

Whose Luck Is It Anyway?

R A Duff¹

Dangerous driving attracts a maximum penalty of a heavy fine, or in the most serious cases up to six months' imprisonment; but if it causes death, the maximum penalty is fourteen years' imprisonment. Careless driving attracts a maximum penalty of a level 4 fine; driving whilst under the influence of drink or drugs attracts a maximum penalty of a level 5 fine and/or up to six months' imprisonment: but if someone causes death by careless driving when under the influence of drink or drugs, the maximum penalty is again fourteen years' imprisonment, and for causing death by careless driving it is five years' imprisonment. Driving when unlicensed, uninsured or disqualified attracts maximum penalties of, respectively, a level 3 fine, a level 5 fine, and a level 5 fine and/or six months' imprisonment; but an unlicensed, uninsured or disqualified driver who causes death faces a maximum penalty of two years' imprisonment.² The difference between causing and not causing death in such cases might be purely a matter of luck; we therefore face the familiar question of whether and how it can be consistent with the demands of penal justice to allow 'outcome luck' to make such a dramatic difference to an offender's criminal liability.

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² Penalties as specified in Schedule 2 to the Road Traffic Offenders Act 1988, as variously amended (by, most recently, the Road Safety Act 2006); I leave aside here the mandatory or discretionary disqualifications that such offences also attract.

My aim in this paper is, first, to show why the problem of outcome luck in this context is different from the problem of outcome luck in certain other familiar contexts, particularly that of criminal attempts; and, second, to show why, whilst it is appropriate to attach a heavier punishment to dangerous conduct if it actually causes death, the increase in severity should be modest—much more modest than our law currently provides. I will also argue that it is not in the same way appropriate to increase the punishment for a driver who causes death whilst unlicensed, disqualified or uninsured.

1. Justice, Outcome Luck and the Criminal Law

Philosophical and legal theorists too often talk as if there is just one problem of outcome luck in the criminal law—a problem to which there should be a uniform solution across the criminal board.³ Crudely put, the problem is: should the actual occurrence or non-occurrence of the harm associated with the offence make any difference to the criminal

³ The label ‘outcome luck’ is due to Thomas Nagel: ‘Moral Luck’, in his *Mortal Questions* (Cambridge: Cambridge University Press, 1979) 24. On the significance of outcome luck, see more generally S J Schulhofer, ‘Harm and Punishment: A Critique of Emphasis on Results of Conduct in the Criminal Law’ (1974) 122 *University of Pennsylvania Law Review* 1497; B A O Williams, ‘Moral Luck’, in his *Moral Luck* (Cambridge: Cambridge University Press, 1981) 20; A M Honoré, ‘Responsibility and Luck’ (1988) 104 *Law Quarterly Review* 530; D Z Phillips, ‘How Lucky Can You Get?’, in Phillips & P Winch (eds), *Wittgenstein: Attention to Particulars* (London: Macmillan, 1989) 165; A J Ashworth, ‘Taking the Consequences’, in S Shute, J Gardner, J Horder (eds), *Action and Value in Criminal Law* (Oxford: Oxford University Press, 1993) 107.

liability of the person who commits the offence? Slightly more precisely, the problem is: if two people act in a relevantly similar way, with relevantly similar culpability in relation to a kind of harm that properly concerns the criminal law, should the mere fact that in one case the harm ensues whilst in the other it does not ensue make a difference to whether either agent is criminally liable, or to the offence for which each is liable to be convicted, or to the sentence that each receives upon conviction?

Offences that impose ‘criminal liability for non-aggressive death’ provide familiar examples of this general problem. Two drivers engage in a similarly risky manoeuvre, of a kind that constitutes dangerous, or careless and inconsiderate, driving, and are at similar fault in doing so; one in fact causes death, the other does not; the latter is guilty only of dangerous, or careless, driving, whereas the former is guilty of causing death by dangerous, or by careless and inconsiderate, driving, and likely to receive a significantly heavier sentence. The other familiar example comes from criminal attempts. Two agents attempt to cause some criminal harm (death, injury, damage to another’s property) with similar commitment and skill, and with similar chances of success; one in fact succeeds, whilst the other fails; the former is guilty of the completed crime (murder, or wounding, or criminal damage), whilst the latter is guilty only of attempting to commit that crime, and is likely to receive a substantially lighter sentence.⁴ Another less often discussed but clearly relevant kind of example comes from offences of reckless harm for which there is no inchoate ‘endangerment’ version. Two agents create similar risks of damage to

⁴ See e.g. P Winch, ‘Trying’, in his *Ethics and Action* (London: Routledge, 1972), 130; A J Ashworth, ‘Belief, Intent and Criminal Liability’, in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence*, 3rd Series (Oxford: Oxford University Press, 1987) 1, at 13-20; N Jareborg, ‘Criminal Attempts and Moral Luck’ (1993) 27 *Israel Law Review* 213.

another's property, and are similarly reckless as to those risks; one in fact damages the property, the other does not: the former is guilty of criminal damage, whilst the latter might not be guilty of any criminal offence, unless he created the risk in a particular way—for instance by causing an explosion or by starting a fire.⁵ In all these examples, a difference in outcome that might be a matter of pure luck makes a substantial difference to the agents' criminal liability.

I will not here rehearse all the familiar arguments for and against allowing outcome luck to play such roles in the criminal law. In particular, I will ignore consequentialist arguments, since I take the question to be primarily one of justice: we must first decide whether justice allows the law to attach such weight to outcome luck, even if we then go on to consider more pragmatic arguments that can guide policy within the constraints of justice. The justice that is at stake here is, clearly, retributive justice: if *A* is guilty of an offence whilst *B* is not, or if *A* is convicted of a more serious offence than is *B*, or if *A* receives a heavier sentence than does *B*, just because *A* actually caused a relevant harm whilst *B* did not, does *A* (or anyone else) have reason to claim that justice has not been done as between *A* and *B*? What justice requires here is, in general, that the criminal law treat wrongdoers in ways that are appropriate to their wrongdoing. If the wrong that *A* commits is relevantly similar, as a wrong, to that which *B* commits, then either both or neither should, in principle, face criminal liability; they should, in principle, be guilty of

⁵ See Explosive Substances Act 1883, s 2; Model Penal Code, s 220.1(2). On inchoate endangerment offences generally, see K J M Smith, 'Liability for Endangerment: English Ad Hoc Pragmatism and American Innovation' (1983) *Criminal Law Review* 127; J Horder, 'Varieties of Intention, Criminal Attempts and Endangerment' (1994) 14 *Legal Studies* 335; C M Clarkson, 'General Endangerment Offences: The Way Forward?' (2005) 32 *University of Western Australia Law Review* 1.

the same offence—an offence whose name and definition fairly labels their wrong;⁶ they should, in principle, receive similar sentences that are appropriate to the character, including the seriousness, of the wrong that each committed—punishments which in some yet to be clarified sense ‘fit’ their crimes. Some principle of proportionality is part of that requirement of fit, if only in its modest and negative form as a principle of non-disproportionality according to which those who have been convicted of offences of similar gravity (including both *actus* and *mens* aspects) should not receive sentences that are grossly dissimilar in their severity (although it can be argued that there is more to penal fittingness than proportionality—that we should look for a more substantial fit between the characters of the offence and of the punishment).⁷

Justice-based arguments against allowing outcome luck to affect criminal liability are by now familiar. Criminal convictions and punishments condemn those on whom we impose them as wrongdoers: that is why punishments, unlike other kinds of coercive state imposition (quarantine, taxation, for example) must be grounded in and calibrated to the defendant’s culpable responsibility for committing some criminal wrong. But the

⁶ See A J Ashworth, *Principles of Criminal Law*, 5th edn (Oxford: Oxford University Press, 2006), 88-90; also V Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005), 103-15.

⁷ For useful discussions of the proper role of proportionality, see N Morris & M Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (New York: Oxford University Press 1990), ch 4; M Tonry, ‘Interchangeability, Desert Limits and Equivalence of Function’, in A von Hirsch & A J Ashworth (eds), *Principled Sentencing* (Oxford: Hart Publishing, 1998), 291; A von Hirsch & A J Ashworth, *Proportionate Sentencing* (Oxford: Oxford University Press, 2005). On proportionality and appropriateness see R A Duff, *Punishment, Communication and Community* (New York: Oxford University Press, 2001), ch 4.

character and extent of our culpable responsibility cannot depend on factors that are matters of luck or chance, since luck and chance negate the kind of control on which responsibility depends: the lucky fact that your attempt to wound another person failed cannot ‘redound to your credit’,⁸ in that it cannot render you less culpable; the unlucky fact that my careless driving caused someone’s death cannot, likewise, redound to my discredit, in that it cannot render me more culpable than one whose similarly careless driving causes no such harm.⁹ Such arguments sometimes appeal to philosophically dubious claims about the concept of action (that the agent’s action, strictly speaking, includes only what was within his control, and thus does not include outcomes which depended on luck), or about the extent to which luck negates control;¹⁰ but they still seem forceful, when we ask ourselves whether and how it can be just for the criminal law to treat two agents so differently on the basis solely of the fact that, by sheer chance or luck, one of them actually caused a criminal harm whilst the other did not.

I will not tackle such arguments head on here.¹¹ Instead, I want to take for granted some kind of communicative conception of criminal punishment, according to which a central—if not the primary—function of punishment is to communicate to the offender (and to others) the censure that his crime deserves, and to ask how the content, character

⁸ *Carmichael* [1930] 22 Cr App R 142, at 143.

⁹ See especially Ashworth, *op cit* nn 3 and 4 above; also ‘Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law’ (1988) 19 *Rutgers Law Journal* 725.

¹⁰ For critical discussion see R A Duff, *Criminal Attempts* (Oxford: Oxford University Press, 1996), ch. 12; M S Moore, *Placing Blame* (Oxford: Oxford University Press, 1997), ch 5.

¹¹ Largely because I have little to add to my previous discussion of them, in *op cit* n. 10 above, chs 12, 13.2.

and severity of that censure could be affected by the actual outcomes of the offender's action.¹² But I also want to look in a more discriminating way at different kinds and contexts of outcome luck, especially at the difference between outcome luck in the context of attempts (attacks), and outcome luck in the context of endangerment. We will see that outcome luck affects our moral responses to wrongdoers in different ways in these different contexts: the question then will be whether we can or should try to reflect such differences in the criminal law.

2. Attacks, Endangerments and Outcome Luck

An attack is an action that is intended to injure another's interests: it is structured by a direct intention to harm, whether as an end or as a means; it will, from the agent's point of view, have failed if the intended harm does not ensue. Endangerment, by contrast, is a matter of creating a risk of harm as a side-effect of one's intended action: the action is not intended to cause harm, but might do so. An attack necessarily involves *mens rea* (although an attacker might still of course have a defence): if harm is not intended, the action cannot constitute an attack. Endangerment need not involve *mens rea*: I can endanger others by my actions not only non-intentionally, but through non-culpable inadvertence or accident.¹³

¹² For different communicative accounts (the differences between which need not concern us here), see A von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press 1993); Duff, *op cit* n 7 above.

¹³ See further R A Duff, 'Criminalizing Endangerment', in R A Duff & S P Green (eds), *Defining Crimes: Essays on the Criminal Law's Special Part* (Oxford: Oxford University Press, 2005), 43.

Although the distinction between attacks and endangerments can be drawn fairly precisely, in relation to any particular criminal harm we can identify a range of different cases along a complex spectrum. At one end we have what can be called a pure attack: the agent acts with the intention of bringing about the very harm specified in the offence definition—death in the case of homicide, or damage to another’s property in the case of criminal damage. At the other end we have what can be called a case of pure or mere endangerment: the agent acts in a way that in fact creates some risk (a risk significant enough to be worth taking note of) of the harm in question (death, damage to another’s property), but has no intention either to cause any such harm or to create any such risk. In between those two extremes, cases can vary along several dimensions.

As far as attacks are concerned, one kind of variation concerns what is intended. Perhaps the agent intends a harm less serious than, although still related to, the harm specified in the offence definition: he intends to injure rather than to kill, for instance. Or perhaps he intends to create a risk of harm rather than actually to cause harm—to endanger life or property, rather than actually to kill or to damage. Such intended endangerments still constitute attacks, since they are intended to cause at least the secondary harm of risk or danger;¹⁴ the question then is how we should determine the

¹⁴ See, notoriously, *Hyam* [1975] AC 55, in particular Lord Hailsham’s claim that one who intends to expose another to a serious risk of death or grievous bodily harm is guilty of murder if she actually causes death (at 79). See also *Chief Constable of Avon and Somerset v Shimmen* [1987] 84 Cr App R 7: *D* clearly intended to create a risk of damaging a shop window, when he tried to impress his friends with his martial arts skills by showing them how close he could kick to the window without hitting it. On whether we should see risk as harm, see C O Finkelstein, ‘Is Risk a Harm?’ (2003) 151 *University of Pennsylvania Law Review* 963; Duff, *op cit* n 13 above, at 51-2.

agent's criminal liability if the harm actually ensues. Another kind of variation concerns the agent's chances of success—how certain, or unlikely, it was that he would actually bring about the intended harm: that kind of variation is, however, less significant here than it is in the case of pure endangerment, since the agent is 'intent' on causing the harm, however unlikely it might be that he will succeed. This reflects a larger point: that, at least in the pure case, the action is structured by its relationship to the intended harm. Success is the core or paradigm case, by comparison with which cases in which the harm does not ensue can be seen as the failures that, from the agent's point of view, they are.¹⁵ This suggests that when we ask about the significance of outcome luck, the natural question to ask in relation to attacks is whether the agent whose criminal attempt fails deserves or should receive a condemnation and punishment lighter than he would have received had he succeeded: we ask, that is, whether failure makes a penal discount appropriate, rather than whether success should constitute an aggravating factor.

As for endangerments, the obvious dimensions of variation (if we keep constant the harm that is risked) concern probability, reasonableness and foresight. The risk can vary from very low to near or actual certainty;¹⁶ the taking of it can be wholly reasonable, or utterly unreasonable, or something in between those extremes; the agent might be quite unaware of any risk, or aware of some risk but not of its gravity, or accurately aware of the risk she creates; and if she is unaware of it, that might be a matter of non-culpable

¹⁵ There are of course variations along this dimension of success or failure as well: how close to success did the agent come; did he cause some lesser harm?

¹⁶ I would count an action that the agent is certain will cause harm as a side-effect as a limiting case of endangerment, not as an attack (so-called 'oblique intention' is not a species of intention); but nothing in what follows hangs on this.

inadvertence, or of culpable negligence—which can itself range from minor negligence to gross negligence. There is also of course the key matter of actual harm: does the harm that is risked actually ensue; or does a lesser harm related to it ensue, as when an action that endangers life actually causes some lesser injury; or does no material harm ensue? We can see here one important difference between attacks and endangerments: attacks are structured by the prospective harm in a way that endangerments are not. From the endangering agent's perspective, if the anticipated harm does not ensue, that does not render her action a failure, since the action was not oriented towards that outcome; she can indeed be relieved that she has caused no harm (I will return to this point shortly). From the point of view of a reasonable observer, particularly if the risk was one that it was unreasonable for the agent to take, the risk might be salient: what strikes me about the reckless driver's conduct is not its purposeful character as aimed at getting him to his meeting faster, but the danger it creates to other road users. But the risk is still one that he takes in the course of doing something else; and there is still room for him, as well as for us, to hope that it is not actualised. This then suggests that in asking about the significance of outcome luck in the context of endangerment, the natural question to ask is not whether the agent who does not cause harm should receive a lighter sentence, or should be convicted of a lesser offence, than one who does cause harm, but whether the agent who does cause harm should be punished more severely, or be convicted of a more serious offence, than one who does not: rather than the absence of harm serving to mitigate the seriousness of the wrong, as in the case of failed attempt, the occurrence of the harm (if luck can properly make a difference) aggravates what would otherwise have been an offence of mere endangerment.

(It might be argued that the difference here depends not on the difference between intended and non-intended harm, but solely on differences in the degree of (perceived)

probability: the more likely that harm is to ensue, the more we are inclined to see its non-occurrence as a mitigating factor rather than its occurrence as an aggravating factor. But intended actions can be undertaken with only slim chances of success, i.e. when the prospective harm is, and is known to be, less likely to ensue than it is in many cases of endangerment; yet we would, I think, still see and respond to such intended actions in the light of success as the paradigm—as we would not do with endangering actions, even when the risk is very high.)

Even if what I have said about the differences between attacks and endangerments, and about the different ways in which questions about the significance of outcome luck figure in each context, is right, it does not yet show that those questions are not, in the end, versions of the same question, to which we should give the same answer—either that outcome luck can properly affect liability, or that it cannot do so—across the board. However, those differences underpin further, more significant differences in the kinds of response that are available to or appropriate for the agent, and others, in each kind of context; and these differences do bear more directly on questions about how such agents should fare in a communicative system of trials and punishments. For simplicity's sake, I will focus in what follows on examples lying at or towards either end of the spectrum: on pure attacks, and on pure endangerments that create only a relatively modest, but still unreasonable, risk of harm, and whose agents are negligent rather than entirely non-culpable in creating them. We certainly should not assume that what applies to these cases will also apply to cases further from the ends of the spectrum along any of the variety of dimensions noted above; but they provide a useful and manageable starting point for discussion.

As 'reasonable' observers, that is as people who share the attitudes and expectations of the 'reasonable person' to whom the criminal law so often appeals as a normative

standard,¹⁷ we will feel relieved if the prospective harm does not ensue, both in the case of an attack and in the case of endangerment:¹⁸ ‘Thank goodness’, we might think to ourselves, ‘his shot missed’, or ‘Thank goodness, there was no car coming the other way’. However, our responses to the agent—both our informal moral responses and thus also the kinds of response that might be appropriate for a communicative criminal process—are conditioned not merely by our own direct responses to the occurrence or non-occurrence of the prospective harm, but by the responses available to the agent: sometimes¹⁷ by his actual response to the occurrence or non-occurrence of the harm, but also and for present purposes more significantly by the responses that his action leaves room for, by the responses that we think he should have—and by the extent to which the former include the latter. These obscurely expressed points should become clearer in what follows.

If an agent engages in an attack, he must see the non-occurrence of the intended harm as a source of regret, frustration and disappointment: that is how we respond to the failure of our projects. There is no room, from within the action as he engages in it, for him to be relieved if it fails: however reluctant he might have been to embark on this

¹⁷ This is not the place to discuss the proper role and meaning of the ‘reasonable person’ in criminal law (see generally M Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003)). All we need notice is, first, that to ask whether a reasonable person would have acted or reacted as this person did is just a way (sometimes a confusing way) of asking whether this person’s action or reaction was reasonable; and, second, that in this context reasonableness is a matter of moral disposition rather than of cognitive competence.

¹⁸ I leave aside the complication that, if an attack is justified, we would not feel such relief at its failure; we can focus here on attacks for which there is neither justification nor excuse.

course, once he embarks on it, genuinely intending to complete it (as distinct from going through the motions in order to give the impression of someone who intends to complete it), he cannot hope for its failure or be relieved if it fails. After the event he might be relieved; ‘Thank goodness’, he might then think, ‘my shot missed’. But he can think that only if he has undergone a radical change of practical or conative orientation: he must have foresworn or repented his former intention, for whatever reason, if he is to be relieved at his failure to carry it out.

From the point of view of a reasonable person, however, relief is precisely what the attacker should feel if his attack fails: for that is the normatively appropriate response to the frustration of a wrongful enterprise. What the attacker should feel is, therefore, not something that is available to him, not a response for which there is logical room, from within the action as he engages in it. The relief that he should feel, it is worth noting, is not quite the relief that our imagined reasonable observer feels. The observer’s relief is that of a detached, but interested, spectator: she is relieved that the harm or the evil (the death or the murder) did not take place. By contrast, the agent’s relief, the relief felt by the repentant agent after the event, is not such a detached response to what happens in the world: he is relieved not merely that *V* was not harmed (as he might be relieved at seeing someone walk away unharmed from a dangerous situation), but that he did not harm *V*. Such ‘agent-relief’ is analogous to the agent-regret that I properly feel when I actually cause harm:¹⁹ I am relieved that I was not the agent of this harm or evil—and, in the case of wrongful actions, relieved that I do not now have that harm or evil on my conscience.²⁰ The failed attacker should, we think, come to feel such relief: that is what

¹⁹ See Williams, *op cit* n 3 above, at 27-31.

²⁰ Compare Winch, *op cit* n 4 above, at 144-50.

he will come to feel if he repents his attack as he should, and comes to have the kind of regard for his victim that his attack so radically failed to manifest. Our responses to him, at least our informal moral responses, will then naturally be conditioned by that thought: we will condemn his attack; but we will also express our relief at its failure, and we will encourage him to regard its failure as a matter for relief rather than disappointment.

Matters are different in the case of endangerment, since the agent's action does then leave room, as the attacker's action does not, for relief if the prospective harm does not ensue (and regret if it does ensue). There is nothing intrinsic to an endangering action that commits the agent to regarding the non-occurrence of the prospective harm as constituting the action's failure, or as a source of disappointment or frustration; it would be consistent with the attitudes intrinsic to the action as she intends it for her to regret the occurrence of the harm, and to be relieved at its non-occurrence;²¹ indeed, her action leaves room, as the attacker's does not, for the hope that the harm will not ensue. It is true that such a hope, or prospective relief if the harm does not occur, is not *integral* to the action of a negligent or reckless agent, in so far as it is negligent or reckless: her action is not structured by a concern to avoid causing harm in the way that the action of someone paying due attention and taking due care is structured, such that the occurrence of the harm marks at least the partial failure of the action. A careful agent intends not merely to achieve *X* (the outcome that gives her action its positive point) but to achieve *X* without bringing about *Y* (the harm that it could cause); her hope that the harm will

²¹ The attitudes 'intrinsic' to the action are not attitudes that might (or might not) be inferred from it as a matter of empirical discovery—they are not mental states separate from, and only contingently related to, the action. Rather, they are attitudes that are manifested in, and part constituted by, the action as it is intended and carried out: see further Duff, *op cit* n 13 above, at 45-7.

not ensue, and regret if it does, is integral to the structure of her action as she intends it, and to the precautions that she takes in acting as she does. A negligent or reckless agent might of course take some precautions—one can be careless without being without any care at all; in so far as she does take care, such hope and relief, or regret, are integral to her action. But, if she is negligent or reckless, she takes less care or pays less attention than she should; to that extent her action is not structured by, does not itself display, the kind of hope, and the prospective relief or regret, that it should.²² However, her action does leave room for such hope, relief or regret, albeit as somewhat detached rather than as properly practical attitudes; such attitudes are available to her without abandoning her intended course of action.

As properly concerned, ‘reasonable’ observers, we will think that a negligent agent should be relieved if the prospective harm does not ensue, and distressed if it does; we will also recognise that whilst those attitudes are not, as we have just seen, integral to her negligent action, they are not at odds with it or ruled out by it. In our response to her, we can therefore address her as someone who, even without any manifest rejection of her own past conduct, can be expected to feel such relief or distress for herself: we can advert to what she has done, or draw her attention to it if she has not noticed it for herself, in the expectation that she will feel and exhibit such responses without the need

²² Aristotle claimed that an act is truly ‘involuntary’ only if it is immediately followed by regret as soon as the agent realises what she has done; in the absence of such regret it is merely ‘non-voluntary’ (*Nicomachean Ethics* III.1). This reflected his focus on dispositions of character rather than on actions as such, but we can see how the prospect or promise of regret if harm is caused is integral to the actions of the careful agent, in a way in which it is not integral to—though it is not ruled out by—those of the careless agent.

for further prompting or persuading. ‘Look what you have done’, we might say when harm is actually caused; or ‘Look what you almost did’, if the risk was not actualised: once she sees what she did, or what she almost did, such locutions assume, she will be suitably distressed or relieved. Indeed, given the principle of charitable interpretation,²³ whose role in moral life is analogous to that of the presumption of innocence in criminal law, we *should* make such an assumption in our response to her: we should assume that she has such proper dispositions of attitude, unless and until her actions show that she does not.²⁴ We will also, of course, think that she ought to repent and disavow her own negligent action—a response that is ruled out by the action as she performed it in the same way that relief at failure is ruled out by the attacker’s action; and that response can be available to her only through a change of heart—a change that might be induced in her precisely by her clear(er) recognition of the risk that she created or the harm that she caused. When we address an attacker, however, it is not just the repentant disavowal of his own action that we cannot assume he will make; we cannot assume that he will feel a suitable relief at the failure or his attack, or distress at its success, since such responses are not only not integral to, but are ruled out by, his commission of the attack.

²³ Some such principle is, I take it, essential to the possibility of any kind of society: compare S Dimock, ‘Retributivism and Trust’ (1997) 16 *Law and Philosophy* 37, on the essential role of trust in social life; see also D Davidson, ‘Radical Interpretation’, in his *Inquiries into Truth and Interpretation* (Oxford: Oxford University Press, 2001) on the role of a principle of charity in interpreting others’ beliefs.

²⁴ This is, at least, true when we are dealing with relative strangers (which is the moral context most closely analogous to that of the criminal law); matters are more complicated when we are dealing with familiars. I comment on this point below, at the end of this section.

These differences between attacks and negligent endangerment—the way in which in attacks success is the paradigm, whereas in endangerment it is the non-occurrence of harm that is the paradigm; differences in the extent to which we can or cannot assume that the agent would react with appropriate distress or relief to the occurrence or non-occurrence of the harm—will in various ways condition the content and the tone of our responses to the agent. The way in which we address a failed attacker, for instance, will be conditioned by our awareness that he was intent on doing the harm that he (luckily) failed to do; by our relief that he failed, and our hope that he will come to share it; but also by our recognition that he will be able to share it only if he repents and disavows his attack. Our response will properly differ from our response to one whose similar attack succeeds, even if there is no relevant difference in the seriousness or competence of their attempts, in their motives or further intentions, or in other culpability-affecting factors, just because it is partly structured by the relief that is appropriate to the attack's failure.²⁵

What matters is not just that our relief might incline us towards leniency: it is also and crucially that the attacker *should* be relieved, since he *will* be relieved if he comes to see and repent his attack as he should. To repent his attack is to (re)gain the concern or respect for his intended victim that his attack denied, and such concern or respect will be expressed in relief that the attack failed. The 'But, thank goodness, he failed' that qualifies our own response to the failed attack is therefore not something quite separate

²⁵ See further Duff, *op. cit.* n 10 above, ch. 12. The view offered here depends on the further argument, which some would reject, that the actions of successful and of failed attackers are different, as actions on which moral attention focuses: the former murders, or defrauds, or destroys, whilst the latter does not.

from our critical moral response to the attacker as a wrongdoer; if that moral response is intended, as it should be, to elicit from him an appropriate moral response to his wrong, it must include as one of its aspects the ‘thank goodness he (I) failed’ that is integral to such an appropriate moral response. To be an attempted murderer, fraudster, vandal or whatever is bad enough: but at least—we think, and he should come to think—he did not become a murderer, fraudster or vandal; he did not become the agent of another’s death or loss, and although that does not ‘redound to his credit’, in that he cannot claim it as an achievement, it should condition both our and his response to what he has done.

The way in which we address a careless endangerer will be conditioned in different ways by the occurrence or non-occurrence of the prospective harm, since we will be able to address her from the start as someone who will—we can assume—share in the appropriate responses of distress or relief (although hers will be an agent’s distress or relief, whereas ours is not). In particular, the manifest character of her action does not suggest that we must try to *bring* her to be distressed if it causes harm; we can, rather, expect to be able to share that distress with her (as soon as she realises, if she did not already realise, that she did cause the harm). There is, of course, something else that we might need to persuade her of, as much as or more than we need to persuade an attacker: that she should not have acted as she did. For it is quite possible to regret having caused some harm, or to be relieved that I did not, without seeing the action that caused or that risked causing that harm as being for that reason wrongful—which is to say that it is possible to regret having caused the harm without feeling any remorse for having done so.²⁶ But in trying to persuade her of that, we could appeal to the reluctance to cause

²⁶ There might be something else that we need to persuade her to recognise and accept that is less likely to be an issue with the attacker—that she did cause the harm: it is all too familiar a temptation to try to

harm that would inform her relief at not causing it and her distress at causing it. There will still be an important difference between ‘Look what you have done’ and ‘Look what you almost did’, because there is an important moral difference that both the agent and observers should recognise, and to which they should respond, between actually harming others and only endangering them; if our moral responses to our and others’ actions are to be sensitive to morally significant aspects of those actions, they must be sensitive to, *inter alia*, the harm that is or is not caused. My suggestion here, however, is first, that that difference is a different difference from that between our responses to the successful and the failed attacker; and second, that if we can assume that the agent will herself already be distressed by the harm that she actually caused, our response need not include a forceful attempt to induce such distress in her. We will not try to talk her out of such distress—assuming that we agree that her negligent conduct did cause the harm, and that her distress is not disproportionately excessive;²⁷ but the tone of our response can be one of sharing in the distress that she already feels, rather than of trying to bring her to feel it.

Readers whose main interest is in how the criminal law should deal with outcome luck might by now be a little impatient. Whether or not I am right about these subtleties and nuances in our responses to attackers and to endangerers, it is not clear how they

deny (even to ourselves) our own culpable agency in relation to the harm for which others seek to hold us responsible—for instance by denying lack of due care, or by seeking to shift responsibility onto others. But that reluctance to avoid admitting that I caused the harm can itself reflect, in a distorted way, a proper moral attitude to the significance of the harm: I try to deny responsibility for it because to admit responsibility would commit me to a painful kind of agent regret and remorse.

²⁷ I cannot pursue here the interesting questions that arise when we ask what should count as ‘excessive’.

bear on the criminal law, since criminal courts cannot be expected to deal in such niceties. I will argue in the following section that the way in which the criminal law deals—in its offence definitions, in its criminal process and in sentencing—with those who endanger others should be conditioned by the moral differences discussed in this section; but as a final prelude to that argument, I should respond to a likely criticism from those whose interest is more in our moral lives and dealings with each other than in the criminal law. For I have talked as if we have no knowledge of the agent's own response to the harm she has caused or to the risk she has created—that we have to work on assumptions based on what her endangering action itself did or did not imply; but of course that is very often not the case, since we often have as much information about, as much direct knowledge of, her response as we have about or of her original action. We know whether she is appropriately distressed or relieved—we do not have to make assumptions; we can therefore adapt the tone and the content of our response not merely to her action, but to what we know to be her own response to it. My account of how we would respond might fit some cases in which we are dealing with strangers, but does not fit many of our mutual dealings. Furthermore, it might be said, even when we do not know whether she is appropriately moved, we have no good reason to presume or to expect that she is: her action might not preclude an appropriate response, but surely it undermines any reason we might have had to expect one.²⁸

That criticism is apt in the context of our more intimate dealings with our families, friends, colleagues and others with whom we have more or less personal relationships. The point is not merely that in such dealings we are more likely to know, or to be easily able to find out, how the other person in fact responds to the harm that she has caused or

²⁸ Thanks to John Stanton-Ife for pressing me on this point.

risked causing: it is that we have, in virtue of our relationship, a proper interest in how she actually feels about what she has done; that relationship requires a willingness to be in various ways open about our attitudes or feelings, and makes it appropriate to inquire more closely into each others' attitudes and feelings than is proper between strangers. The criminal law, however, is concerned with our mutual dealings not as friends, lovers, family members or colleagues, but as citizens; and in a liberal polity that eschews more ambitiously intimate forms of communitarianism, citizens—at least in their formal and law-governed dealings—preserve a certain respectful distance from each other. That is why privacy is such an important value for liberals: activities, thought and feelings that might be the business of our friends, families or colleagues are simply not the business of our fellow citizens as such, or of the law that regulates our activities as citizens.²⁹ As we will see in the following section, one implication of this respect for privacy is that the criminal law's responses should depend on what is implied by a criminal action, rather than on what might be known of the agent's subsequent response to it.

3. Endangerment, Outcome Luck and the Criminal Law

I will not pursue the question of whether and how outcome luck should affect the law's treatment of attackers here, since our concern here is with liability for non-aggressive

²⁹ Hence the powerful resonances of the Wolfenden Committee's comment that certain kinds of conduct, however immoral they might be thought to be, are 'in brief and crude terms, not the law's business': *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd. 247; London: Stationery Office, 1957), para. 61.

death. All I would claim here, on the basis of the discussion in the previous section, is that we should not assume that the question of outcome luck must be answered in the same way for attacks and for endangerments. One question is whether, why, or to what extent we should reduce the seriousness of the crime for which an attacker is convicted, or the severity of his punishment, in virtue simply of the fact that his attack failed. The other question is whether, why, or how far we should increase the seriousness of the crime for which an endangerer is convicted, or the severity of her punishment, in virtue simply of the fact that she caused the prospective harm. In both cases, of course, what makes the difference is the occurrence or non-occurrence of the harm that was (in the case of an attack) intended or (in the case of endangerment) risked; but I have argued that in extra-legal contexts that difference makes different differences to our moral responses to attacks and to endangerments.

To see what difference the occurrence of harm might properly make to the criminal law's treatment of the endangerer, we should first note the way in which the criminal law of a liberal polity focuses primarily on criminal actions (or omissions), rather than on the motives or dispositions of character from which they flow, or on the perpetrator's responses to them. This is the normative force of the slogan that criminal liability is, or ought to be, for actions. Obscure though the precise meaning and implications of that slogan might be,³⁰ it expresses a central liberal thought: that whilst the criminal law is

³⁰ See e.g. M S Moore, *Act and Crime* (Oxford: Oxford University Press, 1993); for a useful critique, see D N Husak, 'Does Criminal Liability Require an Act?', in R A Duff (ed), *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press, 1998, 60); see further R A Duff, 'Action, the Act Requirement and Criminal Liability' in J Hyman & H C Steward (eds), *Agency and Action* (Cambridge: Cambridge University Press, 2004), 69.

properly concerned with the ways in which we make a wrongful impact on our shared social world, it should not seek to intrude too far into the deeper aspects or dimensions of our lives and conduct. It can properly take an interest in those practical attitudes or motives that are directly manifested in our actions, insofar as they make a significant difference to the character and meaning of those actions, but should not seek to explore our moral character more deeply than that.³¹ It can properly seek to persuade offenders to repent their wrongdoing; but it should not inquire into the depth or sincerity of any expression of repentance as a determinant of conviction or sentence.³²

If we put that thought together with the values that are reflected in the presumption of innocence, we can conclude that insofar as an offender's attitudes or responses bear on her culpability, or on the character and seriousness of her wrongdoing, the criminal law should make the most favourable or charitable assumptions about her attitudes or responses that are consistent with what her criminal action itself displayed. That is, if

³¹ This should not be read as implying that we can draw a sharp distinction between action and character: that distinction is to a significant degree flexible, and is negotiated or constructed rather than discovered. Thus to create an aggravated offence of 'racially or religiously aggravated assault' that is committed by someone whose assault 'demonstrates' the hostility towards V's racial or religious group that motivated the assault (see Crime and Disorder Act 1998, ss 28-9, as amended by Anti-terrorism, Crime and Security Act 2001, s 39) need not be to punish motive as distinct from action; its implicit claim is, rather, that such a motive, when demonstrated in the action, makes a significant and relevant difference to the character and wrongfulness of the action.

³² For a development of this idea in the context of punishment and apology, see C Bennett, 'Taking the Sincerity Out of Saying Sorry: Restorative Justice as Ritual' (2006) 23 *Journal of Applied Philosophy* 127.

her action itself displayed, for instance, a hatred of a particular racial or religious group, that could in principle count as an aggravating factor; similarly, if it displayed an utter practical indifference to the interests of a victim whom she was attacking, she can count in law as being reckless as to the harm that she foreseeably caused to those interests—even if she herself did not advert to the risk that she would cause such harm.³³ If, on the other hand, her action did not display such an utter indifference to the harm that it might cause; if, although it did not display the degree of care to avoid harm that we expect of each other, it left open the possibility that she would be appropriately distressed by the occurrence of the harm (and appropriately relieved by its non-occurrence): then the law should treat her as if she was thus distressed (or relieved).

To put the point slightly differently, the criminal law should assume that those whom it binds, including those who appear as defendants in its courts, are ‘reasonable’ people unless and until their actions prove otherwise—and when their actions do prove otherwise, it should ascribe only that kind and degree of unreasonableness that their actions irrefutably displayed. (‘Reasonableness’ in this context is a heavily normative notion: the reasonable person is one who *inter alia* has and displays that modest concern and respect for the interests of others that the criminal law properly requires of us.) Now a defendant’s actions might have displayed a criminal lack of such concern and respect—if, for instance, he attacked a protected interest, without justification or excuse; or if he recklessly endangered such an interest; or perhaps if he negligently endangered such an interest: such attacks and endangerments not merely fail to manifest appropriate

³³ This is, I think, the best way to understand the way in which recklessness need not always require conscious risk-taking—and the English doctrine of implied malice: see R A Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990), ch 7.

concern and respect—they are inconsistent with it. However, a central difference between attacks and endangerments that Section 2 highlighted now becomes even more important: that whereas the attacker’s action precludes relief at its failure or distress at its success, the endangerer’s action does not preclude relief at the non-occurrence of the harm that is risked, or distress at its occurrence. The argument sketched above therefore suggests that the criminal law, and the criminal court in which the attacker or the endangerer appears, should treat them differently in this respect: in particular, whilst it must treat the attacker as someone who is (absent a radical change of heart) frustrated by the attack’s failure, it should treat the endangerer as someone who is appropriately distressed by the realisation that she has actually caused the relevant harm.

In moral contexts, especially in dealing with people whom we know, there might well be room to inquire into the agent’s actual attitudes and responses: to distinguish the person who is genuinely distressed from one who is unmoved, or not moved in the way or to the extent that she should be, by the harm she caused, and to tailor our responses to her accordingly.³⁴ But if we take seriously the limits noted above on the scope or reach of a liberal criminal law, we cannot allow the courts to engage in such inquiries: they must work only with what was displayed in and by the defendant’s criminal actions. Since the negligent endangerer’s action did not rule out a proper distress at the actual occurrence of the harm (or relief if it did not occur), the court must therefore presume that the defendant was in this respect innocent, i.e. that she did not lack this proper kind of response. Given proof of an attack, an action structured by the intention to harm, we

³⁴ That is why, as I noted at the end of s 2, the discussion in that section was from a moral point of view very limited, since it did not allow for this possibility; but it was still appropriate to our dealings with strangers.

cannot presume that the successful attacker was properly distressed by the harm that he caused, or that the failed attacker was properly relieved: the presumption that he would have responded in such ways is defeated by proof of his attack. But given only proof of an act of culpable endangerment, we can still presume such appropriate responses in the agent: not because she has given us any positive evidence of them, but because proof of her endangering action does not defeat the presumption that she is in that respect and to that extent innocent. It has been proved that she acted unreasonably, in taking a risk that a reasonable person would not have taken: but proof of that species of unreasonableness in action is not proof of unreasonableness in all her responses to her actions; it should not be taken to defeat the presumption of reasonableness in those responses (I comment later on whether we should treat that presumption as rebuttable or as irrebuttable).³⁵

This line of thought suggests that whilst there is good reason for the criminal law to distinguish between mere endangerment that causes no material harm and endangerment that does cause harm (at least when the harm is relatively serious), this need not involve imposing *much* heavier punishments on those who actually caused the harm. I suggested above, and have argued elsewhere, that the difference between causing and not causing harm is a relevant difference in the agents' actions—a difference that should be marked in our moral responses to the agents, and in the criminal law's dealings with them. If my attack succeeds, I have killed, or wounded, or damaged; if it fails, I have only tried to do

³⁵ There is an analogous question, which I cannot pursue here, about whether an offender's repentance should constitute grounds for a lighter sentence: see J Tasioulas, 'Punishment and Repentance' (2006) 81 *Philosophy* 279, 'Repentance and the Liberal State' (2007) 4 *Ohio State Journal of Criminal Law* 487; in partial response see R A Duff, 'The Intrusion of Mercy' (2007) 4 *Ohio State Journal of Criminal Law* 361, 381-7.

those things. If my dangerous action causes no harm, I have still endangered others—a wrong for which I can properly be condemned and should feel remorse (of a seriousness appropriate to the kind and seriousness of the risk). But if the risk I take is actualised, my action is one of harming: I have, albeit unintentionally, killed or injured or damaged, and I should see that as a salient, and aggravating, feature of what I did—I have done something worse than I would have done had the risk not been actualised. The moral difference between ‘Look what you might have done’ as said to a mere endangerer, and ‘Look what you did’ as said to someone who actually caused the harm can in principle be properly reflected in the criminal law’s definitions and individuations of offences, for instance by distinguishing dangerous driving of various types from causing death by such driving, as distinct offences; the difference in the seriousness of wrong committed can also be reflected in the sentences imposed. I have not defended this claim in enough detail here;³⁶ but what concerns me now is the suggestion that the increase in sentence should be only modest.

The reason for this modesty is that if the court should assume, as I have argued it should, that the defendant was and is appropriately distressed by the harm she caused, the sentence should aim not to persuade her to be thus distressed, but rather to confirm or to reinforce the distress that she already feels (as well as marking the wrongfulness of taking the risk in the first place, which is an aim common to the sentences imposed on the mere endangerer and on the harm-causer). The point is not that she might, since the event, have come to be distressed as she should be (in the way that an attacker might, given a change of heart, come to be either relieved at his failure or distressed by his success); it is rather that the court must assume that she was so distressed as soon as she

³⁶ But see further my *op cit* n 10 above, chs 12, 13.2.

realised what she had done, without any change of heart. It is true that, if we focus on the harm that is caused, there is an enormous difference between one whose momentary inattention luckily causes no harm, and one whose similar momentary inattention causes another's death; but the court must assume that the agent herself marked and responded appropriately to that difference—which suggests that only a modest increase in sentence is needed to mark, as it were, the court's endorsement of that response. If this is right, then the increases in maximum sentence provided by our existing laws are unwarranted: the difference between, for instance, careless driving that fortunately causes no harm and careless driving that tragically causes death does not warrant a difference between a fine and five years in prison, and the same is true of the other ways in which the law takes note of such outcome luck.³⁷

Much more work is of course needed to flesh this suggestion out (and to render it plausible), but hope that I have said enough to show that it is worth exploring. I should end, however, with two brief comments.

The first concerns the provisions for unlicensed, disqualified or uninsured drivers who cause death.³⁸ What justifies increasing the endangerer's punishment if she causes death is that the causation of death actualises the risk that made her conduct wrongfully dangerous: what we say to her is 'Look what you have done by your carelessness'. Now it is true that if the unlicensed (or disqualified or uninsured) driver had not been driving, he would not have caused death (at least in that way); and given that he was unlicensed,

³⁷ See at n 2 above for the English provisions in relation to driving. Compare also, for instance, the difference in the Model Penal Code between recklessness-based manslaughter, as a second degree felony, and reckless endangerment, as a misdemeanour (ss 210.3, 211.2).

³⁸ See Road Safety Act 2006, s 21, and text at n 2 above.

disqualified or uninsured, it follows that if he had not been driving whilst unlicensed, disqualified or uninsured he would not have caused death. But it is still not true that he caused death by driving whilst unlicensed, disqualified or uninsured, unless it was his being unlicensed, disqualified or uninsured that made his driving especially dangerous. Now there is of course *some* connection between being unlicensed, or disqualified, and driving dangerously: under an appropriate system, being licensed gives both drivers and others some assurance that drivers are competent to drive safely, and being disqualified is often the result of driving dangerously or being incompetent to drive safely. However, there is no such connection between being uninsured and driving dangerously, because insurance has to do with paying for harm caused rather than with avoiding causing it; and even in the cases of driving when unlicensed or disqualified it is far from clear that the connection is close enough to treat the causation of death as the actualisation of a risk that made the driving wrongful in the first place.

The second comment concerns a question noted above. The court must presume that a defendant guilty of harmful endangerment was suitably distressed by the harm that she caused: but should that presumption be rebuttable? Suppose that a negligent defendant makes it clear, at the time that he causes the harm, or when questioned by the police or in court, that he is not distressed by the harm he caused (or not in the appropriate way; he might be annoyed that it has now caused him inconvenience): why should the court not be allowed to attend to that fact, as a reason for increasing his sentence? (Given the argument so far, this is the way in which the question should arise—not as the question of whether some suitable display of distress should serve to mitigate the sentence.) It is tempting to say it should, but we must resist that temptation: for the offender's sentence, within the kind of liberal system of criminal law that I am concerned with here, should still depend on the character and meaning of his criminal action; and it remains true of

this offender that his action did not itself display the kind of utter unconcern that he now displays. If we begin to allow sentence severity to be determined in part by the way in which the offender responded after the event to his commission of the offence, we start down a dangerous road—dangerous not just because of the incentives to dishonesty that such sentencing practices provide, but because they subvert the criminal law’s, and the criminal courts’, proper focus on the actions that constitute crimes.³⁹

³⁹ Compare, again, discussions of whether an offender’s repentance should be taken to justify a reduced punishment: see n 35 above; also M Nussbaum, ‘Equity and Mercy’ (1993) 22 *Philosophy and Public Affairs* 83; S P Garvey, ‘“As the Gentle Rain from Heaven”: Mercy in Capital Sentencing’ (1996) 81 *Cornell Law Review* 989, ‘Is it Wrong to Commute Death Row? Retribution, Atonement and Mercy’ (2004) 82 *North Carolina Law Review* 1319; J Tasioulas, ‘Mercy’ (2003) 103 *Proceedings of the Aristotelian Society* 101; C Bennett, ‘The Limits of Mercy’ (2004) 17 *Ratio* 1; J G Murphy, ‘Remorse, Apology and Mercy’ (2007) 4 *Ohio State Journal of Criminal Law* 423.