

Closing the Gap

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Contemporary debates about "moral luck" were inaugurated by Thomas Nagel's celebrated essay on the topic. Nagel notes that the puzzle about moral luck is formally parallel to the familiar epistemological problem of skepticism. In each case, the problem is generated by the apparent coherence of the thought that inner aspects of our lives are self-contained, and can be both understood and evaluated without any reference to anything external. Epistemological skepticism begins with the thought that my thoughts could be exactly as they are without any contact with the world outside, where "exactly as they are" is glossed in terms of the grounds that connect those thoughts with each other and provide the basis for our confidence in them. In the practical case, the problem of moral or legal luck arises from the thought that the only basis we have for evaluating a person's action is his decision to perform that action.

The Kantian and post-Kantian response to epistemological skepticism is not to try to defeat the skeptic on his or her own grounds, but rather to show that there is something wrong in the way the problem is set up. Our ordinary ways of thinking about ordinary things, and other persons, are only in trouble if they rest on an unwarranted inference from something that is more secure.

I will engage with legal luck in a parallel way: our ordinary ways of thinking about responsibility are only in trouble if they rest on an unwarranted inference from something more secure. I argue that the

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concept of a completed wrong is basic to law, and that aspects of human interaction on which luck-skeptics focus — blameworthiness and harm — are derivative. I frame the issue not in terms of moral significance, but rather in terms of the authorization of the state to use force, either to order the payment of damages in tort or to imprison criminals. In the first part of the Article I consider the case of tort liability for negligence, explaining the structure of a completed wrong and the correspondingly derivative significance of carelessness as such. In the second part I turn to the issue of criminal punishment. I offer a brief explanation of the state's authority to punish, before going on to show that the basic case that engages this authority is the completed crime. I then show why the failed attempt also attracts punishment, even though it is a derivative case.

INTRODUCTION

Contemporary debates about the role of "moral luck" in the law were inaugurated by Thomas Nagel's celebrated essay on the topic.¹ Nagel notes that the puzzle about moral luck is formally parallel to the familiar epistemological problem of skepticism. In each case, the problem is generated by the apparent coherence of the thought that inner aspects of our lives are self-contained, and can be both understood and evaluated without any reference to anything external. Epistemological skepticism begins with the thought that my thoughts could be exactly as they are without any contact with the world outside, where "exactly as they are" is glossed in terms of the grounds that connect those thoughts with each other and provide the basis for our confidence in them. At best these inner assessments bear an entirely contingent relation to how things really are. If the argument succeeds, the contingency of the connection undermines any grounds we could have for judgments about events outside the mind. In the practical case, the problem of moral luck arises from the thought that the only basis for evaluating a person's action is his choice to perform that action. These choices could be exactly the same and bring about entirely different outcomes, where "exactly the same" is glossed in terms of the grounds for assessing their moral quality. This inner

¹ Bernard Williams's essay of the same title inaugurated other aspects of the debate; Nagel's fuelled the specifically legal debates about liability for consequences. Williams's essay's main contribution to *that* debate was the unfortunate adoption of the label "Kantian" to describe the view that luck should not matter.

basis for assessment bears at best an entirely contingent relation to the effects of the action.² If this argument succeeds, it undermines our basis for holding people accountable for the consequences of their actions.³

2 The focus on inner aspects of moral life is sometimes glossed as Kantian or deontological, but the similarity is a product of a significant misreading of Kant, according to which he believes that moral assessment depends only on things an agent can control. This way of reading Kant goes back at least to Hegel's discussion in GEORG WILHELM FRIEDRICH HEGEL, *PHENOMENOLOGY OF SPIRIT* 77-78 (A.V. Miller Trans., Clarendon Press 1977) (1807) but seems to have found its way into the moral luck literature through Bernard Williams's contention that Kant sought to insulate morality from luck by focusing on inner aspects of choice. See Bernard Williams, *Moral Luck*, 50 *PROC. ARISTOTELIAN SOC'Y (SUPP.)* 115 (1976), reprinted in BERNARD WILLIAMS, *MORAL LUCK* 20 (1981). Kant's own view is more complex. In the *Groundwork of the Metaphysics of Morals*, he argues that the moral worth of a deed depends on the maxim on which an agent acts, that is the taking up of means to achieve a certain end. IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, in *PRACTICAL PHILOSOPHY* 37, 55-56 (Mary Gregor trans., 1996). This raises substantial difficulties for the attribution of luck worries to Kant. First, Kant explicitly denies that the moral worth of an action fixes imputation, and so governs the accountability for consequences. Indeed, Kant's explicit discussion of imputation in the *Metaphysics of Morals* contends that a wrongdoer is responsible for the bad consequences, even unforeseeable ones, of his act. KANT, *supra*. Second, it is not at all clear that *any* blame, punishment or tort liability involves evaluations of moral worth in this sense. In the *Groundwork*, Kant says that the acts of a shopkeeper who is honest only out of sympathy or concern for his reputation have no moral worth. *PRACTICAL PHILOSOPHY*, *supra*, at 382, 612. Saddling Kant with the view that accountability tracks moral worth in the *Groundwork* sense leads to surprising conclusions, even more extreme than those found in the moral luck literature. The requirement that like cases be treated alike would lead to the conclusion that a sympathetic or strategic shopkeeper should be treated in the same way as a dishonest one. The parallel point can be made about the person who refrains from crime only out of fear of punishment. If punishment is supposed to track moral worth, and his act lacks it, why not treat him like the successful and unsuccessful criminal? Kant faces none of these difficulties, because he recognizes that the maxim on which a person acts is not, as such, inconsistent with the freedom of others. Only the outer aspects of conduct could justify the use of coercion, because one person's actions are potentially inconsistent with the freedom of others.

3 A helpful discussion of the parallels can be found in Daniel Statman, *Moral and Epistemic Luck*, 4 *RATIO* 146 (1991).

The two sets of puzzles might be thought to differ in that the epistemological version of the problem focuses on the first-person case, while the practical version is typically focused on the third-person case of blame, or punishment. This contrast reveals itself in the fact that one of the standard versions of epistemological skepticism is skepticism about other minds, seemingly depriving the practical version of the problem of its starting point in the thoughts of others. Despite these differences, however, the parallels are worth investigating, because both puzzles

The Kantian and post-Kantian response to epistemological skepticism is not to try to defeat the skeptic on his or her own grounds, but rather to show that there is something wrong with the way the problem has been set up. Our ordinary ways of thinking about ordinary things, and other persons, are only in trouble if they rest on an unwarranted inference from something that is more secure.

I will engage with legal luck in a parallel way. I will argue that the concept of a completed wrong is basic, and that aspects of human interaction on which luck-skeptics focus — blameworthiness and harm — are derivative. My focus is on legal rather than moral luck. I will frame the issue not in terms of the moral significance of wrongdoing, blame, and harm, but in terms of the authorization of the state to use force, either to order the payment of damages in tort or to imprison criminals. In the first part of the Article I will develop the parallel between the luck puzzles and epistemological skepticism, showing their common roots. In the second part I will consider the case of tort liability for negligence, explaining the structure of a completed wrong, and the correspondingly derivative significance of carelessness as such. In the third part of the Article I will turn to the issue of criminal punishment. I will offer a brief explanation of how it might be possible to conceive of the state's authority to punish as something other than a tool for achieving a result that can be articulated apart from the law. I will show that the basic case that engages this authority is the completed crime. I will then show why the failed attempt also attracts punishment, even though it is a derivative case.

I will have very little to say about the problem of moral luck, as it arises outside the legal context. The assumption that the problems and their potential solutions must be parallel is an artifact of the underlying assumption that legal liability, in the form of either tort damages or punishment, is simply a tool for achieving some extrinsic result. If liability is a tool, it makes perfectly good sense to ask just what it is for and what its proper functioning is, and to suppose that external moral considerations will determine or at least constrain these questions. If liability is not a tool, but merely the expression of the underlying standards of conduct, the only questions concern the moral basis of those standards.

grow out of underlying assumptions about the relation between thought and choice and the world. The theoretical version assumes that thought aspires to represent a world that transcends it entirely, and that it is successful when it represents that world as it is. The practical version assumes that blame and punishment are tools for achieving a morally desirable outcome that can be articulated without reference to the norms of ordinary legal thought.

I also avoid the question of moral luck because nothing I say here fixes the question whether other modes of moral evaluation, such as blame, criticism, attribution of bad character, and self-reproach, are themselves merely an expression of the underlying moral norms whose violation invites them, or whether they have some other place in moral thought instead. Nor will I develop an account of the structure of moral norms — do they refer to actions, to choices, or to wrongs against other persons? My suspicion is that morality contains all of these forms of misconduct, but it would be a mistake to assimilate all aspects of morality to any one of them. Thus a parallel to the response that I have developed here may be available for some aspects of morality but not others. Perhaps a parallel governs the need to apologize, but some occasions for self-reproach do not depend on what actually happens. There is no reason to suppose that all modes of moral assessment depend on luck in the same way or, conversely, that they depend on control in the same way.

I. SKEPTICISM AND GAPS

Skeptical arguments typically begin with a contrast. The case of successful perception differs from misperception, but is also similar. The thing that seeing a tower and thinking that I see a tower have in common is that, in both cases, I think I see a tower. What separates them is something radically external to my thought, namely whether or not there actually is a tower. The externality of the object of thought is the basis of the skeptic's worry.

Concerns about legal luck have a similar structure: a successful crime differs from a failed attempt, but it is also similar. In both cases, the criminal tries to commit the crime. Whether he succeeds or not, however, is governed by something radically external to his deed, in the standard example, whether the carefully fired bullet hits the victim. The externality of the causal chain linking the deed with its object opens up the gap, which is the basis of the skeptic's worry.

The parallel between these cases leads Nagel to think of both of them as natural.⁴ Perhaps they are natural, in something like the sense that Kant

4 Nagel defends his conception of the naturalness of some problems in the following terms:

I believe one should trust problems over solutions, intuition over arguments
If arguments or systematic theoretical considerations lead to results that seem intuitively not to make sense . . . then something is wrong with the argument and more work needs to be done. Often the problem has to be reformulated, because

identifies dialectical illusions as natural results of the exercise of human reason — regressing backwards through a series of conditions, it is natural to suppose one has found an "unconditioned" foundation for all of them, either in thought or choice. I want to suggest, however, that the parallel should give rise to suspicions about both cases. The skeptic is notoriously difficult to answer in the epistemological case, but the reason for the difficulty is not that he has raised a serious worry. Instead, it is that the skeptical position rests on presuppositions that we have no reason to accept. The skeptic is not to be refuted on his own terms, so much as to be shown that the starting point for his argument is neither natural nor inevitable. It is, instead, the result of philosophical preconceptions. Those who have sought to develop post-skeptical philosophical accounts of cognition — especially Kantian and post-Kantian idealists and their Sellarsian heirs — have not tried to answer the skeptic on his own terms, or to show that his presuppositions are impossible. Instead, they have satisfied themselves with rejecting the starting point that the skeptic finds so obvious and showing that its presuppositions are not required.⁵

My aim will be to disarm the legal luck skeptic in a similar way. The worries that the luck skeptic raises are a consequence of a certain way of setting up a series of questions about the relevance of voluntary action to questions of legal and political justification. I do not think that I can show that it is impossible to consistently set things up in this way. Instead, I will content myself with showing that the apparent naturalness of the starting point is a misleading cover for what is ultimately an artificial and baroque construction. There is a more straightforward and plausible way of thinking about the questions that give rise to the luck-skeptic's way of framing things, and, if we think in this more familiar way, the skeptic's worries simply do not arise. We do not need to show that the successful assassin is more

an adequate answer to the original formulation fails to make the *sense* of the problem disappear.

THOMAS NAGEL, *MORTAL QUESTIONS*, at x-xi (1979).

In the cases of both skepticism and moral luck, however, the intuition that veridical perception is possible, or completed wrongs more serious, is at least as firmly rooted as the intuition that it is unfair to hold a person accountable for something he or she could not control. Nagelian confidence about intuitions and problems does nothing to fund the priority often assigned to the latter intuition.

- 5 On the post-Kantian Idealists, see PAUL FRANKS, *ALL OR NOTHING* (2006) and DIETER HENRICH, *BETWEEN KANT AND HEGEL* (2003); on the Sellarsian appropriation of Kant, see WILFRID SELLARS, *EMPIRICISM AND THE PHILOSOPHY OF MIND* (1996); John McDowell, *Having the World In View: Kant, Sellars and Intentionality*, 95 *J. PHIL.* 431 (1998); JOHN MCDOWELL: *REASON AND NATURE* (Marcus Willaschek ed., 1999).

wicked than the unsuccessful one,⁶ or more wholehearted, or that a penal lottery treats like cases alike after all,⁷ because the aim of punishment is not to give effect to judgments about wickedness. In the same way, we do not need to show that the careless driver who injures another person is in any respect a worse person than the equally careless one who does not. The aim of tort liability is not to give effect to judgments of relative culpability, so its failure to do so does not give rise to any puzzles.

Both forms of skepticism take their motivation from the certain conception of the "inner" as the basic unit of justification and evaluation. In the epistemological case, talk about how things appear to a person can be presented as more basic than talk about how things are. Claims about how things are are always open to challenge, but, if the person challenged responds by saying "perhaps it is not actually this way, but this is how it appears to me," the challenge dissipates, and the conversation comes to an end. Claims about how things appear are not subject to challenge. From this it is easy to conclude that appearances are the basic case, and claims about underlying reality are derivative and therefore problematic. A parallel point applies to trying: I cannot guarantee that I will keep my appointment, but, it seems, I can guarantee that I will try to do so. If challenged, I am more likely to be bewildered than defensive: it makes no sense to ask if I will try to try, any more than it makes sense to ask whether things appear to appear a certain way. That is, talk about appearances and attempts cannot be imbedded. Making an honest report of how things seem, or doing your best — or, in the case of wrongdoing, your worst — is doing the best you can do. Recent writers, starting with Wilfrid Sellars, have pointed out the confusions running through this line of argument.⁸ The reason that you cannot get behind talk about appearances or attempts is not that they are basic, but rather that they are denuded — that the commitment made in "I will be

6 Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 CAL. L. REV. 791 (2000).

7 David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53 (1989).

8 SELLARS, *supra* note 5. Sellars makes this point in the context of a broader argument against what he calls "the myth of the given" according to which passive states such as sensation can serve to justify knowledge claims without themselves requiring any justification. The analogue in practical philosophy of the target of Sellars's larger argument is the view that desires, preferences or other passive states can provide reasons for action. I explore this issue in Arthur Ripstein, *Preference*, in PRACTICAL RATIONALITY AND PREFERENCE: ESSAYS FOR DAVID GAUTHIER 37 (Christopher W. Morris & Arthur Ripstein eds., 2001). The main focus of the current argument is on a very different idea, according to which only active states such as choices are subject to evaluation. That traditional empiricism should make activity and passivity

there at 10" or "it is red" has been withdrawn. Trying is not a special inner kind of action; having things seem a certain way is not a special kind of judgment. Each is that withdrawal from a more basic case. As a result, the naturalness that Nagel finds in both forms of skepticism is perhaps the product of a set of philosophical preconceptions or confusions.

I am aware, of course, that those who write about the element of chance in the law are typically not motivated by this form of regress-stopping argument, but instead by what they take to be first-order moral concerns about treating like cases alike. I mention the conceptual confusions for two reasons. First, they do offer an explanation of the seeming naturalness and obviousness of the puzzles. In so doing, they also underscore the fact that if the principle of treating like cases alike engages moral concerns, the dimensions of likeness must themselves be morally significant. Second, both sets of puzzles start with the idea of a basic case and a contrasting derivative one; both see the inner as basic. The difficulties with the regress-stopping arguments suggest, however, that the basic case is not inner in either sense; instead, the basic case of perception is successful perception, and the basic case of action is a completed action. As I shall explain below, the seemingly distinct grounds for generating the luck-puzzles draw on what is, finally, the same general philosophical picture. Epistemological skepticism gets its apparent teeth from the idea that thought is a tool for representing the world entirely apart from it, but owes nothing to that world, except incidentally. The legal puzzles about luck get their apparent teeth from the related idea that tort liability and punishment are sanctions, that is, tools for achieving moral ends that could be achieved entirely without them. Both tort (especially negligence) and criminal law are fertile ground for these worries, because both focus on unwelcome conduct — carelessness or intentional wrongdoing.⁹ In a world in which everyone behaved well, neither

central in inconsistent ways is both one of its hallmarks and one of the sources of its incoherence.

9 There is virtually no literature on moral luck in contract law, perhaps because it is often understood as a realm in which people self-consciously decide which risks to take. If you make a deal, and it is difficult for you to perform, at least (it might be thought) you went into it with your eyes open, and so you took the risk that came back to trouble you. That is it is an instance of what Ronald Dworkin referred to as "option luck." See RONALD DWORKIN, *SOVEREIGN VIRTUE* (2001). In a world of uncertainty, people take risks; sometimes they work out, and sometimes they do not. The determination of which risks a contracting party has taken is objective, as it is in tort. A coherent development of the parallels between the two would force the luck skeptic to conclude that contract law should be abolished, since it enables people to open themselves up to factors they cannot control, something that

tort liability nor punishment would be needed. From this thought it is easy, if not quite inevitable, to conclude that they must be understood as tools for achieving some sort of good in a "non-ideal" world.

The idea that thought, or law, is a tool runs deep in a certain kind of philosophical sensibility, but in either case it generates implausible consequences and groundless puzzles.¹⁰

The key to the Kantian and post-Kantian rejection of the idea that thought is a tool is to provide an alternative account of how objects are individuated, such that they can, on the one hand, be properly independent of thought in such a way that particular thoughts can properly be said to be about them — and in any particular case, mistaken about them — and, on the other hand, be dependent on the general structure of thought.

The key to the Kantian rejection of the idea that law is a tool is to understand law as the systematic realization of equal freedom, guaranteed by reciprocal (and coercive) limits. Instead of asking, "what moral constraints limit the use of law in achieving socially useful purposes?" the Kantian account recognizes legal restraints as themselves already moral, in the form of the conditions on each person's freedom required to create space for others to enjoy the same freedom. Private law protects the means that each person happens to have against use or damage by others, while public law sustains conditions of equal freedom in a variety of ways: by providing public goods, by underwriting the social conditions in which all can participate fully in social life, and by articulating and enforcing a criminal law that prohibits private persons from exempting themselves from the basic requirements of social life. To say that law does these things is not to say that every (or indeed any) legal system does them perfectly. It is only to say that the basic case for understanding the justification of the use of force by the state is the case in which force is the guarantee of systematic equal freedom, because that is the condition under which the use of force is consistent with

the luck-skeptic must regard as objectionable even when self-imposed, because the luck-skeptic supposes that the state of affairs in which a person's life depends on factors he or she cannot control its itself morally objectionable. The luck-skeptic's objection, then, is not to luck, but also to choice under uncertainty. The only example I know of a luck-skeptic carrying his position through to this inevitable conclusion is David Enoch, *Luck Between Morality, Law, and Justice*, 9 THEORETICAL INQUIRIES L. 23 (2008). In this context, the moral luck argument leads to a much more radical revision of ordinary ways of thinking than does luck egalitarianism, which has itself been widely criticized for its counterintuitive implications.

¹⁰ Like a number of other papers I have written recently, this one might have been called "Functionalist Nonsense and the Transcendental Approach," because the luck-puzzles are all artifacts of the view that law is a tool.

freedom; any other use is arbitrary from the point of view of those it is used against.¹¹ Legal responses to wrongdoing — damages or punishment, each in its own way — uphold these limits. The limits themselves provide a way of individuating and classifying the actions the law claims to regulate. The world of human action is independent of its legal regulation; at the same time the law only has a legitimate interest in actions characterized in the right way, as actions potentially infringing on the legitimate freedoms of others. The law is not focused on the thoughts behind an action, or on the effects following from it, but rather, on its specifically legal characteristics. In private law, an act is characterized in relation to the rights of others; in the criminal law, on the basis of its relation to legal prohibitions. These provide the apparatus of individuation to explain the fundamental difference between completed torts and careless actions, or completed crimes and failed attempts.

A sub-theme running through my argument is that the puzzles about luck are, perversely, the result of an unreflective acceptance of a broadly utilitarian or consequentialist understanding of legal institutions. Deterrence-focused accounts of both tort liability and punishment are often set out in avowedly utilitarian terms, and they raise puzzles about luck in a certain way, since only decisions can be deterred, not their consequences. Yet luck does not seem to be an issue for them, perhaps because the worry about luck is that the failure to treat like cases alike presents itself as an issue of fairness, which is usually taken to be an alternative to deterrence-based accounts.

It might be thought that what are often put forward as the only alternative to deterrence-based accounts of legal sanctions, desert-based accounts, give rise to puzzles about luck in a particularly forceful way, precisely because they do not focus on consequences at all. Such accounts are often non-instrumentalist in their conception of the basic standards of conduct articulated by the law. Their treatment of the responses to legal wrongdoing, however, remains in the grip of instrumentalism. As I shall show, they are like utilitarian theories in understanding damages and punishment as a tool, and in their non-legal way of individuating and thus of classifying actions. They, too, regard legal enforcement as a tool for achieving moral purposes, and legal wrongdoing as an opportunity for achieving that purpose, even though, in principle, the purpose of adjusting burdens to bad conduct or character might equally well

11 In focusing on the basic case, I am thus adopting the more general strategy of this Article of treating the successful or complete version of something as basic, and any unsuccessful or incomplete versions as derivative. Although adopting this strategy at a general level may help at the more specific one, the general case makes the strategy much more plausible: the basic case for thinking about whether the use of force is justified must be the case in which it is justified.

be achieved in some other way. In the case of punishment, the rationale that the wicked deserve to suffer operates independently of legal institutions, and legal institutions are merely a way of achieving it or, perhaps, of civilizing it. The contention in the puzzles about negligence liability that equally careless people should bear equivalent burdens has less intuitive resonance, but it, too, is an idea of some extra-legal moral ideal that the legal system should try to implement, or at least accept as a constraint on its pursuit of other aims. Talk about moral aims, or constraints on the pursuit of aims,¹² presupposes the instrumentalist conception of damages or punishment: their moral basis (or, if control or something like it is introduced as a constraint, the permissible occasions of their use) depends on their realization of a result that could be achieved in their absence.

The alternative is to understand both damages and punishment not as something new that gets done in response to a violation of the law, but, rather, simply as the prohibition itself. The enforcement of the prohibitions in question is only as legitimate as the prohibition itself, but the legitimacy of the prohibition — the state's standing to use force against a private person — reflects its place in a system of equal freedom in which the only rationale for limiting one person's freedom is to protect the freedom

12 Analytically, moral constraints can be distinguished from goals, which might appear to entail that a requirement of moral constraints on the use of sanctions differs from the instrumentalist idea that sanctions serve independent goals. In the particular case, however, the difference comes to nothing. Constraints differ from goals inasmuch as they limit the means available for achieving some goal. The "constraint" that the imposition of burdens exclusively track things within the control of the person being burdened does not set limits on the way in which some *other* activity be carried out. The luck skeptic does not need to say that it is objectionable that someone's condition depend upon luck, but must at least contend that it is objectionable if institutions make that person's condition depend upon luck. The skeptic can make this one consideration among many. This position can be *stated* as a constraint of the general form "whatever social aims the law pursues must be pursued in ways that do not give effect to luck." That looks like a constraint, because it talks about limits on the ways in which you can do something else. Unlike more familiar constraints, which limit the means available to agents or institutions by characterizing those means apart from their effects, this is a constraint that rules out certain ways of doing things *based on their expected effects*. That is just to say that it is a goal; it is a constraint only in the sense in which "do not spend too much money" is a constraint on any particular shopping trip — that is, a paraphrase of the idea that, in addition to your goal of purchasing the things on your grocery list, you should have also pursue the goal of bringing back some change. In this case, the proposed constraint has the exact same structure, that is, "do not give effect to luck" is one of the effects you are supposed to take into account as you try to do whatever else.

of others. Negligence liability and criminal punishment do not exhaust the requirements of a system of equal freedom, but they are both aspects of one.

The idea that law is a tool is sometimes thought to provide the only possible critical perspective on existing legal systems, by allowing us to ask how well they are achieving or approximating external goals. The idea that the basic case for understanding law is the successful case in which it realizes equal freedom provides a more powerful critical perspective, because it provides grounds for criticizing those uses of state power that cannot be understood as parts of a condition of equal freedom. These criticisms differ from the instrumentalist both in their content — there is no objection to moral luck, for example — and in their form: for the instrumentalist, uses of power can only be objected to if they are ineffective; for the non-instrumentalist, uses of power are arbitrary if they are not consistent with a system of equal freedom.¹³

I will begin with the case of negligence, because the contrast between basic and derivative cases is sharpest there and so enables a clearer presentation of the analytical structure of my argument. Tort liability and criminal liability differ in important ways. Most notably, for present purposes, mere carelessness which does not injure another person gives rise to no tort liability, whereas criminal attempts are punishable. I will explain these differences but, before doing so, I will turn to the tort case.

II. NEGLIGENCE LIABILITY

Recent scholarship has treated tort law as a doctrine in search of a rationale. Candidates have been plentiful — deterrence, compensation, guaranteeing that people bear the costs of their choices, promoting distributive justice, institutionalizing private revenge, or expressing judgments about "outcome responsibility." All of these proposals share a premise, no less dubious for being so common, according to which tort liability is a tool for achieving some purpose that is extrinsic to tort doctrine. Unsurprisingly, these various instrumentalist proposals all give rise to what George Fletcher, many years

¹³ This difference spares the non-instrumentalist the embarrassment of needing convenient factual stipulations about such things as the long-term effects of interfering with freedom. Mill famously claimed that following his "harm principle" would best promote the "permanent interests of man as a progressive being," but offered no factual support for this claim, or for his claim that a principled exception for consent could be carved out. I criticize Mill on this and other grounds in Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215 (2006).

ago, described as "diminished expectations."¹⁴ Tort does not seem to be especially well-suited to achieving any of these things, so it is often presented as part of the "theory of the second-best," an account of what we can hope realistically to achieve with the peculiar historical artifact of a trial in which a particular plaintiff comes before a court complaining about the conduct of the defendant who has injured her.

Instrumentalist theory inevitably gives rise to puzzles about the role of luck in tort liability. If liability is a tool for achieving some goal, it is natural to ask which aspects of the tort regime are actually essential to achieving it. There may be political or institutional reasons to doubt the prospects for change, but whatever exactly tort liability is supposed to achieve, the actual results of negligent conduct seem to have nothing to do with achieving it.¹⁵

14 George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

15 Two recently proposed "functions" of tort liability provide exceptions that are in certain ways illuminating. The idea that the purpose of tort liability is to give satisfaction to angry plaintiffs does not generate the puzzle, at least as it has been developed by Benjamin Zipursky, both in his own work and in work co-authored with John Goldberg. See John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 402-03 (2005); see also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998). For Zipursky and Goldberg, civil recourse is conditional on the analytically independent claim that tort law incorporates standards of conduct which one person owes to another. As a result, they focus only on the anger that plaintiffs experience in response to what are, in fact, wrongs against them. By predicating liability on a defendant's having completed a wrong against the plaintiff in breach of the duty prohibiting a particular type of injury, Zipursky is able to avoid the puzzle about moral luck. However, all of the work in his account is done by the notion of relational duties, none of it by the idea of giving satisfaction to angry plaintiffs. It may be that sophisticated plaintiffs would be just as angry with those who (they knew) were careless with their safety as with those who actually injured them. Actual plaintiffs, however, seem to be angry in proportion to their actual losses, and so, perhaps, focusing on what actually happened makes sense in the context of that aim.

Second, several writers have sought to develop Tony Honoré's idea of "outcome responsibility" into an account of tort liability. As John Gardner has developed it, a person is only outcome-responsible if he had a reason not to perform the act in question, while acts, and in turn the reasons supporting or prohibiting them, are individuated in terms of completed acts — you have a reason not to injure me, as opposed to having a reason not to act carelessly. See John Gardner, *Obligations and Outcomes and the Law of Torts*, in RELATING TO RESPONSIBILITY: ESSAYS IN HONOUR OF TONY HONORÉ ON HIS 80TH BIRTHDAY 111 (John Gardner & Peter Cane eds., 2001). As such, the relational nature of the reasons closes the gap. A different approach, developed by Stephen Perry, emphasizes the idea that a person can be outcome-responsible for something over which she had some measure of control,

If the point of liability is to deter dangerous conduct, then the dangerousness of the conduct rather than its results in a particular case should be the object of liability. If the aim is to compensate, then the resources for compensation need not come from the people who actually cause the injury, but should, instead, come from those who are in a better position to bear the cost or spread it, or from the class of risk imposers, or from those who benefit from the type of activity that produced it.¹⁶ Keeping track of everyone who is careless might be an administrative nightmare, rendering this sort of skepticism as practically impotent as epistemological skepticism. Still, the worry about luck is supposed to be a worry, not necessarily a recipe for policymakers. As Larry Alexander makes the point, if two people are equally blameworthy, either both should be held liable, or neither. To single out one is to fail to treat like cases alike.¹⁷

Suppose, however, that we were to explain tort liability in a non-instrumentalist way, such as that pioneered by my colleague Ernest Weinrib, and developed by various others, including much of my own recent writing about torts. For the non-instrumentalist, tort liability is not a tool for achieving some further result. The point is not that it is useless, or that it is some version of liability for liability's sake, modeled (perhaps) on some conception of art for art's sake. Instead, tort liability is simply the protection of the underlying rights that private persons have against each other. These rights are relational. There may be some truth to Donald Davidson's famous quip that "We never do more than move our bodies: the rest is up to nature,"¹⁸ but the law (and much of morality) starts with the thought that moving our bodies is not all that people ever do *to each other*.¹⁹ Suppose I take some piece of your property by mistake. I must return it to you, or, if I have consumed it, I must give you its replacement cost. The reason that I have to do so is not that I am culpable (for I may not be), or that making me pay is an effective way of reducing the incidence of such mistakes in the future. Instead, I have to return or replace your property because it is yours; my obligation to return

and treats ideas of control as antecedent to ideas about obligation. See Stephen Perry, *Responsibility for Outcomes, Risks, and the Law of Torts*, in *PHILOSOPHY AND TORT LAW* 72 (Gerald Postema ed., 2002). As such, Perry's development of Honoré's idea potentially leaves the gap open.

16 Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 *UCLA L. REV.* 143, 159 (1990).

17 Larry Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 *LAW & PHIL.* 1 (1987); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387 (David G. Owen ed., 1995).

18 DONALD DAVIDSON, *Agency*, in *ESSAYS ON ACTIONS AND EVENTS* 59 (1980).

19 See STEPHEN DARWALL, *THE SECOND PERSON STANDPOINT* (2006).

it is an expression of your right to it. If I violate that right, the right does not disappear; it takes the form of your right to compel me to return your property.

The example of conversion might be thought to be unrepresentative: if I convert your property, I now have it, and so compelling me to return it gives you back what was yours by forcing me to surrender what is not mine. This second component is missing in cases of negligent injury. The difference is real, but irrelevant: If I convert your property, and then lose or destroy it, I am still liable. This liability is not predicated on some imagined gain that I have reaped by having had your property. I may or may not have received or realized such a gain. Instead, liability rests on your claim to your property: I deprived you of it. You could, in principle, sue in "waiver of tort" and demand that I disgorge the gains reaped through conversion; if these exceed your losses (or the limitation works differently, and you have missed your chance in conversion), you might be prudent to do so. Your claim to get back what you already had, however, rests on your antecedent right to the thing, not on the wrongfulness of my having it.

The basic idea is this: tort law protects each person in his or her right to have the means that he or she may happen to have. Private law enables a plurality of separate persons to set and pursue their own purposes, consistent with the entitlement of others to do the same. You can only make something your purpose if you have means that enable you to pursue it; without means, all you can do is wish. Private law does not guarantee anyone success in his or her pursuits, or even means adequate enough for an acceptable range of pursuits. Public law must see to these things.²⁰ Instead, private law focuses simply on each person's security in whatever means he or she has — most notably bodily powers and property — to set and pursue such purposes as he or she sees fit, consistent with the entitlement of others to do the same. I will not attempt to articulate this picture in much, let alone all, of its detail.²¹ Instead, I will simply focus on its implications for negligence liability.

20 I explain how the rights and duties in private law can be integrated with those in public law in a series of recent papers: Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004); Arthur Ripstein, *Private Order and Public Justice*, 92 *VA. L. REV.* (2006); and Arthur Ripstein, *Tort Law in a Liberal State*, 1 *J. TORT L.* (forthcoming 2007) [hereinafter Ripstein, *Liberal State*].

21 I do so in a number of other recent papers. I should, however, draw attention to one feature of this account, namely its formality. The ability of separate persons to each use their own means can only be reconciled if their rights are formal in two respects: first, they do not depend on the particular uses to which the means are put, and second, rights protect the means themselves. I cannot have a right that you use

You have an entitlement, as against other private persons, to the security of your person and property. This entitlement imposes a correlative duty on others to avoid injuring your person or property. This duty is subject to a qualification — not all injuries are wrongful, but only those that are a result of conduct that is dangerous, that is, above the threshold of risks that people inevitably impose on each other in what Lord Reid describes as the "crowded conditions of modern life."²² The fault requirement for liability is thus not an expression of moral condemnation of deficient conduct, but the implication of the general entitlement of each person to use his or her means in a way consistent with the entitlement of others to use theirs. Those who impose greater risks on you only interfere with your entitlement to what is yours if they actually injure you, because it is only by injuring that one person's use of his or her means is inconsistent with the ability of another to use theirs. Carelessness without injury fails to engage your right, because a system of equal freedom protects your right to continue to have what is yours, and imposes no restriction on the conduct of others apart from your interest in equal freedom. Injury without carelessness also fails to engage your right, because the mere occurrence of injury is not, as such, inconsistent with equal freedom. The standard of care is objective, because it permits each person to impose the same degree of risk on others as others impose on them. Many cases of negligence reflect badly on the defendant. The surgeon who leaves an instrument inside a patient, the manufacturer that does not test its products before marketing them, or the distributor who changes the expiration dates on baby food all behave terribly, but the basis for liability is the dangerousness of their conduct, not its defective moral character.²³ When people expose others to risks without injuring them, those who are exposed have something to

your means in the way that best suits my purposes — for example, that you refrain from building in a way that will cast a shadow on *my* land — because my right is to control what goes on on my land, not a right to control what goes on on yours. Since I could only have a path for sunlight by controlling the use of your land, such a right cannot be part of the set of rights that landowners have. For parallel reasons, I could not have a right to be free of risk imposition, as such, but only a right to be free of dangerous injury.

²² Bolton v. Stone, [1951] A.C. 850, 867 (H.L.) (appeal taken from Eng.).

²³ Confusion on this point may be the source of the luck puzzles about negligence — if tort liability is thought of as a sort of penalty for bad moral character, the fact of injury does seem irrelevant. Yet it fails to fit the objective standard of care that is a standard feature of the tort of negligence. Negligence need not be within an agent's control. There is no reason to suppose that two comparably negligent defendants are equally in control of their conduct, and so alike from the standpoint of some standard of subjective blameworthiness.

complain about, but it is not a violation of their right to what they had, because they have not been deprived of that.

Law always regulates the means that it is permissible for persons to use. Private law regulates each person's entitlement to use his or her own powers as he or she sees fit, consistent with the entitlement of others to do the same. Each person's entitlement to his or her own means generates a complete prohibition on one private person's using the person or property of another without that person's consent. More directly relevant to current concerns, it generates limits on the ways in which each person may use his or her own means: each person is required to forbear from using means in ways that damage the means of others. Thus, injury to person and property are wrongful. Such wrongfulness is always qualified, however, by the requirement that the injury in question be the result of a failure to take ordinary care, that is, that it be the realization of a risk above those that are unavoidable in the "crowded conditions of modern life." These "background" risks, as Lord Reid describes them, occasionally lead to injury, but such injury is not wrongful, because it is simply the inevitable concomitant of the exercise of freedom.²⁴

On this analysis, the basic case of wrongdoing is wrongful injury. The requirement that adequate care be taken is, in turn, a requirement that the injury result from inappropriate risk imposition. The risk imposition, as such, however, is irrelevant. By imposing a risk on you, I endanger what is yours, but I do not deprive you of it. You are still as free as ever to use what is yours to set and pursue your own purposes. By contrast, if I damage the means that are subject to your choice, I commit a wrong against you.

In cases in which one person wrongfully injures another, the remedy to which the aggrieved party is entitled is just the underlying right in a new form. Wrongdoing cannot change a person's rights. As such, her entitlement to her means survives; she is still entitled to them, and thus entitled to them back or, failing that, their equivalent back. The measure of the damages is the measure of the plaintiff's loss of means, and money, understood as a universal means, is the medium through which this measurement is made.²⁵ The plaintiff receives means equivalent to those that she lost through the injury. In one sense it is too late; as a matter of fact, she has lost them; in another it is not, because her factual loss is not a normative loss — she has not lost her entitlement to them.

²⁴ I explain this point in more detail in Ripstein, *Liberal State*, *supra* note 20.

²⁵ IMMANUEL KANT, *The Doctrine of Right*, in PRACTICAL PHILOSOPHY, *supra* note 2, at 435.

To say that the plaintiff's right to what is hers survives wrongs against it is not to say that it would be a good thing if she had them back, or that the wrongdoer ought to return them to her, but rather that the act that violated her right must be without legal effect. Thus, because her rights are to objects in space and time, rather than to some imaginary ideal circumstances, her primary right survives in the form of a remedial right to receive equivalent means, so that she has means equivalent to those she was entitled to all along. A wrong — a violation of a right — does not change the right. The plaintiff thus has a right to demand repair. She may decline to exercise that right, but the right exists precisely because she is still entitled to her means.

This remedial structure may sound puzzling, but in fact it is completely familiar in other contexts. If I owe you \$100, I do not owe you repeated attempts to pay it. Thus if I attempt to pay you but fail — I get robbed along the way, or the road is closed due to heavy snow — I still owe you the money. If I was supposed to pay you on Tuesday, and Tuesday passes and I have not paid you, your entitlement to have me pay does not go away. Nor do you receive a new right, designed to provide me with an incentive to make more careful plans for future payments. Instead, it survives in the form of a (now remedial) right to have me pay. If I was supposed to meet you at an appointed time, and have failed to do so, my obligation to show up a minute later is not some independent obligation, with a separate moral basis — a way of appeasing your anger, deterring me from future lateness, or a way of "making it up" to you. It is just the survival of my obligation to be there at the appointed time. The tort of conversion has the same structure. If I convert your property, I must return it, or pay to replace it. I must do so because your right to that property is not dissolved by my conversion of it, and so it survives in your right to replevin or damages. No further good accomplished by the remedy is relevant to your right to repair. In the same way, if I owe you a duty not to injure you through my carelessness and, in breach of that duty, I carelessly injure you, you are entitled to a remedy because you were entitled to be free of the injury to begin with.

The remedy is a derivative case, but it is structured by the right and duty that preceded it. The remedial duty is secondary; the defendant is not under a disjunctive duty to either avoid injuring the plaintiff, or else pay damages. Again, the example of conversion makes this clear: if I take your coat, I must return it. My duty to return the coat is derivative because it is structured by my duty not to take it; it is not that I have an option of refraining from taking it or taking it and returning it. If it is lost or destroyed, I must replace it, but it does not follow from that remedial duty that I have a three-pronged disjunctive duty to avoid taking it, or return it, or replace it. The primary duty structures the remedial duties, and all the further remedial duties that

apply if I breach my remedial duty. At every stage, it is up to you to decide whether to stand on your rights.²⁶

On this understanding of damages in negligence, there is no puzzle about moral luck, because there is no point at which the comparison of the relative character of the defendant who injures with the imagined one who does not could even come up. Although they are alike in some respects, they are completely unlike in the respect that is relevant to negligence liability. It is true that the person who takes a risk with the safety of others opens himself up to chance. This opening of oneself to chance is no different, however, than the way in which people who use their means to set and pursue their own purposes always open themselves up to chance. They do not need to have "chosen" a chance in the way in which some writers imagine that people should only be held responsible if they could control the choices and circumstances that led them to choose a particular course of action. Instead, separate persons with their separate purposes use their means to pursue those purposes. Doing so sometimes leads to the loss of the means in question — as I use my hammer to repair my roof, it slips, falls, and drops irretrievably into the sewer grate. This may be my bad luck, but it is difficult to feel the grip of the puzzle that says "why should he lose his hammer, given that another person, also carelessly fixing his roof, did not lose his?" That is because there is no candidate institution that can be said to have the purpose of erasing luck from all of life.²⁷

Before I turn to the more complex case of the criminal law, it is worth noticing that the way of closing the gap in this case turns on rejecting the

26 I develop these points in more detail in Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957 (2007).

27 Some might propose creating such an institution — or even claim that the real point of all social institutions must be to do exactly that. Luck egalitarians are instrumentalists about political institutions, seeing no interesting or challenging issues about the use of force to achieve their ideals of equality of unchosen condition coupled with an exception for "real" choices. Any such proposal, however, will face two fundamental obstacles. The first is to show that the ideal in question is even coherent for a plurality of persons, each setting and pursuing his or her own purposes, each choosing in a context made up of the effects of the choices of others. Every time someone makes a choice, all of the bundles of other people need to be adjusted accordingly, so as to control for what G.A. Cohen has called "bad price luck." G.A. Cohen, *Expensive Tastes Ride Again*, in DWORKIN AND HIS CRITICS 1, 6-7 (Justine Burley ed., 2004). The second is to make a picture that stipulates equality of condition with an exception for legalized gambling normatively plausible. I examine these difficulties in Arthur Ripstein, *Liberty and Equality*, in RONALD DWORKIN 82 (Arthur Ripstein ed., 2007).

assumption that opened it up in the first place, according to which tort liability is a tool for realizing something apart from the particular duties as between plaintiff and defendant. The pairing of plaintiff and defendant for purposes of liability is puzzling if liability has nothing to do with the relation between them, but is focused instead on the quality of the defendant's act. The puzzle goes away, as does the puzzle about luck, once we realize that the damages are nothing more than the remedial form of the right that the defendant violated. The merely careless person did not violate any right, and so, although the merely careless person and a careless injurer are alike in some respects, these are not legally relevant respects. The distinctive feature of the careless person who injures another is that he is the one who violated the plaintiff's rights. Other likenesses between him and other people are beside the point, because the rationale for using force in this case is simply to give back to the plaintiff what she had a right to all along.²⁸

III. CRIMINAL LAW

My argument about the criminal law will have a similar, though not entirely parallel, structure. The similarity is that the source of the skeptic's worry about the differential treatment of attempted and completed crimes is ultimately the same as that of the skeptic's worry about tort liability: the idea that punishment is an instrument. This diagnosis may sound surprising, since avowedly instrumentalist writing in criminal law theory is comparatively rare, and it is not the natural home of arguments about luck. A large part of criminal law theory focuses on blameworthiness and guilt, or on the character of criminals, and even consequentialist accounts of criminal doctrine and punishment often give a nod in the direction of the criminal's guilt. How could an account of punishment that focuses on blame be dismissed as merely instrumentalist?

Blame-based accounts of criminal law are instrumentalist in a sense parallel to that in which so many theories of tort law are instrumentalist. If the criminal law is a tool for assigning blame, and punishment the expression

²⁸ The use of force in order to express condemnation is excessive, and inconsistent with the idea that citizens are free and equal; the use of force to deter others uses the defendant in a tort action as a mere instrument of purposes he may not share; the use of force to compensate others sounds philanthropic, but is ultimately also a use of the defendant for purposes he does not share; the use of force to give civilized effect to private revenge is just barbaric. By contrast, the use of force to uphold a right, which has been violated through the use of force, is none of these things.

of some version of blame, then punishment itself is ultimately a tool. When James FitzJames Stephen wrote, more than a century ago, that the purpose of punishment is that it is "a good thing to hate criminals," he gave expression to the core instrumentalist idea. The same idea can be found in those who try to articulate a retributive theory of punishment based on the thought that the world is a better place if vicious people suffer in proportion to their vice. On this view, punishment is a tool for improving the world by achieving a better match between wickedness and suffering.²⁹ Tom Hill gives a forceful statement of this view (which he does not endorse): "For example, although retributivists grant that, theology aside, it is a contingent question whether wrongdoers *are actually likely to suffer* for their misdeeds, they see it as a moral necessity, independently of the consequences, that wrongdoers *ought to be made to suffer* in proportion to their offenses. What I call *deep retributivism* holds this as a fundamental principle, in need of no further justification."³⁰

H.L.A. Hart, in his "Prolegomenon to the Principles of Punishment," articulated a different version of instrumentalism half a century ago when he suggested that the "general justifying aim" of punishment is deterrence, but that the appropriate "principle of distribution" must focus on giving criminals a chance to avoid punishment. Hart suggests that punishment is only legitimate when governed by what he calls the "capacity/opportunity" principle, according to which a person is liable to punishment for a crime committed provided that he had both the capacity and opportunity to avoid a crime (and thus the punishment). Despite their countless differences, Hart and Stephen both suppose that punishment is a tool for achieving ends that are, at least in principle, separable from it. If punishment aims at reducing

29 This view is often attributed to Hegel, though not without controversy. For a more explicit endorsement, see, for example, C.W.K. Mundle, *Punishment and Desert*, 4 PHIL. Q. 216 (1954). MICHAEL MOORE, *LAW AND PSYCHIATRY* (1984) gives a particularly trenchant statement of this view: "the good that is achieved by punishing has nothing to do with future states of affairs Rather the good that punishment achieves is that someone who deserves it gets it." *Id.* at 233. Lord Denning is making an obvious point when he says that "the truth is that some crimes are so outrageous that society insists on adequate punishment because the wrongdoer deserves it, irrespective of whether it is a deterrent or not." ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, NINTH DAY 207 (Dec. 1, 1949) (Memorandum submitted by the Right Honorable Lord Denning). It is also implicit in many discussions of legal luck, most of which take the relevance of inner wickedness as their starting point.

30 Thomas E. Hill, Jr., *Kant on Wrongdoing, Desert and Punishment*, 18 LAW & PHIL. 407 (1999).

crime, assigning blame, or inflicting a sanction on those who are genuinely culpable, it makes sense to ask whether some alternative to punishment might work equally well. As soon as this question arises, the gap is open.

It is no surprise that these instrumentalist conceptions give rise to puzzles about moral luck. Hart himself did not indulge in them, but his theory of punishment opens up the gap in which they operate. If the general justifying aim of punishment is deterrence, then it makes perfect sense to ask whether deterrence could be achieved equally well by punishing completed crimes and failed attempts alike. It seems that it could. With respect to the possibility of deterrence, the attempt and the completed crime are alike, and so the requirement of treating like cases alike seems to require treating them alike. If the principle of distribution of punishment is meting it out only to those who had a fair chance to avoid performing the prohibited acts, then, once more, the person who attempts and the one who succeeds equally have (or lack) a chance to avoid committing a crime. The capacity/opportunity principle applies to what a person could accomplish or avoid, not to what he actually did accomplish.³¹ The successful and unsuccessful criminals differ only in the part they did not in fact control, that is the unchosen consequences of their deeds. The same point applies to Stephen's account: if it is good to hate criminals, it is presumably because of what they have tried, rather than what they cause.³² The source of the difficulty here is not the particular structure of Stephen's approach or of Hart's, for that matter. The same point applies to any more palatable blame-based account of punishment: it looks as though trying is what is blameworthy. The point also applies to any more palatable deterrence-based account of punishment: trying is the object of deterrence.

Any combination of these two purposes generates the same problem once more. Even if some way could be found to render such a pluralist account internally consistent so that deterrence and blameworthiness concur rather than conflict in their demands, the two proposed purposes of punishment are both ultimately external to the prohibition, the violation of which the punishment is supposed to address.

In order to close the gap, then, I must provide an account of punishment on which it does not open up in the first place. The basic idea is simple

31 See A.M. Honoré, *Can and Can't*, 73 *MIND* 463 (1964), reprinted in TONY HONORÉ, *RESPONSIBILITY AND FAULT* 143 (1999) for the origins of this way of framing choice. Honoré discusses the ability to sink a nine-foot putt, which, he notes, can be truly predicated of someone who misses on a particular occasion, provided he has the general capacity to do so.

32 Stephen might have noted that we hate successful criminals more, though, and so allow greater punishment for them.

and familiar: the criminal is punished not in order to achieve something further, but because she has broken the law. Like every simple statement, this one invites a variety of misunderstandings and requires a number of clarifications. Instrumentalist theory arises out of the thought that punishment can only be justified by showing that it has good effects, whether the overall reduction of crime, the matching of suffering to wickedness, giving effect to a criminal's choices, or some combination of these two. Non-instrumentalist theory says that all of these accounts make the mistake of analyzing the legitimate use of force in terms of its effects. Neither the prohibition nor its enforcement is justified by its effects. Instead, a prohibition is legitimate if it bars people from using illicit means to achieve their purposes; a punishment that enforces a legitimate prohibition is itself legitimate.³³

This is hardly the place to develop a non-instrumentalist account of punishment in any detail, let alone to defend it adequately. I will limit myself to the minimum required to show that the gap does not need to open. The basic idea is simple and familiar: a criminal is punished because he has broken the law; lawbreaking is inconsistent with the legal system's power to determine which acts are permissible and which prohibited. Just as the remedy in a tort action is not a tool for achieving something, but rather the form that the plaintiff's primary right takes after it has been violated, so too, the punishment is not a tool for achieving something, but rather the form the prohibition takes if it is violated. Damages uphold private rights by restoring them; punishment upholds the state's entitlement to prohibit by restoring it.

Several broad features of punishment, each of which is familiar and largely uncontroversial, point the way towards a non-instrumentalist account. First,

33 This interpretation makes Kant resolutely non-instrumentalist in a way that, for example, Sharon Byrd's prominent interpretation of his theory of punishment does not. For Byrd, the connection is causal; she argues that "the purpose of the criminal law is to protect this social order," and it does so by threatening punishment so as to reduce the amount of crime. See B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW & PHIL. 154, 154 (1989).

On the interpretation developed here, by contrast, the criminal law simply is part of the social order; the justification of punishment is that the criminal has violated the basic rules of social order, and these rules cannot be violated. The carrying out of punishment is more closely related to the threat of punishment in Warren Quinn's classic essay, Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 32 (1985). For Quinn, the justification of carrying out a punishment flows from the justification of setting it. On the Kantian account developed here, only the state is entitled to prohibit.

punishment is conditioned on the offender having broken the law. One commonplace about punishment is that it is properly reserved for the guilty; punishing the innocent is objectionable even when expedient. Another commonplace is that forms of harmful or blameworthy conduct that have not been prohibited do not merit criminal punishment, even when doing so would advance important social or even moral goals. Second, it is almost always acknowledged that the punishment of criminals is a public act, to be carried out by state officials. Its publicity does not consist of its being done out in the open, sending a message, or anything of the sort; instead punishment is public because it is carried out by the state as a representative of the citizens as a collective body. Not only are private citizens prohibited from punishing but, if a criminal has suffered private "punishment," it is not normally thought to be relevant to the sentence he should receive for his crime. Although it may be possible to come up with a specification of factual circumstances under which these familiar features of punishment could be shown to advance instrumentalist considerations, perhaps by reducing the unreliability inherent in private punishment, there is no need to do so. Instead, I will now suggest that these features provide a non-instrumentalist way of thinking about punishment.

Consider first the requirement that the wrongdoer have committed a crime. Although a new cause of action in tort can be created (or articulated) by common law courts in the course of litigation, there can be no common-law crimes. It is sometimes said that this is because there is so much at stake in criminal punishment, or that if the criminal is punished no one else ends up bearing the burden. Although both of these things are plausible enough, the real reason is to be found elsewhere. A novel cause of action can be found in tort if the plaintiff can establish that the defendant has deprived her of something to which she had a right. It is extremely difficult to establish that the defendant has violated the plaintiff's right in a novel way, but there is nothing in the structure of private rights of action to preclude such a possibility.³⁴ The case of the criminal law is different, because of the difference

³⁴ This point is particularly obvious in the common law in which causes of action develop in part by analogical reasoning by courts. The conclusion of such reasoning always concerns whether, given the other rights the law recognizes, the plaintiff must be taken to have a cause of action in this novel type of case. *See, e.g.,* *Hedley Byrne & Co. Ltd. v. Heller*, [1964] A.C. 465 (H.L.) (appeal taken from Eng.). It is perhaps less familiar in civilian systems, which are often said to be heavily dependent upon antecedent codification. However, the interpretation of the code sometimes leads to parallel results. *See, for example,* the French "wheel of fortune" case with the poisoned wine bottle containing acid. Cass. 2e civ., June 26, 1953, Bull. civ. II, No. 7801, *cited in* Jean-Louis Baudouin, *Of the Influence of Bottled Snails on the Law*

between crimes and torts. The criminal is punished because he has performed a prohibited act, not because he has caused harm or otherwise behaved badly. If there is no prohibition in the criminal code, then nothing can establish that a crime has been committed. The most that the prosecution could show is that such a prohibition *should* be included in the criminal code, but that is not sufficient to show that a crime has been committed.³⁵ Instead, a crime is a violation of a rule that has already been laid down.

The role of the state in prosecuting crimes follows directly from its role in defining them, because a crime is a violation of the state's authority.³⁶ This public aspect of the criminal law is marked by such familiar features as the fact that the criminal trial takes place at the state's initiative, rather than the victim's, and the different standards of proof. The state takes an interest in crime because the criminal does not merely wrong the victim but also acts in a way that is inconsistent with the law's more general claim to direct conduct, by performing an act knowing that it is prohibited. In so doing, the criminal acts in a way that is contrary to the state's entitlement to set limits on the use of force by prohibiting certain actions.³⁷

The claim is not that the state is entitled to make whatever rules it wishes

of Negligence and Other Things: A Comparative Perspective from a Civilian Point of View, in DONOGHUE V. STEVENSON AND THE MODERN LAW OF NEGLIGENCE 215, 217 (Peter T. Burns & Susan J. Lyons eds., 1991).

35 By contrast, there can, at least in principle, be novel common-law defenses to crimes. Such defenses, especially excuses, can arise through a kind of analogical reasoning that is familiar in private law, because new factors could be shown to be sufficiently similar to ones that are recognized as casting doubt on an offender's responsibility. This form of reasoning can take place against the background of a fixed set of prohibitions.

36 As Alon Harel has pointed out in a forthcoming paper, Alon Harel, Why Only the State May Punish (Oct. 2006) (unpublished manuscript, on file with the author), the power of the state to punish criminals finds a partial parallel in the power of parents to discipline their children. Part of the parental task of raising children to be responsible adults consists in making rules for them, and part of the task of making rules includes the power to enforce those rules where necessary. This is not to say that parents always exercise sound judgment in doing so, or that there are no limits on the parental power to discipline children. The need for sound judgment and the existence of these limits are rather a reflection of the integration between the rule-making and rule-enforcing aspects of the parental role. Others are not allowed to take it upon themselves to discipline children, except in those situations in which they occupy some other guardian-like role in relation to those children, such as teachers, and even in those circumstances the power is *in loco parentis*.

37 This state-centered account needs to be filled out in more detail to articulate the nature of the crimes against humanity that made up so many of the horrors of the 20th century. Those who commit such crimes often seek to avoid state-centered sanctions by claiming that the law in effect at the time licensed their acts. On the

for its citizens, and then punish anyone who fails to do as they are told. There are important limits on the power of the state to define crimes, and certainly there are some things, such as murder, that the state must define as crimes, and others that it cannot coherently prohibit. In what follows I will limit myself to what I take to be uncontroversial examples of crimes, because in each of these examples there is some temptation to suppose that the crime constitutes only a personal wrong to the victim. To the contrary, I will argue that, although in such cases there is typically a private wrong to the victim, the criminal law takes an interest in such conduct precisely because there is *also* a violation of its own lawmaking power.

Crimes against persons and property are typically also torts against their victims. Criminal battery is tortious battery, breaking and entering trespass, theft conversion, and so on. As torts, these wrongs involve interfering with a plaintiff's means. As crimes, the criminal does not merely use prohibited means, but, in addition, chooses to do so. In so doing, he places himself above and outside the law; his awareness of the prohibition does not constrain his action.

Which acts are prohibited? The state's claim to authority limits the means that private persons may use, rather than the ends they may pursue. The criminal law prohibits using certain means — in the most familiar cases, the person or property of others; in other, derivative cases, various classes of objects or substances. The crime of breaking and entering violates the prohibition on using forcible entry to another's building to achieve one's purposes; the crime of murder violates the prohibition on taking the life of another to achieve one's purposes. In order to use these means, the criminal typically uses some other means — burglar's tools for breaking and entering, or a gun for murder. The use or even possession of these included means are also prohibited in many jurisdictions, but such examples do not show that the legitimate aims of the criminal law are limited to prohibiting the use of burglar's tools or deadly weapons, or that burglary or murder are merely unfortunate effects of these basic prohibited acts. To the contrary, any such prohibitions are derivative of more basic prohibitions on burglary and murder.

Kantian analysis, however, the lawmaking power of the state is always limited by the possibility of consent to laws by all living under them. A law that purports to license mass killing could not pass this test, because it is contrary to what Kant calls "the right of human beings as such," the possibility of people living together under laws. PRACTICAL PHILOSOPHY, *supra* note 2, at 452. They are thus legally void and without effect, and the laws that they purport to replace, including those prohibiting mass killings, remain binding. On this issue, see Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law* (1946), 26 O.J.L.S. 1 (2006).

There are certain things you are not allowed to do to achieve your purposes, and forcibly entering another person's building or taking your rival's life are among them. Prohibitions on the use of firearms or burglar's tools are prohibitions on using specific means that are thought to be usable only³⁸ in order to use other, further means, where the latter means are prohibited.

The criminal's act is objectionable because of the prohibited means that he willfully uses, not because of how he thinks about his act or the harm that it causes. If I decide to use your horse without your permission, it may be that the horse will actually benefit from the exercise I give it, and so, I might try to argue, I have caused you no harm. Nonetheless, I have committed a crime. If I surreptitiously let myself into your house while you are away, and take a nap in your bed, I commit a crime even if I am meticulous in making sure that I leave no discernible trace. In most cases criminals also cause harm, but the rationale for prohibiting their acts is not to be found in these unwelcome effects, but in the objectionable means that they use. That is, acts are prohibited because they interfere with a system of equal freedom, not because they reveal a wicked character.

On this understanding, then, harm and culpability are not separate components in which the law takes an interest for separate reasons.³⁹ The issue is not what the criminal causes or thinks, but what he does. His action may reveal a bad character; it may also cause harm, or be likely to cause it. None of these is sufficient, or even relevant. Instead, it is the fact that the criminal knowingly uses means prohibited by law. Doing so is culpable because it is a choice of prohibited means.

Just as a private wrong does not depend on the harm the tortfeasor does to his victim, so too the public wrong does not consist in the harm that criminal acts are likely to cause to the rule of law. It may well be true that tolerating crimes undermines respect for the rule of law. The rationale for punishing them, however, is not the harm that they cause, but rather that they violate the legal system's entitlement to prohibit the use of certain means. The difference between harm and wrongdoing parallels the difference in the case

38 Or primarily — exceptions for authorized uses of each reflect cases in which they can be used in ways that are not parts of acts that have already been prohibited.

39 It is striking that instrumentalist thought finally resolves both harm and culpability into forms of passivity: harm is objectionable as suffered, apart from the way in which it is brought about. Once harm is conceived of in this way, culpability can be nothing but the choice of harm, which is again understood as a representation of — a wishing for — the harm in question, or a causal disposition to cause it, rather than a taking up of prohibited means. "Choice" in this sense resolves into a form of passivity.

of a wrong against the individual victim: just as I wrong you by using your means in a way that is inconsistent with your independence, and the harm that I do to you is in an important sense incidental to its wrongfulness, so too the criminal commits a wrong against the legal order by acting in a way inconsistent with its entitlement to determine which means people may use. A civil action can address the private aspect of the wrong — the plaintiff may be entitled to damages or disgorgement — but the public aspect of the wrong requires something separate, even if the private remedy causes the wrongdoer to suffer, or serves to deter others.

More concretely, as a wrong against some particular victim, a criminal wrongfully uses specific means — your car, for example. As a wrong against the legal order, the criminal wrongfully uses a type of means — the property of another person — the use of which the legal order has prohibited.

The solution to a private wrong is the restoration to the victim of a means to which he or she was entitled. The solution to the public wrong is to make it the case that the prohibition does limit the criminal's choice. Although there appears to be a sense in which it is too late after the crime is committed — just as there is a sense in which it is too late after a tort is completed — the coercive response in each case makes the constraint effective after the fact. In the case of punishment, the constraint in question is the power of the legal order to determine which means people may use.

In private law the means restored by damages are always particular means, and so the remedy must be tied to the particular private object against which the wrong was committed, restoring to you the particular thing to which you had a right, or, failing that, its equivalent. In the case of crimes, the criminal aspect of the violation is not of a particular *plaintiff's* entitlement to a particular object or power, but rather of the *legal system's* entitlement to determine which powers are available to whom. The only way the latter, public entitlement can survive a particular violation of it is to have the general entitlement survive the violation, that is, if the punishment deprives the criminal of the powers he illicitly exercised.⁴⁰ Only then are these means normatively unavailable.⁴¹

40 The conduct does not merit probation because it violates the state's authority — such a suggestion would be circular, since it would suppose that the point of the prohibition is merely to prohibit. Instead, the point of the *prohibition* is that the conduct in question is inconsistent with a system of equal freedom. The punishment upholds the state's authority to impose the prohibition. In neither case are the claims to be understood in causal terms: the crime need not undermine the state's ability to shape behavior, and the punishment need not promote it. Instead, the crime *violates* the prohibition, and the punishment *upholds* it.

41 Another way of making this point is to say that if the state is entitled to prohibit

The point here is not that the criminal gets some sort of unfair benefit by committing the crime, which must then be matched by a corresponding detriment.⁴² If that were the case, it would not matter what the source of the detriment was. Instead, the point is that the criminal exercises an illicit prerogative by committing the crime — using prohibited means — and the punishment deprives him of the prerogative. The criminal may gain a private benefit; if so, the benefit gained would just be disgorged to the victim. As against the legal system, however, it is not a benefit at all.

On this understanding, then, the rationale for punishment is simply that the law's generality survives the wrong against it. Private damages cannot repair this wrong, because the wrong is against the legal system — against the citizens as a collective body,⁴³ rather than against one or more of them considered severally. In order to implement such a system, there must be some way of measuring the criminal's wrongful use of means. If the criminal is punished because he has committed a crime, it follows that the punishment, too, must fit the crime — the violation of a specific law, rather than either the harm caused or the inner wickedness that it reflects. Kant's own solution to this problem is a strict principle of retribution. For Kant, punishment is not a tool for achieving retribution, and retribution plays no part in the justification of punishment. Instead, the only justification of punishment that is necessary is also the only one that is possible: the punishment is just the prohibition in remedial form. Retribution enters instead as the measure of punishment, because the only non-instrumental measure is to make the crime itself the measure of the punishment. This does not mean inflicting the same crime on the criminal,⁴⁴ but, instead, depriving the criminal of the type of means that he

an action, it is entitled to stop people from performing it by providing them with incentives to refrain from performing it. The available incentives, however, are set by the underlying standard of conduct.

42 Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968).

43 John Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 159, 170 (Amartya Sen & Bernard Williams eds., 1982).

44 This understanding of retribution is not vulnerable to the familiar objection that certain crimes cannot be visited back upon their perpetrator, because the purpose of punishment is never to visit the crime upon the perpetrator. Instead, the punishment excludes the criminal from participation in that aspect of the legal system that he violated. It does not require or even permit battery against batterers, because the significance of battery must be its interference with the freedom and purposefulness of its victim. As such, the appropriate punishment must be the criminal's exclusion from using his or her bodily powers to set and pursue his own private purposes. Thus the crude view is blocked in advance, and not only by Kant's insistence that punishment must not turn the criminal's humanity into something abominable.

has wrongfully chosen to use. Kant's basic insight is that the only way to make the prohibition effective after the fact is the same as the way a private norm is made effective after the fact: by depriving the violation of legal effect. Just as a private wrong does not change the plaintiff's underlying entitlement (and so damages make empirically real what was normatively always the case), the only way to make the criminal prohibition effective is by depriving the violation of legal effect. The crime does not change the state's underlying right to regulate the use of means; punishment makes empirically real what was normatively always the case. The criminal exempts himself from the law's protection of a system of equal freedom; the punishment excludes the criminal from participation in the system of freedom he violated.

The entire rationale for punishment thus comes from the underlying prohibition that the criminal violated. The point is not that the conjunction of crime and punishment is normatively equivalent to the absence of crime, any more than a tort plus a remedy are normatively equivalent to the absence of the tort. Instead, the punishment responds to the wrongfulness of the crime by depriving the criminal's exemption of himself of legal effect. Once more, things only look otherwise if it is supposed that punishment is a tool for matching suffering to bad conduct: on that supposition, non-crime and crime plus punishment are indistinguishable, because they reflect the same equilibrium. On the non-instrumentalist view, however, the punishment responds to the crime.

This is not the place to develop or assess a non-instrumentalist account in detail. The success of the non-instrumentalist account of punishment depends on an acceptable way of matching punishment to crime, not on showing that Kant's proposed way succeeds in its details.⁴⁵ Indeed, any

45 This is not a principle of retribution based on some idea that it is good that wrongdoers should suffer in accordance with their moral iniquity. Instead, it is simply the principle that says crimes are prohibited. As such, the way to address the crime is to prohibit the criminal from using the type of means that he has claimed to be master of. This idea works itself out fairly straightforwardly in the case of theft — the thief is not excluded from the victim's property, or even from his own property, but rather, from the system of property — that is, he is not entitled to have external means subject to his choice. The retributive response to theft is not to steal from the thief, then, but to turn the criminal's principle of action against him — to prohibit him from holding property for a specified time, that is, imprisonment.

Kant's treatment of the problem makes it look both simpler and more complicated than it is. It looks simpler because Kant suggests that the prohibited object of the criminal's maxim is sufficient to determine the appropriate punishment. Yet Kant's own treatment of it makes it clear that it determines the nature of the punishment, but not, as such, its magnitude. Kant speaks of the thief being excluded from the system of property "for a certain time, or permanently if the state sees fit." KANT, *supra* note

plausible account of punishment requires some way of matching punishment to crime. The non-instrumentalist account is distinctive in its account of what is specifically wrongful about crime — the use of prohibited means — and so must find its own principle of proportionality in terms of the use of prohibited means. The requirement that the punishment fit the crime is thus not a further constraint imposed on an account of punishment that gets its moral impetus from elsewhere. Instead, it is simply the underlying basis of punishment.

All of this talk about the nature of crime and punishment may seem like a digression in order to get to the question of luck in relation to punishment. From an instrumentalist perspective, it must seem so, because crimes and their punishment are, for the instrumentalist, nothing but tools; punishment in particular is a tool for reducing harmfulness or producing suffering in proportion to culpability, or some combination of these purposes. This perspective makes it look as though the problem of moral luck arises apart from the details of a specific account of punishment, a matter of a further moral constraint that governs the use of punishment to achieve any goal whatsoever.

25, at 474. He provides no account, however, of how the state might see fit in this respect, and other remarks he makes suggest that the state does not have discretion with respect to punishment. The principle of retribution only shows what the type of punishment will be, then, not its quantum. Kant also makes things look more complicated than they are because he argues that the punishment must be carried out in a way that "must still be freed from any mistreatment that could make the humanity and the persons suffering it into something abominable." Thus the batterer cannot, in fact, be battered. Yet the retributive principle, properly understood, does not focus on the battery as an infliction of pain, but rather as a wrongful use of another's person. As such, the penalty must be a deprivation of personal freedom — imprisonment.

This point holds more generally, however. All crimes against persons and property are misappropriations of freedom. As such, all punishments take the form of deprivations of freedom. In some notorious passages Kant seems to call for a greater degree of specificity — the castration of rapists, for example, on the grounds that those who misappropriate the sexuality of others must be deprived of their own sexuality. Yet the argument for the retributive principle does not require that level of specificity. Indeed, given Kant's broader philosophical understanding of the way in which positive law is required to make abstract concepts of right determinate, the level of specificity must be left open, and so the Kantian account can be rendered consistent with using imprisonment as the common currency for all wrongs. Retributive punishment must not use the criminal for any purpose other than the upholding of the general will, and must do so in a way that does not treat his humanity as an abomination. (Notice that these are the two strands of constitutional analysis — does it serve a public purpose, and does it use means consistent with the criminal's humanity.)

From the non-instrumentalist perspective, however, there is no space for the idea of an external moral constraint that operates apart from moral justification of punishment itself. The use of force against the criminal is legitimate if, and only if, its use is a part of a system of equal freedom under law. If punishment is a tool, it makes sense to ask about whether there are moral constraints governing its use. If it is not a tool, however, the justification fully articulates the moral constraints that govern it.

If the justification of punishment reflects a focus on the incompatibility of the criminal's use of prohibited means with the law's authority, the gap has already been closed. To use prohibited means is not to cause a certain result. Nor is it to have a blameworthy character or mental state, or any combination of having a blameworthy character and bringing about (or being disposed to bring about) a bad result. Nor is it to have a negative attitude towards the state's authority. Instead, it is to act contrary to the law's entitlement to regulate the use of force. The only way to do so is to use prohibited means intentionally, that is, to complete a crime. Wishing or even trying to use such means is not the object of the prohibition — these are both derivative cases. The criminal law prohibits the completed crime, because the crime is inconsistent with the state's power to rule through law. To tolerate the crime would be to abdicate that rule.

Protecting persons against crimes by other persons is one of the central dimensions of the state's legitimate lawmaking power. Indeed, it is the aspect of that power that the state must exercise. Other aspects of the exercise of state power, including the protection of public health, the orderly collection of taxes and regulation of currency, and so on, are all things that a state may legitimately do, and about which the state is entitled to make decisions. The criminal who willfully violates these regulations also challenges the state's authority. The difference between these different types of crime is significant, but the two types of criminals that violate them are alike in using prohibited means. The person who falsifies a tax return, the person who markets a prohibited product, and so on, all use means to advance their purposes that are inconsistent with the law's authority. In each case, a legal prohibition focuses on the means the wrongdoer uses, rather than on his or her mental state.

The gap in which the moral luck argument operates grew out of the idea that punishment is a tool for achieving some moral result. Crimes and failed attempts appear to be alike in relation to most of the proposed purposes, so the pressure to treat like cases alike appears to find an anchor. Without the artificial assumption that punishment is a tool, however, the attempt and the completed crime are not relevantly alike. The completed crime is the primary object of criminal prohibition, because it is inconsistent with

the state's lawmaking powers. The completed crime must also be object of the punishment, because the punishment is merely the enforcement of the prohibition. It remains for me only to show why, if the completed crime is the basic case, the failed attempt attracts a legal response at all. The merely careless act does not attract negligence liability, not even reduced liability. In most legal systems, a failed attempt attracts a lesser punishment. If it is not the basic case, in what sense is it enough of a case to merit any response?

The proper way of framing the crime determines the way in which the attempt must be understood. An attempted crime is a deficient version of the completed one.⁴⁶ Like the lesser included offenses of possession of burglar's tools, or use of a deadly weapon, they are incomplete versions of more basic criminal wrongs. The person who attempts the crime does not manage to take up the means that are the direct object of the criminal prohibition. The attempter does not actually steal another person's property, or advance his purposes by killing his rival, or whatever. Instead, he takes steps to do these things, but ultimately fails to accomplish them. He was in the process of doing the prohibited act. Like the person who makes unauthorized use of a deadly weapon, the attempter takes up means in order to use prohibited means. The unsuccessful attempter tries, improperly but unsuccessfully, to determine for himself which types of means are subject to his choice. He fails because he does not manage to pursue his purposes by using the means in question. Instead, he performs a defective version of the prohibited act, using means in order to use other, further means, where the latter means are prohibited. Sometimes, the means that the criminal manages to use are also prohibited, in which case he commits the lesser included offense. The attempt alone is a generic version of this lesser included offense. Because his act is a derivative version, it is coherent (though not mandatory) to treat it differently. It is not that he is less wicked, nor even that he causes less harm. The person who attempts a harmless trespass does no less harm than the person who succeeds in completing one. Instead, the lesser response to a failed attempt reflects the fact that it is an unsuccessful version of the basic case of the wrong.

The attempt is not a basic or freestanding wrong, then, but a derivative one. Because it is a part of the completed crime, the criminal receives a part of the punishment for the completed crime. Such parts/whole divisions are conceptual rather than quantitative, so it makes no sense to ask how *big*

⁴⁶ The merely careless act which does not injure is not a deficient version of the completed tort of negligence. The careless act does not engage the rights of others at all; they still have what is theirs. The failed attempt does engage the law's authority because the attempter sets out to act on a rule contrary to the law's rule. He thus tries, albeit unsuccessfully, to put himself beyond the law's authority.

a part of murder attempted murder is, and so the requirement of depriving the criminal of the type of means he used does not generate a precise quantitative proportion of the punishment for the completed crime. Instead, the attempter's punishment is keyed to the punishment for the crime he attempted; as a fixed proportion, a derivative punishment is meted out for a derivative act.⁴⁷ This account does not say how derivative it must be, whether, for example, the punishment for an attempt should be one half of the punishment for a complete crime (as in the Canadian criminal code) or some larger proportion. Nor does this account say in any specific way how crimes that violate the prohibition on the use of certain means — not because they violate the right of some particular person, but rather, for example, on grounds of public health — are to be measured.⁴⁸ It says only that the prohibition focuses on a prohibited act, the basic case of which is a completed act.

To sum up, in the case of criminal liability, the gap between a deed and its consequences opens up because the punishment is conceived of as a tool for some combination of reducing anti-social conduct or holding people to account for blameworthy conduct (or anti-social conduct that they chose to engage in). If these were the purposes of punishment, luck would be a problem. The problem goes away, however, as soon as the idea that punishment is a tool in this sense is rejected in favor of the idea that punishment is simply the underlying prohibition, seeing to it that the express legal prohibition is effective, so that the criminal's act of setting himself up as above the law is without legal effect. The criminal law prohibits people from using means that are inconsistent with the law's claim to protect everyone from each other. As such, the object of the prohibition is not the

⁴⁷ Understanding attempts as derivative versions of completed crimes also sharpens the contrast between preparation and attempt. To attempt a crime is to take up prohibited means that are part of the means that are prohibited by the underlying crime. Shooting *at* a person is part of shooting that person. Buying a gun, by contrast, is at most merely preparation for shooting, because the means prohibited by the law of murder is the taking of another person's life, not the tools that someone might use to do so (though doing so may also be prohibited).

⁴⁸ Prohibitions on narcotics presumably fall into this category, as does the practice of medicine without a license. These crimes *mala prohibita* forbid certain acts, and those who commit them act contrary to the state's legitimate lawmaking power. Those who attempt to do so commit a wrong in the same derivative sense. One of the difficulties with crimes *mala prohibita* is that not all of them are actually instances of legitimate lawmaking powers, and as a result there may be some question whether the punishment for the completed crime is legitimate. Nothing I say here is meant to call that into question. Instead, the point is simply that the analytical structure is the same.

end pursued by the criminal, but rather the means that he uses. The basic case of using a wrongful means is the completed crime, and the attempt is a derivative case. Thus the completed crime is a more serious legal wrong than the failed attempt. They are not identical acts that differ only in their consequences; from the standpoint of the rule of law, they are different acts.

CONCLUSION

The puzzles about luck are, as Thomas Nagel taught many years ago, parallels to familiar puzzles of epistemological skepticism. Nagel offered these as a way of motivating his account of luck, but, in retrospect, they should instead have been taken as warning signs about the puzzles. The epistemological puzzles are an artifact of the idea that thought, and with it language, is a tool for getting inside the world that radically transcends it, in such a way that there will always be a gap between thought and its intended object. My aim in this Article has been to argue that the puzzles about legal luck are themselves an artifact of the idea that legal prohibitions and with them the coercive responses that attach to their violation are tools for achieving moral purposes that radically transcend them. Epistemological skepticism is a hangover from a form of empiricism that most philosophers have by now repudiated. The puzzles about legal luck are a hangover from the crude utilitarianism and legal positivism that grew out of this form of empiricism. In each case, the puzzles have no solution, only a remedy: to abandon the premise that gave rise to them, and thereby close the gap.

