but frequently other factors—such as race, class, or administrative convenience—determine which of the many of us who violate criminal laws will join the felonry. Membership in the felonry, in short, does not require or reveal any essential evil or extreme wrongdoing.

But popular perceptions are otherwise. The social meaning of felony, as opposed to its legal meaning, is a significantly harmful or depraved crime. Accordingly, discrimination against felons is widely accepted, and even demanded, on the presumption that felony convictions are reliable indicators of dangerousness and bad character. Today, the collateral consequences of felony convictions are so pervasive that they are compared often to exile, in-

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<sup>5</sup> See *infra* Part I.B for a discussion of how U.S. jurisdictions settled on this definition.

<sup>6</sup> See, e.g., JAMES MUDIE, *THE FELONRY OF NEW SOUTH WALES: BEING A FAITHFUL PICTURE OF THE REAL ROMANCE OF LIFE IN BOTANY BAY (1837)* (Lansdowne Press ed., 1964); see also *infra* Part I.C.

<sup>7</sup> E.g., *Boyd v. California*, 494 U.S. 370, 399 n.5 (1990) (Marshall, J., dissenting) (quoting Wharton’s *Criminal Law*); Elizabeth Papp Kamali, *Felonies*, in *THE ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* (2014) (“Felonies are serious crimes, such as murder, rape, or arson . . .”).

<sup>8</sup> See *infra* Part II.A (surveying specific felony offenses). Again, a crime becomes a felony whenever the legislature authorizes a maximum sentence of more than one year. As many scholars have discussed, there are many reasons for legislatures to authorize lengthy criminal sentences, whether or not those sentences are imposed in actual cases. E.g., William J. Stuntz, *The Pathological Politics of the Criminal Law*, 100 MICH. L. REV. 505, 509–10, 525 (2001). American law does not contain meaningful proportionality constraints on these legislative choices. See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 312–13 (2005) (describing the deference to legislative sentencing choices that characterizes Eighth Amendment proportionality jurisprudence).

<sup>9</sup> See *infra* Part II.B.

famy, or civil death.<sup>10</sup> These consequences are the ostensibly civil burdens that flow from a criminal conviction, such as ineligibility to vote, denial of access to various forms of public benefits, or exclusion from certain professions. Efforts to challenge collateral consequences have not fared well in either courts of law or the court of public opinion, where there is little sympathy for the plight of a convicted felon.

There are thus two important dimensions to the term felony, and the interaction between these dimensions provides a powerful lens through which to understand American criminal justice. As a matter of positive law, felony is a pure legal construction, a category wholly defined by public authority and with the clearest of bright lines: the sentence authorized by the legislature. In the social imagination, though, felony conjures the idea of natural, pre-legal wrong—a “true crime.”<sup>11</sup> This duality is a key mechanism of severity and racial disparity in the U.S. penal system. Thanks to the bright lines of the legal category, felony is an easy—and seemingly race-neutral—way to multiply the constraints imposed on a convicted person. Thanks to the deep-seated beliefs about bad character and wrongful actions that give felony its social meanings, constraints on felons are tolerated and legitimized, even when (or perhaps because) they are distributed in clearly inegalitarian ways.

We need to understand better the separate legal and social meanings of the words felon and felony. We need to identify the specific work that these terms accomplish. We need to see how persons are made into felons, and the role of race in that process. We need to see that the terms lump together people, and crimes, on the basis of no defensible principle. Once lumped, felonies and felons are subjected to additional formal legal burdens and informal social stigma, disadvantages that cannot be justified by any unifying characteristic of the category. We need to see how the law’s bright lines can conceal its dark motives.

This Article begins the exposition. It will suggest that felony should be jettisoned rather than reformed—that American criminal law should abolish

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<sup>10</sup> Infamy was a condition imposed on ancient Roman citizens to deprive them of rights of political participation; it was sometimes but not always associated with a criminal conviction. In English common law, “infamous crimes” became a category of crimes that triggered various civic disabilities or specific shameful punishments. On modern collateral consequences as infamy, see generally Margaret Colgate Love, *Deconstructing the New Infamy*, 16 CRIM. JUST. 30 (2001); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999).

<sup>11</sup> See *United States v. Gaag*, 237 F. 728, 731 (1916) (finding a failure to keep records of an opium order to be a violation of an “administrative regulation, a mere statutory infraction” and not a “true crime,” and arguing that the recordkeeping requirement was improperly classified as a felony under federal law); see also John S. Baker, Jr., *United States v. Morrison and Other Arguments Against Federal “Hate Crime” Legislation*, 80 B.U. L. REV. 1191, 1212–13 (2000) (equating “true crimes” with felonies, and defining both in terms of malicious intent).

the felon/felony categories altogether.<sup>12</sup> This change would be easy to accomplish in one respect, and nearly impossible in another. As a matter of formal law, there is precedent for simply eliminating the felony: England and other commonwealth countries stopped using the category decades ago, and a few U.S. jurisdictions operate fully functional criminal law systems without classifying any crimes as felonies.<sup>13</sup> But the challenge is not simply to change the way we speak, or to delete a word from the legal lexicon.<sup>14</sup> The challenge is to evaluate and transform the way we think about criminal law.

A critical study of felony and its cognates reveals three attributes of the conceptual structure of criminal law. First, as already suggested, the duality of the category felony helps identify and distinguish contingency and naturalism in criminal law. Felony, like crime itself, is a contingent and constructed category, but its contingency is obscured by the rhetoric of naturalism and by connotations of intrinsic wrongfulness. Second, our separate terms for act and person—felony and felon, or crime and criminal—can be used to illuminate the ways in which criminal law is personal, designed to alter the status of persons and not just to condemn specific acts.<sup>15</sup> Both the contingency of criminal law and its status-altering function come into sharper focus when viewed alongside the third dimension of criminal law highlighted here: criminal law as state action, an enterprise in which public officials are the key agents determining outcomes and not the mere servants

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<sup>12</sup> There is, of course, a considerable body of scholarship that critiques specific burdens imposed on felons, from expanded homicide liability under the felony-murder rule to disenfranchisement to exclusion from social services. These works object to the way felons are treated in American law; they do not, so far as I am aware, question the category “felon” itself.

<sup>13</sup> See, e.g., Criminal Law Act 1967, s. 1 [England] (abolishing distinction between felonies and misdemeanors); Can. Criminal Code, c. 146, s. 14 (1906) [Canada] (same). New Jersey does not designate crimes as felonies, but does use the apparently equivalent category “indictable offense.” See *State v. Johnson*, 30 N.J.L. 185, 188 (1862) (Elmer, J., concurring) (discussing deliberate avoidance of the term felony in New Jersey law); see also N.J. REV. STAT. § 2C:43-1 (designating crimes as first, second, third, or fourth degree offenses). Even without felony as a formal statutory classification, New Jersey courts do use the phrase “felony murder” to describe killings in the course of certain enumerated offenses. See, e.g., *State v. Martin*, 573 A.2d 1359, 1369–73 (N.J. 1990). Maine formally abolished the felony/misdemeanor distinction in 1976, but as in New Jersey, judges persist in using the term. See *State v. Carey*, 412 A.2d 1218, 1220 (Me. 1980) (noting abolition of the distinction); but see *State v. Parker*, 156 A.3d 118, 120 (Me. 2017) (quoting a sentencing court’s discussion of a defendant’s “lengthy criminal history,” including “a few felonies and a lot of misdemeanors”).

<sup>14</sup> Obviously, it would accomplish little simply to rename felonies—“indictable offenses,” perhaps—and then simply impose the same array of legal and political disabilities on all persons convicted of indictable offenses. This is what has happened in New Jersey, which classifies crimes by degree without using the term felony, and which imposes various collateral consequences on crimes of a given degree of severity. See NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, COMING HOME FOR GOOD: MEETING THE CHALLENGE OF PRISONER REENTRY IN NEW JERSEY 9–10 (2003).

<sup>15</sup> In both ordinary discourse and specialized philosophical discussions, it is often said that the criminal law punishes acts, offenses, crimes, or conduct. But there is no way to impose punishment on an action; the law always imposes punishment on a person, even if the punishment is understood to be a response to some specific act taken by that person. For further discussion of this point, see *infra* Part IV.

of extra-legal moral necessity. When public officials, and not only individual wrongdoers, become the agents with which criminal law theory is concerned, the inadequacy of the usual moralistic narratives will quickly become apparent.<sup>16</sup> Of particular interest is the role of criminal law in managing a political community by subdividing it.<sup>17</sup> Here the term felony is especially useful, even though that word has never been widely used in the United States. The juxtaposition of the felony with the citizenry invites a study of an apparent need, or compulsion, to divide and distinguish: to subdivide first the criminal law into two categories, lesser and greater offenses, and then to subdivide our political community into criminals and everyone else.<sup>18</sup> The challenge for those who would transform criminal law—and indeed disrupt broader structural inequalities—is not simply to stop using the label felon, but to identify and overcome the prisons of our conceptual categories. Felony is a doorway into that intellectual effort.

It is only a doorway. By raw numbers, crimes that are not felonies—that is, misdemeanors punishable by no more than one year in custody—make up the vast majority of state criminal dockets.<sup>19</sup> Like a felony conviction, a misdemeanor conviction can alter one’s political status, access to social benefits, and legal obligations in profound ways.<sup>20</sup> With one caveat, this Article is intended to serve as a complement rather than a counterpoint to important recent work on misdemeanor offenses and their significance to American criminal law.<sup>21</sup> Ultimately, making persons into felons is just one

<sup>16</sup> See *infra* Part IV.B.2; see also Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305 (2018); Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017 (2014).

<sup>17</sup> Recent scholarship has emphasized the “managerial” function of low-level criminal law interventions, such as misdemeanor arrests. See sources cited *infra* notes 19–21. But similar managerial functions have long been served by the category felon. See *infra* Part II.B and Part III.

<sup>18</sup> For the moment I am focusing on divisions, but the category felony is interesting as an effort to lump and split simultaneously. Felonies are distinguished from misdemeanors and petty wrongs, but a huge range of very different acts is lumped together as felonies. On “lumping” and “splitting” as basic cognitive operations and analytical strategies, see Eviatar Zerubavel, *Lumping and Splitting: Notes on Social Classification*, 11 Soc. F. 421 (1996).

<sup>19</sup> Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280–81 (2011) (noting that “the vast majority of criminal cases in the United States are not felonies” and citing state court data). At the same time, the bulk of the Supreme Court cases that define the core constitutional framework for police authority do involve felony prosecutions, generating doctrinal rules that may be based on an incomplete picture of police practices. See Catherine M. Grosso & Barbara O’Brien, *Grounding Criminal Procedure*, 20 J. GENDER, RACE & JUST. 53, 70–71 (2017).

<sup>20</sup> See Chin, *supra* note 10, at 1790 (2012) (describing collateral consequences of both misdemeanor and felony convictions).

<sup>21</sup> See, e.g., Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 U.C.L.A. L. REV. 738 (2017); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Roberts, *Why Misdemeanors Matter*, *supra* note 19. Many of the inequities identified by scholars of misdemeanors appear to be produced, at least in part, by the very felony/misdemeanor distinction. The label felony seems to trigger an assumption of serious crime, thus justifying harsh punishment and extensive collateral consequences. In contrast, the label misdemeanor

piece of the project of making persons into criminals. The entire project needs critical scrutiny. That takes me to my caveat: while some critics of misdemeanor jurisprudence hold out felony jurisprudence as a salutary alternative representing criminal law at its best, this Article advocates a broader and more radical critique.<sup>22</sup>

Felonies and misdemeanors alike have been used as tools of governance, as devices to sort and manage a political community. In the United States, this project has been distinctly racialized, and one reason to name and study “the felonry” as a classification is to emphasize the mechanisms by which persons of color are subordinated. But the critique here is not exclusively about race. Criminal law entrenches, magnifies, and legitimizes inequalities of various forms, not just racial inequalities. This function of criminal law is as or more important than the protection of public safety or the adjudication of past misconduct, and it extends across the felony/misdemeanor distinction.

Part I provides a brief history of felony as a legal category, and introduces the little-used term felonry as a useful way to understand the role of felonies in constituting a secondary class of political membership. Part II examines the production of the felonry in the contemporary United States to show that there is little relation between the legal designation felon and the character flaws or wicked acts that give the term its social meaning. Instead, state actors—legislators, police, and prosecutors—are the primary decision-makers with power to make a felon. Part II also examines the outputs of those decisions, including the overrepresentation of persons of color among the felonry. While Part II is about how one becomes a felon in the United States, Part III is about what happens afterward. This Part shows how felonry operates as a lever in American law, multiplying the social and legal burdens

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seems to conjure notions of both trivial offense and trivial punishment, thus making permissible the elimination of procedural protections for the defendant. See Natapoff, *Misdemeanors*, *supra*, at 1315–16 (describing the weakened procedural protections for misdemeanor defendants). In reality, the consequences of a misdemeanor conviction also can be debilitating. See Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 788–93 (2016) (discussing collateral consequences of misdemeanor convictions, including registration requirements, firearms prohibitions, and deportation). Furthermore, a misdemeanor conviction can make a subsequent felony arrest and conviction more likely. See Sopen B. Shah, *Marked: Do Prior Convictions Cause New Ones?*, 51 GONZ. L. REV. 1 (2015).

<sup>22</sup> For example, Alexandra Natapoff describes the operation of criminal law in the United States as a “penal pyramid.” At the top, “the bedrock legitimating values of criminal justice are at their strongest,” and “the criminal system can assert with a straight face that it proceeds according to rule and is centrally motivated by the culpability of defendants.” Alexandra Natapoff, *The Penal Pyramid*, in *THE NEW CRIMINAL JUSTICE THINKING* 77–78 (Sharon Dolovich & Alexandra Natapoff eds., 2017). At the bottom of the pyramid, Natapoff explains, “[c]ase outcomes (almost always guilty pleas) are governed not by the evidence in cases, details of substantive law, or the Bill of Rights, but by police and prosecutorial discretion and local bargaining habits.” *Id.* at 78. Although offense severity is not the only factor determining where a case is located on the pyramid, Natapoff describes it as “arguably the least appreciated and most important factor determining the extent to which criminal cases are decided by law.” *Id.* at 79. For further discussion of misdemeanor scholarship and its relation to this project, see *infra* notes 147–152 and accompanying text.

of a conviction without an individualized assessment of appropriate treatment. Part IV contemplates abolition of the category—what abolition might accomplish, and as importantly, why abolition might be so hard to achieve. The terms felony and felon are distinctively harmful, but burying them is only one step toward meaningful reform. Much of the theory and discourse of criminal law, including the discourse of “reform,” reproduces or simply takes for granted the ideological structures that make existing law seem moral and necessary. Individual critics may decry specific portions of the criminal law—wrongful convictions, the death penalty, racial disparities, or misdemeanor case processing—but these critics tend to condition their arguments on a reaffirmation of the basic legitimacy of the criminal law. They speak and write as though there were some core of criminal law that is right, natural, and necessary—as though some acts were true crimes, and some people true criminals. This Article suggests that criminal law in the United States will not undergo the change it needs until we begin to think differently about crime—until we stop thinking of crime as a natural rather than a constructed category.

## I. THE TWO FACES OF FELONY

From its early appearances in medieval criminal law to its ubiquity in contemporary American law, felony has operated in two dimensions. On one hand, the designation of a crime as a felony is simply a matter of positive law. The parameters of the legal category are defined by the choices of the ruling authority, and in particular, by the consequences the ruling authority imposes upon the felon. At various times and in various places, the penalties that define felony have included forfeiture of land or other property, death, or imprisonment. On the other hand, to say that someone has committed a felony, or is a felon, is widely understood as a claim about that person’s internal character and choices. From the first perspective, felony is a matter of what the state will do to you. From the second, felony is a matter of what you have done, or even what you are. These twin attributes of the term felony make the designation an especially powerful political tool. It is a way of subordinating others while disclaiming responsibility for that subordination. The history of the category, examined in this Part, helps illuminate its present operation, examined in Parts II and III.

### *I.A. Medieval Origins*

As a matter of etymology, it is likely that felony begins on the inside—the unpleasant but fascinating inside of the human digestive system. In classical Latin and then in Anglo-Norman French, *fel* referred to the gall bladder, a small organ that collects bile and inspires numerous descriptions of the



human personality and emotions.<sup>23</sup> Applied as an adjective to describe persons or actions, *fel* and its cognates suggested “bitterness (an attribute of gall), treachery, evil, deceit, or violence.”<sup>24</sup> Sir Edward Coke identified *fel* as the root of felony, and though the evidence bears the usual mysteries of ancient etymologies, many historians now endorse Coke’s account.<sup>25</sup> Internal wickedness thus shaped the early understanding of felon, with a particular emphasis on treachery and disloyalty. On the European continent, felony in the feudal system signified an act of betrayal by a vassal to his lord.<sup>26</sup>

Rather quickly, however, felony also developed an external face. The formal legal definition of a felony came to be, and still is, constructed around the acts taken against the felon rather than the felon’s own internal properties or the felon’s own actions. The treacherous vassal lost his property, for example, and felony became defined by the loss of property rather than by the treachery.<sup>27</sup> But even as felony became a category whose formal legal boundaries were determined by the authorized sentence, the specific penalties that marked the scope of the legal category changed over place and time. Thus, any effort to define felony in terms of a specific punishment must be geographically and historically specific. Many contemporary scholars have attributed the label felony to offenses punishable by death.<sup>28</sup> Already by the thirteenth century, however, several distinct deprivations had defined a felony at one time or another: loss of life “or member”; loss of property; loss of legal standing (outlawry).<sup>29</sup> When Blackstone wrote in the

<sup>23</sup> On the etymology and early legal history of the terms felon and felony, I am especially indebted to Elizabeth Papp Kamali, *Felonia Felonice Facta: Felony and Intentionality in Medieval England*, 9 J. CRIM. L. & PHIL. 397 (2015). On the special role of the gall bladder, bile, and “the four humors” in linguistic expression, see JAMES J. MISCHLER III, METAPHOR ACROSS TIME AND CONCEPTUAL SPACE: THE INTERPLAY OF EMBODIMENT AND CULTURAL MODELS 111–16 (2013). See generally GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (2003).

<sup>24</sup> See Kamali, *supra* note 23, at 400.

<sup>25</sup> See, e.g., FREDERICK POLLOCK & FREDERIC W. MAITLAND, 2 THE HISTORY OF THE ENGLISH LAW 463 (2d ed. 1898); Kamali, *supra* note 23, at 400. William Blackstone expressed some skepticism about Coke’s biological etymology, suggesting instead that the word was the combination of *fee* (*fief*, or estate) plus *lon* (*price* or value). WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 95–96 (1765). A felony was an act for which one paid the price of one’s estate. Blackstone’s alternative etymology only illustrates that the two ways of defining felon—by the internal character of the person, or by the external consequences imposed by a punisher—have both been in contention for centuries. For a rich discussion of various etymological possibilities, and a conclusion that Coke’s gall bladder story has merit, see Elizabeth Papp Kamali, *Felony and Mens Rea in Medieval England* 47–60 (forthcoming manuscript on file).

<sup>26</sup> See JULIUS GOEBEL JR., FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF CRIMINAL LAW 250 (1976); POLLOCK & MAITLAND, *supra* note 25, at 463–64.

<sup>27</sup> BLACKSTONE, *supra* note 25, at 95–96; GOEBEL, *supra* note 26; POLLOCK & MAITLAND, *supra* note 25, at 464 (“The specific effect of the ‘words of felony’ when they were first uttered by appellors, who were bringing charges of homicide, robbery, rape and so forth, was to provide that, whatever other punishment the appellees might undergo, they should at all events lose their land.”).

<sup>28</sup> See, e.g., GEORGE FLETCHER, RETHINKING CRIMINAL LAW 282 (1978).

<sup>29</sup> POLLOCK & MAITLAND, *supra* note 25, at 464.

eighteenth century that “the true criterion of felony is forfeiture,”<sup>30</sup> he was stating a historically contingent truth rather than a metaphysical one. Additionally, felony was defined in terms of the maximum authorized punishment rather than the punishment actually imposed in any given case. For example, in the seventeenth and eighteenth centuries, when felonies in Britain were crimes punishable with death, the authorities often elected to transport felons out of the country rather than to execute them.<sup>31</sup>

Put simply, the category “felony” is defined by the choices of public agents about authorized sentences, not by essential attributes of the underlying criminal conduct. True, nine specific crimes were traditionally classified as felonies at common law—murder, manslaughter, rape, sodomy, burglary, robbery, arson, mayhem, and larceny.<sup>32</sup> Arguably, these nine offenses capture some core of intrinsically wrongful conduct, or what was thought at one time to be intrinsically wrongful. But our sense of what is wrong-in-itself has changed, and the content of the offenses labeled felonies has changed even more.<sup>33</sup> By 1620, the category felony had already expanded beyond the nine common law offenses listed above to include many other crimes designated as felonies by statute.<sup>34</sup> By 1765, when Blackstone wrote his Commentaries, Parliament had designated at least 160 crimes as statutory felonies.<sup>35</sup> Blackstone could identify no principle to explain the category felony other than the then-typical legal usage—crimes punishable by forfeiture and death. And thus “felony lost any real force as an organizing concept”<sup>36</sup>—at least, if it is crimes themselves we want to organize.

If it is *persons*, and their legal statuses, that we want to manage, then felony is of course still useful. Today, felony is still a category formally defined with reference to legal consequences. For more than a century, the predominant definition in U.S. law has classified any crime punishable by more than a year of incarceration as a felony. The next subsection will examine how felony came to be defined in terms of that particular penalty. The important point now is that across the centuries and across jurisdictions, it

<sup>30</sup> BLACKSTONE, *supra* note 25, at 97.

<sup>31</sup> See *infra* Part I.C.

<sup>32</sup> See Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 464 (2009).

<sup>33</sup> For example, in the United States sodomy is mostly decriminalized, and in some circumstances, constitutionally protected. *Lawrence v. Texas*, 539 U.S. 558 (2003). For examples of the wide array of offenses now classified as felonies, see *infra* Part II.A. On changes to the definitions of homicide and rape, see Alice Ristorph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 588–98 (2011).

<sup>34</sup> Tress, *supra* note 32, at 464.

<sup>35</sup> “It is a melancholy truth, that among the variety of actions that men are daily liable to commit, no less than a hundred and sixty have been declared by an act of parliament to be felonies without benefit of clergy, or in other words, to be worthy of instant death.” BLACKSTONE, *supra* note 25, at 18.

<sup>36</sup> LINDSAY FARMER, *MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER* 72 (2016); see also *id.* at 83 (“[T]he problems encountered by Blackstone with these terms [felony and misdemeanor] had, if anything, got[ten] worse . . . . The problem, above all, was that the distinction corresponded to no clear measure of overall seriousness.”).

has long been the penalty—not the essence of the criminal act or any distinctive attribute of the defendant—that sets the official legal boundaries to the term felony.

It would be too hasty, however, to conclude that a word that once conjured internal wickedness has been entirely redefined in terms of external consequences. Both faces of felony persist, and indeed, the very duality of internal and external seems deeply embedded in the history of the concept. For a compelling illustration, consider legal historian Elizabeth Papp Kamali's study of English criminal juries in the thirteenth and fourteenth centuries.<sup>37</sup> One such jury was called upon to decide the fate of three men accused of killing, and decapitating, a cow thief.<sup>38</sup> Though there was apparently little doubt that the three defendants had killed the victim, the jurors concluded that the defendants were not suspected "of any felony committed feloniously."<sup>39</sup> As Kamali notes, the curious phrasing raises the question whether it is possible to commit a felony in a non-felonious way. What distinguishes felony, the act, from feloniously, the manner of committing it? Kamali's own answer to these questions focuses on *mens rea*. Though medieval criminal law did not use the *mens rea* frameworks that have become familiar to us today, Kamali argues that "the idea of criminal intent lay at the heart of the word 'felony.'"<sup>40</sup> Medieval criminal juries tended to acquit often in felony cases, and many of the acquittals seem based upon judgments that the accused lacked the wicked state of mind that motivated truly felonious acts.

Kamali's study thus recovers an internal dimension of felony for a twenty-first century world that uses external consequences to mark the formal boundaries of the felony category. It is important to observe, however, that the idea of "a felony committed feloniously"—or non-feloniously—suggests that the dual dimensions of the concept of felony may have been operating in tandem already in the thirteenth and fourteenth centuries. In other words, perhaps the term felony is not best understood by choosing between a definition focused on internal character or mental states, on one hand, and a definition focused on legal penalties, on the other.<sup>41</sup> Both dimensions matter, and appear to have mattered from the very early usage of the word. Perhaps it was possible to speak of "a felony committed feloniously" because medieval jurors already intuited a gap between two meanings of felony, and held both meanings in view.

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<sup>37</sup> Kamali, *supra* note 23.

<sup>38</sup> *Id.* at 397–99.

<sup>39</sup> *Id.* at 398. This conclusion spared the lives of the defendants, though each apparently was fined a small amount. *Id.* at 399.

<sup>40</sup> *Id.* at 399.

<sup>41</sup> Kamali argues that "the word 'felony' was layered with meanings," but suggests that the internal, mental component of "felony" was "the deeper meaning of the term," more important in the thirteenth and fourteenth centuries than any definition based on externally imposed legal consequences. *See id.* at 418. For purposes of this Article, it is sufficient to emphasize the dual meanings.

That duality of meaning has persisted. By the end of the nineteenth century, historians of the English common law would observe, “We thus define felony by its legal effects; any definition that would turn on the quality of the crime is unattainable. We may see, however, that . . . the word imports a certain gravity in the harm done and a certain wickedness in the doer of it.”<sup>42</sup> These two understandings of felony—in some tension with one another—both crossed the Atlantic Ocean with the colonists and reappeared in American criminal law.

### I.B. *American Felon*

Post-revolution, the fledgling American republic borrowed some aspects of English law and rejected others. The new nation took the term felony from English common law, and even used it in the new Constitution, but the parameters of the felony category were unclear at the time the Constitution was drafted and remained so for several decades.<sup>43</sup> As American states modernized and codified their criminal laws, however, they eventually converged on a new legal definition of felony, one that again focused on the externally imposed consequences of the crime (now, imprisonment of more than one year) rather than the quality of the crime or internal blameworthiness of the offender. Alongside this formal legal definition, however, the social meaning of felony remained closely associated with especially severe, harmful, or wicked conduct. But this is not to suggest that American lawmakers did not innovate—to the contrary, it seems fair to say that America invented the modern *felon*. Though England and other countries had used felon as a noun, the United States has constructed the felon as an encompassing legal and social identity not known elsewhere.<sup>44</sup>

The decades after the ratification of the Constitution were a period of transition in American law, with calls to codify and modernize the criminal law, and increased emphasis on imprisonment as an alternative to capital punishment. Lawmakers were aware of the different ways the term felony

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<sup>42</sup> POLLOCK & MAITLAND, *supra* note 25, at 465.

<sup>43</sup> The U.S. Constitution protects members of Congress from arrest while in session, except for cases of “Treason, Felony, and Breach of the Peace.” U.S. CONST. art. I, § 6.; *see also* *Williamson v. United States*, 207 U.S. 425, 435–46 (1908) (interpreting this phrase as a legal term of art that encapsulates all crimes rather than a list of specific types of crimes). The Constitution also gives Congress the power “to define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations.” *Id.* art. I, § 8. Finally, it requires that each state extradite persons charged with “Treason, Felony, or other Crime” to the state with jurisdiction over the offense. *Id.* art. IV, § 2. In other provisions, the Constitution refers to crimes, high crimes, capital crimes, infamous crimes, and misdemeanors, without defining any of these terms. Even during the constitutional drafting process, some complained that “felony” was too vague a term. *See* Eugene Kontorovich, *Discretion, Delegation, and Defining in the Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1699 (2012); *see also* Christina Mulligan et al., *Founding-Era Translations of the U.S. Constitution*, 31 CONST. COMM. 1, 45–46 (2016) (noting the broad and changing meanings of “felony” at the time of drafting and immediately after).

<sup>44</sup> *See infra* Part III.

had been defined over time, and they had an opportunity to select among these meanings, choose a new one, or abandon the term.<sup>45</sup> As noted above, the drafters of the Constitution had used the word felony a few times, and referred also to “infamous crimes” and “high crimes and misdemeanors” in the constitutional text, without defining any of these terms.<sup>46</sup> In 1829, however, New York adopted a new criminal code that explicitly defined “felony” as “an offence for which the offender, on conviction, shall be liable by law to be punished by death, or imprisonment in a state prison.”<sup>47</sup> This definition, linking felony to liability for a prison term, would prove enormously influential. Over thirty-five states had adopted similar definitions by the early 1900s, when Congress revised the federal criminal code.<sup>48</sup> Since the federal criminal justice system used prisons only when the sentence was longer than one year,<sup>49</sup> Congress tweaked the formal definition slightly: “[a]ll offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies.”<sup>50</sup> By the mid-twentieth century, nearly every U.S. jurisdiction defined felonies in these or very similar terms.<sup>51</sup>

It is worth noting briefly the path not taken to see better the contingency of the modern legal definition. The 1829 New York code was drafted by young reformers of a pragmatist bent. In their legislative report on the new criminal code, they explicitly disclaimed any essentialist understanding of the term felony even as they chose to retain it: “[F]orfeitures have long been abolished, and the term [felony] has really no signification in our law. It is frequently used in statutes, and it is therefore desirable to give it a definite meaning.”<sup>52</sup> For other legal reformers, the multiple meanings and

<sup>45</sup> Tress, *supra* note 32, at 463–65. I am greatly indebted to Tress’s comprehensive study of the early American history of the term felony.

<sup>46</sup> On the meaning of the phrase “infamous crimes,” see especially Ex parte Wilson, 114 U.S. 417, 422–24 (1884). The phrase “high crimes and misdemeanors” is generally treated as a single term of art, but the meaning of the term is notoriously contested. See, e.g., Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL’Y REV. 53, 67 (“Commentators on impeachment differ widely among themselves over what constitutes a ‘high crime or misdemeanor.’”).

<sup>47</sup> Quoted in Tress, *supra* note 32, at 482.

<sup>48</sup> See *id.* at 486.

<sup>49</sup> See Ex parte Karstendick, 93 U.S. 396, 398 (1876).

<sup>50</sup> 18 U.S.C. § 1 (1908) (repealed). Congress repealed this precise wording with the sentencing reforms of the Comprehensive Crime Control Act of 1984. But current federal law still defines felonies as crimes punishable by more than one year imprisonment. See 18 U.S.C. § 3559 (2018) (distinguishing among felonies of different classes, all punishable by more than one year in prison, and misdemeanors).

<sup>51</sup> See Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 956–57 (1970).

<sup>52</sup> Report of the Revisors, quoted in Tress, *supra* note 32, at 482. The revisors went on to claim that their proposed definition was “conformable to the common understanding.” See *id.* But as Will Tress observes, to the extent there was a “common understanding” of the term felony in early nineteenth-century America, it would more likely have limited felonies to capital crimes, or else taken the somewhat ad hoc approach that Maryland adopted and still retains, labeling as felonies the traditional common law felonies (murder, rape, arson, etc.) and any other crime designated a felony by statute. See *id.* at 475–76, 482–83.

historical baggage associated with felony were reason to jettison it altogether. For example, inspired in part by Jeremy Bentham's work, a proposed Louisiana criminal code rejected the death penalty, disdained common law criminal traditions, and did not use the word felony at all.<sup>53</sup> But the state legislator that drafted this felony-less code was soon elected to national office, and Louisiana never enacted his proposed reforms.<sup>54</sup>

Instead, the pragmatist, anti-essentialist understanding of felony prevailed. So began the American association of felony with imprisonment, or with crimes that carried the potential for imprisonment. One more observation about this association is key: at the time that New York and other states began to define felony as a crime punishable by imprisonment, prisons held a very different place in American law and culture than they do today. The prison was still a relatively new institution, seen as a humane alternative to capital punishment or public corporal punishments such as the pillory. In the eyes of its champions, the prison was to serve as a place of reformation—the penitentiary, a place for penitence.<sup>55</sup> Incarceration rates were low, and typical sentences were short.<sup>56</sup> To define felony with reference to imprisonment maintained the word's common law association with serious offenses, but when New York adopted its new code in 1829, the prison did not conjure notions of long-term exclusion and disability. At that time, the prison was still seen as a new experiment.<sup>57</sup>

Much has changed since then. The changes in the quantity and quality of U.S. prisons are well known. For purposes of this Article, however, even more important than the growth of the American prison has been the birth of the American felon and the constitution of the American felony. Felon, the noun applied to a person rather than an act, now captures a legal and social identity that bears no resemblance to a penitent or a candidate for reformation. To the contrary, the felon is marked as such for the purposes of exclusion and disadvantage. Parts II and III will examine the production and management of today's felons in much more detail. Before we turn to that

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<sup>53</sup> See *id.* at 478–79.

<sup>54</sup> See *id.* at 479.

<sup>55</sup> See ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 59–66 (1992); David J. Rothman, *Perfecting the Prison, United States, 1789–1865*, in *THE OXFORD HISTORY OF THE PRISON* 100, 104–11 (1995).

<sup>56</sup> Data on incarceration rates in the nineteenth century is limited, but Rothman notes that in the early 1800s, prisons administrators were able to enforce rules of complete silence, in part because the prison populations were sparse enough. See Rothman, *supra* note 55, at 109. And there are few records of sentence lengths, but one study of nineteenth-century sentencing in New York identifies contemporaneous newspaper reports that suggests even those convicted of murder spent only a few years in prison. See Carolyn Strange, *The Unwritten Law of Executive Justice: Pardoning Patricide in Reconstruction-Era New York*, 28 *LAW & HIST. REV.* 891, 893–94 (2010). To be sure, much changed over the course of the nineteenth century; prisons grew more crowded and chaotic. See Rothman, *supra* note 55, at 112 (“Prisons in the post-Civil War era became modern, that is, characterized by overcrowding, brutality, and disorder.”). But in 1829, when felonies were first defined in terms of eligibility for imprisonment in the New York code, the failure of the prison as a place for quiet penitence was not yet evident.

<sup>57</sup> HIRSCH, *supra* note 55, at 48, 172 n.8.

contemporary study, it is worth recalling the genesis of the *felonry*—comprised of all persons with felony convictions—as a discrete and identifiable collective entity.

### I.C. *Settling the Felonry*

Across centuries and nations, the term felony has been defined by a few standard authorized penalties—death, imprisonment, or forfeiture. As noted above, however, it is the authorized sanction and not the punishment actually imposed that matters. Even today in the United States, many felons never spend a day in prison, sentenced instead to periods of probation or community supervision. This subsection examines another alternative sanction for felons, one that never defined the legal category but nevertheless sheds light on current practices. When death was still the nominal sanction for felonies in Britain, but as official and popular appetites for executions were waning, there was a period in which many felons were simply sent away. Banishment, or “transportation” as it was called at the time, was a sanction frequently used by British authorities in the eighteenth and nineteenth centuries.<sup>58</sup> This subsection details a few central aspects of British penal transportation to both America and Australia. In this period there developed the idea of “the felonry”—a group comprised of all felons—which may then be contrasted to “the citizenry” or “the people.”<sup>59</sup> Australia may have received far greater numbers of transported felons, but in America, a home-grown felonry has become part of our basic political structure.

It is relatively widely known that Australia was once a collection of penal colonies; it is less well known that England resorted to Australia as a substitute destination only after the first designated repository of British convicts—the American colonies—declared its independence and revolted.<sup>60</sup> The majority of white settlers in colonial America were free persons who moved to their new continent by choice, often in search of religious freedom, wealth, or adventure.<sup>61</sup> But some early Americans came as convicts. Back in England, a growing aversion to impose capital punishment led many judges and officials to endorse transportation as an alternative sentence, and the American colonies seemed a good destination.<sup>62</sup> At least as early as

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<sup>58</sup> J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800* 500–06 (1986).

<sup>59</sup> As discussed below, a Scottish official supervising convicts in New South Wales claimed to coin the term “felonry” in an 1837 book. MUDIE, *supra* note 6.

<sup>60</sup> See BEATTIE, *supra* note 58; see also PETER WILSON COLDHAM, *EMIGRANTS IN CHAINS: A SOCIAL HISTORY OF THE FORCED EMIGRATION TO THE AMERICAS OF FELONS, DESTITUTE CHILDREN, POLITICAL AND RELIGIOUS NON-CONFORMISTS, VAGABONDS, BEGGARS AND OTHER UNDESIRABLES 1607-1776* (2007).

<sup>61</sup> At least as early as 1619, the colonies also included African slaves brought to the new land in captivity. And of course, the white colonists displaced and sometimes clashed with the native peoples already living in America.

<sup>62</sup> A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718-1775* 19–21 (1987).

1650, Scottish fighters captured at the end of the English Civil War were transported to New England and sold there as “servants.”<sup>63</sup> The majority of transports do not appear to have been rebels or political prisoners, however—records suggest that ordinary “cattle-killers and burners of corn-stacks” were among those shipped to the new world.<sup>64</sup> With chattel slavery already established, the colonists used different labels for the white British convicts (“servants”) and the black Africans (“slaves”), though both were transported and sold as property.<sup>65</sup> One important basis for distinction was that for the convicts, servitude was typically limited to a specific number of years; merchants advertised the sale of “seven years servants.”<sup>66</sup> The pace of transportation increased rapidly after 1717, thanks to new legislation from Parliament that regularized the sentence and expanded its applicability, and the total number of British felons sent to America would reach about 50,000.<sup>67</sup> But many colonists, including Benjamin Franklin, resented the convicts and called upon British authorities to stop sending them.<sup>68</sup> At the same time, several prominent Englishmen, including Samuel Johnson, viewed all American colonists as “a race of convicts [who] ought to be content with anything we may allow them short of hanging.”<sup>69</sup> Notwithstanding the vehemence of these judgments, the majority of transported felons appear to have been absorbed into American society without causing discernible increases in crime or unrest.<sup>70</sup>

Once the American colonies declared independence, England needed a new repository for those felons it wished neither to keep nor to kill. Botany Bay in New South Wales was the chosen destination, and over several decades about 162,000 felons were transported there and to other Australian

<sup>63</sup> James Davie Butler, *British Convicts Shipped to American Colonies*, 2 AM. HIST. REV. 12, 13–14 (1896).

<sup>64</sup> *Id.* at 17; see also COLDHAM, *supra* note 60, at 7 (“Of the total number of convicts dispatched to the Americas . . . all but an insignificant minority belonged to the poorest class and most were sentenced for crimes which today might incur a small fine or, more likely, probation.”).

<sup>65</sup> See Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 225–26 (1995) (discussing the evolution of legal distinctions between white “servants” and black slaves as part of the construction of a “racial caste system” in which “the genetic tie took on supreme importance”).

<sup>66</sup> EKIRCH, *supra* note 62, at 124.

<sup>67</sup> COLDHAM, *supra* note 60, at 3, 7; An Act for the further preventing Robbery, Burglary, and other Felonies, and for the more effectual Transportation of Felons, and unlawful Exporters of Wool; and for declaring the Law upon some Points relating to Pirates (1717). Ekirch reports a lower number of convicts transported (“well over 30,000”), but begins counting only after the passage of 1717 Transportation Act. See EKIRCH, *supra* note 62, at 23.

<sup>68</sup> In 1751, Franklin wrote a satirical letter to the Philadelphia Gazette in which he proposed that America send rattlesnakes back to Britain in exchange for her felons.

<sup>69</sup> Butler, *supra* note 63, at 12 (quoting JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 312).

<sup>70</sup> EKIRCH, *supra* note 62, at 176–77 (finding that transports to Virginia and Maryland committed few offenses there); *id.* at 185–93 (noting that transported felons committed few crimes, and discussing various explanations); see also COLDHAM, *supra* note 60, at 155–56 (noting that in the late eighteenth century British administrators and experts, including Jeremy Bentham, considered transportation to have been successful in reforming felons).



colonies.<sup>71</sup> Unlike the American colonies, where most European settlers were voluntary immigrants, Botany Bay was planned as a penal colony from the outset. In that location, felons were the *raison d'être* of the settlement, not an unwelcome intrusion imposed by the colonial power. Nevertheless, there were obvious distinctions between those who came to Australia by choice (often, to work as overseers) and those who came as prisoners. In the penal colonies of Australia there arose the concept of the felonry as a class or order of persons, occupying a fixed and disfavored status in contrast to the free citizenry.

The term felonry was apparently introduced in 1837 by James Mudie, a Scotsman of some disrepute who published a screed entitled *The Felonry of New South Wales*.<sup>72</sup> Claiming to coin the word, Mudie explained that the felonry included both felons still serving sentences and felons who had completed their sentences. Mudie described the felonry as a caste or order in the commonwealth, a classification analogous to the peasantry, the yeomanry, or the gentry.<sup>73</sup> The members of the felonry were properly “divested of their natural and legal rights” and subject to new legal burdens not imposed on ordinary free citizens.<sup>74</sup> Membership in the felonry was permanent, Mudie insisted; one could not escape the classification even by completing a term of years.<sup>75</sup> Indeed, Mudie reportedly proposed to make the mark of a felon hereditary, so that children born to members of the felonry would themselves suffer the same social and political disabilities.<sup>76</sup> With language that could apply as easily to contemporary collateral consequences and social stigmas, Mudie rationalized “the just and legal inequality”<sup>77</sup> that he envisioned for the felonry:

It is not enough that the felon pay the immediate penalty which the law awards to his crime. Other consequences, both legal and moral, flow from the fact of the conviction. . . . [T]he universal feeling of the entire British people [is] that a convicted felon is unworthy both of future trust and of mingling with and participat-

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<sup>71</sup> COLDHAM, *supra* note 60, at 155; EKIRCH, *supra* note 62, at 237.

<sup>72</sup> MUDIE, *supra* note 6. In 1822, Mudie left England amid financial difficulties and allegations of misconduct to operate a large settlement of convicts in Botany Bay. Mudie's estate was initially an agricultural success, but Mudie faced allegations of cruelty. He eventually lost his official commission and returned to England, where he published *The Felonry of New South Wales*. Most of the book is an attack on those who criticized Mudie's conduct.

<sup>73</sup> *See id.* at xiii–xiv.

<sup>74</sup> *Id.* at 6.

<sup>75</sup> *Id.* at 7.

<sup>76</sup> Sandra Blair, *The Felonry and the Free? Divisions in Colonial Society and the Penal Era*, 45 *LABOUR HIST.* 1, 1 (1983) (noting that Mudie reportedly sought to make the legal disabilities imposed on felons hereditary). As discussed below, Mudie's proposals never won much support in Australia.

<sup>77</sup> MUDIE, *supra* note 6, at 6.

ing in the provident arrangements or the social enjoyments of his former associates and fellow subjects.<sup>78</sup>

Perhaps with the blinders of privilege, or perhaps with great prescience, Mudie juxtaposed New South Wales and its felony to two very different alternatives. The first counterpoint was a (supposedly) truly egalitarian society like England, where, according to Mudie, “[t]he law exerts itself equally for the protection, and for the punishment, of all.”<sup>79</sup> New South Wales was clearly not an egalitarian society, but nor was it comparable to “the West India colonies of England, [where] a caste of English freemen” ruled over “a caste of negro slaves” in a condition “incongruous with the genius of British liberty, . . . avowedly founded in injustice, and maintained only by oppression and force.”<sup>80</sup> Thus England had achieved both equality and justice, while the West Indies were a place of inequality and injustice. Unlike either of these counterpoints, the unique “social constitution” of New South Wales entrenched inequality as justice: “The inequalities of the society of New South Wales are so far from being founded in injustice, or from being maintained in violation of the law, that the inequalities have been constituted by the administration of justice. . . .”<sup>81</sup>

Inequality as justice: that is the core normative principle underlying the construction of a felony. It does not appear that Mudie’s work was ever widely read in the United States (and perhaps it was never widely read anywhere), but no matter.<sup>82</sup> The idea that a criminal conviction should produce a form of “just and legal inequality,”<sup>83</sup> an entrenched and permanent distinction in political status, would win many American adherents even without Mudie as propagandist. In Australia, Mudie’s proposals were promptly rejected.<sup>84</sup> But in the United States, the idea that felons are so “unworthy of future trust” that they should be excluded from ordinary social and political interactions seems to underlie much of the existing regime of collateral consequences. Thus Mudie’s neologism (now an archaism), the felony, serves well to illuminate post-colonial caste society that America has become, as described in the remainder of this Article.

<sup>78</sup> *Id.* at 7.

<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 6.

<sup>82</sup> A contemporaneous blurb in a Sydney newspaper noted, “We have not had an opportunity of perusing [Mudie’s *Felony*] ourselves, but we are informed that all ‘the other journals’ . . . have condemned, in the most indignant tone, this execrable performance.” *The Book of Books – Mudie’s Felony*, *THE AUSTRALIAN*, Sept. 5, 1837, at 2.

<sup>83</sup> MUDIE, *supra* note 6, at 6.

<sup>84</sup> See Blair, *supra* note 76 (discussing criticism of Mudie). The men and women transported to Australia had not, for the most part, engaged in especially violent or spectacular crimes, and modern Australian sympathies are with the convicts rather than their masters. See John Hirst, *The Australian Experience: The Convict Colony*, in *THE OXFORD HISTORY OF THE PRISON* 235, 237 (1995) (noting that at one time, Australians “lump[ed] convicts into a single category and prefer[ed] not to speak of them,” but this view changed in the early twentieth century).

The next two Parts examine the contemporary construction of the felonry. Part II examines the process by which persons become felons, from the legislative choices that generate felony statutes through the investigative, prosecutorial, and judicial choices that yield actual felony convictions. Part III is about life as a felon, a status subject to specific criminal and civil regulations and considerable social disadvantage. As we will see, Mudie's concept of the felonry adds something important to the many existing critiques of specific collateral consequences: the key attribute of existence as a felon is not any particular legal burden, but rather the relegation to a lower political and legal status in which one is distinctively vulnerable to exclusion and regulation.<sup>85</sup>

## II. GETTING TO FELON

Excess bile has never actually defined the felon, as we have seen, so let us examine how a felon *is* made in the contemporary world. The simplest account begins and ends with the prohibited act: a person steals, or rapes, or kills, and now he is a felon. That simple account envisions the felon himself as the agent responsible for his status as felon. But of course, there is more to the story. The label felon requires a felony, and the label felony requires action by various public actors. The path by which a person becomes a felon is one that involves the criminalization and sentencing choices of legislatures (discussed in Part II.A below), the enforcement choices of police and prosecutors, the decisions of grand and petit jurors in some instances, and the actions or acquiescence of judges (Part II.B). Part II.C examines the results of these choices, summarizing what we know about the demographics, and actual offenses of conviction, of the American felonry. Thus, this Part emphasizes not just the fact that public actors make choices about who and what to felonize, but also the particular choices that have been made. As we shall see, legislatures have chosen to felonize a wide array of conduct, and police and prosecutors exercise great discretion in choosing which acts to investigate or charge, and thus which people to make into felons.

Much of what is discussed in this Part is familiar, certainly to scholars and practitioners of criminal law, and even to many casual observers. The breadth of substantive criminal law, the severity of criminal sentences, and the tremendous space for police and prosecutorial discretion have each been the subject of considerable academic and popular commentary.<sup>86</sup> It is none-

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<sup>85</sup> Gabriel Chin has similarly emphasized “degraded legal status” as a defining attribute of a criminal conviction, though Chin addresses both misdemeanors and felonies. *See* Chin, *supra* note 10, at 1832 (describing “the new civil death” that flows from a criminal conviction); *id.* at 1790 (listing various collateral consequences of misdemeanor and felony convictions).

<sup>86</sup> *See, e.g.*, DOUG HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2007) (describing, and decrying, the breadth of the substantive criminal law); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480–91 (2016) (describing perceptions and reality of prosecutorial power and

theless important to put these facts together with a specific focus on the composition of the felony. Whether experts or ordinary citizens, we all should know, but have not yet acknowledged, that public choices have produced a system in which there is little connection between actual felony convictions and intuitive conceptions of “core” or “true” or “serious” criminality.

### II.A. *Enactment*

The production of a felon begins at the legislative threshold, where Congress or a state legislature must make two choices. First, the legislature must choose to criminalize a given act, and second, it must choose a maximum penalty greater than one year.<sup>87</sup> In practice, legislative bodies make both choices often. Importantly, they do so almost entirely unburdened by internal principle or external legal constraint.<sup>88</sup> One need not develop a comprehensive theory of crime legislation (and I shall not attempt to do so here) to see that the choice to designate a felony is hardly a choice reserved for especially dangerous, harmful, or wicked behavior.

Once upon a time, felony seemed to be a discrete and relatively small category, limited to nine common law crimes: murder, manslaughter, rape,

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prosecutorial discretion); Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 442 (2017) (describing broad consensus in U.S. that criminal sentences are too severe). One scholar has recently expressed doubt that criminal justice in the United States can properly be said to be a system of “law”—rather than executive discretion—at all. See Ronald F. Wright, *A Criminal Law Atheist Teaching in the Seminary*, 10 OHIO ST. J. CRIM. L. 639, 639 (2013) (“I am a non-believer when it comes to criminal law.”).

<sup>87</sup> As discussed in Part I, most states and the federal government define a felony as an offense with a maximum authorized sentence greater than one year. There are isolated exceptions. For example, Maryland has an idiosyncratic rule that allows the state legislature to designate any crime as either felony or misdemeanor, without regard to the sentence range. See Tress, *supra* note 32, at 490. The more common approach is to treat sentence length as dispositive even in the face of a contradictory label, which can lead courts to the odd conclusion that crimes labeled misdemeanors are in fact felonies. See, e.g., *State v. Kelly*, 15 N.W.2d 554, 564 (Minn. 1944) (“Absent any constitutional definition or classification, it is competent for the legislature, in creating or defining an offense, to name it, classify it, and prescribe the punishment for it, subject only to the limitation that excessive fines shall not be imposed, nor cruel or unusual punishments inflicted. . . . Statutory nomenclature does not necessarily determine the grade or class of crime. Calling an offense a misdemeanor does not make it so when the punishment prescribed makes it . . . a felony.”). Of course, each jurisdiction may decide for itself whether and when to treat another jurisdiction’s offenses as felonies. Federal law treats prior state convictions as felonies whenever the state statute authorizes a sentence of more than one year, whether the state calls the offense a felony or not. See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM’N 2014); *Burgess v. United States*, 553 U.S. 124, 126–27 (2008) (holding that a state drug offense classified by state as misdemeanor, but punishable by more than one year imprisonment, was a felony for purposes of the federal Controlled Substances Act).

<sup>88</sup> “The classification of an offense as a felony or misdemeanor is within the discretion of the legislature, and where the legislature designates a particular offense as one or the other, its designation in this respect has been said to be conclusive.” 21 AM. JUR. 2d *Criminal Law* § 26 (2017). Again, a legislature usually makes this designation simply by setting the maximum authorized penalty.

sodomy, burglary, robbery, arson, mayhem, and larceny.<sup>89</sup> Or so scholars describe seventeenth century criminal law, but it is likely that we forget how quickly the numbers and types of felonies multiplied.<sup>90</sup> The list of nine common law felonies is cited often, though, demonstrating the enduring belief that there is coherence to the category. With the exception of sodomy (and the possible exception of burglary), each of the common law felonies involved violence, destruction, and/or a serious deprivation of property.<sup>91</sup> Not so with the modern felony. Today, the category reaches everything that seems even a little bit wrongful or harmful, and much that does not.

One cannot give a systematic overview of the types of acts presently prohibited as felonies. One can only collect examples, in the hopes of illustrating the absence of any system. The crimes that were felonies at common law are, with the exception of sodomy, still felonies, but in many jurisdictions they are now more broadly defined to reach a much wider range of conduct. Six of those nine common law felonies involved a threat or exercise of interpersonal violence, and indeed physical violence, or threats of it, is an element of many contemporary felonies. Assault, once a misdemeanor, is often chargeable as a felony. More recently conceived offenses against persons, such as making threats or stalking, are also chargeable as felonies.<sup>92</sup> Sodomy, less a crime of violence than a morals offense, is mostly decriminalized, but other so-called morals offenses such as prostitution are felonies in at least some circumstances.<sup>93</sup>

But physical violence, or the threat thereof, describes only a tiny fraction of felony offenses. Many contemporary felonies address dishonesty of one form or another (though of course, not all dishonesty is criminal). Lying is very often a felony—even when the speaker is not under oath.<sup>94</sup> Indeed,

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<sup>89</sup> See Tress, *supra* note 32, at 464. One noted treatise adds suicide to this list. See WAYNE R. LAFAVE, *CRIMINAL LAW* § 2.1(b) (5th ed. 2010) (“[B]y the 1600’s the judges . . . had created and defined the felonies of murder, suicide, manslaughter, burglary, arson, robbery, larceny, rape, sodomy, and mayhem.”).

<sup>90</sup> Recall that by the time Blackstone wrote his Commentaries in 1765-1769, he counted at least 160 statutory felonies, in addition to whatever common law felonies existed at that time. See BLACKSTONE, *supra* note 25; see also FRANCIS WHARTON, *I TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* § 2 (7th ed. 1874) (listing nine traditional common law felonies, but adding that other felonies were created by statute “running from the earliest period”).

<sup>91</sup> Burglary, traditionally defined as the breaking and entering of a dwelling with intent to commit some further felony therein, may but need not involve violence or destruction of property.

<sup>92</sup> See, e.g., Idaho Code § 18-7905; 1992 Fla. Laws Ch. 1924–25.

<sup>93</sup> See, e.g., Tex. Pen. Code Ann. § 43.02(c) (2017) (defining felony prostitution).

<sup>94</sup> See *United States v. Wells*, 519 U.S. 482, 505 (1997) (Stevens, J., dissenting) (“[A]t least 100 different federal false statement statutes may be found in the United States Code.”); *United States v. Gaudin*, 28 F.3d 943, 959–60 n.3–4 (9th Cir. 1994) (Kozinski, J., dissenting) (cataloguing almost 100 federal lying offenses, most of which are felonies); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 8, 291 n.6 (2006) (listing various felonies, including misrepresentations by refrigerator contractors or about tobacco weight). See generally Stuart Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001).

under prevailing interpretations of fraud statutes, cheating in almost any context, from academia to sports to the business world, is prosecutable as a felony.<sup>95</sup> (If “cheating” seems a bit underspecified, it should—by many accounts, that is the very design of fraud statutes.<sup>96</sup>) On paper, if not always in actual enforcement, modern felonies reach persons with white collars, blue collars, and no collars. They include an array of record-keeping failures, impersonations of professionals, omissions of material information, various copyright violations, accessing records or computers without authorization, and other types of negligence or malfeasance in the professional world.<sup>97</sup>

It’s easy to be a felon at work, but outside the workplace, there is still no shortage of mundane ways to commit felonies. Property offenses such as shoplifting or writing bad checks are often felonies, as is vandalism.<sup>98</sup> The possession of prohibited objects generates many felony convictions. Drugs and guns are the best-known contraband, but some possession offenses address fairly ordinary items; for example, in some states, the possession or use of fake identification is a felony.<sup>99</sup> America’s roadways are famously rife

<sup>95</sup> See, e.g., *Schmuck v. United States*, 489 U.S. 705 (1989) (upholding felony mail fraud conviction for defendant who rolled back odometers on used cars); *United States v. Al Hedaithy*, 392 F.3d 580 (3d Cir. 2004) (upholding felony mail fraud convictions after defendants paid imposters to take a standardized test for them); *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997) (upholding felony mail fraud convictions based on professors’ knowing approval of students’ plagiarized work). After the infamous “Black Sox” baseball scandal, members of the 1919 Chicago White Sox were indicted (but ultimately acquitted) under state law for felony conspiracy to defraud. See ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 155 (1998).

<sup>96</sup> See, e.g., Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1973 (2006) (“[B]y design, fraud prohibitions are exceedingly open-textured, setting forth conduct rules that usually amount to little more than the declaration, ‘Do not defraud.’”); see also John Coffee, *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); John Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981).

<sup>97</sup> In one noted example, Aaron Swartz, one of the founders of Reddit, was indicted for several federal felonies after he accessed computer networks without authorization in an attempt to make the academic articles in the JSTOR database available to the public. Among the felony charges against Swartz were Unlawfully Obtaining Information from a Protected Computer and Recklessly Damaging a Protected Computer. While under indictment but before trial, Swartz committed suicide. See Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. 157, 194–95 (2014).

<sup>98</sup> The Supreme Court famously upheld a 25-to-life prison term for a shoplifting offense under California’s Three Strikes Law. See *Ewing v. California*, 538 U.S. 11 (2003). Other states similarly punish shoplifting as a felony in some circumstances, such as when the value of the stolen property exceeds a given amount, or when the offender has prior shoplifting convictions. See, e.g., GA. CODE ANN. § 16-8-14 (West 2012); N.M. STAT. ANN. § 30-16-20 (West 2006). Similar considerations often structure felony vandalism statutes. See, e.g., CAL. PENAL CODE § 594 (West 2011) (defining vandalism as felony offense if cost of damage is \$400 or more). California law also permits felony charges for those who write checks with insufficient funds, depending on the number of checks and dollar amounts involved. See Cal. Penal Code 476(a)-(b) (West 2014).

<sup>99</sup> See, e.g., TEX. PENAL CODE ANN. § 32-21 (West 2009); *id.* § 37.01(2)(C) (defining crime of forgery as third-degree felony when forged document purports to be government-issued license).

with offenses, the majority of which are civil traffic offenses or mere misdemeanors, but driving generates many felonies as well.<sup>100</sup> Recreation can easily become felonious, even setting aside the wide array of felonies involving prohibited substances. A few infamous crimes of misdirected fun are only misdemeanors—disturbing mud in a federal cave, riding a snowmobile onto protected land, using Smokey the Bear’s image in an unauthorized way—but activities that damage state or national parks are often chargeable as felonies under destruction of government property statutes.<sup>101</sup> Still other forms of disfavored entertainment, such as fight clubs, dogfighting, drag-racing, or gambling, are also subject to felony charges.<sup>102</sup>

In one colorful and widely noted anecdote, a former federal prosecutor recalled a workplace game: one prosecutor would name a famous (but seemingly not felonious!) person such as Mother Teresa or John Lennon, and other prosecutors would find a plausible way to indict that person.<sup>103</sup> The challenge was to find *the best* offense, but it was no challenge to find *an* offense—and more specifically, an offense that carried possible prison time, or a felony. Many commentators have similarly bemoaned the breadth of the criminal law (especially the federal criminal law), in works whose titles express the essential point: *You’re (Probably) a Federal Criminal*.<sup>104</sup> [The typical professional commits] *Three Felonies A Day*.<sup>105</sup> *Go Directly to Jail*.<sup>106</sup> The anecdote, and the broader complaints, are important illustrations of the

<sup>100</sup> Depending on the circumstances, offenses such as drunk driving, reckless driving, or texting while driving may be felonies.

<sup>101</sup> See 18 U.S.C. § 711 (defining federal misdemeanor offense of using “Smokey Bear” without authorization); Jacob A. Kramer, *Preventing the Destruction of America’s Cave Resources: Enforcing Cave Protection Legislation Against Vandals and Profiteers*, 9 ENVTL. L. 725, 734–46 (2003) (describing various misdemeanor and felony statutes, state and federal, that can be used to prosecute damage to public parks). For further details on the snowmobile offense and other obscure crimes, both felonies and misdemeanors, see Edwin Meese III & Paul J. Larkin Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 747 n.115 (2012).

<sup>102</sup> See, e.g., Michael McCarthy, *Illegal, Violent Teen Fight Clubs Face Police Crackdown*, U.S.A. Today at A1-2 (Aug. 1, 2006) (discussing various charges brought against participants in fight clubs, including felony charges of aggravated assault and “engaging in organized criminal activity”); Francesca Ortiz, *Making the Dogman Heel: Recommendations for Improving the Effectiveness of Dogfighting Laws*, 3 STAN. J. ANIMAL L. & POL’Y 1, 24 (2010) (noting that all fifty states have dogfighting felonies); see also Ariz. Rev. Stat. 28-708(B) (West 2018) (providing for felony charges for second offense of drag racing). The regulation of gambling is broad and complex. For one overview of state and federal law, see Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201 (2002).

<sup>103</sup> Tim Wu, *American Lawbreaking: Introduction*, SLATE (Oct. 14, 2007), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/features/2007/american\\_lawbreaking/introduction.html](http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/introduction.html) [https://permacc/3V9H-GRUB].

<sup>104</sup> Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in IN THE NAME OF JUSTICE 43 (Timothy Lynch ed., 2009).

<sup>105</sup> HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, at xxxvi (2011) (“[I]t is only a slight exaggeration to say that the average busy professional in this country wakes up in the morning, goes to work . . . takes care of personal and family obligations, and then goes to sleep, unaware that he or she likely committed several federal crimes that day.”).

cheapness and triviality of the modern felony. Still, to search the criminal codes for unusual or obscure federal (or state) felonies is to risk misrepresenting the problem. It is true that the array of felonies on the books is vast. But the production of America's huge felony depends on enforcement choices (as discussed in Part II.B), and only a subset of felonies-in-the-criminal-codes generate the bulk of actual felony convictions (as discussed in Part II.C). In recent years, immigration offenses and drug crimes have vied with each other to generate the most federal felony convictions, each category typically claiming about 30 percent or slightly more of the federal total.<sup>107</sup> Criminal immigration offenses include illegal entry and re-entry, which means that one of the most common ways to become a federal felon is simply to try to get into the country.

Two points should be clear. First, if conduct is criminal, it can probably be prosecuted as a felony. The challenge is simply to select the right offense: public nudity is typically a misdemeanor, but conduct harmful to a minor is often a felony.<sup>108</sup> Often, all it takes to get from misdemeanor to felony is to do it twice: a second or subsequent offense will be charged as a felony.<sup>109</sup> Thus, the ubiquitous description of felonies as "serious crimes" is simply

<sup>106</sup> GENE HEALY, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* (2004). The works cited in the text are all relatively recent, but scholarly complaints about the breadth of the substantive criminal law extend back several decades. See, e.g., HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 249–364 (1968); Henry Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401 (1958); Sanford H. Kadish, *The Crisis of Overcriminalization*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Nov. 1967, at 157.

<sup>107</sup> Immigration offenses made up almost 40% of the federal criminal docket in fiscal year 2013. See EXEC. OFFICE OF ATTORNEYS, U.S. DEP'T OF JUSTICE, *U.S. Attorneys' Annual Statistical Report: Fiscal Year 2013*, at 11 (2014). These offenses were the most common federal crime from 2011 to 2015, but, in fiscal year 2014, drugs again became the most common federal crime. See U.S. SENTENCING COMM'N, *OVERVIEW OF FEDERAL CRIMINAL CASES - FISCAL YEAR 2015*, at 2 (2016).

<sup>108</sup> Similarly, new "sexting" offenses are often classified as misdemeanors, but some jurisdictions also have felonies that penalize the distribution of material harmful to minors, or other harm-to-minors felonies, that could easily encompass teenage sexting. Others allow a felony for a second or subsequent offense. See John Kip Cornwall, *Sexting: 21st Century Statutory Rape*, 66 *S.M.U. L. Rev.* 111, 136 (2013). At one time, federal law classified all conspiracy charges as felonies, even when the offense contemplated by the conspirator was only a misdemeanor. This allowed a prosecutor who could argue for the relatively minimal elements of conspiracy to turn any misdemeanor into a felony charge. After considerable criticism of the rule, Congress amended the federal conspiracy statute to permit either felony or misdemeanor prosecution. But federal prosecutors still sometimes bring felony charges for conspiracies to commit misdemeanors. See Lance Cole & Ross Nabatoff, *Prosecutorial Misuse of the Federal Conspiracy Statute in Election Law Cases*, 18 *YALE L. & POL'Y REV.* 225, 236–39 (2000). For a more general discussion of the frequency with which apparently similar conduct spans felony and misdemeanor classifications, see JOHN H. LINDQUIST, *MISDEMEANOR CRIME: TRIVIAL CRIMINAL PURSUIT* 16–17 (1988).

<sup>109</sup> For example, Alabama's much-scrutinized prohibition on the sale of sex toys treats a first offense as a misdemeanor, but provides that a second or subsequent violation is a felony. See ALA. CODE § 13A-12-200.2 (1975). In North Carolina, breaking into a coin machine is a misdemeanor the first time, but a subsequent offense is a felony. See N.C. GEN. STAT. § 14-56.1 (1994). These are just two examples of a very common statutory structure. See LINDQUIST, *supra* note 108, at 13. Two Supreme Court Justices expressed surprise at this structure, and some skepticism of its constitutional validity, during the oral arguments in *Johnson v.*



mistaken (unless one insists that all crime is serious, in which case the adjective becomes unnecessary).

Second, there is no unifying principle or characteristic shared by the crimes designated as felonies. It is important to emphasize this, given the widespread and persistent assumption that legislatures reserve the felony classification for the most severe offenses.<sup>110</sup> The category does include many types of very harmful and violent conduct, to be sure, but it also includes nonviolent, minimally harmful acts. It spans grave offenses to persons and also victimless crimes. It spans long-prohibited, *mala in se* offenses and newly minted, *mala prohibita* offenses. All it takes to make a crime a felony is, again, a legislatively authorized penalty of more than one year. Legislatures are profligate, not selective, in authorizing such penalties.

It is not my aim here to offer a theory of criminal legislation. It is worth noting, however, that there's disagreement whether any particular partisan platform or ideology is to blame for broad criminalization,<sup>111</sup> and no easy way to scale it back. Criminal law is a "one-way ratchet," Bill Stuntz famously observed, and his explanation pointed to "the politics of institutional design and incentives" rather than partisan ideology.<sup>112</sup> For a legislature, designating behavior as criminal—and more specifically, as felonious—is itself symbolically powerful and nearly costless. Broad criminalization expands prosecutorial discretion, a result that both prosecutors and legislatures embrace. And for the most part, the judiciary can do little to stop the expansion of the criminal law (assuming, of course, that judges would want to do so). Constitutional protections of civil liberties generate a few, but only a

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*United States*, 559 U.S. 133 (2009). See Transcript of Oral Argument at \*38–39, \*49, Johnson v. United States, 559 U.S. 133 (2009) (No. 08-6925).

<sup>110</sup> This assumption is common not only among non-specialists, but even among experts in criminal law or criminal justice. See, e.g., Henry F. Fradella, *Mixed Signals and Muddied Waters: Making Sense of the Proportionality Principle and the Eighth Amendment*, 42 CRIM. L. BULL. 498, 498 (2006) ("We differentiate what is more severe as compared to what is less severe often using nothing more than common sense. Legislatures do this when they designate offenses as violations, misdemeanors, and felonies.").

<sup>111</sup> To put the point another way: scholars have found plenty of blame to go around, with various works tracing the expansion of criminal law to conservative "law-and-order" politics, or Civil Rights-era progressivism, or the social welfare programs of the Great Society. See, e.g., KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* (2d ed. 2004); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2015); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2009).

<sup>112</sup> Stuntz, *supra* note 8, at 509–10. John Pfaff has questioned whether the politics of criminal law are *uniquely* dysfunctional, but like Stuntz, Pfaff details a number of ways in which the American political system will "overreact to increases in crime and . . . underreact to decreases." JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 162 (2017); see also John Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go from Here*, 26 FED. SENT. REP. 265, 268 (2014) [hereinafter Pfaff, *Escaping*] (questioning whether "the politics of criminal justice are uniquely dysfunctional").

few, judicially enforceable constraints on what may be criminalized.<sup>113</sup> In theory, the Eighth Amendment prohibition of cruel and unusual punishments could bar the designation of a minor crime as a felony, but courts do not actually reject felony classifications on Eighth Amendment grounds.<sup>114</sup> On a few occasions, courts have viewed a felony designation as a reason to interpret a statute narrowly.<sup>115</sup> In general, though, the choice to criminalize and the choice to authorize punishments of more than one year are seen as matters of legislative prerogative and occasions for judicial deference.

## *II.B. Enforcement*

As a result of these expansive substantive criminal laws, we are all felons—at least, we would be, if all it took to become a felon was conduct that could plausibly be interpreted to violate a felony statute. In actuality, legislative crime definition, and acts by an individual that fall within the statutory language, are hardly sufficient conditions to create a felon. The purportedly felonious action must be detected, and it must be prosecuted. Police and prosecutors could not possibly detect, investigate, and prosecute all transgressions of law that occur, so they must make choices. These enforcement choices by state officials are critical to the production of the felony. Like the breadth of the substantive criminal law discussed in the last section, the tremendous space for enforcement discretion has been widely observed and discussed.<sup>116</sup> Accordingly, my aim here is simply to highlight a few ways in which enforcement discretion is determinative of felony convictions in particular.

### *II.B.1. Police*

At the outset of a discussion of police and felonies, it is worth noting that on several occasions the Supreme Court has declined to use the felony/misdemeanor line to regulate the scope of police authority. Instead, the

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<sup>113</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 710 (2012) (striking down Stolen Valor Act's criminalization of false statements about military honors as violation of First Amendment); *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (First Amendment right of free speech prohibits conviction for flag-burning under statute aimed at suppressing expression).

<sup>114</sup> The closest example that comes to mind is Justice Powell's concurring opinion in *Bowers v. Hardwick*, which found no due process violation in Georgia's felony sodomy statute, but which suggested that the statute could present Eighth Amendment problems. *Bowers v. Hardwick*, 478 U.S. 186, 197–98 (1986) (Powell, J., concurring); see also *Harmelin v. Michigan*, 501 U.S. 957, 1018 (White, J., dissenting) (suggesting that the Eighth Amendment would prohibit "mak[ing] overtime parking a felony punishable by life imprisonment").

<sup>115</sup> See, e.g., *Staples v. United States*, 511 U.S. 600, 618 (1994).

<sup>116</sup> See generally KENNETH DAVIS, *POLICE DISCRETION* (1975); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 331–33 (2004); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419 (2002); Stuntz, *supra* note 8; Ronald Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006).

Court has typically adopted “transsubstantive” rules for police investigations: the same doctrinal rules apply whatever the substantive crime the police are investigating.<sup>117</sup> In its defense of transsubstantivity, the Court’s reasoning is telling. The Court has described the felony/misdemeanor distinction as “minor and often arbitrary,”<sup>118</sup> relatively unimportant,<sup>119</sup> possibly obscure to police officers,<sup>120</sup> and subject to legislative whim.<sup>121</sup> These observations should reinforce what this Article has already argued—that the felony/misdemeanor line is not based on the intrinsic harmfulness or seriousness of the underlying conduct. At the same time, the Court has underemphasized the degree to which police officers are aware of and able to manipulate the felony/misdemeanor distinction.<sup>122</sup>

For anyone to become a felon, his or her purportedly illegal acts must somehow come to the attention of law enforcement. Police may stumble upon illegal activity by chance, or (more likely) they may receive reports of such activity and respond, or (still more likely) they may actively look for

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<sup>117</sup> “Fourth Amendment law mostly ignores substantive criminal law; distinctions among crimes are usually irrelevant when it comes to regulating criminal investigations.” William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 843 (2001). As Stuntz notes, the few exceptions are well-known precisely because they are so unusual. *See id.* at 847 n.16 (discussing *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *People v. Sirhan*, 497 P.2d 1121 (Cal. 1972)). When it comes to adjudicative rather than investigative procedure—that is, the right to counsel, to a grand jury, to a jury trial, or other rights in the adjudicative process—the felony/misdemeanor distinction, or some other measure of the length of the potential sentence, does sometimes matter. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 160–62 (1968) (applying Sixth Amendment right to a jury trial to state criminal proceeding when defendant is exposed to two-year sentence, but declining to draw precise line between “serious” and “petty” offenses).

<sup>118</sup> *Tennessee v. Garner*, 471 U.S. 1, 14 (1989). Declining to incorporate into Fourth Amendment doctrine a common law prerogative to use deadly force against any fleeing felon, the Court observed that “[m]any crimes classified as misdemeanors, or nonexistent, at common law are now felonies. . . . [These changes] have also made the assumption that a ‘felon’ is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.” *Id.*; *see also Virginia v. Moore*, 553 U.S. 164, 177 (2008) (declining to find Fourth Amendment violation after arrest for state misdemeanor offense in violation of state law); *but see United States v. Hensley*, 469 U.S. 221, 229 (1985) (upholding police authority to conduct investigative stop on basis of reasonable suspicion that a completed felony has occurred, and declining to address whether this authority extends to suspicion of any completed crime, no matter how serious).

<sup>119</sup> *See United States v. Carroll*, 267 U.S. 132, 158 (1925) (“In England at the common law the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors.”).

<sup>120</sup> *See Atwater v. City of Lago Vista*, 532 U.S. 318, 348 (2001); *see also Berkemer v. McCarty*, 468 U.S. 420, 431 n.13 (1984) (“[O]fficers in the field frequently have neither the time nor the competence to determine the severity of the offense for which they are considering arresting a person.”).

<sup>121</sup> *See Carroll*, 267 U.S. at 158.

<sup>122</sup> *See Atwater*, 532 U.S. at 348; *see also* Yale Kamisar, ‘Comparative Reprehensibility’ and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 13 (1987) (“When the police make an arrest for a misdemeanor not committed in their presence, but lack the statutory authority to do so, they sometimes stretch or manipulate the facts in order to justify their action as a ‘felony arrest.’”).

and sometimes even deliberately generate criminal activity.<sup>123</sup> The first two categories of investigation are known as reactive policing; the latter is known as proactive policing.<sup>124</sup> In any of these situations, police officers are agents with choices, and their choices help determine whether a suspect is charged and eventually convicted of a felony. Most obviously, police have the discretion to simply ignore criminal behavior when they encounter it; on the path to a felony conviction, police can very often flip an off switch.<sup>125</sup> More interestingly, and more importantly for present purposes, police can usually find a misdemeanor if they want to,<sup>126</sup> and they can at least sometimes flip a switch from misdemeanor to felony. Police decide what evidence to collect, what questions to ask a suspect, and what charges to specify in an arrest report. None of these factors is necessarily determinative of the ultimate charges filed in court, but each influences that decision. Police may make felony arrests less frequently than misdemeanor arrests, but they tend to prefer to pursue felonies, and they have some ability to indulge that preference.<sup>127</sup>

When officers engage in proactive policing, or the active search for crime even when and where no specific offense has been reported, their ability to produce felonies is most pronounced. Departmental decisions about where and whom to police shape the demographics of the felony, as Part

<sup>123</sup> “[T]he typical police officer . . . spends more of her time on proactive patrol-model policing than reactive crime-solving and warrant-type policing.” Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 824 (2011) (summarizing results of several studies of different types of police departments).

<sup>124</sup> See Donald Dripps, *Race and Crime Sixty Years After Brown v. Board of Education*, 52 SAN DIEGO L. REV. 899, 904 (2015) (defining reactive and proactive policing).

<sup>125</sup> See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1140 (2000) (“Beat cops, for example, are customarily accorded broad latitude in their encounters on the street—to confront the jaywalker or turn a blind eye; to arrest the streetwalker or give her a free pass; to frisk the suspicious vagrant or just walk on by.”). Historically, police often declined to make arrests after incidents of domestic violence, leading some jurisdictions to pass mandatory arrest statutes for that particular type of offense. But even “mandatory” directives to police officers have not disrupted the basic premise that police authority to arrest, or otherwise apprehend suspects, is and must be discretionary. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005) (“A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”).

<sup>126</sup> “[P]olice practices mediate criminal events and arrests. . . . The police can find as many instances of marijuana or drug possession, petit larceny, unlicensed vending, misdemeanor physical altercations, public alcohol consumption, turnstile jumping, prostitution, and disorderly conduct as they devote the time and resources to find.” Kohler-Hausmann, *supra* note 21, at 630.

<sup>127</sup> The preference for felony arrests appears to be held both by individual officers and by police departments. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places*, 97 COLUM. L. REV. 551, 590 n.203 (1997) (noting that although an average officer makes a felony arrest rarely, officers value such arrests highly); *id.* at 652 (noting that departments seek and reward felony arrests); see also Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 189 (2013) (“[L]aw enforcement officers have broad discretion to select how and where to police.”). As Murphy observes, Maryland’s law requiring DNA samples of all felony arrestees gives police an additional incentive to pursue felony charges in instances when either felony or misdemeanor charges are plausible. *Id.* at 190.

II.C will discuss; police choose which suspects to pursue.<sup>128</sup> And against any given suspect, police also choose which specific crimes to pursue. Undercover operations are often designed specifically to generate felonies rather than petty offenses. For example, officers may place attractive “bait,” such as a car or a bicycle, in a location where they believe it is likely to be stolen. By choosing the right bait—a bicycle valued over a given dollar amount—police try to ensure their trap will produce a felon rather than a mere misdemeanor.<sup>129</sup>

Of course, as noted previously, most criminal cases involve misdemeanors.<sup>130</sup> That is not a claim about the intrinsic quality of the criminal conduct; as I have argued, there is nothing about prohibited conduct that makes it “intrinsically” a misdemeanor or a felony. The point is that most criminal cases are charged as misdemeanors and resolved as such, even many cases based on incidents that police sought to frame as felonies. In the twentieth century, several studies found high dismissal rates of felony charges filed by police, and scholars surmised that police tend to seek the most serious feasible charge and let courts, or prosecutors, reduce or dismiss if necessary.<sup>131</sup> These studies are somewhat dated, and the next section will discuss some recent research on prosecutorial charging practices that finds prosecutors especially likely to pursue felonies rather than misdemeanors. But even if the ways in which prosecutors exercise discretion have changed, these dismissal studies help illustrate that prosecutorial discretion surely limits the impact of police discretion. The fact that an officer’s ability to control the final disposition is constrained by prosecutors should only reinforce the key argument here: the production of a felon is a process over which state actors, not the individual defendant, have primary control.

### II.B.2. Prosecutors

Prosecutors exercise even more influence than police officers on the production of felonies, and institutional incentives push them to use this in-

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<sup>128</sup> See Aleksandar Tomic & Jahn K. Hakes, *Case Dismissed: Police Discretion and Racial Differences in Dismissals of Felony Charges*, 10 AM. L. & ECON. REV. 110 (2008) (analyzing dismissal rates after felony arrests and suggesting that blacks are more likely than whites to be arrested on felony charges in cases with marginal evidence of guilt).

<sup>129</sup> See Eda Katharine Tinto, *Undercover Policing and Overstated Culpability*, 34 CARDOZO L. REV. 1401, 1439–40 (2013). Critics call the basic strategy “sentencing entrapment” or “sentencing manipulation,” but most incidents of this police tactic are not prohibited by entrapment doctrine or constitutional constraints. See *id.* at 1412–17 (discussing jurisdictional variation in definitions of sentencing entrapment or sentencing manipulation, and criticizing narrow reach of the doctrines).

<sup>130</sup> See Roberts, *supra* note 19, at 280–81.

<sup>131</sup> See, e.g., HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* (1982); VERA INSTITUTE OF JUSTICE, *FELONY ARRESTS 1* (rev. ed. 1981). In some instances, the evolution of a charge from felony to misdemeanor is simply a matter of plea bargaining: the prosecutor initially charges, or threatens to charge, a felony, and the defendant agrees to plead guilty to a misdemeanor to avoid the felony charges.

fluence.<sup>132</sup> Indeed, prosecutorial choices to charge felonies rather than misdemeanors may be one of the key drivers of increased incarceration rates in the United States.<sup>133</sup> That explanation for America's extraordinary prison growth, advanced most powerfully by John Pfaff but increasingly accepted by other scholars, has led to several proposals to regulate prosecutors or constrain their discretion.<sup>134</sup> Without questioning the promise of such prosecutor-focused reform measures, we should also draw from Pfaff's research lessons about the category "felony" itself, and the contingency of a defendant's transformation into a felon.

As an initial matter, the wide scope of prosecutorial charging discretion can hardly be overemphasized.<sup>135</sup> Given the breadth of the substantive criminal law, and especially the wide range of conduct punishable by more than one year in prison, it is usually not difficult for a prosecutor to find a plausible theory under which to charge any given defendant with a felony.<sup>136</sup> And once the prosecutor has made her charging decision, there is relatively little judicial review of her choice. The only requirement to substantiate a charge is probable cause to believe that the accused committed the offense, and probable cause is a notoriously low threshold.<sup>137</sup> So long as probable cause is deemed established, courts decline to review most prosecutorial choices

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<sup>132</sup> As noted above, the breadth of prosecutorial discretion has been widely and long recognized, and the scope of that discretion continues to grow. See Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 304 & n.20 (2017) (noting that prosecutors are frequently described as the most powerful actors in the criminal justice system, and citing examples). One notable change in the literature on prosecutorial discretion is the diminishing plausibility of the assertion that prosecutors use their discretion to reduce rather than increase the severity of charges. Compare Lance Cole & Ross Nabatoff, *Prosecutorial Misuse of the Federal Conspiracy Statute in Election Law Cases*, 18 YALE L. & POL'Y REV. 225, 225 (2000) ("Misdemeanor charges are seen as 'small potatoes' that do not impose sufficiently onerous penalties on offenders and do not justify the employment of limited prosecutorial resources."), with Phillip E. Johnson, *Importing Justice*, 87 YALE L.J. 406, 409 (1977) ("As I have observed it, prosecutorial screening is a rigorous process that weeds out a great many cases that the police would like to charge as felonies. . . .").

<sup>133</sup> See John Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L.J. 1239, 1267 (2012); Pfaff, *Escaping*, *supra* note 112, at 267 ("[T]he primary engine of prison growth, at least since the early 1990s, has been an increased willingness on the part of prosecutors to file felony charges.").

<sup>134</sup> See PFAFF, LOCKED IN, *supra* note 112, at 71–74 (describing increased filing of felony cases in state courts from 1994 to 2008); Shima Baradan Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1121–38 (2017) (relying on Pfaff's research to propose subconstitutional mechanisms to check prosecutorial discretion); Griffin & Yaroshefsky, *supra* note 132, at 315–30.

<sup>135</sup> See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

<sup>136</sup> See Crane, *supra* note 21, at 778 ("For many cases, the alleged conduct could plausibly be charged either as a felony or misdemeanor."); Wu, *supra* note 103.

<sup>137</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see also Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 268 (2001) (noting that probable cause "may not be very restrictive in practice, and may provide a low threshold for charging"); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 680 (describing probable cause as an "essentially meaningless" constraint).

about which statute(s) to use and which penalties to seek—and importantly, which defendants to charge and which to ignore.<sup>138</sup>

That is, discretion gives prosecutors a choice: they could charge a felony, or they could charge only a misdemeanor—or nothing at all. Declinations to prosecute sometimes garner considerable attention, and the expansion of collateral consequences of misdemeanor convictions may lead prosecutors to “strategically undercharge” in some instances.<sup>139</sup> But there is some empirical evidence that at least in state courts, prosecutors have used their expansive discretion to produce felony convictions rather than misdemeanors. Analyzing data from the National Center on State Courts, John Pfaff found that between 1994 (the year that the Center began collecting the felony case data) and 2008, the number of felony cases in state court increased significantly even as reported crime and arrests declined.<sup>140</sup> Over the same time period, the chance that a felony charge would eventually lead to a prison sentence remained fairly constant, and so the increased rate of felony charging led to a significant increase in the number of people admitted to state prisons.<sup>141</sup>

There is some debate whether this state court data can support Pfaff’s focus on prosecutors as the state actors most responsible for the tremendous expansion of America’s prisoner population.<sup>142</sup> Setting aside that debate, Pfaff’s research is independently helpful as we seek to understand the role of prosecutors in the production of America’s felonry. To be clear, the production of prisoners and the production of felons are different enterprises. Although everyone who goes to prison must be convicted of a felony, not everyone convicted of a felony goes to prison. According to the most recent available data, only about 41 percent of state felony convictions incur prison sentences; another 28 percent receive local jail sentences, and 31 percent, no

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<sup>138</sup> See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“[T]he decision to prosecute is particularly ill-suited to judicial review.”). It does not help a defendant who *is* charged to point out that others who engaged in similar conduct were not charged similarly. Challenges to selective prosecution under the Equal Protection Clause require a showing that the prosecutor intentionally discriminated against that particular defendant, and courts have denied defendants the right to discovery of evidence that could establish discriminatory intent. See *United States v. Armstrong*, 517 U.S. 456, 468–71 (1996).

<sup>139</sup> See *Crane*, *supra* note 21, at 782–83 (describing “strategic undercharging” as the practice of charging a lesser offense to further prosecutorial aims rather than simply to show mercy); see also Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1246 (2011) (defining “prosecutorial nullification” as a declination to prosecute motivated by the prosecutor’s disagreement with the underlying substantive prohibition).

<sup>140</sup> PFAFF, *LOCKED IN*, *supra* note 112, at 71–72. In tracking arrests rates, Pfaff focuses on “violent, property, public order, and non-marijuana drug offenses.” *Id.* at 71. Marijuana arrests are fairly common, but they very rarely result in prison time. See *id.* at 257 n.52.

<sup>141</sup> See *id.* at 71–72. “Fewer and fewer people were entering the criminal justice system, but more and more were facing the risk of felony conviction—and thus prison.” *Id.* at 72.

<sup>142</sup> See Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835 (2018) (reviewing PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017)).

confinement at all.<sup>143</sup> For purposes of this Article, one of Pfaff's most notable findings is the fact that prosecutors began to charge more felony cases during a time of declining crime and declining arrests.<sup>144</sup> With fewer reported instances of illegal behavior and fewer defendants to process, prosecutors chose to charge more felonies. This change in prosecutorial practice illustrates clearly that the label "felon" is a construction of state agents, not the inevitable fate of an evil character.

Unfortunately, Pfaff's research reveals relatively little about the reasons that prosecutors began charging more felonies. It could be that prosecutors tend to be punitive, and changes in substantive criminal law, or increases in available sentences, simply created new temptations that severity-prone prosecutors could not resist. It could be that these same changes in the law have induced more defendants to waive a right to a jury trial and plead guilty, thus making felony charges less costly to prosecutors. It could be that electoral pressures, or perceived electoral pressures, led elected district attorneys to pursue more serious charges. Pfaff does point out some perverse political incentives created by the dispersion of criminal justice authority across different political subdivisions. Most prosecutors are selected by and serve counties, but prisons are funded by states.<sup>145</sup> Jails and probation offices are also typically funded by counties. So a defendant sentenced to probation or jail is one who imposes costs on the county, while felonies resulting in prison sentences allow prosecutors to "reap the full tough-on-crime political benefits" without imposing the full costs on their constituents. But this "significant moral hazard problem" cannot fully explain the sharp increase in state prosecutors' pursuit of felonies—again, the majority of felony convictions do not result in a prison sentence.<sup>146</sup>

One possible rationale for a prosecutorial choice to pursue felony charges is suggested indirectly by recent scholarship on misdemeanors and other low-level criminal justice interventions. Some of that work has emphasized the managerial, regulatory nature of a misdemeanor charge or even a simple arrest.<sup>147</sup> Under regulatory or managerial models, state actors are not primarily focused on the traditionally professed goal of "adjudicating guilt and punishment in specific cases," but rather are "concerned with managing

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<sup>143</sup> See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 - STATISTICAL TABLES 1 (2009) (noting that 69% of state court felony convictions resulted in a sentence of confinement in 2006, with 41% going to prison and 28% to local jails).

<sup>144</sup> PFAFF, LOCKED IN, *supra* note 112, at 72.

<sup>145</sup> Pfaff, *Escaping*, *supra* note 112, at 267.

<sup>146</sup> *Id.*

<sup>147</sup> See generally Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (exploring the ways various public and private institutions use arrest records as a regulatory device); Kohler-Hausmann, *supra* note 21, at 619–24 (analyzing misdemeanor case processing in New York City and offering a "managerial model" as an alternative to an "adjudicative model" of criminal law); cf. Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195 (2015) (discussing "dataveillance" of juvenile offenders as a managerial technique).



people over time through engagement with the criminal justice system.”<sup>148</sup> Traditional (“adjudicative”) accounts of criminal law portray the field as concerned with specific acts, and the question in any criminal case is whether the accused did commit the prohibited act and if so, what punishment is appropriate. The managerial model, in contrast, is concerned with people more than with acts—with sorting populations, supervising them, and regulating them. These sorting and regulatory functions don’t depend much on the adjudication of guilt for specific acts; an arrest alone can provide much of the information-gathering, record-keeping, and signaling that the state needs to manage people.<sup>149</sup>

This reframing from adjudication to management/regulation is an important scholarly reorientation, but in actual legal practice, the managerial approach is not new—nor is it limited to low-level interventions such as arrests and misdemeanor charges.<sup>150</sup> For more than a century, the designation as a felon has served an important regulatory or managerial function: once classified as felons, large groups of people could be and have been excluded from various social benefits and civil rights, and the same groups could be and have been subject to specific regulatory burdens, such as registration requirements.<sup>151</sup> Indeed, the very label “felon” reveals a concern with the *person*, not simply a specific act, and the permanence of that label is consistent with the goal of regulation over an extended time. One should distinguish between a concern with labeling the person and a concern with individuation. The label felon classifies the person, but does not represent a nuanced individual judgment. Rather, the fact that felons are frequently reg-

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<sup>148</sup> Kohler-Hausmann, *supra* note 21, at 614. Recent discussions of “managerial justice” in criminal law overlap partially, but not completely, with Marc Galanter’s earlier use of that term to describe courts using discretion to manage and resolve disputes quickly, sometimes with indifference to the underlying facts of the dispute. *See, e.g.*, Marc Galanter, *The Vanishing Trial*, J. EMPIRICAL LEGAL STUD. (2004). Regulatory models of criminal law also encourage attention to the ways that institutions of criminal law form a self-perpetuating bureaucracy likely to aim at its own expansion rather than contraction. *See* Rachel Barkow, *The Criminal Regulatory State*, in *THE NEW CRIMINAL JUSTICE THINKING* 33 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

<sup>149</sup> *See, e.g.*, Jain, *supra* note 147, at 809.

<sup>150</sup> I’m sympathetic to Kohler-Hausmann’s suggestion that the emphasis on the adjudication of guilt for specific acts distorts standard models of criminal law, but I am skeptical that the models are flawed *because* they have focused on felony adjudication. Kohler-Hausmann writes,

Existing models of criminal law, which have been built up almost entirely around felony adjudication, simply do not fit lower criminal courts. The social imperative to punish and the incentive to litigate diverge dramatically from felony to misdemeanor cases. Lower criminal courts process cases where the alleged crimes do not, by and large, represent an affront to widely held moral sentiments or cry out for the social act of punishment.

Kohler-Hausmann, *supra* note 21, at 615. Thus, Kohler-Hausmann reproduces the argument that felony and misdemeanor cases involve intrinsically different kinds of conduct. But as I have argued, many felony cases involve acts that do not “represent an affront to widely held moral sentiments or cry out for the social act of punishment.”

<sup>151</sup> *See infra* Part III.

ulated as an undifferentiated whole, without attention to the specific offense of conviction, demonstrates the concern with population management that often characterizes the managerial justice model.<sup>152</sup>

If “felon” has long been a regulatory designation, how can the regulatory or managerial models of criminal law shed light on state prosecutors’ choices to pursue *more* felony convictions in recent decades? They suggest that we should investigate whether American criminal law has grown more managerial across the board—more concerned with sorting, tracking, and regulating populations over time. Felony convictions, misdemeanor convictions, collateral consequences, and mere arrests are all ways of pursuing those goals. And though they are different managerial mechanisms, they may be able to serve as partial substitutes for each other. Note that in Pfaff’s data set, the rate at which prosecutors filed felony charges increased as arrests decreased, while in the New York City data analyzed by Issa Kohler-Hausmann in her study of misdemeanor cases, arrests increased dramatically while actual convictions decreased.<sup>153</sup> We need to learn much more to figure out how state actors choose among these various managerial strategies, and to what degree they do make conscious choices. Fortunately, some of this research has been undertaken already.<sup>154</sup> There is still much more to learn, but my key suggestion here is simply that population management may be one of the motivations behind prosecutors’ increased pursuit of felony convictions. The next Part will analyze further the regulatory mechanisms that apply to the modern felony.

In principle, a discussion of discretionary choices by state actors should not end after examining police and prosecutors. In principle, a felony case is one in which a prosecutor should not have the last word. Indeed, in some jurisdictions one of the distinctive procedural requirements of felony charges is that the prosecutor usually must submit the charges to a grand jury and obtain an indictment; the grand jury is supposed to act as an additional check on prosecutorial discretion.<sup>155</sup> In addition to grand juries, other decision-makers are nominally involved in the production of a felon: even after in-

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<sup>152</sup> See *id.*

<sup>153</sup> See Kohler-Hausmann, *supra* note 21, at 615; PFAFF, LOCKED IN, *supra* note 112, at 71–72.

<sup>154</sup> For example, Andrew Guthrie Ferguson has documented what he calls “predictive prosecution,” a practice in which prosecutors (like departments doing “predictive policing”) use data to predict categories of persons likely to prove troublesome in the future. Of specific relevance to this Article, Ferguson notes that prosecutors might sometimes choose to press felony charges because, based on aggregated data about various population subgroups, they believe a given individual needs to be incapacitated through incarceration. See Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705, 734 (2016); see also Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016) (discussing ways in which prosecutors exercise their discretion to manipulate the collateral consequences that will regulate a defendant post-conviction).

<sup>155</sup> See, e.g., U.S. CONST. amend. V; *United States v. Cotton*, 535 U.S. 625, 634 (2002) (“[T]he Fifth Amendment grand jury right serves a vital function . . . as a check on prosecutorial power.”); *United States v. Dionisio*, 410 U.S. 1, 17 (1973) (describing grand jury’s “historic role as a protective bulwark standing solidly between the ordinary citizen and

dictment, a defendant has a right to a jury trial; no one should become a felon without a “circuitbreaker” to flip the switch if the laws or state officials are unduly harsh.<sup>156</sup> And in theory, judges should supervise the entire adjudicative process, throwing out baseless charges or issuing judgments of acquittal when there is insufficient evidence to support a jury’s finding of guilt. In reality, a slight majority of states do not require grand juries to review felony charges, and where grand jury proceedings persist, they have been structured to favor the prosecutor and rarely fail to deliver indictment.<sup>157</sup> Judges rarely dismiss charges, even when they have the power to do so.<sup>158</sup> At trial, a petit jury usually convicts, though petit juries are somewhat less compliant with prosecutorial wishes than a grand jury.<sup>159</sup> The petit jury matters little in practice, though, since so few defendants go before them: close to ninety percent of defendants plead guilty and forego the right to a jury trial.<sup>160</sup> There are few judicial constraints on the negotiations that lead to these guilty pleas, and so most of the time, the production of a felon really does rest very heavily on a prosecutor’s choice.<sup>161</sup>

The upshot is that a prosecutor is the state agent with the greatest power to make an individual into a felon. As noted above, we don’t yet know enough about why prosecutors have become more likely to charge felonies over time. We do know, however, a fair amount about *who* they have chosen to charge with felonies. As this section has shown, prosecutors choose charges, but in various respects, they also choose defendants.<sup>162</sup> Among everyone arrested and brought before a prosecutor, only some are selected to be designated as felons. The next section explores the demographic characteristics and other attributes of those selected for felony convictions.

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an overzealous prosecutor,” but acknowledging that grand juries do not always fulfill this function).

<sup>156</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (describing jury trial as a “circuitbreaker in the State’s machinery of justice”).

<sup>157</sup> See Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 2 (2004); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2337 (2008) (“Today, grand juries rarely serve the purposes envisioned by the founders.”); see also Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 751 n.22 (2016) (listing states that require grand jury indictment and those that do not).

<sup>158</sup> See, e.g., Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327 (2017).

<sup>159</sup> In the federal system, about 84% of criminal cases tried to a jury end in conviction. Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L. Q. 151, 152 (2008). In state courts, jury conviction rates range from around 60 percent to over 80 percent. Neil Vidmar et al., *Should We Rush to Reform the Criminal Jury*, 80 JUDICATURE 286, 288 (1997).

<sup>160</sup> One can measure the guilty plea rate as a percentage of all defendants or as a percentage of all convictions. The second (and necessarily higher) measure is around 97%. But even as a fraction of all defendants, the guilty plea rate is high, about 87% in 2009. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1267 (2016).

<sup>161</sup> Crane, *supra* note 21, at 799–800 (noting cases usually finish on same side of felony-misdemeanor line as prosecutor’s original charging decision).

<sup>162</sup> When Robert Jackson was Attorney General, before he was appointed to the Supreme Court, he reportedly told other federal prosecutors, “If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants.” SILVERGLATE, *supra* note 105, at xxxvi.

## *II.C. The Composition of the Felony*

It is harder to track felons (or “ex-felons”<sup>163</sup>) than prisoners, but scholars estimate that between 16 and 20 million Americans have felony convictions.<sup>164</sup> Racial minorities are overrepresented in this group relative to their proportion of the general population, as they are in the subset of felons who actually serve prison sentences. Better data is available on the specific distribution of felonies—the actual crimes of conviction of the American felony. This section looks first at the felonies and then at the felons, finding in the available information reasons to believe that designation as a felon has more to do with race and class than with evil character or especially serious criminal conduct.

### *II.C.1. Which Offenses?*

In the federal system, drug offenses and immigration offenses have competed in recent years to produce the most felony convictions, with immigration offenses taking the lead for a few years during the Obama administration. Immigration felonies—most often, illegal entry or illegal reentry—made up almost 40 percent of federal convictions in 2011, but this category has decreased since then.<sup>165</sup> In fiscal year 2016, immigration offenses were just under 30 percent of all federal felonies, and drug crimes, with 31.6 percent of the total, had reclaimed their status as the most common type of federal crime.<sup>166</sup> Thus, together drug and immigration offenses make up the majority of federal felonies. The remaining felonies are fraud (9.6 percent in 2016), larceny (1.5 percent), other white-collar crime (3.3 percent), firearms offenses (10.8 percent), and child pornography (2.9 percent), with “other”

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<sup>163</sup> Some researchers use the term “ex-felon” to designate a person who has completed his sentence, whether prison or probation, and is no longer under the direct supervision of the criminal justice system. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 68 n. 8 (2003) (noting the usage, but electing to use “felon” to describe all persons with felony convictions). Importantly, such an ex-felon is still subject to most of the collateral consequences discussed in this article.

<sup>164</sup> See Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS. AM. ACAD. POL. & SOC. SCI. 281, 283 (2006) (estimating the “felon class” at more than 16 million Americans); see also Sarah Shannon et al., Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010, at 12 (Apr. 1, 2011) (unpublished manuscript), <http://paa2011.princeton.edu/papers/111687> [<https://permacc/2BBH-993D>] (estimating about 19.8 million living persons convicted of a felony in the United States, including those inside prison and out).

<sup>165</sup> U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES — FISCAL YEAR 2016, at 2 (2017). This report does not distinguish between felony convictions and misdemeanors, but federal prosecutors file misdemeanor charges relatively infrequently. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2011 - STATISTICAL TABLES, at 16 Table 4.1 (2015) (indicating that less than 12% of federal cases involved only misdemeanor charges and no felonies).

<sup>166</sup> U.S. SENTENCING COMM’N, *supra* note 165. Most federal drug felony convictions are based on manufacture or distribution rather than simple possession. *Id.* at 5.

making up about 11 percent of the total.<sup>167</sup> Note that few federal felony convictions represent offenses of interpersonal violence; the firearms offenses are overwhelmingly possession offenses, usually felon-in-possession.<sup>168</sup> And the approximately ten percent of federal felonies based upon fraud should be assessed in light of federal fraud statutes, which are notoriously broad and used by prosecutors to punish various flavors of dishonesty.<sup>169</sup>

But the federal courts process only a small fraction of criminal prosecutions in the United States; it is important to look closely at state felonies, too. In state courts, almost one third of felony convictions are based upon drug crimes, with distribution or trafficking (selling) offenses producing slightly more felonies than simple possession.<sup>170</sup> Approximately another third of state felony convictions are property offenses, distributed roughly equally among burglary, larceny, and fraud.<sup>171</sup> Around 15 to 18 percent of felony convictions result from offenses classified as violent, including aggravated assault, robbery, sexual assault, and homicide.<sup>172</sup> Another 3.4 percent of state felonies are weapons offenses, and about 16.7 percent of felony convictions are for the random other crimes that states have classified as felonies—vandalism, receipt of stolen property, second-offense distribution of sex toys.<sup>173</sup>

A few observations about these categories of offenses are important. First, and unsurprisingly, felony convictions actually obtained are not drawn equally from all felony statutes in existence. The considerable scholarly literature on over-criminalization has tended to focus more on the breadth of existing criminal codes and less on actual prosecutorial choices.<sup>174</sup> That approach can overemphasize odd and rarely used statutes, but it also may obscure disturbing patterns in the application of the most popular statutes. Second, felonies actually charged do not necessarily reveal the circumstances that brought a given defendant to authorities' attention. Pretextual

<sup>167</sup> *Id.* at 2.

<sup>168</sup> *Id.* at 8–9. It is possible, though, that prosecutors sometimes charge a weapons possession offense in lieu of a harder-to-prove assault offense.

<sup>169</sup> See *supra* Part II.A; see also SILVERGLATE, *supra* note 105.

<sup>170</sup> See BUREAU OF JUSTICE STATISTICS, *supra* note 143; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES (2013). Unfortunately, the Bureau of Justice Statistics has not released similar statistics on felony sentences in state courts since the 2006 data.

<sup>171</sup> See BUREAU OF JUSTICE STATISTICS, *supra* note 143; see also MANZA & UGGEN, *supra* note 94, at 70 (citing similar proportions using 2002 data).

<sup>172</sup> BUREAU OF JUSTICE STATISTICS, *supra* note 143, at 3; see also MANZA & UGGEN, *supra* note 94, at 70 (19% of felony convictions based on violent offenses); BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES, *supra* note 165, at 25 (in the 75 largest counties, about 15.7% of convicted felony defendants had violent offense as most serious offense).

<sup>173</sup> BUREAU OF JUSTICE STATISTICS, *supra* note 143, at 3. This report does mention vandalism and receipt of stolen property as examples, but my third example here is tongue-in-cheek. It is not clear whether there have been any actual convictions under the Alabama sex toy statute discussed *supra* note 109.

<sup>174</sup> Cf. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 5 (2012) (arguing that in spite of increase in number of federal criminal statutes, federal enforcement practices have not changed significantly).

prosecutions, in which a prosecutor files an easy-to-prove charge to ensure punishment of a defendant suspected of some other offense, are common.<sup>175</sup> Thus, it is certainly possible that felons are more violent than actual offenses of conviction suggest. With that acknowledgment, it is nonetheless striking how few felons are convicted of crimes involving physical violence—a tiny minority of federal felons, and a somewhat less tiny minority of state felons. Even among the felonies classified as violent, there are few of the homicides and rapes that are so closely associated with the label “felon.”<sup>176</sup> The majority of “violent” felony convictions are versions of assault, which is the paradigmatic bridge offense, chargeable either as a misdemeanor or a felony.<sup>177</sup>

To be clear, the distribution of actual convictions across various statutes is shaped by many factors, including the rates at which persons engage in prohibited conduct, prosecutorial priorities, and the ease of detection and conviction for a given offense. Conviction data does not give us a full picture of the actions of the average felon. All the same, it seems safe to say that it is not usually violence that makes a felon. Instead, in the federal system, felons are convicted predominantly of drug, immigration, fraud, or gun possession offenses. In the states, two-thirds of felons are convicted of drug or property offenses. Indeed, a shift in focus to felony convictions rather than prison admissions sheds light on recent debates about the precise impact of the War on Drugs. Drug offenses, notorious for the degree of police and prosecutorial discretion they involve, may not be the most important source of prison growth in the United States.<sup>178</sup> But they appear to be the

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<sup>175</sup> See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583 (2005) (defining pretextual prosecutions as those in which “prosecutors target defendants based on suspicion of one crime but prosecute them for another”).

<sup>176</sup> Since homicide and rape are so often framed as the “core” of the criminal law, it is worth observing that the legal definitions of these offenses, and the types of conduct actually punished under homicide and rape statutes, has fluctuated considerably with time. See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 588–98 (2011) (describing shifting definitions of homicide and sexual assault).

<sup>177</sup> BUREAU OF JUSTICE STATISTICS, *supra* note 143, at 3; see also *supra* Part II.A (on assault as a bridge offense).

<sup>178</sup> John Pfaff has criticized Michelle Alexander’s book *The New Jim Crow* for overemphasizing the role of the War on Drugs in increasing America’s prison population. See, e.g., Pfaff, *Escaping*, *supra* note 112, at 265 (“When someone like Michelle Alexander argues in *The New Jim Crow* that drug incarcerations are the primary source of prison growth, she is simply, categorically wrong.”). Alexander probably should have said “mass convictions” in many of the instances where she referred to mass incarceration—*Mass Convictions in an Age of Colorblindness* would be a more accurate subtitle for her book than *Mass Incarceration in the Age of Colorblindness*. From its opening paragraphs about a felon out on parole to its lengthy discussions of the collateral consequences of felony convictions, *The New Jim Crow* is about criminal law as an instrument of racial caste; it is not narrowly about prisoners per se. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–2 (2010) (using story of Jarvis Cotton, a convicted felon out on parole but unable to vote, to discuss “legalized discrimination” against black men who have criminal convictions); Pfaff, *Escaping*, *supra* note 112, at 265 at 141–77 (discussing various formal and informal burdens imposed on convicted persons who are not in prison). Importantly, Alexander does identify her unconventional use of the term “mass incarceration,” explaining that she

single most important category of crime that produces America's felons—many of whom, it should be said again, live outside of prison walls but in a subordinate political status. And because drug crimes, along with gun possession and immigration offenses, are crimes subject to tremendous enforcement discretion, it becomes all the more important to look closely at the demographics of those selected to become felons.

### *II.C.2. Which People?*

As noted above, there are upwards of 16 million people with felony convictions in America.<sup>179</sup> Much has been said about the dramatic increase in America's prison population, but there has been an even larger increase in the ex-prisoner population—felons who have served prison sentences and been released—and a still greater increase in the overall felonry, which includes felons who were sentenced to jail or probation and never served prison time.<sup>180</sup> It is difficult to get a precise count of these groups, since the government does not keep a census of felony offenders not in prison. But scholars have begun to gather some of the information.

After its sheer size, perhaps the most notable attribute of the felonry is its racial composition. African Americans, who comprise about 13 percent of the total population of the United States, make up about a quarter of the overall American felonry.<sup>181</sup> (To be sure, the overrepresentation of blacks is even greater in prisons, as many commentators have noted: among those convicted of felonies, blacks are more likely to go to prison.<sup>182</sup>) The racial impact of felony convictions may be even more evident when stated as a percentage of African Americans: Almost a quarter of African American adults, and about a third of African American men, have felony convictions.<sup>183</sup> Many commentators have catalogued, and criticized, the racial disparities in American criminal law, and several have argued that the criminal

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uses it to refer “not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison.” ALEXANDER, *supra*, at 13.

<sup>179</sup> Uggen et al., *supra* note 164, at 288.

<sup>180</sup> Uggen et al., *supra* note 164, at 282. Uggen and his co-authors estimate the total felon population by analyzing and combining yearly data on prison inmates, persons released from prison, and persons convicted of felonies but not sentenced to prison. The latter two categories must be discounted to reflect the probability that a released prisoner or former probationer has committed a new offense and entered the prison population, or has died.

<sup>181</sup> *Id.* at 288.

<sup>182</sup> See, e.g., Robert J. Sampson & Janet Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 355 (1997) (“Controlling for crime type and prior record, black defendants in some jurisdictions are more likely to receive a prison sentence than are white defendants.”). And as penalties increase in severity, so does the overrepresentation of African Americans, who are disproportionately more likely to be sentenced to life without parole or to death. See Charles E. MacLean, *Is Death Really That “Different”? Extraordinary Racial Disparities Infect Life Sentences, Too*, 25 WIDENER L.J. 1, 8–10 (2016).

<sup>183</sup> Uggen et al., *supra* note 164, at 283.

justice system now functions as “the new Jim Crow.”<sup>184</sup> The analogy has some limitations,<sup>185</sup> but the most sophisticated deployments of the analogy rightly emphasize that a felony conviction, which can but does not always lead to imprisonment, is a device of control and exclusion that has profoundly affected black Americans.

We know only a few other details about the people in the felony. It is reasonable to surmise that Latinos are also overrepresented among all persons with felony convictions, given their overrepresentation among prisoners and their status as the most frequent targets of federal immigration prosecutions.<sup>186</sup> But this surmise is difficult to verify at this point, as the scant scholarship on the felony has focused on African Americans to the exclusion of other racial or ethnic groups.<sup>187</sup> We also know that felons are overwhelmingly male.<sup>188</sup> And, like everyone who enters the criminal justice system, persons with felony convictions are overwhelmingly poor and poorly educated.<sup>189</sup>

A possible objection to the claim of racial overrepresentation should be addressed here. Some commentators urge close attention to the rates at which different racial groups commit offenses, arguing that we cannot claim that any given demographic is “overrepresented” among arrestees, defendants, or prisoners without this data.<sup>190</sup> If blacks have more felony convictions because blacks simply commit more felonies, this argument goes, blacks are

<sup>184</sup> See ALEXANDER, *supra* note 178; Symposium, *U.S. Drug Laws: The New Jim Crow?*, 10 *TEMPLE POL. & CIV. RTS. L. REV.* 303 (2001); see also ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 22–39 (2003) (detailing historical connections between racial segregation and Jim Crow laws and the development of prisons in America); Loic Wacquant, *From Slavery to Mass Incarceration*, 13 *NEW LEFT REV.* 41 (2002).

<sup>185</sup> See, e.g., James Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 *N.Y.U. L. REV.* 21 (2012).

<sup>186</sup> In the federal prisons, about one third of the inmates are classified as Hispanic. The Bureau of Prisons, like the U.S. Census, treats Hispanic as an ethnic category rather than a race. See Federal Bureau of Prisons, *Inmate Ethnicity*, FEDERAL BUREAU OF PRISONS (Jan. 27, 2018), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_ethnicity.jsp](https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp) [<https://permac/HEC8-CFWK>]. But again, prisoner data, though easy to obtain, does not tell the full story. Immigration-related arrests made up half of all federal arrests, and almost all of these arrests took place along the U.S.-Mexican border. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *FEDERAL JUSTICE STATISTICS 2013-2014*, at 5 (2017). About half of those actually convicted of immigration offenses are Hispanic. See PEW RESEARCH CENTER, *THE RISE OF FEDERAL IMMIGRATION CRIMES: UNLAWFUL REENTRY DRIVES GROWTH* (2014).

<sup>187</sup> See Uggem et al., *supra* note 164, at 287 (providing estimates of all prisoners and ex-prisoners, and of black prisoners and ex-prisoners, but without data for other races). The total number of federal prisoners classified as Hispanic increased from 2015 to 2016, while numbers of black prisoners and white prisoners decreased. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2016*, at 5 (2018).

<sup>188</sup> Uggem et al., *supra* note 164, at 289 (“[M]ore than 82% of all current and ex-felons are male.”).

<sup>189</sup> *Id.* at 295–96.

<sup>190</sup> See, e.g., David Rudovsky & Lawrence Rosenthal, *Debate: The Constitutionality of Stop-and-Frisk in New York City*, 162 *U. PA. L. REV. ONLINE* 117, 132 (2013) (statement by Professor Rosenthal describing “the problem of differential offending” and suggesting that, if blacks offend at higher rates, it is rational and appropriate for police to target blacks for stop-and-frisk).



accurately represented, and not overrepresented, in the felon population. Such claims are often met with efforts to show that both African Americans and Hispanics are targeted by law enforcement at rates disproportionate to actual offending.<sup>191</sup> It is important to identify racial bias in enforcement choices, but I want to emphasize a separate response to the demand for attention to rates of offending: Rates of offending themselves are not independent of the state's choices. This is not to say that the state controls any given person's actions, though it certainly influences them, but rather to say that the state chooses which kinds of conduct will be characterized as criminal offenses, which communities to police closely, and which of the persons who engage in the designated conduct it will prosecute and punish.<sup>192</sup> So even if data did suggest that African Americans sell drugs at elevated rates, and that their conviction rates are proportionate to their rate of actual trafficking, it would still make sense to highlight, and critique, the overrepresentation (relative to the overall population) of African Americans as felons. Criminal prohibitions, like all of criminal law, are constructions of the state, not laws of nature. If the state has constructed a legal regime in which racial minorities bear disproportionate burdens, even under conditions of bias-free enforcement, that racial disproportionality should be identified. For any given offense, the fact that those punished will be predominantly minorities may not be sufficient reason to decriminalize, but it is a fact that should figure into the decision whether to enact or preserve a criminal statute.<sup>193</sup>

No assessment of American criminal justice should ignore its racial disparities, and the classification felon is both a particularly pernicious manifestation of those disparities and a mechanism by which racial inequality is preserved even outside the formal criminal law.<sup>194</sup> This Article's critique of the felon/felony classification is not dependent on the racial disparities associated with that classification, however. Even if the racial composition of the felonry matched the racial composition of the whole citizenry, felon would be an objectionable designation. The problem stems from its very dualism, the two faces that make the felonry such a foundational and enduring concept. Its legal meaning can be and is drawn with bright lines, while the separate social meaning continues to shape popular perceptions. Thus felon collapses the constructed and the natural. As I elaborate further in Part IV below, felon legitimizes, by naturalizing, the extraordinarily severe criminal

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<sup>191</sup> See *id.* at 142 (statement by David Rudovsky that “[t]he national data demonstrate that whites use, possess, and sell drugs at rates approximately equal to minorities, but the arrest and incarceration rates for drug offenses are overwhelmingly disparate by race”).

<sup>192</sup> See *supra* Part II.A.

<sup>193</sup> See Ristroph, *The Thin Blue Line*, *supra* note 16, at 322–23 (“If we are to view criminal law as a form of state action that should be justifiable to the whole community, then we must consider the social and political costs that ensue when we choose criminalization over other measures (or over doing nothing).”).

<sup>194</sup> See *infra* Part III.

justice system we have constructed.<sup>195</sup> This is all the more objectionable given the racial disparities of that system, but it would be objectionable even in the absence of those disparities. When James Mudie sought to institutionalize the felony as a permanent sub-caste in New South Wales, he was widely and rightly criticized, and the felons he so loathed were as white as he was.<sup>196</sup>

### III. THE FELONY LEVER

A lever is a “simple machine”—a fairly easily obtainable, ordinary device that multiplies force. Think of a crowbar. In this Part, I examine felon/felony as a lever in two senses. From the perspective of an individual defendant, classification as a felon dramatically increases the consequences of contact with the criminal justice system, extending them beyond the nominal sentence on the charge of conviction. From the state’s perspective, the category felony is a lever that makes it easy to regulate many people at once, without having to adjudicate individual cases. Many of felony’s operations are familiar—the felony murder rule, felon-in-possession laws, and of course the many collateral consequences of a felony conviction. Rich, detailed descriptions of those areas of law, especially the law of collateral consequences, are available from many sources, so the aim of this Part is not primarily descriptive.<sup>197</sup> Rather, I develop two points that have received insufficient attention. First, it is important to see felony as a legal sorting mechanism that allows decision-makers to impose burdens without making individualized judgments, even as the social meaning of “felon” invokes ideas of individual bad character. In other words, the designation of persons as felons is a way to manage and regulate populations, though the word seems to reflect a judgment about the individual. Second, felon as a legal category developed alongside other legal identities marked for disadvantage, such as paupers, bastards, idiots and imbeciles. The defense of those categories, like the defense of felon, depended on appeals to nature and natural order. The demise of those categories, insofar as bastards, paupers, idiots

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<sup>195</sup> See *infra* Part IV. For a similar argument that focuses on the concept of criminality broadly rather than felon specifically, see Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777, 1784–94 (2012-2013).

<sup>196</sup> See MUDIE, *supra* note 6; see also Sandra Blair, *The Felony and the Free? Divisions in Colonial Society and the Penal Era*, 45 LABOUR HISTORY 1 (1983) (discussing criticism of Mudie); Blair, at 16 (noting that “there was no clear dividing line between convict and free” in Australian colonial society).

<sup>197</sup> See, e.g., Chin, *supra* note 10; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions*, 93 MINN. L. REV. 670 (2008).

and imbeciles are no longer formal legal categories, depended on disrupting the naturalist claims.<sup>198</sup>

Whether or not a person convicted of a felony is imprisoned, that person faces legal and social disabilities so extensive that his condition is compared often to infamy, exile, or civil death.<sup>199</sup> Among the widely documented collateral consequences of a felony conviction are ineligibility for public employment; denials of licensure in other occupations; bans on gun ownership; ineligibility for public housing and many other welfare benefits; curtailment of parental rights; exclusion from juries and from public office; and perhaps most infamously, disenfranchisement.<sup>200</sup> Not every state adopts all of these disabilities, but every state imposes at least some of them.<sup>201</sup> States also impose specific positive obligations on many felons, most notably registration requirements, which are often accompanied by community notification and a corresponding denial of privacy to the felon.<sup>202</sup> Collateral consequences are typically and controversially classified as civil, but felons are also subject to a distinctive set of criminal laws. Many statutory prohibitions apply only to felons, and the sentence for any new offense will almost certainly be enhanced for someone with a prior felony conviction.<sup>203</sup> Beyond these formal burdens imposed by public authorities, felons face substantial social discrimination, especially from private sector employers.<sup>204</sup> It is easy to see that the cumulative effect of these disabilities is often devastating, preventing a felon from reintegrating into society and making recidivism much more likely.

The label “felon” brings together many different kinds of offenders and subjects them to these disabilities.<sup>205</sup> To be sure, some specific burdens apply only to a subset of felons; for example, seventeen states permanently deny food stamps to persons convicted of drug felonies, and many registration requirements apply specifically to sex offenders.<sup>206</sup> In many instances, how-

<sup>198</sup> As discussed below, “bastard,” “idiot,” and “imbecile” are no longer official legal designations. Most “pauper” classifications have also been abandoned, though the term is still used to designate an indigent litigant.

<sup>199</sup> See *supra* note 10.

<sup>200</sup> See, e.g., Uggen et al., *supra* note 164, at 297 (chart listing many standard collateral consequences).

<sup>201</sup> *Id.*

<sup>202</sup> See Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727 (2013).

<sup>203</sup> See, e.g., 18 U.S.C. § 922(g) (2018) (federal felon-in-possession statute); see also JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 236–41 (2015) (discussing sentence enhancements based on prior felonies).

<sup>204</sup> See Johnathan J. Smith, *Banning the Box But Keeping the Discrimination?: Disparate Impact and Employers’ Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197 (2014). Private landlords are also typically permitted to discriminate against felons, and in states that require a showing of fault for divorce, conviction of a felony is often identified as adequate grounds for divorce.

<sup>205</sup> As noted above, “felon” functions both to lump and to split—to bring together many very different criminal defendants, and to separate some criminal defendants from other defendants, and from the general unconvicted population. See *supra* note 18.

<sup>206</sup> Uggen et al., *supra* note 164, at 297, 302.

ever, laws imposing collateral consequences apply to anyone with a felony conviction.<sup>207</sup> Thus, though “felon” still carries the connotation of individual bad character, collateral consequences are typically imposed with no individualized assessment of the specific person who will bear those consequences. And the cumulative effect of various collateral consequences is profound. A specific identity is bestowed upon the felon, one that recalls Mudie’s description: “[A] convicted felon is unworthy both of future trust and of mingling with and participating in the provident arrangements or the social enjoyments of his former associates and fellow subjects.”<sup>208</sup> This is the lever at work: The initial use of state coercion to prosecute and convict becomes quickly and easily multiplied as the fact of a felony conviction rationalizes a lengthy array of new forms of coercion.

Many commentators urge courts to recognize the coercions of collateral consequences as forms of punishment, and thus to subject them to heightened procedural rights and the specific constitutional constraints that apply to punishment.<sup>209</sup> Without contesting the punitive qualities of collateral consequences, I want to emphasize that they are also regulatory—they are devices of supervision, monitoring, and discipline that target broad groups with little concern for individualized adjudication.<sup>210</sup> Registration and residency requirements clearly serve these functions, but so does a blanket denial of rights of gun ownership or exclusion from particular occupations. Collateral consequences push felons in or out of designated spaces, enable pervasive monitoring of felons, and regulate their day-to-day conduct closely. Indeed, courts have declined to subject collateral consequences to constitutional constraints precisely on the grounds that the consequences are public safety measures broadly applicable to large groups, not individualized sanctions.<sup>211</sup> If the goal is indeed long-term public safety, collateral consequences may well be ineffective regulatory measures, because they often make a productive and law-abiding existence more difficult to achieve after a felony conviction. But foolish regulation is still regulation.

If citizenship is classically defined as “a status bestowed on those who are full members of a community,” a status that makes all who enjoy it “equal with respect to the rights and duties to which the status is endowed,” then felons are clearly not full citizens.<sup>212</sup> Scholars have used a number of

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<sup>207</sup> And some collateral consequences are imposed on anyone with any criminal conviction, even a misdemeanor, or even persons only arrested but never convicted. See JACOBS, *supra* note 203; see also Chin, *supra* note 10, at 1790; Crane, *supra* note 21, at 787–88.

<sup>208</sup> See MUDIE, *supra* note 6, at 7.

<sup>209</sup> See, e.g., Chin, *supra* note 10, at 1815–21 (arguing that cumulative collateral consequences tantamount to “civil death” should be barred by the Eighth Amendment, but acknowledging that the Court has rejected that argument so far); Crane, *supra* note 21, at 829–38.

<sup>210</sup> See *supra* Part II.B (on managerial models of criminal law).

<sup>211</sup> See, e.g., Smith v. Doe, 538 U.S. 84, 92–102 (2003) (considering, and rejecting, various arguments that Alaska’s sex offender registration law was punitive rather than regulatory).

<sup>212</sup> T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 84 (1950), quoted in Uggen et al., *supra* note 164.

terms to describe the subordinated status of a felon: not just infamy, internal exile, or civil death, as mentioned above,<sup>213</sup> but also sub-caste,<sup>214</sup> under-class,<sup>215</sup> or “shadow citizens.”<sup>216</sup> James Mudie’s nineteenth-century neologism—the felonry—is one more way to describe the subordination of this group.<sup>217</sup> No doubt Mudie’s term sounds antiquated to twenty-first century ears, especially in contrast to the alternatives, but the very archaism of the felonry is part of what makes the term evocative. Felon itself is an antiquated, ancient word, and the idea that felons would be universally and collectively subject to legal disability is a very old one.

Here it may be helpful to view the felon alongside his historical companions—the bastard, the idiot, the imbecile, the pauper. Each of these terms entered the English language in the late Middle Ages, and for centuries each served as a formal legal designation that identified persons subject to specific legal or political disabilities. Indeed, exclusionary laws often grouped felons alongside one or more of these other status categories. Felons were once barred from having heirs, and bastards from being them.<sup>218</sup> “Imbeciles” and felons alike were selected for compulsory sterilization.<sup>219</sup> “Paupers” and felons both have been denied the right to vote.<sup>220</sup> At the border, idiots, imbeciles, paupers and felons—along with prostitutes, professional beggars, and other unsavories—have all been deemed excludable by virtue of their status.<sup>221</sup> Underlying all these laws was a view that members of the given cate-

<sup>213</sup> See *supra* note 10.

<sup>214</sup> Uggem et al., *supra* note 164, at 300 (“A contemporary application of the caste concept to felons and ex-felons would rest on . . . [their] social exclusion from a wide range of institutional settings . . . as a result of an indelible felony conviction that cannot be removed for life.”).

<sup>215</sup> *Id.* at 301 (discussing the concept of an underclass, but concluding that, given that some felons do enjoy financial or other resources, “class concepts provide only a limited view of felons’ place in the stratification order”).

<sup>216</sup> Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 352 (2012) (“Criminal convictions set in motion a variety of social conditions that are mutually and negatively reinforcing and, taken together, render convicted felons ‘shadow citizens.’”).

<sup>217</sup> MUDIE, *supra* note 6.

<sup>218</sup> See *Avery v. Everett*, 18 N.E. 148, 150 (N.Y. 1888) (“The blood of the [attainted felon] was deemed to be corrupt, so that neither could he transmit his estate to his heirs, nor could they take by descent from the ancestor.”); R. GLANVILLE, *TRACTATUS DE LEGIBUS* 87 (G. Hall ed., 1965) (“No bastard born outside a lawful marriage can be an heir.”).

<sup>219</sup> See PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK v. BELL* (2010).

<sup>220</sup> See Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 18 (2011) (“Many states also enacted laws disenfranchising paupers and felons in the early nineteenth century.”).

<sup>221</sup> See, e.g., *Cmmr. Immigration of Port of New York v. Gottlieb*, 265 U.S. 310, 313 (1924) (listing classes of aliens to be excluded); *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915) (characterizing “paupers . . . professional beggars . . . idiots, persons dangerously diseased . . . [and] convicted felons” as excludable from the country “on the ground of permanent personal objections”).

gories were, by their nature, unfit for full membership in the political community with complete legal rights.<sup>222</sup>

The irony of this argument, of course, is that the disfavored categories were themselves social constructs. This is most obvious of bastard, perhaps—marriage is a human institution, and the rule that children born to unmarried parents should be legally distinct is a rule adopted by humans, by choice. Bastard is clearly a legal construct, but even “idiot” and “imbecile” were categories constructed by the law, ostensibly on the basis of mental disability.<sup>223</sup> An individual’s actual cognitive capacities are what they are, independent of the law’s constructions. But lawmakers and enforcers decided who to classify as an imbecile, just as today they decide who to classify as a felon. In one of the law’s most notorious constructions of imbecility, a young woman named Carrie Buck was institutionalized as “feeble-minded” and selected for involuntary sterilization, producing the Supreme Court decision *Buck v. Bell* and Justice Holmes’s infamous conclusion that “three generations of imbeciles are enough.”<sup>224</sup> But Carrie Buck was not mentally disabled, nor was her mother (also institutionalized and classified as “feeble-minded”) nor was Carrie’s infant daughter (described as “not quite normal”).<sup>225</sup> Instead, Carrie was a rape victim who bore a child out of wedlock—a bastard, in the parlance of the day.<sup>226</sup> She was not disabled but simply poor and unwanted, a ward of the state who was subjected to arbitrary and probably deliberately dishonest medical examinations, and eventually to involuntary sterilization, as part of the eugenics movement in the early twentieth century.

Political and cultural attitudes toward the disabled, the poor, and those not to wedlock born have changed substantially, as have our legal categories. *Buck v. Bell* has never been overruled, but American law does not often use

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<sup>222</sup> Thomas Cooley’s influential nineteenth-century treatise on state legislative power asked, “Who are the people in whom is vested the sovereignty of the State?” Certain groups were widely and properly excluded from “the people,” Cooley argued, including slaves, women, and “the idiot, the lunatic, and the felon, on obvious grounds.” THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 28–29 (1st ed. 1868).

<sup>223</sup> The legal definition of an idiot was a person so severely disabled that he or she “totally lack[ed] reason and understanding.” See *Atkins v. Virginia*, 536 U.S. 304, 340 (2002). An idiot was excused from criminal responsibility by virtue of his “utter destitution of every thing like reason.” *Id.* at 341. Imbecile was a distinct legal term applied to persons who did “possess some intellectual capacity, though infinitely less than the great mass of mankind.” *Id.* Imbecile became particularly important as a classification used to justify institutionalization or other incapacitation against projected criminality. A famous paper described and warned of “the imbecile with criminal instincts.” Walter E. Fernald, *The Imbecile With Criminal Instincts*, 65 AM. J. PSYCHIATRY 731 (1909).

<sup>224</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>225</sup> PAUL LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 116–17 (2010).

<sup>226</sup> *Id.*

the labels imbecile and idiot anymore.<sup>227</sup> Mental disability is not a suspect class in constitutional terms and thus classifications on mental disability are not formally subject to heightened judicial scrutiny, but the Supreme Court has made clear that at least some efforts to disadvantage the disabled violate constitutional guarantees of equality.<sup>228</sup> Bastard too has been abandoned as a legal label, and classifications based on nonmarital birth have been subjected to heightened scrutiny in equal protection doctrine.<sup>229</sup> Courts have found unconstitutional voting restrictions based on one's status as a pauper, even if poverty itself is not a suspect classification.<sup>230</sup> But the felon survives, as subordinated in 2018 as he was a century ago. The final Part asks whether we could abolish this legal classification, too, and free ourselves of the grip it has on the way we think about criminal law.<sup>231</sup>

#### IV. GETTING OUT OF THE BOX

Felony is only one of many terms used to designate the subset of crime that ostensibly matters most. Other notable criminal law classifications of past and present include “serious” felonies or crimes,<sup>232</sup> “violent” felonies or crimes,<sup>233</sup> “aggravated” felonies or offenses,<sup>234</sup> “particularly serious” crimes (used in immigration law),<sup>235</sup> crimes of moral turpitude (same),<sup>236</sup>

<sup>227</sup> A handful of states continue to use “idiot” as a legal classification, especially in order to deny the right to vote. *See Developments in the Law, Voting Rights and the Mentally Disabled*, 121 HARV. L. REV. 1179, 1181–85 (2008).

<sup>228</sup> *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (finding lower court erred in treating “mental retardation” as quasi-suspect classification triggering heightened review); *id.* at 450 (affirming lower court’s invalidation of zoning ordinance designed to prohibit group home for mentally disabled). At least in the context of the death penalty, mental disability implies some constitutional guarantees of greater procedural protections. *See Atkins*, 536 U.S. at 321.

<sup>229</sup> *See Clark v. Jeter*, 486 U.S. 456, 462–63 (1988). It goes too far, though, to claim that legal doctrines of illegitimacy have disappeared altogether. *See Solangel Maldonado, Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 350–64 (2011) (describing array of continuing legal disabilities imposed on children born out of wedlock).

<sup>230</sup> *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (striking down Virginia’s poll tax, known as a “pauper exclusion,” as a violation of the Equal Protection Clause); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18–29 (1973) (considering, and rejecting, arguments that the poor are a suspect class for purposes of equal protection).

<sup>231</sup> An act/status classification cannot easily distinguish felons from those classified on the basis of disability or birth since, as I have argued, becoming a felon is not determined primarily by one’s own actions. *See supra* Part II. Indeed, the terms felon and felony should prompt us to reexamine our assumptions about act and status in the criminal law. *See infra* Part IV.B.1.

<sup>232</sup> *See, e.g., CAL. PENAL CODE* § 1192.7(3)(c) (West 2012) (identifying crimes as “serious felonies” for purposes of mandatory sentence laws).

<sup>233</sup> *See, e.g., 18 U.S.C. § 924(e)(2)(B)* (2006) (defining “violent felony” for purposes of Armed Career Criminal Act); *but see Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (finding the same statutory definition of “violent felony” to be unconstitutionally vague).

<sup>234</sup> *See, e.g., 8 U.S.C. § 1101(a)(43)* (2018) (defining “aggravated felony” for purposes of immigration law).

<sup>235</sup> *See, e.g., Delgado v. Holder*, 648 F.3d 1095, 1097 (9th Cir. 2011) (interpreting the statutory phrase “particularly serious crime” to review a denial of an asylum request and an

“high crimes and misdemeanors,”<sup>237</sup> and “infamous crimes.”<sup>238</sup> Many of these classifications fall prey to the same circularity that one can observe with felony: the category is the predicate for various heightened legal burdens, but the category itself is defined by nothing other than the initial legal burdens imposed on the group—the actual or potential sentences attached to the initial offense. Still other classifications label persons rather than acts, offenders rather than offenses: the outlaw, the habitual offender, the sex offender, or even just the criminal.<sup>239</sup> This Article has argued that the designation “felon” merits particular attention, but the study of the felony should prompt reflections on categorical thinking throughout the criminal law. We cannot think without categories, but what drives us to embrace the specific categories that presently structure our law? In particular, why has it so often seemed necessary to identify a subcategory of the most serious crimes, or a class of true criminals? Why have we repeatedly defined such classifications in terms of authorized punishments rather than the underlying prohibited conduct? And why, once it has seemed necessary to partition the criminal law, do we so often define the subcategory in broad terms that threaten to swallow the whole?

This Article cannot fully answer all of these questions, but I do suggest this much: the categories we use to divide criminals and offenses, especially but not limited to felon/felony, offer an opportunity to reassess what is perceived as natural and what is constructed in our criminal law. That reassessment should in turn prompt reconsideration of the criminal law’s legitimacy. Criminal law generally, like the term felony, trades on a core dualism. The criminal law itself, like all human law, is a political and social construct, made and enforced by public authorities. But the law’s claim to legitimacy rests in part on the assumption that substantive criminal prohibitions are properly principled—that the criminal law (or at least, its “core”) prohibits not an arbitrary or random array of acts but instead acts that are truly wrong,

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order of removal, and holding that a crime need not be an “aggravated felony” to be a “particularly serious crime”).

<sup>236</sup> See 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2018) (identifying conviction of “a crime involving moral turpitude” as a basis for exclusion of an alien, but not defining the term “moral turpitude”).

<sup>237</sup> The Constitution identifies “treason, bribery, or other high crimes and misdemeanors” as grounds for impeachment of the president and other civil officers. U.S. CONST. art. II, § 4. There is no consensus, however, on what the phrase “high crimes and misdemeanors” means, or even whether the category is actually limited to criminal offenses. See, e.g., Joseph Isenbergh, *Impeachment and Presidential Immunity from Due Process*, 18 YALE L. POL’Y REV. 53, 106 n.228 (1999) (reporting that in the early 1970s, staffers on the House Judiciary Committee were instructed not to suggest that impeachable offenses were limited to crimes).

<sup>238</sup> The Fifth Amendment requires a grand jury for anyone prosecuted for “a capital, or otherwise infamous crime.” U.S. CONST. amend. V. For sources discussing the meaning of infamy, see *supra* note 10.

<sup>239</sup> Today, “outlaw” refers simply to someone who breaks the law, but the noun once designated someone who had received the particular sentence of “outlawry,” an erasure of all legal protection including protection against violence. Once a man was sentenced to outlawry—declared an outlaw—it was not a crime to kill him. See Jane Y. Chong, Note, *Targeting the Twenty-First Century Outlaw*, 122 YALE L.J. 724, 727 (2012).



truly harmful, mala in se, or otherwise “natural” crimes.<sup>240</sup> The social acceptance of punishment, and of legal burdens not formally labeled punishment, rests heavily on intuitions about pre-legal or extra-legal wrong. Our categories of crimes and criminals repeatedly invoke, and betray, those intuitions. Call a man a felon, and it will be hard to shake the implication that he is an internally wicked man; but call a man a felon, and in fact you have told us no more than that he has been convicted of an offense punishable by more than one year imprisonment. In this final Part, I contemplate the possibility, challenges, and potential payoff of abolishing the felonry.

#### IV.A. *Abolition With, and Without, Ambition*

Given the many labels used to identify serious crime, would it do any good to abolish the label felon, as other countries have done? There probably would be several advantages to using more neutral terms (e.g., “indictable offense”), given the deep stigma attached to the specific word “felon.”<sup>241</sup> And there would be advantages to shortening the lever described in Part III: If criminal offenses were subdivided into smaller, more internally cohesive categories, it would be much more difficult to apply broad restrictions to masses of dissimilar, but legally undifferentiated, offenders. Better still, without any subdivisions among criminal offenses, legislatures would have to attach collateral consequences to the specific crimes that ostensibly merit them, perhaps forcing closer attention to the question whether such consequences are in fact merited. But though there are practical upsides to abolishing the label felony, by now it should be clear that my argument is one about concepts, not one about terminology. To abolish the category felon without tackling the conceptual structure that surrounds it would be abolition without ambition, and that is not my project.

Indeed, on the subject of ambition and arguments for criminal law reform, one might observe a deeply conservative, legitimating strand in many otherwise powerful critiques of criminal law. Across a range of subfields,

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<sup>240</sup> The Italian criminologist Raffaele Garofalo described “natural crimes” as those acts contradictory to fundamental human instincts and banned in all societies. See RAFFAELE GAROFALO, *CRIMINOLOGY* 4–5 (Robert Miller trans., 1968) (1885). A similar idea lies beneath recent efforts to establish “empirical desert”—cross-jurisdictional and cross-cultural consensus about which acts to punish and how much to punish them. See generally Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reising, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010). Though Robinson’s work speaks the language of empiricism and social science, its overall aim is to align the criminal law with a purportedly natural, shared morality. See generally Donald Braman, Dan Kahan, & David A. Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531 (2010); Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151 (2010).

<sup>241</sup> There is extensive sociological and psychological literature on the effects of criminal labels, much of it suggesting that the stigmatization of a person as a criminal is itself criminogenic. See, e.g., JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989); D.J. WEST & D.P. FARRINGTON, *THE DELINQUENT WAY OF LIFE* (1977) (presenting results of longitudinal study and concluding that being labeled as delinquent was associated with subsequent increased criminality).

arguments against various specific legal practices are typically conditioned on what I will call the premise of perfectibility: the idea that something called “the criminal law”<sup>242</sup> can be perfected, and that the instant critique applies only to a piece of criminal law rather than the entire field. Examples are numerous. Critiques of the death penalty have repeatedly claimed that “death is different,” giving implicit and sometimes explicit endorsement to the notion that the flaws of capital punishment are not shared by incarceration or other penalties.<sup>243</sup> Some recent proposals to reduce the prison population focus on the so-called “non, non, nons”—nonviolent, nonserious, and nonsexual offenders—and thus reaffirm the principle that violent, serious, or sexual offenders all belong in prison.<sup>244</sup> Relatedly, critiques of specific types of criminal prohibitions often distinguish the given conduct from the “core” of criminal law—the stuff that should really be criminalized.<sup>245</sup> At least some recent work on misdemeanors relies upon a contrast with the properly punishable felony offense.<sup>246</sup> Efforts to improve the treatment of juvenile offenders have sought to distinguish them from truly responsible, truly blameworthy adult offenders.<sup>247</sup> Wrongful convictions scholarship and advocacy is premised on the idea of a rightful conviction.<sup>248</sup> And in the realm of criminal law theory, where scholars should be most free to think outside the

<sup>242</sup> The phrase “the criminal law,” with a definite article, rather than “the law of crimes” or simply “criminal laws,” is a verbal formulation that does considerable intellectual work. See Alice Ristroph, *The Definitive Article*, 68 U. TORONTO L.J. 140, 145–46 (2018).

<sup>243</sup> Cf. Richard Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1365 n.5 (1988) (collecting cases that endorse or rely upon the claim that “death is qualitatively different” from other penalties). More recently, some commentators have questioned whether death really is so different. Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009); Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1599–1600 (2001).

<sup>244</sup> The phrase “non, non, nons” seems to have originated during discussions about how to reduce California’s prison population. See Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 185 (2013). Consistent with my suggestion here, Marie Gottschalk argues that the non/non/non reform strategy is likely to be self-defeating. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165–66 (2015).

<sup>245</sup> See, e.g., Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 756–57 (2004). Cf. Louis Bilonis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 U.C.L.A. L. REV. 979, 1007 (2005) (discussing, in the context of procedural protections, the conservative effect of a “core” / “periphery” distinction in criminal law).

<sup>246</sup> See the discussion of Kohler-Hausmann, *supra* note 21; see also Natapoff, *supra* note 22.

<sup>247</sup> See *Roper v. Simmons*, 543 U.S. 551, 569–72 (2005) (finding that the immaturity and susceptibility to influence of juveniles under age 18 reduced their culpability and rendered them ineligible for the death penalty); see also Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 108 (2013) (arguing that juvenile offenders should receive a general sentencing discount against whatever sentence would be imposed on an adult).

<sup>248</sup> See, e.g., Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALA. L. REV. 325, 369 (2016) (describing need for compromise between “rightful convictions” and allowing previously convicted defendants to introduce new exculpatory evidence).

box, a couple of generations of scholars have begun every argument for scaling back criminal punishment by reinventing philosophical justifications for it.<sup>249</sup> These wide-ranging reform arguments all share the premise of perfectibility. They all assume that existing flaws in criminal law are perversions of it rather than its usual and typical operation.

It is past time to tie together all these strands of critique and notice that the problems that scholars have identified with each specific piece of criminal law—violence, tendencies toward severity, arbitrariness, discretion that creates opportunities for discrimination, procedural failures, insufficient attention to the causes of harmful activity, insufficient consideration of alternatives to criminal penalties—are just the problems of criminal law, period.<sup>250</sup> Such a meta-critique is an ambitious project, but it may free us from the legitimist assumptions that make meaningful reform so hard to imagine, much less achieve. By scrutinizing the concepts of felons and felonies, this Article aims to begin getting free.<sup>251</sup>

#### IV.B. *Three Lessons of Felon/Felony/Felonry*

We have seen that felony is a concept with two different and contradictory meanings: a legal meaning wholly contingent on the state's sentencing choices, and a social meaning that suggests inherent wickedness of character or wrongfulness of action. And we have seen that there is no uniform principle or logic that explains which criminal conduct is designated as felonious and which is not. We have seen, too, that the emptiness and incoherence of the category has been evident to at least some observers since the founding of America. And yet, as again we have seen, state officials continue to identify and prosecute people as felons, and then to impose upon them legal disabilities and burdens that deny this felony full citizenship. This section examines three ways that the concepts of felon and felony distort our thinking, and thus suggests three opportunities for conceptual reorientation.<sup>252</sup>

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<sup>249</sup> See, e.g., PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* 13–27 (2005); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 35–45 (1976); Sharon Dolovich, *Legitimate Punishment in a Liberal Democracy*, 7 *BUFF. CRIM. L. REV.* 307, 314–15 (2004); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 *Nw. U. L. REV.* 1367, 1378–97 (2017).

<sup>250</sup> Recent scrutiny of police violence could push more scholars toward more fundamental critiques. See generally Paul Butler, *The System is Working the Way It Is Supposed To: The Limits of Criminal Law Reform*, 104 *GEO. L.J.* 1419 (2016).

<sup>251</sup> Cf. PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2010).

<sup>252</sup> Cf. Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 *OHIO ST. L.J.* 109, 112 (2011) (“[W]e need a more finely textured description of the ideological structures that produce the political acquiescence necessary to carry out a program of hyper-incarceration.”).

### 1. *Act/Status*

A felony is an act, and to be a felon is to be a person who has committed that act. Or so it is assumed by those who do not scrutinize these terms closely. Felon/felony leads to act/status confusion. It leads observers of criminal law sometimes to elide the distinction, or sometimes to see it when it is not there. (It also encourages us to ignore the acts of every agent other than the person labeled the felon, but I will address that implication in the next section and focus on act and status here.)

A recent defense of felon disenfranchisement provides a useful illustration. In an article called “Voting and Vice,” Richard Re and Christopher Re argue that the Fourteenth Amendment was deliberately designed to endorse criminal disenfranchisement, even as Reconstruction egalitarians sought constitutional protection against race-based disenfranchisement.<sup>253</sup> Re and Re describe the “irony” that proponents of the Fourteenth Amendment would link racial enfranchisement with criminal disenfranchisement; they apparently do not credit the possibility that the latter was added to the text as a safe way to blunt the effects of the former. To explain the purported irony, “Voting and Vice” argues that a principle of formal equality motivated the drafters of the Fourteenth Amendment: “Formal equality is the notion that what you do is more important than who you are, that voluntary actions are morally significant and so should be prioritized over inherited statuses.”<sup>254</sup> From that, the rest of the argument is easy—race is a status, and so racial disenfranchisement is a violation of formal equality, but crime is an act, and so criminal disenfranchisement actually vindicates formal equality.

Notice, however, that no American jurisdiction has laws providing for arson disenfranchisement or assault disenfranchisement; most don’t even have laws providing for “felony disenfranchisement.” Rather, these exclusions are most often described as felon disenfranchisement, because it is a person’s status as a felon that triggers the exclusion. Re and Re would presumably argue that felon is just a label we give to a person who has committed a specific act, but there are problems with this claim. First, there’s no coherence between the acts designated felonies and no principled way to distinguish them from acts not designated felonies, as we have seen—and that was true long before Reconstruction.<sup>255</sup> In addition, the act/status dis-

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<sup>253</sup> Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 *YALE L.J.* 1584, 1603–24 (2012).

<sup>254</sup> *Id.* at 1593. The labeling of selective disenfranchisement as egalitarian illustrates well Peter Westen’s claim that the idea of equality is empty. Peter Westen, *The Empty Idea of Equality*, 95 *HARV. L. REV.* 537, 542 (1982). If equality requires treating like cases alike, then everything turns on the criteria we use to classify cases as like or unlike, and equality does no work. Martha Stewart has a felony conviction and I do not, but we are both American citizens. Are we like cases or unlike? On this point, it is also helpful to recall Mudie’s characterization of the subordination of the felony as “just and legal inequality.” See *supra* notes 77–83 and accompanying text.

<sup>255</sup> See *supra* Part I.

inction is not always a rigid one, and felony/felon is one instance in which it is particularly flimsy.

Sometimes, a status is reached by means of an act. Being a parent is a status, but almost every parent (excluding, for example, Carrie Buck) reached that status after a voluntary act.<sup>256</sup> Sometimes, a status reached by one person depends on the acts of others, as is true for adoptive parents who need state officials to constitute them as parents. For some kinds of status, such as being a pauper, you could get there by your own actions, be placed there through no choice of your own, or reach the status through some combination of act and circumstance, some combination of your acts and other people's. Being a felon, or a criminal, is this last kind of status. It usually (but not inevitably) involves acts by the person who will be designated as a felon; it inevitably involves acts by state officials.

Meaningful changes to American criminal law will require attention to the relationship between acts and status. Eradication of the caste divisions in place now will require recognition of the ways that the criminal law operates to make criminals—to impose a status on persons and not simply to punish disembodied, depersonalized acts.<sup>257</sup> The re-enfranchisement of convicted persons could be an important piece of that reform, but my primary aim is not to critique felon disenfranchisement, or any specific burden imposed upon felons. My aim is to critique the category itself, and the conceptual structure it implies.

#### IV.B.2. *State Action*

A second distorting effect of the term felon extends back to the early origins of the term described in Part I. As noted there, felon may be etymologically linked to *fel* and the human gall bladder, repository of bile and symbol of bitterness and evil.<sup>258</sup> Whether or not this specific etymology is accurate, felon undoubtedly has for centuries conveyed a claim about the person who bears the label. The idea that felony begins on the inside, in one's own internal character or with one's own choices, operates as an enticing and effective distraction from the role of state actors in enacting and enforcing criminal laws.

The inattention to the state is most profound among criminal law theorists, who focus on offenders and their conduct (and sometimes, on victims). Indeed, much work in criminal law theory must take the passive voice to keep the offender as the only agent in view: what conduct should *be criminalized*? Why, and how much, does this person deserve to *be pun-*

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<sup>256</sup> Not everyone who chooses to have sex chooses to become a parent, of course, but I am assuming that most people who become (biological) parents did choose to have sex. Again, there are exceptions, like Carrie Buck. See *supra* notes 223–24. Other parents reach their status via other acts, such as adoption or artificial insemination.

<sup>257</sup> See Ristroph, *The Definitive Article*, *supra* note 242.

<sup>258</sup> See *supra* Part I.A.

ished?<sup>259</sup> This language obscures the legislators that criminalize, the police that investigate and arrest, the prosecutor that seeks conviction, the judge that sentences, and the probation officers or prison officials that administer the sentence. Indeed, the omission of state actors from criminal law theory has led to a common conceptualization of criminal statutes as “conduct rules” directed at private individuals, when in fact by their actual language criminal statutes merely authorize (and almost never require) other public officials to take enforcement actions.

Happily, other strands of criminal law scholarship give far more attention to the public institutions and officials who make criminal law, and to the interactions among them. Credit for that focus is due at least in part to the late William Stuntz, whose interest in what he called “the political economy” of criminal law has deeply influenced other scholars.<sup>260</sup> Less happily, even these scholars who study state actors in the criminal justice system have so far mostly taken for granted that the inequities we see when we focus on state actors are pathological rather than juristypical. They have assumed that criminal law’s institutions and actors can be reorganized to vindicate a naturalistic and moralistic understanding of crime and punishment.<sup>261</sup> Few have asked whether the pathologies of criminal law’s implementation impact the justice of punishing even a guilty offender.

The two main inquiries of criminal law theory—criminalization (or crime definition) and punishment—are better framed in the active voice, with attention to state action. And to these two classic inquiries should be added one about enforcement choices, one that again focuses on state actors. Together, the reframed inquiries would set a research agenda for the study of official actors rather than the moral evaluation of private individuals. When and why should legislators authorize a criminal sanction instead of adopting some other type of law, or doing nothing? When and why should state agents enforce a given criminal law? When and why should state agents impose punishment? To generate these inquiries, we cannot pretend that a felon, or any criminal, is self-made.

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<sup>259</sup> See, e.g., Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27, 31 (2009) (“[P]rima facie, all moral wrongs culpably done should be criminalized.”). See generally Jim Staihar, *Proportionality and Punishment*, 100 IOWA L. REV. 1209 (2005).

<sup>260</sup> See, e.g., Stuntz, *supra* note 8, at 523 (addressing “the political economy of crime definition”); Richman & Stuntz, *supra* note 175 (discussing “the political economy of pretextual prosecution”). On Stuntz’s profound scholarly influence, see THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THE THEMES OF WILLIAM J. STUNTZ (Michael Klarman et al. eds., 2012). As far as I’m aware, Stuntz never offered a precise definition of “political economy,” but most take the phrase to refer to “the structural and institutional dimensions of criminal justice.” Joseph L. Hoffman, *The Political Economy of Capital Punishment*, in THE POLITICAL HEART OF CRIMINAL PROCEDURE, *supra*, at 30.

<sup>261</sup> Like many others, Stuntz often suggested that procedural flaws in an investigation should not bar the punishment of an actually guilty offender. See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE XX (2011).

### IV.B.3. *Beyond Natural Law*

Criminal law theorists are, in a sense, the last natural law theorists in an era that has almost universally embraced positivist legal theories. I am using “natural law” loosely, to represent the simple suggestion that law’s content and/or legitimacy can be derived from nature or reason rather than the deliberate choices, or whims, of human officials. For many philosophers of criminal law, the proper content of criminal statutes can be deduced by reason; the content of criminal law (in the perfect system, of course) is not itself seen as contingent or man-made.<sup>262</sup> This idea arises from the close association between criminal law theory and moral philosophy; some theorists have claimed explicitly that criminal codes should mirror our understanding of moral wrongs.<sup>263</sup> Thus many scholars distinguish between the “core” of criminal law—the *mala in se* or “wrong in themselves” offenses that criminal law naturally and necessarily must address—and the periphery, which includes the *malum prohibitum* offenses that are the contingent choices of a particular jurisdiction.<sup>264</sup> And these naturalist views impede reform: the suggestion that criminal law has a natural essence or core is one that relieves lawmakers and their constituents of responsibility for the criminal law—those who codify and enforce criminal laws are simply acting as they must.

The felony designation exploits and perpetuates the assumption that some acts just are really, truly crimes, as do similar classifications such as “serious offenses,” “aggravated offenses,” or “crimes of moral turpitude.” When we investigate the precise definitions of these labels, we inevitably find that it is the penalty imposed by the state, and not any given attributes of the defendant’s conduct, that defines the category. A study of the actual operation of criminal law should make us all relentless positivists, emphasizing at every turn that nothing and no one is criminal until made so by public authority. With that emphasis, we can better position ourselves to evaluate our collective choices to enact and apply criminal sanctions.

## CONCLUSION

Felon is one of several concepts in American criminal law that helps produce and perpetuate its distinctive severity and its profound racial and economic inequalities. We structure and speak about the criminal law in ways that obscure its contingent, manufactured origins. Felon frames the

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<sup>262</sup> Most theorists do acknowledge, but bemoan, the fact that existing criminal laws are simply products of legislative prerogative and are not subject to meaningful substantive constraints. See, e.g., HUSAK, *supra* note 86.

<sup>263</sup> See Moore, *supra* note 259.

<sup>264</sup> See, e.g., GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 234 (1978); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 37 (2007) (listing “physical aggression, taking property, and deception in exchanges” as “those core wrongs with which criminal law primarily concerns itself”).

burdens of conviction as a product solely of an offender's agency rather than public agency.<sup>265</sup> In other words, the category tends to explain public choices by redirecting attention to private choices—to the alleged bad choices of the offender. And to connect private choices to legitimate punishment, felon appeals to natural right, natural wrong, or other nonfalsifiable claims about what is morally appropriate. Commentators increasingly recognize the outcomes of the American penal system as problematic, overly severe and deeply inegalitarian, but the categories of our criminal law trap those same critics, and familiar concepts such as the felon encourage the purportedly law-abiding public to view those inequalities as the natural byproduct of wrongdoers' blameworthy choices. Thus criminal law claims legitimacy by disclaiming responsibility, or perhaps by *displacing* responsibility, shifting it away from the agents and institutions that decide what and how to punish, and attributing responsibility instead to the persons who are punished. This way of thinking allows both public officials and ordinary citizens clear consciences about the vast harms imposed by the criminal justice system. Felon is one of the devices by which we construct the targets of the criminal justice system as guilty, the better to construct ourselves as innocent. We should bid farewell not just to the label, but to that avoidance of responsibility.

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<sup>265</sup> Other basic concepts in criminal law, like desert and responsibility, function similarly. See Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1327–34 (2006) (discussing “the opacity of desert” and the ways it may serve as a “placeholder” for prejudice and bias). See generally Alice Ristroph, *Responsibility for the Criminal Law*, in *PHILOSOPHICAL FOUNDATIONS OF THE CRIMINAL LAW* 107 (R. A. Duff & Stuart P. Green eds., 2011).