VIOLENCE BETWEEN LOVERS, STRANGERS, AND FRIENDS

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INTRODUCTION

In his *Nichomachean Ethics*, Aristotle remarked that behavior that is "unjust . . . becomes more unjust as it is practised on closer friends. It is more shocking, e.g., to rob a companion of money than to rob a fellow-citizen, to fail to help a brother than a stranger, and to strike one's father than anyone else."[1] Modern society appears to have taken the opposite view: violent behavior directed towards strangers is perceived as more serious than violent behavior between two individuals who have an existing relationship. While violence between intimates is seen as an essentially unavoidable by-product of personal relationships, violence between strangers has been portrayed as a random act by predators who threaten society at large.

The significant increase in population and urbanization in modern times has undoubtedly given rise to more situations where strangers interact, and thus more opportunities for stranger violence. Yet even today, the majority of violent crimes are committed by people who know their victims. Between 1998 and 2002, for example, 54% of all violent crimes occurred between non-strangers.[2] And for certain types of violent crimes,

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1. ARISTOTLE, NICHOMACHEAN ETHICS 224–25 (Terence Irwin trans., 1985) ("What is just is also different, since it is not the same for parents towards children as for one brother towards another, and not the same for companions as for fellow-citizens, and similarly with the other types of friendship. Similarly, what is unjust towards each of these is also different, and becomes more unjust as it is practised on closer friends. It is more shocking, e.g., to rob a companion of money than to rob a fellow-citizen, to fail to help a brother than a stranger, and to strike one's father than anyone else. What is just also naturally increases with friendship, since it involves the same people and extends over an equal area.").

2. In 2005, the majority of violent crimes, 51.77%, were committed by non-strangers. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 9 tbl.9 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv05.pdf [hereinafter CRIMINAL VICTIMIZATION 2005]. This figure appears to have remained relatively stable over time. *See, e.g.*, VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 19 (1977) (1970s study of felony arrests in New York City; 56% of all charged violent felonies involved some prior relationship between the offender and victim). However, some years the overall victimization rates of strangers are slightly higher than the victimization rates for non-strangers. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1993 30 (1993), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus933.pdf ("Fifty-three percent of all violent victimizations, 28% of rapes, 81% of robberies, and 50% of assaults were

the percentage committed by non-strangers is much higher. In 2004, only 23% of murders[3] and approximately 30% of sexual assaults were committed by strangers.[4] Robbery is the only category of violent crime consistently committed more often by a stranger rather than by someone known to the victim.[5]

The specter of violence at the hands of a stranger dominates the modern construction of crime.[6] Despite the higher rate of non-stranger violence, respondents to a recent poll indicated a belief that they were significantly more likely to be shot or badly hurt by a stranger than hit by their spouse or partner.[7] Criminal law commentators have long remarked

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committed by strangers in 1993.") [hereinafter CRIMINAL VICTIMIZATION 1993]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1995 34 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus9503.pdf (stating that 51% of all violent crimes that occurred in 1995 were committed by a stranger) [hereinafter CRIMINAL VICTIMIZATION 1995].

3. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2004 UNIFORM CRIME REPORTS 18–23 (2004), *available at* http://www.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf.

4. "[S]even in ten female rape or sexual assault victims stated the offender was an intimate, other relative, a friend or an acquaintance." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME CHARACTERISTICS, http://www.ojp.usdoj.gov/bjs/cvict_c.htm (last visited June 13, 2006).

5. "Robbery was the offense most often committed by strangers; 77 percent of the robbery victimizations were committed by strangers." MARC RIEDEL, STRANGER VIOLENCE: A THEORETICAL INQUIRY 64 (1993) (citing victimization surveys from 1982 to 1984); *see also* CRIMINAL VICTIMIZATION 2005, *supra* note 2, at 9 tbl.9 (indicating that 66% of robberies in 2005 were committed by strangers); VERA INST. OF JUSTICE, *supra* note 2, at 19 (1970s study of felony arrests in New York City; 64% of all charged robberies were committed by strangers); F.E. Zimring & J. Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1 (1986) (reporting that 87% of robberies in Chicago in 1986 were committed by strangers).

6. *See, e.g.*, Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 71 (1998) ("[F[ear of crime is associated with a burglary, robbery, rape, or assault perpetrated by a stranger. Fear of strangers, in short, helps generate the fear of crime."); Joachim Kersten, *Crime and Masculinities in Australia, Germany and Japan*, 8 INT'L SOC. 461, 461 (1993) ("Perpetrators of offences that fit into stereotypical images of 'stranger-danger' appear to be at the basis of crime debates, regardless of evidence indicating that most reported and (with some likelihood) most unreported attacks, occur between people who know each other."); Marc Reidel, *Stranger Violence: Perspectives, Issues, and Problems*, 78 J. CRIM. L. & CRIMINOLOGY 223, 223–24 (1987) (noting previous commentators "have argued that the fear of crime is basically a fear of strangers"); Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 487 (1999) ("The fear of the stranger fuels the majority of criminal legislation . . . ."); *see also* U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 52–53 (1967) [hereinafter CHALLENGE OF CRIME] ("[T]he fear of crimes of violence is not a simple fear of injury or death or even of all crimes of violence, but, at bottom, a fear of strangers."); V. Edwin Bixenstine, *Spousal Homicide*, *in* LETHAL VIOLENCE: A SOURCEBOOK ON FATAL DOMESTIC, ACQUAINTANCE AND STRANGER VIOLENCE 231, 231 (Harold V. Hall ed., 1999) ("Among violent crimes, homicide is rare. Intuitively, it strikes us as . . . the actions of a menacing stranger.").

7. The poll, which was conducted in October, 1998, asked respondents to rate the likelihood of a series of incidents happening to them. When asked about the likelihood of being shot or badly hurt by a stranger, 8% responded very likely, 30% said somewhat likely, 40% said not likely, and 18% thought there was no chance it would occur. When asked about the likelihood of being hit by their spouse or partner, 6% responded very likely, 8% said somewhat likely, 24% said not likely, and 58%

that violent crimes committed by strangers are more likely to lead to an arrest, result in a conviction, and garner a longer sentence than comparable crimes committed by family or acquaintances. Well-publicized studies of capital sentencing decisions have consistently demonstrated that offenders who murder strangers are significantly more likely to receive the death penalty than offenders who murder people they already know.[8] The idea that crimes between strangers are more serious than crimes between those who already know each other has been repeated so often[9] that it has become the conventional wisdom in criminal law.

Many previous publications have discussed the relative lack of priority accorded to violent crimes that occur in domestic or other intimate relationships.[10] This Article examines whether the modern view of stranger violence as more serious crime than violence that occurs in any relationship where the victim and offender already know one another—including violence between intimates and family members, as well as violence between friends and acquaintances—can be justified.

For ease of reference, this Article collectively refers to violent acts committed by intimates, family members, friends, and acquaintances as "non-stranger violence." This definitional decision does not reflect a judgment that criminal justice decision makers treat all non-stranger violence alike. To the contrary, the available data suggest that most people perceive that the seriousness of crime is inversely related to the closeness of the personal relationship—that is to say, violence between intimates and

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thought there was no chance it would occur. PollingReport, *Misc. HealthCare Issues*, http://www.pollingreport.com/health.htm (last visited Sept. 26, 2006).

Nor does the disproportionate fear of strangers appear to be a new phenomenon. *See* Robert J. Sampson, *Personal Violence By Strangers: An Extension and Test of the Opportunity Model of Predatory Victimization*, 78 J. CRIM. L. & CRIMINOLOGY 327, 327–28 (1987) ("[I]t is the possibility of attack by strangers that seems to engender the most intense feelings of vulnerability and fear. . . . [T]he general public tends to 'equate strange with dangerous,' thereby rating victimization by strangers as one of the most serious and pressing crime problems." (quoting C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 8 (1978))).

8. *See infra* note 32.

9. As Gottfredson and Gottfredson put it:

> Nearly every decision-maker in the [criminal justice] process seeks alternatives [to prosecution] for criminal acts between relatives, friends and acquaintances. The most grave dispositions are reserved continuously for events between strangers. Victims report non-stranger events less frequently, police arrest less frequently, prosecutors charge less frequently, and so on through the system.

MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, DECISION-MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 331 (1st ed. 1980). For further examples of such statements, see DONALD BLACK, THE BEHAVIOR OF LAW 40 (1976); RIEDEL, *supra* note 5, at 14; VERA INST. OF JUSTICE, *supra* note 2, at 65; Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Caseload*, 55 EMORY L.J. 691, 701 (2006).

10. *See infra* notes 64–67.

family members is treated as least serious. Nor is the "non-stranger" terminology meant to imply that the arguments about whether non-stranger violence should be treated as seriously as stranger violence are unaffected by the type of relationship between the victim and the offender. (In fact, several of the arguments in Part III apply only to close personal relationships.) This Article uses the term "non-stranger" because many of the arguments in support of treating stranger violence more seriously are based on specific assumptions unique to strangers, and it is this unique treatment of stranger crime that this Article ultimately seeks to challenge.[11] Assumptions about culpability, dangerousness, and victim fault may differ with respect to different non-stranger relationships, and this Article endeavors to note where these differences affect any conclusions about the justification of treating stranger violence as more serious.

Part I of this Article briefly summarizes the commentary and studies that have examined the effect of victim-offender relationships on criminal justice decision making. It also notes instances where the treatment of stranger violence as more serious crime than comparable non-stranger violence has been codified in statutes or other written regulations.

Possible justifications for the prioritization of stranger violence over non-stranger violence are explored in Part II. Those justifications include (a) a perception that stranger offenders are more culpable than non-stranger offenders; (b) a perception that stranger offenders are more dangerous than non-stranger offenders; (c) a belief that the non-stranger victims are at least partially at fault for the offenders' actions; (d) a belief that non-stranger violence is best resolved as a private or non-criminal matter; and (e) fear and general public concern caused by stranger crime. This Part examines the empirical evidence that supports and contradicts each explanation, as well as the soundness of each justification for differentiating between offenders who are similar in all respects except for whether they knew their victims prior to the offenses.

Part III makes the affirmative case for according non-stranger violence the same level of priority as stranger violence by identifying three

11. For a summary of evidence suggesting that the underenforcement of violent crimes has historically been more pronounced for all non-stranger violence (including both domestic and other personal relationships) than for stranger violence, see LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 37–38 (1992) (describing one commentator's observations of Los Angeles in the early 1970s of "a general pattern of police inaction in the face of violence stemming from any kind of personal dispute, not just domestic" and discussing a 1977 study finding that "where the suspect and victim were strangers, police failed to make arrests in 66% of the cases (compared to 83% of cases where the parties were acquainted)").

arguments that suggest non-stranger crime is more serious than stranger crime. Drawing on the role of victim harm in criminal liability and sentencing decisions, it argues that the prioritization of violent crimes committed by strangers ignores the unique harms associated with non-stranger violence, such as increased victim injuries and breach of trust. Violence within personal relationships is also distinct from stranger violence in that a non-stranger offender violates not only the ordinary duty of one citizen not to physically harm another, but also the additional obligations and duties associated with many close social relationships. This Part briefly outlines the various positive obligations that the law imposes in close personal relationships, and it concludes that in prioritizing violence by strangers, the criminal law is inconsistent with other areas of law. The final affirmative argument in favor of equal prioritization of stranger and non-stranger violence is an argument about the interplay of criminal law and social norms: in treating stranger violence as more serious than non-stranger violence, the criminal justice system reinforces the questionable notion that violence is an unavoidable, and thus potentially excusable, aspect of personal relationships.

The final Part of this Article briefly sketches my conclusions and their implications, explaining that my conclusions do not necessarily require more severe treatment of non-stranger violence, but indicate that non-stranger violence should receive equal treatment to stranger violence. This Part also notes that the two types of crime differ in some practical respects, and those differences must be considered in setting crime prevention and enforcement policies. Ultimately, the most effective prevention and enforcement techniques for non-stranger violence may require changing the public perception of non-stranger violence as less serious than stranger violence. The last several decades have already seen significant changes in public attitudes towards the seriousness of domestic violence and acquaintance rape.[12] But even today stranger violence continues to garner a disproportionate amount of public attention and criminal justice resources. If, as this Article concludes, the more serious treatment of stranger violence cannot be justified, then public attitudes toward non-stranger violence require further change.

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12. *See, e.g.*, David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320 (2000) (noting "evolving public attitudes toward acquaintance rape"); George C. Thomas III, *A Critique of the Anti-Pornography Syllogism*, 52 MD. L. REV. 122, 133 (1993) (discussing a "change in attitude" toward acquaintance rape); *see also infra* note 231.

I. EVIDENCE OF THE PRIORITIZATION OF STRANGER ABOVE NON-STRANGER CRIME IN THE CRIMINAL JUSTICE SYSTEM

Many criminal law commentators have remarked on the criminal justice system's different treatment of stranger crime and non-stranger crime.[13] The prevailing view among commentators is that the criminal law is most likely to become involved, to proceed aggressively, and to be penal in style when the parties are strangers; it is least likely to become involved and most likely to be lenient and conciliatory when they are intimates.[14] As one criminal law commentator explained, the existence of a preexisting relationship between the offender and the victim is one factor prosecutors use to distinguish between "real" and "technical" crimes:

> This "relationship" can take many forms, as the crime might occur between people who are strangers, acquaintances, friends, family members, or lovers. Relationships are thus defined by the degree of intimacy that existed between the parties prior to the crime in question. Much of the available literature suggests that as the relationship between the parties moves toward the intimate end of the spectrum, criminal justice actors are more likely to regard the crime as technical rather than real, which produces a more lenient disposition.[15]

Some commentators appear to endorse the treatment of stranger violence as more serious than non-stranger violence.[16]

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13. *See supra* note 9.

14. *See* BLACK, *supra* note 9, at 40–46.

15. Levine, *supra* note 9, at 701; *see also id.* at 699–700 (recounting that "[w]hen New York City prosecutors used case facts and criminal background to distinguish between 'real' crimes (those that occur between strangers) and 'technical' crimes (those that occur between acquaintances or relatives) it was part of a larger effort to assess the overall seriousness of the crime and the actual harm suffered by the victim").

16. After conducting a lengthy study of the criminal courts in New York City, authors for the Vera Institute of Justice remarked:

> At the root of much of the crime brought to court is anger—simple or complicated anger between two or more people who know each other. Expression of anger results in the commission of technical felonies, yet defense attorneys, judges and prosecutors recognize that in many cases conviction and prison sentences are inappropriate responses. . . . The congestion and drain on resources caused by an excessive number of such cases in the courts weakens the ability of the criminal justice system to deal quickly and decisively with the "real" felons, who may be getting lost in the shuffle. The risk that they will be returned to the street increases, as does the danger to law abiding citizens on whom they prey.

VERA INST. OF JUSTICE, *supra* note 2, at xv. For other commentary apparently endorsing the treatment of stranger crime as more serious, see, e.g., RIEDEL, *supra* note 5, at 2 ("While stranger violence represents a smaller proportion of criminal violence than that between persons known to each other, its

Social scientists have long considered the victim-offender relationship an important facet of violent crime.[17] And when studying the effects of other variables (such as race, gender, and social class) on criminal justice decision making, many social science studies include a relationship between the offender and his victim as a control variable.[18]

Although the available evidence does not conclusively establish, as an empirical matter, that cases involving violence by non-strangers are in fact treated more leniently than stranger violence, some studies have found that, where a prior relationship exists between the victim and the offender, a violent act tends to be treated more as a personal dispute than as a crime. While there is a range of quality and strength of findings, several studies indicate that violent crimes by strangers are treated as more serious than comparable crimes by non-strangers at arrest, prosecution, and sentencing. Indeed, one study reported statements indicating that some court officials do not believe non-stranger violence cases belong in the criminal courts.[19] One study recorded prosecutors making "disparaging remarks about non-stranger violence cases,"[20] and another described a judge's reaction to a

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effects are disproportionately greater. Stranger murders and violence represent one of the more frightening forms of criminal victimization."); Ron Langevin & Lorraine Handy, *Stranger Homicide in Canada: A National Sample and a Psychiatric Sample*, 78 J. CRIM. L. & CRIMINOLOGY 398, 398 (1987) ("Homicide is understandable in cases where intense relationships such as romantic involvements or rivalries exist; it is, however, difficult to comprehend when total strangers have been killed.").

17. "The issue of victim/offender relationships in homicide has been treated as an important concept for a long time." Marc Riedel & Roger K. Przybylski, *Stranger Murders and Assault: A Study of a Neglected Form of Stranger Violence*, *in* HOMICIDE: THE VICTIM/OFFENDER CONNECTION 359, 362 (Anna Victoria Wilson ed., 1993); *see also* Scott H. Decker, *Exploring Victim Offender Relationships in Homicide: The Role of Individual and Even Characteristics*, 10 JUST. Q. 585, 585 (1993) ("An important dimension of homicides is the relationship between victim and offenders."); Colin Loftin et al., *An Attribute Approach to Relationships Between Offenders and Victims in Homicide*, 78 J. CRIM. L. & CRIMINOLOGY 259, 259 (1987) ("The relationship between the victim and the offender is an important variable in studies of personal violence because it places the event within the context of social structures.").

18. *See* Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking Over Time*, 38 LAW & SOC'Y REV. 105, 107 (2004); *see also* Riedel & Przybylski, *supra* note 17, at 362 ("The victim/offender relationship is a variable that has consistently been used by many studies of homicide.").

19. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NON-STRANGER VIOLENCE: THE CRIMINAL COURT'S RESPONSE 2 (1983) ("Court officials are cited as believing that [non-stranger violence] cases do not appropriately belong in the criminal courts.").

20. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *supra* note 19, at 4 ("[I]n the studies conducted by the research staff of the Victim/Witness Assistance Project in Brooklyn Criminal Court, it was not uncommon to hear prosecutors make disparaging remarks about non-stranger violence cases.").

fourteen-year-old girl's claim that her mother's boyfriend had raped her: "This was really a Family Court squabble."[21]

Several studies conclude that, all else being equal, a victim is less likely to report an assailant with whom she has a preexisting relationship,[22] and thus the assailant is less likely to be arrested than if he had been a stranger.[23] Various explanations for the discrepancy between reporting for stranger and non-stranger victims have been given. The victim may fear retaliation,[24] she may be pressured or persuaded by others who also know the offender,[25] or she may reconcile with the offender and

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21. VERA INST. OF JUSTICE, *supra* note 2, at 48. For more recent examples of judges and juries treating domestic violence cases with relative leniency, see CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AND A MEASURE OF MAN 180–83 (2000).

22. This Article uses the masculine pronoun when referring to violent offenders and the feminine pronoun when referring to victims of violent crime. This distinction has been made both to provide clarity as well as to reflect that the overwhelming majority of violent offenders are male and that, to the extent women are involved in violent crime, they are more likely to be victims of violence. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES, at 11, tbl.2.3 & 13, tbl.2.6 (2005) (reporting that men account for 80% of all violent offenders and that women account for 20% of violent offenders and 45% of violence victims).

23. *See* RIEDEL, *supra* note 5, at 71–77 (collecting and discussing sources); *see also* NAT'L INST. OF JUSTICE, *supra* note 19, at 4; Richard R. Sparks, *Surveys of Victimization—An Optimistic Assessment*, *in* CRIME AND JUSTICE: A REVIEW OF RESEARCH (M. Tonry & N. Morris eds., 1981) (noting that respondents are less likely to report a crime against them by a relative or acquaintance than by a stranger, other things being equal); Richard Block, *Why Notify the Police: The Victim's Decision to Notify the Police of an Assault*, 11 CRIMINOLOGY 555, 560–61 (1974) (citing data from 190 assaults which showed that 66% of stranger assaults were reported to the police; 51% of assaults involving a non-stranger non-relative were reported; and 44% of relative assaults were reported).

Because most violent crimes occur outside the view of law enforcement, an arrest can be made only if a crime is reported to the police. *See* MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 48 (2d ed. 1998) ("[I]t is the victim of the crime rather than the police officer who is the principal initiator of criminal law."). Obviously, this is not necessarily the case for homicide. While victims of nonfatal violence can "choose to conceal the existence of the offense from the police unless it is observed by them or other witnesses, . . . the unexplained absence of another person"—or the discovery of a dead body—suggests "the possibility of homicide" and is thus likely to "stimulate[] inquiries by others." RIEDEL, *supra* note 5, at 59–60.

24. VERA INST. OF JUSTICE, *supra* note 2, at 69 ("[S]ometimes there's intimidation, a bribe or a scare to put off the complaining witness. I just don't have time to find out—the drive is just to clear the calendar.") (quoting one New York City prosecutor speaking about non-stranger robbery cases); Sparks, *supra* note 23, at 463 (noting that "studies also confirm that victims who know the defendant are particularly likely to fear retaliation or to want to protect their relationship with the offender").

25.

> [W]here the offender and victim are relatives, their interaction is very likely to continue beyond the time of the incident. Given this additional time period, it is likely that the event is discussed and reevaluated by the victim, his family and the offender. Other members of the family may encourage a non-criminal definition.

RIEDEL, *supra* note 5, at 74; *see also* NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 94 (3d ed. 2004) (noting that in intra-family sex

decide that she does not wish to see him punished.[26] The fact that a victim has a preexisting relationship with an offender may cause her to view the offender's act of violence within the broader context of that relationship. In contrast, when a person is victimized by a stranger, her entire impression of the offender is defined by the violent crime, making it much easier for the victim to label her attacker a criminal.[27]

In addition to the lower number of arrests for non-strangers, studies show that cases where the victim and offender are strangers are less likely to be dismissed by the prosecutor[28] or to result in an acquittal by the jury[29]

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abuse cases, the non-offending parent "may protect the child, pressure the child not to talk about the abuse, or persuade the child to recant the disclosure so the perpetrator does not face the criminal justice system").

26. Some non-stranger violence victims are hesitant to pursue traditional criminal prosecution because they wish to protect the offender or because they are economically dependent on the offender. *See* Sparks, *supra* note 23, at 463.

27. Professor Sam Pillsbury has alluded to this phenomenon:

> When called upon to judge a stranger who is to some extent responsible for a serious harm, the decision maker's temptation is to ignore moral complexities and declare the person and his act entirely evil. The decision maker labels the offender a Criminal, remaining indifferent to the person—the being capable of both good and evil—behind that label. In this way the offender is designated as "other." The more we can designate a person as different from ourselves, the fewer moral doubts we have about condemnation and punishment. We assign the offender the role of Monster, a move that justifies harsh treatment and insulates us from moral concerns about the suffering we inflict.
>
> In our private lives, the fact that we otherwise value those we judge checks the temptation to exaggerate their wrongdoing. The people who hurt us are often friends, relatives, and colleagues—individuals whose good points we acknowledge and value. Our judgment takes place within a context of caring, limiting the tendency to exaggerate evil.

SAMUEL H. PILLSBURY, JUDGING EVIL: THE LAW OF MURDER AND MANSLAUGHTER 69 (1998); *see also* RIEDEL, *supra* note 5, at 74 ("Where the offender is a stranger, the definition of the [violent] act at the time of the event is not subject to restructuring because the victim and offender are not likely to have any further interaction. . . . On the other hand, where the offender and victim are relatives, their interaction is very likely to continue beyond the time of the incident. Given this additional time period, it is likely that the event is discussed and reevaluated by the victim, his family and the offender. . . . [W]hen one has a close relationship with an individual one tends, over time, to put the assault into the context of one's overall relationship with the person and as a consequence the incident tends to become normalized.") (internal quotation marks omitted).

28. For example, a study of assault cases in Los Angeles revealed that "non-stranger cases [were] dismissed three times as often as stranger-to-stranger cases." NAT'L INST. OF JUSTICE, *supra* note 19, at 92. A 1970s study of felony arrests in New York City revealed that prior relationships between a victim and an offender "were often mentioned by prosecutors, in the deep sample interviews, as their reason for offering reduced charges and light sentences in return for a plea of guilty. Even more commonly, prior relationships led to dismissals." VERA INST. OF JUSTICE, *supra* note 2, at 20. Similarly, a 1970s study of arrests in the District of Columbia found that prosecutors were more likely to dismiss cases in non-stranger robberies "due to some sort of witness problem," such as "witness failed to appear, witness appeared but signed a statement indicating unwillingness to cooperate, witness gave garbled or inconsistent testimony, and witness indicated reluctance to testify." BRIAN FORST ET AL., WHAT HAPPENS AFTER ARREST? A COURT PERSPECTIVE OF POLICE OPERATIONS IN THE DISTRICT OF COLUMBIA 24 (1977); *see id.* at 28 (noting similar findings for violent offenses other than robbery); *see also* Delbert S. Elliott, *Criminal Justice Procedures in Family Violence Crimes*, *in*

than cases involving non-strangers. The findings from these studies, viewed in conjunction with several recorded comments by prosecutors,[30] suggest that prosecutors view at least some episodes of non-stranger violence as private disputes between two individuals. Stranger violence, by contrast, is perceived to be a crime committed against the community at large.[31]

The evidence with respect to sentencing is less conclusive. Several studies have documented that stranger violence is more likely to lead to the imposition of the death penalty.[32] Other studies indicate that stranger rapists are more likely to receive longer sentences than non-stranger rapists.[33] But with respect to other violent crimes (assault and robbery), the

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FAMILY VIOLENCE 427, 460 (Lloyd Ohlin & Michael Tonry eds., 1989) ("[W]hatever the type of crime, the proportion of cases prosecuted is lower when the offender knows the victim."); ELLEN GRAY, UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE 114 (1993) (study of child sex abuse found that when offender was not a member of victim's family, charges were less likely to be dropped and offender less likely to be diverted to treatment). *But see* Rodney F. Kingsnorth et al., *Sexual Assault: The Role of Prior Relationship and Victim Characteristics in Case Processing*, 16 JUST. Q. 275, 278 (1999) ("Studies limited to bivariate analysis are more likely to find effects than those employing more complex methods.").

29. *See* GOTTFREDSON & GOTTFREDSON, *supra* note 23, at 61–62 (recounting a 1970s study's finding that for both violent and non-violent offenses "convictions were more likely to result from offenses occurring between strangers than in similar offenses between strangers"); *see also* FORST ET AL., *supra* note 28, at 24 (finding that "convictions are more likely to occur in . . . robbery arrests when the victim did not know his or her assailant prior to the occurrence of the offense"); *id.* at 26–28 ("[C]onviction rates in stranger-to-stranger violent offenses other than robbery are, on the whole, nearly twice as large as they are in intrafamily violent episodes, and they are significantly larger than for the aggregate of all nonstranger violent offenses other than robbery."). *But see* Kingsnorth et al., *supra* note 28, at 291 (reporting similar conviction rates for stranger and non-stranger rapes).

30. *See supra* notes 19–21.

31. *See, e.g.*, NAT'L INST. OF JUSTICE, *supra* note 19, at 4. *See generally* Part II.D, *infra.*

32. *See, e.g.*, Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 58 (1984) ("Those who killed strangers were far more likely to be sentenced to death than those who killed family members, friends, or acquaintances: ten times as likely in Georgia, four times as likely in Florida, and over six times as likely in Illinois."); *see also* Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1340 (1985) (noting "an observed pattern under which, all other factors being equal, stranger-to-stranger killings are more 'prone' to death sentences than those in which the victim knew the defendant"); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 770 tbl.2 (1983) (noting that the probability of a prosecutor seeking a death penalty in a capital murder case was 0.429 in cases where the stranger was an offender and 0.248 where the victim was a non-stranger).

33. *See, e.g.*, Kingsnorth et al., *supra* note 28, at 295 ("Whether the perpetrator was a stranger or a nonstranger is important in determining sentence length. The existence of any kind of prior relationship appears to reduce sentence length by 35 months."); Jennifer S. McCormick et al., *Relationship to Victim Predicts Sentence Length in Sexual Assault Cases*, 13 J. OF INTERPERSONAL VIOLENCE 413, 417 (1998) (study of sentence lengths of rapists incarcerated in Ontario). Offenders who sexually assaulted strangers received an average sentence of 66.1 months, while those offenders who assaulted acquaintances received an average sentence of 52.8 months. Offenders who raped

effect of an existing victim-offender relationship is less clear. Some studies have documented an effect[34] while others have not,[35] and several studies that documented an effect have been criticized for not controlling for other variables that may have affected the results.[36]

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intimate partners (including offenders who raped former partners) received the shortest average sentence, 49.3 months. *Id.* at 416 tbl.1. After performing a regression analysis to control for a variety of factors, including age, socioeconomic status, prior offenses, degree of force used, type of instrument of force used, and amount of physical injury, the study's authors concluded that the victim-offender relationship was one of only two significant predictors of sentence length. The regression analysis explained only 16% of the variance in sentence length. "Surprisingly, criminal history was not predictive of sentence length. Moreover, instrumentality of force was the only significant predictor among the index offense characteristics ($\beta = .28$). Victim offender relationship was the only other significant predictor of sentence length ($\beta = -.22$)." *Id.* at 417; *see also* Simon, *Sex Offender Legislation*, *supra* note 6, at 511 n.157 (collecting studies that found "subjects in experiments recommend a less severe sentence for a convicted rapist if there had been a prior dating relationship between the parties").

34. *See, e.g.*, VERA INST. OF JUSTICE, *supra* note 2, at 78 (noting that the study's "few clear cases of predatory robbery against strangers were [in contrast to the non-stranger robberies] punished severely"); *id.* at 135–36 ("[Judges and prosecutors] were outspoken in their reluctance to prosecute as full-scale felonies some cases that erupted from quarrels between friends or lovers. . . . Thus, where prior relationship cases survived dismissal, they generally received lighter dispositions than stranger cases."); NAT'L INST. OF JUSTICE, *supra* note 19, at 4 (noting that data from one study "suggest that the court is likely to give defendants in relationship cases lighter sentences than defendants in stranger-to-stranger cases, for similar offenses"); *see also* Simon, *Sex Offender Legislation*, *supra* note 6, at 493 n.28 (recounting the findings of a 1998 nationwide study of child molestation prosecutions that "[s]tranger molesters were substantially more likely to be incarcerated than nonstranger molesters" (citing AMERICAN BAR ASS'N CRIMINAL JUSTICE SECTION, COMMISSION ON DOMESTIC VIOLENCE, CENTER ON CHILDREN AND THE LAW, AND COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 25–27 (1998))).

Not all studies found significant differences. For example, a recent study of incarcerated offenders who were serving sentences for homicide, rape, kidnapping, robbery, and assault in Arizona found offenders who victimized strangers received only moderately longer sentences than offenders who victimized non-strangers. Leonore M.J. Simon, *Legal Treatment of the Victim-Offender Relationship in Crimes of Violence*, 11 J. INTERPERSONAL VIOLENCE 94, 102 (1996). The difference in sentence length was small—less than two months. But Simon controlled for many important variables, including seriousness of conviction, prior record, plea bargaining, and whether the victim was injured, and the largest difference in sentence length she discerned in the entire study, which occurred when the offender entered a plea, resulted in only a four-month difference. *See id.* at 103 tbl.6.

35. *See, e.g.*, Martha A. Myers, *Offended Parties and Official Reactions: Victims and the Sentencing of Criminal Defendants*, 20 SOC. Q. 529, 537 (1979) (studying defendants convicted at trial in Indianapolis and concluding that a previous relationship between victim and offender did not affect judges' decisions to sentence the offender to prison or to impose a less serious sanction (e.g., probation)).

36. *See* Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking Over Time*, 38 LAW & SOC'Y REV. 105, 107–08 (2004) (noting that "studies using bivariate analyses have consistently found that violence between intimates is treated more leniently by criminal justice officials than violence that occurs between strangers"; however, "the effect of victim-defendant relationship on court outcomes is less clear in more rigorous multivariate analyses that enable researchers to control for the effects of other legal (e.g., prior criminal record, offense seriousness) and extralegal (e.g., race, age) factors"); *see also* Kingsnorth et al., *supra* note 28, at 281.

The authors of these studies and other commentaries on arrests, prosecutions, and sentencing practices suggest that the effect of a preexisting relationship between victim and offender appears strongest in situations where officials have broad discretion.[37] For example, police and prosecutors generally perceive themselves as having more discretion in less serious cases, such as in cases of simple assault, and therefore are more likely not to proceed in a case involving non-strangers. On the other hand, criminal justice actors are less likely to exercise their sentencing discretion to minimize criminal punishment in cases where the victim suffered serious injury.[38] (Two notable exceptions to this trend are rape and capital sentencing.)[39]

However, the difference in treatment of stranger and non-stranger violence is not limited to discretionary actions. For at least some crimes, the different treatment is standardized, if not codified. Rape is one example. The differing treatment for stranger and non-stranger rapes is codified, and is not simply the result of individual decision makers. For example, several states have statutory provisions that "mandate lesser penalties for spousal rape than for other rapes regardless of the force used."[40] The Model Penal Code endorses this approach. It explicitly

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37. *See, e.g.*, Elliott, *supra* note 28, at 459; NAT'L INST. OF JUSTICE, *supra* note 19, at 55 (describing design of study and remarking that "cases which we believed had a large potential for discretionary decisions [were cases] which involved relatively minor incidents *with few injuries* and no independent witnesses") (emphasis added).

38. *See* Gerald T. Hotaling et al., *Intrafamily Violence, and Crime and Violence outside the Family*, *in* FAMILY VIOLENCE 315, 319 (Lloyd Ohlin & Michael Tonry eds., 1989) ("Violence in families that has a high probability of producing an injury is typically seen as comparable to criminal violence, but there is a lack of consensus as to whether 'minor' violence in families should be similarly conceptualized."); VERA INST. OF JUSTICE, *supra* note 2, at 9 (noting that, with the exception of rape, "felonies of violence show conviction rates declining with the lessening seriousness of the crime, from 72% for homicide arrests to 41% for assaults"); *id.* at 58 (noting that as one New York City prosecutor explained: "Family cases are always treated differently, . . . but the fact that a gun was used in this assault, and the severe injuries, means there was no question of dismissal even if the complainants wanted to withdraw").

39. While rape and first degree murder are undoubtedly serious harms, there is evidence that non-stranger rapes and capital murders receive less serious treatment than comparable stranger crimes. *See supra* notes 32–33.

40. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1490 (2003) (identifying six states that have separate statutes and four states that mandate lesser penalties); *see also* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1484–85 (2000) (noting that some states "provide for vastly reduced penalties if a rape occurs in marriage").

Forell and Matthews describe a 1992 case from North Carolina—a state which recognizes marital rape as a crime—in which a jury chose to disregard apparently overwhelming evidence of a marital rape, including a videotape of the incident, and acquitted the defendant. FORELL & MATTHEWS, *supra* note 21, at 232.

exempts a man who victimizes his wife from its definition of the crime of rape.[41] The explanatory notes explain this exemption as follows:

> With respect to the crime of rape itself, the Model Code seeks to introduce a rational grading scheme by dividing the offense into three felony levels, reserving the most serious category for those instances of aggression resulting in serious bodily injury or for certain cases of imposition *where there is no voluntary social and sexual relationship between the parties.*[42]

Some jurisdictions impose additional elements for marital rape, such as a requirement that the rape be reported within a specified period of time, that the offender and victim be separated or divorced at the time of the assault, or that the offender use force or violence beyond mere coercion (which is sufficient in the case of stranger rapes).[43] And some states have retained marital immunity for other sexual offenses short of forcible rape.[44]

It is tempting to attribute this different treatment of stranger and non-stranger rape to concerns about consent. Because consent is a complete defense to rape,[45] and because consent is more likely in situations where the victim and offender know one another, one might say the different treatment of non-stranger rape may be attributable to lingering doubts about liability.[46]

But rape is not the only violent crime for which the law explicitly treats stranger crime as more serious than non-stranger crime. In cases of child

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41. "A male who has sexual intercourse with a female not his wife is guilty of rape . . . ." MODEL PENAL CODE § 213.1(1) (2001).

42. MODEL PENAL CODE § 213 explanatory note (2001) (emphasis added).

43. Anderson, *supra* note 40 at 1491–96; *see also* Hasday, *supra* note 40, at 1484–85 ("A majority of states still retain some form of the rule exempting a husband from prosecution for raping his wife. Some states require a couple to be separated at the time of the injury (and sometimes extend the exemption to cover unmarried cohabitants). Some only recognize marital rape if it involves physical force and/or serious physical harm. Some provide for vastly reduced penalties if a rape occurs in marriage, or create special procedural requirements for marital rape prosecutions.").

44. *See* Anderson, *supra* note 40, at 1470, 1489.

45. Consent poses a unique problem in cases of rape that it does not pose in other violent crimes. *See* Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1806 (1992) ("[C]onsent to violence is somewhat exotic, and therefore far less credibly alleged [than consent to sexual contact alone]."). For a fascinating account of the origins of this issue, see Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998).

46. *See, e.g.*, Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 461 (2006) (noting that cases of stranger rape "entail a higher burden in proving the alleged rape event was consensual, because there is a less developed rape myth structure about an accuser's willingness to have sex with a stranger" as compared to cases of acquaintance rape).

molestation—where offenses by strangers account for only 7% of all cases[47] and where consent clearly does not pose the same problem that it does in rape—assaults by strangers are treated as more serious. The criminal codes of some states include not only the offense of child rape, but also a lesser offense of incest.[48] While such a statutory scheme presumably allows for prosecution of an intra-family offender for the greater offense of child rape,[49] the availability of the lesser offense of incest suggests that at least some intra-family offenders will be prosecuted for the lesser offense, for which stranger offenders are not eligible.[50]

In addition, several states exclude offenders from sex offender registries[51]—which are touted as necessary for crime prevention[52]—if the offender had an existing relationship with his victim. For example, in California, offenders may apply for exclusion from the sex offender registry published on the internet if, inter alia, the victim "was a child, stepchild, grandchild, or sibling of the offender."[53] The state of New York considers an offender's "relationship to the victim" when determining "the

47. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT AND OFFENDER CHARACTERISTICS, at 10 (2000). Approximately 34% of child molestation offenders were family members and 59% were acquaintances. *Id. Cf.* GRAY, *supra* note 28, at 84–85 (strangers accounted for 13.7% of child sex abuse cases in study of eight jurisdictions in 1987–88).

48. *Compare* WASH. REV. CODE § 9A.64.020 (Supp. 1998) (designating incest as a Class B felony) *and* TEX. PENAL CODE ANN. § 25.02 (Vernon 2005) (designating sexual intercourse with, *inter alia* a descendant or stepchild as a felony in the third degree), *with* WASH. REV. CODE § 9A.44.073 (Supp. 1998) (designating the rape of a child as a class A felony), *and* TEX. PENAL CODE ANN. § 22.011 (Vernon 2005) (designating sexual intercourse with a child under the age of 14 as a felony in the first degree).

49. *See* Nelson v. State, 612 S.W.2d 605, 607 (Tex. Crim. App. 1981) (rejecting argument of defendant, who was convicted of raping his daughter, that he should have been prosecuted for the offense of incest, rather than the offense of raping a child).

50. *See* Simon, *Sex Offender Legislation*, *supra* note 6, at 494 (noting that an "explicit discrimination against the stranger offender occurs by inclusion of a less serious category for incest offenders under family offenses than the child rape offenses included under sex offenses").

51. While courts have held that sex offender registries generally are not punitive in nature, see Smith v. Doe, 538 U.S. 84 (2003), many commentators have noted that such registries cause serious hardships for the offenders included within them. *See, e.g.*, Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1854–55 (2005); Note, *Making Outcasts out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731 (2004).

52. *See, e.g.*, State of California, Office of the Attorney General, Megan's Law Information on Registered Sex Offenders, http://www.meganslaw.ca.gov/homepage.aspx?lang=ENGLISH; Pennsylvania State Police, Megan's Law Website, http://www.pameganslaw.state.pa.us/.

53. "Registrants whose only registrable sex offenses are for the following offenses may apply for exclusion: . . . any offense which did not involve penetration or oral copulation, the victim of which was a child, stepchild, grandchild, or sibling of the offender, and for which the offender successfully completed or is successfully completing probation." State of California, Office of the Attorney General, Megan's Law, *Sex Offenders Tracking*, http://www.meganslaw.ca.gov/sexreg.aspx.

level of community notification and duration of registration" for sex offenders.[54] The State of New Jersey similarly considers the offender-victim relationship when determining the extent of notification for sex offenders. Specifically, the state manual that sets forth the relevant criteria for notification denotes the offender's "victim selection" as one of the criteria used to determine an offender's "risk level."[55] The manual explains that "[v]ictim selection is related to likelihood of reoffense (with intrafamilial offenders having the lowest base rate of reoffense) as well as risk to the community at large."[56] Notably, the New Jersey assessment scheme does not limit itself to a dangerousness assessment based only on familial relationships; it specifically classifies family member assaults as "low risk," stranger assaults as "high risk," and assaults by acquaintances and within other social and business relationships as "moderate risk."[57]

II. EVALUATING THE POTENTIAL JUSTIFICATIONS FOR TREATING STRANGER CRIME MORE SERIOUSLY THAN NON-STRANGER CRIME

Race, gender, and class differences between the offenders and victims of stranger and non-stranger violence may go a long way to explaining the more serious treatment of stranger crime. Because individuals tend to associate mostly with other individuals of the same social class and race, non-stranger violence is most likely to be intra-racial and intra-class.[58] Stranger crime, by contrast, is more likely to cross racial and class lines.[59]

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54. New York State Division of Criminal Justice Services, *Sex Offender Risk Level Determination*, http://criminaljustice.state.ny.us/nsor/risk_levels.htm; *see also* N.Y. CORRECT. LAW § 168-l(5)(b)(i) (McKinney 2003) (establishing Board of Examiners for sex offenders, directing the Board to "develop guidelines and procedures to assess the risk of a repeat offense by such sex offender and the threat posed to the public safety," and specifying that "guidelines shall be based upon, but not limited to, the following: . . . the relationship between such sex offender and the victim").

55. N.J. DEP'T OF LAW & PUBLIC SAFETY, ATTORNEY GENERAL GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS, EXHIBIT E: REGISTRANT RISK ASSESSMENT SCALE MANUAL 5 (2005), *available at* http://www.state.nj.us/lps/dcj/megan/meganguidelines1-05.pdf.

56. *Id.*

57. *See infra* note 113.

58.

> [O]pportunity for crimes against the person in the United States is socially structured. Most intimate social interaction in this country takes place among people of the same race. Thus it makes sense that crimes of violence that arise from personal disagreements and confrontations will involve members of the same race.

JOHN E. CONKLIN, CRIMINOLOGY 302 (1981).

> For crimes of violence the opportunity to commit a crime is largely a function of social relationships between people and the likelihood that interaction will become violent. Murder and aggravated assault generally occur between people of similar social backgrounds, because

Women and children are far more likely than adult men to be the victims of violence at the hands of a relative or an intimate partner, rather than at the hands of a stranger.[60] And stranger violence is more likely than non-stranger violence to involve a white male victim.[61] A 1967 Presidential Commission Report indicates that law enforcement historically overlooked violence in these lower socioeconomic groups:

> Not long ago there was a tendency to dismiss reports of all but the most serious offenses in slum areas and segregated minority group districts. The poor and the segregated minority groups were left to take care of their own problems. . . . One of the main causes for an increase in the recording of violent crime appears to be a decrease in the toleration of aggressive and violent behaviour, even *in those slum and poor tenement areas where violence has always been regarded as a normal and accepted way of settling quarrels, jealousies or even quite trivial arguments*.[62]

> [they] interact with each other more often than they do with they do with people of different backgrounds. . . .
>
> . . . Robbery occurs between people of the same social background less often than other crimes that involve violence. . . . Although data are lacking, a typical robbery probably involves an offender of a lower social class than his victim.

Id. at 306; *see also* Dean C. Rojek & James L. Wilson, *Interracial vs. Intraracial Offenses in Term of the Victim/Offender Relationship*, *in* HOMICIDE: THE VICTIM/OFFENDER CONNECTION 249, 264 (Anna Victoria Wilson ed., 1993) ("Because of the intensely segregated nature of American communities, homicide is an intraracial phenomenon: blacks kill blacks, and whites kill whites. Further, most homicides are acts of passion that take place between family members or acquaintances, and only rarely are strangers involved.").

59. *Compare* BUREAU OF JUSTICE STATISTICS, *supra* note 22, at 34, tbl.5.5 (noting that 54.4% of stranger violence *offenders* are white and 44.5% are black), *with id.* at 32, tbl.5.3 (noting that 70.1% of stranger violence *victims* are white and 23.9% are black).

60. BUREAU OF JUSTICE STATISTICS, *supra* note 22, at 11, tbl.2.3; *see also* CRIMINAL VICTIMIZATION 1995, *supra* note 2, at 34 ("Males were more likely than females to be victimized by strangers."); CRIMINAL VICTIMIZATION 1993, *supra* note 2, at 30 ("Males were more likely than females to be victimized by strangers. . . . Males, however, were significantly more likely than females to be victimized by a casual acquaintance.").

61. *See, e.g.*, CRIMINAL VICTIMIZATION 1995, *supra* note 2, at 34 ("Whites were more likely than blacks to be victimized by strangers."); *see also* CHALLENGE OF CRIME, *supra* note 6, at 40 ("Robbery, the only crime of violence in which whites were victimized more often than Negroes, is also the only one that is predominantly interracial."); *supra* note 60.

62. CHALLENGE OF CRIME, *supra* note 6, at 25 (emphasis added) (quoting, in part, a 1963 study from the University of Cambridge's Institute of Criminology); *see also* SHERMAN, *supra* note 11, at 28–29 ("An American Bar Foundation study found in the 1950s that what might have been called an aggravated assault in a white middle-class neighborhood was often written off as a 'family disturbance' in a black neighborhood."); Joseph Goldstein, *Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 574–75 (1960) (noting police attitudes that assaults are common, resources are scarce, and that some policemen feel "that assault is an acceptable means of settling disputes among Negroes, and that when

This report is remarkable not only because it notes the past trend of ignoring crime in poor minority communities, but also because it identifies the then-prevailing view that non-stranger violence is a well-settled and accepted way of life in those communities. This evidence of past views towards non-stranger crime in poor minority communities makes it difficult to dismiss the racial implications of the prioritization of stranger crime.

But while gender, race, and class may provide valuable information for explaining the origins[63] and enduring viability of a criminal justice system that prioritizes stranger violence,[64] none of these factors can provide a

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both assailant and victim are Negro, there is no immediate discernable harm to the public which justifies a decision to invoke the criminal process"); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 913–14 (1962) (recounting "a calculated nonenforcement of certain laws [including felonious assault] against the Negro population, justified on the ground that a lesser standard of morality prevails"). Riva Siegel's work on the history of domestic violence includes several historic sources identifying a "doctrinally explicit assumption that violence was a common part of life among the married poor." Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2134 (1996) (citing Bailey v. Bailey, 97 Mass. 373, 379 (1867)).

63. For example, Forell and Matthews have contended that "[d]omestic violence came to public attention in the mid-1970s. Before then it was largely invisible, considered a purely private matter, ignored by the police." FORELL & MATTHEWS, *supra* note 21, at 158. Riva Seigel tells a more complicated story of domestic violence, noting that it captured public attention at several times in early America, and that criminal laws forbidding husbands from beating their wives were used to punish and otherwise subjugate men from poor, immigrant, or African American backgrounds during Reconstruction. Siegel, *supra* note 62, at 2121–41; *see also* SHERMAN, *supra* note 11, at 45–48.

64. For examples of how gender may explain the different treatment of stranger crime, see SHERMAN, *supra* note 11, at 41 ("[T]here is greater cultural distance between male police officers and female citizens than between police and male citizens. This in turn may shape moral evaluations of the seriousness of the circumstances of each case.") (describing Donald Black's hypothesis); G. Kristian Miccio, *Exiled From the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 129–30 (2005) (discussing the "gendered nature" of states' failure to arrest in domestic violence cases); *see also* DAVID PETERSON DEL MAR, WHAT TROUBLE I HAVE SEEN: A HISTORY OF VIOLENCE AGAINST WIVES 7 (1996) ("The social, economic, and physical advantages that society has disproportionately awarded to men has made husband abuse rare and wife abuse commonplace."); FORELL & MATTHEWS, *supra* note 21, at 163 ("For men, the law generally treats violence against an intimate as *more* permissible than violence against an acquaintance or a stranger.").

For examples of how race and class may explain the different treatment of stranger crime, see JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 113 (1997) ("Research has shown that stereotypes about criminals clearly have a racial element. A 1993 Gallup poll in the United States found that 37 percent of both whites *and* blacks see blacks as 'more likely' than other groups to commit crimes. . . . [This survey] did not specify the nature of the crimes, but in all probability, the association between race and crime in the public mind focuses on crimes of violence, street crimes and drug offenses."); Kurt Weis & Sandra Weis, *Victimology and the Justification of Rape*, in 5 VICTIMOLOGY: A NEW FOCUS 3, 6 (I. Drapkin & E. Viano eds., 1975) (postulating that individuals of "inferior social status," namely "lower class individuals, racial minorities, and females" are seen as having little or no reason to complain about their victimization because they belong to an inferior social class).

justification for such a system. A feminist critique of criminal law[65] provides insight into how the different treatment of stranger and non-stranger crimes may have originally developed and may help to explain why it has endured. But it does not provide a defense of the modern treatment of stranger crime—quite the contrary, it suggests that the system of treating stranger violence more seriously than violence in personal relationships may be a product of some particularly undesirable norms.[66] Because it is the goal of this Article to determine whether more serious treatment of stranger violence can be justified, it does not revisit the powerful feminist critique of criminal law doctrines, such as the provocation defense, surrounding non-stranger violence.[67]

This Part examines five potential justifications for treating stranger violence more seriously: (a) stranger offenders are more culpable than non-stranger offenders; (b) stranger offenders are more dangerous than non-stranger offenders; (c) non-stranger victims are at least partially at fault for the offenders' actions; (d) non-stranger violence is best resolved as a private or a non-criminal matter; and (e) stranger violence engenders greater fear and general public concern. These potential justifications have been included because each seems, at first glance, to be a legitimate reason for treating stranger violence more seriously than non-stranger violence. But testing each potential justification either against existing empirical data or through a series of hypothetical situations[68] reveals that none is as persuasive as it first seems.

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65. The feminist critique is "concerned with uncovering the ways that the criminal law contributes to women's deprivation by continuing to reflect and protect patriarchal interests." Dorothy E. Roberts, *Foreword: The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1, 3 (1994). For example, the feminist critique posits that although particular criminal law doctrines, such as the provocation defense and the consent defense to rape, are written as gender-neutral rules, in practice they operate to the disadvantage of women. *See generally* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003). Provocation and consent are more plausibly raised as defenses in cases involving non-strangers than strangers.

66. *See, e.g.*, Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1317 (1991) ("Crimes against women, especially rape and domestic violence, are decriminalized through the evil logic of a trilogy of suppositions: she must have asked for it; she must have enjoyed it; she must have deserved it. These decriminalizing efforts are rooted in beliefs and attitudes about women that sanction, or at least facilitate, violence against them.").

67. For just a few examples of the feminist critique, see FORELL & MATTHEWS, *supra* note 21; JEREMY HORDER, PROVOCATION AND RESPONSIBILITY (1992); LEE, *supra* note 65; Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71 (1992).

68. This Article uses empirical desert—that is, a punishment theory "that assigns punishment in ways that closely reflects the community's intuitions about appropriate condemnation and punishment"—to challenge a phenomenon that seems be enjoy public support. Paul H. Robinson &

Before discussing the potential justifications, I want to note that information about a preexisting personal relationship may elicit certain assumptions about the offender, the victim, and the crime.[69] Stranger offenders are perceived to act calculatingly, motivated by personal profit, and they are assumed to have randomly chosen an innocent victim.[70] Robbery is the classic example of stranger violence.[71] In contrast, non-stranger offenders are perceived to have acted spontaneously out of anger, and the non-stranger victim is thought to have played some role in the events leading up to the violent incident.[72]

Because potential justifications may rely on these stereotypes, the stereotypes themselves are relevant in assessing the legitimacy of the justifications. Of course, that is not to say that all non-stranger violence is impulsive and motivated by anger, nor that all stranger violence is calculated and motivated by profit;[73] rather, these stereotypes are useful

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John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456 (1997); *see also* Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical 8–9*, *available at* http://ssrn.com/abstract=924917. This inductive model of testing the desirability of a rule or principle is commonly employed in criminal law analysis. *See, e.g.*, Leo Katz, *The Morality of Criminal Law: Why the Successful Assassin is More Wicked Than the Unsuccessful One*, 88 CAL. L. REV. 791, 795–96 (2000); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 684–85 (1994); *see also* John Rawls, *Outline of a Decision Procedure to Ethics*, 60 PHIL. REV. 177 (1951).

69. "[K]knowledge of a prior relationship between the victim and the offender is a cue which elicits various stereotypical images about what occurred during the alleged incident and how the case will be handled at later stages of criminal processing." Terance D. Miethe, *Stereotypical Conceptions and Criminal Processing: The Case of the Victim Offender Relationship*, 4 JUST. Q. 571, 572 (1987).

70. *See infra* note 72.

71. "For most citizens, 'robbery' conjures up a frightening set of images: street muggings, retail stick-ups and other incidents in which a threatening stranger confronts and demands money from a terrified victim. It is a crime of violence—stealing by force or threat of injury—and because the robber is thought to be a predatory rather than a spontaneous criminal, he may be the archetypal 'real' violent felon in the public imagination. VERA INST. OF JUSTICE, *supra* note 2, at 63.

72. Albert Alschuler noted these presumptions, stating:

> We may sense, for example, that stranger and non-stranger crimes should ordinarily be treated differently. Violence directed against a stranger typically grows out of predatory, instrumental, professional crime or else is the product of sadism. Its terror proceeds partly from its suddenness and from the victim's inability to know where it will stop. Violence directed against a non-stranger typically reflects anger (sometimes sustained, sometimes momentary), provocation (sometimes real, sometimes imagined), and complex, difficult-to-untangle emotions that have developed over the course of an intimate, social, or working relationship. The victim often understands the genesis of this violence and, in most cases, senses that it is likely to stop short of homicide.

Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 914 (1991).

73. The relationship between an offender and his victim is a separate variable in violent crime from the circumstances that precipitated the violence. "To use them as if they were interchangeable—to assume, for example, that all homicides between acquaintances are impulsive and all homicides between strangers are instrumental—would be to misrepresent the truth. Of the two aspects, we have

starting points. This Article concludes, however, that prioritizing stranger violence is unjustified *even assuming the stereotypes are true*.

A. Offender Culpability

The culpability argument—that is, the argument that stranger offenders are more culpable than non-stranger offenders—is based on the general notion that the relationship between offender and victim provides context for the violence,[74] and that this context somehow excuses or mitigates the behavior.[75] While the archetypal stranger offender has had no previous interactions with his victim, and thus his decision to commit a violent crime against the victim is calculated and predatory, the archetypal non-stranger offender commits his offense against the backdrop of a larger relationship and usually in a situation where his decision to act violently was spontaneous and motivated by anger.[76] This presumption encompasses two independent arguments about how a non-stranger offender is less culpable than a stranger offender: (1) the non-stranger offender is less culpable because his ability to control his violent actions is

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found circumstance to be, by far, the more fundamental—a basic variable to which everything else, including relationship is secondary." C.R. BLOCK, HOMICIDE IN CHICAGO: AGGREGATE AND TIME SERIES PERSPECTIVES ON VICTIM, OFFENDER, AND CIRCUMSTANCES (1965–1981) 35 (1987), *quoted in* RIEDEL, *supra* note 5, at 11.

74. *See* Decker, *supra* note 17, at 592 ("[T]he greater frequency of interaction and attachment to others with whom one is intimately involved creates situations that are likely to lead to disputes, and potentially to fatal violence. The intensity of the stake in another's well-being can be turned 'upside-down' and can facilitate rather than insulate nonstrangers from violence."); Levine, *supra* note 9, at 701–02 ("Conventional wisdom suggests that crimes between strangers occur for mercenary or nonpersonal motives and often involve high levels of violence or damage. . . . In contrast, crimes between family members, friends, or acquaintances—otherwise known as intimates—are typically understood as driven by strong emotions and as embedded in preexisting complex relationships among the parties involved."). *Cf.* VERA INST. OF JUSTICE, *supra* note 2, at 32 (noting that in a "typical" assault involving non-strangers "the passion of the relationship led to infliction of injuries in the attack").

75. Even if the context does not excuse or mitigate the offender's violence, it allows the general public a way to contextualize the violence so that it does not seem completely random. This context may be relevant not only in intuitive assessments of culpability, but also intuitive judgments about an offender's dangerousness because "the randomly targeted victim is quite apt to invoke . . . a strong sense of identification with the victim and a sense of 'there, but for the grace of God, go I.'" Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 359 (2003).

76. For one example of a commentator espousing these archetypes, see Rojek & Wilson, *supra* note 58, at 264 ("[There are] distinctively different forms of homicide based on the varying degrees of relationship between the victim and the offender. . . . Homicides that occur between family and acquaintances are by far the highest in number and generally the least deterrable. Most of these homicides are caused by sudden and violent arguments over what appear to be insignificant matters or romantic entanglements. Homicide between strangers tends to be more property-oriented and more rational."). *See also* Hotaling et al., *supra* note 38, at 324–25.

impaired by anger, and (2) even if the angered offender could easily control himself, violence motivated by anger is less blameworthy than violence motivated by profit.[77]

1. Non-stranger Offender Less Able to Control His Violent Behavior

It is a basic tenet of criminal law that, if an individual is completely incapable of controlling his actions, that individual should not be subject to criminal punishment.[78] If an individual decides to violate the law after calm deliberation, most everyone would agree that he should be punished.[79] But in situations where self-control is difficult, but still possible,[80] punishment decisions become more complicated.

The argument that an individual who is less capable of controlling himself should be punished less harshly is essentially as follows: because his anger made it more difficult for the offender to control himself, his subsequent loss of control is not as blameworthy as the completely calm individual who rationally chose to act violently.[81] This argument has its roots in the provocation defense. That defense reduces the charge for an intentional homicide, which would otherwise qualify as murder, to voluntary manslaughter if the defendant killed upon adequate provocation in the heat of passion.[82]

Under the common law provocation defense, the list of events constituting "adequate provocation" was quite limited—it included adultery, mutual combat, false arrest, and violent assault by the victim.[83]

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77. These two arguments may overlap. For example, stranger violence may be viewed as more capable of control because it is motivated by financial profit.

78. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 160 (1982) ("[I]f punishment is to be justified at all, the criminal's act must be that of a responsible agent: that is, it must be the act of one who *could have* kept the law which he has broken.").

79. There are, of course, exceptions to this general rule, such as the line of defenses known as justifications. To be eligible for a justification defense, an individual's otherwise illegal act must have been a necessary and proportional response to a threatened harm. *See* 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 24(b) (1984). The necessary and proportionality requirements seem to almost invite deliberation by the offending individual.

80. *See infra* note 89.

81. "It is sometimes said that a person who commits a crime under the influence of emotion is less culpable than a person who acts calmly and deliberately." Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1992 (2001). As Joshua Dressler explains the difficulty-of-control argument: "[T]he [provocation] defense is based on our common experience that when we become exceptionally angry . . . our ability to conform our conduct to the dictates of the law is seriously undermined, hence making law-abiding behavior far more difficult than in nonprovocative circumstances." Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 974 (2002).

82. *See generally* 1 ROBINSON, *supra* note 79, § 102.

83. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106

While the requirements for a provocation defense have been relaxed in modern times,[84] some qualitative requirement for the provoking event has been retained. Even the Model Penal Code's extreme emotional disturbance defense,[85] which is substantially broader than the common law provocation defense and places a great deal of emphasis on the mental and emotional state of the offender, does not permit an offender free rein in arguing that any circumstance provoked his behavior. The extreme emotional disturbance defense is available only to the offender whose emotional disturbance "is one for which there is some reasonable explanation or excuse."[86]

The provocation doctrine's requirement of legally adequate provocation may reflect the substantial consequences of the defense: a defendant who successfully raises a provocation defense will have a murder charge reduced to manslaughter. The less serious treatment of non-stranger violence may sometimes have similarly, if not more, dramatic results, such as when a prosecutor decides to dismiss a case altogether. But the treatment of non-stranger violence as less culpable may also occur at times when finer distinctions of offender blameworthiness are made. Sentencing is a good example.[87] Sentences are often reduced when a

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YALE L.J. 1331, 1341 (1997) (identifying these categories of adequate provocation as the "nineteenth century four").

84. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 309 (1996) ("[M]odern authorities have tended to abandon categorical definitions of adequate provocation.").

85. Under the Model Penal Code § 210.3(1)(b) (2006), an offender may receive a reduced charge of manslaughter when

> a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

86. 1 ROBINSON, *supra* note 79, § 102(c)(2).

> The most important compromise which legal systems make over the subjective element [in responsibility] consists in its adoption of what has been unhappily termed the 'objective standard.' This may lead to an individual being treated for the purposes of conviction and punishment as if he possessed capacities for the control of his conduct which he did not possess, but which an ordinary or reasonable man possesses and would have exercised.

HART, *supra* note 78, at 153.

87.

> [T]he sentencing process allows for finer distinctions of culpability than determinations of liability. Criminal liability is essentially binary: A defendant is either guilty or not guilty of an offense. By contrast, because criminal sentences are measured chronologically, a court can adjust a defendant's sentence by a percentage of the overall sentence or by different set amounts of time. This flexibility is especially useful in making fine distinctions between the relative blameworthiness of various offenders.

Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 132 (2006).

defendant presents an imperfect defense.[88] Thus, simply noting that the culpability argument fails to meet all of the requirements for a provocation defense does not settle the question whether the culpability argument justifies the prioritization of stranger violence in sentencing decisions.

Determining whether a non-stranger offender's difficulty controlling himself reduces his blameworthiness requires an examination of the theory underlying the culpability argument. The culpability argument does not rest on the assumption that the angry offender *cannot* control himself; while anger may make it *more difficult* for non-stranger offenders to control their behavior, non-stranger offenders still are *capable* of controlling their violent outbursts.[89] The question, therefore, is not whether non-stranger offenders can control their violent urges, but rather whether the relative difficulty of control should affect punishment severity. In other words, as the desire to commit a crime increases, should the increasingly difficult struggle to resist that desire reduce an offender's punishment?

When the culpability argument is phrased in these most general terms, a problem with the argument begins to come into focus. The problem is that we routinely increase punishment to account for increased incentives to commit a crime in order to achieve optimal deterrence. As Professor Steven Shavell succinctly puts it: "The higher the benefits to a person contemplating a harmful act, the higher should be the sanction, for higher benefits require higher sanctions to deter."[90] For example, it is certainly more difficult for an individual confronted with an opportunity to steal $10,000,000 to resist the temptation than it is for an individual with an opportunity to steal only $10. Indeed, it is, at least in part, to compensate

88. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.10–5K2.13 (2005).

89. Some discussions of non-stranger violence portray the angry non-stranger offender as beyond reason and impossible to deter. *See, e.g.*, SHERMAN, *supra* note 11, at 41 ("The police view is that unlike 'rational' crime, emotional violence cannot be deterred."). One might think that an offender who is impossible to deter is incapable of controlling himself. However, as most individuals are capable of controlling themselves when angry and as the non-stranger offender almost certainly restrained himself from committing a violent act on other occasions when he was angry, the view of an angry offender as *incapable* of control is likely incorrect. *See* JEREMY HORDER, EXCUSING CRIME 89 (2004) ("[E]ven though the intensity of an emotion reduces the degree of deliberative, rational control one has over one's reaction, reason has yet a more active role to play."). *Cf.* FORELL & MATTHEWS, *supra* note 21, at 162 ("Domestic violence . . . [is] *not* inevitable: Men who batter their intimates usually manage to contain their anger in other contexts, with other people."). For a persuasive account of specific deterrence in domestic violence cases, see L.W. Sherman & R.A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

90. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF THE LAW 499 (2004). He goes on to explain: "There is, however, a limit to this relationship: If the benefits become so great that deterrence may not be possible, then the sanction should fall (and to zero if deterrence is impossible for all persons to whom the sanction would apply)." *Id.*; *see also* Posner, *supra* note 81, at 1993–94.

for the increased temptation to steal the larger amount of money that the penalty for stealing $10,000,000 is higher than the penalty for stealing $10.[91]

Loss of control presents a similar problem. If a defendant is more likely to lose control of himself and commit a violent act when he is angry, then reducing penalties on the basis of an offender's loss of control reduces punishment at the time that deterrence is most important.

To be sure, other concerns may limit the amount the punishment should be increased to ensure adequate deterrence. For example, where the amount of punishment necessary to deter future offenses exceeds the amount of punishment that an offender "deserves," the desire to treat the offender fairly may limit the amount of punishment.[92] But that observation simply brings us back to the original question: Does the fact that it is more difficult for the non-stranger offender to control his violent actions than a comparable stranger offender mean that the non-stranger offender deserves less punishment? As the example of the different sums of money demonstrates, a greater desire to commit a crime does not necessarily decrease the amount of punishment that an offender deserves. Because difficulty to control oneself does not provide a definitive answer about what an offender deserves, it seems logical to revert to the basic framework of the provocation defense and examine why the non-stranger offender is angry with and wishes to act violently towards his victim.

Several commentators have noted that legal evaluations of an offender's emotions include a moral component.[93] It is this moral evaluation that has, for example, led some courts to refuse to permit a defendant who killed in response to a homosexual advance to present a provocation defense.[94]

> [Those courts] do not assume that the asserted provocations were insufficient to destroy the defendants' volition; indeed, many of these cases have excluded expert psychiatric testimony designed to

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91. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2005) (increasing offense level based on amount of financial loss). The penalty is higher not only for deterrent purposes, but also to account for greater loss to the victim.

92. *See, e.g.*, SHAVELL, *supra* note 90, at 539 ("From the deterrence perspective, for example, we may want to impose a ten-year prison sentence on a car thief because the odds of finding him are quite low, but the demand for retribution . . . may well limit the sentence to a lesser level.").

93. *See* Kahan & Nussbaum, *supra* note 84; Nourse, *supra* note 83; *see also* Posner, *supra* note 81, at 1980 ("[E]motion is never a fully sufficient excuse; the reason for the emotional reaction always matters."); PILLSBURY, *supra* note 27, at 103–04 ("[E]motion should not be considered a monolithic force in responsibility; it must be closely analyzed for moral content. . . . [T]he degree of passion or dispassion does not prove a reliable measure of culpability.").

94. Kahan & Nussbaum, *supra* note 84, at 310.

> show exactly that. Rather, they deem the provocations insufficient because they conclude that the law should criticize rather than endorse the evaluation of the victim's identity implicit in the defendant's rage.[95]

Examples of other situations where a defendant's desire to commit a violent act was heightened and his ability for self-control weakened further illustrate the moral component of these legal evaluations. We would not decrease the punishment for a racist who assaults an African American on the theory that his racial hatred made it more difficult for the offender to control himself.[96] But we would likely wish to decrease the punishment of the father who kills his daughter's rapist. Both actors' self-control is diminished by hate, but we accept the father's hatred as legitimate and reject the racist's hatred as illegitimate.

Because the *reasons* for an offender's loss of self-control must withstand moral scrutiny—a loss of control alone is insufficient—the stereotypes associated with non-stranger violence do not necessarily indicate that the non-stranger offender is less culpable. In other words, the mere fact that the offender acted in circumstances that provide context for the violence is not sufficient to justify less serious treatment for non-stranger offenders. Rather, each act of non-stranger violence must be evaluated through a fact-specific inquiry to determine whether the anger that preceded the violent reaction was not only understandable, but also not inappropriate.[97] One can easily imagine a series of interpersonal disputes where an offender's anger that precipitates a loss of control is clearly warranted—e.g., two sons witness their mother's boyfriend kill their mother, and they retaliate by killing him.[98] One could similarly think

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95. *See id.* at 310 n.172 (collecting cases).

96. Professor Dan Kahan gives the example of the white supremacist who kills out of racial hatred and the mother who kills a man who has sexually abused her child. "Both acts are wrong, and their consequences are in some sense equivalent—there is one dead person in each case. Nevertheless, the racist's killing is more worthy of condemnation precisely because his hatred expresses a more reprehensible valuation than does the mother's anger." Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996).

97. *Cf.* Dressler, *supra* note 81, at 989 (noting that in provocation cases, the jury's evaluation of the triggering event is whether the event "'justifies' or 'excuses' the defendant's anger (something that either makes us feel that anger is appropriate or, at least, understandable)").

98. This example is drawn from the shooting death of Emmanuel Allen in July 2006. Allen was romantically involved and living with a woman named Vilma Rosario, a resident of the Bedford-Stuyvesant neighborhood in New York City. Allen and Rosario had a volatile relationship: police had been called to Allen's apartment on at least one previous occasion for a fight between the couple, and, according to Rosario's sons, Allen's abusive behavior toward Rosario has worsened during the course of their three-year relationship. One Friday night, Allen showed up drunk at Rosario's apartment, began to harass her, and ultimately shot her in the head, killing her. Rosario's sons, who were present

of a series of disputes where the anger that precedes a loss of control is significantly less warranted—e.g., the mother who hits her child who will not stop crying. It is only when the reasons for the offender's anger can withstand moral scrutiny that his violent reaction is less culpable.

One other point about loss of control and culpability deserves mention: it is best to err on the side of underinclusion for the category of disputes that are considered mitigating. Once we recognize the moral dimension of this doctrine, any decision to mitigate punishment based on a loss of self-control smacks of tacit approval of violent impulses. A trivial argument between friends, for example, that escalates into violence should not be deemed appropriate. Were we to treat the offender who punches his friend less seriously than a comparable stranger, implicit in that decision is a partial endorsement of using violence to settle arguments between friends.

2. Non-stranger Offender Motivated by Anger

The second version of the culpability argument is that an individual who is motivated by anger is less culpable. The stereotypes driving this argument are that the non-stranger offender acts violently because he is motivated by anger, and that his violence is an expression of that anger. In contrast, the stereotypical stranger offender calculatingly uses violence as an instrument, and rather than acting out of anger he is fueled by baser motives, usually financial gain.[99] Motive has long been considered an

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in the apartment, responded by stabbing and shooting Allen to death. According to news reports, Rosario's sons were initially detained by the police but then released. *See* Kareem Fahim & Ann Farmer, *Woman's Killer Was Slain by Sons, Police Say*, N.Y. TIMES, July 23, 2006, at 27, *available at* 2006 WLNR 12653573; Samuel Bruchey, *Man Kills Girlfriend; Sons Retaliate, Cops Say*, NEWSDAY, July 23, 2006, at A16, *available at* 2006 WLNR 12657191; Georgett Roberts, Perry Chiaramonte & Lukas I. Alpert, *Mom-Slay Revenge; Two Brothers Kill 'Abuse' Beau with Pistol & Saber*, N.Y. POST, July 23, 2006, at 7, *available at* 2006 WLNR 12826418. The day after the shooting, "[a] spokesman for the Brooklyn district attorney said the shooting was still under investigation," Fahim & Farmer, *supra*, but subsequent accounts continued to report that no charges were filed against the sons. *See Man who Killed Lover Allegedly Killed by Sons*, ALBANY TIMES UNION, July 24, 2006, at A3 ("No charges have been filed against the sons.").

99. For example, in robberies, which unlike other violent crimes are disproportionately committed by strangers, see *supra* note 5, offenders use violence or the threat of violence in order to obtain something of value. Robbery is "[t]he illegal taking of property from the person of another, or in the person's presence, by violence or intimidation." BLACK'S LAW DICTIONARY 1329 (7th ed. 1999). *Cf.* Decker, *supra* note 17, at 537 ("Robbery is the textbook example of an instrumental crime involving an offender who seeks to maximize gain or advantage while minimizing risk of apprehension. Stranger homicides traditionally have been defined as instrumental events. Expressive events, on the other hand, fail to include the 'rationality' of such cost/benefit considerations. Instead, expressive or impulsive actions arise from 'character contests' to establish 'face' or from the desire to retaliate or redeem esteem or to express rage. These typically have been classified as nonstranger homicides; the classic example is the slaying of a spouse or lover, though these categories also could

important component of a defendant's culpability,[100] and financial gain is one of the motives most often identified as aggravating for sentencing purposes.[101]

There are two problems with this argument. First there is a flaw in the assumption that a non-stranger uses violence to express himself and not as an instrument. When an individual resorts to violence within an existing personal relationship, it does not mean the violent actions are purely expressive—the individual does not act violently simply to demonstrate that he is angry. Rather, violence in relationships is often used instrumentally, i.e., to achieve certain ends. Domestic violence advocates have long contended that an abuser uses violence to "control his wife or lover, to gain compliance with his demands."[102] Violence in non-domestic personal disputes is likely also used instrumentally. Consider one friend who insults another, resulting in the insulted friend punching the other. The offender throws the punch not only because he felt insulted by the remark, but also to set certain boundaries to ensure that the friend does not insult him in the future. In punching his friend, the offender is defining the relationship as one in which such personal insults are not tolerated.

Financial gain may be considered an aggravating motive for violent crimes because it seems particularly depraved to use violence as an instrument to obtain certain ends. But a person who acts out of anger is

include the killing of a friend."); Rojek & Wilson, *supra* note 58, at 257 ("[S]tranger homicides reflect a certain instrumental nature. . . . On the other hand, family and acquaintance homicide are more often expressive or emotive in nature, with little rational input.").

100. *See* Hessick, *supra* note 87, at 101 ("It is generally understood that a sentencing judge may impose a shorter sentence on a defendant because he was acting with good motives, or a rather high sentence because of his bad motives. Published reports of the practice date back at least to the beginning of the 20th century." (internal citations and quotation marks omitted)).

101. For example, Elizabeth Rapaport has identified this motive as one of "five aggravating factors which are among the most frequently included in modern death penalty statutes." Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 526–27 (1990); *see also* Hessick, *supra* note 87, at 102–03 ("Many state capital sentencing schemes classify pecuniary gain as an aggravating sentencing factor. The Federal Sentencing Guidelines provide for sentencing enhancements when defendants who commit certain non-financial crimes, such as aggravated assault or trafficking in material involving the sexual exploitation of a minor, are motivated by pecuniary gain. The Federal Guidelines also provide sentencing reductions where a crime that would ordinarily be committed for pecuniary gain, such as criminal infringement of copyright or trademark, is committed for a non-financial motive.").

102. Donna K. Coker, *Heat of Passion and Wife Killing: Men who Batter/Men who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 85 (1992). "[M]uch of current literature on battering notes that the violence, contrary to earlier psychoanalytic explanations, is *instrumental* rather than *expressive*. In other words, the violence is not only an expression of rage, but serves a *purpose*." *Id.* (citing James Ptacek, *Why Do Men Batter Their Wives?*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 133, 142–51 (Kersti Yllö & Michele Bograd eds., 1988), and R. Emerson Dobash & Russell P. Dobash, *The Nature and Antecedents of Violent Events*, 24 BRIT. J. CRIMINOLOGY 269, 274 (1984)).

essentially acting out of a desire to cause someone harm or to inflict injury.[103] A person who uses violence specifically to hurt his victim is arguably more blameworthy than one who uses violence to obtain money;[104] the financially motivated offender may have used violence only as a last resort to obtain his desired ends, while the offender who acts out of anger is motivated by a specific desire to harm his victim.[105]

When violence is used instrumentally to achieve particular ends within a personal relationship, such as to establish control or to define boundaries, it is difficult to meaningfully distinguish between the culpability of the motives behind stranger and non-stranger violence. Even though the motive of anger is *different* than the motive of financial gain, it is not clear that a financial motive is more blameworthy. Of course, the real distinction between the stranger and non-stranger offender may be not that we believe anger or the desire to inflict pain are more sympathetic motives than the desire for financial gain, but rather that we assume that the offender's anger at the victim was, for some reason, appropriate—an issue that is discussed more fully below in the context of victim fault.[106]

B. Offender Dangerousness

Another potential justification for the view that non-stranger violence should not be treated as seriously as stranger violence is based on assumptions about offender dangerousness. A non-stranger offender is perceived as less dangerous than a stranger offender because the non-stranger does not seem to be a threat outside of the specific relationship in which the violence occurred.[107] As one commentator put it:

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103. *Cf.* Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 513 (1993) ("[M]any would question the proposition that an offender motivated by prejudice is more culpable than one motivated by greed, spite, or pure sadism.").

104. *Cf.* Hessick, *supra* note 87, at 103–04 ("Many capital sentencing statutes include a provision that identifies a murder that 'was especially heinous, atrocious or cruel' or a murder that 'manifest[ed] exceptional depravity' as an aggravating factor. Several judicial decisions (and at least one legislative act) have indicated that this aggravating factor assesses the defendant's motive at the time of the killing, focusing on whether the defendant 'intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death.'").

105. This may explain the evidence that non-stranger violence leads to greater victim injuries than stranger violence. *See infra* notes 200–06 and accompanying text.

106. *See* discussion *infra* Part II.C.1.

107. *See* Robert C. Davis & Barbara E. Smith, *Crimes Between Acquaintances: The Response of Criminal Courts*, 6 VICTIMOLOGY 175, 183 (1981) (noting that while non-stranger offenders "did, indeed, seem to pose less of a threat to the community at large, . . . they may have posed a greater threat to individual victims"); Levine, *supra* note 9, at 702 ("Persons who victimize strangers . . . are perceived and portrayed as predators: they threaten or attack at random, which makes them more of a threat to the community in the future. . . . These stereotypes suggest that persons who victimize

> [R]elationship cases may be perceived as involving "private" justice because the defendant harmed, and may represent a continuing threat to an isolated individual. Stranger-to-stranger cases, however, may be thought of as involving "public" justice because the defendant is perceived to have harmed the community at large, and may represent a continuing threat to all members of the community.[108]

This view of non-stranger offenders as less dangerous is based on two assumptions: the first is that a non-stranger offender is less likely to reoffend than a stranger offender; the second is that, if a non-stranger offender does reoffend, only his previous victim is at risk, while a stranger offender's next victim could be any member of the public. There is at least some evidence that supports each of these assumptions. But the evidence is far from uniform or conclusive.

Moreover, even if the assumptions that a non-stranger is less likely to reoffend and that only his prior victim is at risk were true, the assumptions would justify more serious treatment of stranger violence only under a theory of incapacitation.[109] As discussed below, some of the available data indicate that treating non-stranger violence as a criminal matter improves the specific deterrence effect on individual offenders. And even assuming that non-stranger offenders are dangerous to a fewer number of potential victims than are stranger offenders, concerns about repeated violence towards vulnerable victims may increase our assessment of a non-stranger offender's culpability.

1. Recidivism

The assumption that a non-stranger offender is unlikely to commit a subsequent act of violence is predicated on the stereotype of the non-stranger offender as an otherwise law-abiding citizen whose anger got the better of him during an argument with a friend or family member.[110] His violent behavior is viewed as an abnormal incident that will never be

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intimates, as compared with those who victimize strangers, . . . will be less likely to commit future criminal actions against random people. The intimate assailant may continue to be a threat to his intimate partner, friends, or family members, but he presents little or no danger to the rest of us.").

108. NAT'L INST. OF JUSTICE, *supra* note 19, at 4.

109. Incapacitation, as a goal of punishment, aims to deal with "dangerous" offenders or repeat offenders by making them incapable of offending again for long periods of time. ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 68 (3d ed. 2000).

110. *See* FORELL & MATTHEWS, *supra* note 21, at 189 (noting that courts often view "'provoked' men who kill their intimates . . . as not inherently violent, as posing no threat to society").

repeated. In contrast, the stereotypical stranger offender is assumed to be a predator who repeatedly attacks unwitting victims.[111]

Sex offender registries present one example of assumptions regarding family and other non-stranger dangerousness shaping criminal justice policy. As mentioned above,[112] various state sex offender registries distinguish between child molesters on the basis of offender-victim relationship. New Jersey, for example, classifies family member assaults as "low risk," assaults by acquaintances and within other social and business relationships as "moderate risk," and stranger assaults as "high risk" for recidivism purposes.[113] According to the state's manual for classifying sex offenders, an offender's previous relationship with his victim "is related to the likelihood of reoffense (with intrafamilial offenders having the lowest base rate of reoffense) as well as risk to the community at large."[114] Several commentators have disputed the accuracy of this claim, noting that "the low reoffense rate among incest offenders might be due to other factors, such as pressure on victims not to report, and the unwillingness of law enforcement to pursue familial abuse charges aggressively"[115] and that more recent studies suggest that incest offenders

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111. These stereotypes, of course, are not absolute. Drug offenders or gang members are presumed to often act violently towards non-stranger victims with similar drug or gang backgrounds. *Cf.* Keith Harries, *A Victim Ecology of Drug-Related Homicide*, *in* HOMICIDE: THE VICTIM/OFFENDER CONNECTION 397, 406 (Anna Victoria Wilson ed., 1993) (noting that drug homicides are more likely to involve acquaintances rather than family members or strangers). These non-stranger offenders likely pose a much greater recidivism risk.

112. *See supra* notes 52–57 and accompanying text.

113. The Manual gives the following specific examples:

> Low risk example: sexually abuses younger sibling, household member, biological child, stepchild, or common law spouse's child; offender sexually abuses family member who does not live in the household.
>
> Moderate risk example: "acquaintance" implies a degree of social/business interaction beyond that of a single contact and includes an offender who sexually abuses a neighbor's child, a child for whom he or she is babysitting, or a child for whom he or she is coach or teacher; offender performs coercive sexual acts with date ("date rape").
>
> High risk example: sexually abuses child or adult stranger accosted on street, in park, or in schoolyard; offender lures stranger (either adult or child) into coercive sexual activity; offender meets victim in bar and later assaults. Use of the word "stranger" does not automatically preclude fact situations in which the victim knows the identity of the offender, for example, the offender and victim may have had an exchange of words in a bar or social setting.

ATTORNEY GENERAL GUIDELINES, *supra* note 55, EXHIBIT E, at 5.

114. *Id*.

115. *See* Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267, 291–92 (2006) ("Studies have shown that the closer the relationship between victim and offender, the less likely the act will be reported to police, and the less likely it is to be successfully prosecuted through the criminal justice system."); Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS L. REV. 1851, 1873–76 (2006)

have higher recidivism rates than originally believed.[116] And even if the statement that intra-family sex offenders have the lowest rates of recidivism is correct, it does not explain the decision to categorize acquaintances, including coaches, teachers, neighbors, and babysitters, as moderate risk rather than as high risk, which is the category reserved for strangers.[117] It is certainly plausible that an individual who used his position as a teacher, babysitter, or coach to sexually assault a child in his care may have chosen that position in order to have access to children.[118]

To be sure, there is at least some evidence supporting the general assumption that non-stranger offenders are less likely to commit a future crime than stranger offenders. For example, a 1970s study of 295 cases in Brooklyn Criminal Court found that "defendants in cases involving acquaintances were . . . rearrested significantly less often during an 18-month period following case disposition than defendants in stranger-to-stranger cases."[119] But the evidence is not uniform. A more recent study from Arizona, which asked inmates to report on their own criminal histories, "did not yield significant differences in the number of offenses stranger and nonstranger offenders report committing."[120] Data from several other studies show that, while some offenders who act violently

("[C]laims about lower rates of recidivism in related offenders overlook the fact that *intrafamilial child sexual abuse perpetrators are less likely to be caught a second time* in comparison to stranger offenders. After all, a victimized child who observes that the state has decided to forgo any significant penalty for the related offender (or even has decided to allow the offender to return to the child's home) will not be likely to voice a subsequent complaint of abuse.").

116. Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 164–66 (2007) (collecting sources for the proposition that "researchers are increasingly rebutting" the assumptions that "sexual abusers who victimize family members are less dangerous because they are both more amenable to treatment and less likely to reoffend"); Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim's Siblings*, 51 EMORY L.J. 241, 245–46, 256–63 (2002) (same).

117. Although the New Jersey manual cites a series of studies for its conclusions about the likely recidivism of intra family offenders, ATTORNEY GENERAL GUIDELINES, *supra* note 55, EXHIBIT E at 3 n.3, it does not appear to provide any support for its decision to classify acquaintance molesters as less likely to reoffend than strangers.

118. *Cf.* Levine, *supra* note 9, at 717 (reporting study of prosecutorial discretion in statutory rape cases which found that prosecutors were more likely to treat offenses seriously if the offender abused "a position of trust or authority" such as "a clergyman, teacher, coach, camp counselor, foster parent, police officer, or other professional working in close proximity with youth" and noting that "prosecutors believe that exploiting a position of trust to gain sexual favors is a habit that is not easily broken; despite claims that 'this is a one-time transgression and we truly love each other,' it is likely that the offender has taken advantage of other victims in the past and will do so again in the future").

119. Davis & Smith, *supra* note 107, at 183 (noting a rate of "0.49 rearrests per defendant in cases involving a prior relationship, versus 0.85 rearrests per defendant in stranger-to-stranger cases").

120. Leonore M.J. Simon, *The Victim-Offender Relationship*, *in* THE GENERALITY OF DEVIANCE 215, 225 (Travis Hirschi & Michael R. Gottfredson eds., 1994).

within a family or intimate relationship do resemble the stereotype described above and subsequently desist from future violence, others do not.[121] A significant number of individuals who commit violence in a personal relationship commit a further violent act within the same relationship.[122] Several studies have identified a discernable group of non-stranger offenders, in which the victim and offender have "strong interpersonal ties (i.e., nuclear family members or lovers)," where violence not only persists, but often escalates into more serious forms of violence, including homicide.[123] And some studies have found that individuals who commit violent acts within one personal relationship are likely to commit violent acts in subsequent personal relationships.[124]

Intimate offenders may also differ in their receptiveness to criminal justice intervention. A series of studies examining the effect of different police responses to domestic violence found that police decisions to arrest domestic violence offenders, as compared to police decisions simply to separate or counsel the couple, consistently led to a decrease in future violent incidents for first time offenders and offenders who did not seriously injure their victims.[125] On the other hand, those studies also

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121. *See* Jeffrey Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, *in* FAMILY VIOLENCE 377, 382–83 (Lloyd Ohlin & Michael Tonry eds., 1989) (distinguishing "persistent offenders" from "the 'innocents' or desisters").

122. *See, e.g.*, Christopher D. Maxwell, Joel H. Garner & Jeffrey A. Fagan, *The Preventive Effects of Arrest on Intimate Partner Violence: Research, Policy and Theory*, 2 CRIMINOLOGY AND PUB. POL'Y 51, 71 (2002) (noting that 40% of domestic violence offenders in a series of studies had a least one subsequent violent act toward the victim and that "the average suspect with at least one subsequent incident had committed about an average of seven new incidents of aggression against the same victim within just the first six months of follow-up"); Coker, *supra* note 102, at 89 ("Contrary to the popular image of the model citizen who one day goes berserk and kills a family member, police studies have consistently found that men who kill their female partners have a *history* of violent behavior. Roughly 70% to 75% of domestic homicide offenders have been previously arrested and about 50% have been *convicted* for violent crimes." (internal quotations and citations omitted)); Fagan, *supra* note 121, at 397 (describing the "consistent finding that spousal abuse is often repeated and escalates in severity").

123. Davis & Smith, *supra* note 107, at 184 (citing G.M. WILT, J.D. BANNON & R.K. BREEDLOVE, DOMESTIC VIOLENCE AND THE POLICE: STUDIES IN DETROIT AND KANSAS CITY (1977)).

124. *See* Coker, *supra* note 102, at 84 (citing, *inter alia*, Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, SOC. WORK (Sept. 1993) (citing studies which indicate that the likelihood of a batterer abusing in a new relationship to be between 57% and 86%)); *see also* Fagan, *supra* note 121, at 392 ("Anecdotal data from victims and shelter workers suggest that violent spouses often seek out other victims if cut off from a battering relationship. They move on to other relationships and resume violence, albeit with another victim.").

125. The first study to reveal the effect that arrest has in cases of family violence was conducted in Minneapolis in 1980. In that study, law enforcement officers responding to domestic violence calls would, according to a randomly determined pattern, respond in one of three ways: arrest the offender, counsel the parties on the scene, or separate the parties. In cases where police did not arrest the offender, 21% of individuals reoffended within six months. In contrast, only 14% of individuals arrested reoffended within that period. *See* Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 263–67 (1984).

showed that "legal sanctions for more serious cases were less effective and possibly led to escalations in violence."[126] This difference has been explained as follows:

> For 'domestic violence only' men, their violence is instrumental in motivation. Legal and social sanctions will be more meaningful to this (usually) higher social status individual who has much to lose from social disclosure or punishment. . . . For the 'generally' violent men, who had longer histories of violence and arrest, desistance would need to occur through changes in cultural patterns as well as by raising the costs of their well-established behaviorial patterns. For them, violence may be expressive and less amenable to external control.[127]

The results of these studies suggest that, while some non-stranger offenders do fit the stereotype that drives public assumptions about offender dangerousness—they are first-time offenders whose violence did not cause serious injury and who are less likely to offend in the future—those are the very offenders whose recidivism can be significantly decreased through criminal justice involvement.[128] Ironically, those non-stranger offenders that the criminal justice system is unlikely to deter from future offenses—offenders who seriously injure their victims or who have

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Subsequent to the Minneapolis study, replication studies were commissioned in six American cities to test whether the same deterrent effects would follow arrests in domestic violence cases. Maxwell, Garner & Fagan, *supra* note 122, at 54. Although widely referred to as "replication programs," the subsequent studies did differ in several respects, including the number and frequency of victim interviews, as well as the rigor with which police responses (e.g., arrest versus counseling) were assigned. *Id*. at 54. While the results of those studies did not reveal as large of a deterrent effect as the Minneapolis study, they showed "consistently smaller rates of subsequent victimization and recidivism among the suspects assigned to the arrest treatment versus the nonarrest interventions." *Id*. at 66. A statistically significant deterrent effect was observable only from victim interviews, which indicated that "arrest reduced the prevalence of new victimization by 25% and the incidents of victimization by 30%." *Id.* at 64. Official criminal history data and official police records showed reductions that were not statistically significant. *Id.* at 64–66. Interestingly, the deterrent effect was most prevalent in situations where the offender had a higher socio-economic status and no prior history of violence. *Id*. at 67–68.

126. Fagan, *supra* note 121, at 394.

127. *Id*. at 393–94; *see also* Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 213 (1992) ("[T]he studies' findings that unemployed, socially 'marginal' batterers are not deterred by arrest is no more surprising than the fact that our entire justice system fails to deter the majority of socially marginal criminals from committing *any* crime.").

128. This effect of criminal justice intervention is limited to arrest. No similar affect was found comparing cases at subsequent stages, e.g., prosecution, sentence length. *See* Elliott, *supra* note 28, at 467 ("It should also be noted that there is no evidence in the Fagan et al. (1984) study that the deterrent effect of legal action increased with the stage of processing in the legal system or the potential severity of legal sanction.").

a history of violence—are the non-stranger offenders who should be viewed as the most dangerous.

2. Victim Selection

The argument that stranger offenders are more dangerous than non-stranger offenders is based not only on an assumption about recidivism, but also on an assumption about victim selection—that those offenders who are violent within personal relationships do not pose a danger to the community at large.[129] The scarce empirical data available to test this presumption is almost exclusively limited to domestic violence offenders,[130] and the implications of the data are not clear. Some studies have found "violent husbands to be significantly more likely than nonviolent husbands to be violent toward nonfamily members."[131] But whether non-stranger offenders pose as large a risk as stranger offenders to the general public is difficult to determine. One study of victimization patterns by violent spouses—the non-stranger offender most people would presume to have a preference for a particular victim—reported three types of violent offenders: (1) offenders who committed domestic violence only; (2) offenders who were violent only toward individuals outside their families, including strangers; and (3) offenders who committed "general violence," that is, violence against persons both inside and outside of the family.[132] The study found that "nearly 45 percent of the 'generally' violent men began their adult violence careers victimizing only strangers" but "rarely found men whose victim circles widened outward *from* the

129. *See generally infra* note 184 and accompanying text. *Cf.* Davis & Smith, *supra* note 107, at 183 (noting that while non-stranger offenders "did, indeed, seem to pose less of a threat to the community at large, . . . they may have posed a greater threat to individual victims").

130. For some sources indicating that child sex offenders who victimize family members do not limit their victim selection to only relatives, see Andrew, *supra* note 115, at 1875 n. 124; Collins, *supra* note 116, at 165–66; Peggy Heil et al., *Crossover Sexual Offenses*, 15 SEXUAL ABUSE 221, 221–36 (2003) (examining study of incarcerated child sexual offenders, in which majority of offenders admitted to raping both related and nonrelated children); Wilson, *supra* note 116, at 258 n.69; *see also* Judith V. Becker, *Offenders: Characteristics and Treatment*, 4 SEXUAL ABUSE OF CHILDREN 176, 177 (1994) ("[I]t used to be assumed that incest offenders could be clearly separated from other child molesters, but current evidence indicates that a substantial percentage of child molesters offend in both spheres."); Mark Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 286–300 (1991) (reporting study of sex offenders, in which intrafamilial child sexual offenders self-reported high degree of "crossover" offenses, such as rapes of nonrelated children or adult women).

131. Hotaling et al., *supra* note 38, at 356 (cautioning that "this literature is difficult to interpret").

132. *See* Fagan, *supra* note 121, at 392–95 (discussing Nancy Shields & Christine R. Hanneke, *Patterns of Family and Non-family Violence: An Approach to the Study of Violent Husbands* (1981) (paper presented at the annual meeting of the American Sociological Association)).

family—few 'domestic violence only' men became violent over time toward strangers as well."[133] However, that study appears to have categorized its subjects on the basis of how often they victimized a particular group—that is to say, a person who committed significantly more domestic assaults than non-domestic assaults would be categorized as "domestic violence only" even though he was committing some crimes against persons outside his family.[134] Because of this method of categorization, the study is of limited value in assessing whether the victim selection assumption is true.

Accounts of how many domestic violence offenders also commit crimes against strangers vary. One study found that "50% of a sample of wife abusers reportedly had spent time in prison, and 33% of these prison terms were for violent offenses toward strangers."[135] A second study found that approximately 20% of battered women interviewed had husbands who "were violent with other individuals besides their wives."[136] A separate study revealed that those domestic violence offenders who seriously injure their victims are more likely to victimize strangers as well.[137]

There is little reason to believe that this victim selection assumption applies outside the context of domestic violence, such as in the context of violence between friends. That is because the assumption relies on the uniqueness of the offender-victim relationship. An offender's domestic relationships are, by their very nature, limited in scope. The offender

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133. Fagan, *supra* note 121 at 392.

134. An article subsequently published by the two authors whose unpublished paper Fagan describes, *see supra note* 132, explained its methodology as follows:

> If the respondent was violent with both family and nonfamily targets, then the following procedure was used to make a classification: The target with whom the respondent had been violent most often (in terms of the number of violent behaviors) became the man's "most severe target." The man had to be more than one-half as violent with any other target (compared with the severe target) to be used in determining the overall pattern of violence. For example, if the respondent's most severe category was friends, but he was also at least half as violent with his wife, then he was classified as "generally" violent. However, if the violence with his wife was not at least half as severe as with friends, then he was considered a "nonfamily only" violent husband.

Nancy M. Shields et al., *Patterns of Family and Nonfamily Violence: Violent Husbands and Violent Men*, 3 VIOLENCE & VICTIMS 83, 86 (1988).

135. Jeffrey Fagan & Sandra Wexler, *Crime at Home and in the Streets: The Relationship Between Family and Stranger Violence*, 2 VIOLENCE & VICTIMS 5, 9 (1987).

136. *Id.* Other estimates range from 20% to almost 50%. *See* Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43, 55 n.80 (1995) (collecting sources).

137. Jeffrey Fagan et al., *Violent Men or Violent Husbands? Background Factors and Situational Correlates*, *in* THE DARK SIDE OF FAMILIES (David Finkelhor et al. eds., 1983) (reporting that spouses with histories of severe violence at home are more often violent toward strangers, have more often been arrested for violent offenses, and more often injure both domestic and stranger victims).

whose violent actions are limited to domestic relationships will limit his victim selection to a finite number of victims, e.g., his romantic partner, children, etc. In contrast, an individual who acts violently toward his friends or acquaintances has a larger pool of potential victims because he is likely to have more friends and acquaintances.

But even if the assumption about victim selection were true—that is, even if intimate and family offenders pose a risk only to members of their families and to their intimate partners—at most the assumption of victim selection supports an incapacitation argument in favor of more serious treatment of stranger violence.[138] Under alternative theories of punishment, the victim selection assumption arguably supports greater punishment for non-stranger offenders. For example, one could argue that an offender who poses an identifiable risk to the same person or persons should be subject to more serious treatment because his targeting of a vulnerable victim makes him more culpable. That argument is essentially as follows: we generally increase the punishment of offenders who target vulnerable victims, such as the elderly or children.[139] This practice is based on the theories that (a) a vulnerable victim is less capable of defending herself, and thus the violence may result in greater harm,[140] and (b) the offender's targeting of such victims shows an extra measure of depravity.[141] Repeat victims of family violence are obviously at risk and vulnerable to future acts of violence, and thus an offender's repeated targeting of such victims is arguably more blameworthy.[142]

C. Victim Fault

The third argument in favor of treating stranger violence more seriously is based on a perception that the victim may have been at least partially at fault. As Professor Kay Levine explains:

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138. "For incapacitation, the issue is the risk posed by the offender to the general public, rather than the harm done to any particular victim in the past." Martin Wasik, *Crime Seriousness and the Offender-Victim Relationship in Sentencing*, *in* FUNDAMENTALS OF SENTENCING THEORY 103, 104 (Andrew Ashworth & Martin Wasik eds., 1998).

139. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2005) (providing for two-level increase for any offense where the defendant knew or should have known that a victim of the offense was "unusually vulnerable due to age, physical or mental condition, or who [was] otherwise particularly susceptible to the criminal conduct").

140. *See* Wasik, *supra* note 138, at 113.

141. *See id*. (quoting United States v. Moore, 897 F.2d 1329 (5th Cir. 1990)).

142. *See id*. at 116 ("[A recent decision] that an assault committed in a domestic setting should be sentenced on the same basis as any other assault (i.e. rather than more leniently) . . . does not go far enough. Are not abused women almost archetypal 'vulnerable victims,' so that attacks upon them should justify enhanced rather than reduced sentencing levels?").

> Persons who victimize strangers thus are perceived and portrayed as predators: they threaten or attack at random . . . . [In contrast], the victim who knows her assailant may be perceived as having somehow incited the assailant's behavior, which under the legal doctrine of provocation may lessen the assailant's culpability. These stereotypes suggest that persons who victimize intimates, as compared with those who victimize strangers, cause less (undeserved) harm to their victims . . . .[143]

Victim fault can take two forms: First, the victim may have actively engaged in aggressive (or, in any event, affirmative) behavior that provoked or goaded the offender into a violent act. Second, a victim may have passively failed to act by not ending a relationship with a violent offender or otherwise taking precautions to avoid violent situations.[144]

1. Active Victim Fault

The victim whose behavior affirmatively triggers a violent response is a well-known image. This figure appears in the provocation defense[145] and is generally thought to be entitled to less protection than other victims. The idea is that, because the victim is guilty of some intensely disfavored conduct, such as assaulting the offender, the offender's violent outburst is partially justified.[146] Although it ordinarily arises in the context of aggressive conduct that prompts the offender's violence, the notion of active victim fault likely plays an important role in other decisions to treat non-stranger violence less seriously. For example, assaults between two members of the drug trade or between a prostitute and her pimp are unlikely to receive the same moral condemnation as a similar assault on an "innocent" victim.[147]

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143. Levine, *supra* note 9, at 702.

144. *See* James J. Gobert, *Victim Precipitation*, 77 COLUM. L. REV. 511, 514 (1977) (defining "victim precipitation" of a crime as "some overt, identifiable conduct or omission on the part of the victim which provokes an individual to commit a crime").

145. *See generally supra* notes 82–86 and accompanying text.

146. There is considerable debate among criminal law theorists over whether the provocation defense is properly characterized as a justification or as an excuse. For a summary of this debate, see Dressler, *supra* note 81.

Here, the argument about victim fault focuses exclusively on the victim's wrongdoing. In light of this, and in light of the discussion of offender culpability, *supra*, and the important moral component necessary to mitigate an offender's punishment, for the purposes of this Article I have elected to characterize the victim fault argument as a partial justification.

147. *See* Wasik, *supra* note 138, at 113 (noting that the "'ideal victim' identified in criminological literature . . . is upright, innocent, passive, and morally uncompromised, displaying contrasting characteristics to those of the offender"); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37

Leaving aside the non-stranger victim who is engaged in unrelated criminal activity, the image of the non-stranger victim whose actions resulted in violence is reminiscent of the provoking victim, whose affirmative conduct partially justifies the provoked offender. While the non-stranger violence victim need not have legally provoked the offender (i.e., engaged in behavior considered to provide "adequate provocation"), and while the offender need not have actually killed the non-stranger victim,[148] the provoking victim and the non-stranger victim are viewed similarly in that their behavior is believed to have caused the offender's violence. Consider the non-stranger victim who, in the course of a verbal argument with an acquaintance at a bar, says something very offensive to the acquaintance; in response, the acquaintance punches the victim in the face. It is unlikely the offender would have been entitled to the provocation defense had he killed the victim. Yet we recognize that the offender would not have hit the victim had the victim not made the offensive comment,[149] and we tend to view this victim as less deserving of protection than a victim who, while walking down the street and minding her own business, was suddenly punched in the face by a complete stranger. At the very least, we intuit that the "innocent" victim walking down the street deserves more protection from violence than the victim who is making offensive comments in bars.

STAN. L. REV. 937, 951 (1985) ("In the criminal law context, the word 'victim' has come to mean those who are preyed upon by strangers: 'Victim' suggests a nonprovoking individual hit with the violence of 'street crime' by a stranger. The image created is that of an elderly person robbed of her life savings, an 'innocent bystander' injured or killed during a holdup, or a brutally ravaged rape victim. 'Victims' are not prostitutes beaten senseless by pimps or 'johns,' drug addicts mugged and robbed of their fixes, gang members killed during a feud, or misdemeanants raped by cellmates."); *see also* Sundby, *supra* note 75, at 354–55 ("[T]hose victim attributes that correlate with a life sentence—drug use, alcohol abuse, unstable personality—tend to manifest themselves in the cases through evidence of victim behavior that can be termed 'high risk' or 'antisocial.' . . . By contrast, victims perceived by jurors as possessing more 'worthy' attributes are found in fact patterns in which the victim was an 'innocent' minding her own business, a fact pattern that . . . correlates strongly with a sentence of death.").

148. Provocation is only a partial defense—allowing a provoked offender to be convicted of manslaughter rather than murder, but not to escape criminal liability altogether—and is permitted only in homicide cases. The Federal Sentencing Guidelines allow what is essentially a provocation defense for all violent crimes. The Guidelines include an evaluation of active victim fault: "If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and the circumstances of the offense." U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (2006).

149. *See* Gobert, *supra* note 144, at 528–30, 544 (discussing the causative role of victim fault and arguing that there are "degrees of causation, and the strength of the causal link between the precipitative conduct and the defendant's crime should be relevant to the amount of sentence mitigation, with reservation of the greatest mitigation for cases in which the causal relationship is strongest").

What distinguishes these hypothetical situations and our relative perceptions of the two victims is not whether their attacker was a stranger before the violent incident. Had the first hypothetical victim made the same comment to someone he did not know, rather than to an acquaintance, it would unlikely change our assessment of which victim was more deserving of protection. Rather, what matters is whether the victim's conduct triggered the violence. We also care about the nature of the victim's conduct: whether someone believes the conduct of the first hypothetical victim is relevant to judging the offender's crime will likely depend on what the victim said. Had the first victim merely told his acquaintance to shut up, the victim's plight would seem more sympathetic than if, for example, the victim had made a comment disparaging the offender's race or religion.[150]

But the nature of this example may be obscuring intuitive distinctions regarding whether the victim and offender are acquainted prior to the violent act. It is difficult to picture an individual suddenly maligning a complete stranger. An offensive comment is far more likely to occur in a preexisting relationship.[151] It may, therefore, limit our ability to determine whether a victim-offender relationship ordinarily affects our assessment of victim fault.

Road rage shootings provide a useful example that avoids this problem. Road rage shootings involve the same kind of trivial victim fault that is perceived to precipitate non-stranger violence, but road rage incidents are perceived to be committed primarily by strangers. The public response to road rage freeway shootings illustrates the striking role that a victim-offender relationship can play. News accounts of the shootings often include details of the victim's conduct that caused the offender's excessive retaliation[152]—such as one driver cutting off another,[153] making a rude gesture,[154] or minor traffic infractions and accidents.[155] Non-stranger

150. *Cf.* Gobert, *supra* note 144, at 543 ("Some precipitative conduct may be so trivial that it should have no effect on a defendant's sentence.").

151. *See* Rojek & Wilson, *supra* note 58, at 257 ("The probability of an argument precipitating a stranger homicide is relatively low compared to family or acquaintance homicide.").

152. *See* Robert F. Blomquist, *American "Road Rage": A Scary and Tangled Cultural-Legal Pastiche*, 80 NEB. L. REV. 17 (2001) (collecting sources); *see also id.* at 47 (noting that a clinical psychologist who testified at congressional hearings on road rage "defined road rage 'as one driver expressing anger at another driver for something he or she did on the road'").

153. *Id*. at 20, 27, 29; Joel Best, *"Road Warriors" on "Hair-Trigger Highways": Cultural Resources and the Media's Construction of the 1987 Freeway Shootings Problem*, 61 SOC. INQUIRY 327, 332 (1991).

154. Blomquist, *supra* note 152, at 27.

155. *Id*. at 27, 28.

shootings and homicides are regularly precipitated by similarly trivial disputes.[156] Indeed, one highway patrol officer drew an explicit comparison between road rage shootings and non-stranger crime in a television interview: "These are difficult crimes to try to stop for law enforcement. These are ty—, these are crimes of passion which are akin to the types of crime that occur, uh, between family members."[157]

The public outcry following the highly publicized freeway shootings focused on the triviality of the incident that provoked the offending driver[158] and thus on their relatively random nature. While road rage shootings are far outnumbered by non-stranger shootings and homicides,[159] they have garnered a disproportionately large amount of public attention.[160] These shootings prompted congressional hearings,[161] and several states introduced legislation to address road rage violence.[162] California enacted legislation that added five years to the prison sentence of "anyone convicted of shooting someone in a motor vehicle and causing serious injury or death."[163] Separate legislation forbade judges from imposing only a sentence of probation for offenders convicted of freeway violence and added more officers to highway patrol.[164] Because the victim fault present in road rage incidents is so similar to the victim fault that is perceived to precipitate non-stranger violence, this reaction to road rage strongly suggests that victim fault, standing alone, does not justify treating stranger violence more seriously than non-stranger violence.

2. Passive Victim Fault

The second type of victim fault that might lead us to perceive non-stranger violence as less serious than stranger violence involves the

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156. *See* Best, *supra* note 153, at 332 (noting that a news report which described the events leading up to a freeway shooting as drivers "jockeying for position" "makes the shooting seem less random, less an irrational response, . . . and more like the escalating 'character contests' which often precede interpersonal violence").

157. *Id*. at 333 (quoting NBC news story).

158. Blomquist, *supra* note 152, at 45 (quoting congressional testimony).

159. For figures on "roadway firearm assaults," see Best, *supra* note 153, at 342 n.1.

160. *Murder By Strangers: From Gang Gunfire to Freeway Shootings, L.A. County's 1987 Homicides Often Linked by Their Random Nature*, L.A. TIMES, Dec. 30, 1987, at Part II page 1.

161. Blomquist, *supra* note 152, at 40–49 (describing 1997 hearings before the Surface Transportation Subcommittee of the House Committee on Transportation and Infrastructure).

162. Donald W. North, *The Fury Within All of Us Yearning to Break Free: Road Rage Comes of Age*, 27 T. MARSHALL L. REV. 183, 200 (2002).

163. Jerry Gillam, *Bills Signed to Combat Violence on the Freeways*, L.A. TIMES, Sept. 27, 1987 at Part I page 21.

164. Best, *supra* note 153, at 333–34.

victim's failure to protect herself from violence. That failure can take many forms, such as failing to end a relationship with an individual who is prone to violence or failing to take other precautions, such as locking one's door at night. Because these victims failed to take appropriate precautions to avoid violence, one might argue that they deserve less protection than those victims who did take precautions. Indeed, commentators have ordinarily discussed the arguments for reducing an offender's punishment on the basis of passive victim fault in the more general context of a failure to take precautions.[165]

One argument that has been advanced in favor of reducing an offender's punishment on the basis of passive victim fault is that if offenders are punished less harshly for committing crimes against careless victims, then potential victims will have an incentive to take precautions against crimes.[166] The proponent of this theory has conceded that it should be limited to victims whose vulnerability to crime is voluntary.[167] This concession would seem to exempt many victims of non-stranger crimes, whose victimization was attributable to factors over which they have limited control. There is a large body of research indicating that domestic violence victims, for example, are not psychologically capable of leaving their violent mates.[168] The theory could also exempt individuals whose victimization was more likely because they live in high crime areas. Because those who live in high crime areas often do so because they do not have enough resources to live elsewhere, their vulnerability to crime is not entirely voluntary.

Another variation on the idea of passive victim fault is the notion of consent. One might argue that a victim consents to violent behavior if that victim continues to maintain a personal relationship with the offender after the offender has already committed a violent crime against her. But there are several problems with this theory of victim consent. First, it cannot justify more lenient treatment of all non-stranger violence; by its own terms, it applies only in situations where an offender commits a violent crime against the same victim a second (or subsequent) time. Second, it assumes that all personal relationships are purely voluntary interactions. That is most certainly not so, for example, in cases of violence between

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165. *See generally* Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1183 (1994); Gobert, *supra* note 144.

166. Gobert, *supra* note 144, at 1196–97.

167. *Id*. at 1204–05.

168. For examples of this research, see the amicus briefs of the American Psychological Association and American Civil Liberties Union in State v. Kelly, reprinted in 9 WOMEN'S RTS. L. REP. 245 (1986).

parent and child.[169] Other family relationships or relationships based on close geographical proximity (e.g., neighbors) may also require more than simply the victim's desire to end the relationship in order to sever all personal ties.

The inadequacy of the consent theory can also be found in the treatment of repeated domestic violence that culminates in the death of the victim. If we assume that the victim's decision to remain in the relationship gives the offender some sort of license to continue his actions, then we would not want to prosecute the offender even when his actions resulted in death. A sense that it is appropriate to prosecute these domestic violence homicides indicates that, at some point, we believe what the offender has done is wrong and deserves punishment, the victim's desire to remain in the relationship notwithstanding. However, once we recognize that some incidents of "consenting" non-stranger violence are, in and of themselves, deserving of punishment, then it becomes necessary to articulate a justification for allowing other forms of non-stranger violence to be minimized or ignored.

D. Non-stranger Crime as a Private Matter

Historically, violence within relationships was viewed as a "private" matter.[170] That view appears to persist today.[171] This belief may explain the apparent preference of criminal justice actors to defer to the wishes of non-stranger victims and to pursue stranger crime regardless of the victim's wishes.[172] As other commentators have noted:

> [C]riminal justice actors view crime between acquaintances as essentially private matters between the two parties, rather than as public matters. In crimes between acquaintances, officials view the defendant as having harmed, and representing a continuing threat to,

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169. *See, e.g.*, Anderson, *supra* note 40, at 1502–04.

170. Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1161 & n.64 (collecting sources).

171. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 22, at 26, tbl.4.5 (2005) (noting that violence in the context of personal relationships is often not reported to the police because the victim perceives the matter as a personal or private matter or because the victim wishes to protect the offender); *see also* RIEDEL, *supra* note 5, at 178 ("Victims often regard their conflicts with family and friends, including violent ones, as matters that can be resolved without law."); Simon, *supra* note 6, at 523 n.237 (citing ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 233 (2d ed. 1990) for the proposition that "child sexual abuse cases that come to the attention of medical authorities are usually not turned over to the criminal justice system because families consider the incidents to be private matters").

172. *See infra* notes 252–54 and accompanying text.

> an isolated individual. Therefore, the decision to prosecute depends heavily on the victim's interest; only if there is reasonable assurance that the victim wants to press charges, may the prosecutor and the court see a compelling reason to proceed with the case. In stranger-to-stranger cases, on the other hand, the defendant is perceived by officials as having harmed the community at large, and is seen as representing a continuing threat to all members of the community. The interests of the individual victim are subordinate to the interest of the community (as those interests are interpreted by court officials). Therefore, victims are less likely to be consulted about their interests, and defendants are more likely to be prosecuted regardless of whether or not victims have indicated that that is what they wish.[173]

The view of non-stranger violence as a private matter often encompasses a belief that such violence should be handled within the confines of the existing relationship or community, rather than through formal legal processes.[174] Even those who do not advocate complete non-intervention on the part of the state argue for non-criminal resolution of crimes involving close personal relationships in some circumstances.[175] The arguments in favor of this view are often framed in terms of the collateral consequences to the victim if the non-stranger offender is prosecuted. Those arguments include the economic hardship that will befall the victim if the offender is the head of household and his imprisonment will interfere with his earning potential.[176] Arguments concerning the further damage to the victim-offender relationship or the offender's relationship with other family members are also made. These "best for the family" type arguments are particularly prevalent in child

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173. Davis & Smith, *supra* note 107, at 182–83 (citing James Bannon, Law Enforcement Problems With Intra-Family Violence (1975) (paper presented at the American Bar Association Convention) and B.E. Smith, The Prosecutor's Witness: An Urban/Suburban Comparison (1979) (unpublished Ph.D. dissertation, State University of New York at Stony Brook)).

174. RIEDEL, *supra* note 5, at 178. Unfortunately, the idea that non-stranger violence is best resolved informally may also mask a belief that it is not worth the resources of the formal criminal justice system. *Cf.* CHALLENGE OF CRIME, *supra* note 6, at 25 ("Not long ago there was a tendency to dismiss reports of all but the most serious offenses in slum areas and segregated minority group districts. The poor and the segregated minority groups were left to take care of their own problems.").

175. *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 804–05 (2007) (articulating the argument that a domestic violence victim is in the best position to know how to protect herself).

176. *E.g.*, Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1016–18 (2000); Tamara L. Kuennen, *"No Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 41 (2007).

molestation cases, where a premium is often placed in keeping the family together and trying to return the family to a normal situation.[177]

There are two flaws with these arguments. First, while these informal social controls may have existed at some point, the modern decline of informal dispute mechanisms in specific communities has been well documented.[178] Indeed, modern studies of crime have demonstrated a correlation between high rates of non-stranger violence and a lack of neighborhood support networks.[179]

Second, the collateral economic and social consequences of criminal justice intervention for an offender's family are not limited to the punishment of non-stranger violence. Some stranger offenders also have families, and imprisonment will disadvantage those families just as much as it would a non-stranger offender's family. Thus, these collateral consequences cannot justify different treatment for stranger and non-stranger violence.

E. Fear of Strangers

Another professed reason for treating stranger crime more seriously is that crimes committed by strangers cause more fear.[180] Public concern

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177. *See, e.g.*, GRAY, *supra* note 28, at 10–14 (describing the rise of the "therapeutic" approach, under which intrafamily child sex abuse was treated as a family problem rather than as a crime, and noting a more recent "concerted push toward criminal prosecution of these cases, although not without controversy"); Daniel G. Saunders & Sandra T. Azar, *Treatment Programs for Family Violence*, *in* FAMILY VIOLENCE 481, 490 (Lloyd Ohlin & Michael Tonry eds., 1989) (noting a debate in the child abuse field over "whether family members should be separated after abuse is discovered" and further noting that some "professionals believe that greater trauma will occur to the victim if the family breaks up because of the loss of the parent, guilt for breaking up the family, and social and economic hardships for all family members"); *see also* Collins, *supra* note 116, at 167–71 (noting this argument and discussing its flaws); GRAY, *supra* note 28, at 115 ("[T]he therapeutic approach to intra-family cases of child sexual abuse—at least in the child welfare system—has not been very successful.").

178. As Carolyn Ramsey has explained in the context of partner violence, "the network of relatives, neighbors, and friends who helped shield victims of intimate violence from their abusers had largely disintegrated" by the late nineteenth century, as "urban dwellers increasingly maintained a polite distance from their relatives and treated the family next door as strangers. Court records and prosecutors' papers abound with evidence that both neighbors and relatives frequently ignored screams from family fights." Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101, 165 (2006); *see also* Davis & Smith, *supra* note 107, at 175 ("As family and community bonds have become weakened in modern industrial societies, informal dispute resolution mechanisms and structures have deteriorated." (citing Laura Nader & Duane Metzger, *Conflict Resolution in Two Mexican Communities*, 65 AM. ANTHROPOLOGIST 584 (1963)). *Cf.* BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT (1987) (documenting the replacement of community dispute resolution by formal legal proceedings).

179. *See, e.g.*, Rebecca Miles-Dolan, *Violence Between Spouses and Intimates: Does Neighborhood Context Matter?*, 77 SOC. FORCES 623 (1998).

180. *See, e.g.*, VERA INST. OF JUSTICE, *supra* note 2, at 6 (stating that felonies committed by

about crime is disproportionately directed at crimes committed by strangers.[181] There is evidence suggesting that violent crimes committed by strangers are more likely to receive media coverage than non-stranger violence,[182] though whether this media focus is a cause or an effect of public concern is not clear.[183] The disproportionate public concern about stranger violence may be explained by perceptions of personal control. People tend to believe that they can avoid personal relationships with violent individuals and thus minimize their exposure to non-stranger crime. They know, by contrast, that they do not have similar control with respect to strangers. As Lawrence Friedman explains:

> Stranger violence is what people fear most—and as soon as we enter a "public environment," we lose a lot of our power to "screen out undesirable social contacts." Even the most innocuous setting can turn into a minefield: . . . a crazed man kills passengers on a suburban train; an ex-convict kidnaps a young girl from her own bedroom and murders her. These are truly terrifying events, because they suggest that nobody is safe *anywhere*. These particular types of crime are, in fact, pretty uncommon, but they send chills down our spine. They could happen to anyone. They come out of nowhere.[184]

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strangers "might be regarded as more serious and more frightening"); *see also supra* note 6.

181. *See supra* notes 6–7.

182. *See, e.g.*, Best, *supra* note 153, at 337 (noting the press emphasis on "random" violence in freeway shootings, serial murderers, and strangers abducting children).

183. *Cf.* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1292 (2005) ("Because of the availability heuristic, through which people estimate how frequently an event occurs based on how easy it is to recall the event, when people think about the risk of crime and the appropriate sentence, they will think of the examples they get from the media. Thus, the public's fears of crimes will be fueled by the media, and they will perhaps place greater stock in incarceration policies that promise to deal with their fears in the most immediate fashion."); PILLSBURY, *supra* note 27, at 65 ("Generally we fear most what we understand least. For example, residents of relatively safe suburbs often have much greater fear of crime than do those who live in more dangerous urban areas. We tend to fear certain highly unusual crimes of violence, like stranger kidnappings of children, than the much more common crimes of domestic violence. We often exaggerate the dangers posed by those of different races and classes.").

184. Lawrence M. Friedman, *Some Remarks on Crime, Violence, History, and Culture*, 69 U. COLO. L. REV. 1121, 1131–32 (1998); *see also* Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 545–46 (2006) ("As with all varieties of family violence, child abuse homicide does not arouse fear in the general public of the sort that lead to persistent demands for attention to public safely because the threat is perceived as confined to the family circle of the abuser. The brutal mother, father, or live-in boyfriend does not galvanize fear about danger to the community at large as does, for example, the pedophile lurking near the schoolyard or other criminal predator who is a stranger to the victim."); FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 10 (1997) ("The more members of the public feel the risks of a particular harm are within their control, the more secure citizens will feel about their personal situation. But if potential victims feel there is no way they can

Fear of crime can result in various expensive consequences, such as private money spent on crime prevention (e.g., burglar alarms, dead bolts, private security personnel) and opportunity costs (e.g., avoiding certain neighborhoods, not going out after dark).[185] If fear of stranger violence results in a significant expenditure of resources, one might think that the allocation of additional resources to reduce stranger crime may be justified as an efficient response to public crime fears.[186] But there are limitations to this resource allocation argument. Because the greater allocation of resources to preventing stranger violence would heighten arrest levels, prosecution rates, and sentence lengths for stranger offenders, this is not simply an argument for traditional resource allocation. Rather it is an argument about treating some criminal defendants differently.

Any argument to treat some criminal defendants differently than others must overcome the modern criminal law's preference for punishment equality.[187] That preference will allow for disparate treatment of different defendants only when meaningful distinctions between defendants can be drawn.[188] It is not clear that public fear, standing alone, can provide such a distinction.

For one thing, there are certainly examples where public fear would suggest disparate treatment based on illegitimate criteria, such as race. Public opinion research indicates that individuals are more afraid of being

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take action to modify risks, this will heighten their anxiety about a particular risk. . . . [O]ne reason citizens fear stranger violence more than they fear being killed by friends or family is because they feel more control over their choice of personal acquaintances, while the strangers they encounter are not as easy to choose or to reject."). *Cf.* Gobert, *supra* note 144, at 538–39 ("If the victim in a violent assault, for example, did nothing to bring about the crime, then the likelihood that the victim was randomly selected increases. In that event, everyone is a potential victim. On the other hand, if the victim was at fault to some extent, then those who do not precipitate crimes against themselves have less to fear. The result is that finding victim precipitation allows citizens to feel more secure about their chances of being victimized.").

185. *See* Marc Reidel, *Stranger Violence: Perspectives, Issues, and Problems*, 78 J. CRIM. L. & CRIMINOLOGY 223, 223–24 (1987).

186. Criminal justice resources include the time of police and prosecutors, as well as space within prisons.

187. *See, e.g.*, HART, *supra* note 78, at 172 (discussing "the claim of justice that 'like cases should be treated alike'"); Andrew Ashworth & Elaine Player, *Sentencing, Equal Treatment, and the Impact of Sanctions*, *in* FUNDAMENTALS OF SENTENCING THEORY 251, 253 (Andrew Ashworth & Martin Wasik eds., 1998) (arguing for a "general principal of equal treatment" of sentencing in order "to respect individuals by ensuring fair treatment").

188. For discussions about the undesirability of "unwarranted disparity" in the criminal justice system, see, e.g., PIERCE O'DONNELL ET AL., TOWARDS A JUST AND EFFECTIVE SENTENCING SYSTEM 1–15 (1977); Andrew Ashworth, *Four Techniques for Reducing Sentence Disparity*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 227, 236–37 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

the victim of a crime committed by African Americans.[189] But it is doubtful that many people would argue that such fear would justify disproportionately high arrests, prosecutions, or sentences for African American offenders. The same objection would apply to increased arrests and longer sentences based on an offender's income, gender, or education level.

Of course, these examples demonstrate only that public opinion and public reaction to certain crimes should not drive criminal justice resource allocation when the opinion and reaction are based on illegitimate criteria, such as race. But, as discussed above, there is reason to believe that public opinion and reaction to stranger crime is based, at least in part, on considerations of race and socioeconomic status, and it is hard to separate out these illegitimate bases.[190] And even if we were to change the variable that causes public fear to some seemingly random criteria—offenders who commit crimes while wearing blue shirts, or offenders who are left-handed—we can see that the preference for punishment equality makes the disparate arrest levels and sentence lengths based on these criteria seem illegitimate.

Moreover, public fear about stranger violence is largely ungrounded in fact. Non-strangers commit the majority of violent crimes.[191] If heightened public fear of stranger violence had some real factual support, then there could be utilitarian crime control reasons for disparate treatment.

III. THE CASE FOR EQUAL TREATMENT OF NON-STRANGER VIOLENCE

The previous Part of this Article discussed the possible justifications for treating stranger violence as more serious than non-stranger violence. This Part identifies independent arguments in favor of treating non-stranger violence more seriously than it is presently treated. Those arguments include (1) non-stranger violence results in greater harm to victims than stranger violence, (2) the treatment of non-stranger violence as less serious than stranger violence is at odds with the legally recognized positive obligations that accompany close personal relationships, and (3) more serious treatment of non-stranger violence may be required to counterbalance the weaker social norms against such violence.

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189. *See* Craig St. John & Tamara Heald-Moore, *Racial Prejudice and Fear of Criminal Victimization by Strangers in Public Settings*, 3 SOCIOLOGICAL INQUIRY 267, 268–69 (1996) (describing two studies which found that encounters with young African American males evoked especially high levels of fear for white study participants).

190. *See supra* notes 58–64 and accompanying text.

191. *See supra* notes 2–4 and accompanying text.

A. Accounting for Greater, or at Least Additional, Victim Harm

Criminal law ordinarily evaluates the seriousness of a crime according to two factors: the harm done by the offense and the offender's culpability.[192] While offender culpability may be slightly higher in some crimes of stranger violence,[193] there is reason to believe that both the physical and psychological harm to at least some victims of non-stranger violence may be more serious than the harm to victims of comparable stranger violence. As discussed below, studies of victim harm—specifically, studies of robberies and assaults—reveal that those who are victimized by an offender whom they know are more likely to suffer serious injury during the course of a crime than those victimized by strangers. Evidence also suggests that victims of non-stranger violence suffer *other* harms in addition to those suffered by victims of stranger crime. These additional harms include feelings that the victim was herself to blame for the violent incident or intimidation and other fears associated with knowing and being known to the offender. Finally, violent crimes that occur within the context of close personal relationships may involve a breach of trust and feelings of betrayal that would not arise had the same crime been committed by a stranger.

The central role that victim harm plays in criminal liability is illustrated by the practice of classifying attempt as less serious than a completed crime. Consider the situation of the would-be murderer who shoots and misses. He has taken all necessary steps to complete a crime, and failed to complete the murder only for reasons that were beyond his control. The would-be murderer is just as culpable as the offender who actually completes the crime, just less successful.[194] Yet most jurisdictions punish the would-be murderer less severely than the successful murderer, despite their identical culpability.[195]

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192. "Crimes must be ranked according to their relative seriousness, as determined by the harm done or risked by the offence and by the degree of culpability of the offender." Andrew Ashworth, *Desert*, *in* PRINCIPLED SENTENCINGS: READINGS ON THEORY AND POLICY 141, 143 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

193. *See supra* notes 97–98 and accompanying text.

194. Of course, offender culpability for attempt may arguably be less than for a completed crime if attempt liability is allowed in situations where the offender has not yet taken actions in substantial fulfillment of the crime—e.g., the attempted murderer who shoots and misses is arguably more culpable than the attempted murderer who has done no more than purchase a gun.

195. *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 544–45 (8th ed. 2007) (noting that "the usual punishment for attempt is a reduced factor of the punishment for the completed crime . . . however, a substantial minority of states have departed from the predominant scheme by making the punishment the same for the attempt as for the crime attempted, except for crimes punishable by death or life imprisonment").

Victim harm also plays a significant role in sentencing determinations.[196] For example, the Federal Sentencing Guidelines increase a defendant's sentence for financial crimes based on the amount of loss sustained by the victim.[197] For white collar offenses, such increases often make the difference between a relatively moderate and a very long sentence. And federal law requires that, for all crimes, details about the harm that the defendant inflicted on the victim be included in presentence reports—the documents that usually form the factual basis of a judge's sentencing determination.[198]

The additional victim harm associated with non-stranger crimes takes two forms: (a) a greater likelihood of serious physical injury during the violent incident, and (b) non-physical harm unique to close personal relationships. Several studies have shown that violent crimes committed by non-strangers tend to result in more serious injury to victims than comparable stranger crimes.[199] For example, one study of robbery victims found that "robberies by strangers appear less likely to cause serious injury than robberies by acquaintances."[200] A study of felony assault arrests in New York City similarly found that "serious injury—that is, injury requiring some medical attention, stitches or hospitalization—was more

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The doctrine of felony murder provides another example of the centrality of victim harm to offense seriousness. While the attempt doctrine reduces offender liability in the absence of victim harm, the felony murder rule increases liability on the basis of greater harm. Under the doctrine of felony murder, an offender whose culpability is relatively low, e.g., he intends only to rob a store, will be charged with the more serious crime of murder when his actions result in the loss of a life. *Id.* at 435–46.

196. "Wholly apart from its role in the definition of crime, however, judges traditionally have considered a crime's effect on its victim in deciding on a sentence." Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115, 115 (2006).

197. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2006).

198. *See* FED. R. CRIM. P. 32(d)(2)(B) ("[A presentence report must include] verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed."). That requirement was added by the Federal Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982). "Although the record of the hearings before the Criminal Law Subcommittee of the Senate Judiciary Committee indicates that a major reason for including this information was for purposes of determining restitution, the appendix to the hearings emphasizes that statements concerning the actual harm caused are 'useful tools in determining equitable penalties during the sentencing of a convicted offender.'" Henderson, *supra* note 147, at 999.

199. "Victims of violence were more likely to report being injured when the offender was an intimate partner (48 percent injured) or a family member (32 percent injured) than when the offender was a stranger (20 percent injured)." Press Release, Bureau of Justice Statistics, "About One in Four Victims of Violent Crime are Physically Injured During the Offense" (June 24, 2001), http://www.ojp.usdoj.gov/bjs/pub/press/ivc98pr.htm; *see also* CHALLENGE OF CRIME, *supra* note 6, at 19 (noting that studies "suggest that the injury inflicted by family members or acquaintances is likely to be more severe than that from strangers").

200. Philip J. Cook, *Robbery Violence*, 78 J. CRIM. L. & CRIMINOLOGY 357, 362 (1987).

frequent in the prior relationship cases (46%) than in stranger cases (33%)."[201] It is possible that this higher proportion of severe injury in cases of non-stranger violence is attributable to a bias in reporting effects, namely that victims are, on the whole, less likely to report a crime to law enforcement when they know the offender.[202] Reasoning that a victim's tendency to report a crime increased with the seriousness of her injury, the authors of these studies posited that victim reluctance to report non-stranger violence would distort the number of reported non-stranger robberies as a proportion of all non-stranger robberies.[203]

But there are reasons to believe that the disproportionately high number of non-stranger crimes that end in serious injury is attributable to more than just reporting bias. Another possible explanation is that robbery victims are more likely to resist when being robbed by an individual that they know as opposed to a stranger. In that case, it seems that the existing relationship itself plays a causal role in the injury: because the robbery victim knows the offender, she may be less likely to immediately perceive the incident as a crime and comply with the offender's demands. An existing relationship may also play a causal role in non-robbery violence. Non-stranger violence is often driven by interpersonal conflict, and that conflict may significantly predate any one particular incident of violence.[204] A study of New York City felony arrests found that, in assault cases, "long-standing personal conflicts were more likely to result in serious injury than spur-of-the-moment stranger assaults."[205]

The causal link between existing relationships and a propensity for serious physical injury should give us pause in assuming that non-stranger crime is, in general, less serious than stranger crime. Of course, as discussed above, the existence of physical harm is a factor that leads to

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201. VERA INST. OF JUSTICE, *supra* note 2, at 29; *see also id.* at 30 ("The higher incidence of serious injuries in prior relationship cases was matched by the more frequent use of weapons . . . . Virtually all (93%) defendants who attacked people they knew used a weapon of some kind; over half used a knife. But less than half (43%) of those who allegedly attacked strangers used any weapon at all.").

202. *See supra* note 23.

203. Cook, *supra* note 200, at 362; VERA INST. OF JUSTICE, *supra* note 2, at 30. Cook also suggests that "robberies by acquaintances [may] involve nonpecuniary motives conducive to violence such as a desire to avenge a drug rip-off." Cook, *supra* note 200, at 362.

204. *See* NIGEL G. FIELDING, COURTING VIOLENCE: OFFENCES AGAINST THE PERSON CASES IN COURT 113 (2006) ("Violence is often between parties known to one another, and may be an episode in a series of frictions."). *Cf.* MANN, *supra* note 178, at 20 ("[Disputes in ongoing personal relationships can be] particularly nasty precisely because the personal relations are close and frequent. The informal multiplicity of social ties may, in fact, leave law as the only vehicle available to the parties to resolve their differences").

205. VERA INST. OF JUSTICE, *supra* note 2, at 135.

higher prioritization for both stranger and non-stranger violence.[206] Thus, in specific cases where a personal relationship results in more serious physical injury to the victim, the existence of greater physical injury may result in more serious treatment of that specific case.

But non-stranger violent crimes are often accompanied by unique, non-physical harms that are unlikely to garner the same criminal justice attention as physical injury. Victims of non-stranger violence are likely to feel guilt or confusion about the violent incident.[207] In the case of stranger violence, the victim knows that the violence was a random event. By contrast, the non-stranger victim may wonder what she did to precipitate the violence, and thus end up feeling angry not only at the offender, but also at herself.[208]

Victims of non-stranger violence are also likely to experience additional non-physical harm associated with the fear of future violence or reprisal. A 1977 study of victims in Brooklyn Criminal Court found that victims who knew their offender tended "to be more afraid that the defendant would seek revenge against them." The study appeared to confirm those fears, finding that "29% of these victims, compared to 11% of other victims were threatened by the defendant at some point during their court case."[209] The Brooklyn Criminal Court study also revealed that victims of non-stranger violent crimes were "more likely to report emotional problems" stemming from the crime.[210] A higher incident of emotional problems stemming from non-stranger violence is not surprising because "[v]ictimization at the hands of an acquaintance [is] not a discrete experience bound in space and time, but a continuing source of stress

206. *See supra* notes 37–38.

207. For example, victims of non-stranger rape sometimes believe that they were responsible for the offense. *See, e.g.*, Allison West, *Tougher Prosecution When the Rapist is not a Stranger: Suggested Reform to the California Penal Code*, 24 GOLDEN GATE U. L. REV. 169, 178 (1994). And because victims may not be able to treat the incident purely as a crime, they may fail to seek counseling or other help. *See id.* at 174 n.13.

208. A 1977 study of victims in Brooklyn Criminal Court revealed that "victims who knew the offender tended . . . to be angrier at themselves for their victimization . . . ." Davis & Smith, *supra* note 107, at 178; *see also* West, *supra* note 207, at 178 ("One of the discernable differences between nonstranger rape and stranger rape is that the randomness of the crime is absent. Numerous types of crimes are inflicted indiscriminately upon people who find themselves the victims of bad timing or unusual circumstances. In these instances, the mere randomness of the crime can assuage feelings of guilt or personal attack and vulnerability.").

209. Davis & Smith, *supra* note 107, at 178.

210. *Id.* at 178–79. The study revealed a similar and more significant pattern for property crime. *Id.*

because the victims kn[o]w that they might very well encounter the defendant in the future."[211]

In addition to these greater feelings of fear or stress, people who are victimized by individuals with whom they have a close personal relationship are also likely to experience a sense of violation of trust.[212] The Federal Sentencing Guidelines currently increase sentences for individuals who use a "position of public or private trust" to commit a crime.[213] But the Guidelines limit this provision to offenders who hold "professional or managerial" positions in relation to their victims.[214] While some professional relationships—such as attorney-client or doctor-patient—certainly give rise to an expectation of trust that the state should encourage, so too do certain personal relationships, such as husband-wife and parent-child.[215] The same rationale that supports the designation of a breach of professional trust as an aggravating factor at sentencing also supports similar treatment for breach of trust based on marriage and other familial relationships.[216]

B. Equalizing Positive and Negative Obligations

Society imposes on all of its members certain negative obligations—that is, obligations to refrain from certain conduct. Close personal relationships also create positive obligations—that is, obligations to affirmatively perform tasks. These positive obligations are recognized social norms and are enshrined in modern laws. Treating stranger violence

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211. Davis & Smith, *supra* note 107, at 178–79.

212. *See* Simon, *Sex Offender Legislation*, *supra* note 6, at 493–94 ("Family offenses such as child sexual abuse . . . caus[e] victims irreparable harm due to the betrayal of a trusted relationship.").

213. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2006) ("If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels.").

214. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2006) ("'Public or private trust' refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)."). Other jurisdictions do not appear to have such limitations. For example, California considers whether "[t]he defendant took advantage of a position of trust or confidence to commit the offense" to be an aggravating factor for all crimes. CAL. R. CT. 4.421(a)(11).

215. *See, e.g.*, Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post*-Furman *Era*, 49 S.M.U. L. REV. 1507, 1542 (1996) (arguing that "[a]ll domestic violence exploits the vulnerability and trust which accompany intimacy").

216. *See* ONTARIO WOMEN'S DIRECTORATE, BREACH OF TRUST IN SEXUAL ASSAULT: STATEMENT OF THE PROBLEM 3 (1992) (noting that in sexual assault cases "judges often fail to recognize a breach of trust, although it is a standard aggravating factor in sentencing guidelines," and that in cases where the offender is "a father; paternal figure (e.g., the mother's common-law partner); relative of the victim; friend of child victim's parent, or parent of the child victim's friend . . . a trust relationship may be presumed to exist").

as more serious than violence occurring within close personal relationships is in tension with this system of positive obligations. Just as close personal relationships create positive obligations, they should also mandate strict observance of negative obligations.

Marriage and filial relationships both give rise to legally enforceable obligations. At common law, a man had a duty to financially support his wife.[217] Nowadays the obligations of support apply to both spouses: "most states have enacted a variety of family expense statutes that codify the spousal duty of support and statutes that impose criminal sanctions for non-support. Family expenses and criminal non-support statutes also apply to an equal, and sometimes greater, extent to child support."[218] Like the bi-directional duty of spousal support, some states have enacted statutes that require adult children to support their elderly parents.[219]

Financial duties are not the only positive obligations within families. Parents have the obligation to provide their children with certain necessities (e.g., food, water, and medical care), the obligation to supervise their children, and the obligation to intervene to protect their children from abuse or neglect by another.[220] While an individual ordinarily has no legal duty to come to the aid of another citizen, a parent can be found criminally liable for failing to perform these obligations.[221]

Other close personal relationships, such as those between siblings and close friends, may also create positive legal obligations. In Texas, for example, courts have held that a close, personal relationship may give rise

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217. That obligation could be enforced by the wife. *See* Robert Coleman Brown, *The Duty of the Husband to Support the Wife*, 18 VA. L. REV. 823, 846–47 (1932) (noting that courts permitted a "direct action by the wife to have support decreed to her" without requiring her to first seek a divorce or a judicial separation, but the wife did have to show justification for living apart from her husband). Alternatively, the obligation could be enforced by third parties who had sold necessary goods to the wife. *See id.* at 843 ("The conception of the common law judges was that the duty [of a husband to support his wife] was to be enforced through the merchants or other outside parties who have furnished the wife with necessities."); JOHN DE WITT GREGORY, PETER N. SWISHER & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW § 3.10 (3d ed. 2005) ("[Under the doctrine of necessaries] the wife and children could purchase any essential goods or services, including food, clothing, shelter, and medical and legal services, on the husband's credit and the husband became directly liable to the provider of these necessary items. Unlike agency law principles, the doctrine of necessaries held the husband responsible regardless of his consent to, or knowledge of, the purchases").

218. GREGORY ET AL., *supra* note 217, § 3.12.

219. A "majority of states have enacted relative responsibility statutes . . . requiring adult children to contribute to the support of needy parent. Some states also have statutes that create a crime of failure to support a parent in need." GREGORY ET AL., *supra* note 217, § 3.14; *see also* Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 CAL. W. L. REV. 351 (1990); Walton Garrett, *Filial Responsibility Laws*, 28 J. FAM. L. 793 (1980).

220. Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 818 (2006).

221. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 109–10 (1993).

to an "informal" fiduciary relationship.[222] Similarly, some (though not all) courts have held that "friendship may be a relevant factor in establishing a party's right to rely on representations" or in assessing a duty to deal fairly.[223]

There is an inherent conflict between positive and negative obligations in a regime that treats stranger violence more seriously than violence in close personal relationships. For example, a mother who strikes and kills her child may receive a lighter sentence than a stranger who strikes and kills a child. If, however, the mother watched the stranger strike and kill her child, and if she did nothing to protect the child, both she and the stranger would be punished: the stranger would be punished for killing the child, and the mother would be punished for failing to protect her child. A regime that punishes more harshly the stranger who kills the child than the mother who kills the child attaches less value to the mother's negative obligation not to harm the child than to the stranger's negative obligation not to harm the child. And such a regime completely fails to account for the mother's positive obligation to protect her child. The stranger has a duty not to hurt the child, while the mother has both an obligation not to hurt the child and an obligation to protect him.

C. Strengthening Weaker Norms

From a utilitarian perspective, more severe treatment of non-stranger violence may be necessary in order to compensate for weaker moral norms against non-stranger violence as opposed to stranger violence. Those weaker norms are particularly evident in comparing the treatment by criminal justice actors of acquaintance or date rape to rape by a stranger. Police and prosecutors are more hesitant to pursue the former than the latter,[224] and judges and juries are reluctant to convict and punish rapists when the victim's behavior might have somehow contributed to the offender's decision to rape.[225] The trend is not limited to rape.

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222. *See, e.g.*, Holland v. Lesesne, 350 S.W.2d 859 (Tex. Civ. App. 1961) (holding that the close personal, friendly, and confidential relation between the parties and their families, which visited each other regularly, dined together, and vacationed together, constituted a fiduciary relationship and was sufficient to impress constructive trust in view of an oral agreement between the parties); *see also* Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 S.M.U. L. REV. 315, 344–52 (2000).

223. *See* Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 689 (2007).

224. West, *supra* note 207, at 184–85.

225. *See id.* at 186 n.57 (recounting the sentencing decision of a judge to sentence a rapist to probation in a rape case where the victim and offender were friends: "Analogizing the matter to a

Prosecutions and convictions are proportionally fewer for non-stranger violent crimes across the board.[226]

Any consistent use of discretion by criminal justice decision makers to treat non-stranger violence less seriously than stranger violence likely reflects not only determinations about specific cases, but also a more generally held view that stranger violence is, in some way, worse than non-stranger violence.[227] Treating violence within relationships just as seriously as violence between strangers will reinforce the message that non-stranger violence is entirely unacceptable behavior. Because social norms are some of the most effective deterrents of criminal behavior,[228] the success of this message is essential to preventing non-stranger violence, and thus to decreasing levels of violent crime generally. As the English jurist James Fitzjames Stephen famously remarked:

> Some men, probably, abstain from murder because they fear that, if they committed murder, they would be hung. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hung with the hearty approbation of all reasonable men.[229]

To combat prevailing norms that appear to trivialize non-stranger violence, some jurisdictions have elected to remove discretion from decision makers. The most obvious examples of the removal of discretion are the mandatory arrest and no-drop prosecution policies for domestic violence. These policies remove discretion not only from police and prosecutors, but also from domestic violence victims.[230] Although it is not clear whether the elimination of discretion is necessary to effect a change

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property claim, the judge said, 'if I grab your purse, its robbery, but if you leave your pocketbook on the bench and I take it, its larceny, which is less serious'").

226. *See supra* note 28.

227. I use the word "worse" here to include many of the justifications discussed *supra* in Part II—e.g., stranger offenders are more culpable, more dangerous, and more likely to inspire public fear.

228. *See* Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1187–90 (2004); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997) ("Empirical studies of why people obey the law . . . reveal a strong correlation between a person's obedience and her perception of others' behavior and attitudes toward the law. . . . [T]he perception that one's peers will or will not disapprove exerts a much stronger influence than does the threat of a formal sanction on whether a person decides to engage in a range of common offenses.").

229. JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863), *quoted in* Meares et al., *supra* note 228, at 1183.

230. *See* Developments in the Law, *Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1535–43 (1993).

in the social norms about domestic violence, there is evidence that those norms are beginning to change.[231]

While changing social norms is likely to require some formal legal response,[232] a legal rule itself may not be sufficient to effectuate change. To the contrary, legal rules that are too dissimilar to public sentiment are likely to be circumvented.[233] For example, each of the fifty states has some form of legislation that treats domestic violence more seriously than non-domestic assaults.[234] Yet, recent statistics indicate that those offenders

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231. *See* Elliott, *supra* note 28, at 473 ("The past decade has witnessed a dramatic shift in public attitudes and orientations toward family violence: a shift from a policy of indifference to one of control, in which legal remedies are more frequently invoked in an attempt to deter this form of violence, provide better protection for victims, and facilitate positive changes in family relationships."); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L. J. 2, 6 (2006) ("The recognition of domestic violence ('DV') as a public issue is manifest in law reform aimed at reshaping law enforcement officials' response so that they treat DV as a crime.").

232. *Cf.* Hotaling et al., *supra* note 38, at 317 (noting that the previous "lack of response of the legal system, in turn, reinforced the view that family violence is not a crime").

233. *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608 (2000) ("If the law condemns the conduct substantially more than does the typical decisionmaker, the decisionmaker's personal aversion to condemning too severely will dominate her inclination to enforce the law, and she will balk. Her reluctance to enforce, moreover, will strengthen the resistance of other decisionmakers, whose reluctance will steel the resolve of still others, triggering a self-reinforcing wave of resistance."); Meares et al., *supra* note 228, at 1185 (noting that high penalties may "create what may be termed an inverse sentencing effect. High penalties, instead of increasing conviction rates, may decrease them. As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught").

234. Some states create a separate domestic abuse offense, which sometimes (but not always) carries an additional penalty or at least a mandatory minimum of prison time. *Compare* ALA. CODE § 13A-6-20 (2005), *with id.* at § 13A-6-130; *compare* CAL. PENAL CODE § 243(a) (Deering Supp. 2007), *with id.* at § 243(e)(1); *compare* MONT. CODE ANN. § 45-5-201 (2005), *with id.* at § 45-5-206; *compare* N.M. STAT. ANN. § 30-3-4 (West Supp. 2007), *with id.* at § 30-3-15; *compare* VT. STAT. ANN. tit. 13, § 1023 (2006), *with id.* at § 1042. *See also* COLO. REV. STAT. §18-6-801 (2006); FLA. STAT. § 741.283 (2006); GA. CODE ANN. §§ 16-5-20, 16-5-21, 16-5-23, 16-5-24 (2006); N.C. GEN. STAT. § 14-33 (2005); OKLA. STAT. ANN. tit. 21, § 644 (West Supp. 2007); VA. CODE ANN. § 16.1-253.2 (Supp. 2007); WASH. REV. CODE § 10.99.080 (2006); WYO. STAT. ANN. § 6-2-501 (2007). Sometimes special enhanced penalties for repeat offenses are imposed on domestic assaults. *E.g.*, ARIZ. REV. STAT. ANN. § 13-3601(M) (2006–2007); COLO. REV. STAT. § 18-6-801(7) (2006); IDAHO CODE ANN. § 18-918(3) (2006); 720 ILL. COMP. STAT. ANN. 5/12-3.2 (West Supp. 2007); IND. CODE ANN. § 35-42-2-1.3 (West Supp. 2006); IOWA CODE ANN. § 708.2A (West Supp. 2007); KAN. STAT. ANN. § 21-3412(a) (2006); KY. REV. STAT. ANN. § 508.032 (West 2006); LA. REV. STAT. ANN. § 14:35.3 (Supp. 2007); MICH. COMP. LAWS ANN. § 750.81a (West Supp. 2007); MISS. CODE. ANN. § 97-3-7 (2006); N.D. CENT. CODE § 12.1-17-01 (Supp. 2005); OR. REV. STAT. § 163.160 (2005); R.I. GEN. LAWS § 12-29-5 (Supp. 2006); S.C. CODE ANN. § 16-25-65 (Supp. 2007); TEX. PENAL CODE ANN. § 22.01 (Vernon Supp. 2007); UTAH CODE ANN. § 77-36-1.1 (Supp. 2006); W. VA. CODE ANN. § 61-2-28 (Supp. 2006); WYO. STAT. ANN. § 6-2-501 (2007). And some states criminalize the violation of domestic violence protective orders and simply tack on that penalty to whatever is normally imposed for the underlying assault. *E.g.*, ALASKA STAT. § 18.66.130 (2006); CONN. GEN. STAT. § 46b-15 (2007); 10 DEL. CODE ANN. tit. 10, § 1046 (Supp. 2006); HAW. REV. STAT. ANN. § 586-11 (LexisNexis 2005); 750 ILL. COMP. STAT. 60/223(g) (Supp. 2007); IOWA CODE § 236.8 (Supp. 2007); ME. REV. STAT. ANN. 19-A § 4011 (Supp. 2007); MD. CODE ANN. FAM. LAW § 4-509

who assault family members receive significantly less punishment than those who assault non-family members.[235] In order to avoid such circumvention in cases of non-stranger violence,[236] several intermediate steps may be required to ensure more serious treatment of non-stranger violence.[237] Steps may also need to be taken outside of the traditional criminal justice model in order to affect prevailing social norms.[238] However, without corresponding changes in criminal justice decisions—that is, so long as criminal justice decision makers continue to prioritize stranger violence above non-stranger violence—norms against non-stranger violence are likely to remain relatively weak.

IV. CONCLUSIONS AND IMPLICATIONS

The preceding pages of this Article have discussed why stranger violence should not be treated as more serious than non-stranger violence. While there are likely a not-insignificant number of non-stranger crimes where the offender *is* less culpable or less dangerous than other offenders, those determinations must be made on a case-by-case basis. Criminal justice decision makers should err on the side of caution when making such a determination, remembering that any decision to treat non-stranger violence more leniently includes a moral judgment that the offender's anger was understandable.[239]

(West 2006); MASS. GEN. LAWS ANN. ch. 265, § 13A (Supp. 2007); MINN. STAT. ANN. § 518B.01 (West 2006); MO. ANN. STAT. § 455.085 (West Supp. 2007); NEB. REV. STAT. ANN. § 42-924 (LexisNexis 2005); N.H. REV. STAT. ANN. § 173-B:9 (Supp. 2007); N.J. STAT. ANN. § 2C:29-9 (West 2005); N.Y. FAM. CT. ACT § 846 (McKinney Supp. 2007); OHIO REV. CODE ANN. § 2919.27 (West 2006); S.D. CODIFIED LAWS § 25-10-13 (2004); TENN. CODE ANN. § 36-3-612 (2005); WIS. STAT. ANN. § 813.12 (West 2007). So, while nearly every state, at least according to statute, treats domestic violence more harshly than conventional assault, there often needs to be a protective order violation or a repeat offense for the overall punishment to be enhanced.

235. 13.7% of family assault offenders and 18.7% of nonfamily assault offenders received sentences of nonincarceration. 58.9% of family assault offenders and 30.6% of nonfamily assault offenders were sentenced to jail. 27.4% of family assault offenders and 50.7% of nonfamily assault offenders were sentenced to prison. BUREAU OF JUSTICE STATISTICS, *supra* note 22, at 50, tbl.6.13.

236. *Cf.* VERA INST. OF JUSTICE, *supra* note 2, at 55 (quoting a New York City ADA as saying "juries will not convict on first degree murder unless it's a gangland premeditated murder—they hand down first degree manslaughter convictions instead, particularly where the crime is committed in the heat of passion").

237. *See* Kahan, *supra* note 233, at 610–11 ("If the lawmaker selects a sufficiently mild degree of severity . . . then a majority of decisionmakers will enforce the law at the outset. This condition, too, will reinforce itself. As members of society are exposed to consistent and conspicuous instances of enforcement, they will revise upward their judgment of the degree of condemnation warranted by the conduct in question. Accordingly, over time, the percentage of decisionmakers willing to enforce the existing law will grow.").

238. *See, e.g.*, *infra* note 268 and accompanying text.

239. *See supra* notes 93–96 and accompanying text.

This Part summarizes the reasons underlying my conclusion that equal treatment of stranger and non-stranger violence is appropriate. It then briefly explores the implications of that conclusion, sketching what equal treatment of stranger and non-stranger violence would entail in light of the practical differences between the two types of violence.

A. Explaining the Equality Recommendation

As explained above, the justifications for treating stranger violence more seriously than non-stranger violence are much weaker than they originally appear,[240] and there are reasons to treat violence in close relationships more seriously than violence between strangers.[241] In light of these observations, one might suppose that the logical inference to draw is that non-stranger violence should be treated more seriously than stranger violence. But this Article espouses equal treatment instead.

There is at least some empirical support for the assumption that, as a group, stranger offenders pose a greater danger of reoffending and a greater danger to a larger number of people than non-stranger offenders.[242] A higher recidivism rate of some stranger offenders would arguably support harsher treatment under an incapacitation rationale for punishment. There is no doubt that incapacitation is a legitimate justification for punishment decisions—indeed it has been deemed sufficient to justify significant punishment variations.[243] But incapacitation certainly is not the only purpose of punishment. Part III identifies strong reasons to conclude that some non-stranger violence—specifically, the violence that occurs within close personal relationships—is more blameworthy (and thus more deserving of punishment under the retributive theory of punishment) than stranger violence.

When different punishment theories suggest different punishment outcomes, it is not clear how best to resolve the conflict. The purposes themselves—retribution, deterrence, incapacitation, and rehabilitation—incorporate different concerns.[244] Several commentators have expressed

240. *See supra* Part II.

241. *See supra* Part III.

242. *See* discussion *supra* in Part II.B.

243. *See* Ewing v. California, 538 U.S. 11, 30, 31–32 (2003) (Scalia, J., concurring in the judgment).

244. Justice Scalia alluded to this problem in *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991):

> [E]ven if "similarly grave" crimes could be identified, the penalties for them would not necessarily be comparable, since there are many other justifications for a difference. For example, since deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant

the opinion that retribution should limit, if not largely determine, punishment decisions.[245] But, even were we generally to accord greater weight to retributive concerns, that would not necessarily imply that the heightened retributive concerns regarding non-stranger offenders identified above justify the treatment of non-stranger offenders (even offenders in close personal relationships with their victims) as more serious than stranger offenders. That is because where, as here, conflicting punishment purposes are as different as incapacitation and retribution, any attempt to balance those purposes would be akin to attempting to judge "whether a particular line is longer than a particular rock is heavy."[246]

Given the difficulties in balancing these very different punishment purposes, this Article concludes that stranger and non-stranger violence should be treated equally. This solution not only avoids the difficulties inherent in attempting to balance the various punishment purposes, but also has the benefit of promoting the independent value of equality in criminal punishment.[247] While different levels of concern with respect to either incapacitation or retribution would almost certainly justify different levels of punishment, where the differences between offenders are weak, as they are here, equal treatment promotes the perception of fairness.

B. Confronting Practical Differences Between Stranger and Non-stranger Violence

While this Article aims only to test whether more serious treatment of stranger violence relative to non-stranger violence can be justified, a few

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> substantially higher penalties. Grave crimes of the sort that will not be deterred by penalty may warrant substantially lower penalties, as may grave crimes of the sort that are normally committed once in a lifetime by otherwise law-abiding citizens who will not profit from rehabilitation. Whether these differences will occur, and to what extent, depends, of course, upon the weight the society accords to deterrence and rehabilitation, rather than retribution, as the objective of criminal punishment . . . . In fact, it becomes difficult even to speak intelligently of "proportionality," once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept . . . .

(Although Justice Scalia delivered the opinion of the Court in *Harmelin*, only Chief Justice Rehnquist joined the portion of the opinion that included this observation.)

245. *See generally* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES (1985).

246. Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) ("Having evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.") (internal citation omitted).

247. *See supra* notes 187–88 and accompanying text.

brief words are necessary about how to develop policies to treat non-stranger and stranger violence equally in light of the practical differences between the two. Those practical differences include differing levels of victim cooperation and the relative effectiveness of traditional crime prevention measures.

Any current deficiency in prosecution rates is likely attributable, at least in part, to victims' hesitancy to pursue criminal charges against a close friend or family member. Victims of non-stranger violence appear to be less likely to cooperate—especially when they have a close personal relationship with the offender—than victims of stranger violence.[248] Prosecutor interviews conducted as part of a 1970s study of felony arrests in New York City revealed that prosecutors often dismissed non-stranger cases because of "lack of cooperation by the complainant."[249] But there is some evidence that prosecutors act differently when faced with a lack of cooperation from stranger victims. A study of Brooklyn Criminal Court found that in non-stranger cases when victims were uncooperative, the prosecutor dismissed 61% of the time; in stranger cases when victims were uncooperative, the dismissal rate was only 37%.[250] And in cases where the complainant never showed up in court, prosecutors were far more likely to dismiss non-stranger cases than stranger cases: "41% of relationship cases in which the complainant never appeared were dismissed, compared to only 14% of stranger-to-stranger cases in which the complainant never appeared."[251] Studies have also revealed that prosecutors were far more likely to consult non-stranger victims about their wishes than stranger victims.[252]

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248. *See, e.g.*, VERA INST. OF JUSTICE, *supra* note 2, at 32 (noting that "[d]ismissal because of complainant non-cooperation appears less likely to occur when the prior relationship is a business, rather than a personal, one").

249. VERA INST. OF JUSTICE, *supra* note 2, at 20 ("The most frequently cited reason for dismissal in prior relationship cases was lack of cooperation by the complainant."); *see also supra* notes 23–26 and accompanying text.

250. Davis & Smith, *supra* note 107, at 182. "When victims did cooperate, however, the dismissal rate for relationship and non-relationship cases was an identical 23%." *Id.*

251. NAT'L INST. OF JUSTICE, *supra* note 19, at 3 (citing an additional study which "found that in instances in which complainants are absent from court on a particular date, relationship cases are less likely to be continued, and more likely to be dismissed on that date than stranger-to-stranger cases"). A similar pattern of prosecutorial explanations for dismissing more non-stranger cases than stranger cases was uncovered in a study of criminal cases in which felony charges were initially filed in Alaska between 1974 and 1976. That study revealed that strength of evidence made a difference in decisions whether to dismiss charges in non-stranger crimes—that is, a case was more likely to be dismissed if the evidence against the offender was not particularly strong—but strength of evidence did not have a similar effect in stranger cases. Miethe, *supra* note 69, at 584.

252. "[V]ictims who knew the defendant were much more likely than other victims to be consulted by prosecutors about their wishes; in 52% of relationship cases observed, victims were

To combat the lack of victim cooperation some jurisdictions have experimented with various policies and practices. In domestic violence cases, for example, some jurisdictions have instituted mandatory arrest policies, "no drop" policies (under which the case is prosecuted even against the victim's wishes), or pretrial diversion programs (which allow the offender to avoid punishment, provided he does not reoffend within a certain time period).[253]

Some commentators have supported these policies,[254] while others have not.[255] Arguments in favor of these policies include that it is necessary, at least in the short term, to institute such policies in order to protect domestic violence victims while changing enforcement norms.[256] Arguments against these policies include that it undermines the victim's autonomy to prosecute a case that she does not wish to pursue.[257] Both of these positions suffer the same shortcoming: they frame the issue of non-stranger violence prosecutions only in terms of the victims' interests. The reasons for punishing the non-stranger offender should not neglect the reasons for punishing the stranger offender or the offender who commits a victimless crime—that is, in breaking a law, the offender has done something that is worthy of punishment.[258] Punishment not only gives the offender what he deserves, it also expresses the public's moral condemnation of his actions.[259]

In addition to ignoring the desert purposes and expressive content of punishment, a system that defers to victim wishes may have unintended

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consulted, compared to only four percent of stranger-to-stranger cases." Davis & Smith, *supra* note 107, at 182; *see also* NAT'L INST. OF JUSTICE, *supra* note 19, at 4 (noting that these findings are consistent with a sample from a study in Suffolk County, New York).

253. *See* Developments in the Law, *Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1535–43 (1993).

254. *See, e.g.*, Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

255. *See, e.g.*, Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281 (2002); Gruber, *supra* note 175.

256. *See, e.g.*, Machaela M. Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 648 (1997) (arguing that mandatory arrest laws are necessary "to provide adequate protection to all victims of domestic violence").

257. *See, e.g.*, Carol Wright, Note, *Immediate Arrest In Domestic Violence Situations: Mandate or Alternative*, 14 CAP. U. L. REV. 243, 260 (1985) (noting that mandatory arrest laws take decision making power away from victims and can possibly force them to prosecute against their wishes).

258. *See, e.g.*, Michael S. Moore, *The Moral Worth of Retribution*, *in* PRINCIPLED SENTENCINGS: READINGS ON THEORY AND POLICY 201 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

259. In punishing the wrongdoer, society expresses its view that the offender's actions are wrong, and the amount of punishment that society inflicts reflects the "judgment of 'how bad' the offence was" by translating that judgment into the particular amount of punishment. ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 61 (3d ed. 2000).

negative consequences. For example, if a domestic violence victim believes that it is her decision whether to continue the prosecution of her loved one, she may experience feelings of doubt or guilt at the end of a successful prosecution. And the perception that a victim can end a prosecution may result in pressure on the victim—not only from the offender, but also from other friends or family members—to have the charges dropped.

This is not to say that a victim's interests or wishes should never shape enforcement decisions. But decisions about how to incorporate victim wishes into enforcement efforts should use the same criteria, without regard to preexisting relationships between victim and offender. And to the extent that victim cooperation remains a significant problem in non-stranger cases, it may be appropriate to address these issues outside the context of the decision whether to prosecute, such as providing counseling or other support services to victims.[260]

Equalizing enforcement levels is likely necessary, but not sufficient, to prevent non-stranger violence. Many crimes by family members and friends are never reported,[261] and arrests do not necessarily lead to convictions. Successful prosecutions and lengthy criminal sentences do not, standing alone, appear actually to deter crime.[262] Changes to crime prevention policies are likely also necessary in order to actually reduce non-stranger crime levels.

Today's crime prevention policies focus primarily on issues such as police presence on the street and get-tough policies on drug crime.[263] Unlike stranger violence, much non-stranger violence occurs in secluded locations, such as the victims' homes, rather than in public.[264] Thus,

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260. "A number of cities have established special family violence prosecution units and family victim/witness assistance programs to deal with these victim-related problems. [There are] a number of federally funded programs with mandates to encourage and coordinate the efforts of police, prosecutors, and community agencies and to provide additional services such as shelters, special prosecution units, mental health clinics, protection order clinics, and educational and training programs." Elliott, *supra* note 28, at 464.

261. *See supra* note 23.

262. *See supra* note 228.

263. *See, e.g.*, Steven Duke, *Clinton and Crime*, 10 YALE J. ON REG. 575, 583 (1993) ("During the campaign, Clinton said he favored putting 100,000 new police on the street . . . . Calling for more cops is standard fare for any politician.").

264. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 22, at 9 tbl.2.2 (reporting that 66% of stranger violence between 1998 and 2002 occurred in a public place or on commercial property, as compared to 54% of violence between friends and acquaintances, 17% between non-married intimates, and 8% between family members); Margaret A. Zahn & Philip C. Sagi, *Stranger Homicides in Nine American Cities*, 78 J. CRIM. L. & CRIMINOLOGY 377, 389 (1987) ("Not unexpectedly, the percentage of family killings occurring at home was higher (78%) than with other types of killings. The percentage of killings occurring in public settings increased as the relationship between the victim and

traditional crime prevention methods may not be sufficient to combat the unique challenges presented by non-stranger crime.

Some jurisdictions have begun to experiment with non-traditional crime prevention and crime resolution methods. These non-traditional methods, often collectively referred to as community justice measures, include community prosecution, community courts, sentencing circles, and citizen reparative boards. Each of these methods differ in important respects, but all share the common goal of "eliminating local situations that encourage crime, compensating the victim and victimized community, and rehabilitating the offender rather than inflicting punishment."[265] For example, the state of Arizona recently piloted a program called "The Impact of Crime on Victims," the goal of which is "to show inmates the impact of their crimes and to help them see the consequences from a victim's perspective."[266] The ten week class for prisoners includes presentations by victims and victims' families that are intended to teach inmates "to appreciate that their conduct has had a profound impact on others."[267] The city of Milwaukee has launched a separate program that does not resemble traditional crime control or dispute resolution at all. In Milwaukee the "homicide review commission has frequent, formal meetings with corrections officers, prosecutors and social service agencies to identify problem families, and is meeting with schools to assess what they are teaching about conflict resolution and how to reduce truancy."[268] While the efficacy of these programs is still largely unknown, they offer an alternative to traditional crime control methods that could be employed for both non-stranger and stranger violence.

Whatever policies are pursued in order to address the unique crime prevention problems associated with non-stranger violence, it is important that non-stranger violence be treated as a serious crime. Because non-

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the offender became more distant. The stranger non-felony homicide is clearly the most public homicide type, with 85% of these killings occurring in a public space."); *see also* NSW BUREAU OF CRIME STATISTICS AND RESEARCH, FAMILY, ACQUAINTANCE AND STRANGER HOMICIDE IN NEW SOUTH WALES 16 (1992); Robert A. Silverman & Leslie W. Kennedy, *Relational Distance and Homicide: The Role of the Stranger*, 78 J. CRIM. L. & CRIMINOLOGY 272, 302 (1987).

265. Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 368 (2005).

266. Judi Villa, *Victims' Perspectives Connect with Prisoners: Program Puts Face on Crime's Toll, Attempts to Repair Harm*, ARIZ. REPUBLIC (Oct. 13, 2006), *available at* http://www.azcentral.com/news/articles/1007victims1007.html#.

267. *Id.* For a discussion of other, similar programs, see Marilyn Peterson Armour et al., *Bridges to Life: Evaluation of an In-Prison Restorative Justice Intervention*, 24 MED. & L. 831, 832–35 (2005).

268. Kate Zernike, *Violent Crime Rising Sharply in Some Cities*, N.Y. TIMES, Feb. 12, 2006, at A1, *available at* 2006 WLNR 2438193.

stranger violence is often perceived as a problem between a particular offender and a particular victim, criminal justice decision makers may see their primary goal as protecting the particular victim from future violence, rather than pursuing a criminal case against the offender.[269] Protecting victims against future violence is certainly an important criminal justice goal, but the expressive and deterrent value of criminal sanctions should not be neglected. Criminal penalties "send out 'messages' to members of society, and these messages exert a moral influence that inculcates social norms."[270] Taking non-stranger violence seriously *as crime* will help to protect those who have already been the victim of non-stranger violence, and it may also decrease future non-stranger violence.

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269. Indeed, there are reasons to suspect that this view affects a victim's decision to pursue criminal charges. As Elliott tells us:

> In a majority of cases dropped, the victim's reasons were consistent with their stated desired outcome at the time of filing: they believed they had been successful in obtaining agreements from their mates that they considered satisfactory. This typically involved using the leverage of prosecution to control the violence so they could remain in the relationship or to obtain agreements allowing them to leave the relationship on terms more acceptable than had they not threatened prosecution.

Elliott, *supra* note 28, at 465 (discussing the results of a study conducted in Indiana in 1981). The traditional lack of cooperation by non-stranger victims may make the goal of protection seem more important and more attractive because it is easier to achieve than prosecutions. *See* Suk, *supra* note 231, at 18–19 ("Prosecutions for protection order violations can be a way of short-circuiting proof problems for the prosecution, and thus a more efficient and effective means of convicting and punishing domestic abusers. A violation of a protection order is far easier to prove than the target crime of DV. The testimony of the victim is generally less important. No physical injury need be shown. The existence of the protection order and the defendant's presence in the home, to which the arresting officer can usually bear witness, are sufficient to establish violation of the protection order.").

270. Meares et al., *supra* note 228, at 1182–83 (citing generally JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE (1974)).