

Law, Not-Law, and the Felon in Between

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The term “felony” does not “lack ... definition.”^[1] To the contrary, as a legal term felony has long been defined “with the clearest of bright lines.”^[2] Indeed, in those jurisdictions that still use the category felony, it is easier to tell whether a given crime is a felony than to answer many other legal questions, such as whether a given killing is a murder. Definitions of murder (like those of many other crimes) refer to subjective mental states that are both difficult to describe and difficult to ascertain. The legal designation felony may once have entailed similar psychological detective work, but today it does not.^[3] In law, the word felony has long been used to name a category of offenses that can be punished with some specified penalty—once, forfeiture of property or death, and today, a prison sentence of more than one year. Thus felony exists as a subset of the category “crime,” with crimes that are not felonies most often labeled misdemeanors. Bright lines can be erased and redrawn, and the specific penalties that correspond to the category “felony” have varied over place and time.^[4] But in a given jurisdiction at a given time, the penalties that mark the boundaries of felony as a legal category have been identified with precision.

And yet Elise Wang’s fascinating *The Making of Felony Procedure in Middle English Literature* is built around the claim that felony is undefined in law and hence had to be defined by nonlawyers.^[5] Wang examines both legal records and literary sources to unearth medieval understandings of what was, and was not, a felony. Something curious is happening with the book’s present-tense assertion that “the law never defines [felony],”^[6] and a clue to the puzzle is Wang’s additional claim that “the legal category felony has been sustained by the fact that its conceptualization has always lain outside the law, out of reach of any shift or reform.”^[7] What is “the law” that supposedly didn’t define felony? Where is this space outside “the law,” where felony supposedly carries an enduring meaning not subject to reform? Why is the abolition of felony so “difficult to imagine,”^[8] even though most jurisdictions other than the United States have in fact abolished the category? Both in its direct argument and in the assumptions that seem to lie beneath the argument, Wang’s book prompts us to consider whether and how much law can

define terms at odds with their social meanings. Is felony indeed a matter of extralegal “dark imaginings,” a “diffuse intellectual project ... mired in and elevated by ideals of justice drawn from every corner of life,”[9] or instead, might legal choices sometimes produce unseen limits to both literary and scholarly imaginations?

(American) laws *do* define the term felony, but not in a way that corresponds with what could be called the social meaning of felony. As a matter of social meaning, a felony is an especially harmful or depraved crime.[10] In the nineteenth century, with the explicit aim to establish a clear legal definition that broke with earlier traditions, American reformers decided that “felony” should refer to any crime punishable by more than a year in prison.[11] Wang acknowledges that legal instruments have long used a “consequentialist definition” that classifies crimes as felonies based on the available punishment.[12] But her precise claim of non-definition is that “the law has never defined *the act of* felony” (emphasis mine); she elaborates that in legal terms, “the quality of felony lies not in the act, but in how the law responds to that act.”[13] So Wang knows that legal instruments define felony as a category of offenses subject to a given penalty, but she begins her book with a search for something she calls “the act of felony.” This act is the thing that purportedly lacks a legal definition.

But is “the act of felony” a thing that could be defined, whether in law, literature, or any other field? A search for “*the act of* felony” is a bit like a search for “*the act of* wickedness” or “*the act of* sin.” Like felony, wickedness and sin were never names for a single identifiable act. Wickedness and sin are instead attributes of a person’s character that may be manifested in innumerable outward actions; it is impossible to say in advance all the ways that wickedness might show itself.

So too with felony, if we try to define it without reference to available penalties. Early usages of the term, both legal and nonlegal, emphasized the characteristics of felons, not a set of necessary or sufficient attributes of the actions labeled felonies. The literary sources in Wang’s study do not define “the act of felony” any more than do legal statutes. Instead, the poetry (and legal documents) she examines show ordinary people trying to decide whether specific individuals who have committed specific acts are properly designated as felons. This is not a process of *definition*. Neither the inquest records, nor the poetry, generates an account of what it is to be a felon, or what constitutes “the act of felony,” concise enough to determine any future cases. Felony procedure is not about definition, but about classification and exclusion. Felony procedure empowers some humans to classify other humans as felons, and thus to deny those so classified some fundamental attribute(s) of membership in the community.[14] Precisely because literature cares about *character*, it is indeed a rich resource for an examination of felons and felonies. But literature, like law, does not and cannot offer a “uniform principle or logic that explains which

... conduct is designated as felonious and which is not.”^[15] By the end of the book, Wang has abandoned the search for “the act of felony” and recognized that “a felon was always already a felon.” A felony is merely “an act that unmask[s] the felon behind it.”^[16]

The term felony has meanings, both social and legal, but its only clear definition is the penalty-focused legal understanding. At times, *The Making of Felony Procedure in Middle English Literature* may be read to suggest that the social meaning(s) of felony, or other extralegal sources of meaning, operate as a constraint on law and legal definitions. Perhaps it is not within the power of “the law” to repurpose the word felony as the name for a category of offenses punishable by more than one year—that seems the implication of Wang’s claim that the “conceptualization [of felony] has always lain outside the law, out of reach of any shift or reform.”^[17] Statutes purporting to redefine felony are just empty proclamations, on this account, and the real meaning(s) of felony will inevitably be determined beyond legal institutions.

History and experience show otherwise. Legal meanings and social meanings interact, and the story of that interaction is not a story of continuity. The decision to define “felony” as all crimes punishable by more than one year imprisonment, regardless of the tangible harm or perceived moral seriousness of the offense, was a radical change that has had and continues to have profound effects in the United States and beyond.^[18] Becoming a felon today does not require the kinds of community investigation and lay moral reasoning that Wang depicts in medieval England. The line between felony and not-felony is no longer drawn by ordinary individuals in a local community, closely scrutinizing allegations against a member of that community. Even the jury trial, which does allow laypeople to reject the felon designation by refusing to convict a defendant, is vanishingly rare. The process by which a person becomes designated as a felon is now largely within legislative and prosecutorial control—legislatures authorize punishments of more than a year for a huge range of actions, and prosecutors then wield broad discretion to charge felonies (and induce guilty pleas to those charges). Those classified as felons are then subject to an array of collateral consequences, some so extensive or severe that they are characterized as “civil death.” Millions of Americans are now felons, and troubling but familiar patterns of racial disparity can be identified in this modern felony. Today, a felony conviction is not a careful judgment made by laymen, but an easily deployed “device of control and exclusion” that has been disproportionately wielded against persons of color.^[19]

Beyond U.S. borders, many jurisdictions that do not use the label “felony” nevertheless retain some penalty-based distinction between more serious crimes and less serious crimes. The mere fact of such a distinction cannot be traced to the American decision to redefine felony, but the specific

choice to define that distinction in terms of authorized incarceration of more than one year is traceable to the nineteenth-century American decision. Today, many countries—again, including those that do not use the label “felony”—restrict entry for foreigners with the type of criminal convictions that America still labels felonies. As many have noted, the current U.S. President could face such a ban.^[20] Whether he would actually be denied entry is unclear, but the mere existence of entry restrictions based on convictions such as his illustrates the worldwide impact of the American *legal* conceptualization of felony. The notion that a prison term of more than a year marks the scope of felony did not arise from a sphere beyond law, but now the effects of this idea reach seemingly everywhere.

Thus, ancient social or literary meanings of felony have not operated as constraints on legal power. To the contrary, legal institutions have benefitted from those ancient understandings of felony as an especially severe offense, even as law operates on a much more expansive vision of what counts as a felony. “Thanks to the deep-seated beliefs about bad character and wrongful actions that give felony its social meanings, constraints on felons are tolerated and legitimized, even when (or perhaps because) they are distributed in clearly inegalitarian ways.”^[21] Not-law may sometimes constrain what law can accomplish, but that has not been the story of felony. With felony, we see law draw on not-law (religion, literature, culture) as a source of legitimation even as law quietly circumscribes the scope of our non-legal imaginations.

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^[1] But see Elise Wang, *The Making of Felony Procedure in Middle English Literature* 3 (2024) (referring to “felony’s lack of definition”); see also *id.* at 3 (“[F]elony—unlike most legal categories—was left to laymen to define.”); *id.* at 146 (referring to felony’s “lack of definition as a legal category”).

^[2] Alice Ristroph, *Farewell to the Felonry*, 53 *Harv. C.R.-C.L. L. Rev.* 563, 566 (2018).

^[3] Elizabeth Papp Kamali, *Felony and the Guilty Mind in Medieval England* (2019) (arguing that a blameworthy mental state was a core attribute of the designation felony as used in medieval England). In the United States today, many crimes classified as felonies have no mental state element at all. See, e.g., *United States v. Engler*, 806 F.2d 425, 435-36 (3d Cir. 1986) (reinstating felony conviction under the Migratory Bird Treaty Act and noting other “strict liability” felony offenses that lack a *mens rea* requirement).

^[4] “[A]ny effort to define felony in terms of a specific punishment must be geographically and historically specific.” Ristroph, *Farewell to the Felonry*,

571.

[5] See *supra* n. 1.

[6] Wang, *Making of Felony Procedure*, 140.

[7] *Id.* at 4.

[8] Elise Wang, *Felon and Villain: The Literary Life of Felony*, 1 *Mod. Crim. L. Rev.* 169, 169 (2025).

[9] Wang, *The Making of Felony Procedure in Middle English Literature*, at 6. All subsequent references to Wang are to this book.

[10] See Ristroph, *Farewell to the Felonry*, at 565.

[11] See *id.* at 574-76.

[12] Wang, 2.

[13] Wang, 1-2. Confusion could arise from Wang's claim that it is "Anglo-American law" that retains the "consequentialist definition" of felony. As Wang acknowledges in a footnote, the United Kingdom abolished the felony / misdemeanor distinction in 1967. And though Wang does not mention it, most common law jurisdictions have done the same. See Ristroph, *Farewell to the Felonry*, 567.

[14] I have argued that the obscure neologism "felonry," a term to be juxtaposed to the "citizenry," captures this characteristic of felon classifications. See Ristroph, *Farewell to the Felonry*, 580, 605-09.

[15] *Id.* at 613.

[16] Wang, 143.

[17] Wang, 4.

[18] This argument, and the descriptions in this paragraph of the role of felony in modern American felony law, are developed in Ristroph, *Farewell to the Felonry*.

[19] Ristroph, *Farewell to the Felonry*, at 602.

[20] See, e.g., Marni Rose McFall, *Donald Trump Faces Travel Ban to 37 Countries*, *Newsweek*, May 31, 2024 (<https://www.newsweek.com/donald-trump-travel-ban-1906686>).

[21] Ristroph, *Farewell to the Felonry*, 565.

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