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Cecelia Klingele

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## LABELING VIOLENCE

CECELIA KLINGELE\*

*In recent years, federal and state-level criminal justice reforms have softened the punitive responses to crime that defined the quarter-century from 1980–2005. The main beneficiaries of these reforms have been non-violent criminals, who are increasingly eligible for pre- and post-charge diversion, expungement, early release from custody and early discharge from community supervision. For those convicted of violent offenses, not much has changed: sentences remain long; opportunities for release remain few; and conditions of post-release supervision are tightly enforced, leading to high rates of return to prison. The justification for a harsh response to violent crime is that such crime inflicts significant harm and represents a dramatic deviation from standards of acceptable behavior. In fact, “violent” behavior—that is, behavior that is intended to cause, or does in fact cause, physical injury to another person—is hardly anomalous. Across the life-course, and particularly in youth and young adulthood, such behaviors frequently occur among a broad spectrum of the population and rarely lead to criminal conviction. This Article explores why only some behavior is labeled violent, and what implications this fact has for sentencing and correctional management of people convicted of violent crimes, and for the broader management of the criminal justice system.*

*“I think the big point is that there are not two kinds of humans: one the kind that commits crimes and gets imprisoned and another the kind that does not commit crimes . . . . I think there is but one kind of human beings, all of whom are a mix of good and bad, all of whom do a mix of good and bad things. As for the bad things, comparatively few of them have been labeled criminal. There is an infinite number of ways not declared crimes in which, without justification, we inflict pain and sorrow upon and exploit one another and destroy the thin envelope of air and water and soil in which we live.”*

*—Hon. James E. Doyle, U.S. District Judge<sup>1</sup>*

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\* Associate Professor, University of Wisconsin Law School. Many thanks to Michael O’Hear for inviting this paper, and to Barbara Sella and the staff of the *Marquette Law Review*, especially Andrew Salomone and Allison Mignon, for their editorial assistance. +JMJ

1. Letter from Hon. James E. Doyle to Aaron A. Johnson (Apr. 12, 1984), in *THE HISTORY OF JUDGE JAMES DOYLE* 45 n.4 (2013).

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## I. INTRODUCTION

In an era characterized by lengthy sentences, high imprisonment rates, and restrictive collateral consequences for all convicted individuals,<sup>2</sup> those who commit violent crimes often receive the harshest treatment of all. To be classified a “violent offender” is to be subject to a form of what Michael O’Hear has rightly dubbed “third class citizenship”<sup>3</sup>—a mosaic of legal penalties that marginalize violent offenders in lasting ways. Through penalty enhancements, mandatory minimum penalties, and often life-long restrictions on democratic participation, states and the federal government have ensured that individuals labeled as violent are stigmatized in ways that mark them as different from other categories of offenders and community members.<sup>4</sup>

The stringent consequences that follow conviction for a violent crime do not only apply to people who are likely to continue harming others in the future. Instead, the commission of a single past crime of violence frequently triggers the full panoply of restrictions, suggesting that those who have resorted to violence even once are uniquely deviant and dangerous.<sup>5</sup> The law’s treatment of these individuals implies that once the line of violence has been crossed, there is no turning back.

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2. See generally Michael O’Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing A “Violent” Crime*, 109 J. CRIM. L. & CRIMINOLOGY 165 (2019).

3. *Id.* at 168.

4. *Id.* at 185–227.

5. *Id.* at 204, 205.

Were “crimes of violence” limited by definition to those behaviors that inflict serious, permanent injury or death on other people, the stigma that attends conviction might be more understandable, since homicide and closely-related conduct are frightening and anomalous behaviors in the modern United States. However, “crimes of violence” include not only those behaviors, but also many other, lesser forms of aggression, such as (in some jurisdictions) simple assaults, extortion, concealed weapons charges, and operating motor vehicles while intoxicated.<sup>6</sup> Defining violent conduct this broadly raises questions about how common such behavior actually is, and how accurate an indicator it is of future harm toward others.

The fundamental human tendency toward aggression has been well-documented across time, culture, and place. Moral and legal strictures have long been employed to restrain the human impulse to harm others in ways large and small. Philosophers and theologians<sup>7</sup> have reflected on the tendency of the human person toward destruction and harm; behavioral psychologists, anthropologists, and biologists<sup>8</sup> have mined the cultural and evolutionary origins of aggression, and political theorists<sup>9</sup> have proposed ways to mitigate

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6. *Id.* at 175–76.

7. *See, e.g.*, SAINT THOMAS AQUINAS, TREATISE ON LAW: SUMMA THEOLOGICA, QUESTIONS 90–97, at Q.95 A.1 (1996) (“[S]ince some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evildoing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training, which compels through fear of punishment, is the discipline of laws.”); THE BABYLONIAN TALMUD: A TRANSLATION AND COMMENTARY, Sanhedrin 58b (Jacob Neusner, trans., rev. ed. 2011) (“He who lifts his hand against his neighbour, even if he did not smite him, is called a wicked man”).

8. *See, e.g.*, SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 78–79 (James Strachey, trans. 1961) (identifying the urge for destruction and death as a fundamental drive of the human person); John Archer, *The Nature of Human Aggression*, 32 INT’L J. L. & PSYCHIATRY 202, 204 (2009); R. J. R. Blair, *Aggression, Psychopathy and Free Will from a Cognitive Neuroscience Perspective*, 25 BEHAV. SCI. & L. 321, 326 (2007); David M. Buss & Todd K. Shackelford, *Human Aggression in Evolutionary Psychological Perspective*, 17 CLINICAL PSYCHOL. REV. 605, 607 (1997); José María Gómez, Miguel Verdú, Adela González-Megías, & Marcos Méndez, *The Phylogenetic Roots of Human Lethal Violence*, 538 NATURE 233, 233 (2016); Mark V. Flinn, Davide Ponzi & Michael P. Muehlenbein, *Hormonal Mechanisms for Regulation of Aggression in Human Coalitions*, 23 HUM. NATURE 68, 69 (2012).

9. *See, e.g.*, Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (Hans Gerth & C. Wright Mills eds., 1948); THOMAS HOBBS, LEVIATHAN (Edwin Curley, ed. 1994).

violence through the creation of social systems intended to maximize the common good.

The frequency with which people indulge in acts of violence, and the severity of the harm they cause, is influenced by age, culture, life experience, temperament, and other biological and environmental factors.<sup>10</sup> Though the vast majority of modern humans have not—and will never—kill another person,<sup>11</sup> nearly all will inflict some measure of physical pain on another person, whether by shoving, pinching, slapping, punching, biting, or using a weapon to inflict injury.<sup>12</sup> Most of these acts of outward violence will be committed in early childhood (with another peak in aggressive behavior seen in adolescence),<sup>13</sup> but acts of violence and aggression toward others sometimes persist into adulthood. Violence can also be self-directed: in 2018, 48,000 Americans ended their own lives through suicide, and 1.4 million more made a non-fatal suicide attempt.<sup>14</sup>

Acknowledging that aggression and violence are pervasive human experiences—and not rare acts limited to a deviant few—has important implications for the criminal justice system. This Article surveys the many ways in which aggression and violence manifest in the lives of people *not* convicted of violent crime, and explores the dangers of failing to acknowledge the reality of aggression and violence across the general population. Part II explores the various constructions of violence in both theory and law, noting the wide range of human conduct captured within modern definitions of violence. Part III turns to the prevalence of violence and aggression across the general population, observing that many individuals, with and without criminal records, exhibit a range of violent behaviors across the lifespan. Part IV surveys biological, psychological, moral, and sociological explanations for this

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10. See generally Jianghong Liu, Gary Lewis, & Lois Evans, *Understanding Aggressive Behavior Across the Life Span*, 20 J. PSYCHIATRY MENTAL HEALTH NURSING 156, 164 (2013).

11. According to the United Nations Office on Drugs and Crime's International Homicide Statistics database, fewer than seven people per 100,000 were intentionally killed each year from 1996–2017, a statistic low enough to that suggest a very small portion of the population kills, even over the course of a full lifetime. See United Nations Office on Drugs and Crime, *Global Study on Homicide* (2019), [https://dataunodc.un.org/GSH\\_app](https://dataunodc.un.org/GSH_app) (select “Time Series Trends”; choose “Homicide Rate” and “World”; set “Year Range” bounds at 1996 and 2017) (last visited Sept. 7, 2019).

12. Liu, Lewis, & Evans, *supra* note 10, at 158.

13. *Id.*

14. *Suicide Statistics*, AM. FOUND. FOR SUICIDE PREVENTION, <https://afsp.org/about-suicide/suicide-statistics/> [<https://perma.cc/P4UU-Y99X>] (data drawn from CTRS. FOR DISEASE CONTROL & PREVENTION, DATA & STATISTICS FATAL INJURY REPORT FOR 2018).

violence, noting the correlation of violence with variations in environmental stressors. Finally, Part V examines how an honest assessment of human violence outside the criminal justice system leads to a rethinking of violence within the criminal justice system. Openly acknowledging that violence and aggression are shared human tendencies not limited to a sub-class of convicted felons leads to several observations. First, people who commit crimes of violence are not different in kind from other people: they can, and do, desist from violence and should be given ample opportunity to escape the legal consequences that attach to the label “violent offender.” Second, because the tendency to violence is universal, aggression and violence exist wherever people are given opportunity to exercise power over others—and particularly in contexts where the use of force is openly sanctioned, such as during arrest and within jails and prisons. Being honest about the prevalence of human violence permits us to identify and redress violence perpetuated not just by those subject to the criminal justice system, but also by those who administer it.

## II. TAXONOMIES OF VIOLENCE

What is violent crime? In the popular imagination, the term conjures up images of bloodshed, torture, and all manner of intentionally-inflicted physical suffering. Providing a precise definition, however, requires answering difficult questions. Is violence limited to incidents of physical harm, or does it include threats designed to invoke fear? Does it require direct contact, or can it include severe deprivations that induce suffering? If violence is to be treated differently from other forms of deviance, then defining its parameters is essential. In both law and theory, however, precise definitions are elusive.

### A. *Defining Violence*

Theorists have defined violence in many ways, often viewing it along a continuum of increasingly aggressive behavior that ranges from passive approval of others’ suffering to threats of harm to actualized harm to property and persons to the intentional taking of life without cause.<sup>15</sup> In social psychology, for example, aggression and violence are often defined in terms of non-consensual and intentional harm, and differentiated by the amount of harm

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15. Sherry Hamby, *On Defining Violence, and Why It Matters*, 7 PSYCHOL. VIOLENCE 167, 168 (2017).

caused.<sup>16</sup> DeWall, Anderson, & Bushman, for example, define aggression as “any behavior intended to harm another person who does not want to be harmed,” and violence as “any aggressive act that has as its goal extreme physical harm, such as injury or death.”<sup>17</sup> In this view, aggression and violence exist along a spectrum that embraces a range of harmful behavior, but excludes any harms not intended by the perpetrator. By contrast, Sherry Hamby suggests that violence should be defined as “nonessential, unwanted, harmful, intentional acts.”<sup>18</sup> This definition excludes aggressive acts which are needed for survival (e.g., self-defense or emergency surgery), while including intentional acts that may lack malicious intent, such as reckless injury.<sup>19</sup>

Public health models take an even broader approach to the problem of violence. The World Health Organization defines violence as “[t]he intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.”<sup>20</sup> In this model, violence includes conduct that causes physical, sexual, or psychological harm, or that involves deprivation or neglect.<sup>21</sup> Such violence can be divided into the three categories of self-directed violence (such as suicide and self-harm), interpersonal violence (such as domestic violence and stranger assault), and collective violence (such as war and economic oppression).<sup>22</sup> In other words, it does not require physical harm, but would include any use of force that results in a harmful deprivation, even when that harm is attenuated.

In law, violence is defined in several different ways. During the last quarter of the twentieth century, many U.S. states passed laws targeted at violent

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16. *Id.*; see also C. Nathan DeWall, Craig A. Anderson, & Brad J. Bushman, *The General Aggression Model: Theoretical Extensions to Violence*, 1 *PSYCHOL. VIOLENCE* 245, 246 (2011).

17. DeWall, Anderson, & Bushman, *supra* note 16, at 246.

18. Hamby, *supra* note 15, at 170.

19. *Id.* at 170, 175.

20. WORLD HEALTH ORG., *WORLD REPORT ON VIOLENCE AND HEALTH 5* (Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi, & Rafael Lozano, eds. 2002), [https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf?sequence=1) [<https://perma.cc/WT22-76KR>].

21. *Id.*

22. *Id.* at 6.

criminal behavior.<sup>23</sup> Penalty enhancements, mandatory minimum penalties, and collateral consequences for violent criminals proliferated at both the state and federal levels of government.<sup>24</sup> Although there are commonly-acknowledged crimes of violence across jurisdictions, such as intentional homicide and rape, the range of specific behaviors that legally qualify as “violent crime” differs tremendously.<sup>25</sup>

As Professor O’Hear has explained, there are three primary ways in which jurisdictions define violent crime: through enumerated lists of offenses; through broad definitions of conduct; and through hybrid approaches that merge the other two.<sup>26</sup> All approaches include within their definitions of violent crime behaviors that intentionally inflict serious and lasting physical harm. They differ widely, however, in what else they include. In many states, for example, crimes of violence include not only physical harm, but threats of harm as well—in essence, emotional assault.<sup>27</sup> In several states, enumerated crimes of violence also include behaviors whose connection to violence is tenuous at best, e.g., theft of a firearm or drug offenses.<sup>28</sup>

As a general rule, the legal consequences that attend violent crime attach based upon the crime of conviction: the underlying theory of liability that leads to conviction is irrelevant. As a consequence, passive participants in group crimes may be stigmatized as violent in the same way as the actual physical

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23. See JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 119–50 (2017).

24. *Id.*

25. O’Hear, *supra* note 2, at 170.

26. *Id.* at 170–79.

27. See, e.g., DEL. CODE ANN. tit. 11, § 4391 (2020) (defining “crime of violence” as “any crime which involves the . . . threat of physical force or violence against any individual”); 725 ILL. COMP. STAT. ANN. § 120/3 (LexisNexis 2019) (“violent crime” includes “any felony in which . . . threat of force was used against the victim”); HAW. STANDARD CRIM. JURY INSTRUCTIONS 15.00 (2014) (“Crime of violence” means any offense as defined by the Hawai’i Penal Code that involves . . . threat of injury to the person of another”).

28. See, e.g., MINN. STAT. § 62A.712(5) (2019) (defining “crime of violence” to include felony convictions for crimes committed for the benefit of a gang; use of drugs to injure or facilitate crime; simple robbery; solicitation, inducement, and promotion of prostitution; child neglect or endangerment; commission of crime while wearing or possessing a bullet-resistant vest; theft of a firearm, controlled substance, explosive, or an incendiary device; unlawful possession or use of machine gun or short-barreled shotgun; riot; terroristic threats; harassment; *any* drug of controlled substance offense; and an attempt to commit any of these offenses).

aggressors.<sup>29</sup> All face the same legal penalties and lingering collateral restrictions, regardless of their prior knowledge of intended violence or active participation in it.

The label “violent criminal” evokes an image of someone dangerous; however, the wide range of behavior included in legal definition of violence calls into question the idea that those convicted of violent crime are meaningfully different from those who are not. If the category extends to the drug user or the drunk driver or the get-away driver with no knowledge of her co-conspirator’s violent acts, then the line between “violent” and “nonviolent” begins to fade. The murderers and predatory sex offenders of popular imagination are diluted by thousands of people convicted of lesser crimes involving less serious injury—or no injury at all.<sup>30</sup>

The breadth of conduct included under the label “violent offender” explains in part why much of the criminological literature discussed elsewhere in this volume suggests that most violent offenders are not meaningfully different from other categories of offenders, either in their responsiveness to intervention or their propensity to cause future harm to others.<sup>31</sup> But that is not the only reason.

Even when we consider only the subset of “violent offenders” who have actually punched or kicked or stabbed or shot someone, the distinction between violent criminals and “the rest of us” fades more quickly than we might care to

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29. See, e.g., *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (explaining that aiding and abetting a crime of violence is equivalent to directly committing the act for purposes of penalty enhancement under the Armed Career Criminal Act).

30. In a sample of felony defendants in the seventy-five largest U.S. counties, 24% were arrested for a violent crime. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 3 tbl.1 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/HP7Z-AQHL>]. Of those 13,938 alleged violent felons, only 958 (only 7%) were arrested for homicide or sexual assault. *Id.* Even in state prisons, which presumably hold those convicted of the most serious crimes, of the 712,000 felony offenders serving a term of confinement for a violent offense, approximately half have been convicted of robbery, assault, or another crime other than homicide or sexual assault. Wendy Sawyer & Peter Wagner, *Prison Policy Initiative, Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/U7XH-2YU8>].

31. Jennifer Copp has suggested that the very category of “violent offender” may lack useful meaning, Jennifer E. Copp, *The Impact of Incarceration on the Risk of Violent Recidivism*, 103 MARQ. L. REV. 775, 789 (2020), and Jennifer Skeem calls it a “myth” that high-risk violent offenders are somehow qualitatively different than the rest of us, see Jennifer L. Skeem & Devon L. L. Polaschek, *High Risk, Not Hopeless: Correctional Intervention for People at High Risk for Violence*, 103 MARQ. L. REV. 1129, 1145, 1148 (2020).

admit when we examine the universe of violent and aggressive behavior that occurs *outside* the context of the criminal justice system.

### B. *Types of Violence*

Psychologists distinguish between two types of human aggression, distinguished by their causes: reactive and appetitive aggression.<sup>32</sup> As the name suggests, reactive aggression is a response to strong emotions, often triggered by perceived threats of harm to one's self or loved ones.<sup>33</sup> It "is typically impulsive, immediate, and directed toward the perceived perpetrator,"<sup>34</sup> and can arise not only out of threats to one's physical integrity but also threats to self-identity, dignity, or status.<sup>35</sup> Reactive aggression includes instances of self-defense, but also accounts for some forms of gang violence, and responsive domestic violence.<sup>36</sup> Appetitive aggression, by contrast, arises from a fascination with or desire to commit acts of aggression for pleasure.<sup>37</sup> Appetitive violence thrives under conditions of tribal affiliation:

If one attaches positive value to out-group members' suffering, then one may be motivated to inflict suffering on them. In extreme cases, this motivation may lead to atrocities, including genocide, and in more quotidian cases, it can lead to brawls

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32. James K. Moran, Roland Weierstall, & Thomas Elbert, *Differences in Brain Circuitry for Appetitive and Reactive Aggression as Revealed by Realistic Auditory Scripts*, FRONTIERS IN BEHAV. NEUROSCI., Dec. 9, 2014, at 1; Roland Weierstall & Thomas Elbert, *The Appetitive Aggression Scale—Development of an Instrument for the Assessment of Human's Attraction to Violence*, EUR. J. PSYCHOTRAUMATOLOGY, Nov. 25, 2011, at 1.

33. Moran, Weierstall, & Elbert, *supra* note 32, at 1; Thomas Elbert, James Moran, & Maggie Schauer, *Appetitive Aggression*, in AGGRESSION AND VIOLENCE 119 (Brad J. Bushman, ed. 2017).

34. Rachael A. Lickley & Catherine L. Sebastian, *The Neural Basis of Reactive Aggression and Its Development in Adolescence*, 24 PSYCH. CRIME & L. 313, 313 (2018).

35. Cf. MARTIN DALY, *KILLING THE COMPETITION: ECONOMIC INEQUALITY AND HOMICIDE 2* (2016) (discussing competitive threats to status as a driver of homicidal violence).

36. Edward D. Barker, Richard E. Tremblay, Daniel S. Nagin, Frank Vitaro, & Eric Lacourse, *Development of Male Proactive and Reactive Physical Aggression During Adolescence*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 783, 787 (2006) (discussing high rates of both reactive and appetitive aggression among youth with gang involvement); Susan G. O'Leary & Amy M. Smith Slep, *Precipitants of Partner Aggression*, 20 J. FAM. PSYCHOL. 344, 344 (2006) (discussing reactive aggression as a justifying component in use of "mild" physical violence by women involved in relationships of domestic abuse).

37. Moran, Weierstall, & Elbert, *supra* note 32, at 1.

among rival sports fans.<sup>38</sup>

Studies find that combat veterans and civilian survivors of war and violence tend to have high levels of appetitive violence, and that the existence of appetitive violence is inversely related to the presence of post-traumatic stress disorders<sup>39</sup>—an indicator that learning to thrive in conflict can be a technique of both physical and psychological survival for those exposed to high levels of violent conflict.

Despite the dark images conjured up by the phrase “appetitive aggression,” it is a surprisingly widespread phenomenon, not at all limited to sadists (though inclusive of them).<sup>40</sup> In its most innocent forms, appetitive aggression drives the thrill of sports fans at the defeat of their arch-rivals or engaged citizens in the victory of their candidate over his opponent. In its darker iterations, it drives racial and xenophobic violence, and reinforces abuse, perpetuating cycles of violence.<sup>41</sup> In fact, researchers have suggested that under the “right social and psychological circumstances . . . [d]ata from diverse contexts show that lust to attack, fight and hunt, including extreme states of ‘blood-lust’, and ‘Combat High,’ can be potentially awoken in nearly all people, at least when male.”<sup>42</sup> That more Americans are not exposed to those circumstances is largely a matter of our good fortune at being born in a time, place, and environment that do not require many of us to take up arms against an enemy, or otherwise fight for physical survival.

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38. Mina Cikara, Matthew M. Botvinick, & Susan T. Fiske, *Us Versus Them: Social Identity Shapes Neural Responses to Intergroup Competition and Harm*, 22 *PSYCHOL. SCI.* 306, 306 (2011).

39. Anke Köbach, Susanne Schaal, & Thomas Elbert, *Combat High or Traumatic Stress: Violent Offending is Associated with Appetitive Aggression but not with Symptoms of Traumatic Stress*, *FRONTIERS PSYCHOL.*, Jan. 7, 2014, at 6–8, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4285743/> [<https://perma.cc/FP97-HYPC>]; Roland Weierstall, Sina Huth, Jasmin Knecht, Corina Nandi, & Thomas Elbert, *Appetitive Aggression as a Resilience Factor Against Trauma Disorders: Appetitive Aggression and PTSD in German World War II Veterans*, *PLOS ONE*, Dec. 2012, at 3; Roland Weierstall, Inga Scahlinski, Anselm Crombach, Tobias Hecker, & Thomas Elbert, *When Combat Prevents PTSD Symptoms—Results from a Survey with Former Child Soldiers in Northern Uganda*, *BIOMED CENT. PSYCHIATRY*, May 14, 2012, at 6, <https://bmcp psychiatry.biomedcentral.com/track/pdf/10.1186/1471-244X-12-41> [<https://perma.cc/ZK6G-JNYR>].

40. Erin E. Buckels, Daniel N. Jones, & Delroy L. Paulhus, *Behavioral Confirmation of Everyday Sadism*, 24 *PSYCHOL. SCI.* 2201, 2202 (2013).

41. Cikara, Botvinick, & Fiske, *supra* note 38, at 306.

42. Thomas Elbert, James Moran, & Maggie Schauer, *Lust for Violence: Appetitive Aggression as a Fundamental Part of Human Nature*, 23 *NEUROFORUM A77*, A78 (2017).

### III. THE PREVALENCE OF VIOLENCE

Like other categories of crime, violent crime often goes unreported, and when reported it is often not “cleared”—that is, suspects are not always identified.<sup>43</sup> Even when identifications are made, charges may not be filed or pursued for substantive or procedural reasons.<sup>44</sup> As a result, a great deal of violent behavior is not subject to a formal response by the criminal justice system.

Some violent behavior is not prosecuted because it occurs in contexts where it is not labeled violent by those engaged in it or those subject to it.<sup>45</sup> For example, although it is a crime to destroy another’s property in anger, when a teenager smashes her sister’s phone in the midst of an argument, the altercation will often be managed by parental discipline and not police arrest. In such these cases, violent behavior occurs, but no “violent offender” is produced because no conviction results from the conduct at issue.

It is difficult to accurately measure the prevalence of violence among the general population, though rough statistics can be cobbled together from a variety of sources. In large, urban counties, allegations of violent crime comprise roughly 25% of criminal arrests made by police.<sup>46</sup> (Aggregate statistics are unavailable for rural counties, or for the prevalence of arrest or conviction for misdemeanor assaultive offenses.) Victimization surveys, which attempt to capture both reported and unreported crime, indicate that in the year 2010, just over 1% of the population experienced at least one incident of violent victimization.<sup>47</sup> A recent survey of women ages 18–44 found that one in sixteen reported that her first sexual encounter was a rape, and that most rapes occurred

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43. COMM. TO REVIEW RESEARCH ON POLICE POLICY & PRACTICES, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 227–28 (Wesley G. Skogan & Kathleen Frydl eds., 2004).

44. See, e.g., Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 223–24 (2003).

45. *Id.* at 230.

46. REAVES, *supra* note 30, at 3 tbl.1, 34 (defining violent crimes to include murder, rape, robbery, felony assault, vehicular manslaughter, involuntary manslaughter, negligent or reckless homicide, nonviolent or nonforcible sexual assault, kidnapping, unlawful imprisonment, child or spouse abuse, cruelty to a child, reckless endangerment, hit-and-run with bodily injury, intimidation, and extortion).

47. JANET L. LAURITSEN & MARIBETH L. REZEY, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 4 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/RC5C-4RBE>].

when the victim was an adolescent.<sup>48</sup> This finding is consistent with widespread violence against juveniles, much of which goes unreported.<sup>49</sup> One study comparing victim survey results with police reports estimated that “only 28% of violent crimes against juveniles . . . become known to police.”<sup>50</sup>

But even victimization surveys do not tell the full story: a 1994 study of non-fatal violence-related injuries requiring treatment in hospital emergency departments found that the number of domestic violence-related medical injuries was four times higher than the number reported in the National Crime Victimization Survey.<sup>51</sup> This finding suggests that the actual prevalence of serious injury far surpasses that found in official reports—and gives rise to the inference that incidents of violence that lead to less significant injuries are more common still.

When trying to quantify the universe of violent behavior, it is important to look beyond criminal justice statistics to all of the ways and places in which violent conduct is managed. Violence is a wide-spread social phenomenon, affecting workplaces, schools, hospitals, and homes. Studies of violence outside the criminal context can be found in volumes dedicated to the effects of workplace aggression on work productivity and employee retention;<sup>52</sup> on the management of aggression among the mentally ill, the developmentally

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48. Laura Hawks, Steffie Woolhandler, David U. Himmelstein, David H. Bor, Adam Gaffney, & Danny McCormick, *Association Between Forced Sexual Initiation and Health Outcomes Among U.S. Women*, 179 JAMA INTERNAL MED., 1551, at 1555.

49. David Finkelhor & Janis Wolak, *Reporting Assaults Against Juveniles to the Police: Barriers and Catalysts*, 18 J. INTERPERSONAL VIOLENCE 103, 103 (2003).

50. *Id.*

51. MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE-RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS 1 (1997), <https://www.bjs.gov/content/pub/pdf/VRITHED.PDF> [<https://perma.cc/Z4TD-TCN2>].

52. *See, e.g.*, Sheryl L. Erdmann, Note, *Eat the Carrot and Use the Stick: The Prevalence of Workplace Violence Demands Proactive Federal Regulation of Employers*, 43 VAL. U. L. REV. 725, 728 (2009) (arguing that prevalence of workplace violence suggests need for additional legal protections); Leon J. Warshaw & Jacqueline Messite, *Workplace Violence: Preventive and Interventive Strategies*, 38 J. OCCUPATIONAL & ENVTL. MED. 993, 993 (1996) (proposing a plan for the interdisciplinary development of strategies for prevention and intervention of workplace violence); Jennell L. S. Wittmer, Robert R. Sinclair, James E. Martin, Jennifer S. Tucker, & Jessica Lang, *Shared Aggression Concerns and Organizational Outcomes: The Moderating Role of Resource Constraints*, 34 J. ORGANIZATIONAL BEHAV. 370, 370 (2013) (examining effects of faculty perceptions of school safety on job attitudes and educational outcomes).

disabled, and the elderly;<sup>53</sup> on risks posed by returning war veterans,<sup>54</sup> and in studies of antisocial behavior among schoolchildren.<sup>55</sup> In these contexts, employers, teachers, and others frequently manage violence—though often they refer to it by other, often gentler, names, such as “aggressive impulsivity,”<sup>56</sup> “dysregulation,”<sup>57</sup> “reactivity,”<sup>58</sup> “anger,”<sup>59</sup> and “antisocial conduct.”<sup>60</sup> All these are terms used to describe the type of aggressive behavior that, in its more serious forms, may lead to criminal conviction—though often it does not.

In explaining why geriatric nursing staff reported low levels of violence but high levels of minor physical injury in workplace surveys, Malin Åkerström explained:

The very process of identifying someone or some acts as “violent” is inherently exclusionary: the actor is cast as deviant

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53. See, e.g., Malin Åkerström, *Slaps, Punches, Pinches—But not Violence: Boundary-Work in Nursing Homes for the Elderly*, 25 *SYMBOLIC INTERACTION* 515, 516–17 (2002); David Allen, *Recent Research on Physical Aggression in Persons with Intellectual Disability: An Overview*, 25 *J. INTELL. & DEVELOP. DISABILITY* 41 (2000); J. Maguire & D. Ryan, *Aggression and Violence in Mental Health Services: Categorizing the Experiences of Irish Nurses*, 14 *J. PSYCHIATRY. & MENTAL HEALTH NURSING* 120, 122 (2007).

54. See, e.g., Deirdre MacManus, Kimberlie Dean, Margaret Jones, Roberto J. Rona, Neil Greenberg, Lisa Hull, Tom Fahy, Simon Wessely, & Nicola T. Fear, *Violent Offending by UK Military Personnel Deployed to Iraq and Afghanistan: A Data Linkage Cohort Study*, 381 *LANCET* 907, 907 (2013).

55. A review conducted by several National Academic Centers of Excellence (ACE) on Youth Violence, funded by the Centers for Disease Control, catalogued fifty different instruments that have been developed to measure aggressiveness in young people. EMILY K. ASENCIO, *SELF AND TEACHER REPORT MEASURES OF AGGRESSION AND VICTIMIZATION* (2005), [https://stopyouthviolence.ucr.edu/website\\_pages/Aggression%20Measures%20Matrix2.pdf](https://stopyouthviolence.ucr.edu/website_pages/Aggression%20Measures%20Matrix2.pdf) [<https://perma.cc/A66G-EQQK>].

56. See, e.g., Joshua Hatfield & Chris S. Dula, *Impulsivity and Physical Aggression: Examining the Moderating Role of Anxiety*, 127 *AM. J. PSYCHOL.* 233, 238–39 (2014) (finding strong correlation between aggression and impulsivity, and aggression and anxiety).

57. See, e.g., Ann Shields & Dante Cicchetti, *Reactive Aggression Among Maltreated Children: The Contributions of Attention and Emotion Dysregulation*, 27 *J. CLINICAL CHILD PSYCHOL.* 381, 381 (1998).

58. *Id.* at 382.

59. See, e.g., Howard Kassinove & Raymond Chip Tafrate, *Anger-Related Disorders: Basic Issues, Models, and Diagnostic Considerations*, in *ANGER RELATED DISORDERS: A PRACTITIONER’S GUIDE TO COMPARATIVE TREATMENTS* 1, 9–10 (Eva L. Feindler, ed. 2006).

60. See, e.g., Adrian Raine, *Biosocial Studies of Antisocial and Violent Behavior in Children and Adults: A Review*, 30 *J. ABNORMAL CHILD PSYCHOL.* 311, 311 (2002).

and made subject to more severe sanctions than if the acts were labeled “not violent.” We can hence assume that in some situations one wants to avoid pushing persons outside the boundary of normalcy and of continued acceptance. Placing elderly patients’ violence outside the boundaries of violence means that the elderly remain “care recipients,” the staff “caregivers,” and the nursing home a “caring context.”<sup>61</sup>

The opposite is also true: the boundary-crossing inherent in the use of the label “violence” may well explain the harshness with which we treat the criminal “other,” while often ignoring instances of violence that exist closer to home.

Common experience suggests that few people without criminal records will openly confess to “violence” *per se*, though most will admit to an “angry outburst” or a bout of “dysregulation.” And yet, when violent and aggressive behaviors are surveyed outside the criminal justice context, it becomes clear that many individuals in the general population engage in significant threatening and harmful behaviors toward others at various points across the lifespan.<sup>62</sup>

In childhood and adolescence, violence is statistically normative. More than 60% of teenagers report having experienced at least one outburst that “involve[ed] destroying property, threatening violence, or engaging in violence”<sup>63</sup> and over 20% of teens (30% for boys) have been involved in a physical fight in the prior twelve months.<sup>64</sup>

But aggression is not limited to youth. In a study conducted by the AAA Foundation for Traffic Safety, 78% of drivers admit to “aggressive driving,” with 50.8% purposely “tailgating”; 12% purposely cutting off other drivers; and 3% purposely ramming another vehicle.<sup>65</sup> A full 7% of adults will, at some

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61. Åkerström, *supra* note 53, at 516–17.

62. See, e.g., Raine, *supra* note 60, at 322–23.

63. Katie A. McLaughlin, Jennifer Greif Green, Irving Hwang, Nancy A. Sampson, Alan M. Zaslavsky, & Ronald C. Kessler, *Intermittent Explosive Disorder in the National Comorbidity Survey Replication Adolescent Supplement*, 69 ARCHIVES GEN. PSYCHIATRY 1131, 1133 (2012).

64. Laura Kann, Tim McManus, William A. Harris, Shari L. Shanklin, Katherine H. Flint, Barbara Queen, Richard Lowry, David Chyen, Lisa Whittle, Jemekia Thornton, Connie Lim, Denise Bradford, Yoshimi Yamakawa, Michelle Leon, Nancy Brener, & Kathleen A. Ethier, *Youth Risk Behavior Surveillance — United States, 2017*, MMWR SURVEILLANCE SUMMARIES, June 15, 2018, at 1, 16.

65. AAA FOUND. FOR TRAFFIC SAFETY, PREVALENCE OF SELF-REPORTED AGGRESSIVE DRIVING BEHAVIOR: UNITED STATES, 2014, at 4 (2016), <https://aaafoundation.org/wp-content/uploads/2017/12/Prevalence-of-Aggressive-Drivig-2014.pdf> [https://perma.cc/987H-M77W].

point, qualify for a diagnosis of intermittent explosive disorder—a condition characterized by “recurrent behavioral outbursts representing a failure to control aggressive impulses.”<sup>66</sup> Even sleep does not guarantee respite from aggression: nearly 2% of the population experiences some form of sleep-related violent behavior!<sup>67</sup>

Research suggests that it is in the comfort and relative privacy of our homes where we are most likely to show aggression. Although reported rates of domestic violence vary, approximately 30% of men and women report having experienced physical abuse (including slapping, pushing, shoving, or more severe physical violence) at the hands of an intimate partner.<sup>68</sup> Between 30% and 40% of both men and women report having pushed, shoved, or hit their intimate partners at some point in their relationship.<sup>69</sup> Importantly, these self-reported incidents of violence are not always indicative of a generalized pattern of domestic violence: in many cases, people report anomalous altercations that occurred only once or very infrequently.<sup>70</sup>

Beyond physical aggression, but closely related to it, is the experience of *schadenfreude*.<sup>71</sup> Taking delight in the suffering of another—particularly when the “other” is viewed as a competitor or outsider—is a nearly universal human emotion.<sup>72</sup> Research suggests that even in its most extreme forms, *schadenfreude* is not an emotion experience only by violent criminals or known psychopaths. Rather,

enjoyment of cruelty occurs in apparently normal, everyday people. Consider the popularity of violent films, brutal sports, and video games with cruel content—not to mention incidents of police and military brutality. These common place

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66. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5®) 312.34 (5th ed. 2013).

67. Maurice M. Ohayon & Carlos H. Schenck, *Violent Behavior During Sleep: Prevalence, Comorbidity and Consequences*, 11 SLEEP MED. 941, 943 (2010).

68. SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW, & JIERU CHEN, CTRS. FOR DISEASE CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 8–9 (2018).

69. *Id.* at 20 tbl.9, 22 tbl.11.

70. *See id.* at 7.

71. *Cf.* RICHARD H. SMITH, THE JOY OF PAIN: SCHADENFREUDE AND THE DARK SIDE OF HUMAN NATURE (2013).

72. *Cf. id.*; see also Marco Brambilla & Paolo Riva, *Self-Image and Schadenfreude: Pleasure at Others' Misfortune Enhances Satisfaction of Basic Human Needs*, 47 EUR. J. SOC. PSYCHOL. 399, 399 (2017).

manifestations of cruelty implicate a subclinical form of sadism, or, simply, *everyday sadism*.<sup>73</sup>

While taking pleasure in others' pain is not criminal in itself, it is a behavior that differs more in degree than kind from the violence that is usually the subject of criminal conviction. To the degree that it represents a shared human sentiment, it invites us to interrogate further the idea that violent offenders are as unique as the laws that govern them suggest.

#### IV. THE CAUSES OF VIOLENCE

For those of us who have never been convicted of a crime, it is easy to overestimate the degree to which our freedom from legal entanglement is a result of personal virtue.<sup>74</sup> In reality, manipulating environmental factors can have dramatic effects on behavior: research suggests that “[v]irtually anyone can be aggressive if sufficiently provoked, stressed, disgruntled, or hot.”<sup>75</sup>

For many people, life is a series of provocations, emotional stressors, and unrelenting physical stress of a type likely to produce reactive aggression. Nonetheless, in gauging the severity and reasons for others' acts of violence, observers tend to exaggerate both their own virtue and others' vice.<sup>76</sup> In a study examining racial perceptions of violence, for example, whites shown videos of ambiguous physical interactions between an interracial couple were less likely to label a shove “violent” when the perpetrator was white.<sup>77</sup> They were also more likely to blame the interaction on a lack of character when the offender was black and on circumstances beyond his control when he was white.<sup>78</sup> This

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73. Buckels, Jones, & Paulhus, *supra* note 40, at 2201 (citations omitted).

74. See, e.g., Brian Mullen & Craig Johnson, *Distinctiveness-based Illusory Correlations and Stereotyping: A Meta-Analytic Integration*, 29 BRITISH J. SOC. PSYCHOL. 11, 12 (1990).

75. Susan T. Fiske, Lasana T. Harris, & Amy J. C. Cuddy, *Why Ordinary People Torture Enemy Prisoners*, 306 SCIENCE 1482 (2004).

76. That does not mean free will and virtue play no role in refraining from anger or avoiding injury to one's enemies. “Turning the other cheek” in response to assault, *Matthew* 5:38–39, 43–44, (New Jerusalem), or responding to hatred with loving-kindness and generosity, see Donald Rothberg, *Buddhist Responses to Violence and War: Resources for a Socially Engaged Spirituality*, J. HUMANISTIC PSYCHOL., Oct. 1992, at 41, 49 (1992), are not easy mandates. Conforming one's conduct to the dictates of civil and moral law is a duty that requires sustained effort for most people faced with the frustrations and challenges of daily life. Even so, it is a duty that can be made more difficult by a wide range of biological, environmental, and socioeconomic circumstances.

77. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1976).

78. *Id.*

mis-labeling of identical behavior suggests that people tend to excuse conduct when they identify with a perpetrator and exaggerate conduct when it is committed by someone they see as “other.”

What then, besides a lack of moral fortitude, might explain the prevalence of violence? Three primary causes stand out: biological factors (including phylogenetics, personal hereditary conditions, hormonal variations, illness, and injury), socio-economic factors, and opportunities to exercise differential power over others.

#### A. *Biological Factors*

The prevalence of violence and aggression is not surprising when viewed through a deep historical lens. Throughout human history, aggressiveness has ensured survival and prevented catastrophe for individuals and for civilizations. Evolutionary biologists report that among species, mammals are particularly prone to violence, and in species, such as humans that are “social and territorial,” rates of lethal violence are higher still.<sup>79</sup> Research suggests that “humans have phylogenetically inherited their propensity for violence.”<sup>80</sup> Nonetheless, biology does not tell the whole story.

Across history, rates of lethal violence have varied dramatically, falling to historically low levels in the Modern Era—a fact that “suggests that culture can modulate the phylogenetically inherited lethal violence in humans.”<sup>81</sup> Nonetheless, in times and places where organized states have prevailed and established a stable social infrastructure, researchers have found that levels of lethal violence fall “lower than the phylogenetic inferences” would predict.<sup>82</sup> As a result, “[i]t is widely acknowledged that monopolization of the legitimate use of violence by the state significantly decreases violence in state societies.”<sup>83</sup>

It is not only our phylogenetic propensities to harm that need constraining, however. Genes inherited from more recent ancestors also play a role in our propensity to violence: meta-studies conducted on twins and adoptees suggest a roughly 50–50 divide between genes and environment when it comes to violent propensities, with an interaction likely modulated by gender and other

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79. Gómez, Verdú, González-Megías, & Méndez, *supra* note 8, at 235.

80. *Id.*

81. *Id.*

82. *Id.* at 235.

83. *Id.* (citing Seth Abrutyn & Kirk Lawrence, *From Chieftdom to State: Toward an Integrative Theory of the Evolution of Polity*, 53 SOC. PERSP. 419 (2010)).

factors.<sup>84</sup> Genes play a strong role in conditions such as ADHD, anxiety, and other disorders affecting mood and executive functioning that are positively correlated with violent behavior.<sup>85</sup> Moreover, medical and developmental conditions that affect executive functioning and working memory increase risks of aggressive behavior. These conditions include low cognitive function and ADHD in youth, and dementia in the elderly.<sup>86</sup> Similarly, inadequate communication and language processing skills increase the odds of violent behavior: because “communication skills enable people to express themselves and to understand others accurately, incompetence and inadequacy in these skills increase likelihood of aggression.”<sup>87</sup>

Despite the many ways in which biological conditions may reduce people’s ability to modulate their emotional responses to anger or threats, such challenges are not insurmountable. Regulatory control can be improved with coaching and practice.<sup>88</sup> Improved regulation reduces anxiety and impulsivity, which in turn reduces perceptions of threat that can lead to reactive aggression, and gives individuals more control over impulses toward appetitive aggression.<sup>89</sup> Such interventions can improve behavior in any setting, from home to workplace to prison.<sup>90</sup>

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84. Catherine Tuvblad & Laura A. Baker, *Human Aggression Across the Lifespan: Genetic Propensities and Environmental Moderators*, 75 *ADVANCES GENETICS* 171, 172 (2011).

85. See, e.g., Eva Billstedt, Henrik Anckarsäter, Märta Wallinius, & Björn Hofvander, *Neurodevelopmental Disorders in Young Violent Offenders: Overlap and Background Characteristics*, 252 *PSYCHIATRY RES.* 234, 238–39 (2017) (finding, in a study of young male violent offenders, that almost half had at least one neurodevelopmental disorder, with particularly high rates of ADHD and substantial rates of autism spectrum disorders and Tourette’s Syndrome); Katherine M. Keyes, Katie A. McLaughlin, Thomas Vo, Todd Galbraith, & Richard G. Heimberg, *Anxious and Aggressive: The Co-Occurrence of IED with Anxiety Disorders*, 33 *DEPRESSION & ANXIETY* 101, 108 (2016) (finding “individuals with anxiety disorders experience more anger attacks (which are defined at their core by both anger and aggression in this instrument), including those that are out-of-control and out-of-proportion to precipitating circumstances, and are more than 3 times as likely to meet criteria for lifetime [intermittent explosive disorder] than those without an anxiety disorder”).

86. Tuvblad & Baker, *supra* note 84, at 187.

87. Yildiz Kurtyilmaz & Gürhan Can, *An Investigation of Turkish Preservice Teachers’ Aggression Levels*, 33 *EDUC. & TREATMENT OF CHILD.* 85, 89 (2010) (citations omitted).

88. Thomas F. Denson, C. Nathan DeWall, & Eli J. Finkel, *Self-Control and Aggression*, 21 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 20, 23 (2012) (“[E]xperiments on bolstering self-control foster optimism regarding the possibility of improving self-control as a means to reduce aggression.”).

89. *Id.* at 23–24.

90. See, e.g., Cleoputri Yusainy & Claire Lawrence, *Brief Mindfulness Induction Could Reduce Aggression After Depletion*, 33 *J. CONSCIOUSNESS & COGNITION* 125, 129 (2015) (finding that brief

### B. *Socio-economic Factors*

Although aggression and violence remain common human behaviors, the world is, on average, more peaceful today than in centuries past.<sup>91</sup> Rates of homicide have fallen, and laws and moral and social norms that favor peaceful solutions over aggressive ones have contributed to long lifespans and fewer wars.<sup>92</sup> Even so, not all places have achieved equal stability, and in nations where the benefits of an ordered state are not fully realized, rates of violence remain high.<sup>93</sup> Even within developed countries with low levels of aggregate violence, in cities and neighborhoods where stabilizing institutions, such as churches, schools and medical facilities, falter, rates of violence often rise.<sup>94</sup>

The close connection between violence and social disadvantage suggests that when basic safety is uncertain, resort to brute force is more likely to be seen as a matter of survival and internalized as desirable. Context changes human behavior in predictable and important ways that are not attributable solely to personal temperament or moral character.

### C. *Unchecked Power Differentials*

Beyond biology and environment, there is another, less discussed but no less well-documented, predictor of violence that is particularly important to the

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mindfulness interventions reduced aggression in individuals experiencing depletion brought on by tiresome tasks); Ryan Bremner, Sander L. Koole, & Brad J. Bushman, "Pray for Those Who Mistreat You": *Effects of Prayer on Anger and Aggression*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 830, 830 (2011) (finding that prayer for an aggressor leads to reduced aggression); N. Bouw, S.C. J. Huijbregts, E. Scholte & H. Swaab, *Mindfulness-Based Stress Reduction in Prison: Experiences of Inmates, Instructors, and Prison Staff*, 63 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 2550, 2558 (2019) (finding that mindfulness programs reduced prisoners' anger and reduced impulsivity for a strong majority of program participants).

91. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* *passim* (2011).

92. *Id.*

93. Sean Fox & Kristian Hoelscher, *Political Order, Development and Social Violence*, 49 J. PEACE RES. 431, 440 (2012) (concluding "strong autocracies and democracies exhibit less violence and higher incomes. This is consistent with the hypothesis that coherent political institutions are good for growth, whether or not they reflect democratic values—although the least violent and wealthiest countries in the world tend to be fully institutionalized democracies.").

94. See Bruce P. Kennedy, Ichiro Kawachi, Deborah Prothrow-Stith, Kimberly Lochner, & Vanita Gupta, *Social Capital, Income Inequality, and Firearm Violent Crime*, 47 SOC. SCI. & MED. 7, 15 (1998); see also MARGARET BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA* (2014) (detailing connection between school closings and rises in crime within urban neighborhoods).

study of criminal justice. That is the existence of unregulated power over individuals with known vulnerabilities, including unequal power.

Many people are familiar with the notorious Stanford Prison Experiment, which involved what was intended to be a two-week simulation of prison life carried out by undergraduate students assigned to play the roles of prisoners and guards.<sup>95</sup> Instead, the cruelty exhibited by the “guards” and the harm inflicted on the “prisoners” was substantial enough that the experiment had to be shuttered within six days—and even that was not soon enough in the later judgment of ethicists and researchers.<sup>96</sup> The experiment demonstrated the degree to which ordinary people, when given extensive authority over vulnerable populations and little regulation, readily descended into the very worst of their nature, becoming violent to their peers and delighting in their humiliation.<sup>97</sup>

The Stanford Prison Experiment is just one example of the ways in which human beings can justify cruelty to themselves, ignoring their own values and identities as moral and law-abiding people when they are given permission to indulge their baser instincts. Today, human subjects could not be subjected to the conditions of the Stanford Prison Experiment, out of concern it would inflict significant emotion damage on all of them, guards and prisoners alike.<sup>98</sup> Yet every day millions of people across the United States take part in an equally dangerous enterprise: the administration of the actual criminal justice system, with its real guards and prisoners. The risks of abuse are just as present in these settings as in controlled experiments, and yet in many jurisdictions, oversight of jails, prisons, and police lock-ups is weak or nonexistent.<sup>99</sup>

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95. See PHILIP ZIMBARDO, CRAIG HANEY, W. CURTIS BANKS, & DAVID JAFFE, STANFORD UNIV., *THE STANFORD PRISON EXPERIMENT: A SIMULATION STUDY OF THE PSYCHOLOGY OF IMPRISONMENT* 16 (1971).

96. *Id.*; PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 179 (2007).

97. ZIMBARDO, *supra* note 96, at 180.

98. See generally Michael Sontag, *Research Ethics and Institutional Review Boards: The Influence of Moral Constraints on Emotion Research*, 31 *POL. & LIFE SCIS.* 67, 69 (2012).

99. See Michael B. Mushlin & Michele Deitch, *Opening Up A Closed World: What Constitutes Effective Prison Oversight?*, 30 *PACE L. REV.* 1383, 1397 (2010) (observing that although a number of correctional oversight mechanisms exist, they “are not well established or in wide existence in the United States”).

Crime requires three prerequisite conditions: a motivated perpetrator, an unguarded location, and a vulnerable victim.<sup>100</sup> Potential victims can be made vulnerable to others through many conditions, including youth, incapacity, illness, poverty, and reduced legal and social status.<sup>101</sup> Whenever vulnerable victims are left without formal or informal guardians, the potential for harm to result is heightened.<sup>102</sup> Motivated individuals with proclivities to harm may hide in plain sight in occupations that give them access to vulnerable populations, or that normalize the use of force. The most notorious example of this phenomenon is the crime of child sexual abuse, which is too-often committed by trusted figures with access to children, such as relatives, coaches, schoolteachers, and ministers.<sup>103</sup> Similarly, victimization rates are higher for children, the elderly, and those with disabilities than for the general population,<sup>104</sup> suggesting that victims who are isolated and marginalized are significantly more likely to suffer harm.

This violence is not confined to those who commit obvious felony offenses against sympathetic victims. Ironically, some of the most “unguarded” victims may be those who are subject to formal state surveillance by police and correctional officers. Throughout the criminal justice system, line level actors from police officers to correctional agents to judges are given vast legal authority to use or authorize physical force and other restraints on liberty over a population legally denominated as worthy of punishment. In these roles, many state actors are provided with weapons and other tools of restraint, from

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100. Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activity Approach*, 44 AM. SOC. REV. 588, 589 (1979).

101. See generally Christopher J. Schreck, Richard A. Wright, & J. Mitchell Miller, *A Study of Individual and Situational Antecedents of Violent Victimization*, 19 JUST. Q. 159, 160 (2002).

102. *Id.*

103. See Sandy K. Wurtele, *Preventing the Sexual Exploitation of Minors in Youth-Serving Organizations*, 34 CHILD. & YOUTH SERVS. REV. 2442, 2444 (2012).

104. See, e.g., David Finkelhor, Richard Ormrod, Heather Turner, & Sherry L. Hamby, *The Victimization of Children and Youth: A Comprehensive, National Survey*, 10 CHILD MALTREATMENT 5, 8 (2005) (reporting that in a nationally representative sample of children two to seventeen “just more than one half of the children and youth . . . experienced an assault in the course of the study year”); NANCY SMITH, SANDRA HARRELL, & AMY JUDY, VERA INST. OF JUSTICE, HOW SAFE ARE AMERICANS WITH DISABILITIES? 9 (2017), <https://www.vera.org/downloads/publications/How-safe-are-americans-with-disabilities-web.pdf> [<https://perma.cc/5YF9-8H52>] (reporting that “the rate of serious violent crime—rape or sexual assault, robbery, and aggravated assault—against people with disabilities was more than three times higher than the age-adjusted rate for people without disabilities”).

batons to jail cells, and are given legal protections that guard against personal liability for the use of force except in the most egregious of circumstances.<sup>105</sup> The correctional facilities in which state actors are authorized to use force are, by design, cut off from the general public, thereby increasing the dependency and vulnerability of those involuntarily confined within them.<sup>106</sup> Knowing what we do about human proclivities toward violence and the conditions in which violence is most likely to occur, the broad power given to police and correctional officers should cause us to more closely examine the ways in which violence may be perpetrated not only by those confined in prisons and jails, but also the state actors who work within them due to the imbalance of power that exists in these environments.

As catalogued above, acts of violence stem from many sources, ranging from free will to biological and environmental deficits to social settings that authorize force against vulnerable people. In all of these cases, resort to violence is complicated and contextual, and not confined to those individuals who have been convicted of violent crime. Any one of us can be violent—and too often, we are.

#### V. THE IMPORTANCE OF ACKNOWLEDGING THE UNIVERSALITY OF VIOLENCE AND AGGRESSION

Acknowledging the prevalence of human violence is uncomfortable and disheartening. Nevertheless, for those interested in the fair administration of justice, it is essential to unblinkingly confront it for at least two reasons. First, viewing violent offenders as outcasts and outliers makes it is easy to overpunish and overstigmatize “them,” while remaining blind to violence perpetuated and sanctioned by the criminal justice system itself. Second, honesty about the prevalence of violence illuminates the many ways in which the criminal justice system often fosters the very violence it condemns.

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105. See, e.g., *Taylor v. Stevens*, 946 F.3d 211, 218 (5th Cir. 2019) (granting qualified immunity to prison officials who allegedly kept a prisoner for days in a cell covered in fecal matter with no access to potable water); *Dukes v. Deaton*, 852 F.3d 1035, 1042 (11th Cir. 2017) (granting qualified immunity to police officers who needlessly threw an incendiary device into a room with sleeping people, causing massive injuries to an innocent person).

106. See Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291, 296–98 (2010) (describing the many ways in which isolated prisoners in particular are vulnerable to abuse within prisons); see also *Miranda v. Arizona*, 384 U.S. 436 (1966) (“Privacy results in secrecy, and this, in turn, results in a gap in our knowledge as to what, in fact, goes on in the interrogation rooms.”).

### A. *Challenging Stereotypes of Irredeemability*

Labels matter: they affect self-identity and alter human behavior in ways consistent with the labels themselves.<sup>107</sup> That is why it is important to consider who deserves to be called “violent,” and for how long that label and its attendant stigma should last. Lying is a ubiquitous vice,<sup>108</sup> for example, but rarely does the telling of a falsehood result in the life-long stigma of being labeled a liar, or even an “ex-liar.” While lying is a vice, it is not ordinarily considered identity-defining. By contrast, labels such as “felon,” “ex-felon,” and “offender” are usually inescapable once imposed,<sup>109</sup> regardless how minor or idiosyncratic the underlying criminal behavior may have been.

Studies show that individuals charged with felony offenses who are placed in diversion programs that allow them to avoid felony conviction recidivate at rates far lower than those who proceed to formal conviction (and consequently bear the label “felon”).<sup>110</sup> Being labeled a felon causes two types of re-entry problems: first, the legal restrictions that flow from felony conviction have a lasting effect on economic opportunity.<sup>111</sup> Second, people often internalize the label itself, making it a part of their self-identity and reinforcing a narrative of social failure that often drives behavior consistent with that narrative.<sup>112</sup> By inference, the label “violent felon” may well do extra damage by signaling not only that a person has transgressed the law, but also that violence has somehow become a petrified component of his or her character, defining not only past conduct but also future behavior.

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107. See generally HOWARD BECK, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963).

108. Kim B. Serota, Timothy R. Levine, & Franklin J. Boster, *The Prevalence of Lying in America: Three Studies of Self-Reported Lies*, 36 HUMAN COMMUNICATION RES. 2, 4 (2010) (reporting that “the current literature provides estimates ranging from 0.59 to 1.96 [average] lies per day” per person in the United States).

109. At a conference for the United States Court of Appeals for the Ninth Circuit some years back, I had the good fortune to sit on a panel with Mr. Dorsey Nunn, Director of the California-based non-profit Legal Services for Prisoners with Children. He memorably chided all the legal professionals in the room about our use of labels for individuals with criminal records, including “ex-offender,” observing, “We can never get out from under ‘ex-.’”

110. See, e.g., Ted Chiricos, Kelle Barrick, & William Bales, *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 571 (2007).

111. *Id.* at 548.

112. *Id.* at 572.

If, however, violence (along a continuum) is actually normative—as the discussion above suggests it is—then periodic or isolated examples of violence—even those that lead to criminal conviction—are not necessarily indicators of persistent, escalating, or enduring danger that must be aggressively controlled in perpetuity. Instead, violent conduct—like any other deficit, such as poor interviewing skills or dishonesty or blaming others—should be met with opportunities to identify the driver of the conduct and build skills to improve the quality of future interactions, whether by reducing impulsivity, improving distress tolerance, increasing empathy, or altering home and work environments to improve safety.

Ample research included elsewhere in this symposium issue confirms that most people convicted of violent crime are no less responsive to intervention than non-violent criminals, or than people in the general population.<sup>113</sup> Just as people outside the justice system benefit from dialectical-behavioral therapy groups, mindfulness classes, and planned respites from life stressors, so too would people with criminal convictions of all kinds, if they were given access to them. Instead of restricting the ability of people convicted of violent crime to access rehabilitative programs, community and institutional corrections officials should provide robust opportunities to build core stress and conflict-management skills to all individuals who have shown deficits in these areas. They should do so not because these individuals are intrinsically dangerous or different, but because managing aggression is an important human competency that can be mastered with practice.

The more we are honest about aggression as a shared human trait, the more we will eschew unhelpful labels that literally and figuratively place those convicted of violent crime in a box they cannot escape. And if we are honest about the degree to which violent impulses are commonly experienced and imperfectly muted, we will be more inclined to devise and implement interventions and supports for convicted individuals similar to those we seek out for ourselves and our loved ones when anger management or impulse control become life-impairing.

#### B. *Identifying System-Inflicted Violence*

Finally, and perhaps most importantly, it is only when we acknowledge our own capacity for violence that we can identify the ways that the criminal justice system itself often replicates and fosters the very violence it condemns.

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113. Skeem & Polaschek, *supra* note 31, at 1135–38.

To get at this point in a concrete way, a simple illustration is useful. When I address youth and family court judges, I often ask them to imagine two hypothetical cases. In the first, a mother is charged with disciplining her wayward teenage son by locking him in a cage the size of a tiny room for many consecutive weeks. Such a case, I suggest, would rank among the most severe instances of child abuse, likely attracting attention from the media and meriting not only child welfare consequences, but criminal charges, too. (The judges ordinarily nod in agreement at this assertion.) The second case involves a youth alleged to be delinquent. His behavior is risky, and his parents and teachers are at their wits' end trying to decide what to do with him. After considering other interventions that have been tried and failed, the judge orders him to—at this point in the story, I pause, and many audience members begin to look chagrined.

The punch line, of course, is that the judge does exactly what he condemned the mother for doing: he orders the boy to be locked in a cage. Not only will the judge in my scenario escape condemnation for his order, but in all likelihood, he will not even feel cognitive dissonance between his own action in the delinquency proceeding and his condemnation of the mother in the child welfare proceeding. Despite the inescapable similarities between the mother's excessive discipline and the state-sanctioned detention of an identically-situated child, the judge is habituated to seeing violence only in the behavior of those who are prosecuted, and not in his own behavior or that of other system actors. While the scenario I present is imagined, it hits close to home for many judges and other system professionals serving in youth and family courts.

Surely, most people in criminal justice agencies—like most people everywhere—do not go to work each morning intending to cause harm. Even so, there is strong evidence that individuals authorized to use force often hold problematic beliefs about how and when they should use that power.<sup>114</sup> In one study on police officers' attitudes toward the use of force, for example, nearly 25% of respondents “felt that it is sometimes acceptable to use more force than legally allowable to control a person who physically assaults an officer.”<sup>115</sup>

One explanation for this willingness to use excessive force is found in “angry aggression theory,” which explains police violence as a result of

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114. DAVID WEISBURD, ROSANN GREENSPAN, EDWIN E. HAMILTON, KELLIE A. BRYANT, & HUBERT WILLIAM, POLICE FOUND., *THE ABUSE OF POLICE AUTHORITY: A NATIONAL STUDY OF POLICE OFFICERS' ATTITUDES* 23–24 (2001).

115. *Id.* at 24.

“chronic physiologic arousal” while on duty.<sup>116</sup> The chronic state of hypervigilance produced from patrols creates in them, as it would in any other hypervigilant individual, a tendency to see threats everywhere and overreact to perceived danger, even when it does not exist.<sup>117</sup> The theory posits that these “excessive perceptions of threats and aggressive responses . . . embedded in values and norms” of policing subcultures.<sup>118</sup>

Opportunities for the use of force are not limited to the police, of course. Correctional officers are also members of a distinct subculture, one that is even more radically isolated from the general public by virtue of the correctional institution itself. Research suggests that correctional officers, like police, often use force ranging from verbal intimidation to beatings to maximize control within prison environments, reinforce the status of correctional officers to inmates, and build solidarity among officers as a distinct class.<sup>119</sup> The opacity of the correctional environment makes it difficult to determine how frequently correctional officials use excessive force against prisoners because reliable, comprehensive data on uses of force by correctional officers are not collected. Consequently, the best sources of information about such abuses comes from lawsuits and investigation reports alleging violations of prisoners’ Eighth Amendment right to be free from cruel and unusual punishment.<sup>120</sup> Limited though these cases are, they often contain deeply distressing examples of abuses of power conducted under the guise of lawful punishment.

In *Madrid v. Gomez*, for example, California correctional officers “left [prisoners] naked in outdoor holding cages during inclement weather. Fetal restraints and ‘hogtying’ were commonplace. Prisoners were routinely shot with wood blocks and rubber pellets discharged with high velocity from a 37-

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116. Sean P. Griffin & Thomas J. Bernard, *Angry Aggression among Police Officers*, 6 POLICE Q. 3, 4 (2003).

117. *Id.*

118. *Id.*

119. See, e.g., James W. Marquart, *Prison Guards and the Use of Physical Coercion as a Mechanism of Prisoner Control*, 24 CRIMINOLOGY 347, 360–62 (1986).

120. Sadly, such cases are not difficult to find. See Fox Butterfield, *Mistreatment of Prisoners Is Called Routine in U.S.*, N.Y. TIMES, May 8, 2004, at A11 (reporting that “[n]ationwide, during the last quarter century, over 40 state prison systems were under some form of court order for brutality, crowding, poor food or lack of medical care”).

millimeter gas gun.”<sup>121</sup> More recently, the U.S. Department of Justice served the State of Alabama with notice that its prison staff failed to protect male prisoners from physical and sexual violence and maintained other unsafe conditions.<sup>122</sup> Examples included permitting unchecked extortion, placing sexual assault victims in segregation, and placing prisoners in cells infested with bugs, with inadequate ventilation and plumbing.<sup>123</sup> In contrast to the allegations in *Madrid*, the allegations in Alabama involved less overt physical force and more acts of omission and passive indifference. The distinction, however, is a fine one: in both cases, prisoners suffered significant and preventable harm at the hands of state actors who were aware of the conditions to which they were condemning prisoners by their inaction.

Although some of the violence perpetrated by correctional officials (and others within the justice system) may be explained by the fact that individuals with higher levels of affective violence are more likely to seek out jobs where violent behavior is likely to be tolerated, selection bias does not wholly explain the levels of state-imposed aggression within correctional facilities. Studies have suggested that the culture of corrections itself fosters aggression and violence among male staff, increasing over time the degree to which male (but not female) guards feel comfortable resorting to the use of physical aggression against prisoners.<sup>124</sup>

In a system dedicated to the principles of justice and equality, there is no excuse for brutality or abuse of power. Nonetheless, unless system actors (and policymakers, too) are willing to acknowledge that violent tendencies are not the sole province of those convicted of violent offenses, hubris will blind us to

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121. Steve J. Martin, *Staff Use of Force in U.S. Confinement Settings: Lawful Control Tactics Versus Corporal Punishment*, 33 SOC. JUST., no. 4, 2006, at 182, 184 (citing *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995)).

122. Letter from Eric S. Dreiband, Assistant Attorney General, Civil Rights Division, Jay E. Town, United States Attorney, Northern District of Alabama, Louis V. Franklin, Sr., United States Attorney, Middle District of Alabama, & Richard W. Moore, United States Attorney, Southern District of Alabama, to Kay Ivey, Governor of Alabama (Apr. 2, 2019), <https://www.justice.gov/opa/press-release/file/1150276/download> [<https://perma.cc/TB5M-65VW>] (regarding “Notice Regarding Investigation of Alabama’s State Prisons for Men.”).

123. U.S. ATTORNEY’S OFFICES FOR THE NORTHERN, MIDDLE, AND SOUTHERN DISTRICTS OF ALABAMA, U.S. DEP’T OF JUSTICE, INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN 43–47 (Apr. 2, 2019), <https://www.justice.gov/opa/press-release/file/1150276/download> [<https://perma.cc/TB5M-65VW>].

124. Ben M. Crouch & Geoffrey P. Alpert, *Sex and Occupational Socialization Among Prison Guards: A Longitudinal Study*, 9 CRIM. JUST. & BEHAV. 159, 169 (1982).

the many ways that the justice system inflicts every manner of harm on those in its custody. In the name of the state, police and correctional officers have not only used excessive force in making arrests or beating inmates, but they have shackled laboring mothers,<sup>125</sup> arrested small children,<sup>126</sup> and exposed grown men and women to sexual assault.<sup>127</sup> The use of solitary confinement—a practice that, when prolonged, has been found to constitute torture under several international human rights laws<sup>128</sup>—is widespread in the United States, affecting up to 20% of prisoners in a given year.<sup>129</sup> In many prisons, dangerous conditions of confinement induce in prisoners a level of hypervigilance that naturally increases levels of reactive aggression in prisoners—a trait that does not disappear the moment prisoners return to their families and communities.<sup>130</sup>

Violence does not only come from law enforcement, however. State-imposed violence can include all manner of intentional and non-consensual harms,<sup>131</sup> many of which can be found in the routine practices of criminal courtrooms. Activities such as shackling children<sup>132</sup> and intentionally humiliating defendants<sup>133</sup> are everyday activities in criminal courts, sanctioned by law in many instances. In short, through direct and indirect violence, actors

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125. See generally Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012).

126. See, e.g., Sarah Mueller, *Lawmakers to Vote on Amendment Setting Minimum Age of Arrest*, FLAPOL (Mar. 9, 2020), <https://floridapolitics.com/archives/322394-lawmakers-to-vote-on-amendment-setting-minimum-age-of-arrest> [<https://perma.cc/37YJ-3YL8>] (describing legislation reacting to the aggressive arrest of a six year old child for throwing a temper tantrum).

127. See U.S. ATTORNEY'S OFFICES FOR THE NORTHERN, MIDDLE, AND SOUTHERN DISTRICTS OF ALABAMA, *supra* note 123, at 43–45.

128. See Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 966 (2018).

129. Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 287 (2018).

130. CRAIG HANEY, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT 78 (2001), <https://www.urban.org/sites/default/files/publication/60676/410624-The-Psychological-Impact-of-Incarceration.PDF> [<https://perma.cc/F5YG-CHZ8>].

131. See DeWall, Anderson, & Bushman, *supra*, note 16, at 246.

132. ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 9 (2019) (describing the prolonged shackling of children as young as eight years old in courts of the District of Columbia).

133. See, e.g., Samantha Schuyler, *In a Florida Courtroom, People Charged with Probation Violations Face Humiliation from Judge*, THE APPEAL (Feb. 26, 2020), <https://theappeal.org/florida-judge-probation/> [<https://perma.cc/YD7L-4HV4>] (describing abusive judicial practices in a Florida courtroom).

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throughout the system too-often inflict on those they punish harms of the very kind the system condemns.

Acknowledging the breadth of violence inflicted *by* the criminal justice system is an essential prerequisite to properly understanding the role of violence *in* the criminal justice system. If violence begets violence, then those within the criminal justice system are responsible for the harms they inflict on the bodies and psyches of those they are charged to both monitor and protect. Until those within the criminal justice system more readily acknowledge that “violent offenders” are not only criminal defendants, but also state actors, reform is not possible. Change requires a deeper understanding of both the redeemability of past offenders and the violence inherent in the criminal justice system. Although the tendency to violence is a shared human impulse, it is also one that can be managed and controlled. By becoming alert to the many ways in which violence manifests itself in the criminal justice context, we can better identify and reward non-violent change both in those subject to the criminal justice system, and also in those who administer it.