



Moral Luck and the Law

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Abstract

Is there a difference in moral blameworthiness between a murderer and an attempted murderer? Should there be a legal difference between them? These questions are particular instances of the question of moral luck and legal luck (respectively). In this paper, I survey and explain the main argumentative moves within the general philosophical discussion of moral luck. I then discuss legal luck, and the different ways in which this discussion may be related to that of moral luck.

Consider the following argument:

- (1) Someone who attempts to commit a murder and fails is – other things being equal – just as morally blameworthy as someone who succeeds in committing a murder.
- (2) Criminal punishment should be proportionate to the moral blameworthiness of the offender for having committed the crime.
- (3) Therefore, attempted murderers and murderers should be equally punished (when all other things are equal).

This argument is pretty much valid (the ‘pretty much’ qualifier will be explained in Section 2.1). Its first premise has nothing to do with the law – it is a claim about comparative moral blameworthiness. But the argument proceeds to draw a normative conclusion about the law. This conclusion does not, of course, follow from the first premise alone. Rather, some premise is needed to bridge the gap between moral blameworthiness and the law. This is the role played in this little argument by its second premise. Is this argument sound?

In what follows, I will not focus on just this argument. Rather, I will comment on several more general phenomena, of which this argument is a particular instance. Thus, the argument’s first premise is a particular instance of a denial of a certain kind of moral luck. So evaluating the argument – and many other, related arguments – will require a discussion of the (non-legal) problem of moral luck. This is the topic of Section 1. But this will not be enough, as we also need to evaluate the argument’s second premise, and its natural generalizations. In other words, we need to discuss the relations between moral blameworthiness and related phenomena on one side, and the appropriate legal response on the other. This is the topic of Section 2.

1. The Moral Luck Debate

Can it ever be the case that the extent to which we are morally blameworthy or praiseworthy for something depends on factors that are beyond our control, on factors that may be thought of as a matter of luck? This question is best approached comparatively. Imagine, then, two agents, and assume that they are alike in all relevant matters that are

under their (respective) control. Is it still possible that the moral status of one of them – in terms of responsibility, blame- and praiseworthiness, and the like – differs from that of the other? If you answer ‘Yes’, you believe in moral luck. (Full disclosure: I answer ‘No’.)

1.1. THE CLASHING INTUITIONS

The explicit discussion of moral luck – launched in its current form and terminology by papers by Williams (Moral Luck) and Nagel (Moral Luck) in the 1970s – is conducted in the shade of two contrasting families of intuitive judgments, judgments which are – in the circumstances relevant for moral luck – mutually inconsistent.

On the one side, there is the control condition for moral responsibility (and the like), according to which – somewhat roughly – we are not morally responsible for what is not under our control. If so, it seems, we are morally responsible for something at most to the extent that that thing is or was under our control.

Crucially – and a point both Nagel (59) and Williams (‘Moral Luck’ 36) emphasize – something like the control condition is part and parcel of our commonsensical way of thinking about morality. It is not a highly theoretical principle cooked up by philosophers with an axe to grind. Rather, it is built into our everyday practices of holding one another responsible. If, for instance, I blame you for something (Why on earth did you hit me?), and you proceed to show that it was not under your control (You don’t understand, Badguy pushed my arm strongly in your direction.), I proceed to withdraw my blame. Why would I do that, if I am not tacitly committed to something like the control condition? (This ‘something like’ qualification may be important, as is the precise way of putting the control condition. I return to these shortly.)

So, it seems like there is a strong initial case for the denial of moral luck. But when we consider intuitive judgments of responsibility in specific cases, we find very different results. In thinking about these cases, it is convenient to use Nagel’s (60) taxonomy into consequential moral luck, circumstantial moral luck, and constitutive moral luck.¹

Cases of consequential moral luck are cases where one’s moral status is determined to an extent by the outcomes of what one does. We already have one example of this sort: If you think that the successful murderer is more morally blameworthy or responsible than the attempted murderer even when all other things are equal, you believe that this is a case of consequential moral luck. Other examples are easy to come by: If there is a difference in the moral status between a negligent driver who kills a pedestrian and an equally negligent driver who does not (when all other things are equal), or if there is such a difference between a *non*-negligent driver who kills and one who does not (when all other things are equal), or if there is a difference in moral praiseworthiness between a fire-fighter who rescues a person from a burning building and one who – in the same circumstances, showing the same degree of skill and courage – drops the person to his death (Nagel 58) (rescuing people from burning building is, I guess, a percentage game, like almost everything else): If there is a difference in any of these pairs of cases, then there is consequential moral luck.

Circumstantial moral luck is luck in the morally relevant circumstances one finds oneself in, or in the moral tests and opportunities one faces. Suppose there are two judges, both of them dispositionally corrupt (Thomson 207); both, in other words, are happy and disposed to take a bribe if an offer comes their way in the right circumstances. One of them is offered a bribe at some point in time, and so her dispositional corruptness manifests itself in actual corruptness. The other is never offered a bribe, and so – although

she would have taken a bribe had a suitable offer come her way – she never actually takes a bribe. And assume further that the difference between the two judges – whether someone offers them a bribe – lies entirely beyond their control, and that there is no other difference between them. Are the two judges – the actually and the hypothetically corrupt – morally on a par? If you think that the former is more responsible or blameworthy than the latter, you believe that this is a case of circumstantial moral luck. And here too, other examples are easy to come by, both on the blameworthiness side, and on the praiseworthiness side (consider, for instance, two dispositional heroes, when because of circumstances that are beyond their control only one of them gets to manifest his heroic dispositions in action and become – in a sense – a real hero).

Constitutive moral luck is luck in the character traits and dispositions one finds oneself with when arriving at the morally relevant scene. Suppose, then, two persons, the first naturally empathetic and the second not so much. And assume further – as surely seems possible – that this difference between them is due to factors like genetics and early childhood education over which neither of them has or indeed has ever had any control (so it is not as if the empathetic one worked hard on his personal skills to become more virtuous). We tend to judge people – indeed, to praise or blame them – for their morally relevant character traits. If this tendency of ours is justified, then this is a case of constitutive moral luck. Furthermore, it seems reasonable to suppose that our character traits are causally relevant to the actions we perform.² If all other things are equal, for instance, we would (descriptively) expect our empathetic friend to give more to charity than his less empathetic counterpart. And then, won't we praise the former, and perhaps even blame the latter? Here too there is (perhaps indirect) constitutive moral luck (Enoch and Mar-mor 426; Nelkin).

The combined force of such intuitive examples of consequential, circumstantial, and constitutive moral luck seems quite strong. But in all these cases, something like the control condition seems to entail that there can be no moral luck, of whatever kind. Should we revise all these apparently intuitive judgments? Are they all erroneous? Or should we reject the control condition on moral responsibility, at least in the versions in which it seems to entail that such a major revision is called for?

1.2. SOME ARGUMENTATIVE MOVES

Clashing intuitions are often the sign of an interesting philosophical problem. But we try not to settle for stating the clashing intuitions. We try, rather, to come up with arguments that give reason to go one way or the other on the relevant matter. Although the philosophical debate on moral luck is not new, and is quite heated,³ the number and force of *arguments* on either side remains, in my opinion, disappointing (I return to this point in the Section 1.3). Nevertheless, there are some argumentative moves that are worth mentioning here, even if very briefly.

1.2.1. There is moral luck

As already stated, the friends of moral luck typically rely – partly, at least – on the purported intuitive force of some or all of the examples mentioned before. But some of them also have more to offer by way of argument.⁴

A line of thought made famous by Williams ('Moral Luck', starting on 42) focuses on the common and appropriate responses of agents to their own actions and their consequences. Williams focuses attention on 'agent regret' – the special kind of emotion that is available, for instance, to a driver who has killed a pedestrian but not to spectators (who

may be equally sorry for the loss of a life), even in cases where the driver knows the accident did not result from any fault of his. Williams' focus on agent regret seems to amplify the intuitive force of the examples (of consequential moral luck) of the sort already described. It is doubtful, however, whether it can do more work here.⁵

Some such argumentative moves are designed to break the spell of the control condition. One way of doing that is by trying to offer a *reductio* of it. This can perhaps be done by noting how extreme – and extremely implausible – the consequences would be of pursuing this principle consistently. Thus, the examples of purported cases of moral luck divided into the three categories above are often presented not just as three kinds of moral luck, but also as a kind of progression, where the intuitive pressure to acknowledge the existence of moral luck increases as we proceed from consequential to circumstantial and then to constitutive moral luck. Furthermore, it seems we can proceed even further down this dangerous road, and approach the hazardous area of the free will debate. If we uncompromisingly adhere to the control condition, we may find ourselves shrinking the area of moral responsibility to 'an extensionless point' (Nagel 66). If you find this result unacceptable, you may think of the progression described as a *reductio* of the control condition. Of course, one may want to adhere to the control condition up to a point on this progression, and not beyond it. But unless one can offer a rationale for so restricting the control condition, such restriction would be objectionably *ad hoc* (Nelkin; Katz 798). It remains an open question whether a rationale for such restriction can be found.

Another way to go here would be to distinguish different versions of the control condition, showing that some are in fact compatible with (some kinds of) moral luck, and rejecting only those versions that are not. Consider the example of the successful murderer again. If he says something like 'Well, the murder was not really under my control.', referring to the similarity between him and his failing counterpart, this would sound at the very least odd. It is not, after all, as if the murder was out of his hands – he could have easily avoided it. So, if we understand the control condition as just the claim that people are not morally responsible for what is not under their control, then it is not clear that it entails the denial of moral luck. Perhaps this version of the control condition is one the friends of moral luck need not reject. What they need to reject is just a comparative version of the control condition (there can be no difference in moral responsibility between two agents without a difference in what is under their control (Zimmerman, 'Taking Luck Seriously', 559)), or perhaps a gradual one (one is responsible for something only to the extent that that thing is under one's control (Nelkin)). And those believing in moral luck may want to argue that these stronger versions of the control condition are not as intuitively compelling as the weaker version (that, as we saw, may very well be consistent with the existence of moral luck). It is not clear how plausible such a claim is.

A related line of thought here is that what underlies the control condition on moral responsibility is a simple-minded conception of human agency. The thought is sometimes expressed that a clearer understanding of what agency is⁶ or perhaps of why it is that agency is important (if indeed it is) (Williams, 'Moral Luck') undermines the appeal of the control condition, and perhaps even suffices all by itself to positively ground a commitment to moral luck. The plausibility of such moves entirely depends, of course, on their details. And sufficient details are hardly ever supplied.

Another argument – due to Margaret Urban Walker – asks us to imagine a world with no moral luck, and compare it with a world with moral luck. If the former seems like a better world – as Walker argues, partly because it can accommodate certain intimate relationships that the latter cannot accommodate – this is taken as some reason to believe that there is moral luck. But such reasoning is problematic at least for the following three

reasons: It seems to employ the inference scheme ‘Wouldn’t It Be Nice If p , therefore, p .’ (where p stands for ‘There is no moral luck.’); if this is indeed the form of the argument, this is reason to be highly suspicious of it (although see Enoch, ‘Wouldn’t It Be Nice If p , Therefore, p ’). Second, given some plausible assumptions about the modal status of basic moral truths – namely, that they are rather robustly necessary – it is not clear that the thought experiment is coherent, for it asks us to imagine a situation in which the moral truths are different than they are, and such a situation is arguably impossible. Third, one can argue with Walker about the details of her thought experiment. It is not clear, for instance, that a world with no moral luck cannot accommodate the relationships Walker focuses on.

1.2.2. There is no moral luck

Typically, those who deny the existence (and indeed possibility) of moral luck rely – by way of positive support – directly on their favorite version of the control condition on moral responsibility. What more can be said here?

The denial of moral luck, and indeed the control condition, are often associated with Kant, perhaps because of his emphasis on the absolute (and so consequence-independent) value of the good will. And indeed, this is Nagel’s starting point. But the interpretive issues are complicated here, and it is clear neither what Kant thought about these matters (it is sometimes suggested, for instance, that Kant thought the moral status of our actions is immune to luck when we behave permissibly, but not otherwise), nor whether a good argument can be extracted from what Kant said or should have said about these and related matters.⁷

Some emphasize intuitions about fairness and arbitrariness (for instance, Feinberg 119). It just seems unfair, for instance, to blame the successful murderer more than the attempter. But while fairness considerations are certainly relevant in the context of a discussion of legal punishment (to which we return shortly), it is not clear that they are relevant to questions of blameworthiness. Indeed, because morality is not an agent (and because only on some highly controversial metaethical views is it an artifact), speaking about its norms in terms of fairness may be a category mistake. Perhaps, those emphasizing thoughts about fairness really just put the denial of moral luck in a different, perhaps especially intuitively powerful, way – they seem to be insisting that blameworthiness attributions must be fair, that is they must not be arbitrary, that is they are not subject to luck. If so, there is here a restatement of the anti-luck intuition, rather than an argument for it. Nevertheless, something closer to an argument-from-fairness may be reconstructed here, a point I return to later on.

Another possible way of motivating the denial of (at least consequential) moral luck may be based on an analogy with *rational* luck more generally. Imagine, then, two basketball coaches who (independently) make a last-second call regarding who gets the last shot. Suppose further that both of them make the same mistake (choosing the shooter who is not the one with the best percentage in such circumstances), but that in one case the shooter makes the shot, and in the other she does not. We know, of course, what *will* happen: One coach will be praised, the other criticized. And we know which team will win, and which will lose. But what *should* we say about the rational status of the coaches’ decision? It seems to me that the two coaches are rationally on a par. If you agree, then you agree that (in this case, at least) there is no rational luck. And assuming that there are some strong connections between morality and rationality, or at least that moral responsibility is analogous to rational responsibility in cases like this one, this is some reason to believe that there is no moral luck (in consequences, at least). This kind of argument is

vulnerable to two kinds of objection: It may be argued that morality is not like rationality in this way; or, it may be argued that there *is* rational luck⁸ (perhaps even in the coaches' example, or perhaps in other cases).

Almost all of the argumentative work done by those denying moral luck is, however, negative in nature: efforts are dedicated to criticizing the arguments of the supporters of moral luck, and – perhaps mainly – to explaining away the intuitions about specific cases that are supposed to manifest moral luck. The more philosophical attempts at debunking explanations typically proceed by drawing distinctions between propositions that are indeed about moral luck, and other, somewhat related ones. Then the former are denied, the latter conceded, and the intuitive appeal of the former is explained (away) by the appeal of the latter, and our natural tendency to conflate the two (Andre 125; Rosebury 509–513).

In this spirit, it is sometimes argued that what is subject to luck is not our agents' moral status directly, but rather *our evidence* regarding their moral status. And consequences are sometimes thought as a reasonably reliable evidence for bad intention, or whole-heartedness, or degree of negligence (Rosebury; Richards; Thomson 205; Rescher 154; Enoch and Marmor 415; Latus). It is then argued that the intuitions seemingly supporting the existence of moral luck are better understood as indicating only this kind of evidential luck. Another distinction the deniers of moral luck often utilize is that between blameworthiness (and the like) on one side, and the justification of blame-related reactions (Zimmerman, 'Luck and Moral Responsibility', 218–9; Jensen; Richards; Enoch and Marmor 412) on the other. Intuitions seemingly supporting the existence of moral luck – about blame- and praiseworthiness – are then explained as intuitions about what should be done about these matters. And of course, because what should be done is determined not just by the blame- and praiseworthiness themselves (but also by other considerations), that the murderer and the attempted murderer should be treated differently (*if* they should) does not entail that they are equally blameworthy, and similarly for other examples. Another distinction that is sometimes used in this context is that between the evaluation of the agent and the evaluation of the action (Thomson). Blameworthiness is thought more closely related to the former, but the moral-luck-intuitions are thought to be more closely related to the latter. Yet another relevant distinction is that between *moral* luck and *plain* luck, even when it has moral implications (Enoch 28; Athanassoulis 6). The deniers of moral luck do not deny, after all, that *some* things are out of our control. They do not even typically deny that how well our lives go is partly determined by matters that are not under our control. Indeed, there is even a sense in which they needn't deny that morality is subject to luck. Which moral obligation one has, for instance, certainly depends on the circumstances one finds oneself in, and these are certainly not completely under our control. And the question is whether, once the deniers of moral luck admit all this luck, the friends of moral luck still feel that something about luck has been left out.

Recently, the project of coming up with debunking explanations for intuitions about luck has taken also a psychological turn, with some writers trying to show that these intuitions are the product of some well-known cognitive biases (Domskey; Royzman and Kumar). It remains to be seen how successful such attempts can be, both in terms internal to such psychological explanations and in terms of their implications for the philosophical debate over moral luck (Statman, 'Doors, Keys and Moral Luck'; Enoch and Guttel).

And of course, the deniers of moral luck can help themselves to a combined strategy – using some or all of these distinctions, perhaps with others, to explain away the intuitions of those believing in moral luck.

1.3. BEDROCK?

On both sides of the debate, then, arguments come up. And yet there is a nagging worry, that there is an upper bound to the strength of such arguments, simply because the moral luck debate is too close to moral bedrock. Often, believers in moral luck will come up with a purported example of moral luck, and will be amazed that some are tempted not to so classify it. Similarly, deniers of moral luck will insist on the control condition, and find it almost unbelievable that some philosophers – even some good philosophers – deny it. On both sides, then, the views on moral luck are thought of as pretty basic, the kind of claim that helps to support other claims, and that needs little support itself (Sverdlik 183). Perhaps, this is why this literature leaves a kind of frustrating feeling (Nelkin, for instance, speaks of a stalemate) – moral luck is a topic everyone *wants* to have something to say about, but one that hardly anyone *does* have something interesting (let alone convincing) to say about.

2. *The Law*

The interesting question about moral luck was whether it does or even can exist. But there can be little doubt that there is *legal* luck. Our legal responsibilities, liabilities, etc., are often determined partly by matters that are not under our control. Whether or not there is a *moral* difference between the murderer and the attempted murderer, there is a *legal* difference between them, as the success of the attempt determines what offense the relevant person is criminally responsible for; whether one's partners in a robbery kill a guard determines whether one is criminally responsible for felony murder, regardless of whether or not one's moral status is influenced in a parallel way; whether a pedestrian jumped in front of one's car when one was driving negligently determines whether and to what extent one is liable in torts, and this regardless of whether or not this also influences one's moral status; all legal appearances of causation requirements – in criminal law and elsewhere – incorporate an element of luck; and so on. So it can not be seriously doubted that there is legal luck. The only remaining interesting question about legal luck is whether there *should* be any legal luck. And in answering this question, one natural way to go would be to try and pursue the implications of the moral luck debate to the one about legal luck. But it is not completely clear how such implications are supposed to follow from the moral luck debate. Furthermore, legal examples are often used even in the *moral* luck debate. So it seems that some think there are interesting implications going in the opposite direction, from the discussion of the law to the more abstract discussion of moral luck. And, of course, there is in logical space room for the claim that law is autonomous in this regard, that the discussion of legal luck should be conducted on its own terms, without any straightforward implications from the moral case.

2.1. FROM MORAL LUCK TO LEGAL LUCK

As I emphasized already in the opening paragraph, there is no immediate entailment from any conclusion in the moral luck debate to a conclusion about the law. Even if, for instance, the murderer and the attempted murderer are equally morally blameworthy, it just does not follow from this alone that they should be equally punished: Perhaps some other, not blameworthy-related considerations differentiate between them in a way that makes differential punishment morally justified. Nor does it follow from the murderer being more to blame than the attempted murderer that he should be punished more

severely, for again other considerations may be relevant. What is needed, rather, is some further premise, a moral principle that governs the relevant part of the law and that bridges the gap between the abstract moral claim and the one about what the law should be like.

In the argument with which I started, the proportionality principle regarding criminal punishment does this job. And indeed, if the only moral consideration that applies to criminal punishment is that of proportionality to moral blameworthiness, and if there is no difference in blameworthiness between the murderer and the attempted murderer, then it does follow that the two should be equally punished. But notice how strong a version of the proportionality principle is needed for this argument to go through – what is needed is that the *only* normative consideration regulating criminal punishment be that of proportionality to blameworthiness. If we should only endorse a weaker version of the proportionality principle – for instance, thinking that proportionality places at most an upper bound on the appropriate punishment, and allowing other considerations (like deterrence) to determine the appropriate punishment up to this upper bound, or even that proportionality is one consideration among many relevant here, with no one of them enjoying any kind of priority – then the inference is blocked. And, of course, if the true version of the proportionality requirement ties appropriate punishment not to moral blameworthiness but rather to the severity of the wrong committed (more objectively understood), then the denial of moral luck is consistent with a different punishment for full offenses and (complete) attempts.

Thus, a differential punishment for attempts and full offenses may be justified in one of two ways – either by insisting that there is moral luck and so that the two are not equally morally blameworthy, or by pointing to *other* considerations that normatively regulate criminal punishment and that distinguish between the two cases (thereby violating the strictest version of the proportionality principle). But it remains very much an open question *whether* – even if we are willing to sacrifice the strictest version of the proportionality principle (as many of us are) – any other considerations justify such differential treatment. Considerations of deterrence do not seem to point to a clear answer here (Shavell). And it is not clear that any other considerations do better (Kessler; Feinberg). Perhaps the most interesting suggestions of other considerations that could possibly justify a differential treatment of attempts and complete offenses are *indirect* deterrence considerations, suggesting that such a punishment gap better incentivizes potential *victims* not to overinvest in socially ineffective precautions (Ben-Shahar and Harel), and the suggestion that such a gap is a form of an efficient and morally defensible punishment lottery (Lewis; here see also Davis; Duff).

Questions about the differential legal treatment of attempts and complete offenses are central to the debate over legal luck. Indeed, Feinberg writes that these are questions ‘every bona fide philosopher of law tries his hand at least once at’ (117). But we should not assume that these are the *only* relevant questions of legal luck. Indeed, in our context it is clear that they form a very specific particular instance of the phenomenon. First, the luck relevant here is only consequential luck. And second, the law relevant here is only the criminal law. And third, even within the criminal law, and restricting our attention to just consequential luck, many more legal issues come up. Offenses of strict liability are, of course, clear examples of criminal consequential legal luck.⁹ This is also true of many recklessness and negligence offenses, where an actual harm and causation are required for an offense to have occurred.

What can we say about other kinds of luck in the criminal law? Clearly, the criminal law punishes us (paraphrasing Nagel 34) for what we do or fail to do, not for what we

would have done had circumstances been different. The criminal law feels no inconvenience in punishing the judge who took a bribe and not the judge who would have taken a bribe given the opportunity, but in fact did not. Clearly, then, there is circumstantial legal luck. Indeed, it seems that in this case (perhaps unlike the case of consequential criminal luck) the law as well as legal commentators do not even display any moral inconvenience about this kind of luck. So when people say things like 'Fortune may make us healthy, wealthy, or wise, but it ought not to determine whether we go to prison.' (Parker, 273), we should not take this too literally. For some reason – or perhaps for no reason at all – they view consequential legal luck as problematic, but circumstantial legal luck as unproblematic. This may be because people tend to assume more casually that there is circumstantial *moral* luck. Or perhaps this is because of some other considerations that apply to the criminal law (evidential ones loom large here). Still, we should not exaggerate even law's obliviousness to the problem of circumstantial luck. For it seems likely that acknowledging this and related problems finds its place in the sentencing stage. Courts' tendency to take into account – to an extent, at least – the circumstances of the convicted's life seems to incorporate at least a partial acknowledgment of a 'There but for the grace of God go I' intuition, arguably a rough understanding of the arbitrariness of circumstantial – and perhaps also of constitutive – luck.

How about legal luck in other legal domains? The obvious place to look for legal luck – after criminal law – is tort law. Because of the similarities between criminal and tort law, the issues (and the examples) are exactly parallel. But that they are parallel does not mean they are the same issues. Remember that the denial of moral luck itself does not entail any conclusion about the law. What was needed is a bridging principle, of the kind exemplified by the second premise of the argument in the opening paragraph. And here, of course, tort law may be very different from criminal law. Tort law, after all, is primarily – even if not completely – about money, and indeed often about insurance more than about more private money (Baker). So perhaps violating proportionality is much less problematic in tort law than in criminal law (Perry). Perhaps this is why there is much less writing on legal luck in torts (although see Honore; Waldron; Coleman and Ripstein; Schroeder; Zipursky), and indeed some take it for granted that there is nothing problematic in legal luck in torts, and use this observation – together with an emphasis on the differences between tort law and criminal law – as a part of a debunking explanation of claims in favor of criminal legal luck (Feinberg 123; Kessler 2223).

There is hardly any discussion in the literature of which I am aware of legal luck outside criminal and tort law. But I am not sure there is good reason for this neglect. Indeed, if we want a unified account of moral luck – one that either accepts all kinds of moral luck, or rejects all of them, or distinguishes between those it denies and those it accepts in some principled, motivated way – it seems to me that we should look for a similarly unified account of legal luck as well. Here, I think, there is room for much more work (although see Enoch, 'Luck between Morality, Law, and Justice').

Suppose that we come to the conclusion that legal luck – or perhaps just some kinds of it – is morally objectionable. What should we do? One way to go, of course, would be to try and reform our legal practices so as better to conform to the relevant moral requirements (Feinberg; Schulhofer; Shachar; Kessler; Kadish; Sverdlik; Zimmerman, 'Taking Luck Seriously', 576). And to an extent, we have been seeing such reform: Over the past few decades, more and more common law jurisdictions have been reducing – often eliminating – the difference in punishment between attempts and complete offenses (Shachar 13–4). Other reforms are also possible: abolishing causation from the criminal law, and perhaps from law in general; replacing offenses such as murder and attempted

murder with something like ‘intentionally endangering a life’; abolishing tort law as we know it and moving to a ‘pool’ model, perhaps like the one usually attributed to New Zealand; and so on. But the call for reform doesn’t immediately follow from the (purported) moral problems with legal luck. For reform too may have its moral prices. If these are too high, the moral problems of legal luck – if they exist – may be ones we have to learn to live with. This would not undermine the theoretical conclusion, according to which it would be better to have a system with no (or less) legal luck (Lewis 229; Kadish 680–1).

2.2. FROM LEGAL LUCK TO MORAL LUCK

Often, inferences are a two-way street. If interesting conclusions about the law follow from the moral luck debate (together with auxiliary premises like the proportionality principle), perhaps we can also start with premises about the law and come to interesting conclusions within the moral luck debate? Indeed, one can find such moves in the literature on moral luck (Nagel, ‘Moral Luck’, 61; Statman, ‘Introduction’ 14). But one can also find warnings against being too uncritical of such moves (Williams, ‘Moral Luck’, 54 (footnote 2); Nelkin). There are, after all, other moral considerations that presumably apply to the law (criminal or otherwise), and so conclusions about moral luck do not just follow from premises about the moral desirability of legal luck. They certainly do not follow from *descriptive* premises about what the legal arrangement (in a certain jurisdiction) are – such legal arrangements may, after all, be morally indefensible.

Still, I think that there are at least two *prima facie* respectable ways of using the discussion of legal luck to enrich the discussion of moral luck. The first is a kind of inference to the best explanation. For it may be argued that what best explains, say, the prevalence of certain lucky legal arrangements is that there is – or at least, that we are all implicitly committed to there being – moral luck. Thus, observations about the law can help us to see more clearly what we think about moral luck. If, for instance, we find almost a universal acceptance of tort law with its intrinsic luck, and indeed if we find in ourselves an intuitive objection to abolishing this kind of tort law, perhaps all of this is best explained by there being a relevant kind of moral luck.¹⁰ Of course, inferences to the best explanations have their adequacy constraints – for one thing, it must be shown that the thought about moral luck not only explains the relevant phenomena, but also *best* explains it. But this is at least one way in which the discussion of legal luck may have interesting implications to that of moral luck.

Second, thinking about the law may be the beginning of interesting analogies, and those may in turn enrich the discussion of moral luck. Consider the thought according to which there is something unfair about moral luck. As I explained above, there is a suspicion that this way of putting things involves either a vacuity or category mistake (similar to asking about the discipline of mathematics whether it is a theorem). But a better way of making this point, I think, is as follows: A *legal* system which would incorporate (too much) legal luck would be unfair. And perhaps we have reason to believe that morality, if it is analogous in this way to any legal system, is analogous to a fair one. This may give us reason to believe that there is no moral luck.

2.3. THE AUTONOMY OF LAW

Some people think that law is, in a sense, autonomous, that it is already a mistake to think of the law as serving some purpose external to law and its nature. Law has, as it

were, a normative logic internal to its political essence as law, and is in this way isolated – to an extent, at least – from general moral considerations.

There is not much I can say about this way of thinking about the law – personally, I find it very hard to understand, and the parts I do understand I find highly implausible. But I want to note in our context that someone who accepts such a view of the law in general would think that the discussion of the past two subsections is all completely wrong-headed. A discussion of legal luck, on this view, must be conducted in terms of the internal normative logic of the law. And it is not clear what the relations are between such a discussion and that of moral luck.¹¹

Short Biography

David Enoch is Associate Professor of Philosophy and Jacob I. Berman, Associate Professor of Law at the Hebrew University of Jerusalem. He holds a BA in law and philosophy from Tel Aviv University, and a PhD in philosophy from NYU (2003). He works primarily in moral, political, and legal philosophy. His papers appeared in such journals as *Philosophical Review*, *Ethics*, *Nous*, *Philosophy and Phenomenological Research*, *Journal of Philosophy*, *Philosophical Studies*, *Legal Theory*, *Law and Philosophy*, *Theoretical Inquiries in Law*, and *The Oxford Journal of Legal Studies*.

Notes

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¹ I will ignore his fourth category – luck in how one's will is caused – because I do my best not to deteriorate to a discussion of free will.

² There are some empirically-motivated doubts about such claims in the recent philosophical literature, mostly on virtue theory. But, we can safely ignore this here. If the more extreme versions of this critique are correct, then there are no character traits at all. If so, the question of constitutive moral luck does not even arise (although officially what follows is that there is no constitutive moral luck, and all apparent cases of constitutive moral luck are thus reduced to cases of circumstantial moral luck).

³ Feinberg, for instance, characterizes the arguments he criticizes as bad arguments already in his title. Gardner (77) calls the problem of moral luck a pseudo-problem. Domskey has quite a number of barely printable terms for those believing in moral luck. And when reading Williams, one gets the feeling that he thinks of the deniers of moral luck as naïve, highly unsophisticated, philosophically challenged individuals who – instead of noticing obvious phenomena and thinking about them – have read too much Kant.

⁴ In this section, I to a large extent follow Nelkin.

⁵ Because nobody knows what exactly Williams' Gauguin example ('Moral Luck', starting on 37) is supposed to show, I do not discuss it in the text. It seems clear that Williams thinks that as a result of the kind of change in the self that is brought about by the success of some life projects, the person whose life it is cannot coherently regret them, and that this impossibility somehow entails a retroactive justification of the decision to embark on that self-changing project. But as Williams himself later conceded ('Postscript' 254), there is nothing here about *moral* luck specifically, and furthermore both assumptions of this sketched argument are highly problematic (I don't think that in such self-changing cases regret is impossible, nor do I think that the impossibility of regret is so closely related to justification). Furthermore, even if this argument succeeds, the scope of its conclusion is constrained to just self-changing decisions – a negligible minority among all our morally significant decisions. So it is hard to see this as an argument for moral luck. This does not mean, of course, that it is of no interest here. If Williams' argument succeeds, perhaps it shows that at least some times, at least one important kind of justification is retroactive in this way. This is already a significant result. For one sustained attempt to reconstruct Williams' argument, see Dan-Cohen.

⁶ I think, but am not sure, that this line of thought is to be found in Ripstein. See also Honore for the claim that outcome-responsibility is an essential part of agency.

⁷ See, for instance, Moore. For a sustained although highly critical attempt at understanding Kant here, see Gardner. But note that Gardner (mis)understands the issue of moral luck as one about the possibility of moral obligations to succeed that are not entailed by an obligation to try. The relations between this (interesting) topic and that of

moral luck (whether blame- and praiseworthiness supervenes on control) are anything but obvious. For some discussions of these relations, see Zimmerman, 'Moral Luck: A Partial Map'.

⁸ This is how Williams' Gaughin may be relevant. If his argument works, it may be thought of as showing that rational luck is at least possible. For a related point about theoretical rationality, see Sorensen.

⁹ For an interesting and surprising comparative discussion of the luck involved in negligence and in strict liability, see Keating.

¹⁰ For an attempt to draw conclusions about moral luck from the implausibility of 'prepunishment' – punishment before the crime – see Statman, 'The Time to Punish and the Problem of Moral Luck'.

¹¹ For one discussion in this spirit, see Ripstein. For what may be another, see Fletcher 382–3.

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