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FORCIBLE CRIME

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1. Introduction

Larceny is the crime of theft performed with the intention never to return the item taken. Borrowing your neighbor's car without permission but intending to bring it back is not larceny. Taking the car intending to sell it is larceny. Robbery is larceny committed by force. Pulling your neighbor bodily from their car and driving away with the intention to sell the car is robbery. While larceny is a more serious crime than theft, robbery is a far more serious crime than larceny, drawing much longer prison sentences.[1] Force is an element of many other crimes. Often, when the realization of a set of conditions that does not include force constitutes a crime, as with larceny, to realize those same conditions with force is to commit a more serious crime. In many jurisdictions, for instance, and controversially, force is what distinguishes rape from lesser forms of sexual assault.[2] Even when a forcibly committed crime is not a more serious crime, it draws greater punishment because force is frequently treated as an aggravating condition for sentencing purposes. Under the federal Armed Career Criminal Act (ACCA), a defendant can end up with extra years in prison for a relatively minor, non-injurious crime provided that they have in the past committed multiple crimes of violence, where a crime is one of violence if it involves force.[3] Fur-

1. In the state of Massachusetts, for instance, you can be sentenced to any term of years, including life imprisonment, for robbery, while larceny of inexpensive items can attract no more than five years. See MAPC IV.1.265 §19 and MAPC IV.1.266 §30.
2. While there is variation from state to state in US rape statutes, Alabama's statute is typical of states that make force an element of rape. Ala. Code 1975, § 13A-6-61(a)(1) reads, "A person commits the crime of rape in the first degree if he/she engages in sexual intercourse with a member of the opposite sex by forcible compulsion."
3. See 18 U.S.C.A. §924(e)(1) and (2)(B). Because sentencing differences under the ACCA are so great, the question of what crimes involve force and what crimes do not is heavily litigated, including as recently as the 2020 Supreme Court term. *Borden v. United States* (593 U. S. ____ (2021)). The case concerned the question, in the end, not of what constitutes force, but of what constitutes use. The court ruled that crimes of recklessness do not involve "use of force" even if the victim in such crimes is subjected to force. Using force requires at least knowledge of what you are subjecting another person to.

thermore, other forms of unwanted treatment by the government are possible for forcible crimes. A criminal offender who is not a US citizen, for instance, can be subject to deportation more easily if their crimes involve force.[4] In general, criminal defendants face harsher sanctions if their crimes involve force than if they do not.

In several different ways, then, the law enshrines the common-sense moral idea that crimes forcibly committed involve greater wrongdoing than the same crimes committed without force. Force magnifies wrongdoing. To know to whom, if anyone, we are warranted in giving such comparatively harsh treatment, we need to know what the correct criteria are for determining when a person's problematic conduct involves force, and when it does not.

Like many ordinary concepts that carry intuitive moral significance (e.g. weapon, pain, deadly, etc.), the concept of force is heterogeneous: There are many different sorts, which may have little in common with each other. Consider two: If a person harms a victim as a means to achieving a goal—not inadvertently, but because the harm itself is believed by the person to bring them closer to their end—they use force. We might call this "harmful force". Someone who breaks another's fingers to take something from their grasp uses force of this sort. A person might use force, however, even if they inflict no harm. If a person, as a means to their end, brings about an event in the face of opposition on the other's part, they use what we might call "offensive force". Prying open the victim's fingers when they exercise their will to keep their hand shut is to exercise offensive force even if no harm is thereby inflicted. Because harming another and acting in the face of someone's refusal are both wrongful by default, it is no surprise that these types of force magnify wrongdoing.

Intuitively, however, there are other ways to wrongfully get one's way that we are inclined, on occasion, to describe as acting "by force" or engaging in a "forcible wrong". A third type, the nature of which is the subject of this paper, is best illustrated by the issuing of threats. We can induce someone to do something through explicit threat, as when the intending thief threatens to break the victim's fingers if the item is not supplied. The victim who complies suffers no harm and is not caused to comply in the face of their refusal; making an unpleasant decision to do something is not refusing to do it. And the threat need not be explicit. Imagine someone who regularly in the past harmed a person when they did not do as asked. When, on a particular occasion, this person gently takes the other's hand, and slips a ring from their finger, intending to sell it, it is in line with many people's linguistic intuition to say that they "take the ring by force". The victim is unharmed and does not oppose their hand being moved in that way, given that allowing its movement is a necessary means to avoiding what they believe will happen to them if they do not, yet it seems appropriate to say that the ring was taken "forcibly" or "with force". While granting that this is a stipulative definition, let's use the term "harmless force" to refer to the manner of getting one's way by explicit or implicit threat that magnifies wrongdoing in the same way as harmful and offensive force do.[5]

It is possible that to get your way by threat is not to use force; perhaps, instead, employing a threat, while not literally a use of force, magnifies wrongdoing just *as if* force had been used. However, we need not choose between this view and the view according to which harmless force is, literally, force. It is an entrenched legal practice to treat crimes that are completed by implicit or explicit threat as forcible crimes. Some statutes use the words "force or threat",[6] or sometimes "force or fear",[7] in the definition of a crime, but when a statute uses

4. *Leocal v. Ashcroft* (540 U.S. 1 (2004))

5. Note that all three of these categories of what is here called "force" overlap. A person might be harmed while at the same time refusing the state in which they find themselves. And a threat might be communicated by a harmful action, as when one threatens another with being shot by hitting them with the gun. Similarly, one could threaten another by pressing the gun against their temple while they refuse to be touched in that way. And little ingenuity is required to construct examples of wrongful acts that are forcible in all three senses.
6. See e.g. New York Penal Law Article 160.00.
7. See e.g. California Penal Code §211.

only the word "force", the term is interpreted to include implicit and explicit threats. The term "harmless force", then, will be used here to refer to getting one's way by explicit or implicit threat, while leaving the question of whether this is a species of force, properly speaking, unanswered.

Notice that none of these three ways of getting one's way referred to here as types of "force" need be instances of violence, intuitively speaking. Take harmful force: The harm need not be physical harm; perhaps a person gets their way by hurting another's feelings. The case is similar with offensive force: The refused event need not be linked to the body; perhaps a person gets their way by selling a company in the face of another's refusal. Similarly, a person might get their way by threatening to hurt another's feelings, or by threatening to sell a company, explicitly or implicitly. But none of these are violent ways of reaching one's ends. Violence bears some close relationship to the human body that is missing in these examples. What exactly that relationship must be for violence to be present is elusive; but we know it when we see it.[8] However, the various forms of force so far identified belong in the category of violence when the necessary link to the body is present. Harmful force is violent if the harm is physical. Offensive force is violent if what is refused is some movement or state of the body. And, most importantly for our purposes, harmless force is violent if what is threatened is itself violent, as when what is threatened is an act that is either an instance of violent harmful or violent offensive force.

Given criminal law's special concern with responding to violence, it is not surprising that the term "force" appears in criminal statutes and judicial opinions to refer primarily, perhaps exclusively, to *violent* force. That is, for our purposes, what matters is *physically* harmful force, *physically* offensive force and harmless force where what is explicitly or implicitly threatened is either *physically* harmful or *physically* offensive.[9]

Enshrined in the law is the idea that force of any sort (and certainly when it is violent) magnifies wrongdoing. However, despite this entrenched and widespread legal practice, there is no body of either case law or scholarship that specifies precisely what force, of the sort that magnifies wrongdoing, is, much less why such force plays this magnifying role.[10] My aim here is to specify necessary and sufficient conditions of harmless forcing that provide a satisfactory rationale for this entrenched idea. When we understand what it is to get your way by threat, we will also see why it is more wrongful to get your way in that fashion, even without harmful or offensive conduct on your part. Put briefly, under the view to be presented here, to get your way by harmless force is to interfere with the victim's autonomy in a way that, *ceteris paribus*, non-forceful wrongdoing (that is, wrongdoing that is not performed with any form of force) does not.[11]

The account we are aiming for here would help to adjudicate cases like the following from the early 1970s, where the defendant's guilt turned on the question of what constitutes harmless force. Florence

8. For illuminating discussions of the concept of violence, see, for instance, Guerrero, Alex (2022) "Law and Violence" in *Journal of Ethics and Social Philosophy* 22(1); Ristroph, Alice (2011) "Criminal Law in the Shadow of Violence" in *Alabama Law Review* 62: 571–622; Sklansky, David (2021) *A Pattern of Violence*, Cambridge: Harvard University Press.

9. In what follows, I will refer to these types of force without using the term "physically". By harmful force, e.g. I mean physically harmful force.

10. The question of whether the defendant used force is what is sometimes called "a jury question". The jury are required to determine whether force was used, but they are given no guidance at all on what criteria to employ to decide the question. Jury instructions, for instance, simply say that they are to find the defendant guilty of a forcible crime only if they find that the defendant performed the acts involved in the crime "with force". By way of example, see, for instance, Michigan's jury instructions on robbery. See M Crim JI 18.2.

11. The view to be described is connected to the point just made about the link between violence and the body. While perhaps every part of the law is concerned with protecting various interests that people have, criminal law has a special concern with the protection of bodily integrity. While this is surely right, there seems to me little light between the concepts of bodily integrity and bodily autonomy. What is suggested here is that harmless force magnifies wrongdoing by interfering with autonomy, of which bodily autonomy is only one sort; physically harmless force, which is the sort with which criminal law is concerned, magnifies wrongdoing by interfering with bodily autonomy or, equivalently, bodily integrity.

Spring's car was covered with snow. She opened the front and rear doors on the passenger's side and went to the driver's side to clear off the snow with a stick. Her daughter Madeline was tasked with looking for the ice scraper. Madeline put her purse on the back seat of the passenger side and looked under the front seat for the scraper. Not finding it on the passenger side, she lay on her stomach across the front passenger seat and dug around under the driver's seat. When Otis Jones came upon the scene, Madeline's booted feet were hanging out of the front seat on the passenger side, and the back door on that side of the car was standing open with a purse sitting there for the taking. Jones did not take the purse right away. Rather, he first closed the front door of the car against one of Madeline's booted feet. He didn't slam the door. He held it closed carefully with one hand, trapping her left foot, while he took the purse from the back seat with his other hand. Madeline didn't feel the door through her boot, but she realized her foot was stuck. When she turned her head to see what was going on, there was Jones, with her purse in his hand. He immediately released the door and ran away with the purse.[12] He was caught by the police shortly afterwards and found to be in possession of Madeline's credit cards and a few other items from her purse. He was later convicted of robbery, rather than larceny.[13] Jones did not harm Madeline Spring. Nor did he use offensive force: While she didn't choose to have her foot held still, nor did she in any way *refuse* that it should remain where it was held. So far, the case bears an important similarity to typical thefts by stealth, which are not robberies. It is common, for instance, for pickpockets to steal by distracting the victim. A pickpocket who touches their victim's elbow while carefully reaching into their pocket does not use offensive force. The reason is that although the victim in such a case does not consent to have their elbow touched, nor do they refuse the pickpocket's touch. Offensive touching requires refusal. Assuming they understood that Jones used neither harmful nor offensive force,[14] the jury must have reasoned that by pressing the car door against Madeline Spring's foot, Jones used *harmless force*. The verdict was upheld on appeal.

The view proposed here will aid in the principled assessment of such decisions. Did Jones use force in a sense of the term in which Spring was subjected to greater wrongdoing than she would have suffered had she merely been a victim of larceny? If not, then Jones should not be subject to the more severe punishment for robbery. The view to be offered is simply stated: A person's act is performed with harmless force *if and only if* the act manifests a disposition to take there to be a reason to escalate, rather than to back off, in the face of permissible, voluntary acts of the victim's that serve as obstacles to the person's success.

Explaining the account of force offered here is the task of Section 2. Section 3 explains why acts that are forceful in this sense are magnified in wrongdoing. I claim that where there is harmless force, there is a more egregious invasion of autonomy than where there is not. The reason is that to be subjected to harmless force is to be given reasons to aid the wrongdoer in acting against one's interests. The section explains how this follows from the account of harmless force offered here. The conclusion reflects on some legal applications of the proposed view of harmless force. One small implication: Jones committed only larceny and not robbery. The conclusion also looks briefly at the broader project of using greater and more intrusive government power against violent offenders, in contrast to non-violent ones, as under robbery statutes and the Armed Career Criminal Act, and reflects on the import of the discussion for the widely accepted idea that, whatever we might think of criminal law in general, and granting its creeping tendency towards overbreadth, it is functioning as it ought to when it is used to respond to violence.

12. Jones was chased immediately by Florence Spring and he turned back towards her and yanked her purse from her arm. This was a second count of robbery of which he was convicted. I set it aside for the sake of simplicity.
13. *Commonwealth v. Jones* (362 Mass. 83 (1972))
14. And assuming also that there are only three ways for larceny to be forcibly committed.

2. The Nature of Force

This section explains one particular view of harmless force. In our cases of interest, a person, such as a criminal defendant, D, performs a token act **a** (of some type A) in order to reach goal G. In the process, D wrongs a victim, V. O is a class of possible obstacles to D's achieving G through **a**, which would be permissibly imposed by V. A' is a particular type of act: Each token of A' is an *escalation* of **a.** An escalation of a token act is an act that is even more strongly opposed by the same type of reasons that oppose the token act itself.

> D's **a**-ing involves harmless force if and only if **a** manifests a disposition to take there to be, in light of the appearance of any member of O, a reason to perform some token of A'.

So, consider the habitual abuser who gently removes the ring from the victim's finger. Taking the hand and removing the ring is A, and the token act of that type performed by D is **a**; selling the ring is G. To see that **a** is harmlessly forceful, consider the situation in which V withdraws their hand (that is a member of O). Behaving in this way is a permissibly imposed obstacle to D's taking the ring; it will prevent D from doing so unless D takes further steps. Furthermore, in light of V withdrawing their hand, D takes themselves to have a reason to, for instance, hold the hand more tightly, or even break a finger (both tokens of A')—these are both things that would involve an escalation of the token act of removing the ring. Because this disposition on D's part is manifested in the act of taking the ring, that act involves force, on the account offered here.

Note that, in general, earnest threats are harmlessly forceful, under this account. The threatener who honestly asserts that they will impose a nasty consequence if the victim does not comply thereby confesses a disposition to impose the nasty consequence and also identifies a condition that would trigger it: the victim's non-compliance. Assuming, as is plausible, that imposing the nasty consequence is an escalation of the act of threatening itself, the threatener therefore asserts themselves to possess a disposition to escalate. (As we will see below, bluffing threats can also be harmlessly forceful.)

Of the various concepts invoked here, the ones most in need of elaboration are the concepts of a disposition to treat a fact as a reason and what it is to manifest such a disposition.[15]

2.1 Dispositions to Treat Facts as Reason-giving

The disposition that needs to be manifested by one's act for the act to involve harmless force is a disposition to treat certain facts as reason-giving. When an obstacle to the achievement of a goal appears, this implies, in the cases of interest, that escalation has become necessary for one to achieve the goal. On the view being presented here, the agent using harmless force is disposed to treat the fact that an escalation is a necessary means to achieve the goal as a reason to escalate. The disposition in question, then, plays a role in guiding the agent's deliberations and decisions. It is a disposition to deliberate about what steps to take to steal the ring when the victim withdraws their hand, and in which escalations in the removal of the ring are taken to be rationally supported by the fact that the victim has withdrawn their hand. An agent who is disposed to treat a given fact as a reason to act a certain way will be more likely, *ceteris paribus*, to choose to act that way given their belief in the fact. And the agent will be more likely to

15. The notions of "escalation" and "obstacles", also invoked here, are intuitive but, still, a few words can be said in elaboration of them. I am assuming a rationalist conception of wrongfulness according to which a wrongful token act is opposed by reasons; there is sufficient reason not to perform it. An escalation is an act that is even more strongly opposed by *those same* reasons. So if an act is wrongful because it is disrespectful, an escalation of it is any act that is even more disrespectful. Obstacles, of relevance, are conditions that reduce the ability of the agent to achieve the goal *and* which are permissibly imposed by the person who would suffer a setback if the goal was achieved (that is, the victim). Conditions that give the actor reason to give up the goal, but do not diminish his ability to do so, are not obstacles of relevance. Offering to pay the agent to refrain, for instance, is not an obstacle, while grabbing his wrists is. The Relevant obstacles are actions that exceed some contextually supplied level of stringency and that are permissibly put in place by the victim.

consider performing the action—more likely to put it on the menu, as it were—given their belief in the fact. The agent will also be more likely to justify or rationalize the choice to perform the action by citing the fact.

Criminal culpability, in contrast to criminal wrongdoing, should be analyzed with reference to the agent's disposition to recognize, weigh and respond to reasons. To be criminally culpable for behavior banned by statute is to manifest a disposition to either ignore or incorrectly weigh the legal reason-giving force of those features of the conduct that make it match the statute's description.[16] This implies that there is an important relation between the features of wrongful conduct in virtue of which it is performed with harmless force and the features in virtue of which the agent is criminally culpable for it: Both involve the manifestation of a problematic disposition to treat facts as reasons for and against conduct.

Two equally wrongful acts can be performed with different degrees of culpability. This view of culpability explains this: One might manifest a more problematic reason-related disposition than the other. This is why a negligent homicide involves less culpability than an intentional one, even though the two acts are equally harmful and, *ceteris paribus*, equally wrongful. The negligent act manifests a less problematic disposition to recognize or weigh the reason-giving force of the fact that one's act promises another's death than the intentional act; the negligent actor does not care enough to notice that their act is lethal, although they might continue to take that to be a very strong, even decisive reason against performance, while the intentional actor takes the act's lethality to be a reason in favor of its performance.[17]

There is greater culpability in performing an act with harmless force than without it. Taking another's property by harmless force and taking it by stealth both manifest the disposition to under-weigh the reason-giving force of another's ownership; both actors fail to take that to be a decisive reason not to take the object without the owner's permission. However, taking by force harmlessly is different from taking by stealth, which is also harmless. To use harmless force is to manifest a willingness to escalate. The agent, in fact, has a stronger reason *against* an act of escalation than they have against the act of which it is an escalation, and yet they take themselves to have a reason in favor of it. The agent who uses force in this sense, then, manifests a disposition to treat the reasons against wrongful conduct to be even less weighty than the agent who does not use this type of force. If the agent has a reason not to intimidate the victim—outweighed, in their estimation, by the reason to take the victim's property—they have an even stronger reason not to cause more intimidation. But if they are willing to cause more intimidation—they are willing to escalate their intimidating behavior—they under-weigh the reason not to intimidate, or over-weigh the reason to take the victim's property, even more heavily than someone who is unwilling to escalate. By manifesting a willingness to escalate, then, the agent manifests a more objectionable disposition regarding reasons than an agent who performs the same wrongful act without using harmless force. The result: Acts performed with harmless force are more culpable than acts performed without it.

One might think that this is the end of the story. The reason that it makes sense to punish robbery more heavily than larceny, even when the force used is harmless, is that robbery is committed with a higher degree of culpability. Because punishments ought to be proportional not just to wrongdoing but to culpability, such forceful acts ought to be punished more heavily. While I endorse this line of reasoning, I hold that it is only part of the story. Harmlessly forceful acts not only magnify culpability, but they also magnify wrongdoing. Stealing is more wrongful when accomplished by harmless force. Noting how wronging harmlessly but forcefully involves more culpability than equally harmless wrongdoing committed without force does not explain how wronging forcefully is also *more wrongful* than wronging without force.

16. See Gideon Yaffe (2018) *The Age of Culpability: Children and the Nature of Criminal Responsibility*, Oxford: Oxford University Press, chapter 3.
17. See, for instance, Gideon Yaffe (2012) "Intoxication, Recklessness and Negligence" in *Ohio State Journal of Criminal Law*, v. 9, pp. 545-583.

Note that under the account of the disposition to escalate offered here, those who act with harmless force manifest something that is fittingly labeled "dangerousness". Typically, to say that an object is dangerous is to say that it is disposed to cause harm and that this disposition is easily triggered. The disposition under consideration here is not a disposition to cause harm. But it is a disposition to thwart efforts to prevent achievement of a goal. It is, therefore, a disposition to do things that are setbacks to the interests of the victim. Here then is a natural gloss on the account of harmless force offered: conduct that manifests dangerousness of a distinctive sort.

2.2 *Manifestation*

One might think that the account of force offered here is subject to two kinds of counterexamples: First, perhaps there are harmless acts that, intuitively, do not involve force that the theory misclassifies as involving it. Say that the pickpocket takes the wallet from the victim's pocket by stealth but is disposed to use violence in response to steps taken by the victim. The pickpocket, say, is ready to break the victim's fingers if they try to grab their wallet before it is taken. But because the victim never adopts such measures, the pickpocket takes the wallet without violence. Surely that's not a forceful taking, even though the perpetrator is ready to escalate. Call the offender in this example the "Dangerous Pickpocket". Second, perhaps there are cases that do involve force, but not in any of the forms so far identified, which the theory misclassifies as non-forceful. Say a habitually physically abusive intending thief carefully and harmlessly opens the victim's hand to take their ring but is unwilling to do anything worse. Because the thief chooses the maximally objectionable means to achieve their goal that they see any reason to perform, they are unwilling to escalate. Nonetheless, the thief took the ring by force in the same way as if they had been willing to escalate. Call this offender the "Safe Ring Thief".

For reasons that will be explained, the theory correctly classifies both of these examples. Under the account of "manifestation" that will be explained, *possessing* the disposition to treat obstacles as providing reasons to escalate is neither sufficient nor necessary for *manifesting* this disposition. Thus, the non-violent taking of the wallet does not manifest the disposition, despite the fact that the agent possesses it; the wallet, therefore, is not taken forcibly. Similarly, because possession of the disposition is not necessary for manifesting the disposition, it is reasonable to argue (and, as we will see, it follows from the account proposed) that the conduct of the Safe Ring Thief does manifest the disposition, despite the fact that they do not possess it.

Let's say that X's disposition to engage in behavior with quality Q1 is triggered only if X engages in Q1 behavior. Triggered dispositions are thereby manifested, but in the sense we aim to capture, it is possible to manifest a disposition that is not triggered. A threatener who gets their way never deliberates in the face of obstacles produced by the victim, but the effort here requires that issuing the threat, in such a case, manifests the disposition to deliberate in a certain way. It is true that if a person threatens another if and only if they are disposed to escalate in the face of obstacles, then threats would manifest the disposition. There is an account here of manifestation, but it is far too strong:

> Object O's engaging in Q1 behavior manifests the disposition to engage in Q2 behavior if and only if (1) O engages in Q1 behavior & (2) a thing engages in Q1 behavior if and only if it is disposed to engage in Q2 behavior.

Condition 2 precludes the possibility that threats that are complied with ever manifest the disposition to escalate. After all, it is not true that a person threatens to bring about some nasty consequence if and only if they are disposed to bring it about; there are, of course, bluffing threats, as well as people who are disposed to escalate who never threaten anyone. A revision of the position that weakens condition 2, however, has distinct problems:

> Object O's engaging in Q1 behavior manifests the disposition to engage in Q2 behavior if and only if (1) O engages in Q1 behavior

& (2′) almost all things that engage in Q1 behavior are disposed to engage in Q2 behavior.

On this view, if you behave in a way in which a lot of dangerous people behave, then your behavior manifests dangerousness. But this is an excessively low standard for harmless force. It is possible that most pickpockets are ready to escalate if their victims take steps to thwart their goals. Although it is possible to pick a pocket while being unwilling to escalate, it may be far more common to be disposed to escalate. But thefts by stealth, like those of the Dangerous Pickpocket, simply are not robberies, even if they are very common.

Can we thread the needle between these two flawed accounts of manifestation? What we need to do is specify a link between a person's observable behavior and their underlying disposition that is neither necessity (whether nomological, logical, conceptual or metaphysical), which is too strong, nor very frequent conjunction, which is too weak. What I suggest is the following position, the motivation for which I will explain: To judge that a person's behavior manifests a particular disposition is in part to judge that the likelihood that they have that disposition given that they engaged in such behavior is much higher than the likelihood that a "reference" person has it—someone who is in a contextually specified reference class. The probability that someone who has tried everything on the menu likes chocolate (that is, is disposed to enjoy the experience of eating chocolate) given that they ordered chocolate ice cream is much higher than the probability that they like chocolate given only that they placed an order. Ordering chocolate, therefore, manifests liking it.

Picking someone's pocket does not manifest the disposition to escalate, in the context of criminal justice, because the likelihood that a person is disposed to escalate given their behavior is not much larger than the likelihood that someone who engaged in such behavior but is presumed innocent of robbery (the contextually supplied reference class) is so disposed. In the criminal justice context, the question is whether someone who wronged another in a particular way is much more likely to be disposed to escalate than someone who wronged another in exactly that way but is presumed to be non-dangerous, in the requisite sense—that is, presumed to lack the disposition. Put crudely: Taking someone's wallet by picking their pocket is the kind of thing that non-dangerous thieves do. So even a dangerous thief doesn't manifest their dangerousness by picking a pocket. Roughly, then, to determine whether a particular wrongful act is harmlessly forceful, we ask whether it is the kind of thing that people who are ready to escalate would do; if so, then it is a forcible wrong.

Put more carefully:

> *Manifestation:* Object O's engaging in Q1 behavior manifests the disposition to engage in Q2 behavior *if and only if* (1) O engages in Q1 behavior & (2′′) P(An object has a Q2-disposition | The object engaged in Q1 behavior) » P(An object has a Q2-disposition | The object is in a contextually specified reference class).[18, 19, 20]

Note that under this account, possessing a disposition is not necessary for manifesting it. Consider someone who lacks the disposition

18. P(x | y) is the conditional probability of x given y; » means "much greater than".
19. Condition 2′′ bears a close relationship to the account of the semantics of generic statements offered in Cohen, Ariel (1999) *Think Generic!: The Meaning and Use of Generic Sentences*, Chicago, IL: University of Chicago Press. It is possible that a different account of the semantics of generics would serve the purpose here just as well, or even better. The argument is that an event manifests a disposition if a generic of the following form is true: "Things that figure in events of that sort are disposed in such-and-such a way."—e.g. it is a true generic that "People who donate organs without compensation are generous." What is appealed to in the main text can be construed as this view combined with Cohen's theory of the semantics of generics. For discussion of the variety of theories of the semantics of generics, see Leslie, Sarah Jane (2022) "Generic Generalizations" in *The Stanford Encylcopedia of Philosophy*, https://plato.stanford.edu/entries/generics/.
20. Under this view of manifestation, a disagreement about whether someone used force might be reduced, in the end, to a disagreement about the relevant reference class. While one can imagine a general account of what the appropriate reference class is in a particular context, I will not be offering such an account here, although I do mention the reference class appropriate to the criminal justice context.

but engages in behavior of a sort that people who have the disposition engage in; they are one of the rare exceptions. Their conduct will have manifested a disposition they lack.

Under this account, the Safe Ring Thief's conduct manifests the disposition to escalate, despite the fact that they lack the disposition. Many people who have a history of inflicting abuse of the sort we are imagining, who remove rings in this way, are disposed to escalate. That is, P(Someone has the disposition | They behaved in the way the thief did) is quite high. The relevant reference class is those who behave in the same way and have the same history but are presumed innocent of robbery—that is, they are presumed to *lack* the disposition to escalate, despite engaging in the very behavior that the actual thief engages in. The probability that someone in this class has the disposition to escalate is zero. It follows that P(Someone has the disposition | They behaved in the way the thief did) » P(Someone has the disposition | They behaved in the way the thief did & lacks the disposition). So the behavior manifests the disposition to escalate, under the proposed account of manifestation, and the thief is, therefore, a robber.[21]

A similar line of reasoning demonstrates that to get one's way with a bluffing threat is, sometimes at least, to get your way with harmless force. The likelihood that a person who points a gun at another and says, "Your money or your life" is ready to pull the trigger if the victim does not comply is much higher than the likelihood that someone who behaves in the same way is ready to pull the trigger *given that they are not ready to follow through on the threat*. People who say such things in the circumstances we are imagining—not as part of a theatrical performance, for instance—are far more likely to be in earnest than any bluffing threateners. That does not imply that the person who behaves in that way is not bluffing. They might be, but still, their conduct manifests a willingness to escalate in the face of non-compliance, even though they in fact lack the disposition manifested. Note that this is in line with the fact that demonstrating that one was bluffing is not a defense, under the law in any jurisdiction, against a robbery charge without showing that earnest threats in similar circumstances are very rare.

A further word here about the presumption of innocence is important. For the fact finder to comply with the presumption of innocence with respect to a particular element of a crime, they must initiate their reasoning by trying to doubt its presence but can continue to draw on their actual degree of confidence with respect to all other conditions of relevance to the inquiry. A fact finder who is convinced that the defendant took an object that was not theirs still reasons in accordance with the presumption of innocence if they hold this confidence fixed while trying to doubt that the defendant lacked the owner's permission to take it. In the criminal justice context, on the view of manifestation on offer, knowing whether a crime was committed with harmless force requires comparing the defendant who we are confident committed the lesser crime to someone who also acted criminally in that way but is presumed to have done so non-forcibly. That is, in assessing the force element of robbery, we do not compare a person who acted as the defendant did with someone who did nothing at all wrong. Rather, we compare a person who acted as the defendant did with someone who committed larceny in just the way the defendant did but was not dangerous. This is the relevant reference class for assessing manifestation because this form of piecemeal application of the presumption of innocence is essential to the fact finder's inquiry.

3. The Wrongfulness of Harmless Forcing

There is no mystery about why harmful and offensive forcing are more wrongful than non-forceful wrongful behavior: It is wrong to cause harm, and wrongful to bring about an event that another person actively opposes, so the person who uses either type of force in performing a wrongful action commits an additional wrong. The puzzle that remains,

21. The argument is that the likelihood is high that someone who behaves in a certain way has a certain disposition, even if the world happens to be mostly populated by exceptions. This is to assume a non-frequentist account of probability. For discussion of such an account, see Lewis, David (1994) "Humean Supervenience Debugged" in *Mind* 103: 473–490.

which I aim to solve in this section, is why harmless force magnifies wrongdoing.

Our view of harmless force appears to imply that there is much in common between harmlessly forceful and non-forceful norm violations. Both the robber and the larcenist take another's property without permission. If the robber uses harmless force, they might cause the world to be no worse than the larcenist causes it to be. The difference between them, on the view proposed, is solely in a possibly untriggered disposition manifested in the robber's behavior and not in the larcenist's. It might be a disposition that the robber does not even actually have, given the account of what is involved in manifestation. Recognizing this, it can seem impossible that a harmlessly forceful robbery involves greater wrongdoing than an otherwise identical larceny. How could the manifestation of an unexercised disposition, which you might not even have, make any difference to the wrongfulness of your behavior?

Given what has been proposed about manifestation, there are four cases to consider:

		D's conduct manifests the disposition?	
		Yes: D's conduct is forceful	**No: D's conduct is not forceful**
D is in fact disposed to escalate?	**Yes**	Case I	Case II
	No	Case III	Case IV

Case I is the paradigm case: Even if the actor does not physically harm the victim or place the victim's body in a state that the victim refuses, they behave in a way that is wrongful and, for the reasons described in the previous section, manifest the disposition to escalate; and, most importantly, they are, indeed, so disposed.

Case I harmless forcible norm violations are more wrongful than non-forcible ones, I suggest, because they diminish the victim's autonomy by causing the victim to aid the offender in wronging them. The special problem with being harmlessly robbed—that is, in contrast to being a victim of larceny only—is that when you are robbed, you aid in the commission of a larceny perpetrated against you. Actors who steal by force induce their victims to be party to their own property losses, on pain of irrationality. They thus add a violation of another's autonomy to the wrongdoing involved in stealing. This is an additional wrong.

To see this, start by noting that, ordinarily, someone who is about to become a victim of crime, or about to be wronged, has reason to generate obstacles. They have reason, that is, to take steps to protect themselves from being victimized. However, in Case I (and in Case III—on which more momentarily), on the view proposed, D manifests a disposition to treat all such efforts as reasons to escalate. Assuming V has a reason to avoid facing an escalated step, D's willingness to take one gives the victim a reason *not* to generate obstacles to D's act; to do so is to provide D with a reason to escalate. If the escalation would be bad enough, and the victim behaves rationally, they will refrain from self-protective acts. But such an omission on V's part *aids* D's effort to violate the norm and thereby to victimize V. Even if V overlooks the reasons that they have for refraining from imposing obstacles, they are still under rational pressure to aid D by omitting to place obstacles in the way of D's progress.[22]

So, if D uses harmless force when performing **a**, and the example is of Case I, the landscape of reasons has an importantly different structure than it has when an agent does the same thing without force: The victim is under rational pressure to aid D in their efforts to achieve G by performing **a**. There is an important difference in the victim's

22. To be an accomplice is to provide aid with the right intentions. What has just been argued is that those who are subject to harmless force in Case I, in contrast to those who are offended against non-forcibly, are under rational pressure to provide aid (in the form of omitting the placement of obstacles) to those who are offending against them. Those who do omit to place such obstacles thereby provide aid. Because they do this while lacking the intentions required for criminal complicity, they are not accomplices to the crimes of which they are victims.

autonomy when D uses harmless force: The landscape of reasons is structured so as to direct their agency to their own detriment. The victim in Case I will, in effect, fall into one of two categories of diminished autonomy: They will either do what they have most reason to do, which is to aid in being wronged by staying out of D's way, on the one hand; or, on the other, they will behave contrary to reason and refrain from aiding in their own wrongful treatment by standing in the offender's way in expectation of escalation, and so to their own detriment. They will either participate in harm to themselves, or else act contrary to reason, both of which are ways of acting non-autonomously.

It should be clear why there is no magnified wrongdoing of this form in either Case II or Case IV. In Case IV, the victim neither has nor takes themselves to have a reason to refrain from imposing obstacles to D's progress; their autonomy, therefore, is not diminished. The example of the Dangerous Pickpocket is of Case II. There is no magnified wrongdoing here, in comparison to the same act performed in the absence of the disposition to escalate, because while the victim has a reason not to place obstacles, they do not refrain from placing them for this reason; rather, they simply don't notice. They therefore avoid aiding the effort to steal their wallet. Because, on the view on offer, Cases II and IV do not involve harmless force, this is how it should be.

The most challenging examples are of Case III, of which the Safe Ring Thief is an example. The victim in such cases behaves as though D is dangerous and so the victim takes themselves, falsely, to have a reason to omit obstacles to being wronged by D. This is a mistake: Were they to withdraw their hand, D would back off. How can someone's wrongdoing be magnified by *the appearance* that they have a property they actually lack? Put differently: Is there diminishment of the autonomy of someone who falsely believes themselves to have a decisive reason not to do something that is actually favored by their reasons? If so, then the Safe Ring Thief's wrongdoing is magnified; if not, it is not.

A first point to make is that we might be entirely justified in considering criminal liability to be aggravated in such cases, *even if there is no magnified wrongdoing*. It is possible that optimal policy tolerates the moral error. Perhaps, for instance, there are an intolerably large number of false acquittals in a system where a person lacking the disposition, whose conduct manifested it, can use that fact in their defense in a robbery trial; too often, such defenses are honored when they should not be. If so, we might prefer a system without such a defense despite the fact that this alternative system allows occasional convictions of larcenists for robbery where their conduct manifested a disposition to escalate that they lacked.

Note that to follow this line is to retreat, slightly, from a full moral argument in favor of the legal regime under which forcible crimes are invariably worse than non-forcible ones; it is to grant that there might be good reasons to treat them as such even when they are not morally worse. There is a line of thought, however, that does not involve even this slight retreat. Whether it is fully defensible, I am not sure. This line of thought begins with reflection on small linguistic errors. Say that D, when gently opening V's hand, utters the words, "If you resist, I will escalate." But imagine that in saying this, D intended to say, "I will not escalate in response to your resistance." D simply misspoke. Assuming that D thereby induces V to allow their hand to be opened, which is what D was hoping to achieve with the statement they intended to make, did D thereby diminish V's autonomy? Although I am uncertain, it seems defensible to answer yes. D gave V a reason to refrain from resistance, even though D did not mean to give V such a reason. So, in refraining, V either knowingly or negligently aided in D's theft of the ring. On this view, along with the *permission* to treat D as though they meant what they said, there is a *reason* to do so. To behave in a way that makes it permissible for another to treat you in a certain way is to give them a reason to do so. If this is right, the situation is similar to the Safe Ring Thief. D's act of opening V's fingers is like misspeaking, thereby giving V a reason to act as though D is dangerous when they are not. In other words, under a controversial—and here unexamined—conception of the way in which one person's conduct generates reasons for another person, in Case III, the wrongdoing of D's act is magnified for the same reason as in Case I, even though they do not possess the disposition

their conduct manifests.

4. Conclusion

Note that on the account of force offered here, *anything* that an offender does to impede the interests of another person could, in principle, be done with force. Assuming the act does not cause harm, what matters is the unexercised disposition that the conduct manifests, which may not be a function of the conduct's intrinsic qualities or actual effects. Very soft, even gentle forms of conduct are forcible provided that they manifest the disposition to escalate in the face of permissibly imposed obstacles.

Let us return, then, to the case of Otis Jones, with which we began. Was Jones in fact disposed to see reasons to escalate in the face of steps taken by Madeline Spring to defend her purse? Perhaps he was. But even if this is true, did his act manifest such a disposition? No. To see this, start by noticing that Jones fell far short of harming Spring when he closed the car door against her boot; he elected to take a step that was certain not to harm her at all. And he made that choice from a menu of options including ones that might have harmed her, but that would also have increased the probability that he would take the purse safely and successfully. Had he elected to slam the door, there would have been antecedent uncertainty about how much harm the act would have caused, and so there would have been evidence that he was willing to inflict the most harm that this act could reasonably have been expected to cause. If, by slamming the door, he inflicted no pain or any other form of harm but could not have reasonably ruled out the possibility that he would inflict a great amount of harm, then slamming the door would have supplied substantial evidence of a willingness on his part to inflict harm, and so a disposition to recognize reasons to take the purse by taking a step that involved inflicting that much pain. But he elected to take a course of conduct that caused no pain and could not reasonably have been expected to cause any. That is, Jones appeared to act *with the intention of inflicting no harm on Spring*. It is true that there are times when someone who acts with such an intention is in fact disposed to escalate; imagine a case in which there is a good reason to think that D had to keep the victim from screaming, which injuring them would have caused. But such cases are not typical. Far more often, those who act with this intention are not disposed to escalate. So, the conditional probability that Jones had the disposition, given his conduct, is quite low, and is therefore not much higher than zero, which is the conditional probability that someone presumed innocent of robbery had the disposition. The result: Otis Jones did not use force. The case was wrongly decided. The point here is *not* that he might have committed robbery, but that there was insufficient evidence that he did. Rather, to commit robbery, his harmless conduct, assuming that Spring did not refuse it, must have manifested a disposition to escalate; because it did not, he did not commit robbery at all.

There is a famous and difficult question about what conduct warrants criminalization, and a closely related question about what the elements should be of conduct that is rightly criminalized. Those, and I consider myself among them, who are attracted by the wrongfulness constraint—according to which only morally wrongful conduct should be criminalized—are also attracted by the idea that a condition should be an element of a crime only if the element contributes to making conduct that includes it wrongful in the very particular way necessary for it to meet this necessary condition for criminalization.[23] That is, something should be an element only if it is part of what explains why the resulting conduct is wrongful in the way that justifies it being criminal. For reasons explained above, then, it makes sense for force, in the sense in which that term is analyzed here, to be an element of crimes where part of what justifies the criminalization of the relevant conduct is that it is sometimes wrongful thanks to the fact that it involves a diminution of another's autonomy. That is, what justifies making force an element is that one of the forms of conduct we aim to punish is controlling others and making them in part the agents of their own

23. For a study of those necessary conditions, see Husak, Doug (2008) *Overcriminalization: The Limits of Criminal Law*, Oxford: Oxford University Press.

harm. Force should be an element when the target wrongdoing is not only the causation of harm but also the co-opting of the victim in the process of inflicting harm on them.

While contemporary criminal law is excessively broad by many metrics, efforts to scale it back almost always identify violent acts as those against which it is legitimately used. It should be scaled back, but not so far as to minimize punishment for violent acts. This is why, for instance, many jurisdictions that divert drug offenders away from prison and into treatment routinely predicate eligibility for such comparatively lenient treatment on the absence of violence in the crimes the offender has committed. The larcenist who stole to pay for drugs will have a "drug court" adjudicative route available to him, while the robber will not. The argument is not just that violent acts are more destructive than non-violent ones, but that the people who commit them differ in some important way from those who do not; they are proper targets of deep condemnation and punishment. The view offered here diagnoses this argument. While we all want benefits that either others enjoy or that would require us to harm others to gain them for ourselves, only some of us are willing to use those others' agency to gain these desired benefits. Given the further argument, essential to a liberal form of government, that government behavior is authorized entirely by the exercise of agency on the part of the people, often with the aim of advancing their own interests, someone who is willing to co-opt another's agency in this way treats as useful and fungible the central resource that must be treated as sacred and untouchable: others' agency. People who are willing to use force are, for this reason, enemies not of the state, as such, but of the type of thing that sits at the root of the state's authority. They therefore represent a threat to the very legitimacy of the state's power. What else could the state be authorized to use power against?[24]

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