

DON'T BE CRUEL

BUILDING THE CASE FOR LUCK IN THE LAW

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LUCK ABOUNDS in the law. Suppose Jack and Jill both drive 55 mph in a 25 mph zone while aware that doing so imposes a serious risk of harm. Jack gets lucky and does not hit anyone, while Jill hits and kills a ten-year-old who suddenly darts into the road. Many jurisdictions have no general crime of reckless endangerment, which would make one criminally liable even if no harm eventuates provided one behaved in ways one was aware imposed a substantial and unjustified risk of harm.¹ In jurisdictions lacking a general crime of reckless endangerment (and no serious inchoate traffic crimes), Jack would not face severe criminal liability; he would at most have committed routine traffic violations. Jill, by contrast, would face far more serious criminal sanctions.

What has proven persistently puzzling about this feature of the law is that Jill would face greater criminal liability than Jack *even if* both are equally culpable for their conduct—that is, their actions both manifest the same amount of insufficient regard for the legally protected interests of others.² They plausibly are equally culpable if we suppose they acted the same way with the same beliefs and intentions and ended up causing different levels of harm only due to unexpected events over which they had no control. Assuming the amount of criminal liability one deserves tracks the culpability of one's conduct, Jack

1 As Kaplan, Weisberg, and Binder note, “we rarely punish harmless negligence or recklessness (charges of ‘reckless endangerment’ are uncommon . . .), and where we do . . ., we usually . . . narrowly define the risky conduct that will give rise to liability (as in drunk-driving laws), rather than just proscribing any conduct that poses an unacceptable risk to a particular interest” (*Criminal Law*, ch. 10). Even fewer jurisdictions recognize negligent conduct as a general crime where no harm eventuates. Thus, a similar puzzle arises for negligent conduct as well.

2 As Alexander and Ferzan put it, “insufficient concern [is] the essence of culpability” (*Crime and Culpability*, 67–68). For other defenders of the insufficient regard theory of culpability, see Tadros, *Criminal Responsibility*, 250; Westen, “An Attitudinal Theory of Excuse,” 373–74; and Sarch, *Criminally Ignorant*, 27–64.

and Jill deserve to be punished the same. But Jill may still be punished more harshly. How can this be justified?

This question of how to justify the criminal law's recognition of luck—the *legal luck puzzle*—is not limited to endangerment. It also arises for attempt, which is a crime of intent. Suppose Bert and Ernie both fire their guns at a person with the intent to kill, but one of Bert's pet pigeons unexpectedly swoops down and blocks Bert's bullet. Bert's attempt fails, while Ernie's succeeds. In many jurisdictions, Ernie will face greater criminal liability than Bert.³ In these jurisdictions, a more serious label will be applied to Ernie—"murderer"—and he is liable to be punished more harshly. Nonetheless, Bert plausibly is just as culpable for his conduct as Ernie is for his: they both intended the death and believed it was practically certain to occur. Here, I simply assume such pairs of actors (like Bert and Ernie or Jack and Jill) are identical in all respects—including culpability—except that one happens to cause harm while the other does not.⁴ Thus, the legal luck puzzle arises here too. How could it make sense to impose greater criminal liability on Ernie than Bert, even though they are assumed to be equally culpable for what they did? Is this not paradigmatic injustice—the unequal treatment of actors who differ in no normatively relevant respect?

Many solutions to the legal luck puzzle have been proposed. David Lewis sought to explain the differential treatment of such actors as a justifiable form of

3 LaFave's criminal law treatise observes that many jurisdictions provide lesser punishment for attempts than for the analogous completed crimes, although the manner in which this is done varies. As he notes, many "modern recodifications . . . [declare] the attempt to be a crime one degree below the object crime," and for "statutes dealing with attempts to commit particular crimes, the authorized punishment is usually lower than for the completed crime" (*Substantive Criminal Law*, sec. 11.5). See also Christopher, who notes that "almost every jurisdiction world-wide punishes the attempt that succeeds more severely than the attempt that fails" ("Does Attempted Murder Deserve Greater Punishment than Murder?" 419). However, LaFave also notes that this practice is not universal: some provisions "provide that the penalty for attempt may be as great as for the completed crime" (*Substantive Criminal Law*, sec. 11.5). Cf. American Law Institute, *Model Penal Code*, sec. 5.05(1), which subjects attempts to the same penalties as the completed crime, except for attempts to commit a capital crime or a felony of the first degree, which is an offense of the second degree. The present paper is concerned with why jurisdictions that *do* impose lower penalties on attempts might be justified in doing so, even if other jurisdictions might reasonably choose a different course.

4 This is a common position to take on such cases as this. See Lewis, "The Punishment That Leaves Something to Chance"; Edwards and Simester, "Crime, Blameworthiness, and Outcomes"; and Sarch, *Criminally Ignorant*, 81n128. Some might deny the existence of the puzzle by claiming that causing harm makes one more culpable. However, in what follows, I will set aside this response and proceed on the assumption that in a pair of cases like the above the two actors are equally culpable.

penal lottery.⁵ James Edwards and Andrew Simester argue that the person who unluckily causes harm *did something different*, and thus may be guilty of a more serious offense, even if she is no more culpable than the analogous attempter who avoids harm through mere luck.⁶

The aim of this paper is not to evaluate these responses to the legal luck puzzle. Instead, I develop a new sort of nonconsequentialist argument that justifies the criminal law's imposition of differential treatment on equally culpable actors who differ only as to the harm caused. Importantly, however, my argument does not *mandate* a policy of differential punishment for harmful and harmless wrongdoers. My aim is more modest: to provide a rationale that a legislature in jurisdictions like ours can use to normatively justify its decision to adopt such a policy. I do not claim that the decision to recognize luck is the *only* way to comply with the relevant normative principles. Instead, all I argue is that there is robust normative support for this decision compared to other natural ways to satisfy the underlying normative principles.

The sort of argument I focus on does not ask what reason there is to *ratchet up* the criminal liability of harmful actors (Ernie, Jill) above the level faced by the analogous luckily harmless actors (Bert, Jack). Instead, it asks what reason there is to *ratchet down* the criminal liability of luckily harmless actors. The sort of justification I am interested in starts by assuming the criminal law would be permitted to impose just as much liability on Bert (the attempter) as it does on Ernie (the murderer), and to treat Jack (the lucky reckless driver) the same as Jill (his lethal counterpart) because both pairs of actors are assumed to be equally culpable for their conduct. Still, ratcheting-down arguments provide reasons for the legislature to treat harmless actors less harshly than it is entitled to.⁷

Thus, instead of focusing directly on features of the wrongdoer, ratcheting-down arguments focus on reasons the *legislature*, when passing criminal laws, should take into account. Shifting focus to the legislature's standpoint, I suggest, is a promising avenue for securing a justification of luck in the law.

In section 1, I critique existing ratcheting-down arguments. They tend to rely on *pragmatic* reasons for lowering the criminal liability of less harmful

5 Lewis, "The Punishment That Leaves Something to Chance."

6 Edwards and Simester, "Crime, Blameworthiness, and Outcomes."

7 Similar arguments can also explain why someone who causes a smaller amount of harm (say, \$500 of property damage) merely by luck might justifiably be punished less than analogous equally culpable actors who cause more harm (say, \$5,000 of damage). However, it should be obvious how my arguments carry over to these cases. For clarity, therefore, I primarily focus on why it makes sense to punish *harmless* actors less harshly than equally culpable harmful actors.

actors. Ideally, however, we want a genuinely *normative* ratcheting-down argument—one that is not similarly held hostage to practical limitations or unstable factual circumstances. I focus instead on arguments that are more nonconsequentialist in nature.⁸

Thus, in section 2, I develop a new ratcheting-down argument—a more principled justification for countenancing some luck—while section 3 considers alternative solutions. My argument starts from the idea that the legislature, when passing criminal laws, has a duty not to be heartless, mean, vicious, and vindictive—what I dub *the duty to not be cruel*.⁹ I argue that the legislature would breach this duty if it always passed laws that criminalize conduct to the full extent permitted on culpability grounds. Withholding some punishment that would otherwise be due to harmless wrongdoers in virtue of their culpability is a particularly apt way for the legislature to comply with this duty. The upshot is a promising justification for imposing less criminal liability for culpable but luckily harmless conduct. The argument does not aim to show that recognizing luck is *required*. A legislature may adopt other institutional arrangements to avoid the relevant form of cruelty. Still, I argue this duty offers an adequate normative basis for the legislature to withhold some punishment otherwise due to wrongdoers who cause less harm. In closing, I address worries about whether my argument leads to a conflict with retributive justice.

One caveat. While the argument I develop could in principle be used to justify any way that luck impacts criminal liability, it does not have to. Some might think that the normative claims underlying the argument are stronger for some crimes than others. In what follows, I explain how the argument might apply in different ways to endangerments and attempts. My primary concern will be to defend the argument as to endangerment, though I also show how the argument can be modified to extend to attempts.

8 My argument also rests on some contingent facts—e.g., assumptions about human psychology. See *infra* text accompanying notes 32–33. If human psychology were very different, the argument might not hold. Nonetheless, the factual circumstances I rely on are more fundamental and stable background conditions compared to the highly changeable facts appealed to in the arguments I criticize in section 1. This is only a difference in degree, not in kind. But the extra stability and broader applicability of the assumptions behind my argument should make it more interesting. (Thanks to Joe Horton and Erik Encarnacion for this point.)

9 Rawls recognizes a duty not to be cruel and vindictive, which he deems a “natural” duty (i.e., applicable apart from its being endorsed by those in the original position) (*A Theory of Justice*, 114).

1. UNSATISFACTORY RATCHETING-DOWN ARGUMENTS

By a “ratcheting-down argument,” I mean one that explains why the criminal law is justified in lowering the amount of criminal liability imposed on less harmful actors like Bert and Jack, even though they are just as culpable as their more harmful counterparts, Ernie and Jill. What is the best way to construct such a ratcheting-down argument?

1.1. *Self-Interested Ratcheting-Down Arguments*

One version is pragmatic. The government might have self-interested reasons not to punish as harshly when there is no easily identifiable victim who was harmed.¹⁰ Some might think harmful crimes seem easier for law enforcement to detect and prosecute than nonharmful conduct. When harm results, it is more likely there will be a victim or other parties who are in a position to alert the authorities. Accordingly, the legislature might decide that law enforcement will be more cost effective if it focuses on misconduct that tends to be easier to detect.¹¹

This argument is not convincing. Most importantly, nonharmful conduct—whether attempt or endangerment—often *is* easy enough to detect. There may be multiple witnesses to Jack’s driving 55 mph in a 25 mph zone who alert the police. So why not criminalize all inchoate recklessness and allow law enforcement to decide how best to allocate its investigative resources?

Consider, therefore, a second pragmatic argument, based on political self-interest.¹² The legislature might reason that it is likely to remain more popular if it punishes only to the extent it “has to”—that is, only when *not* punishing more harshly would be politically costly. Perhaps being as aggressive as possible in its criminalization choices might alienate voters whose friends and family are imprisoned. To remain popular, the legislature might prefer to impose less harsh penalties. Of course, at some point, *failing* to punish more harshly would also entail political costs. Thus, to strike a balance, the legislature might decide to punish only to the extent needed to avoid political repercussions. So even when actors like Bert and Jack are culpable, the legislature might

10 Cf. Lewis, “The Punishment That Leaves Something to Chance,” 54, which discusses the idea that when the public does not “see blood” they perhaps will not “demand blood.”

11 Cf. Simester, “Is Strict Liability Always Wrong?” 47, which notes that “this requirement [that harm should occur before risky conduct is criminalized] would also have the practical advantages of reducing the costs of policing.”

12 See Sarch, “Knowledge, Recklessness and the Connection Requirement between Mens Rea and Actus Reus,” 34n97, which discusses this idea in another context.

prefer not to punish (or punish less) because it does not *have to* in order to avoid political costs.

Still, there are problems. The first is dependency on highly contingent facts. The present rationale applies only where the right political attitudes prevail. In many jurisdictions, political costs are more likely for underpunishment, as it invites criticism for being “soft on crime.” It is more likely the legislature’s self-interested calculus would support imposing *more* criminal liability to the extent it can get away with it.

Moreover, arguments from self-interest are the wrong kind of reason.¹³ They do not provide a *normative* justification for the criminal law to countenance luck. Self-interested reasons for the legislature to withhold some punishment do not show why this would be *normatively justified*—that is, fair, just, or otherwise morally defensible. Related concerns afflict the first pragmatic argument sketched, based on making law enforcement more cost effective. Considerations of cost legitimately bear on the justification of legislative policies, but I am seeking nonconsequentialist, fairness reasons for the content of the criminal law to recognize luck.

1.2. Mercy

A better ratcheting-down argument stems from the idea that the legislature can display the virtue of mercy by declining to impose as harsh punishments on those who fortuitously cause less harm as on the analogous, equally culpable actors who cause more harm. Since it is good to display mercy in general, the legislature would have a reason to do so when passing criminal laws in particular. This gives another argument for imposing less criminal liability on Bert and Jack than Ernie and Jill, respectively.

This argument has advantages over the previous one. It does not depend on highly contingent facts about what preserves government popularity. Rather, it is a reason for ratcheting down that always applies—regardless of political climate, limited resources, or similarly changeable circumstances. Moreover, it more plausibly is the right kind of reason.

Nonetheless, this argument has problems. First, it is unclear why mercy should routinely be shown to nonharmful actors but not to harmful ones. Insofar as there is a general reason to show mercy, would it not apply in all cases regardless of harm? True, the legislature might decide that if mercy is to be shown at all, it is less likely to arouse controversy if shown to the harmless. After all, the population is more likely to demand a strong state response when harm

13 Cf. Lewis, “The Punishment that Leaves Something to Chance,” 54, which observes that the rationale that the public demands blood only when it sees blood “does nothing at all to defend our practice as just.”

is caused. Still, answering this way is to import pragmatic considerations of the kind that we just saw to be reasons of the wrong kind.

There is also a deeper problem. Mercy is *optional*.¹⁴ It is not generally something one *must* do. It might be desirable for the state to show mercy—just as it might be desirable for the state to display other virtues like courage or good taste. We might want the state to manifest such traits. But declining to show mercy, I take it, is not grounds for complaint by the person affected. Mercy is not something the legislature must do on pain of being an apt target of complaint or blame. It is not something the legislature has a *duty* to display.

As a result, the mercy argument does not appear weighty enough to account for the wide range of cases in which legal systems punish harmless conduct less harshly—that is, both for attempts and for harmless reckless conduct. Consider all the scenarios where legal systems like ours refrain from punishing less harmful actors as much as more harmful, equally culpable actors. Can all of these really be explained as a form of merely optional mercy? Perhaps *some* might. But since mercy is optional, we would expect the reasons to display mercy when legislating in criminal contexts to often be overridden by other reasons the legislature must consider—like deterrence and the value of expressing condemnation of culpable conduct. It is doubtful that mercy is a sufficiently weighty consideration to account for this broad range of cases. Accordingly, we should keep looking for reasons that more fully justify the legislative decision to punish less harmful actors less harshly—reasons that are not optional the way mercy is, but rather are more firmly grounded in the duties of the legislature. (I revisit the comparison to mercy in section 3.2.)

1.3. Reducing the Risk of Abuses

Another ratcheting-down argument is that taking harm to be a prerequisite for punishment might help reduce the risk of abuses by law enforcement. Andrew Simester has suggested a similar idea in another context.¹⁵ Here, the thought is that a simple way to reduce the risk of police and prosecutors abusing their discretion would be to restrict the amount of conduct that is criminalized. Having fewer or narrower crimes on the books would restrict the scope of behavior that

14 See, e.g., Tasioulas, “Mercy,” which expresses skepticism (in section 4) about the idea that there is a duty to show mercy or that offenders have a right thereto.

15 In discussing justifications for strict liability as to result elements, Simester suggests that declining to criminalize risky conduct unless harm ensues “has rule of law benefits, since it confines what otherwise might be wide-ranging discretionary powers of arrest and prosecution. . . . One way of minimizing the risk of malicious or discriminatory prosecutions would be to qualify the offence by [including] a strict liability requirement” of harm to a victim (“Is Strict Liability Always Wrong?” 47).

police and prosecutors are authorized to intrude into. Declining to criminalize harmless conduct would help restrict the domain of behavior that police and prosecutors may look into, thus perhaps reducing the risk of their abusing their discretionary powers.¹⁶

This argument also has drawbacks. First, while it may give reason for the state not to punish harmless risky conduct, it is little help with attempts. It does not explain why the state might have reason to punish attempts less harshly than would be permitted on culpability grounds (i.e., as harshly as completions). Since attempt is already a crime, and merely tends to be punished less harshly, police and prosecutors would still be authorized to pursue attempts. Thus, it is not clear how the present idea explains why Bert is punished less than Ernie.

A second problem is that withholding some punishment when harm is lacking is not the only way the legislature can combat abuses by law enforcement. Instead, the legislature might fully criminalize all the conduct it in principle may on culpability grounds, but then impose heightened accountability to discourage abuses by law enforcement. Perhaps police would face summary dismissal for using overly aggressive tactics. Perhaps prosecutors could be ordered not to always charge the maximum they can plausibly justify (as former attorney general Jeff Sessions ordered federal prosecutors to do), but rather to charge less serious crimes at times (as was the policy under another former attorney general).¹⁷ Why would this alternative way to prevent abuses be worse than punishing Bert and Jack less harshly than Ernie and Jill, respectively? It is an empirical question whether this would be a more effective solution, but it is conceivable it could work better, as it directly targets the abuses to be prevented.

Thus, while punishing harmless actors less than their harmful counterparts is one possible way to combat abuses, this punishment differential is not a *narrowly tailored* way to combat law enforcement abuses. Thus, I doubt it is on its own adequate to justify the many ways the law actually takes harm as the basis

16 Admittedly, it is an empirical question whether restricting the crimes on the books lowers the rate of law enforcement abuses. It is conceivable that reducing the opportunity to abuse one's discretionary powers with respect to some crimes would simply shift the abuses over to other crimes.

17 Compare Attorney General Jefferson Sessions III, "Memorandum for All Federal Prosecutors on Department Charging and Sentencing Policy" (May 10, 2017) with Attorney General Eric Holder Jr., "Memorandum for All Federal Prosecutors on Department Charging and Sentencing Policy" (May 19, 2010).

for differential punishment. It does not fully solve the legal luck problem.¹⁸ Instead, we need a reason for ratcheting down punishment for luckily less harmful actors that applies even with perfect investigation and enforcement mechanisms in place.

2. A NEW RATCHETING-DOWN JUSTIFICATION

I now want to develop a new ratcheting-down argument that fares better than the previous versions. I do not contend it is the only argument that can succeed. Core features of criminal law doctrine—like the tendency to punish harmless wrongdoers less harshly—need not rest on one single justificatory argument but could have multiple normative foundations. Still, the argument I develop has distinct advantages. It is the right kind of argument (i.e., a normative, fairness-oriented reason, not a self-interested consideration). It covers the full range of cases to be explained and does not rely on highly contingent facts (just more stable background conditions). And unlike the argument from preventing law enforcement abuses, it is *narrowly tailored* in the sense of showing why withholding some punishment from harmless actors satisfies the relevant evaluative commitments *directly*. The argument would apply even if our general law enforcement mechanisms were perfected.

As we will see, one might think the normative commitments behind the argument apply more forcefully to endangerment than attempts. Thus, while the argument provides a general recipe for how to defend luck in criminal law doctrine, one need not use it to justify all forms of luck in the criminal law. I show how the argument can be extended to cover attempts as well as endangerments, but I am also happy if it proves best to use the argument only piecemeal for some crimes rather than as a general defense of legal luck.

The argument proceeds in two stages. First, I argue that the legislature has a *pro tanto* duty not to be cruel in passing criminal laws. Second, I argue that withholding some punishment from harmless actors is a particularly appropriate strategy for avoiding an important sort of breach of this duty. The upshot is a justification for the legislature to ratchet down punishments imposed on harmless wrongdoers. I do not claim that this policy is the *only* defensible way a legislature can satisfy the normative principles behind the argument, but it

¹⁸ There may be other institutional ratcheting-down arguments. Perhaps withholding some punishment from nonharmful actors would help reduce the costs of incarceration. However, this idea has similar drawbacks. It is an empirical question whether this would be an effective way to achieve the desired cost reductions. Again, I am open to cost reduction as an additional benefit of recognizing luck in the law, but I doubt it is sufficient by itself to provide the sought-after justification.

provides one sufficient normative ground for the legislature to withhold some punishment that harmless wrongdoers otherwise deserve.¹⁹

2.1. *The Legislature's Duty Not to Be Cruel*

My argument starts from the idea that the legislature has a *pro tanto* duty not to be cruel. By this, I do not just mean cruelty in the narrow sense of taking pleasure in another's suffering, which is an extreme instance of cruelty. The concept of cruelty also covers less extreme cases.²⁰ One can be cruel through callousness and insensitivity to harm.²¹ Conduct can be cruel if it displays a notable lack of sympathy or concern—as when one is cold, indifferent, or overly rigid in one's treatment of others. Beyond this, I remain neutral on precisely what cruelty consists in. For present purposes, I do not need a full account of the notion, as I rely only on minimal claims that can be widely accepted. In general, though, I contend that this duty applies also to the legislature. When passing criminal laws, the legislature has a *pro tanto* duty to eschew cruelty in its treatment of those subject to its laws.²²

The “*pro tanto*” qualification indicates that other considerations can sometimes outweigh this duty. Thus, one might be tempted to say instead that the legislature merely has weighty moral *reasons* not to be cruel or callous when legislating within the criminal law. This is true but too weak. Although it is overridable, we are still dealing with a *duty* (albeit a *pro tanto* one) because,

- 19 I do not need to show that recognizing moral luck is the *uniquely best* way to satisfy the normative principles underlying this argument. A legislature is generally permitted to make incremental progress on a given challenge and need not always adopt the best possible solution to that problem (especially where the ideal solution carries other costs or is difficult to implement).
- 20 See Barrozo, who distinguishes four conceptions of cruelty, including agent-focused vs. victim-focused notions (“Punishing Cruelly,” 69–70).
- 21 For example, even if those responsible for factory farming do not take pleasure in the animal suffering caused, some of these practices can still be cruel if they manifest callousness by failing to minimize animal suffering as much as possible (even at considerable cost).
- 22 I assume that this notion of legislative duties is sensible and am happy to employ whatever proves to be the best account of it. One might be a reductionist who takes our talk of legislative duties to be shorthand for the duties of individual legislators. Or one might adopt a nonreductionist view. Nonreductionism seems apt for the legislature given that its sophisticated decision-making capacities may be enough to hold it responsible and regard it as bearing duties in its own right. See, e.g., List and Pettit, *Group Agency*, 153–63. Nonreductionism also makes sense for legislatures as they can adopt positions—through negotiations or premise-by-premise decision-making—that are independent of the personal views of individual legislators and which no individual legislator fully endorses. See Lackey, “Group Knowledge Attributions.” The present argument does not require nonreductionism, however.

all else equal, a complaint—even blame—would be legitimately leveled by citizens at the legislature if it unjustifiably breaches its duty to eschew cruelty.

Thus, the *pro tanto* duty to not be cruel is stronger than the reasons to display a virtue like mercy. Mercy, we saw above, is generally thought to be optional—something it might be good for the legislature to display in action, but not something it *must* display. By contrast, the *pro tanto* duty to not be cruel is not similarly optional. Rather, it is something the legislature must do on pain of being an appropriate target of complaints and blame all else equal. This is why the present argument is supposed to be stronger than the argument from mercy.²³ It is not plausible to say that there is a duty to show mercy (or that people have a right thereto), but we do plausibly have a right for our institutions not to be cruel to us.²⁴ Behaving cruelly would open up these institutions to legitimate complaints—even blame. This duty can be summarized thus:

Legislative Duty to Not Be Cruel: When legislating in the domain of criminal law, the legislature has a *pro tanto* duty not to be cruel—that is, weighty moral reasons not to be callous, mean, vicious, or vindictive toward the affected citizens—with the result that if these reasons are not outweighed or defeated by other reasons, a legitimate complaint, and plausibly some blame, would be fittingly directed at the legislature in virtue of this failure.

I am not wedded to the details of this statement of the duty. I am happy to use other concepts or formulations if preferable. Nor do I claim that the legislature is the only government actor to have such a duty.²⁵

23 Note also that the duty to not be cruel is a stronger imperative than one's general reasons not to display vices. For at least some vices—especially cowardice or stupidity—there are weighty reasons not to display them in conduct, but doing so nonetheless is not a failing for which blame or complaint is appropriate. There are weighty reasons against being cowardly and stupid, but since such behavior need not manifest insufficient regard for others, it does not automatically call for a blaming response. By contrast, the duty to not be cruel is stronger in that being cruel in one's actions *does* manifest insufficient regard, and thus merits a blaming or complaining response (at least assuming there are no countervailing considerations that justify the failing). Thus, being cruel is more like the vice of being unjust, which also would call for a blame response or generate a complaint. Hence, my claim is not simply reducible to the truism that we generally have reasons not to display vices in our conduct. See also section 3.2.

24 For a discussion suggesting that there is no duty to show mercy, see Tasioulas, "Mercy," sec. 4. Similarly, no complaint or blame becomes warranted if one consistently declines to show mercy—if one in this sense is "merciless."

25 I am open to thinking that other official actors—including courts, prosecutors, and even the executive—may also have an analogous duty to not be cruel within their areas of responsibility.

I cannot give a full account of everything needed to avoid breaching this duty. Articulating *ex ante* all the ways one might be cruel, callous, vicious, or vindictive will be extremely difficult, given how nuanced and context sensitive these notions are.²⁶ Instead, all I need is something more modest: a sufficient condition for being cruel.

More specifically, all I need for the present argument is the claim that *one* way for the legislature to breach its duty to not be cruel would be for it to always impose the full amount of criminal liability on citizens that would be permissible on culpability grounds. It would show the legislature to be cruel if the legislature were to always impose the maximum penalties it could get away with given the culpability of the actor—that is, the maximum penalties that would not run afoul of the desert constraint, which prohibits disproportionately harsh punishments.²⁷ Even if always imposing the maximum criminal liability permitted would not violate any deontological side constraints that restrict the criminal law, systematically imposing the harshest permitted punishments would reflect badly on the legislature. It would suggest the legislature is out to always extract its pound of flesh, no matter the cost and no matter how much insensitivity and callousness it manifests. We can succinctly put the point as follows:

Sufficient Condition: If the legislature, when passing criminal laws, always imposes the maximum amount of criminal liability on citizens that would be permitted on culpability grounds (i.e., as much liability as it can without offending the proportionality constraint built into negative retributivism), then this shows the legislature to be callous, mean, and vindictive—that is, cruel—at least provided there are no sufficiently weighty countervailing reasons or defeaters that would justify or excuse this conduct by the legislature (such as an abnormally acute need for heightened deterrence).

Thus, the legislature would open itself up to complaints—even blame—if it always imposed the maximum punishment permitted on culpability grounds.²⁸

26 To be clear, by “vicious,” I do not mean the broad idea of displaying vices in one’s conduct—as one might think based on note 23. Instead, I intend a more colloquial meaning of “vicious” (i.e., being nasty and hostile).

27 See, e.g., Berman, “The Justification of Punishment,” 151.

28 For example, former US attorney general Jeff Sessions’s prosecutorial policy, which ordered federal prosecutors to always charge the maximum crimes that could be maintained, was decried as cruel. The director of Human Rights Watch argued that this policy “ignor[ed] the facts about the cruelty, waste, and ineffectiveness of the ‘tough on crime’ policies of the 1980s and 90s” (Jackman, “Sessions Takes Federal Crime Policy Back to the ‘80s”).

What grounds this claim? Why would it be cruel to always impose the maximum punishment allowed on culpability grounds? Let me offer some substantive considerations in favor of this claim. As we will see, these considerations may carry more weight as applied to risk-taking than to acts done with intent to cause harm.

2.1.1. *Why Ratchet Down for Risky Conduct*

Most importantly, the above view derives support from the simple realization that people are imperfect, and the legislature may be criticized for not attaching due weight to this fact. Granted, at each moment, it is plausible that each of us ought not behave in ways that are unduly dangerous, risky, or otherwise wrongful. This is a *synchronic duty*. Nonetheless, it would be unreasonably demanding to expect everyone to act perfectly safely and reasonably at every moment across a long period of time—to attain *diachronic perfection* across a period of years. For practically everyone, some moral failures—at least minor ones—are eventually unavoidable. There will be times when all of us behave in ways that are dangerous enough to make us fitting targets of criticism and blame. Perhaps this will be due to tiredness, distraction, cognitive failings, stress, or other excusable burdens. We are likely to face provocations, frustrations, and stresses that over time accumulate in ways that naturally lessen any normal person's capacity for self-restraint (particularly if compounded by nonideal cognitive or emotional conditions). Without pretending to a level of precision I cannot obtain, I submit that at a minimum, a few culpable screwups every few years are inevitable. Thus, even if there is a synchronic duty, applicable at each point in time, not to act in ways that are unduly risky, and which we can be fittingly blamed for breaching, it would be overly harsh for the criminal law to demand unassailable behavior at every moment across long periods (like a term of years). That is, the criminal law should not insist on diachronic perfection across long stretches of time. This is particularly true where the state itself bears significant responsibility for creating trying and burdensome conditions that make it more difficult to exercise the restraint and care necessary to attain diachronic perfection across long periods. To insist on diachronic perfection across long stretches of time would be cruel given how far beyond the actual capabilities of most normal people it is to attain such levels of perfection (at least without entirely sacrificing many valuable activities we should be free to pursue). Thus, it would be harsh and unreasonable for the criminal law not to make accommodations for this fact.

Therefore, even if it would be permitted on culpability grounds to impose punishment whenever we do something unduly risky—which amounts to insisting on diachronic perfection—doing so would make the criminal law

more vindictive and cruel. Since very few would realistically be able to attain diachronic perfection, especially given a sufficiently long time frame, a legislature that always demanded it in its criminal laws would be cruel—even if this would also be permitted on culpability grounds.

The upshot is that in light of normal human imperfection, the legislature has weighty reasons to find ways not to always punish to the maximum extent permitted in response to what we are fittingly blamed for synchronically. To avoid being cruel, the legislature is morally required to pass criminal laws that make some meaningful concessions to unavoidable human imperfection. I contend that all else equal, we as citizens have a *complaint* against the legislature if it fails to make such concessions and instead insists on diachronic perfection by always imposing the maximum punishment permitted on culpability grounds. This supports the above view, as stated in Sufficient Condition.

2.1.2. *Why Ratchet Down for Intentional Harm*

Perhaps this thinking has limits. While some relaxations of criminal liability may be warranted for risky conduct because people are neither perfect nor perfectly good, this reasoning may seem less plausible for graver intentional wrongs like murder or theft. It is far from inevitable that most of us will commit such serious wrongs in our lifetimes. Thus, might the argument only support withholding some punishment for lesser categories of misconduct?²⁹

Without conclusively settling the question, note that the present reasoning still has some merit for actions (like attempts) done with intent to harm—for two reasons. First, even the best of us can be unfortunate in the circumstances we face. Even good people can encounter serious provocations and trying circumstances, which require great effort and restraint not to succumb to. Perhaps in ideal conditions—when well rested, well fed, well paid, and well supported emotionally—good people will always manage to resist provocations or temptations and stay on the right side of the law. But as trying circumstances add up over time, as conditions become less ideal, and as we extend the time frame, maintaining diachronic perfection becomes less likely—even for the otherwise virtuous. Thus, the argument plausibly does support withholding some punishment even for *some* serious wrongs as a concession to human imperfection.

Second, there can be extenuating circumstances for some kinds of property crimes and perhaps even some acts of violence, which should not be recognized as formal defenses—as Judge Bazelon’s proposed “rotten social background” defense would have been—but which nonetheless put normative pressure

29 Thanks to Erik Encarnacion and Liat Levanon for helpful discussions on this point.

on the legislature to make concessions when passing criminal laws.³⁰ Especially when the legislature itself bears some responsibility for allowing severe inequality and other criminogenic conditions to persist, it may be cruel for the legislature to always insist on the maximum punishment permissibly imposed on culpability grounds. The suggestion is not that this means a new type of defense must be recognized. Rather, it is another reason for the legislature to seek ways to relax punishments in order to avoid being cruel—and this reason would also cover intentional crimes.

If one does not find these considerations compelling, then this would mean one takes the legislature not to have as weighty a duty to find ways to ratchet down punishments for intentional crimes. This, as seen below in section 2.3, may be what explains why punishment is not *fully* withheld from attempts but is only imposed at a reduced rate. Regardless, we have seen some considerations that may help underwrite the legislature's duty to not be cruel also where intentional crimes are concerned.

2.2. *Withholding Some Punishment from Harmless Wrongdoers Is an Apt Way to Avoid Being Cruel*

I have argued that the legislature, when passing criminal laws, has a *pro tanto* duty to avoid cruelty—including cruelty of the sort Sufficient Condition specifies. The criminal law must make *some* concessions to normal human imperfection (or other considerations supporting relaxation of punishments) by not insisting on diachronic perfection across long stretches of time. Instead, it must somehow ratchet down punishments below the maximum permitted on culpability grounds.

However, the legislature has great flexibility in deciding how to discharge this duty. There is no limit to the ways it could avoid being cruel in the way Sufficient Condition specifies. All it would have to do is find *some* meaningful way not to impose the maximum punishment permitted on culpability grounds. In this respect, the requirement to avoid cruelty of the sort Sufficient Condition specifies is like the requirement to give to charity. We have no duty to give to any particular charity, but we do typically have a duty to give to some charities sometimes. Otherwise, we would show ourselves to be callous and unkind (all else equal). But we have wide discretion in how to avoid being-callous-by-giving-to-no-charities.

The question thus is *how*, exactly, the legislature should discharge its duty to not be cruel in the way Sufficient Condition specifies. The legislature needs a

30 For discussion of issues relating to the “rotten social background” defense, see, e.g., Morse, “The Twilight of Welfare Criminology,” 1252.

way to break the impasse and decide how best to refrain from always punishing as harshly as it in principle could. I argue that withholding some punishment from harmless wrongdoers is an especially appropriate way—better than the natural alternatives—to avoid being cruel in the manner Sufficient Condition specifies. Defending this claim will complete the argument that the criminal law is justified in recognizing some luck. (To see the structure of the argument, focus for now on luckily harmless misconduct *in general*. I return to the differences between endangerment and attempts in section 2.3.)

Why, then, is the absence of harm a basis for withholding some punishment that is otherwise due harmless wrongdoers? Why is this a good way for the legislature to comply with its duty to not be cruel? Why not just flip a coin for each culpable offense to decide if some punishment should be withheld?

The answer is that the presence of clearly identifiable victims makes a normative difference—at least enough of a difference to break the impasse the legislature faces in deciding how to comply with its duty to avoid cruelty. Unlike other theorists, I do not go so far as to claim that the presence of victims who are harmed is itself a reason to impose criminal liability, or would otherwise (by itself) support enhancing punishments.³¹ Rather, I rely only on the more modest, and hopefully less controversial, claim that the presence of victims is a consideration that can tip the scales in favor of one way of complying with the legislature's independent duties rather than other ways.

To see why victims can make a difference to how the legislature should avoid being cruel, distinguish cases where culpable conduct causes harm from those where it does not. For the former cases, most will include distinct and identifiable victims—whether someone who was directly harmed or their nearest and dearest. Where distinct and identifiable victims exist, they will have a claim on the state to acknowledge their rights that were violated—more precisely, to reaffirm these rights by seeing to it that justice is done to the relevant wrongdoers. In such cases, the victims are in a position to loudly and intensely press these claims against the state, and they can be expected to do so if practically able. This is because when harm occurs, given human psychology, the danger

31 Cf. Binder, “Victims and the Significance of Causing Harm.” As Binder puts it:

What I am suggesting is that we punish harm not only in order to express something to the offender and about the offender, but also to express something to the victim and about the victim to others. We punish not only in order to admonish the offender that he or she should respect the victim, but also in order to show the victim our own respect. If so, we are punishing harm for a purpose that transcends doing justice to the offender. (“Victims and the Significance of Causing Harm,” 733)

See also *infra* note 35 and accompanying text.

will tend to seem more salient, and so victims are more likely to experience resulting feelings of anxiety and insecurity, all else equal.³² This fact plausibly grounds a legitimate claim against the state for it to relieve these painful feelings by providing reassurance to victims through reaffirming their rights.³³

- 32 This is an empirical claim, though I think it is *prima facie* plausible. There is research supporting it. One large study shows higher rates of serious psychological effects (suicide attempts, suicidal ideation, “nervous breakdowns”) in victims of some serious crimes—such as rape—compared to victims of analogous attempts. See Kilpatrick et al., “Mental Health Correlates of Criminal Victimization,” 869–70. Nonetheless, the evidence remains mixed regarding attempts (while not speaking to endangerments). Specifically, the higher rates of serious psychological effects were *not* seen in connection with other types of crime, such as completed vs. attempted robbery or completed vs. attempted molestation (869–70). Here, the attempts actually carried higher rates of serious psychological effects. The authors explain as follows:

Whereas completed rape was much worse [psychologically] than attempted rape, attempted molestation and attempted robbery had more negative mental health consequences than did their completed counterparts. This finding is counterintuitive but may be partially explained by the observation that attempted attacks leave much room for ambiguity in the victim’s mind as to what the assailant intended and as to the actual danger the victim was in. The extent to which victims in ambiguous situations attribute very dangerous intentions to their assailants is apparent in the finding that 35% of these victims of attempted molestation, compared with 18% of victims of completed molestation, thought they were likely to be killed or seriously injured during their assault. Victims of attacks that were not completed do not know what they escaped. (872)

Note that these findings apply to attempts only and do not undermine the plausibility of the analogous claim about endangerments (namely, that suffering a given personal harm tends to be psychologically worse than merely being subject to a risk thereof). Moreover, regarding attempts, even the mixed results above are still compatible with the claim that being the victim of a completed crime on the whole tends to be psychologically worse than being the victim of the analogous attempt at least *all else equal*—including knowledge of the perpetrator’s intentions and the danger the victim was in. This would still provide some support for my argument, which is concerned with assessing the normative strength of competing claims by personally harmed victims vs. those who were in danger. Nonetheless, it remains true that if no version of the empirical claims my argument requires are supported by the evidence, the argument would fail. With this important caveat, I proceed under the assumption that at least some qualified versions of the empirical claims I need are plausible enough to warrant considering normative arguments based on them.

- 33 Of course, it will not always be the case that there will be anyone practically able to press such a claim. For example, the victim might be unable to press the claim because she was killed and no one can do it for her. (Perhaps she was a hermit with no friends or family.) Still, all I claim is that when criminal wrongdoing causes personal harm to a distinct victim, then a claim arises that this person, or someone acting on her behalf, is *entitled* to press. The victim, or someone close to her, will be likely to do so if practically able. That is enough to get my argument off the ground.

The other kind of case is where the wrongdoer's conduct does not cause direct harm—perhaps merely due to luck, as with Bert (the lucky attempter) and Jack (the lucky endangerer). In these cases, there typically will not be victims who are as distinct and identifiable as in the former kind of case, where harm ensues. When harm does not occur in ways that produce distinct and identifiable victims (whose rights were violated in an especially salient way), there will not be anyone with an equally strong claim against the state to have their rights reaffirmed through the imposition of criminal liability. Less anxiety and distress are likely to be felt, all else equal; and with less insecurity to be alleviated, there is a less weighty claim against the state to reaffirm the rights violated when no harm occurs.³⁴

To this, one might object that being exposed to undue risk or targeted in an attempt, even if not directly harmful to body or property, could still violate a right, generate distress and anxiety, and thus generate a legitimate claim for the reaffirmation of rights. Would not people whose rights are violated *non-harmfully* also want the state to acknowledge these rights through a criminal law response?

Yes, but in the main, these claims for the reaffirmation of rights will not be as intensely felt, stem from as much anxiety or distress, and thus be likely to be pressed as loudly as the analogous claims by victims whose rights were *harmfully* violated—such as by a punch, physical wound, or psychological trauma. Given our psychology, harmful rights violations are likely to cause more anxiety and distress, and thus generate more pressing and loud claims for the state to reaffirm the violated rights than would be expected for analogous *nonharmful* rights violations. Indeed, when rights violated *harmfully* are not reaffirmed by the state, this is likely to leave in place more fear, insecurity, and distress for victims than when rights violated *non-harmfully* are not reaffirmed. Thus, the legislature would be justified in ascribing more weight to claims for the reaffirmation of *harmfully* violated rights than claims stemming from *harmless* rights violations—or at least this is so when the legislature cannot respect *all* such claims but must choose between them. And in this context, the legislature *must* choose because of its duty not to be cruel.

Granted, if the state did not have to choose which claims for reaffirmation of rights to respect, then it could just respect them all by imposing criminal liability in response to any serious rights violation—whether harmful or not. But in this context, the state *must* choose which of these claims to respect because of the legislature's duty not to be cruel in the way Sufficient Condition specifies—that is, not to display the cruelty of always punishing the maximum permitted on

34 See *supra* note 32.

culpability grounds. Since the state must withhold full punishment sometimes, it cannot respect all claims to reaffirmation of rights that could be pressed in any case of culpable wrongdoing. Thus, the state must choose. And in so doing, it would be reasonable to ascribe less weight to claims for reaffirmation of rights stemming from nonharmful rights violations than to similar claims stemming from harmful rights violations.

This shows how the presence of harm can make a difference. Suppose I am right that harmful wrongdoing (like Ernie's and Jill's) typically generates claims to reaffirmation of rights that are louder, more pressing, and based on greater anxiety—claims to which the legislature can legitimately ascribe more weight—than the comparable claims arising from harmless wrongdoing (like Bert's and Jack's). If so, harm can make enough of a normative difference to help the legislature decide when it should withhold full punishment—as it must do in some way or else be criticized as cruel and callous. If the legislature withholds full punishment from some cases where harm ensues, it will be disregarding the weightier claims by distinct and identifiable victims to have their violated rights reaffirmed. Call these the *loud claims for reaffirmation of rights*. But if the legislature withholds full punishment only from cases where harm does *not* ensue, it will not be disregarding any of these loud claims for reaffirmation that arise when harm ensues. Assuming there *are* claims for reaffirmation of rights when the wrongdoing is harmless, these claims would typically be ones with less weight—ones that would not be pressed as loudly and intensely, as they would tend not to stem from as intense anxiety. Call these the *quiet claims for reaffirmation of rights*.

Since the legislature must sometimes withhold punishment to avoid being cruel, it would be justified in deciding to do this in a way that at most disregards only the *quiet* claims for reaffirmation of rights (arising when there is no harm), but that always fully satisfies the *loud* claims for reaffirmation of rights (arising when harm ensues). This approach would be a less worrisome failure to reaffirm victims' rights in general. The legislature thus would be justified in seeking to avoid being cruel in a way that does not disregard the loud claims. If some claims to reaffirmation of rights must be disregarded, better to disregard the quiet kind that may arise from harmless wrongdoing than the loud kind arising from harmful wrongdoing.

Before considering differences between reckless endangerment and attempts, let me clarify a central point. What is the role of the duty to not be cruel in the argument? Why not just appeal to victims' rights directly? The reason is that I want my argument to be as ecumenical as possible. I do not want to rely on the contestable view, which others have recently used to argue for luck in the criminal law, that the presence of harmed victims—that is, the need

to express respect for them and reaffirm their rights—can itself be a sufficient basis for imposing or enhancing punishment.³⁵ Whether this view is correct is a fraught question, one I do not want my argument to hinge on. Accordingly, I do not maintain that victims' claims for the reaffirmation of rights have any independent (nonderivative) justificatory force that militates *in favor* of punishment. Instead, I maintain only that such claims of harmed victims bear on when to *ratchet down* punishment, and I only take them to have this normative significance *in virtue of* the more fundamental legislative duty to not be cruel in its criminal laws. This duty requires the legislature to choose some violated rights that will remain unreaffirmed. On my view, the claims of harmed victims for reaffirmation of rights only get to serve as a tiebreaker on this issue because the legislature must make this choice. Hence, my rationale for withholding some punishment from harmless wrongdoers is meant to be more modest and more widely acceptable than more ambitious victim-focused arguments recently offered in favor of luck in the law.

2.3. *Does the Argument Apply across the Board?*

My argument provides a recipe for how to justify withholding full criminal liability from some categories of culpable but harmless wrongs. As indicated in section 2.1, some might think the argument is less plausible for attempts, as

35 See Boeglin and Shapiro, "A Theory of Differential Punishment." They defend a victim-facing justification "premised on the notion that the state should take the interests of victims into account when determining how severely" to punish, and they contend that in at least some instances, greater punishment can justifiably be imposed on harmful actors "out of respect" for victims of the harm caused (1503). See also Binder, "Victims and the Significance of Causing Harm."

My argument here is different from Boeglin and Shapiro's not only because I offer a "ratcheting-down" argument, while they argue for "ratcheting up" punishments for harmful offenders. They, for example, express sympathy for the "judgment that, at times, the degree of punishment warranted by offender-facing justifications might seem 'insufficient' in light of the harm that a victim has suffered" (1523). More importantly, as noted, my argument strives to be more ecumenical. The victim-facing considerations I adduce merely serve as a reasonable way for the legislature to decide how to satisfy its duty to not be cruel. Unlike Boeglin and Shapiro, I do not contend that victim-facing considerations by themselves can justify a policy of differential punishment as between harmful and harmless wrongdoers. Instead, my argument gives victim-facing considerations a role to play in justifying moral luck only *in virtue of* the duty to avoid cruelty and viciousness in the criminal law. Without the normative force of this duty to avoid cruelty, I doubt that victim-facing considerations alone suffice to justify imposing more punishment on harmful wrongdoers than on their harmless counterparts.

intentional wrongs, than for endangerment.³⁶ Nonetheless, the argument need not be rejected outright for attempts. It can still apply in modified form.

2.3.1. *Endangerment*

Begin with the argument in its pure form as applied to endangerment. The duty not to be cruel requires the legislature to find meaningful ways to impose less criminal liability than would be permitted on culpability grounds. In deciding how, it may look to the normative difference victims make. Consider three policies the legislature may adopt to avoid being cruel in the way Sufficient Condition specifies:

1. Unduly risky conduct is a crime only when harmful, not when harmless.
2. Unduly risky conduct is a crime only when harmless, not when harmful.
3. A coin is flipped in each case of unduly risky conduct, regardless of harm, to determine whether to impose less punishment.

Policy 2 is least justified. In virtually all cases of risky conduct that causes harm, there will be distinct and identifiable victims who would have loud and weighty claims for reaffirmation of their rights. But all these loud claims would be disregarded by 2. When wrongdoers cause no harm, claims for reaffirmation of rights are less likely to arise—and if they do, it would only be the quiet kind to which the legislature would be justified in attaching less weight (since they are likely to stem from a less intense sense of insecurity). Policy 2 disregards all the loud, weighty claims to reaffirmation of rights, while only respecting the quiet ones. Policy 3 fares better but remains suboptimal. Under this policy, the state would end up disregarding loud claims for reaffirmation of rights in half the cases where such claims arise.

Policy 1 does the best job of respecting claims for reaffirmation of rights, while also complying with the legislature's duty to not be cruel. When risky conduct causes no harm, there are no distinct and identifiable victims who have loud, weighty claims for reaffirmation of rights. Admittedly, by not punishing harmless risky conduct, the legislature may fail to respect some claims of the quiet kind. Even if quiet claims do arise when no harm results, they are unlikely to be as intense and pressing as loud claims, all else equal, and so the legislature would reasonably attach less weight to them than the comparable loud claims. Thus, a legislature could reasonably conclude a good way to comply with its duty to not be cruel is to refrain from criminalizing risky conduct except when it causes harm. This would ratchet down some punishments while fulfilling the

36 See, e.g., American Law Institute, *Model Penal Code*, sec. 5.01, which holds that attempts require intent, not mere recklessness.

weightiest claims to reaffirmation of rights and only disregarding such claims when less weighty.³⁷

2.3.2. *Attempts*

Some might think this argument is less compelling for attempts, as intentional wrongs. After all, failing to withhold some criminal liability from luckily harmless attempters might seem not to make the legislature *as cruel* as failing to do so for harmless endangerers. As noted in section 2.1, it seems harsher to insist on long periods of diachronic perfection in avoiding risky conduct than to insist on such diachronic perfection in avoiding intentional wrongs. If avoiding cruelty in general requires making some concessions to natural human imperfection, the legislature might seem *more cruel* in failing to allow for natural imperfection with respect to risk-taking than where intentional wrongs are concerned. Thus, the pure form of the argument might not be as compelling for attempts, as intentional wrongs. Of course, some may think concessions to human imperfection are due even concerning intentional wrongs (perhaps particularly if the legislature bears responsibility for creating criminogenic conditions). But even for those who find the argument less forceful for intentional wrongs, it need not be rejected outright. It might still apply to attempts in modified form.

To see this, note that the law does not *completely* withhold punishment for attempts. It merely imposes *less* criminal liability on Bert, for example, while imposing full liability for Ernie's equally culpable harmful conduct. The present rationale can explain why.

It still seems overly harsh of the legislature not to ratchet down *at all* for intentional wrongs as a concession to human imperfection, but the need to do so is less pressing. Instead, the legislature might calculate that fully withholding punishment from harmless attempters would be too unfair to victims. It might reasonably determine it had better *at least somewhat* reaffirm the violated rights of those who were the target of an intentional wrong—even when no harm results. After all, attempting a crime requires intending it. Thus, when one is the target of an attempt, one's rights have been violated in a more salient way—one that is more serious, all else equal, than when one was merely subject to undue risk of the analogous harm but was not targeted in an attempt. Thus, in attempt cases, there are more likely to be distinct and identifiable victims with weightier claims for the reaffirmation of rights—though not as weighty as these claims would be if harm ensued. Accordingly, the legislature would legitimately feel pressure to provide *some* criminal law response to the claims for reaffirmation

37 The same story could be used to justify punishing criminal negligence only when it causes harm as well.

of rights by victims of attempts. However, since the legislature *also* must find meaningful ways to withhold full punishment in order to eschew cruelty, it would have reason to seek a balance between the competing normative pressures it faces. It must not only (a) respect the still somewhat weighty claims of victims of attempts for the reaffirmation of rights but also (b) balance this against the need to sometimes withhold full punishment to avoid being cruel. How to strike this balance? A plausible answer is to punish attempted crimes less harshly than analogous completions.

Thus, a modified version of the argument applies to attempts. Consider three policies:

4. Punish mere attempts less harshly than the analogous completed crimes.
5. Punish completed crimes less harshly than mere attempts.
6. Flip a coin in each case of a completion or attempt to decide whether to punish the conduct at a reduced rate.

Policies 5 and 6 disregard victims' claims to the reaffirmation of rights to a greater degree than policy 4. Policy 5 gets it exactly backward in partially frustrating the loud claims of harmed victims while fully satisfying only the less weighty claims of victims of mere attempts. Policy 4 gets it the right way around. It fully satisfies the loud claims of harmed victims and only partially frustrates the less weighty claims of attempt victims. While 6 fares better than 5, it still does not do as good a job as 4, which is the most justified of the trio.³⁸

Thus, even if one finds it less imperative for the legislature to withhold some criminal liability for intentional wrongs than for endangerment, this does not mean one must entirely reject the ratcheting-down argument for attempts. One could simply adopt the modified version outlined. This would explain the prevailing legal practice of punishing attempts, although less harshly than analogous completions. I remain neutral on whether ratcheting down for attempts is truly needed for the legislature to satisfy its duty to not be cruel. But the reasoning has plausibility even here.

38 A legislature might have adopted the attempts solution for reckless endangerment. Rather than withholding punishment from harmless reckless conduct altogether, the legislature might have decided to withhold only *some* of the punishment that is due. The legislature might think a policy like 4 is normatively better for reckless endangerment than policy 1. I will not try to resolve whether 1 or 4 for reckless endangerment better accommodates both the need to respect victims' claims for reaffirmation of rights and the legislature's duty to not be cruel. Which policy is better may depend on contingent facts about attitudes in the jurisdiction. Even if reasonable legislatures differ on this point, my primary aim here is just to illustrate the *kind* of reasoning that would justify some policy like 1 or 4 that recognizes luck.

3. ALTERNATIVES AND OBJECTIONS

3.1. *Alternative Solutions*

To show that recognizing luck is an appropriate way for the legislature to avoid being cruel, I need to explain why this legislative approach is no worse—and preferably better—than the natural alternatives.³⁹ I cannot canvass all alternatives. But by showing why recognizing luck is not clearly worse than the obvious alternatives, I aim to demonstrate that there is at least an *adequate* normative justification for recognizing luck in the criminal law—that it stands as an available option for the legislature.⁴⁰ I consider four other ways to ratchet down punishments below what is warranted on culpability grounds. I am in no way opposed to these measures, but I claim that they do not obviously do a better job than recognizing luck does in satisfying the considerations behind the duty to not be cruel.

Consider the first two alternatives together. They involve relying on the discretion of other state actors—either prosecutors (or other law enforcement officials) or sentencing judges—to ratchet down the punishments otherwise due on culpability grounds. This move is not satisfying for several reasons. First, prosecutorial and sentencing discretion are worrisome insofar as they are *ex post solutions* to the problem of a legislature passing laws that count as cruel. Better for the legislature to prevent this problem from arising *ex ante* by passing laws that avoid the issue. Second, there are concerns about the legislature delegating its responsibility to avoid cruelty. If the legislature leaves ratcheting down to other actors' discretion, it cannot be as confident that the required ratcheting down will actually happen. There is no guarantee that prosecutors or judges will ratchet down as needed to satisfy the legislature's duty to not be cruel. Safer for the legislature itself to see to the satisfaction of this duty.

Most importantly, the legislature's duty to not be cruel places constraints on the *content* of the criminal law, not merely its enforcement. Even if prosecutorial and sentencing discretion were used in a generous ratcheting-down manner, we would still have a complaint against the legislature for having put laws on the books that are cruel, callous, and vindictive in failing to make adequate accommodation for human imperfection and the legislature's perpetuation of criminogenic conditions (if applicable). To satisfy the legislature's duty to not

39 Many thanks to James Manwaring for pressing me on this point.

40 It is a familiar point that the legislature need not always adopt the best conceivable solution to a given problem but can be justified in taking steps that take us closer to the ideal solution than would otherwise be the case. It is in this sense that I aim to provide an *adequate* justification for recognizing moral luck, though not an argument that *mandates* it.

be cruel, such accommodation is needed in the *content* of the law—the substantive rules delineating criminal offenses.

A final worry about sentencing discretion in particular is that sentencing is individual focused, while the considerations behind the legislative duty to not be cruel are broadly applicable considerations involving pervasive human imperfection and (perhaps) criminogenic conditions sustained by the legislature. Sentencing judges typically respond to individual-specific factors affecting the defendant's conduct and circumstances. It would be unprincipled to announce that the defendant deserves a given sentence but then impose a lower sentence because of the general (non-individual-specific) difficulties in achieving diachronic perfection. Given the individual-focused nature of sentencing, judges are not in a good position to take account of the *generally applicable* reasons to make concessions to human imperfection. These are more properly the purview of legislatures.⁴¹

Similar considerations undermine a third natural alternative. Perhaps the legislature should accommodate the considerations behind the duty to not be cruel by expanding the affirmative defenses—especially excuses. This alternative may seem more promising because it involves the legislature itself making changes to the *content* of criminal law in order to ratchet down. Perhaps this could lead to new sympathy-oriented defenses like Judge Bazelon's "rotten social background defense," or a greater number of partial defenses that lessen the seriousness of one's offense.

Still, this alternative is not an optimal way to accomplish the required ratcheting down because excuses are individual specific. They are narrow individual-focused sets of conditions that call for a lower offense, or no conviction at all, for defendants who satisfy them. Determining whether the excuse is present requires looking at facts about the particular defendant—like whether he or she confronted especially challenging circumstances. The considerations behind the legislature's duty to not be cruel are broader, non-individual-specific facts about human imperfection, the inevitability of some culpable mistakes,

41 Here is a final reason sentencing judges sometimes cannot be relied on to fully satisfy the considerations behind the duty to not be cruel. Consider an offense with a mandatory minimum (and suppose that the mandatory minimum is not unjustly harsh). Now consider a defendant who is guilty of the crime but who deserves a punishment at the very bottom of the legally permitted sentencing range. The sentencing judge cannot lower this person's punishment any further without violating the mandatory minimum law. In such a case, the sentencing judge cannot satisfy the considerations that underlie the duty to not be cruel; only the legislature could do so by ratcheting down the whole permissible sentencing range, including the mandatory minimum provision setting the floor of the available punishments. Here, the legislature's duty to not be cruel could not even in principle be delegated to sentencing judges.

and (perhaps) the legislature's role in sustaining criminogenic conditions. Thus, individualized excuses are not an ideal vehicle for satisfying the more global considerations behind the duty to not be cruel.

Finally, a broader way for the legislature to eschew cruelty is to ratchet down punishments for all offenses.⁴² Jurisdictions like those in the United States arguably have weighty reasons to do this *anyway*.⁴³ But set that aside. Our question is this: Supposing that punishments are set at a nonexcessive level compared to culpability, what is a defensible way for the legislature to ratchet down punishments *even further* so as not to be cruel? Recognizing luck, I claim, is superior to lowering punishments across the board.

The reason is that luck does a better job on balance of satisfying victims' claims to reaffirmation of rights, thus alleviating the anxiety and insecurity grounding such claims. On the luck proposal, all *loud* claims possessed by harmed victims for the reaffirmation of rights will be fully satisfied, while only the quieter, less weighty such claims are not fully satisfied. By contrast, if we lower punishments for all offenses, *none* of these claims will be fully satisfied—neither the loud ones nor the quiet. Lowering the severity of punishments, say, 10–20 percent across the board would entail a corresponding degree of frustration of *all* claims to reaffirmation of rights. Given that *most* crimes involve harmed victims with loud claims to reaffirmation of rights, one can understand why a legislature might conclude that lowering all punishments does a worse job of *fully* satisfying people's claims to reaffirmation of rights, on the whole, than recognizing luck. The legal luck proposal, after all, always fully vindicates harmed victims' loud claims to reaffirmation of rights (which are due more weight). A legislature might reasonably conclude that, compared to the luck solution, ratcheting down across the board would leave in place more anxiety and insecurity on the part of victims.⁴⁴

I have not canvassed all alternatives to luck as a route to complying with the duty to not be cruel. However, I am not arguing that withholding some punishment from luckily harmless wrongdoers is the *uniquely best* way to avoid

42 While one might consider ratcheting down punishments only for *some* offenses, doing so requires a nonarbitrary way to decide *which* offenses this should be done for. That, however, is precisely the question that the occurrence of harm is supposed to answer. Ratcheting down the punishments of some offenses thus is not an alternative to the solution of recognizing luck—it is one attractive *instance* of this strategy.

43 Husak, *Overcriminalization*; Alexander, *The New Jim Crow*.

44 Furthermore, if the legislature ratcheted down across the board, it is likely that within a few years the population would become accustomed to the new range of punishments, so the lowered punishments would cease to be a salient way of not being cruel. By contrast, the luck proposal—given its differential treatment of equally culpable actors—is likely to remain a *visible* way of not being cruel even after a long time.

the form of legislative cruelty we are concerned with—only that this duty gives an adequate normative basis for recognizing some luck in criminal law.

3.2. *Objections*

My argument faces some objections that need a response.⁴⁵ First, is my reliance on the legislative duty to not be cruel just a disguised appeal to mercy? One might think there is a duty not to be merciless, which comes to much the same thing.

To start, I am not concerned with the terminology of the argument. In section 1.2, I rejected ratcheting-down arguments from mercy insofar as they conceive of mercy as optional. These arguments fail to the extent one thinks, as I do, that there is no duty to display the virtue of mercy. If one responds by moving to a stronger conception of mercy—one that sees mercilessness not merely as the absence of a desirable character trait but as the violation of a duty, which gives rise to complaints and blame—then the argument becomes quite similar to mine, albeit in different terminology. I think talking about a duty to not be cruel (or callous or mean, etc.) has greater force, and invites less confusion, since mercy may sound optional in a way that avoiding cruelty is not. But for those who prefer mercy talk, I say go for it. If what I have done is show how best to construct the argument from mercy, then that is progress too.

Still, substantive differences between my argument and the mercy argument remain. Mercy plausibly is individual specific. It is rendered sensible (nonarbitrary) in response to particular actions or feelings by the wrongdoer, such as apology, regret, repentance, or remorse. By contrast, as I have been at pains to argue (see section 2.1), the considerations underlying the legislative duty to not be cruel apply to persons *in general*—particularly the need to make accommodation for natural human imperfection, the practical unavoidability of bad behavior especially over long periods of time, and the legislature's possible contribution to sustaining criminogenic social conditions. Thus, while mercy is based on specific features of the person or her behavior (things that make her merit mercy), the grounds of the duty to not be cruel do not turn on particular facts about people's lives or character. Hence, my argument remains different in substance from mercy-based arguments.

Here is a second worry. Suppose I am right that the duty to not be cruel requires the legislature to find ways to ratchet down some punishments. Where does it end? When have we done enough to satisfy this duty? Are endless relaxations of the criminal law required? No. As we ratchet down punishments more and more because of the duty to not be cruel, at some point the positive

45 Thanks to Erik Encarnacion for the first two and Steve Bero for the third.

grounds for criminalization become decisive. There are multiple normative pressures supporting greater punishment, like prevention and desert. Here I have been concerned with a countervailing pressure pulling punishments downward—the duty to not be cruel. But this normative pressure can only drag punishments down so far before the upward pressures overpower it. Wherever this equilibrium lies is where the legislature’s withholding of punishment to avoid being cruel should cease.

Finally, some worry that mercy conflicts with justice, and an analogous concern might afflict my argument.⁴⁶ The worry for mercy is this. There are reasons, sounding in retributive justice, to criminalize and punish culpable conduct. In failing to punish culpable conduct—even for kind-hearted reasons like mercy—we fail to satisfy the demands of retributive justice. We are not being fair to the people in the jurisdiction whose rights and interests the criminal law seeks to protect. Just as ratcheting down punishments out of mercy might seem unfair to those to be protected by the criminal law, would not the same be true for ratcheting down punishments to avoid being cruel? Thus, one might worry that this approach also conflicts with retributive justice.

In response, I accept that ratcheting down punishments to avoid being cruel does come at the expense of one kind of fairness. It departs a bit from the retributivist ideal of punishing to the extent warranted on culpability grounds. But it does so for reasons that are *internal to fairness*. This is an intra-fairness issue. My argument amounts to sacrificing a bit of fairness (captured in the ideal of retributive justice) due to the concerns of another closely related kind of fairness—what we might call *civic justice* (or a kind of equity), which reflects broader principles of political morality and good governance, and the breach of which also generates complaints and blame.⁴⁷ The view I have been articulating begins with retributive justice but then recognizes that additional fairness reasons pull the appropriate punishment levels down in places. This is a departure from one kind of fairness in order to satisfy another fairness concern—namely, the legislature’s duty to avoid the legitimate complaints it would face from legislating in cruel, callous, or vindictive ways.⁴⁸

46 For discussion of the conflict between mercy and justice, see Duff, who suggests that “mercy involves hindering the achievement of the goals that punishment serves” (“Mercy,” 474). See also Tasioulas, “Mercy.”

47 Cf. Duff, “Mercy,” 481–82. Duff suggests that mercy can sometimes function as “justice-completing equity,” which makes up for generally just criminal law rules that go awry in particular cases because of the rigidity of the rules, even though such rigidity itself may be needed to send a clear message.

48 Something similar may be discernable in excuses. Consider an act that (1) satisfies the offense elements and (2) has no justification. From 1 and 2, we can conclude that the law

4. CONCLUDING REMARKS

In this paper, I have developed a new sort of solution to the legal luck puzzle, which applies in different ways to reckless endangerment and attempts. We have seen how the legislature's duty to not be cruel requires finding meaningful ways to withhold full punishment, and we have seen why doing so when the wrongdoing causes no harm is a particularly good way to strike a balance between the competing normative pressures on the legislature. Withholding full punishment in cases of harmless wrongdoing is an especially good way to minimize the frustration of victims' claims to reaffirmation of rights while complying with the legislature's duty to not be cruel. My argument leaves open that there might be other institutional forms that can satisfy this legislative duty as well, but it at least provides an adequate normative justification for the legislature to ratchet down punishment for some categories of misconduct based on the degree of harm caused. The legislature may opt to deploy this technique for satisfying its duty to avoid cruelty in different ways for different forms of wrongdoing—such as by fully withholding punishment from harmless endangerments but imposing reduced criminal liability on intentional wrongs that luckily prove harmless (i.e., mere attempts). In this way, the legislature has a plausible normative rationale it can use to justify some luck in the criminal law.⁴⁹

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deems the act to be all-things-considered wrong. But suppose that (3) the act is excused—meaning there are reasons of compassion or sympathy that give reason not to punish it fully. Perhaps a young person's father threatens her with severe beatings unless she kills someone. The killing is unjustified but may well be excused, at least partially. It arguably is a culpable wrong, but one where there are good fairness reasons *outside* of retributive justice—reasons of fairness to the wrongdoer stemming from compassion and sympathy for her plight—to punish less than the amount we would be entitled to impose on culpability grounds. This is an individual analog to the “don't be cruel” argument that I am suggesting applies at the societal level. Sacrificing a bit of retributive justice for other fairness reasons is a familiar move in the criminal law.

⁴⁹ Many thanks to Steve Bero, Mihailis Diamantis, Hasan Djinder, James Edwards, Erik Encarnacion, Joe Horton, Ambrose Lee, Liat Levanon, James Manwaring, Andrew Simester, John Tasioulas, Chris Taggart, and audiences at Oxford University, King's College London, and the University of Iowa for extremely helpful feedback on earlier drafts of this paper.

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