Criminal Law Under Semantic Pressure: Methodological Challenges of Politicized Language

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I. Introduction

Criminal law begins where moral certainty runs out. Where ordinary social judgment—the infallible sense that *this was wrong*—is not enough on its own, criminal law supplies something more exacting: a closed catalog of elements and a principle that nothing is punishable unless a rule said so in advance.[1] That exactness is the entire justification for the coercive power criminal law wields,[2] and it is worth pausing on why a discipline so often accused of formalism should need philosophical defending at all.

The answer lies in what the legal concept actually is. A legal concept is not a mirror held up to social reality; it is, in Luhmann's terms, a piece of the legal system's own code, meaningful only inside a communicative order that processes the world exclusively through the distinction of lawful and unlawful.[3] Ordinary language does not observe this discipline, and was never designed to.[4] Law, however, has only a limited vocabulary of its own; for the terms that matter most, it must operate within the field of ordinary language.

When criminal law borrows a word from ordinary language, such as *violence*, *hate*, *discrimination*, *terrorism*, or *genocide*, it imports an open field of competing usages, each shaped by a different communicative system with different criteria of relevance: mobilizing force, capacity to hold attention, and power to condemn. None of these systems has any reason to prefer the narrow, technical meaning that criminal law requires. Sartori called this dynamic *conceptual stretching*: a term travels further than the phenomena it was built to distinguish, and borrows the moral weight it accumulated in its narrower home to lend authority to a much broader claim.[5] The transfer does more than borrow weight; it

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[1] Article 103(2) of the German Basic Law (Grundgesetz); see also Lon L. Fuller, The Morality of Law 39 (rev. ed. 1969).

[2] Cesare Beccaria, On Crimes and Punishments 10, 13-15 (1769).

[3] See especially Richard Nobles & David Schiff, Introduction, in Niklas Luhmann, Law as a Social System 1, 9 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

[4] Ludwig Wittgenstein, Philosophical Investigations § 84 (1953); H.L.A. Hart, The Concept of Law 119 (1961).

[5] Giovanni Sartori, Concept Misformation in Comparative Politics, 64 Am. Pol. Sci. Rev. 1033 (1970).

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manufactures the appearance of *correctness*. What has been cast as metaphor is soon mistaken for description.[6] The concept survives the journey; its precision does not.

Criminal law is not a bystander to this process. A court applying a criminal statute that punishes conduct motivated by "hate," or a legislature amending a sentencing provision to single out "racist" motives for special treatment, cannot simply declare the surrounding political controversy over what that word means to be irrelevant to the legal question at hand. The word is one word, spelled the same way inside the courtroom and outside it. Its instability travels with it across that threshold, whether the legal system wants it to or not. The exclusivity of conceptual hermeneutics in law is an illusion that becomes apparent as soon as people have to apply the method in practical life.[7] This article calls the resulting condition *semantic pressure*: a state in which a legal concept's boundaries are worked upon, continuously and from outside the legal system, by discourses that reward exactly the kind of expansion criminal law's methodology must not tolerate.

The interaction between criminal law and language has itself become a distinct field of study, one this article draws on selectively rather than exhaustively; its methodological commitments lie closer to legal philosophy and systems theory than to the linguistic and cognitive-science approach that field has more often taken.[8] The argument proceeds in five steps. Part II sets out why criminal law is structurally dependent on semantic restraint, drawing on Hart's account of the "open texture" of legal language and Fuller's requirement that law be *clear* enough to guide the conduct it governs.[9] Part III identifies three mechanisms by which legal concepts absorb meanings that originate outside the legal system—moralization, emotionalization, and politicization.[10] Part IV asks why this absorption poses a distinctively methodological, rather than merely rhetorical or political, problem for criminal law, tracing three specific tensions between criminal law's own methodology and the logic of political, moral, and emotional discourse, and drawing on Luhmann's account of law as a self-referential, operationally closed system to explain why the absorption is methodologically corrosive rather than merely untidy. Part V examines three case studies in which the drift can be traced with some precision: the expansion of violence to include forms with no physical component at all;[11] the absence, to this day, of any internationally agreed legal definition of terrorism, despite decades of trying;[12] and the recurring, and

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[6] George Lakoff & Mark Johnson, Metaphors We Live By (1980).

[7] See generally Hans-Georg Gadamer, Truth and Method (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) (1960) (developing the idea that application is not a subsequent step added to understanding, but co-constitutes understanding from the outset).

[8] Cf. Lawrence M. Solan & Peter M. Tiersma, Speaking of Crime: The Language of Criminal Justice (2005).

[9] Hart, supra note 4; Fuller, supra note 1, at 35, 39.

[10] Luhmann, supra note 3, at 378-79.

[11] Johan Galtung, Violence, Peace, and Peace Research, 6 J. Peace Rsch. 167, 168-74 (1969).

[12] Ben Saul, Defining Terrorism in International Law 1 (2006); Alex P. Schmid & Albert J. Jongman, Political Terrorism 5-6 (2d ed. 1988).

ultimately unsuccessful, attempts to fold "cultural genocide" into the legal concept of "physical genocide." Part VI asks what criminal law can do about all this by cultivating what this article calls *disciplined narrowness*: a standing methodological commitment to resist semantic inflation even where resisting it is heavily unpopular.

II. The Semantic Architecture of Criminal Law

Every legal system that criminalizes conduct must answer a simple question: how much certainty does a word need before it is fit to carry a criminal statute. This question, which seems simple at first glance, is in fact intractable, because language can neither be measured nor weighed, and is therefore fundamentally resistant to a final fixation. Hart's answer, developed through his account of the "open texture" of language, was that no word can ever be perfectly determinate.[13] Ordinary concepts have a core of settled meaning surrounded by a penumbra of genuinely doubtful cases, and legal language, being made of the same material as ordinary language, inherits that structure whether the legislature wants it to or not.[14] A rule against bringing "vehicles" into a park settles the easy cases (cars, certainly; a child's toy car, certainly not) and leaves the hard ones (a bicycle, a motorized wheelchair) to judgment.[15] Legal linguists studying the actual distribution of vague and flexible terms across areas of law also have reached the same conclusion from the opposite direction: criminal statutes tolerate markedly less semantic flexibility than other bodies of law precisely because of the notice function flexibility undermines.[16]

This is not, on its own, a crisis. Hart's point was descriptive rather than despairing: open texture is a permanent feature of any rule-governed system that uses natural language, and adjudication exists partly to manage it.[17] What turns open texture from a manageable feature into a genuine danger is when the penumbra itself becomes the target of sustained external pressure, when interests outside the legal system have something to gain from pushing borderline cases toward inclusion, again and again, until the penumbra swallows what used to be the core. To mistake the penumbra for the core is to mistake the shadow for the source that makes it visible at all.

Fuller's contribution sharpens why this matters specifically for criminal law. In his allegory of the hapless lawmaker Rex, Fuller cataloged eight distinct ways in which a system of rules can fail to be law at all, one of which is simply this: the rules are not understandable.[18] A law whose terms are not clear cannot, in Fuller's account, guide the conduct it purports to govern, and a legal order that consistently fails to guide conduct forfeits its

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[13] Hart, supra note 4, at 121.

[14] Id.

[15] Id. at 126-27.

[16] Peter M. Tiersma, Legal Language 81 (1999).

[17] Hart, supra note 4, at 128 (courts perform "rule-making" at the margins).

[18] Fuller, supra note 1, at 39 (the parable of Rex; clarity discussed as the fourth desideratum).

claim to the specific kind of moral standing that separates law from naked command.[19] Clarity, on this view, is one of the conditions without which a rule does not qualify as law in the first place.

German constitutional doctrine arrives at a similar conclusion by a different route, and it is worth lingering on the parallel because it shows that the demand for semantic restraint is a recurring architectural requirement of criminal law as such. Article 103(2) of the German Basic Law, the principle of *nulla poena sine lege*, has been read by the Federal Constitutional Court to prohibit not only the retroactive creation of offenses, but also a subtler failure mode that German doctrine calls *Entgrenzung*, roughly, the blurring and boundary-dissolution of a statutory term through an interpretation so expansive that the term's original, discriminating content is worn away.[20] The doctrine asks a prior question: has the interpretation reached the point where the concept can no longer do the job of excluding anything, where its "core content" has been ground down until the term means, in practice, whatever the enforcing institution wants it to mean on a given day. A concept that has been stretched to that point has stopped functioning as a concept, in the specific technical sense that a concept's whole purpose is to sort the world into what falls under it and what does not.[21]

What Hart described sociolinguistically and what Fuller and the German *Bestimmtheitsgrundsatz* demand normatively, Luhmann's systems theory explains functionally. For Luhmann, law's entire reason for existing as a distinct social system is to reduce the otherwise unmanageable complexity of social life to a single, binary operation: an act, an actor, a situation is either lawful or unlawful, and nothing else about it needs to be settled before the legal system can process it further.[22] This reduction is only possible because the legal system operates with concepts that are, relative to the surrounding communicative noise, *closed*: stable enough that applying them does not require re-litigating the entirety of morality, politics, or public sentiment every time a case arises.[23] A concept under semantic pressure is, in these terms, a concept that has lost the very property that let it perform this reduction. It gives way under the pressure exerted upon it, and it yields to the pressure already lodged within it. If a legal concept can mean whatever a given speaker's moral urgency requires it to mean, invoking the word settles nothing; it merely imports the surrounding social conflict, unreduced, into a system that exists specifically to reduce it. The fox is guarding the henhouse. Categories that shift under the pressure of the very dispute they are meant to resolve cannot perform at all. Clarity therefore is a basic prerequisite

[19] Id. at 39, 42-43.

[20] BVerfG, 2 BvR 1290/99, Dec. 12, 2000 (https://perma.cc/3FJB-E972); cf. Heikki E.S. Mattila, Comparative Legal Linguistics: Language of Law, Latin and Modern Lingua Francas 27-39 (Christopher Goddard trans., 2d ed. 2013).

[21] BVerfG, supra note 20.

[22] Luhmann, supra note 3, at 76-141 (the legal/illegal code).

[23] Id.

for functionality.[24] This argument leans heavily on Article 103(2) of the German Basic Law because German doctrine has developed the clearest institutional vocabulary for the demand at stake. Legal orders lacking any *Bestimmtheitsgrundsatz* achieve functionally comparable restraint through different doctrinal vehicles: the rule of lenity's presumption for the narrower reading of ambiguous criminal statutes, the void-for-vagueness doctrine under the U.S. Constitution's Due Process Clauses, and Article 7 of the European Convention's foreseeability requirement, examined in Part VI below, all perform the same architectural function under different names.

Taken together, these three vantage points—Hart's open texture, Fuller's clarity desideratum reinforced by the German *Bestimmtheitsgrundsatz*, and Luhmann's account of law as complexity-reducing code—converge on a single architectural claim. Criminal law's authority does not rest on the fiction that its words are perfectly determinate; no serious legal theory since Hart has needed that fiction. It rests on the narrower and more defensible claim that criminal law's words must be *more* determinate than the words circulating around them in political and moral discourse, precisely because criminal law is the system tasked with converting social conflict into a decision, rather than merely restating the conflict in more solemn language. Semantic pressure is dangerous exactly because it works to erase that differential.

III. Three Mechanisms of Semantic Transformation

Three distinct, if overlapping, mechanisms of semantic pressure recur across very different legal concepts, and distinguishing them matters because each works on the legal system through a different channel and therefore calls for a different kind of vigilance.

A. Moralization

The first mechanism operates by converting a legal concept into a vehicle for collective condemnation that has already been decided in advance of any legal finding. So here an existing concept is being loaded with moral interpretation, inflating the penumbra until it overshadows the core. Once a legal concept has been recruited as a vehicle of moral condemnation in this way, expanding its scope becomes rhetorically costless and morally advantageous at once: anyone who resists the expansion can be, and often is, cast as siding with the conduct itself, rather than as making the comparatively modest claim that the word does not, as a technical matter, reach that far. Ernesto Laclau's account of the "empty signifier" describes an identical structural trade-off in political discourse: a term absorbs an ever-longer chain of heterogeneous grievances and becomes, in doing so, "increasingly full from an extensional point of view . . . but . . . intensionally poorer."[25] The same trade-off,

[24] See also Joseph Raz, The Rule of Law and Its Virtue, in The Authority of Law: Essays on Law and Morality 210, 223-24 (1979) (1977).

[25] Ernesto Laclau, On Populist Reason 96 (2005).

transposed onto criminal law's vocabulary, is what semantic overloading names: extensional reach purchased at the price of the very specificity a legal concept exists to supply.

Moralization is corrosive to criminal law specifically because criminal law's own legitimacy is partly moral.[26] Punishment expresses a genuine judgment of wrongdoing,[27] and criminal law cannot simply disclaim any relationship to moral vocabulary without abandoning part of what makes punishment intelligible as punishment rather than as mere regulatory cost.[28] The mechanism exploits precisely this legitimate proximity. Because criminal law's moral seriousness is real, borrowing its vocabulary lends real moral weight to claims that have not, and sometimes could not, satisfy criminal law's own evidentiary and doctrinal requirements.

B. Emotionalization

The second mechanism does not appeal to collective moral judgment so much as to individually felt harm, and in doing so it substitutes a different standard of proof for the one criminal law actually requires. When people describe an experience as "hate" or "discrimination" because it was, without any real doubt, hurtful or degrading, they are reporting something true and often important. What has shifted is the criterion by which the legal concept is being applied: not whether the doctrinal elements of the offense are satisfied, but whether the experience felt, *subjectively*, sufficiently severe to deserve the label. Justice Stewart's celebrated non-definition of obscenity, "I know it when I see it," was offered as a confession of the limits of doctrinal precision in one narrow area of constitutional law; used as a general method, the same sensibility becomes a solvent for exactly the kind of conceptual boundary that criminal law exists to police.[29] Sociologists have identified the same shift in the informal norms governing everyday social conflict. Bradley Campbell and Jason Manning describe a broader move from a "dignity culture," in which unintentional slights are met with a thick skin or addressed directly, to a "victimhood culture . . . and sensitivity to slight combined with a heavy reliance on third parties."[30] Jonathan Haidt and Greg Lukianoff have since traced the same pattern to what they call "emotional reasoning," that is, the elevation of feeling into evidence, on the premise that one should simply "always trust [one's] feelings."[31]

Criminal adjudication, whatever its philosophical difficulties in fully reaching a correspondence-based truth, is committed to behaving as though an independent truth exists

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[26] Joel Feinberg, The Expressive Function of Punishment, 49 Monist 397, 400-01 (1965); cf. Fuller, supra note 1, at 39-41.

[27] Feinberg, supra note 26, at 400-02.

[28] Fuller, supra note 1, at 39-41.

[29] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[30] Bradley Campbell & Jason Manning, Microaggression and Moral Cultures, 13 Comp. Socio. 692, 715 (2014).

[31] See the lists in Greg Lukianoff & Jonathan Haidt, The Coddling of the American Mind 4, 38 (2018).

and is worth approximating through evidence. Emotionalized concept-use quietly substitutes a pragmatic standard, the claim counts because it is felt and repeated and unopposed, for the correspondence-oriented standard criminal law's own procedural architecture presupposes. The substitution rarely announces itself. It proceeds one plausible-sounding case at a time, and each case, taken alone, seems too harsh to resist.

C. Politicization

The third mechanism is the most visible. Here, legal terminology becomes embedded within an ongoing ideological conflict, such that using or withholding the term functions as a move within that conflict rather than as an application of doctrine to fact. Unlike moralizing, where the term is charged, and emotionalizing, where the authority of interpretation is personalized, politicizing terms is about upgrading the words of the law into "battle terms."[32] Debate is foreclosed by pre-empting a legal question with a verdict that only looks legal, borrowing the institutional gravity of law while bypassing every institutional safeguard that gives law its legitimacy in the first place. Sociology and conceptual history each supply a name for this move. Howard Becker's foundational insight into labeling theory holds that "deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender'";[33] political labeling borrows this same mechanism and directs it outward, at a rhetorical target rather than a rule-breaker. Reinhart Koselleck's account of "asymmetric counterconcepts" describes the further step this labeling accomplishes: the appropriation of an ostensibly universal category—his examples run from Christian/heathen to human/subhuman—by one side of a conflict, transforming what was a general concept into "a concept of negation" that forecloses, by definition, its opponent's standing to be heard on equal terms.[34] This is the mechanism's true point of entry: superheated political debate creates an incentive for legislatures to respond with symbolic amendments, and battle terms enter the statute directly through that door.[35]

What distinguishes politicization from the two preceding mechanisms is this institutional entanglement. Moralization and emotionalization operate primarily on public discourse and only reach the legal system indirectly, through the interpretive pressure that discourse places on judges and prosecutors. Politicization can bypass that indirection entirely and inscribe the instability directly into the statutory text, at which point resisting the drift is no longer a matter of judicial discipline alone but requires confronting a legislative choice that has already been made.

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[32] Cf. Carl Schmitt, Der Begriff des Politischen 31 (7th ed. 1932). This citation is confined to the quoted terminological point; it implies no endorsement of Schmitt's political theory or of his role in the Nazi regime.

[33] Howard S. Becker, Outsiders: Studies in the Sociology of Deviance 9 (1963).

[34] Reinhart Koselleck, The Historical-Political Semantics of Asymmetric Counterconcepts, in Futures Past: On the Semantics of Historical Time 155, 159-60 (Keith Tribe trans., 1985).

[35] Cf. Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2023-24 (1996).

D. Interim Assessment

These three mechanisms are analytically distinct but rarely travel alone. One could also include them under the overarching term "populist[36] criminal law," but that would not do justice to the necessary differentiation. A term that has been moralized acquires the emotional charge that makes emotionalization easier; a term that circulates in emotionally charged public discourse becomes an attractive target for political actors seeking to weaponize its condemnatory force; and a politically weaponized term, once embedded in legislation, acquires a further layer of institutional legitimacy that reinforces its moral and emotional charge in turn. The three mechanisms are best understood not as competing explanations but as a single reinforcing cycle, each stage lowering the resistance the legal system can offer to the next. What results, cumulatively, is a condition Part IV will call *semantic overloading*: the fact that a concept is carrying more meaning than it can discharge.[37]

IV. Methodological Tensions for Criminal Law

Part III described three mechanisms by which legal concepts absorb meaning from outside the legal system. This Part asks a narrower and more technical question: why does that absorption pose a distinctively *methodological* problem for criminal law. The answer lies in a mismatch between what criminal adjudication is built to do and what moralized, emotionalized, or politicized concepts ask it to do instead.

A. Two Incompatible Logics of Escalation and Restraint

Criminal law depends, as Part II argued, on *semantic restraint*: its concepts must hold still long enough to sort conduct reliably into what falls under them and what does not. Political, emotional, and moral communication operate under the opposite incentive structure. A term that stays narrow attracts no attention; a term that expands, that reaches further with each invocation, generates the outrage, solidarity, or urgency that political and moral speech are built to produce. Nothing about this divergence is accidental or correctable through goodwill on either side. Political rhetoric rewards semantic escalation for the same structural reason that criminal law requires semantic restraint: each system is optimizing for a different output, and the vocabulary they happen to share was never designed to serve both masters at once.[38] When a concept becomes contested territory between the two, the pressure runs almost entirely in one direction, because escalation is cheap to produce and restraint offers no comparable payoff to the discourses generating the pressure.[39]

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[36] Cf. Jan-Werner Müller, What Is Populism? 2-3, 19-20 (2016); cf. also Laclau, supra note 25, at 123.

[37] A cognate diagnosis exists in linguistics, cf. Uwe Pörksen, Plastic Words: The Tyranny of a Modular Language (Jutta Mason & David Cayley trans., 1995) (1988).

[38] Cf. Molly J. Crockett, Moral Outrage in the Digital Age, 1 Nature Hum. Behav. 769, 769-70 (2017).

[39] Cf. William J. Brady et al., Emotion Shapes the Diffusion of Moralized Content in Social Networks, 114 Proc. Nat'l Acad. Sci. 7313, 7313 (2017) (the presence of moral-emotional language in a message increased its diffusion by roughly 20 percent for each additional word).

B. Evidentiary Discipline Against Affective Plausibility

The second tension concerns the standard by which concepts' application is established. Criminal adjudication operates, at least in its self-description, through evidentiary discipline: a fact is established because it withstood scrutiny, not because it felt sufficiently compelling to the person judging it.[40] Political and moral discourse, as Part III's discussion of emotionalization already suggested, typically operate through a much looser standard of affective plausibility, the sense that a claim must be true because it fits, because it feels right, because doubting it would itself seem callous.

This tension has occupied procedural theory for decades, and the resolution generally offered, that the investigatory duty sets the factual frame within which a necessarily subjective judicial conviction is formed, concedes more than it appears to. What the process actually yields is not a discovery of some pre-existing, correspondence-theoretic truth about what happened, but a viable construction of reality:[41] an account that is workable, internally consistent, and able to bear the weight of a verdict, without thereby being identical to whatever "really" occurred. Ordinary criminal procedure tolerates this gap because its remaining safeguards, the presumption of innocence, the requirement that doubt be resolved in the accused's favor, the discipline of admissible evidence, keep the constructed account tethered closely enough to the available facts that the difference rarely matters in practice.

Semantic pressure attacks exactly this tether. When the concept being applied is itself unstable, moralized into an unconditional value judgment, emotionalized into a felt-truth standard, or politicized into a contested legal question with no neutral resolution, the ordinary safeguards that keep judicial construction close to evidentiary constraint lose their grip. The court is no longer merely constructing a viable account of disputed facts under a stable legal standard; it is being asked, silently and without acknowledgment, to resolve a contested question about what the standard itself means, using a decision procedure built for factual disputes rather than for disputes about which construction of law's concepts is ideologically preferable.[42]

C. The Loss of Methodological Autonomy

The deepest of the three tensions concerns criminal law's autonomy as a distinct mode of processing social conflict. For Luhmann, different types of communication—legal, political, moral—are not simply different *styles* of talking about the same underlying reality; they are different, structurally incompatible operations, each processing the world through its own governing code and its own criteria of relevance.[43] Legal communication operates

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[40] Cf. William Twining, Rethinking Evidence: Exploratory Essays ch. 3 (2d ed. 2006).

[41] See generally Ernst von Glasersfeld, Radical Constructivism: A Way of Knowing and Learning 7 (1995).

[42] Cf. Ronald Dworkin, Law's Empire 4-6 (1986).

[43] Luhmann, supra note 3, at 378-79.

through the code of lawful and unlawful; political communication through power and opposition; moral communication through respect and disrespect, esteem and condemnation.[44] These codes can observe one another, and each can be irritated or stimulated by developments in the others, but they cannot simply be merged without one of them losing the operational closure that lets it function as a distinct system at all. This is not in tension with the point, developed in Part VI, that a legal vocabulary cannot be walled off from ordinary usage; it is that point's institutional complement. A system can remain, in Luhmann's own formulation, "cognitively open" to the vocabulary its environment supplies while remaining "operationally closed" in how it decides what that vocabulary settles.[45]

Semantic overloading, anticipated already in Part III, names precisely the mechanism by which this merger actually happens. There are two distinct routes by which a legal concept can be overloaded, and they are worth separating because they call for different remedies. In the first, a doctrinally precise legal category is simply displaced, wholesale, by a vaguer term borrowed from political or activist vocabulary, so that the statute or the judgment comes to speak, more or less openly, in the borrowed idiom. In the second, and more insidious, route, characteristic above all of moralization and emotionalization rather than of politicization in the narrower sense, the legal term itself remains formally unchanged, but the concept has been filled, silently, with additional moral, emotional, or ideological content that a court now imports whenever it applies the term, without any corresponding change in the statutory text that might have alerted anyone to what had happened. The second route is more dangerous precisely because it rarely leaves a textual trace. For moralization and emotionalization, nothing in the black letter of the law changes; only what the black letter is silently taken to mean does. Politicization, having already rewritten the statute itself, leaves the more visible trace, but the interpretive drift it sets in motion can still outrun even that rewritten text.

Either route produces the same structural result: legal concepts begin to carry expectations and narratives that originated entirely outside the legal system, and the more such expectations accumulate within a single term, the harder it becomes for that term to perform the one function a legal concept exists to perform, namely limiting what falls under it and what does not. A concept that has absorbed enough outside meaning to mean, potentially, almost anything a speaker's moral urgency requires has not become richer. It has become unusable for exactly the operation, the sorting of conduct into lawful and unlawful, that justified its existence as a legal concept in the first place.[46]

D. Interim Assessment

The three tensions examined in this Part, escalation against restraint, affective plausibility against evidentiary discipline, and semantic overloading against operational closure,

[44] Id.

[45] Id. at 383-85.

[46] See Sartori, supra note 5.

are not three separate problems requiring three separate solutions. They are three descriptions, pitched at different levels of abstraction, of a single underlying phenomenon: criminal law being asked to process material for which its own methodology was never built, using standards borrowed from systems whose entire function depends on not sharing criminal law's constraints.

V. Case Studies in Semantic Drift

The preceding Parts have argued, at a level of some abstraction, that criminal law's authority depends on resisting the semantic pressure that political, moral, and emotional discourse place on its concepts. This Part tests that argument against three specific concepts, chosen because each has left behind an unusually well-documented record of the pressure at work: *violence*, whose academic history shows the pressure operating gradually and largely without institutional resistance; *terrorism*, whose diplomatic history shows the pressure producing outright definitional failure; and *genocide*, whose doctrinal history shows what successful resistance to the pressure actually looks like in practice.

A. Violence

Criminal law's traditional understanding of violence links the concept to physical force applied against a body.[47] This tracks a phenomenon that is comparatively easy to observe, to prove, and to distinguish from its absence. The academic history of the word tells a different story, one of steady, largely uncoordinated expansion, each step defensible on its own terms and cumulatively transformative.

The decisive step was taken in 1969, when Johan Galtung, writing in the *Journal of Peace Research*, proposed that violence be understood as any avoidable impairment of a person's realization of their physical or mental potential, whether or not that impairment resulted from any identifiable actor's identifiable act:[48] where one husband beats his wife, the case is one of personal violence with a clear subject, object, and action; where a million husbands keep a million wives in ignorance, no comparable act can be pointed to, yet Galtung insists that violence, now understood as *structural*, has nonetheless occurred, built into the very structure of the relations concerned rather than delivered by any single blow.[49] Whatever the analytical merits of this move for peace research, it accomplishes something specific: it detaches the word from the requirement of an identifiable actor performing an identifiable act, which is precisely the requirement criminal law cannot do without, since criminal law exists to attribute conduct to responsible agents rather than to diagnose the condition of a social structure.

The drift is not confined to peace research. In 1986, a deadlocked German Constitutional Court left standing the conviction of road-blockade protesters convicted under §

[47] Cf. Johnson v. United States, 559 U.S. 133, 140 (2010); BVerfG, Jan. 10, 1995, 92 BVerfGE 1 (Ger.).

[48] Galtung, supra note 11, at 169.

[49] Id. at 171.

240 StGB, Germany's general coercion offense, accepting what German doctrine calls the "vergeistigter Gewaltbegriff," a psychologized concept of violence under which the mere psychological compulsion felt by a driver forced to stop without any physical force touching anyone already falls within the concept.[50] Nine years later, the Court held, in *Sitzblockaden II*, that an interpretation of violence dispensing with any physical component can no longer distinguish coercive protest from lawful, if inconvenient, presence, and therefore fails the certainty requirement of Article 103(2) of the Basic Law.[51] The court denied that pressure of that kind remained distinguishable, once "violence" had been stretched to reach it, from the pressure any determined but lawful protester exerts by simply standing somewhere inconvenient.

Once the concept of "violence" had been unmoored from the requirement of an act, subsequent extensions followed with their own, independently persuasive justifications. Bourdieu, developing the idea of *symbolic violence* through his fieldwork in colonial Algeria, described a domination so thoroughly internalized by the dominated that it required no application of force at all, "the gentle, hidden form which violence takes when overt or implicit censorship comes to be applied to all discourse."[52] Spivak, writing on the silencing of colonized subjects, identified *epistemic violence* in the systematic denial of a group's capacity to formulate and be heard in its own terms of knowledge.[53] Each extension, considered in isolation, illuminates something real about how domination operates. What none of them was designed to do, and what none of their authors particularly claimed to be doing, was to supply a concept that could still discharge the function criminal law requires of the word *violence*: sorting conduct, reliably and in advance, into what may be punished and what may not.

By extending the concept to *psychological*, *emotional*, *financial*, *epistemic,* and *structural* violence, the core is dissolved and turned into a moral cudgel available against almost any wrongdoing. The cumulative effect is the phenomenon Sartori's vocabulary anticipates precisely: a term stretched far enough to travel across coercion, structural disadvantage, discourse, and silence alike gains enormous rhetorical reach at the cost of the discriminating power that made it useful to begin with. Psychology has documented an identical trajectory under its own name: what Haslam calls "concept creep" traces the same horizontal and vertical expansion across a cluster of harm-related concepts, violence prominent among them, driven not by any single legal actor's decision but by a broader cultural sensitivity to harm that neither courts nor legislatures control.[54] In this article's own terms: if violence

[50] BVerfG, Nov. 11, 1986, 73 BVerfGE 206, 206, 239-40 (Ger.).

[51] BVerfG, Jan. 10, 1995, 92 BVerfGE 1, 14-18 (Ger.).

[52] Pierre Bourdieu, Outline of a Theory of Practice 191 (Richard Nice trans., 1977) (1972).

[53] Gayatri Chakravorty Spivak, Can the Subaltern Speak?, in Colonial Discourse and Post-Colonial Theory: A Reader 66, 79 (Patrick Williams & Laura Chrisman eds., 1994).

[54] Cf. Nick Haslam, Concept Creep: Psychology's Expanding Concepts of Harm and Pathology, 27 Psychol. Inquiry 1, 1-2 (2016).

comes to include everything, the concept becomes analytically empty, and a criminal statute that borrows the word borrows the emptiness along with the moral force. If everything is violence, then nothing is.

B. Terrorism

The instability of the term *terrorism* has been visible, acknowledged, and formally documented for decades, without this visibility producing a resolution. Ben Saul's monograph on the subject opens with the single sentence that best captures the state of the field: terrorism has never been defined in international law.[55] This is not a claim that no one has tried. Saul's study traces repeated attempts by the League of Nations,[56] the United Nations,[57] and successive diplomatic conferences beginning in the 1920s, each of which foundered on the same fault line: any definition precise enough to be useful threatens to capture, or to appear to exonerate, forms of political violence that some states wish to protect, most persistently the question of whether armed resistance by "freedom fighters" against an occupying power falls inside or outside the definition.[58]

The scale of the resulting disagreement has been measured empirically, which is itself unusual for a legal concept and worth taking seriously as data rather than as anecdote. Schmid and Jongman's survey of the academic and governmental literature identified one hundred and nine distinct definitions of terrorism in circulation, differing not at the margins but in which elements—violence, fear, a political motive, a civilian target, a state or non-state actor—they treated as essential at all.[59] A term that supports one hundred and nine competing definitions has not merely proven difficult to pin down. It has demonstrated, empirically, that no single legal community currently agrees on what the term is even trying to describe, which is a different and more serious problem than mere imprecision at the edges.

The events of September 11, 2001, supplied exactly the kind of shared urgency that might have been expected to force a resolution. Negotiators came closer to a text than at any point before or since, with substantial agreement reportedly reached on most provisions of the draft Comprehensive Convention by 2002.[60] The attempt nonetheless foundered on the same fault line that had defeated every earlier effort: the scope of exemptions for national liberation movements and state armed forces. The Security Council's response took

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[55] Saul, supra note 12; see also Schmid & Jongman, supra note 12, at 1.

[56] League of Nations Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, League of Nations Doc. C.546.M.383.1937.V (never entered into force).

[57] G.A. Res. 3034 (XXVII), U.N. Doc. A/RES/3034(XXVII) (Dec. 18, 1972) (establishing the Ad Hoc Committee on International Terrorism); see also G.A. Res. 51/210, U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

[58] Saul, supra note 12, at 1-4.

[59] Schmid & Jongman, supra note 12, at 5-6.

[60] Rohan Perera, quoted in Thalif Deen, UN: Defining Terrorism, Al Jazeera (Nov. 24, 2010) (https://perma.cc/7P4T-PY7B).

a different, and in its own way telling, form. Resolution 1373, adopted unanimously the day after the attacks, imposed sweeping binding obligations on every UN member state to criminalize terrorist financing and deny terrorists safe haven, while conspicuously declining to define the term whose suppression it mandated.[61] A quarter-century on, the term remains as undefined at the international level as Saul's diagnosis first described it.[62]

This does not prevent domestic prosecution, since national statutes supply their own working definitions. But any such definition operates without the disciplining reference point an internationally settled meaning would provide, leaving legislative or judicial expansion free of any external benchmark, and each legal system free to draw its own line wherever it proves politically convenient.

C. Genocide

The history of *genocide* offers something the two preceding case studies do not: a documented instance of successful resistance to semantic pressure, achieved through the deliberate application of exactly the interpretive discipline Part II described in the abstract.

Raphael Lemkin coined the term in 1944, combining the Greek *genos* with the Latin *cide*, and his own original conception was considerably broader than the one that would eventually be codified.[63] Lemkin's *Axis Rule in Occupied Europe* describes genocide as a coordinated plan directed at the disintegration of a group's political and social institutions, its culture, language, and national feeling, alongside the destruction of its members' personal security and lives, and offers, among his illustrations, the destruction of a group's printed works and writings as itself an instance of the phenomenon he was trying to name.[64] When the 1948 Genocide Convention came to be drafted, however, its Article II definition narrowed this original conception considerably, restricting the crime to five enumerated acts directed at a group's physical or biological existence: killing, causing serious bodily or mental harm, inflicting conditions calculated to bring about physical destruction, preventing births, and forcibly transferring children.[65] The cultural dimension that had been central to Lemkin's own thinking was deliberately excluded from the binding legal instrument that carried his neologism into international law.

The question of whether this exclusion should be treated as settled has never fully gone away, and the doctrinal literature on Article 6 of the Rome Statute of the International Criminal Court, which in turn reproduces almost verbatim the definition in Article II of the

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[61] S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

[62] Any successful definition would also have had to survive translation into each of the United Nations' equally official languages without drift in legal meaning, a requirement legal translation scholarship treats as a constraint on multilateral drafting rather than a merely technical afterthought, see Susan Šarčević, New Approach to Legal Translation 217 (1997).

[63] Raphael Lemkin, Axis Rule in Occupied Europe 79 (1944).

[64] Id. at 79, 84.

[65] Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

1948 Genocide Convention, documents the recurring attempts to reopen it. The International Criminal Tribunal for the former Yugoslavia confronted the question directly in the *Krstić* and *Karadžić* proceedings, and, with one notable dissent in *Blagojević and Jokić*, the tribunal's settled position has been that the destruction of a group's culture, however grave a violation of other norms it may constitute, does not by itself satisfy the destruction requirement that defines genocide as a distinct crime.[66] The reasoning offered for this restraint tracks, point for point, the architecture set out in Part II of this article. Equating a purely cultural genocide with the physical and biological forms of the crime would blur the very feature, deliberate physical destruction, that gives genocide its status as what international lawyers have called the crime of crimes, and would, in a formulation drawn directly from German constitutional doctrine on the boundaries of criminal interpretation, grind down the term's core content until the original understanding of the concept was subverted, rendered arbitrary, or made redundant. A group's culture can be suppressed by banning its language and destroying its sacred sites without the group's physical continuation being threatened at all, and the reverse is equally true; treating the two forms of harm as legally interchangeable would not expand the protection genocide law offers so much as dissolve the specific wrong the offense exists to name.[67]

What makes the genocide case study instructive is not the absence of pressure toward expansion. Lemkin's own broader original usage, the intuitive moral pull of describing cultural destruction alongside mass killing, and the word's unique rhetorical gravity have all pulled toward extension. What makes it instructive is that, at the doctrinal level, the pressure has been named and resisted, not by denying that cultural destruction matters, but by insisting that it matters as something other than genocide.

The pressure has not relented outside the courtroom; it now arrives in new vocabulary. Recent advocacy has proposed "scholasticide" and "urbicide" as freestanding companions to genocide, each covering the cultural and institutional harms Krstić and Karadžić held insufficient on their own.[68] The doctrinal line has not ended the pressure toward cultural inclusion, only displaced it into vocabulary operating outside the concept the tribunals were interpreting. Whether this counts as successful resistance or merely a slower defeat is itself an open question this article does not resolve.

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[66] Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, para. 580 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, para. 553 (Mar. 24, 2016) (only "evidence of intent to physically destroy the group"); Antonio Cassese, Cassese's International Criminal Law 113 (Paola Gaeta et al. eds., 3d ed., Oxford Univ. Press 2013); Mark A. Drumbl, Sixtieth Anniversary of the Genocide Convention: The Power of a Word, 40 Studies in Transnational Legal Policy 97, 106 (2009); but see Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, paras. 663 et seq. (Jan. 17, 2005).

[67] Oliver Harry Gerson, § 6 VStGB, in Strafgesetzbuch. Leipziger Kommentar, Band 20: Völkerstrafgesetzbuch marginal no. 28 (Gabriele Cirener et al. eds., 13th ed. 2024).

[68] See U.N. Office of the High Comm'r for Human Rights, UN Experts Deeply Concerned over "Scholasticide" in Gaza (Apr. 18, 2024) (https://www.ohchr.org/en/press-releases/2024/04/un-experts-deeply-concerned-over-scholasticide-gaza); Martin Shaw, New Wars of the City: Relationships of "Urbicide" and "Genocide," in Cities, War, and Terrorism: Towards an Urban Geopolitics 141 (Stephen Graham ed., 2004).

VI. Normative Reflection: Escaping the Fly-Bottle

Wittgenstein described the aim of philosophy, notoriously, as showing the fly the way out of the fly-bottle.[69] The image is worth taking seriously as more than ornament, because it captures something the preceding Parts have been circling without naming directly: the fly is not trapped by any wall it cannot see. It is trapped by its own repeated, increasingly frantic attempts to leave through the transparent glass, mistaking the appearance of an opening for the opening itself. Criminal law's relationship to semantic pressure has something of this structure. The concepts under strain—*violence*, *terrorism*, *genocide*, and the others canvassed in this article—are not besieged from some clearly external position that the legal system could simply wall off. The pressure comes from language the legal system itself must go on speaking, borrowed from a common vocabulary it cannot decline to share with the political and moral discourse surrounding it. There is no glass-free exit available, no vantage point from which criminal law could address society in a private idiom immune to contamination from the words everyone else is using at the same time.

This matters because it forecloses the most tempting response to everything argued so far, namely that criminal law should simply withdraw from moral and political vocabulary altogether and construct a hermetic technical language of its own. Wittgenstein's own later procedure suggests why this retreat is not merely impractical but conceptually confused. The *Philosophical Investigations* abandoned the picture, still dominant in his own earlier *Tractatus*, of language as a set of terms whose meaning could be fixed once and for all by their correspondence to an independent reality, replacing it with the observation that a word's meaning simply *is* its use within an ongoing form of life, established and re-established through nothing more than the practice of speakers using it among each other.[70] On this view, a legal vocabulary walled off from ordinary usage would not achieve stability; it would achieve unintelligibility, a private language cut loose from the practice that alone could give its terms any content at all.[71] This point can be sharpened rather than merely asserted. Wittgenstein's later philosophy locates meaning not in language as an undifferentiated mass but in the plurality of language-games that make up a form of life, each carrying its own internal standards of correct and incorrect use.[72] To insist that this game hold its own standards against the surrounding political and moral discourse is therefore not to seal criminal law into the kind of private idiom Wittgenstein's own argument forecloses; a private language is one no one but the speaker could in principle check, whereas legal interpretation remains public, rule-governed, and reviewable at every point.

What criminal law *can* do, and what the case studies in Part V suggest it has occasionally succeeded in doing, is something more modest and considerably more demanding than retreat: sustaining a standing methodological discipline against the specific temptations

[69] Wittgenstein, supra note 4, § 309.

[70] Id. § 43.

[71] Id. §§ 243-258, esp. § 258.

[72] Id. §§ 19, 23.

that moralization, emotionalization, and politicization each supply, without pretending that the vocabulary generating those temptations can simply be abandoned. This article calls that discipline *disciplined narrowness*, and it has, on the evidence surveyed above, at least three identifiable components.[73]

The first is a default toward the restrictive reading wherever a legal concept's boundaries are genuinely contested, rather than toward whichever reading the surrounding political or moral discourse currently favors. This is precisely the principle the ICTY applied in declining to extend genocide to purely cultural destruction, and precisely the principle German constitutional doctrine names when it prohibits interpretations that grind a term's core content down to arbitrariness.[74] The principle does not deny that the excluded conduct may be seriously wrong, or that some other body of law, human rights law, other criminal offenses, historical and political accountability mechanisms, may be better suited to addressing it. It insists only that criminal law's own vocabulary is not thereby obligated to expand to cover every wrong that shares a family resemblance with the conduct the vocabulary was built to describe.

The second component is vigilance specifically at the point where a term's ordinary and legal meanings begin to diverge without anyone announcing that divergence, since this is where Part III's second, more insidious route to semantic overloading operates: the statutory text remains unchanged while its interpretation quietly absorbs content from outside the legal system. A legislature that amends a sentencing provision to name a particular animating motive has an obligation that goes beyond the symbolic gesture the amendment was meant to express; it has created an interpretive question that courts must now resolve as a matter of law, and a criminal-law methodology that takes this obligation seriously would insist on confronting that question openly, rather than allowing courts to resolve it silently, case by case, under cover of ordinary sentencing discretion.[75]

The third component follows from Sartori's original diagnosis of conceptual stretching in comparative politics, applied back to the legal domain from which criminal law's vocabulary is borrowed in the first place: a term's usefulness is a direct function of its capacity to exclude, and any proposed extension of a legal concept should be evaluated by asking, concretely, what the extension would now fail to distinguish that the narrower concept previously distinguished, rather than by asking only what moral or political purpose the extension might serve.[76] A concept that has been stretched far enough to include everything

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[73] Cf. the closely related rule of lenity in American criminal law, under which ambiguity in the scope of a criminal statute is resolved in favor of the narrower reading. See Rewis v. United States, 401 U.S. 808, 812 (1971); United States v. Bass, 404 U.S. 336, 347-49 (1971). Lenity governs the construction of ambiguous statutory text in the individual case, whereas disciplined narrowness operates as a standing methodological stance toward the semantic boundaries of the underlying concepts themselves; see also Lawrence M. Solan, Law, Language, and Lenity, 40 Wm. & Mary L. Rev. 57, 58, 62 (1998).

[74] Cf. supra Part V.C.

[75] Cf. David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 737 (1987).

[76] Sartori, supra note 5, at 1039-40, 1041-42.

its proponents find objectionable has not become more protective. It has become unable to protect anything in particular, because protection through law depends on the prior, unglamorous work of drawing a line somewhere and holding it.[77]

Stated together, these components form a sequence a court can apply once a term's boundary is genuinely contested. First: does the reading fall within the concept's settled core, or only its penumbra? If the latter, the default runs toward exclusion, and the burden shifts to whoever proposes the wider reading.[78] Second: has the term's ordinary and legal meaning already begun to diverge without acknowledgment? If so, the divergence must be named and defended on the record, not resolved silently through ordinary discretion.[79] Third, and decisively: what would the extension now fail to distinguish that the narrower reading distinguished? If nothing is lost, the extension survives; if conduct the concept was built to keep separate would now be absorbed into it, the extension fails regardless of the moral case for inclusion.[80] A concept can fail at any one of these three steps.

A skeptical reader schooled in the critical legal studies tradition will object that this sequence relocates the difficulty rather than resolving it: if the line between core and penumbra is never discovered but constructed, defaulting toward the narrower reading does not escape politics, it conceals a political choice inside the vocabulary of neutral method.[81] The objection has force. This article claims only that a standing institutional bias toward restriction, defended in reasoned and reviewable form each time it is applied, is not the same thing as no bias at all, even where the boundary's exact location remains contestable. That the boundary is partly made rather than wholly found is a reason to insist on this discipline, not to abandon it. This asymmetry is also not incidental: unlike other interpretive contexts, criminal law's expansive readings run systematically in one direction, enlarging state power over the individual, which is precisely the asymmetry the presumption of restriction is designed to counteract.

None of these amounts to a claim that criminal law can achieve, or should aspire to, semantic isolation from the society whose conflicts it exists to resolve. Criminal law is, and must remain, capable of hearing what moral, political, and emotional language are trying to tell it.[82] The claim is narrower, and, for that reason, more defensible: that hearing this language and adjudicating through it are two different operations, and that criminal law's authority depends on its capacity to keep performing the second without silently collapsing it into the first. The fly-bottle offers no exit through some undiscovered wall. What it offers,

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[77] Cf. Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 135-37 (1991).

[78] See supra note 74 and accompanying text.

[79] See supra note 75 and accompanying text.

[80] See supra notes 76-77 and accompanying text.

[81] See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1687-1701 (1976); cf. Brian Leiter, Legal Indeterminacy, 1 Legal Theory 481 (1995).

[82] Cf. Luhmann, supra note 3, at 383-85.

if anything, is the considerably less dramatic discipline of learning to fly along the glass without mistaking transparency for absence. A word's presence in political and moral discourse is not, by itself, an invitation for that discourse to settle, uncontested, what the word means inside the courtroom. Disciplined narrowness, on this reading, is not a departure from the practice of meaning-as-use. It is what that practice looks like once one asks which practice, and whose, is doing the settling. Punishment, moreover, is not merely administrative regulation dressed in solemn procedure. It expresses, ineliminably, moral condemnation, and a criminal law that tried to sever every connection to the moral vocabulary of the society it serves would forfeit the capacity to express the very thing that makes punishment intelligible as punishment.[83]

A natural objection runs the other way: is evolutive interpretation not, in other contexts, precisely what gives law its legitimacy, rather than threatening it? The European Court of Human Rights has long held that the Convention is a "living instrument" to be read in light of present-day conditions and has used that doctrine to extend Convention protections into domains its drafters could not have anticipated.[84] The objection has force, but it identifies the wrong invariant. What "living instrument" interpretation and *disciplined narrowness* share is a common commitment to constraining state power over the individual. Evolutive interpretation under the Convention has moved almost exclusively in one direction: expanding what counts as a protected right against the state. Semantic pressure on criminal law's vocabulary moves in the opposite direction: expanding what counts as punishable conduct, which is to say, expanding the state's own reach. The Strasbourg Court itself has recognized this asymmetry: Article 7's guarantee against retroactive criminalization has been consistently exempted from the Court's evolutive methodology and subjected instead to a freestanding requirement of foreseeability and a prohibition on interpretation by analogy.[85] The Grand Chamber applied exactly this reasoning to genocide itself, holding that a conviction resting on an interpretation of the offense broader than what was foreseeable at the time of the conduct violated Article 7, even though the broader reading tracked a morally serious harm.[86] Read this way, the "living instrument" doctrine is not a counterexample to the argument of this article. It is the same argument, applied to the opposite variable. Article 7 has itself tolerated genuine extension, not only rejected it: when the House of Lords abolished the marital immunity from rape, Strasbourg upheld the conviction as "consistent with the essence of the offense and reasonably foreseeable."[87] This is no coincidence. The

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[83] Feinberg, supra note 26; see generally R.A. Duff, Punishment, Communication, and Community (2001).

[84] Tyrer v. United Kingdom, App. No. 5856/72, para. 31 (Eur. Ct. H.R. Apr. 25, 1978).

[85] Kokkinakis v. Greece, App. No. 14307/88, Series A no. 260-A, para. 52 (Eur. Ct. H.R. May 25, 1993) (a criminal offense has to be "clearly defined in law" such that the individual "can know from the wording of the relevant provision . . . what acts and omissions will make him liable").

[86] Vasiliauskas v. Lithuania [GC], App. No. 35343/05, paras. 155-86 (Eur. Ct. H.R. Oct. 20, 2015).

[87] S.W. v. United Kingdom, App. No. 20166/92 (Eur. Ct. H.R. Nov. 22, 1995), (1995) 21 E.H.R.R. 363; C.R. v. United Kingdom, App. No. 20190/92 (Eur. Ct. H.R. Nov. 22, 1995) (companion case, same holding).

immunity was never part of rape's discriminating core but an external carve-out; removing it did not stretch the concept, it stopped an arbitrary narrowing.

VII. Conclusion

This article began with a question posed, in one form or another, by every legal system that punishes: what remains of a legal concept once its words begin absorbing narratives that originate outside law altogether. The answer developed across the preceding Parts is neither reassuring nor despairing. It is, instead, methodological.

Criminal law's authority was never grounded in the fiction that its words are perfectly determinate. It was grounded in the narrower claim that criminal law's words must hold a line that surrounding discourse has no structural reason to hold on its own. Moralization, emotionalization, and politicization erode that line by borrowing criminal law's moral seriousness while substituting a looser standard for it, a drift the three case studies confirmed with markedly different endings: *violence* eroded gradually, *terrorism* never converged at all, and *genocide* showed what disciplined resistance can look like.

The central challenge this article has tried to describe is therefore not, at bottom, simply the growing influence of morality, emotion, and politics on the language criminal law speaks. Some such influence is unavoidable, and Part VI argued that it may not even be coherent to wish it away entirely, given that a legal vocabulary walled off from the ordinary practice of speaking would purchase stability at the price of intelligibility. The deeper challenge is the gradual collapse of the boundary between legal reasoning and moral-political narration, a collapse that proceeds not through any single dramatic event but through the accumulation of individually plausible extensions, each of which seemed too modest, too obviously justified, or too costly to resist in the particular case at hand.

There is, even so, reason for something other than resignation. Criminal law possesses genuine internal safeguards against this collapse: a doctrinal structure that can be articulated and defended rather than merely felt, an evidentiary discipline that does not bend automatically to whatever claim carries the most affective plausibility, and a principle of legality that, taken seriously, prohibits precisely the kind of interpretive drift this article has traced. None of these safeguards operates automatically. Each depends on courts, legislatures, and scholars willing to do the comparatively unglamorous work of insisting on narrowness at the exact moment when broadening a concept would be popular, urgent-seeming, and easy.

Criminal law gains whatever authority it has by performing a specific transformation: converting inchoate social conflict into disciplined legal judgment, rather than merely restating that conflict in more solemn language and calling the restatement a verdict. Few words, held to clear meanings, kept deliberately narrow, serve this transformation better than many words stretched to cover every case that feels, in the moment, urgent enough to deserve the label. Better, on balance, a concept too narrow than one too broad, since a narrow concept can always be extended by the ordinary and accountable means of legislation, while a concept already stretched to cover everything can no longer be narrowed by

anything except the very discipline this article has tried to describe. Only a criminal law willing to discipline its own concepts retains the standing to discipline anyone else's conduct at all.

The limits of criminal law's language, in the end, are not a regrettable constraint imposed on some more ambitious project the discipline might otherwise pursue. They are the limits of criminal law's judgment itself, and there is no version of that judgment worth having that does not depend on holding them.