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# The Bumpiness of Criminal Law

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# THE BUMPINESS OF CRIMINAL LAW

*Adam J. Kolber\**

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## ABSTRACT

*Criminal law frequently relies on all-or-nothing determinations. A defendant who reasonably believed his companion consented to sex may have no criminal liability, while one who fell just short of being reasonable may spend several years in prison for rape. Though their levels of culpability vary slightly, their legal treatment differs dramatically. True, the law must draw difficult lines, but the lines need not have such dramatic effects. We can precisely adjust fines and prison sentences along a spectrum.*

*Leading theories of punishment generally demand smooth relationships between their most important inputs and outputs. An input and output have a smooth relationship when a gradual change to the input causes a gradual change to the output. By contrast, actual criminal laws are often quite bumpy: a gradual change to the input sometimes has no effect on the output and sometimes has dramatic effects. Such bumpiness pervades much of the criminal law, going well beyond familiar complaints about statutory minima and mandatory enhancements. While some of the bumpiness of the criminal law may be justified by interests in reducing adjudication costs, limiting allocations of discretion, and providing adequate notice, I will argue that the criminal law is likely bumpier than necessary and suggest ways to make it smoother.*

## INTRODUCTION

Criminal law frequently relies on all-or-nothing determinations. A defendant either exercised reasonable self-defense and was completely justified in using force or fell just short of being reasonable and may face several years in prison for aggravated assault. A defendant who reasonably believed his companion consented to sex may have no criminal liability, while one who fell just short of being reasonable may face several years in prison for rape. While the law must draw difficult lines, the lines need not have such dramatic effects. We can adjust punishments anywhere along a spectrum. Those who barely cross the line into criminality could be sentenced in ways that better reflect their culpability (or dangerousness).

Leading theories of punishment recommend what I call smooth relationships between their most important inputs and outputs. An input and output have a smooth relationship when a gradual change to the input causes a gradual change to the output.<sup>1</sup> Think of a dimmer switch. As you gradually turn the knob (the input) clockwise, the amount of light released (the output) gradually increases. Dimmer switches and room lighting have

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1. See Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655, 657 (2014).

a smooth relationship because gradual changes to the dimmer's position cause gradual changes to the light emitted.

Many people understand the relationship between the seriousness of an offense and the punishment it deserves in smooth terms. As the seriousness of an offense gradually increases, the amount of punishment it deserves gradually increases as well. Nevertheless, our actual laws fail to live up to the ideal. Some jurisdictions, for example, enhance the punishment for selling illegal drugs within 1,000 feet of a school.<sup>2</sup> Within 1,000 feet, you receive the full enhancement. If you are 1,001 feet away, you receive no enhancement at all. Though little changes about an offender's culpability in the span of one foot, this short distance can have a dramatic effect on an offender's sentence.

Unlike the smooth input–output relationship people generally expect between culpability and punishment, the school zone enhancement creates a bumpy relationship. An input and output have a bumpy relationship when a gradual change to an input sometimes has no effect on the output and sometimes has dramatic effects.<sup>3</sup> To illustrate a bumpy relationship, think of a traditional light switch. When you start moving the switch from off to on, the light in the room doesn't change at all. Then, when you reach a critical point in the arc of the switch, the light suddenly comes on. The pertinent input (the orientation of the switch) spans a continuous range, but the output (the light in the room) takes on a discrete value (off or on).

The school-zone enhancement is bumpy because it makes no difference whether an offender was 100 feet or 900 feet away from a school. For distances right around the critical 1,000-foot mark, however, the precise distance from a school can dramatically alter an offender's punishment. Those who distribute controlled substances within 1,000 feet of a school in Arkansas may be subject to a ten-year enhancement on top of their regular sentences for distributing controlled substances.<sup>4</sup> Such bumpiness pervades much of the criminal law and, as I will discuss, goes beyond familiar complaints about statutory minima and mandatory enhancements.

Bumpiness is troublesome because it requires us to round desired legal outcomes to some nearby discrete option. Unless the rounding is absolutely required or is justified by other valuable goals, doing so creates "rounding error." But unlike the typical use of the phrase, rounding error in the criminal justice system is quite serious; it can leave people in prison much longer (or shorter) than is warranted. While some of the bumpiness of the criminal law may be justified by interests in reducing adjudication costs, limiting allocations of discretion, and providing adequate notice, I will

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2. See *infra* Part II.B.

3. See Kolber, *supra* note 1, at 657.

4. ARK. CODE ANN. § 5-64-411 (2005 & Supp. 2015).

argue that the criminal law is likely bumpier than necessary and suggest ways to make it smoother.

## I. THE MISMATCH BETWEEN THEORY AND PRACTICE

### A. *Leading Punishment Theories Are Fundamentally Smooth*

Retributivism is a leading theory of punishment. According to a common version of retributivism, we ought to punish people by an amount proportional to the seriousness of their offenses.<sup>5</sup> Perhaps the biggest component of the seriousness of an offense (and some would say the only component) is the offender's culpability. Holding everything else constant, as an offender's culpability (a pertinent input) gradually increases, the severity of his punishment (the pertinent output) should gradually increase as well. The input and output have a smooth relationship. As the input gradually increases, the output should increase accordingly.

The details of retributivist theories differ, of course. Instead of saying one ought to be punished in proportion to the seriousness of one's offense, a retributivist might make a weaker claim: we are *justified* in punishing in proportion to the seriousness of one's offense, though we are not necessarily obliged to do so. Yet such variations retain a smooth relationship between a pertinent input (say, culpability) and the pertinent output (say, maximum justified punishment severity).

Consequentialism is a leading alternative to retributivism. According to consequentialists, we ought to punish in a way that optimizes the good consequences of punishment (like crime deterrence, incapacitation of dangerous people, and offender rehabilitation)<sup>6</sup> relative to the bad consequences (like the costs of operating prisons and of making offenders and their families suffer).

Generally speaking, consequentialism also encourages smooth relationships between inputs and outputs. Consider offender dangerousness. The more dangerous an offender is (or if you prefer, is evidenced to be), the more we typically gain by deterring and incapacitating him in prison. As dangerousness increases, all else being equal, optimal punishment increases as well. Similarly, less dangerous offenders will generally

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5. See Douglas Husak, *Already Punished Enough*, in THE PHILOSOPHY OF CRIMINAL LAW 434, 436 (2010) ("A corollary of the 'just deserts' theory is the principle of proportionality, according to which the severity of a punishment should be a function of the seriousness of the offense."); cf. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 66 (1976) (recognizing the "familiar principle" that the "[s]everity of punishment should be commensurate with the seriousness of the wrong" (emphasis omitted)).

6. See C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 7-8 (1987).

warrant less severe punishment in a smooth fashion. Hence, both retributivism and consequentialism centrally rely on smooth relationships.<sup>7</sup>

Precisely how much punishment an offender should receive depends on the details of some particular retributivist, consequentialist, or hybrid theory. Each theory takes facts and circumstances about an offender and the rest of the world and converts these inputs into a theoretical intermediary (like culpability, harm caused, dangerousness, or some combination of these). This intermediary (perhaps with others) serves as the pertinent input into the decision of how much punishment is appropriate.

For simplicity, I will focus on “culpability” as the key determinant of punishment amounts, even though it is not my preferred basis for allocating punishment. My arguments are essentially unchanged, however, even if we consider other possible inputs or combinations of inputs. For example, many people think both culpability and harm caused are pertinent inputs, but they nevertheless believe that each has a smooth relationship with deserved punishment.

I will explain how bumpy criminal laws cause us to diverge from our smooth theories after I make two preliminary points.

## *B. Two Preliminary Points*

### *1. The Importance of Selecting Appropriate Inputs*

The first preliminary point is that whether an input–output relationship is smooth or bumpy is subsidiary to the selection of appropriate inputs and outputs. Sometimes a punishment theory may seem bumpy only because we are ignoring a pertinent input.

Consider the debate about moral luck.<sup>8</sup> One person, Lucky, drives home drunk from a party. In his efforts to get home safe, he swerves dangerously to avoid pedestrians but manages to get home without causing injury. Unlucky, by contrast, drives home equally drunk along the same route. He too swerves dangerously to avoid pedestrians but before he makes it home, he crashes into and kills a skateboarder as a result of his impaired driving. Had the skateboarder been in the same place when Lucky was driving, Lucky would have killed him. So even though Lucky and

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7. There may be instances when consequentialists would recommend bumpy relationships. Perhaps, for example, small increases in sentences never catch people's attention and thereby fail to increase deterrence. Determining precisely which relationships consequentialists should defend requires empirical inquiry. Still, as a safe generalization, consequentialists will generally advocate smooth relationships between key inputs and outputs.

8. See generally MORAL LUCK (Daniel Statman ed., 1993).

Unlucky both drove home with the same level of recklessness, by chance, only Unlucky caused injury.

Lucky and Unlucky's conduct was clearly reprehensible. But was it equally reprehensible? Those who believe in moral luck say no. They believe that Unlucky really is more blameworthy than Lucky, for Unlucky did something morally worse: he killed a person.<sup>9</sup>

Those who doubt the existence of moral luck, by contrast, believe that Lucky and Unlucky's conduct was equally reprehensible. Even though only Unlucky caused death, they both took equally significant risks of killing. Their conduct was morally equivalent on this view because the only thing that differentiates them is morally irrelevant: pure chance.

If the defenders of moral luck are correct, it may seem like we have identified a feature of punishment theory that is bumpy. Lucky and Unlucky's conduct is equally reprehensible until the point at which the child is struck. At that moment, Unlucky's blameworthiness appears to jump substantially.

In fact, both views of moral luck can be understood in a smooth fashion. A major debate about moral luck concerns whether one potentially morally relevant input—harm caused—should serve as an input into moral assessments. Defenders of moral luck say that harm caused is relevant quite apart from the culpability a person has for causing that harm.<sup>10</sup> Holding Unlucky's culpability constant, he deserves additional punishment for hitting a person because doing so caused a great deal of harm. Still, the harm he caused is smoothly related to the punishment he deserves. He would have deserved less punishment if instead of hitting a person he hit a dog, and less so still if he only hit a street sign. Hence, retributivist defenders of moral luck advocate a smooth relationship not only between culpability and deserved punishment but also between harm caused and deserved punishment. To them, both of these smooth relationships comfortably coexist.

Opponents of moral luck agree that punishment theory recommends smooth relationships among central inputs and outputs; they simply deny that harm caused is a relevant input (separate and apart from one's mental state in relation to causing harm).<sup>11</sup> To the extent our moral intuitions suggest that harm is independently relevant, opponents say, those intuitions mislead us.

The point is twofold. First, some aspects of the law that seem bumpy at first can be better explained as smooth when the pertinent inputs and

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9. For an argument to the contrary, see Adam J. Kolber, *The Moral of Moral Luck* (Apr. 29, 1996) (unpublished senior thesis, Princeton University) (on file with the author).

10. See, e.g., MORAL LUCK, *supra* note 8, at 2–3.

11. See Kolber, *supra* note 9.

outputs are properly identified. Second, paying attention to the smoothness of the law will obviously not resolve every substantive theoretical debate. In particular, it will often be silent as to which input and output variables ought to be considered relevant at all.

2. *The Smooth-Bumpy Distinction is Not the Rule-Standard Distinction*

The second preliminary point is that the smooth-bumpy distinction is different than the rule-standard distinction. The rule-standard distinction is frequently illustrated by a law governing driving speed. A statute prohibiting “driving above sixty miles per hour” is formulated as a rule; it clearly specifies prohibited conduct. The rule is rather easy to apply, though it will be both over- and under-inclusive.<sup>12</sup> Sometimes it will punish safe conduct, like driving sixty-five miles per hour when roads are empty and conditions are clear, and sometimes it will permit unsafe conduct, as when driving fifty-nine miles per hour is dangerous because roads are icy and jam-packed.

A statute prohibiting “driving at an unsafe speed,” by contrast, is formulated as a standard. It specifies the law’s goal in a sufficiently general manner that it is neither over- nor under-inclusive with respect to that goal. But unlike the rule formulation, the standard is harder to apply in practice and gives more discretion to police officers and other legal actors. They may use their discretion to apply the standard in more arbitrary or biased ways than they would a rule-based statute.<sup>13</sup>

Much has been written about the rule-standard distinction.<sup>14</sup> The key point for our purposes is that it distinguishes two ways of formulating a threshold test. We can establish that someone crossed the line into illegality by defining the line with either a rule or a standard. But neither formulation speaks to the relationship between inputs and outputs.

The smooth-bumpy distinction, by contrast, says little about how to frame a threshold test but does speak to the relationship between inputs and outputs. Consider a possible input (such as excess speed) compared to a possible output (such as the amount of a fine). If a speed prohibition has a flat \$100 fine, then the law is very bumpy. Regardless of how fast you drive, you must pay \$100 once you cross the pertinent threshold. By contrast, if a speed prohibition has a fine of \$10 per mile per hour above

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12. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 40 (1987).

13. *Id.* at 41.

14. See, e.g., FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).



the speed limit, then the law is much smoother. The ultimate legal output depends in a relatively smooth way on how fast you drive (and could be made even smoother by using smaller incremental fines).

Notice that you can determine whether a law is smooth or bumpy without reference to whether the threshold is formulated as a rule or a standard. In principle, rules can be smooth or bumpy, and standards can be smooth or bumpy. The rule–standard distinction and the smooth–bumpy distinction simply refer to different things.<sup>15</sup>

### *C. How Bumpy Laws Deviate from Smooth Theory*

I have argued that our leading moral justifications for punishment generally call for smooth relationships between legal inputs and outputs. Yet I will show that the criminal law is frequently bumpy, forcing us to round what is, at least in principle, a precise outcome to the nearest available discrete option. In the process, we lose morally relevant information. Some morally relevant information may re-emerge during sentencing, but there are serious legal and practical impediments to smooth sentencing that I discuss in Part II.

#### *1. Statutory Offenses in General*

The all-or-nothing nature of statutory elements contributes to the bumpiness of criminal law. An element is either satisfied or not. Even though the conduct underlying a given element typically generates culpability in a smooth manner, actual determinations about conviction are very bumpy. Consider New York’s “reckless assault of a child” statute, which provides:

A person is guilty of reckless assault of a child when, being eighteen years of age or more, such person recklessly causes serious physical injury to the brain of a child less than five years old by shaking the child, or by slamming or throwing the child so as to impact the child’s head on a hard surface or object.<sup>16</sup>

Furthermore, “[s]erious physical injury’ means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.”<sup>17</sup>

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15. For a bit more on the difference, see Kolber, *supra* note 1, at 666–68.

16. N.Y. PENAL LAW § 120.02(1) (McKinney 2009 & Supp. 2016).

17. N.Y. PENAL LAW § 10.00(10) (McKinney 2009 & Supp. 2016).

Notice that each element of the statute is either satisfied or not, even though most of the elements reflect phenomena smoothly related to culpability. As a defendant recklessly accepts increasingly “substantial risk of death” or of increasingly “protracted loss[es] or impairments,” the more punishment we ought to impose. And though the statute requires the child-victim to be under five years old, the harms of shaking a child who is five or older are about as severe as the harms of shaking a child a little under five. Even the element that speaks to throwing against a “hard” surface is continuous; the harder the surface is (or, perhaps more importantly, is thought to be by a perpetrator), the worse the conduct. Nevertheless, if a defendant can show that he did not satisfy even one of these elements, he has no criminal liability under this statute.

Defendants who fail to satisfy one particular element may nonetheless be far more culpable and dangerous than others who are guilty. One person might barely satisfy the requirements of each element and thereby receive at least the minimum sentence provided for by the statute. Another might clearly violate all but one element with conduct evidencing high degrees of recklessness and violence; yet, if he chose a victim who had just turned five years old, he will be deemed not guilty of this particular offense. Granted, he will be guilty of some other assault offense, presumably with a lower punishment range. But sometimes there are no other pertinent offenses, and the bumpy nature of the law allows wrongdoers to escape punishment.

Hence, it is a general feature of criminal offenses that they are bumpy, at least to some degree. We may be able to smooth some of the bumps by offering prosecutors a wide selection of statutes or giving judges substantial sentencing discretion or sentencing guidelines that examine a variety of factors with small incremental effects. But we must carefully design these protections if we hope to keep the criminal law smooth.

## 2. *Mental States of Belief*

Mental states play a critical role in assessing a defendant’s culpability. One way to be culpable is to take an action while having some level of confidence that the action will cause serious harm, such as death. Notice how, from a moral perspective, there seems to be a smooth relationship: The less likely you believe your conduct will cause some harmful result, all else being equal, the less culpable you are for causing it.

The law nevertheless creates a bumpy relationship between strength of belief one will cause a harmful result and amount of punishment. Under the Model Penal Code (MPC), a defendant has *knowledge* of some result if he is “practically certain” that his conduct will cause it to occur.<sup>18</sup> The MPC’s

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18. MODEL PENAL CODE § 2.02(2)(b)(ii) (1962).

requirement of practical certainty selects a threshold level of confidence along a spectrum. A person who has a bit less confidence than practical certainty is just a bit less culpable than one who satisfies the MPC's requirement. But if a statute requires knowledge, a defendant either satisfies the statute and may be subject to severe punishment, or does not and is not guilty of the offense. He may be guilty of some other offense, but it may have much lower penalties.

Instead of having *knowledge* that some particular result will occur, one might just be aware of a risk the result will occur. The MPC deems it *reckless* to "consciously disregard[] a substantial and unjustifiable risk" that some result will occur.<sup>19</sup> So the difference between knowledge and recklessness depends on one's level of confidence that the risk will eventuate, and one's moral culpability for that result will vary in a smooth fashion accordingly.

Nevertheless, even though the difference between knowledge and recklessness is largely one of degree,<sup>20</sup> the law often draws a sharp cutoff. A person who knowingly causes death is guilty of murder while a person who only recklessly causes death is guilty of manslaughter.<sup>21</sup> Yet their conduct may differ by just the smallest quantum of belief and hence the smallest quantum of culpability and dangerousness.

Similarly, I noted that recklessness refers to awareness of risks that are substantial. Clearly, substantiality varies along a spectrum. So just as we force a sharp line between the sometimes-similar mental states of knowledge and recklessness, we also draw a sharp line between the sometimes-similar mental state of recklessness and a mental state with no criminal liability whatsoever in which one is aware of a risk that is a bit too small to qualify as "substantial."<sup>22</sup>

The doctrine of felony murder, at least in its extreme theoretical form, makes it murder to kill even accidentally during the course of a felony.<sup>23</sup> If

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19. *Id.* § 2.02(2)(c).

20. LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 31–35 (2009) (arguing that "knowledge" is a species of "recklessness"). As these authors point out, however, the choice between a "knowledge" and a "recklessness" mental state term can affect the burden of proof when seeking to establish that one's conduct was justified. *Id.* at 32–33.

21. MODEL PENAL CODE § 210.2(1)(a), .3(1)(a). It does constitute murder, however, to recklessly cause death "under circumstances manifesting extreme indifference to the value of human life." *Id.* § 210.2(1)(b).

22. Recklessness under the MPC also takes an input that refers to the "justifiability" of a risk. *See id.* § 2.02(2)(c). The extent to which a risk is unjustifiable likely warrants a smooth relationship to culpability as well.

23. *See, e.g.,* *People v. Coefield*, 236 P.2d 570, 573 (Cal. 1951) ("It follows that it was not error to instruct the jury that the only criminal intent which the prosecution had to show was a specific intent to rob . . . and that it was not required to prove a deliberate or premeditated killing or to prove any intent to kill.").

applied to truly faultless accidental killings, the accidental killing might not reflect *any* increase in culpability or dangerousness. But even if some level of fault is implicit in felony murder, it is hardly obvious why a somewhat-at-fault killing transforms a felony warranting, say, a year in prison to one warranting decades in prison.

### 3. *Beliefs About Consent*

The harm of sexual activity, if any, closely correlates with the presence or absence of consent. What matters most to an assessment of culpability, however, is not the mere presence or absence of consent; these are matters about which a reasonable person might be mistaken. What matters most to culpability are the beliefs, including, perhaps, the reasonableness of the beliefs, of an alleged rapist about whether or not the other person consented.

Such beliefs have a smooth relationship to culpability. If an alleged rapist honestly believed his alleged victim consented, then his mistake about consent makes him less culpable. The more confidently he believed he received consent, the less culpable he is for his conduct.

Jurisdictions that consider mistakes about consent may also require that a defendant's belief about the presence of consent be not unreasonable.<sup>24</sup> But the unreasonableness of such beliefs may also span a range. Hence, belief in the presence of consent and the unreasonableness of such belief are inputs that can fall along a spectrum and seem to warrant smooth relationships to culpability.

Nevertheless, cases where people make mistakes about consent draw a line that has an extraordinarily bumpy effect. Those narrowly convicted will receive at least the statutory minimum punishment for rape, which can be several years in prison.<sup>25</sup> Those narrowly acquitted receive no punishment. Even though we can barely distinguish the culpability and dangerousness of the narrowly acquitted and the narrowly convicted, they receive radically different treatment under the law.

Often the law focuses not on beliefs about consent but on the actual presence or absence of consent. Leo Katz has argued that the presence or absence of consent is discrete.<sup>26</sup> Perhaps we consent the same way we buy soda from a vending machine. If we insert coins and make a selection, we consent to the transaction.

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24. See, e.g., *People v. Williams*, 841 P.2d 961, 965 (Cal. 1992).

25. For example, rape by forcible compulsion in Alabama has a ten-year minimum sentence. ALA. CODE § 13A-6-61 (2015); *id.* § 13A-5-6.

26. LEO KATZ, *WHY THE LAW IS SO PERVERSE* 163–168 (2011).

I am agnostic about the nature of consent; perhaps there are cases where consent is partial, as where a person is ambivalent about having sex or is under the influence of alcohol.<sup>27</sup> But as I emphasized, even if the presence or absence of consent independently affects warranted punishment, it is still extremely important to consider a defendant's *beliefs* about the presence or absence of consent. So even if Katz is right that consent itself is discrete,<sup>28</sup> a person's *beliefs* about another's consent are best understood along a spectrum, and those beliefs (including, perhaps, their reasonableness) ought to have smooth effects on punishment.<sup>29</sup>

#### 4. *Maturity to Consent*

Statutory rape laws make it a crime for adults to have sexual intercourse with minors, even when intercourse is not physically coerced.<sup>30</sup> Some might criticize the rule-like nature of these laws. If we make the age of consent eighteen, there will presumably be some seventeen-year-olds who are prohibited from consenting to sex but are more mature than some eighteen-year-olds who are permitted to consent. We might settle for the rule-like formulation, however, because even if we knew how to measure maturity to consent, it would be extraordinarily impractical and invasive to do so. We would rather err by restricting the sexual opportunities of those under eighteen capable of consenting in order to protect those under eighteen incapable of consenting. (If you believe no one under the age of 18 is ever capable of consenting, then just reconsider my example with some higher age cutoff, like 21.)

But no matter how we measure the maturity cutoff (using age or, more impractically, maturity), statutory rape laws are bumpy. An adult who has sex with a person who he believes is not quite mature enough to give proper consent is just a bit more culpable than an adult who has sex with a

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27. People vary as to whether they experience consent as all-or-nothing. Compare Viviana I. Maymi, *Here's How I Was Raped*, HARVARD CRIMSON, Oct. 9, 2015, <http://www.thecrimson.com/article/2015/10/9/assault-no-grey-area/> (writing "to dispel the notion that sexual assault is a spectrum," and describing "the nauseating notion [that] sexual assault inhabit[s] a 'gray area' in which alcohol blurs previously clear boundaries"), with Tove K. Danovich, *Was I Raped?*, AEON, Aug. 24, 2015, <https://aeon.co/essays/is-there-such-a-thing-as-an-almost-rape> (expressing ambivalence as to whether or not she was raped, at one point calling it "rape—almost").

28. For some doubts, see Adam J. Kolber, *Smoothing Vague Laws*, in VAGUENESS AND THE LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES (Geert Keil & Ralf Poscher eds.) (forthcoming 2016) (manuscript on file with author).

29. An unusual state supreme court opinion holds that consent can operate as a *partial* defense to the tort of assault when a correctional officer's sexual activity with an inmate would have been deemed consensual outside of the incarcerative context. See *Grager v. Schudar*, 770 N.W.2d 692, 698 (N.D. 2009); see also Aaron D. Twerski, *Expanding Comparative Fault to Apparent and Implied Consent Cases* (Oct. 26, 2015) (unpublished manuscript) (on file with author).

30. See, e.g., GA. CODE ANN. § 16-6-3 (2011 & Supp. 2015).

person who he believes is just barely mature enough to give proper consent. Nevertheless, if the jurisdiction provides for a significant minimum sentence for statutory rape, then the law will have a bumpy effect.

If a statutory rapist is eighteen-years-old and his victim seventeen-years-old, the jurisdiction is unlikely to have a long minimum sentence. But even the collateral consequences of a mere conviction can be severe. Moreover, there are substantial minimum sentences when victims are younger. For example, in Montana, if a nineteen-year-old has sexual intercourse with a fifteen-year-old, the older person “shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years.”<sup>31</sup> Had a hypothetical nineteen-year-old Montanan waited an extra day until his companion turned sixteen years old, he would have no criminal liability under the statute rather than a four-year minimum sentence.

When an adult has sex with a person just below the age of consent, many will think it much worse than when an adult has sex with a person just above it. After all, the former has broken the law, while the latter has not, and surely violating the law can be seriously morally wrong. Indeed, we may have internalized the bumpy norms reflected in our own laws (though the precise age cut-offs of such laws vary tremendously across the world and over historical eras).<sup>32</sup>

These bumpy intuitions are misleading, however. True, once we establish bumpy laws, offenders ought to obey them. But the law should fit our best moral theories, not the other way around. Perhaps a person who reaches the age of majority goes through some celebrations or rites of passage a bit more thoughtful about sexual relationships. But it is unrealistic to think maturity to consent radically changes in a brief moment in time and hence quite unlikely that the age of majority of a sexual companion demarcates a sharp distinction in the culpability and dangerousness of the older person rather than a gradual one.

### 5. *Proximate Causation*

Many criminal statutes, including homicide statutes, prohibit causing some result, such as death. A person is typically the cause of some result

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31. MONT. CODE ANN. § 45-5-503(3)(a) (2015).

32. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 403–04 (1984) (“Statutory rape laws came to America with the common law of England. The age of consent, originally ten, was gradually raised by individual states, sometimes to eighteen or even twenty-one.” (footnote omitted)); see also Eugene Volokh, *Statutory Rape Laws and Ages of Consent in the U.S.*, THE VOLOKH CONSPIRACY, WASH. POST (May 1, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/> (stating that most U.S. jurisdictions deem the age of consent to be sixteen or seventeen).

when, but for the person's action (or failure to act when duty requires it), the result would not have occurred.<sup>33</sup> So, for example, suppose Sam poisons Taylor's drink with the intention of killing him, and Taylor consumes the beverage, dying almost immediately. Sam is, in fact, a cause of Taylor's death because, but for Sam intentionally pouring poison into Taylor's drink, Taylor would still be alive.

Sometimes, however, a result occurs through a series of unexpected events. Maybe Taylor merely sipped the poison, called an ambulance as a precaution, and then died when the ambulance driver crashed into a traffic light that suddenly fell in front of them. Had Sam not poisoned Taylor's drink, Taylor would never have called the ambulance and would likely still be alive. But some would balk at labelling Sam a murderer in this scenario given the unusual circumstances of Taylor's death.

In *People v. Acosta*,<sup>34</sup> Vincent Acosta evaded police in a stolen car. While doing so, he "engaged in some of the most egregious driving tactics imaginable . . . [running] stop signs and red lights, and dr[iving] on the wrong side of streets, causing oncoming traffic to scatter or swerve to avoid colliding with him."<sup>35</sup> While no one on the ground was injured, two police helicopters monitoring Acosta's movements crashed into each other, causing three people to die.<sup>36</sup> The appellate court described one of the pilot's movements as "erratic,"<sup>37</sup> and an aviation expert testified that the pilot violated multiple FAA regulations.<sup>38</sup> The expert testified that he had never before heard of a collision between police helicopters engaged in a ground pursuit,<sup>39</sup> and the court found no civil or criminal case involving a two-helicopter collision.<sup>40</sup>

Under the doctrine of proximate causation, people can be held responsible for the results they in fact cause, so long as those results were foreseeable or satisfy some similar criterion said to make a person justly held responsible for their occurrence.<sup>41</sup> In *Acosta*, the court considered whether the defendant could be deemed the proximate cause of the three deaths given the unusual nature of their occurrence. As is typical, it considered whether the deaths were a foreseeable consequence of Acosta's behavior.<sup>42</sup> Ultimately, it denied his claim that there was insufficient

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33. See, e.g., MODEL PENAL CODE § 2.03(1) (1962).

34. 284 Cal. Rptr. 117 (Cal. Ct. App. 1991) (depublished).

35. *Id.* at 119.

36. *Id.* at 119–20.

37. See *id.* at 120.

38. *Id.*

39. *Id.*

40. See *id.* at 120 n.3.

41. See, e.g., MODEL PENAL CODE § 2.03(2)–(4) (1962).

42. See 284 Cal. Rptr. at 125, 134.

evidence to establish proximate causation.<sup>43</sup> Whether or not the court got it right, the case surely stretches the outer edges of foreseeability.

More importantly, the results of our conduct range from more foreseeable to less foreseeable. If foreseeability matters at all, we might expect amounts of criminal liability to depend on the extent to which a result was actually foreseeable; if the three deaths were just barely foreseeable, then Acosta would seem to warrant much less punishment than an otherwise similar defendant who caused much more foreseeable deaths. Nevertheless, the relationship between foreseeability and criminal liability is bumpy. Since Acosta was deemed a proximate cause of the deaths,<sup>44</sup> he was eligible for substantial punishment, even though a person who caused the deaths of three people under slightly less foreseeable circumstances would have been deemed not guilty of homicide.<sup>45</sup>

## 6. Criminal Defenses

Criminal defenses, like entrapment,<sup>46</sup> self-defense,<sup>47</sup> duress,<sup>48</sup> necessity,<sup>49</sup> and so on, tend to be bumpy. If you satisfy the threshold of every element of the defense, you receive no punishment at all. But if you satisfy every element except one and are close to satisfying that element as well, you nevertheless lose the defense.

Some bits of doctrine make matters a little smoother. In provocation contexts, we mitigate murder to manslaughter,<sup>50</sup> and some jurisdictions allow more generally for reduced sentences when a defendant nearly qualifies for a defense.<sup>51</sup> Even when not explicitly acknowledged, judges

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43. See *id.* at 128.

44. See *id.*

45. As it turns out, the court held that even though Acosta was the proximate cause of three deaths, he lacked the mens rea for murder. See *id.* at 128–31. But he still faced substantial punishment for three counts of manslaughter. See *id.* at 132. Perhaps the manslaughter convictions were actually an attempt to smooth out the bumpy result created by the doctrine of proximate causation.

46. See, e.g., MODEL PENAL CODE § 2.13 (1962).

47. See, e.g., *id.* § 3.04.

48. See, e.g., *id.* § 2.09.

49. See, e.g., *id.* § 3.02.

50. When homicide is committed in the heat of passion after adequate provocation, conduct that would ordinarily constitute murder can be mitigated to manslaughter. See, e.g., *State v. Walker*, 478 S.E.2d 280, 281 (S.C. 1996). Such mitigation arguably smooths the law a bit by tying punishment more closely to culpability and dangerousness. We do not, however, have special procedures to mitigate punishment for other crimes, like theft or assault, when they occur in the heat of passion after adequate provocation.

51. See, e.g., *State v. Jeannotte*, 947 P.2d 1192, 1195 (Wash. 1997) (recognizing “failed defense” mitigating circumstances for “self-defense, duress, mental conditions not amounting to insanity, and entrapment”); see also *Brendon Murphy & John Anderson, After the Serpent Beguiled Me: Entrapment and Sentencing in Australia and Canada*, 39 QUEENS L. J. 621, 633–49 (2014) (describing sentence reduction in Australian and Canadian entrapment cases).



presumably take failed defenses into account at sentencing, though defendants may have no recourse when judges choose not to,<sup>52</sup> and defendants will still be subject to any statutory minima provided for by the crime. Thus, we do not consistently provide for what Doug Husak has called “partial defenses”<sup>53</sup> that could greatly smooth the criminal law.

To illustrate, I will focus on the insanity defense (though the same principles apply to lots of defenses). Under the nineteenth century M’Naghten rule, a defendant is not guilty if he commits what would otherwise be a crime, except that he suffers from a mental illness such that he does not know that his behavior is wrong.<sup>54</sup> The defense is extremely bumpy because a defendant either knew that his behavior was wrong and is eligible for what may be a very long punishment (possibly even death), or he did not know that it was wrong in which case he is completely ineligible for punishment (though he will usually be civilly confined).<sup>55</sup>

The bumpiness of the law contrasts with the underlying moral phenomena. Belief that one’s conduct is not wrong falls along a spectrum. A defendant may believe his conduct was not wrong with extreme confidence, fleeting doubts, trivial doubts, nagging doubts, substantial doubts, and so on. The difference between a defendant with fleeting doubts and one with trivial but persistent doubts may be quite small with respect to all of the reasons that we have an insanity defense. Nevertheless, if we draw a line between these defendants, we create a sharp discontinuity. While the difference in their degrees of confidence may warrant slightly

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52. In *State v. Toscano*, 378 A.2d 755 (N.J. 1977), for example, the chiropractor-defendant had been convicted of conspiracy to obtain money by false pretenses when he filled out false medical reports to be used to submit fraudulent insurance claims. Toscano claimed he did so because he and his wife were being physically threatened. *Id.* at 758. The trial court deemed the pressure to commit the crime insufficiently imminent to warrant a duress instruction, and Toscano was convicted and sentenced to pay a \$500 fine. *Id.* at 756. While there’s no way to know from the appellate record, this rather light punishment may reflect sentence mitigation for a partial defense. But Toscano would have no way to demand such mitigation if his sentence were more severe. (Fortunately for Toscano, the Supreme Court of New Jersey ruled that he was entitled to a duress instruction. *See id.* at 766.)

53. See Douglas N. Husak, *Partial Defenses*, 11 CAN. J. L. & JURISPRUDENCE 167 (1998); see also Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 289 (2003) (arguing for a “generic, doctrinal mitigating excuse of partial responsibility that would apply to all crimes, and that would be determined by the trier of fact”); cf. Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 389–90 (2005) (arguing for a full or partial justification defense such that a “perpetrator’s liability [is] reduced to the extent the victim, by his own acts, has diminished his right not to be harmed”).

54. The full rule provides for a defense if, “at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.” M’Naghten’s Case, (1843) 8 Eng. Rep. 718 (H.L.) 719; 10 Clark & F. 200, 200.

55. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER, CAROL S. STEIKER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES* 964–65 (9th ed. 2012).

different treatment, there is no sound theoretical basis for marking a sharp category distinction.<sup>56</sup>

The Model Penal Code departs from the M’Naghten defense in ways that might at first appear to ease the bumpiness of the traditional approach. Under the MPC, we ask not whether a defendant knew his conduct was wrong but rather whether he had the “substantial capacity” to appreciate its wrongfulness.<sup>57</sup> Doing so may enable the MPC to draw a better dividing line between the guilty and the criminally insane than did the traditional rule. But the MPC rule and the M’Naghten rule are equally bumpy. The MPC draws a sharp distinction, not between those who knew and didn’t know the wrongfulness of their actions, but between those who had and those who lacked substantial capacity to appreciate the wrongfulness of their actions. Using either approach, the legal result can change dramatically even when the morally relevant input changes by small increments.<sup>58</sup>

Mental illness, more so than some other possible mitigating considerations, actually does lead to reduced sentences in a number of contexts. For example, the federal sentencing guidelines provide for a reduced sentence based on “diminished capacity” when an offender’s “significantly reduced mental capacity contributed substantially to the commission of the offense.”<sup>59</sup> Similarly, the Supreme Court has found it unconstitutional to execute mentally retarded killers.<sup>60</sup> But judges’ discretion to mitigate for partial defenses is significantly limited by sentencing guidelines, statutory minima, and other restrictions.

More generally, a judge may simply decide that a jury considered a defense but was unconvinced.<sup>61</sup> In other words, judges may fall victim to

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56. Furthermore, beliefs about the wrongfulness of conduct will also vary in terms of the nature of lingering doubts. One defendant may have had lingering concerns that his act was inappropriate but believed its inappropriateness quite trivial, on par with driving just above the posted speed limit. Another might have had lingering concerns with full cognitive and emotional recognition of the seriousness of his behavior should those doubts prove true. Again, defendants can have a wide spectrum of beliefs and emotional states about the seriousness of violating a rule, but the law draws a bumpy line where there is no sound theoretical basis for marking a sharp distinction.

57. See MODEL PENAL CODE § 4.01 (1962).

58. Some jurisdictions also have a volitional test of insanity. They excuse defendants insufficiently able to control their conduct. See, e.g., *id.* As with cognitive tests of insanity, one might argue, the capacity to control one’s conduct is likely to span a continuum from greater capacity to lesser capacity. The moral culpability of the person who acts along this continuum is likely to vary accordingly. See Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System*, 359 PHIL. TRANSACTIONS ROYAL SOC’Y LONDON B 1787, 1794 (2004).

59. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2014).

60. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

61. In *Hines v. State*, for example, a sentencing judge refused to grant a downward departure based on the victim’s aggressive and provoking behavior because the jury rejected the defendant’s self-defense claim. 817 So. 2d 964, 965 (Fla. Dist. Ct. App. 2002). An appellate court reversed, smoothly reasoning that “[c]onduct that is legally insufficient to excuse the defendant’s actions may nevertheless be legally sufficient to warrant a downward departure sentence.” *Id.*

bumpy thinking. For example, police officers have sometimes pressured people to commit crimes but with amounts of pressure insufficient to warrant entrapment defenses. Though there is some authority for mitigating sentences on such grounds,<sup>62</sup> it rarely happens (or, at least, we rarely discover when it is happening). With greater recognition of the bumpiness of the law, courts might look with fresh eyes on how partial defenses warrant greater mitigation at sentencing.

### 7. *The Stages of a Crime*

Legal scholars often divide the life cycle of a crime into three stages. First, an offender prepares to commit a crime. Then he attempts it. And finally, he completes it. In *People v. Staples*,<sup>63</sup> for example, mathematician Edmund Staples rented an office above a bank while his wife was away on a trip.<sup>64</sup> He brought in “drilling tools, two acetylene gas tanks, a blow torch, a blanket, and a linoleum rug”<sup>65</sup> and planned to drill a hole through the floor into the bank.<sup>66</sup> He even began gradually drilling down, using the rug to cover up his progress. The court had to decide whether Staples was just preparing to burglarize the bank or whether he had actually attempted to do so.<sup>67</sup>

Notice that such determinations are high stakes. A person who merely prepares to commit a crime has no criminal liability whatsoever.<sup>68</sup> By contrast, a person who attempts to burglarize may spend several years in prison.<sup>69</sup> Small progress toward a criminal goal—so slight that it has little impact on culpability—can translate into a substantial difference in criminal liability.<sup>70</sup>

Moreover, the demarcation of these stages hardly carves nature at its joints. It is not immediately obvious if Staples attempted to burglarize the bank when he (a) rented the apartment, (b) bought the drilling tools, (c) brought the tools to the apartment, (d) began drilling, or (e) drilled a particular distance. Plausible claims can be made for various places, and

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62. See *State v. Steadman*, 827 So. 2d 1022 (Fla. Dist. Ct. App. 2002) (granting downward departure from sentencing guidelines where an undercover officer repeatedly purchased drugs from the defendant in order to increase his sentence).

63. 85 Cal. Rptr. 589 (1970).

64. *Id.* at 590.

65. *Id.*

66. *Id.* at 591.

67. *Id.*

68. See *id.*

69. See, e.g., CAL. PENAL CODE § 664 (West 2010 & Supp. 2016).

70. As it happens, Staples was sentenced only to probation. See *Staples*, 85 Cal. Rptr. At 590. But he could have received a steeper sentence, especially if he were charged today under federal law. See 18 U.S.C. § 2113 (2012) (providing up to twenty years' incarceration for attempting to enter a bank to commit larceny).

while the court affirmed the trial judge's view that Staples had indeed attempted to burglarize the bank, we are never told precisely when he crossed the legal line.<sup>71</sup> The point, though, is that crimes often progress gradually in ways likely to warrant smooth rather than bumpy effects on punishment.

Staples claimed that he voluntarily abandoned his plan.<sup>72</sup> He started having second thoughts about whether he wanted to live "a fugitive life," and eventually found his whole plan "absurd."<sup>73</sup> Some jurisdictions follow the Model Penal Code, which eliminates all criminal liability for a defendant who renounces his attempt "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."<sup>74</sup> The renunciation defense may sensibly spare from criminal punishment those defendants who would have desisted from further criminal behavior. But though it may shift the line of criminal liability, it does not smooth it. You either attempted the crime and have attempt liability, or you have no criminal liability because you never crossed the line or crossed the line but subsequently renounced your plan. Any of these three descriptions could arguably apply to Staples,<sup>75</sup> yet they can have substantially different implications for punishment.

Just as the preparation-attempt line is bumpy, so too is the line dividing attempts and completed crimes. For example, Staples never drilled deep enough to get past his own floor and into the bank's ceiling.<sup>76</sup> If he had, he could have been convicted not of *attempted* burglary but of burglary itself. Assuming the crime of burglary is completed the instant a drill enters the bank's property, his moral culpability would have increased just slightly at the point he crossed the property boundary while his criminal liability would have jumped substantially.

We can understand why the defendant's culpability would increase the more he damages the bank's property. Perhaps his culpability might even jump a bit at some moment when he makes the conscious decision to complete a heretofore half-hearted plan. But many completed crimes, as in California, allow for twice as much punishment as their corresponding

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71. See *Staples*, 85 Cal. Rptr. at 594 ("Without specifically deciding where defendant's preparations left off and where his activities became a completed criminal attempt, we can say that his 'drilling' activity clearly was an unequivocal and direct step toward the completion of the burglary." (footnote omitted)).

72. *Id.* at 591.

73. *Id.* at 590–91.

74. MODEL PENAL CODE § 5.01(4) (1962).

75. The California Court of Appeal held that the trial judge could infer that Staples' renunciation was not entirely voluntary because Staples may have realized that police were notified about his activities. See *Staples*, 85 Cal. Rptr. at 594.

76. *Id.* at 590.

attempts,<sup>77</sup> and it is not clear why Staples's criminal liability should jump as much as the law says it does *just* by crossing a property boundary. So under the picture I have painted so far, gradual increases in culpability as crimes proceed lead to bumpy changes to the amount of punishment we actually inflict.

Alternatively, one might argue, what typically increases along a criminal path is not an offender's culpability or dangerousness but rather our confidence in his level of culpability or dangerousness. The closer a person like Staples gets to breaking into the bank, the more confident we are that he really intended to burglarize it and thereby harm the bank and its depositors and insurers. If so, it seems there ought to be a smooth relationship between *evidence* of culpability and level of punishment (or *evidence* of dangerousness and level of punishment). As I discuss in the next section, however, we do not, as a general matter, recognize this relationship in the criminal law.

#### 8. *Factual Uncertainty in Criminal Justice*

At trial, uncertainty about guilt has a bumpy effect on punishment. If a jury deems a defendant guilty beyond a reasonable doubt,<sup>78</sup> he can receive a substantial punishment, like life in prison or even death. If, however, the jury is almost certain a defendant slaughtered innocent people but has an iota of reasonable doubt, the defendant is supposed to go free. Hence, there is a bumpy relationship between confidence the offender is guilty and amount of punishment. Ordinarily, confidence has no effect on punishment until we reach the critical beyond-a-reasonable-doubt threshold. At the threshold, it has enormous effects. Then, it has little or no further effect<sup>79</sup> (though judges may consciously or unconsciously exercise their sentencing discretion in ways that take uncertainty into account).

The law's bumpy treatment of uncertainty at trial stands in stark contrast to its treatment when plea bargaining. Plea bargains are widely

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77. See CAL. PENAL CODE § 664 (West 2010 & Supp. 2016). By contrast, the Model Penal Code punishes most attempts and corresponding completed offenses with the same level of punishment. MODEL PENAL CODE § 5.05.

78. *In re Winship*, 397 U.S. 358, 361–64 (1970) (discussing the “beyond a reasonable doubt” standard).

79. Some features of the law may hint at subtle or surreptitious smoothing of uncertainty and punishment. Talia Fisher argues that, for example, the residual doubt doctrine, the recidivist premium, and the jury trial penalty allow doubt to factor into punishment severity. See Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 838–48 (2012); cf. Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597 (2012) (presenting evidence that we do, in fact, make the beyond-a-reasonable-doubt standard more stringent for more serious offenses).

believed to reflect a kind of epistemic discounting of results at trial.<sup>80</sup> A risk-neutral defendant facing a 50% chance of receiving a ten-year prison sentence at trial and a 50% chance of being acquitted might well accept a plea bargain providing for precisely five years of incarceration. After conviction at trial, however, one will rarely hear a judge say: “Because a defendant’s guilt presented a close call at trial, we will cut his sentence in half.”

Assuming justice calls for a smooth relationship between confidence of guilt and punishment, why don’t we see such smoothing after trials?<sup>81</sup> Alternatively, if justice calls for a bumpy relationship, why do we allow the vast majority of criminal cases to end in plea bargains? Might justice be indifferent between smooth and bumpy treatment of uncertainty? Might it demand that both options be available?

I don’t purport to resolve these tricky questions, though they are receiving increased attention. For example, Henrik Lando has argued that at least under some conditions, above a certain threshold, “it will increase both deterrence and fairness to graduate sanctions.”<sup>82</sup> Talia Fisher argues that “a sliding scale punishment, correlated with the certainty of guilt, is preferable to uniform punishment in the epistemic space above the beyond-a-reasonable-doubt threshold” and also advocates “conviction under a lower evidentiary standard and the imposition of partial punishment . . . in certain circumstances.”<sup>83</sup> And finally, Jacob Schuman recognizes that while it would be difficult to adjust sentence severity when examining guilt in the narrow space above the beyond-a-reasonable-doubt standard, sentencing adjustments made by a preponderance-of-the-evidence standard could take a judge’s level of confidence into account.<sup>84</sup>

## II. AMELIORATING THE MISMATCH

### A. *The Modest Smoothing Effect of Sentencing*

At least in principle, sentencing can smooth out much of the bumpiness of the criminal law. Statutes merely take the first cut at assessing appropriate punishment severity. For example, I noted earlier that New

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80. Cf. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464–68 (2004) (citing the literature but also noting ways in which plea bargaining may deviate from the “shadow of trial” assumption).

81. A notable exception, as I suggested in the prior section, is that the law of attempts could be viewed as increasing punishment as confidence in culpability or dangerousness increases.

82. Henrik Lando, *The Size of the Sanction Should Depend on the Weight of the Evidence*, 1 REV. L. & ECON. 277, 286 (2005).

83. See Fisher, *supra* note 79, at 837.

84. See Jacob Schuman, *Probability and Punishment: How to Improve Sentencing by Taking Account of Probability*, 18 NEW CRIM. L. REV. 214 (2015).

York has a crime of “reckless assault of a child.” It also has many other assault offenses with slightly different requirements;<sup>85</sup> conscientious prosecutors can try to pick the most appropriate one. More importantly, after conviction, judges pick offenders’ sentences from a range set by the legislature or advised by a sentencing commission. So judges can fine-tune sentences within a range based on individualized facts and circumstances. And jurisdictions with parole systems can periodically revisit the question of whether an offender has been rehabilitated.

Moreover, the number of criminal statutes has grown substantially in recent decades.<sup>86</sup> Legal scholars frequently criticize their proliferation,<sup>87</sup> but the more statutes prosecutors can choose from, the more closely they can tie punishment to an offender’s culpability, at least in principle.<sup>88</sup> Thus, when constructing statutory schemes for reckless assault, for example, sentencing should (and often does) recognize the smooth nature of culpability by establishing a series of reckless assault statutes that cover conduct warranting no incarceration to conduct warranting very substantial punishments.

Given the ability of sentencing to smooth criminal law, at least to some extent, criminal law is not as bumpy as many other areas of the law, such as torts.<sup>89</sup> In tort law, a person who ever so negligently causes someone harm may owe millions of dollars while a person who was just a bit more cautious when causing the same harm may have no tort liability at all. There is a very bumpy relationship between level of caution (which can span a spectrum) and the obligation to compensate in tort (which is typically all-or-nothing). Sentencing plausibly makes criminal law smoother than tort law.

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85. See, e.g., N.Y. PENAL LAW § 120.00–.12 (McKinney 2009 & Supp. 2016).

86. Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J., July 23, 2011, <http://www.wsj.com/articles/SB10001424052748703749504576172714184601654>.

87. See Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537 (2012) (“From all across the political spectrum, there is wide consensus [among the scholarly community] that overcriminalization is a serious problem.”).

88. The growth in the number of criminal statutes certainly has its own problems. For example, it makes it difficult to keep track of what conduct is prohibited, increases the costs of legal research, and may give too much power to prosecutors. But in terms of the harms of overcriminalization, the mere number of statutes need not especially worry us. See *id.* at 541 (blaming overcriminalization on the broad interpretation of statutes and other qualitative rather than quantitative factors); cf. Susan R. Klein & Ingrid B. Grobey, *Overfederalization of Criminal Law? It’s A Myth*, CRIM. JUST., Spring 2013, at 23, 26 (“The ‘explosion’ in the federal criminal law (at least in terms of the numbers of federal criminal proscriptions) is largely irrelevant to actual practice in the federal criminal justice system.”).

89. See, e.g., Kolber, *supra* note 1, at 662, 673–75, 677–79, 685–87.

*B. Structural Impediments to Smooth Sentencing*

But while sentencing *can* smooth the criminal law, sentencing systems tend to leave bumpy punishment gaps. Recall those who stop just short of committing the actus reus of a criminal attempt. From a legal perspective, they have no criminal liability at all until they make an attempt; then, their liability spikes instantaneously. Similarly, consider a person who recklessly causes death in a manner that was just a bit too hard to foresee to make his conduct a proximate cause. He might be guilty of a crime like reckless endangerment with a rather modest punishment. But had death been just a bit more foreseeable, his criminal liability would have spiked dramatically.

The spikes often result from structural features of sentencing, like statutory minima, that prevent judges from smoothing the law as much as they otherwise could. If a crime has a mandatory minimum punishment of ten years' incarceration, marginally guilty offenders receive ten more years of punishment than those who fall just shy of the statutory requirements, even though the difference in their culpability is quite small. As Stephanos Bibas puts it, "mandatory penalties create cliffs instead of smooth slopes."<sup>90</sup>

Consider the Supreme Court's decision in *Smith v. United States*.<sup>91</sup> Smith faced a thirty-year minimum sentence under a statute that prohibited "using" a machinegun equipped with a silencer "during and in relation to any crime of violence or drug trafficking crime."<sup>92</sup> Smith offered to trade his silencer-equipped machinegun for two ounces of cocaine.<sup>93</sup> Federal circuit courts had been split as to whether trading a gun in a drug-related transaction constituted "using" a firearm for purposes of the statute.<sup>94</sup> The Supreme Court held that Smith did indeed "use" his firearm, making him subject to the thirty-year minimum.<sup>95</sup>

To be sure, even carrying around such a deadly firearm during an illegal drug transaction is risky. But it is less risky than more violent or threatening uses. Moreover, the Supreme Court's interpretation of the statute might even deem a firearm "used" in a drug transaction if someone simply revealed to counterparties where in the forest they can pick up the weapon. What makes the statutory minimum so bumpy is its insensitivity to the level of culpability of some particular firearm use.

Statutory maxima can also make the criminal law bumpy, at least in principle. As offender culpability gradually increases, we must stop

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90. Bibas, *supra* note 80, at 2487.

91. 508 U.S. 223 (1993).

92. 18 U.S.C. § 924(c) (2012); *Smith*, 508 U.S. at 226–27.

93. *Smith*, 508 U.S. at 225–26.

94. *See id.* at 227.

95. *See id.* at 241.



increasing the corresponding sanction at some fixed point. How often does this make the law bumpy? Offenders do sometimes receive maximum sentences. When they do, it seems very unlikely that each time, the judge believes the maximum sentence precisely reflected the offender's culpability. So unless legislators are unimaginably gifted when they set statutory maxima, at least from the perspective of many judges, statutory maxima can make the law bumpy as well.

Many jurisdictions provide for mandatory sentence enhancements when crimes are committed in a particular manner. For example, the state of Washington has automatic enhancements when certain crimes are motivated by sex, involve firearms, and so on.<sup>96</sup> Many states also have special enhancements or sentencing minima for selling drugs in a school zone.<sup>97</sup> Virginia creates a separate offense. If you engage in a prohibited drug transaction within 1,000 feet of a Virginia school, you are subject to at least a one-year mandatory minimum sentence, but if you do so 1001 feet from a school, the law does not apply.<sup>98</sup> For a second offense, you receive a one-year sentence enhancement consecutive to other drug laws you may have broken.<sup>99</sup>

The standard response that "the law has to draw some line" is entirely inadequate. We don't have to draw a single danger zone of fixed dimensions around schools. We could craft a series of enhancements that get less severe the farther an offender was (or believed himself to be) from a school. Indeed, we could craft a very smooth enhancement providing for one day of incarceration per distance in feet a drug transaction occurred from the outer boundary of the danger zone. Transactions right near a school would lead to a nearly three-year enhancement while transactions near the 1,000-foot edge would hardly be enhanced at all.

The barrier to smoothing the law in the drug-free school zone context is not about some immutable feature of lawmaking. It is mostly about the simplicity of the sentencing system, the ease of passing new legislation, and, importantly, the obligation a smoother system might create to conduct more detailed, expensive fact-finding. It is easier to determine whether or not a drug transaction occurred within a school zone than to determine the distance between the transaction and the border of the zone.

Such bumpiness should be especially disconcerting to retributivists. Many retributivists believe that we should never knowingly or recklessly punish a person in excess of desert.<sup>100</sup> I have shown, however, that we

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96. WASH. REV. CODE ANN. § 9.94A.533(3), .533(8) (West 2010 & Supp. 2016).

97. THE SENTENCING PROJECT, DRUG-FREE ZONE LAWS: AN OVERVIEW OF STATE POLICIES, [http://sentencingproject.org/doc/publications/sen\\_Drug-Free%20Zone%20Laws.pdf](http://sentencingproject.org/doc/publications/sen_Drug-Free%20Zone%20Laws.pdf).

98. VA. CODE ANN. § 18.2-255.2(B) (2014).

99. *Id.*

100. See, e.g., ALEXANDER & FERZAN, *supra* note 20, at 6, 102 n.33.

frequently over-punish from a retributivist perspective. Unless all automatic enhancements are justified when applied to the least culpable offender subject to the enhancement, then these enhancements will periodically cause us to knowingly or recklessly over-punish.

Sentencing an offender for multiple offenses can also generate bumpiness. When an offender commits two offenses in the same criminal episode, judges often have discretion to make the sentences run concurrently or consecutively (so long as neither is a lesser included offense of the other).<sup>101</sup> Even though an offender's culpability for one offense will frequently overlap with the second offense, judges usually give offenders either full credit for the overlap, in which case the sentences run concurrently, or no credit at all, in which case the sentences run consecutively. There is, of course, a smoother solution: authorize judges to issue partly concurrent sentences.<sup>102</sup>

In addition to the bumpiness built into maxima and minima, sentence enhancements, and multiple-offense sentencing, some states have other quirky policies that are quite bumpy. In California, for example, the punishment for committing a "lewd or lascivious act" against a child under fourteen is three, six, or eight years of incarceration.<sup>103</sup> The bumpiness of the penalty provisions in states like California seems difficult to justify. We could make the system smoother by providing for punishment ranges rather than just high, low, and ordinary sentences. Thus, while offense selection and sentencing certainly help smooth the criminal law, sentencing systems have bumpy structural features.

### *C. Encouraging Smooth Sentencing Norms*

The structural impediments to smooth sentencing that I have so far discussed illustrate how judges are often *forced* to sentence in a bumpy fashion. What may be an even bigger problem, however, is that even when judges are not forced to sentence in a bumpy fashion, the law doesn't especially encourage smoothness either and often provides little recourse to defendants sentenced in an unnecessarily bumpy fashion.

Part of the reason sentencing is bumpy is that we do too little to encourage norms of smooth sentencing. Consider a defendant accused of a

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101. See, e.g., KY. REV. STAT. ANN. § 532.110 (LexisNexis 2014); LA. CODE CRIM. PROC. ANN. art. 883 (2008 & Supp. 2016).

102. Cf. *Wilson v. State*, 5 N.E.3d 759, 761 (Ind. 2014) (invalidating a partly concurrent sentence on the ground that it was not authorized by statute). Statutory language in some states suggests that partly concurrent sentences are permissible. See LA. CODE CRIM. PROC. ANN. art. 883 ("In the case of the concurrent sentence, the judge shall specify . . . the date from which the sentences are to run concurrently.").

103. CAL. PENAL CODE § 288(a) (West 2014 & Supp. 2016).

serious crime like murder who narrowly fails to demonstrate enough police pressure to establish an entrapment defense. A judge *might* reason that the defendant should receive a very short sentence since he is just slightly more culpable or dangerous than an offender who is completely acquitted. But even if there were no statutory minimum punishment, judges would be unlikely to issue a very short sentence, and the public would be unlikely to accept it if they did. We likely have archetypical conceptions of offenses. If a person commits an offense in a less culpable or less dangerous way, judges may sentence on the low end. But such sentences are likely anchored by the range typically deemed appropriate for conviction of the offense.<sup>104</sup> In other words, we may not sentence in smooth ways, even when there are no structural impediments to doing so, because we pay too little attention to good smoothing opportunities.

#### *D. Punishments Themselves Are Bumpy*

We tend to speak of punishment severity in terms of the *duration* of incarcerative sentences. But surely duration is not the only pertinent measure of punishment severity.<sup>105</sup> For example, sometimes judges must decide whether to sentence a person through the juvenile corrections system or the adult penal system. Such decisions are quite bumpy, affecting not only durations of confinement but the harshness of the facilities as well.<sup>106</sup>

Even among adults, if we measure punishment severity in terms of the suffering experienced by prisoners, then surely different prisoners suffer to different degrees per unit of time incarcerated.<sup>107</sup> Alternatively, if we measure punishment severity in terms of the amount of liberty offenders are deprived of, then surely different prisoners are *deprived* to different degrees because they varied in their liberties before they were sent to prison (for example, some had extensive rights to land and personal property, others did not).<sup>108</sup>

In order to craft appropriate sentences, we must consider a wide range of factors about offenders and their treatment—aside from duration of

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104. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974) (describing anchoring effects).

105. See Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) [hereinafter Kolber, *Subjective Experience*]; Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565 (2009) [hereinafter Kolber, *Comparative Nature*]; Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 622–48 (2011); Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1 (2012).

106. Andrea Knox, *Blakely and Blended Sentencing: A Constitutional Challenge to Sentencing Child "Criminals"*, 70 OHIO ST. L.J. 1261, 1269–71 (2009).

107. See Kolber, *Subjective Experience*, *supra* note 105.

108. See Kolber, *Comparative Nature*, *supra* note 105.

confinement—that we largely ignore. Once we consider such factors, it might at first seem relatively easy to sentence with severity smoothly related to culpability because we can vary duration along a spectrum. The problem is that judges have limited control over the particular facilities to which offenders are sent, so they have limited control over the suffering and deprivations offenders will experience.

Judges can recommend prison facilities, but the prison bureaucrats who actually assign offenders to facilities are not obliged to follow those recommendations.<sup>109</sup> So even though we can adjust sentence duration continuously, judges have limited ability to craft sentences smoothly related to inputs because they cannot always determine where prisoners will serve their sentences. Hence, punishment is bumpier than we could otherwise imagine it to be.

We could reduce the rounding error caused by variation in facilities by giving judges greater authority to select facilities or the punitiveness of restrictions therein. We could also let judges alter an offender's sentence after the fact if the judge's recommendation of a particular facility is unheeded.

The way we credit time served in pretrial detention represents another bumpy punishment policy. In most cases, for every day detained, detainees receive one day of credit against any sentence they subsequently receive if convicted.<sup>110</sup> There is, thus, a smooth relationship between time served in detention and the amount of time that gets credited upon conviction. But when an offender is not detained in a traditional detention facility, many jurisdictions do not give credit, as when an offender is confined in a community treatment center.<sup>111</sup> Whether punishment is about giving just deserts or promoting good consequences, confinement in a community treatment center is still something of a deterrent and something of a punishment-like harm. The same is true of detention in home confinement for which courts generally give no credit upon conviction.<sup>112</sup>

The debate over whether to give credit for intermediate pretrial restrictions seems hard to resolve because we group forms of pretrial restriction into those that receive full credit and those that receive none at all. Were we to give partial credit for confinement in a community treatment center or in home confinement, we could avoid the bumpy

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109. See, e.g., 18 U.S.C. § 3621(b) (2012) (“The Bureau of Prisons shall designate the place of the prisoner’s imprisonment.”).

110. See, e.g., 18 U.S.C. § 3585(b); 730 ILL. COMP. STAT. ANN. 5/5-4.5-100 (West 2015); LA. CODE CRIM. PROC. ANN. art. 880 (2008 & Supp. 2016).

111. See Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1157 (2013).

112. *Id.*

relationship between the amount of pretrial punishment-like harm we inflict and the amount of credit we give for time served.<sup>113</sup>

### *E. Plea Bargaining*

Even if sharp lines are drawn at criminal trials, we might expect plea bargaining to skirt around the bumps of the letter of the law. And, indeed, plea bargaining does create a particular kind of smoothness. It smooths the relationship between confidence in guilt and severity of punishment. A defendant facing a 50% chance of conviction with a mandatory thirty-year sentence and a 50% chance of acquittal may bargain down to fifteen years' incarceration. More uncertainty smoothly translates into less punishment.

There are good reasons, however, to think that plea bargaining generally does *not* smooth the substance of the law. Consider again a sentencing enhancement that applies to those who sell drugs within 1,000 feet of a school. We noted that if a judge applies the enhancement at sentencing, it will be quite bumpy. Do we expect a different result at plea bargaining?

*In the absence of uncertainty* about how far a drug seller was from a school, there is little reason to expect plea bargaining to smooth the enhancement. If the offender can conclusively prove that he was 1,005 feet from a school, he has no incentive to agree to an enhancement that modestly increases his punishment for being a bit near a school. Alternatively, if the state can conclusively prove that he was 995 feet from a school, then it has no incentive (if it bargains in the shadow of trial) to agree to a plea bargain that eases the bite of the enhancement since it knows it can get the enhancement at trial. Therefore, absent epistemic doubts, if plea bargains are crafted in the shadow of the law,<sup>114</sup> they will generally lead only to a discount for accepting responsibility and for saving the state trial costs. Two offenders with nearly the same culpability may receive radically different punishments after plea bargaining.

Prosecutors and defense attorneys certainly *could* try to assess defendants' actions and mental states along various spectra and then seek to punish accordingly. But while plea bargains *could* follow such a path, they are unlikely to do so. For one thing, prosecutors can only reach bargains that comport with available charges, statutory maxima and minima, and other sentencing requirements, so they cannot always just bargain to a

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113. *Id.* at 1157–58.

114. See Bibas, *supra* note 80, at 2466 (stating that most “scholars view the shadow of trial as the overwhelming determinant of plea bargaining”). Bibas argues that a variety of biases and other inefficiencies make plea bargains deviate from the shadow model. These deviations “add[] . . . distortions that warp” rather than ameliorate “the fair allocation of punishment.” *Id.* at 2467–69.

precise sentence. More importantly, to the extent plea bargains are crafted in the shadow of the law, they essentially re-create the bumpy outcomes expected at trial (with punishments discounted to reflect uncertainty, acceptance of responsibility, and averted trial costs).

Hence, the ability of plea bargaining to smooth the substance of the criminal law is quite limited. It may *seem* like plea bargaining reduces disparities in our treatment of similarly culpable offenders, but the apparent reduction may largely be attributable to discounting for uncertainty about guilt. Plea bargaining probably does smooth the substance of criminal law to the extent prosecutors and defense attorneys make a deliberate effort to negotiate—not in the shadow of our bumpy laws—but in the shadow of the smoothness of the natural world. Such negotiations presumably occur sometimes, though defendants have little recourse when they do not.

#### *F. Challenges to Smoothing Criminal Law*

Imagine a law that makes it a crime to “engage in any criminally culpable act” and provides for “punishment in proportion to culpability.” Such a law would smoothly fit a simple, stripped-down retributivist theory. But it would not satisfy the obligation to give people adequate notice of conduct that subjects them to criminal sanctions. It would also give judges too much discretion to decide which behaviors are prohibited and could lead to very different treatment of similarly situated defendants. Whenever we move from theory to practice, we face cost and administrative challenges that must be considered.

Let me discuss in more detail four noteworthy disadvantages of smoothing the law. First, smooth laws will often be more expensive to adjudicate. It is generally cheaper to decide whether or not people have crossed a legal line than to determine where exactly on that line their conduct falls. These costs should not be overstated, however, as they must be weighed against the costs of sentencing people inappropriately. Moreover, many retributivists disapprove of sentencing arrangements that knowingly or recklessly overpunish, even if doing so saves time and money.<sup>115</sup>

Second, it is sometimes impractical to perfectly smooth the law. Even though we can usually spread punishment severity along a spectrum, we are likely to encounter some modest discontinuities. It would take real work to perfectly smooth the transition from non-incarcerative sentences to incarcerative sentences. The difference in severity between spending zero nights in prison and one night in prison is much more substantial than the difference between spending 999 nights and 1,000 nights. For one thing,

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115. See *supra* note 100.

the psychological distress of the first night in prison is likely more severe than that of the thousandth night.<sup>116</sup> For another, some collateral consequences of incarceration (such as difficulty finding employment) are quite significant<sup>117</sup> and are not well-proportioned to sentence duration.

Similarly, we would not punish a person for engaging in trivially culpable behavior. We don't want the state to meddle in our affairs so much that any kind of immorality receives criminal punishment. A person's conduct must exceed some minimal level of culpability at which punishment becomes worthwhile. Modest betrayals of friendship, for example, are unlikely to warrant state oversight (including the costs of processing a person in order to spend, say, ten minutes incarcerated).

Third, non-discretionary structural features of sentencing like automatic enhancements, sentencing guidelines, and statutory maxima and minima arguably provide better advance notice of penalties. For example, suppose a smooth system of laws punishes some offense with zero to twenty years in prison as determined by a judge. And suppose a bumpy system of laws punishes the same offense but limits judicial discretion with a five-year minimum and fifteen-year maximum sentence. Even if the average punishment under both systems is the same, the bumpy system may provide better notice by reducing variance in sentence length.

It is hardly clear, though, that reducing variance is such an important goal. If the smooth system leads to more accurate punishment, then perhaps it provides overall better information to guide action than the bumpy system. But maybe there are cases where non-discretionary features of sentencing helpfully provide clearer notice.

Finally, some bumpy features of sentencing reduce judicial discretion and may promote sentencing uniformity by reducing racial and other biases. Sometimes, these bumpy aspects of sentencing may actually promote *more* accurate sentences. The whole purpose of smoothing the criminal law is not to achieve some aesthetic design principle; the purpose is to reduce errors in the law relative to our best theories. So we may want to give up some smoothness if doing so leads to allocations of discretion which in turn lead to more accurate sentences.

Unfortunately, theorists offer little guidance as to precisely how we should allocate discretion to maximize sentence accuracy. Few have even attempted to explain how to weigh the pertinent trade-offs. We would need a rather complete theory of criminal justice to do so, along with lots of empirical and experimental work. But we need not wait for such a full

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116. See John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1047 (2009); Kolber, *Subjective Experience*, *supra* note 105, at 225.

117. See Bronsteen et al., *supra* note 116, at 1051.

theory to recognize the value of smoothing the law in many of the examples I give. For example, giving a day of incarcerative credit for every ten days spent in pretrial home detention would likely better reflect the deterrent, incapacitative, and retributive value of home confinement than a system that gives no credit at all. Doing so would add little, if any, adjudicative cost, have no detrimental effect on notice, and allocate little, if any, discretion. (Allowing judges to determine the pertinent ratio might make outcomes more accurate still.)

Importantly, however, we must always keep in mind our best theory of punishment. Armed with such a vision and, eventually, a better understanding of real-world trade-offs between accuracy and uniformity, we can make informed decisions about how much bumpiness we should tolerate to control adjudication costs, provide advance notice of penalties, and properly allocate discretion across the criminal justice system.

### *G. Summary of Steps to Smooth the Law*

Just because we cannot and ought not perfectly smooth the criminal law does not mean that the law is as smooth as it should be. Indeed, were we to rethink the criminal law from the ground up, a smoother criminal law might look very different than the law we have today.<sup>118</sup> Here are some steps that might smooth the criminal justice system without requiring a radical overhaul.

First, new offenses can smooth some bumps in the law. Where prosecutors have to round to the nearest offense, new offenses may more accurately capture a defendant's culpability. Thoughtful sentencing guidelines and statutory maxima and minima can do the same. Second, if a defendant's conduct falls short of an established defense but still demonstrates reduced culpability (or dangerousness), then such facts should be taken into account at sentencing. Third, judges should be allowed to give partial credit for time served pretrial in facilities less severe than jail and should have greater influence over prisoner facility assignments to enable them to more smoothly and accurately assign punishments. Fourth, *if* indeed we ought to smooth uncertainty in the criminal justice system, then we could modify burdens of proof or other aspects of trial practice to make it so. Similarly, appellate courts could modify the all-or-nothing nature of harmless error analysis. Finally, though I haven't said much about criminal procedure, we can likely make it less all-or-nothing in the context of, for example, the Fourth Amendment exclusionary rule and the use of

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118. See ALEXANDER & FERZAN, *supra* note 20, at 263–324 (advocating an approach to criminal justice that more smoothly connects culpability and punishment severity).



dismissal to remedy extreme prosecutorial misconduct.<sup>119</sup> Even filing deadlines and statutes of limitations can be smoothed.<sup>120</sup>

In some areas of the law, concerns about cost and administrability require us to tolerate bumpiness. We should, however, be particularly skeptical of bumpy criminal laws. Both retributivists and consequentialists recognize the harms of inaccurate punishments. Most retributivists claim that it is always impermissible to knowingly or recklessly overpunish a particular person. Such retributivists must oppose any sort of bumpiness that we know will increase a person's punishment above what it would be under a smoother system. Similarly, consequentialists should condemn punishments above what they should be as wasting resources and punishments below what they should be as wasting opportunities to more effectively prevent crime.

### CONCLUSION

In hard-copy dictionaries, guide words list the first and last entries on a page to help fine-tune the search for a particular word. The same model arguably describes the ideal relationship between offenses and sentences. Offenses tell us which page to turn to in order to do the more detailed work of picking out a precise sentence.

In reality, however, offenses play an outsized role in sentencing that leads us to ignore morally relevant information. We are forced to round to the nearest available sentencing option, though it may be harsher or more lenient than our best theory advises. Even when the law does not strictly force rounding errors, we must remain vigilant to avoid familiar ways of looking at the law that lead to unnecessary bumps.

There are reasons to think that criminal law has grown smoother over time,<sup>121</sup> but it could surely be smoother still. The shift from contributory to comparative negligence smoothed tort law, and new approaches to smoothing the criminal law are likely waiting to be discovered.

Indeed, once you start thinking about whether legal relationships should be smooth or bumpy, you see smoothing opportunities all over. While smoothing some aspects of criminal law may be too costly, require ill-advised allocations of discretion, or make it difficult to give adequate notice, by consciously attending to the smooth and bumpy features of the law, we can make more informed trade-offs.

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119. For a smoother solution to prosecutorial misconduct, see Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509 (2009).

120. See Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 611–616, 640–48 (2008).

121. See Kolber, *supra* note 1, at 685–87.