# Felon and Villain: The Literary Life of Felony

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## I. Introduction

Since its beginnings in thirteenth-century English common law, the category of felony has been distinguished by a tension between its seriousness and its conceptual instability. On the one hand, its commission earns the perpetrator a permanent separation from ordinary life. In the medieval period this meant forfeiture of property and death or exile, and in the present US system, a felony conviction usually means imprisonment, but also permanent collateral consequences like disenfranchisement, loss of social services, and exclusion from many professions. To be a felon is to forfeit the good life.

On the other hand, as Alice Ristroph observes, "there is no uniform principle or logic that explains which criminal conduct is designated as felonious and which is not."[1] That is, we only recognize a felony when we punish it like one. This, too, has been true since its beginnings; as Pollock and Maitland observed, medieval felony can only be known "by its legal effects; any definition that would turn on the quality of the crime is unattainable."[2] Despite its lack of definition, the category has proved remarkably stable, persisting over seven hundred years with few conceptual alterations.

Scholars have repeatedly shown this tautology to have malicious effects; the category of felony demonstrably contributes to mass incarceration, unequal treatment before the law, and capriciousness in sentencing.[3] Some have unsuccessfully called for its abolition, but in this essay, I address why we might find such a change difficult to imagine, an answer that I believe lies in the history of felony's concept. While it may pointedly lack a positive legal description, felony does have a robust conceptual history, one that was originally rooted in fictional narratives, specifically in the medieval character of the villain. I turn to the criminal category's literary roots to draw out the impulses nurtured in medieval stories

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[1] Alice Ristroph, Farewell to the Felonry, 54 Harv. C.R.-C.L. L. Rev. 563, 613 (2018).

[2] 2 Frederick Pollock & Frederic Maitland, The History of English Law Before the Time of Edward I 465 (1st ed. 1895).

[3] Elena Saxonhouse, Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination, 56 Stan. L. Rev. 1597 (2004); Margaret Colgate Love, Deconstructing the New Infamy, 16 Crim. Just. 30 (2001); Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 Stan. L. & Pol'y Rev. 153 (1999).

of justice: speed, certainty, and divine retribution against villains rather than procedural rule of law. I demonstrate how these impulses found their way into the prosecution of felony, affording feelings of vengeance and satisfaction an unusual welcome in the law. In this way, I argue that leaving felony undefined preserves within the law an invitation to narrative invention that we are hesitant to foreclose.

## II. Felony's Beginnings

For a term that is now used strictly in a legal sense, felony had peculiar origins. First, it was a term of literature before it was a term of the law. Second, although it appeared in French—specifically, Norman French—about a century before it migrated to English, our first attestations are in Norman legends of English history; that is, it was a word that referred to English people even before it was a word in English. And finally, in these early uses, the term almost always referred to a person or a quality of person, not to an act: "felon" or "fell," not "felony." In other words, when the word was taking shape, it referred first to a species of English literary character, not a legal offense. This history, I argue, set it up to receive literary fantasies in and about the law, long after it had left its literary home to take up permanent residence in the law.

Scholars assume the word must have derived from late medieval Latin (*felonia*), like most legal terms of art, but there is little evidence for its etymology. The most logical hypothesis is that it derives from *fel*, or gall bladder, the source of yellow bile, a bitter humor that was thought to lead to aggression and anger. One could bolster this argument with the observation that at least some association between bitterness and felony was retained in English; a stanza from the *Northern Homily Cycle* (1315) reads, "In thaim es na tholemodenes/Bot felonye and bittirnes" ("In them is no patience in adversity/But felony and bitterness," lines 95-96). But this conjecture has no evidence behind it, nor has any other, as Jeremy Bentham mocked:

> Some etymologists, to show they understood Greek, have derived it from the Greek: if they had happened to have understood Arabic, they would have derived it from the Arabic. Sir Edward Coke, knowing nothing of Greek, but having a little stock of Latin learning, which he loses no opportunity of displaying, derives it from *fel*, gall.[4]

But its early days in Norman French are curiously clear: the term entered regular use specifically as a description for the great betrayers of King Arthur and his court. Wace's *Roman de Brut* (1155) uses the term at least nine times, to refer to Hengist (he is "Un traitor, un mal félon," line 6606), the betrayer of Vortigern, the King of the Britons, and to Mordred, betrayer of King Arthur.[5] Arthur is driven to his own death by the mere thought of Mordred's unavenged guilt: "Artus fu dolans et iriés/Qui de Mordret ne fu vengiés,/Mult li paisa del traitor/Qui en sa tere est à sojor" ("Arthur was sorrowful and full of wrath/That

[4] Jeremy Bentham, The Rationale of Punishment 370 (1830).

[5] Wace, Le Roman de Brut de Wace (Le Roux de Lincy ed., 1836). All translations are mine unless otherwise noted.

he was not avenged of Mordred,/He was greatly troubled by the traitor/Who still remained in his land," lines 13641-4). About twenty years later, Chrétien de Troyes uses "fel" repeatedly as an adjective for Maleagant in his Arthurian chronicle, *Lancelot, le Chevalier de la Charrette* (1177).[6] The duplicitous Maleagant, who betrays Lancelot's affair with Guinevere, is called "fel et deslëaus" (3179), and his men are "fel traïtres" (6891). In all these cases, the term refers to the betrayal of a superior by a beloved and close inferior.

As the term spread out from Arthurian legends, it remained mostly within the literary subculture of Norman literature about England. Chroniclers usually coupled "felon" with another epithet, recognizing it as a potentially unfamiliar word that needed to be defined for their readers. Benoît de Sainte-Maure used the term frequently in the chronicle Henry II commissioned from him to legitimate the Norman rule of England, *Chronique des ducs de Normandie* (1177): "qui felon est e traitor" ("who is a felon and a traitor," 8840), "sodoiant e felon" ("traitorous and a felon," 20489), "E home cruel e felon" ("both a cruel man and a felon," 21070), "felon e villain" ("a felon and a villain," 29920).[7] That is, "felon" was an intensifier for villain; it stood for the kind of villainy that could not be remedied nor forgiven. And it was rarely lobbed at inconsequential characters, whose comeuppance could be relegated offstage; Mordred and Maleagant were beloved and trusted, and their stories ended not with obscurity but with vengeance.

This is how the term is used in a 1185 Scottish charter, one of the first Latin attestations. William the Lion's vassal, Gillicolm, it seems, betrayed the king to his enemies:

> Gillecolm pro felonia quam erga me fecit terra prenominatam amisit sicut ille qui in felonia reddidit castellum meum de heryn et postea sicut iniqus et proditor luit ad inimicos meos mortales et cum eis stetit contra me.[8]
>
> Gillecolm, for the felony he committed against me, lost the aforementioned land because he surrendered my castle at Heryn in felony, and afterward, as a wicked and treacherous person, went to my mortal enemies and stood with them against me.

If Gillicolm was able to surrender William's castle, he must have been a trusted man indeed. Although the use of "felonia" here seems to finally indicate an act (rather than a person), it actually refers to the state of betrayal (he surrendered the castle "in felonia") rather than to the offense itself.

When the term arrived in England, it appeared in literature and law within a few decades of each other. Its course into literature was semantically smooth: in *Havelok the Dane* (1285) the villain Godard "thouthe a ful strong trechery,/A trayson and a felony," (lines 443-4) and in *Handlyng Synne* (1303), Judas is the original felon: "þys Iudas, foule felun,/weytede Ihesu with tresun." ("this Judas, foul felon/awaited Jesus with treason," lines

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[6] Chrétien de Troyes, Le Chevalier de la Charrette (Lancelot) (Alfred Foulet & K. D. Uitti eds., 1989).

[7] Benoît de Sainte-Maure, Chronique des ducs de Normandie (Francisque Michel ed., 1836).

[8] Charters, Bulls and Other Documents Relating to the Abbey of Inchaffray, Chiefly from the Originals in the Charter Chest of the Earl of Kinnoull 265 (William Alexander Lindsay et al. eds., 1908).

4184-85).[9] By the time English law finally attempted to define felony, the structure of the term had coalesced around these legendary villains, such that the story could be fully communicated in a single gesture. The *Summa de legibus Angliae que vocatur Bretone*, or *Britton*, described the category as "any mischief, which a man knowingly does, or procures to be done, to one to whom he pretends to be a friend."[10]

Shortening and generalizing the story makes sense for the law, but the passage has made precious few other concessions to legal use. The subsequent prosecutions of felony over the fourteenth century make it clear that not just "any mischief" would do; only the most serious crimes were ever prosecuted as felonies. In fact, had the author wished to enumerate the crimes, there was already a fairly stable list: murder, rape, arson, robbery, and treason. The second part of the phrase seems at first glance to be more helpful; it specifies premeditation, and that deputizing others for the deed also falls under the banner. But if we wanted to know what victim or perpetrator qualifies for this charge, we are again tossed back into murky territory: how would a prosecution of felony propose to define and verify a friendship, much less a pretense of one? Again, the common law record tells us this phrase was meaningless in practice; the victim of a felony need not have been a deceived friend—the two need not even have been known to each other.

It is clear that even as Britton tried to wrench the term into the legal arena, felony kept both its feet in literature. "Any mischief" was artistic hyperbole, not fact, as was the stipulation of friendship. In fact, a great deal of narrative was compressed into this brief phrase: it preserved individuated perspectives, narrative voice, and even the passage of time. Where the law might struggle to define a pretense of friendship, literary perspective accomplishes this easily; the victim sees a friendship, but the perpetrator sees an opportunity. The omniscient narrator offers the reader both the pretense and the reality, as well as the internal thoughts ("knowingly") and past actions ("does, or procures to be done") of the perpetrator, facts that were not known to the victim at the time. This miniature narrative also offers a temporal vector: a past in which the person was trusted, and the present in which the person is known to have betrayed that trust. While the phrase is mostly useless for prosecution, it is highly useful for the imagination; the righteous indignation stirred by "mischief . . . to one to whom he pretends to be a friend" ignites our storybook sense of arch-villains. As we know from its literary beginnings, the "felon" was a significant character within the plot, one who had to be excised from the world of the story entirely in order for the story to be set right. Calling someone a felon creates a narrative imperative for vengeance.

[9] Graham Drake, Eve Salisbury, & Ronald B. Herzman, Four Romances of England: King Horn, Havelok the Dane, Bevis of Hampton, Athelston (1997); Robert of Brunne, Handlyng Synne (Frederick James Furnivall ed., 1901).

[10] The dating of *Britton* is not known, but it refers to several statutes passed in the 1290s—including the important land statute "Quia Emptores"—which suggests a date between 1295 and 1300. 1 Jean le Breton, Summa de legibus Angliae que vocatur Bretone 40 (Francis Nichols ed., 1865).

## III. The Villain and the Law

In fact, it creates a variety of expectations, inculcated in readers by stories that address justice directly in a way the law cannot. In *Just Silences*, Marianne Constable likens the figure of justice in the law to the figure of silence in a library. Though few signs reading "Silence!" remain in libraries, we nevertheless place them there in our minds and consider silence the right condition for conducting activities in a library. Similarly, though law and texts about law rarely refer directly to justice, we associate justice with the law in our minds and consider justice the right condition for how one conducts process and judgment in the law.[11]

But when justice is the subject of literature, it often structures and motivates the plot, entangling the experience of reading with the experience of justice. In the typical detective story, for example, the plot is propelled by the tension between the detective's knowledge and the reader's, which makes each event, scene, and character a cog in the plot's machine (as Susan Sweeney has put it, the detective story "represents narrativity in its purest form"). In *Havelok the Dane*, the treacherous Godard's crime and punishment bookends the story; he initiates the plot by usurping Havelok's crown and casting him out, and Havelok's (and the reader's) desire for revenge drives the adventure to the last lines, when Godard is finally deposed, flayed, and hanged for his villainy. The desire for just satisfaction dictates the endpoints of the plot; it propels the reader from the start, and its fulfillment signals the end of the story.

Geoffrey Chaucer's "Man of Law's Tale," in which the saintly Custance is framed for murder, neatly outlines the principles about justice that such a plot inculcates. First—possibly in recognition that the law is not the place to talk about justice—the justice in such stories generally takes place outside of the story's legal system, even in contradiction to it. Faced with a company that (like most) is deeply suspicious of lawyers, the Man of Law "seeks rhetorically to affiliate himself not with the recent legal history of England but with an imaginary and idealized deep history," as Eleanor Johnson puts it, an idealized past in which law still harbored a naïve affinity for intuitive justice.[12] Thus, the punishment for the villain—though it comes within a trial scene—comes not by the metaphorical hand of justice, but by the literal hand of God.

Custance has been wrongfully accused of the murder of her friend by a knight whose advances she spurned. The evidence against her was damning; she had slept in the same room and was found with the bloody knife in her bed. King Alla has just begun to set up a trial procedure ("yet wol we us avyse/Whom that we wole that shal been oure justise"/"we will think carefully about/Whom we desire to be our justice" lines 664-65) when God himself settles the matter by striking the knight down where he stands, bursting his

[11] Marianne Constable, Just Silences: The Limits and Possibilities of Modern Law (2005); see in particular the Prologue, id. at 1-7.

[12] Eleanor Johnson, English Law and the Man of Law's "Prose" Tale, 114 J. English & Germanic Philology 504, 507 (2015).

eyes out of his head.[13] In more secular stories of justice, this same principle manifests as a kind of natural punishment, a rebounding upon the villain his own misdeeds, as when the snake and would-be murder weapon of the villain in Arthur Conan Doyle's "The Speckled Band" turns back on its owner, killing him instantly.

Custance's trial scene also demonstrates another principle of the felon-villain's role in the story: whether this knowledge comes immediately or whether it is unraveled in the story, the villain's identity is always clear to the reader by the end. Chaucer elects to never leave the reader in doubt; we are privy to the moments when the treacherous villain slays Custance's friend and lays the knife beside her. Even the townspeople are not confused about her role in the story:

> ther was greet moornyng
> Among the peple, and seyn they kan nat gesse
> That she had doon so greet a wikkednesse,
> For they han seyn hire evere so vertuous,
> And lovynge Hermengyld right as hir lyf.
> Of this baar witnesse everich in that hous. (621-26)
>
> there was great mourning
> Among the people, and they say they can not imagine
> That she had done so great a wickedness,
> For they have seen her always so virtuous,
> And loving Hermengild as much as her life.
> Of this bore witness every one in that house.

Everyone is sure she is innocent. But in fact, she is the very caricature of guilt. The bloody knife in her bed brings to life the classic shorthand for incontrovertible evidence; as Bracton says: "if a person has been captured over a dead body with a bloody knife . . . there is no need of other proof."[14] And yet within the narrative, neither the reader nor the townspeople are allowed a moment of doubt; she is the hero, he is the villain, and her appearance of guilt only adds to the reader's mental tabulation of the offenses against her, to be avenged by the end. This certainty around the villain's identity leads to a moral certainty, a righteousness, that the reader is meant to experience when the treacherous knight is punished, not by a charge of false appeal in which he would be duly tried, convicted, and fined, but by the spectacular hand of God.

Justice here looks like certainty, like the triumph of good over evil, and like satisfaction. These impulses around justice are not ones that the law likes to talk about, nor are they ones the law generally desires to make space for. But felony, in particular because it is not hemmed in by specificity or a positive definition, offers an opportunity to exercise these

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[13] All quotations of "The Man of Law's Tale" and "The Knight's Tale" are from Geoffrey Chaucer, The Riverside Chaucer (Larry D. Benson ed., 1987).

[14] 2 Bracton on the Laws and Customs of England 403-04 (George Woodbine ed., Samuel Thorne trans., 1968) ("cum quis capt fuerit super mortuu cum cultello cruentato . . . in quo casu non est opus alia probatione"). Lorna Hutson demonstrates that legal thinkers a century later were also interested in how the bloody knife—still a symbol of incontrovertible guilt—could be used to "fasten suspicion" on an innocent party in Classical stories of detection and trials. See Lorna Hutson, The Invention of Suspicion 174-76 (2007).

narrative muscles. Although the records of prosecution from this early era of felony are mostly terse and colorless, it is nevertheless possible to perceive some of the echoes of this invitation to fantasy in the cases themselves. While we might imagine that inserting a villain narrative into felony adjudication would uniformly increase the harshness with which juries approached the crime, in fact it had a capricious, unpredictable effect.

Sometimes, it did elicit righteous moral certainty. In 1353, a guest at an inn tried to steal linen and other goods in the night, but was discovered by the innkeeper and reacted with violence. His assault on the innkeeper made it robbery, a felony, which was distinguished from the lower trespass of theft by the use of force, and he hanged for it. In his comment on the case, Chief Justice William Shareshull wrote, with startling venom, that he should have been convicted of the felony "even if he did not intend force, hurt no one, and took nothing at all."[15] Here, Shareshull not only echoes the hyperbole of Britton's "any mischief" (this absolutism towards robbery was never applied in practice), he is also driven to invent a story that did not happen—the man *did* in fact harm the innkeeper. Shareshull seems unable to resist the opportunity to emphasize the villainy of robbery, even at the expense of good legal guidance.

But in other cases, the villain narrative resulted in surprising restraint. In 1238 in Devon, a "schepman" named William was also arrested for robbery. William was a stranger to the area, the jury noted, and the logic of communities that mostly stayed in once place for generations generally dictated extra suspicion towards foreigners. But in this case, his foreignness worked in his favor because, being a stranger to the country, "it was not known" if he was a robber.[16] Here, thinking of felons as villains has resulted in uncertainty. The jurors simply could not be sure, and their position seemed too far from the moral certainty of Custance's audience to say for certain that William was really a villain. Everyone knew the knight was guilty. The fact that everyone *did not* know that William was guilty meant that he might not be.

Finally, felony in the records also seemed to invite a kind of inventiveness at the edges of the law's responsibilities. In a case from 1383 in which a jury had acquitted a man (again of robbery, which was the felony offense most often punished), the justice allowed the acquittal but then turned the responsibility of the law back on them:

> Nota qun homme fuist acquite en Bank le Ron dun Enditement de felonie Tresilian dit al enquest qil fut conus pur laron, p que entant q il soit acquit par eux, ils serront obliges pur luy de son bon port de cel iour en auaunt, Quere per quell ley, Per que les iurors fuer en douis per ycel, & mit lour tests ensemble, & disont as Iustices que il fuit culp. De m le felon Tres. Vre prim verdit est de rec, p que vous venes trop tard ore adire cel. Mes si vous vsses dit cel deuant, il vst ale autervoy &c.[17]
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> Note that when a man was acquitted in the King's Bench of an indictment for felony, [Chief Justice] Tresilian said to the inquest that he was known for theft, and since he was acquitted

[15] 5 Year Books, Liber Assissarum 29 (John Maynard ed. & trans., 1678-80).

[16] Crown Pleas of the Devon Eyre of 1238, at 120 (Henry Summerson, ed., 1985) (no. 750).

[17] Richard Bellewe, Les Ans du Roy Richard le Second 114 (1585).

> by them, they would be obligated to him to ensure his good behavior from that day forward. The question arose as to what law this was based on. The jurors were in doubt about it and they put their heads together and told the justices that he was guilty of the felony. Tresilian said your first verdict is in the record, therefore you are now too late to say this. But if you had said this earlier, it would have gone another way, and so forth.

The query, as to what law this was based on, was a good one, as there was none. Unlike with William, Tresilian thought he knew this man's villainy; he knew he was looking at a Mordred, or a Godard. But the jury, having the power to craft the man's ending, had turned the story in the wrong way. Robbed of the satisfaction he expected, Tresilian invented his own: a consequence for the only part of the story over which he had direct power, the jurors. From a legal perspective, this consequence is out of proportion and has no good precedent. But from a literary one, what is he to do? The villain got away; how is anyone to have a happy ending?

While Britton's hyperbole alone might have seemed like an aberrant flourish, in the context of these cases it becomes clear that there is something about felony that at the very least allowed overreaction, that made space for spite and vengeance. These thieves were small men, not important even in the context of their small communities. It is felony that made them big, that elicited asides from justices that were more pique than commentary, and made jurors hesitate in a case that by other criteria seemed clear. After Britton, the law rarely attempted to define felony again, and simply let its prosecution produce the crime's boundaries. But Britton's compression, this shorthand that hides narrative expanses beneath its surface, became the function of felony within the law, a function we can see in these legal cases. Britton's definition took pains to mimic the law's specificity ("does, or procures to be done"), but in fact functioned like an invitation to flesh out this story, drawing on the reader's own moral sensibilities to imagine the seeming warmth of friendship and the absolute moral certainty that follows betrayal (*any* mischief).

This expansion is a necessary part of felony's narrativity; one must be willing to invent in order to see villains in common thieves. A final passage from Chaucer demonstrates how we do this, the speed and facility with which we invent when offered themes of villainy—no matter how insubstantial the prompt might be. Chaucer's "Felonye" of *The Knight's Tale*, his addition to his Italian source material, is never described directly; he can only be known by the company he keeps—his "derke ymaginyng." This imagining is made up of a "compassyng," a company of half-formed narratives, each more potential than plot:

> Ther saugh I first the derke ymaginyng
> Of Felonye, and al the compassying;
> The crueel Ire, reed as any gleede;
> The pykepurs, and eek the pale Drede;
> The smylere with the knyf under the cloke;
> The shepne brennynge with the blake smoke;
> The tresoun of the mordrynge in the bedde;
> The open werre, with woundes al bibledde. (I.1995-2002)

> There saw I first the dark imagining
> Of Felony, and all the company;
> The cruel Ire, red as any coal;

> The pick-pocket, and also the pale Dread;
> The smiler with the knife under the cloak;
> The sheepbarn burning with the black smoke;
> The treason of the murdering in the bed;
> The open war, with wounds all bled.

The persons of this company, never very distinct to begin with, fade quickly. Ire and Dread are only distinguished by colors, and the pickpocket (the only villain where we know his offense) gives way to the ominous but unspecific "smiler," who recedes into passive constructions that obscure the actors (the murdering without the murderer), the acts (the barn burning without arson) and even the victims themselves (the wounds bleeding without bodies to hold them). Wherein lies the felony, if not in the act, nor the actor, nor the victim?

Chaucer's swerve—around all the constituent parts that might offer clear contours to the crime—mirrors the legal one, which perpetually avoids describing the act itself in favor of describing its own reaction to the act. But Chaucer's "dark imagining" also presents the invitation that compensates for this tautology; these scenes ask the reader to insert our own narratives of villainy. We effortlessly catch each half-formed gesture and complete its arc, almost without noticing that we are doing it. We glimpse the arsonist fleeing into the woods, casting a backward glance. We remember the relationship warm enough to welcome a friend to our bedchamber, and we see the terrible clash of arms. Although we might not know exactly what nefarious things the smiler will do, we immediately know his place in the story (he is the villain) and his rightful end (he will be punished). Though Chaucer gives us no real contours for the crime, we leave the passage with the sense that we have grasped essential concepts, and that we are equipped to recognize felony around us and anticipate its rightful end.

## IV. Conclusion

Welcoming these impulses to the law creates expectations that the law cannot fulfill. The demand for certainty makes the legal procedures designed to acknowledge uncertainty (like the presumption of innocence and rules of evidence) seem at best extraneous and at worst counterproductive. As we can see in the cases above, the moral certainty we feel when facing felons seems to distort the practice of legal commentary away from its purpose, perhaps causing confusion between moral clarity and legal clarity. The exaction of justice within a single narrative also requires a cadence that is impossible in any legal procedure. Having reduced justice to a series of plot points—offense, investigation, capture, judgment, and punishment—each must follow the next like beads on a string in order to keep pace with a reader's attention.

Finally, the preference for natural consequences helps to evacuate the appearance of contingency and human agency from felony procedure. Of course, the actual actors are discrete and identifiable; in the United States, the vast majority of criminal cases (felonies included) are decided by plea bargains, and these are each determined by the individual relationships and negotiations of local police, prosecutors, and judges. And yet felony allows us to rid the law of any impression of contingency by providing an archetype of crime and

criminality that conjures its own punishment against itself.[18] Sarah Berson has shown that prosecutors and defense attorneys rarely consider the collateral consequences of felony in the negotiation of plea deals, even though their effects can be the gravest on the convicted.[19] To consider these consequences would be to admit that, for us, felony is something more than "any crime punishable by more than a year in prison," to give away the narrative imagination that must remain hidden in order to flourish. We depend on Chaucer's "derke ymaginyng." The black smoke, the betrayed bed, and the cloak invoke our inchoate sense that felony exists and that it—by its very existence—calls up society's punishment. It allows us to conceive of the law in the passive voice; it is not people who punish crime, it is felony that brings the law down upon it.

Recognizing felony's fundamental incoherence, some have suggested modifications to impose rational boundaries on the category, like excluding from it all crimes that are not violent, sexual, or serious.[20] Likewise, some have suggested excluding those whose capacity for culpability is in question, like juveniles.[21] These measures are framed as reformist, but as Marie Gottschalk has observed, they only reinforce the idea that (once these cases are excluded) there exists a "true crime" to which the category of felony rightly applies.[22] That is, they provide bright lines that make the category appear more rational but always leave the concept untouched, unsaid.

Constable has observed that the fact that law and legal scholarship almost never refer to justice directly allows the law to operate as it should, while preserving space for less codifiable ideas of justice. It seems to me that the law's persistent refusal to define felony does something similar; it nurtures a connection between lay understandings of justice and the practice of the law, reserving a space within the law for the exercise of our narrative desire for the triumph of good over evil. Both the complaint that the law lacks justice and the answer that the law should not bend to any one person's instincts about justice are commonplace throughout Anglo-American legal history, but felony might be one place where such instincts still find welcome. That is, in the context of our desires for the law, felony's lack of definition is not a flaw, it is a conceptual strength that allows it to stand for concepts we prefer not to specify. We might ask ourselves if preserving this room to exercise our feelings of vengeance is worth the rule of law it costs us.

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[18] I am grateful here to Elizabeth Fowler's incisive question: "You speak of 'the law' as a person. Is it a person?" This question allowed me to realize the centrality of felony to the fiction that the law operates as a personification.

[19] Sarah Berson, Beyond the Sentence—Understanding Collateral Consequences, 25 Nat'l Inst. Just. J. 26 (2013).

[20] Margo Schlanger, *Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics, 48 Harv. C.R.-C.L. L Rev. 185 (2013).

[21] See, e.g., 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 (2013).

[22] Marie Gottschalk, Caught: The Prison State and the Lockdown of American Politics 165 (2015).