

Moral Luck and the Criminal Law

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The problem of moral luck springs from a discrepancy between our notion of responsibility and the actual manner in which we make moral judgments. We tend to think people are only responsible for what they can control, but we are also inclined to judge them on the basis of what they cannot. The problem was introduced by two seminal articles written by Bernard Williams and Thomas Nagel¹, and has generated a good deal of interest since. Scholars concerned with the criminal law have found it especially rich. Most lawyers have focused on Nagel's account of moral luck, perhaps because it is more concerned with external judgments of an agent's action (which are the kind of judgments the law makes), while Williams focuses on self-evaluation². As a matter of fact legal scholars have focused especially on one aspect of Nagel's account, namely luck in the outcomes of our actions, or *outcome luck*.

This paper begins with a short example aimed at bringing out some of the questions involved in the notion of 'moral luck'. It then proceeds to give a critical account of the debate concerning the role of fortuity in the moral assessment of criminal actions and in their punishment. I preface the final part of the essay with a cautionary note about taking sides in this debate. The problem of moral luck represents a paradox in the heart of our moral practices; it needs to be described rather than 'solved', since

¹ T. Nagel, Moral Luck, reprinted in Moral Luck, (Daniel Statman ed., State University of New York Press, 1993) p. 57 and B. Williams, Moral Luck, reprinted in the same volume, p. 35.

² See Williams p. 36 "the agent's reflective assessment of his own actions... it is this area I want to consider". See also Daniel Statman in his Introduction to Moral Luck, *supra* note 1, p. 5.

paradoxes cannot be argued away. I then go on to describe aspects of the relationship between law and luck that have been largely neglected by the literature.

1. What is moral luck?

Max, a bus driver, is taking a group of 30 schoolchildren home after a day trip to the local zoo. He is quite tired, and occasionally doses off at the wheel. After several minutes of monotonous driving he awakens, startled, to find himself in the opposite lane. He sharply jerks the steering wheel to the right, and manages to steer the bus back to safety. He sighs in relief, marking that he should never agree to work more than one driving shift a day, even if he is threatened by his employers with termination. The children reach their homes safely, and excitedly recount their zoo experiences, quite oblivious to how close they were to catastrophe. Max mentions the incident to his supervisor and insists on a reduction in his daily workload. The supervisor agrees, although he makes it clear that Max's salary will be diminished accordingly. Two weeks later Max, unable to make ends meet, is back working two shifts a day.

None of us have ever heard of Max or of the company he works for. His story as recounted above is quite uninteresting. It is not the stuff news is made of. But if there had been an oil spill in the exact spot where Max regained his consciousness, or if there had been a car in the opposite lane at that exact time, or if Max had been naturally endowed with weaker instincts, or if a loud song had not come on the radio shaking Max from his slumber, the situation would have been very different. His name and image would be mentioned in every household in the community. He would be subject to criminal and then civil proceedings. Some of the enraged parents would refer to him as a murderer. For Max the difference between obscurity and notoriety boils down to the location of an

oil spill, the velocity of muscular reflexes, the editorial choice of music. None of these are subject to his control. Whether we ever hear of Max or not, whether we condemn him or continue to be oblivious to him is a question of moral luck.

According to Thomas Nagel, the term ‘moral luck’ describes a state of affairs “where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment...”³.

If people can only be held responsible for what they control, judging them on the basis of what they cannot is problematic. Yet we make such judgments all the time.

Whether we treat Max as a negligent killer or not depends, considerably, on factors he could not influence. What he ends up having done is, to an important extent, not up to him. It seems, then, that the phenomenon of moral luck denotes a paradox embedded in our notion of responsibility. As Nagel so succinctly puts it: “A person can be morally responsible only for what he does; but what he does results from a great deal he does not do; therefore he is not morally responsible for what he is and is not responsible for”.⁴

Nagel provides us with four categories for classifying cases of moral luck⁵. The first is ‘*constitutive luck*’. This concerns the kind of person the agent is, and it includes one’s inclinations, capacities and temperament. The speed of Max’s reactions and his physical propensity to dose off under certain conditions would be subsumed under this category. The second category, ‘*circumstantial luck*’, relates to the kinds of situations and problems one’s specific history presents one with, or in Nagel’s words, “the things we are called upon to do, the moral tests we face...”⁶. To use Nagel’s own example, most

³ Nagel, p. 59

⁴ Ibid, p. 66

⁵ Ibid, p. 60

⁶ Ibid, p. 65

Germans complied with the diabolical regime they lived under, and we condemn them for this. But whether or not one lives in a society where he has to face such moral challenges is a question of luck. Correspondingly, whether or not one ends up in a line of work like Max's, where the chances of being involved in a road accident are relatively high is also, to some degree, a matter of circumstantial luck. The last two forms of luck "have to do with the causes and effects of action"⁷. Following Daniel Statman, I will call the third category *causal luck*⁸. This kind of luck concerns the circumstances antecedent to action, which may often determine whether or not the action is actually performed. A loud song comes on the radio and shakes Max from his sleep an instant before it is too late. Yigal Amir decides to assassinate Yitzhak Rabin, but the latter unexpectedly catches a bad cold and stays home on the designated day, thus aborting the plan. Finally, *outcome luck* concerns the way our "actions and projects turn out"⁹. Max does not wake up at the last moment, but miraculously none of the children are hurt in the accident. Yigal Amir shoots at Rabin but misses and manages to get away in the commotion that is created. Subsequently, Max is never treated as a negligent killer; Amir is never regarded as a murderer.

2. The Moral Luck Debate

The problem raised by the notion of moral luck has generated a lively debate among commentators on the criminal law. As I have already indicated, the discussion has, for the most part, focused on Nagel's fourth category, namely outcome luck. Writers have dealt with four kinds of scenarios under this category: creation of risk vs. causation of risk, attempts vs. completed offenses, impossible attempts, and proximate causation.

⁷ Ibid, p. 60

⁸ Statman, p. 11

Corresponding examples of questions arising under these scenarios are: should our evaluation of Max's behavior differ according to whether the accident actually took place? Should our treatment of Yigal Amir differ according to whether he hit or missed his shot? Should our treatment of someone who buys talcum powder, thinking it is a drug, differ from that of someone who actually buys Cocaine? Should our treatment of a fact pattern in which a woman shoots at her husband and misses, only to find that he dies in a car crash while fleeing the scene¹⁰, differ from that of a woman who shoots and hits her husband directly? The first two scenarios have received most of the attention, and I shall focus on them here.

The question underlying the debate concerns the appropriate basis for moral evaluation of action, and, more specifically the appropriate basis for punishment. Should we restrict ourselves to examining an agent's intentions and actions, or should we allow the consequences those actions brought about (or the more subtle questions of whether they could have brought about any consequences, in the case of impossible attempts, and the causal route between actions and consequences in the case of proximate causation) to weigh in? I shall now move on to discuss the main arguments supporting these two alternatives. For the sake of brevity, I will refer to the first view as the subjectivist view and to the second as the objectivist view¹¹.

⁹ Nagel, p.60

¹⁰ See L. Alexander, "Crime and Culpability", Contemporary Legal Issues, Vol. 5:1, 1994 p. 14 for further examples.

¹¹ Other names in the literature for the subjectivist view are: the Kantian position, the standard educated view, and the equivalence theory. Other names for the objectivist view are the anti-Kantian position, the Harm doctrine, and the non-equivalence theory.

2.1. The subjectivist view

The general argument for the subjectivist view is simple enough: only intentions, and the criminal acts they produce, are subject to an agent's control. Therefore they alone constitute the appropriate basis for responsibility and punishing. The practical upshot of this is that attempts, or risk creation become the basis for criminal responsibility.¹² Thus, if Yigal Amir aimed and shot at Rabin with the intention of killing him, he has done everything that is within his power to bring about that result. Whether Rabin is actually hit, or whether he actually dies is immaterial. Similarly, if Max drove in spite of the fact that he was too tired to competently control the bus, he has created a risk. Whether or not an actual accident resulted is, again, irrelevant.¹³

The first argument in support of this view proceeds from the *purposes of punishment*.¹⁴ Punishment is, among other things, a means for deterrence. The occurrence of harm is said to be irrelevant both for specific deterrence and for general deterrence. The aim of specific deterrence is to reduce future danger from the offender at issue. This goal is not served by taking harm into consideration because the amount of harm caused is not a competent indicator of dangerousness. An offender who did not bring about harm might be just as dangerous as one who did, and therefore if punishing may be said to deter from future criminal activity at all, there is no justification for punishing lightly when no or little harm is caused. Insofar as general deterrence is concerned, basing punishment on the acts rather than results is said to decrease the possibility that offenders

¹² G.P. Fletcher, Basic Concepts of Criminal Law (Oxford University Press, New York, 1998), p. 173

¹³ For different versions of this argument see generally S. Kadish, "Forward: The Criminal Law and The Luck of the Draw" in The Journal of Criminal Law & Criminology Vol.84 No.4, 1994; A. Ashworth, "The Problem of Luck" in Action and Value in Criminal Law (S. Shute, J. Gardner, and J. Horder eds. ,New York : Oxford University Press, 1993),107 and L. Alexander "Crime and Culpability" , *supra* note 10.

¹⁴ Kadish pp. 684-688

will engage in creation of risks. This argument is more relevant to negligent creators of risk than it is to those engaged in premeditated criminal activities. As Yoram Shachar puts it: “[The reckless risk creator] may be indifferent to the harm, or wish it would not occur, but finds it expedient to take the risk. ...From the point of view of deterrence... the reckless perpetrator gambles on non-occurrence of the harm and can therefore be effectively persuaded to desist only if a high price is set on the act of gambling itself”.¹⁵ The attempted murderer, on the other hand, assumes that he will bring about the harmful result. It is, therefore, unlikely that basing responsibility on attempts would have any influence on him.

The second argument attempts to establish that we naturally gravitate towards intention-based judgments. Larry Alexander argues, quite compellingly, that there are cases in which we intuitively disregard the identity of the agent causally responsible for the harm, and focus instead on the intentions of all of those involved.¹⁶ Our attitudes towards a member of a firing squad would not change if we knew he had actually fired a blank shell. When our two children break a vase during a play sword fight (an activity we strictly prohibited them from engaging in), we do not mind which of the two actually struck it. What we care about in both these instances is that the agents exhibited the willingness to participate.

This seems a bit too weak to make the point. The argument only proves that at times we do not care about the specific identity of the agent causally linked to the occurrence of harm. It does not establish that we are intuitively indifferent to the question of whether harm was caused or not. It is this indifference that needs to be addressed if

¹⁵ Yoram Shachar, “The Fortuitous Gap in Law and Morality”, Criminal Justice Ethics, Fall 1987, p. 14

¹⁶ Alexander pp. 8-12

Nagel's challenge is to be met. The fact that we don't mind which of our children actually hit the vase, still leaves room for us to be much less concerned or altogether oblivious of the swordfight, had it ended without consequences.

A third argument maintains that basing our moral evaluation on harm rather than intent introduces a problem in long-term judgment of actions. Today's harms can turn into tomorrow's benefits. Thus, for example, if we judge Hitler by the amount of harm he has brought about, how will we maintain our unequivocal condemnation of him if it turns out that in the long run his actions created such a universal feeling of shock that they averted further killings of similar magnitude?¹⁷

This does not seem like a fair argument to make against the objectivists. Objectivists do not necessarily base responsibility on consequences. Their claim seems to be, rather, that the severity of consequences may serve as an aggravating factor in our evaluations. In other words, the incredible number of people murdered is not the exclusive basis for condemning Nazism; it is, rather, a reason to condemn it more vehemently.

Proximate causation provides the basis for the next argument. If one ties culpability and punishment with the causation of harm, we encounter problems with cases in which the causal chain between the agent and the consequences is unusual. Consider the scenario, mentioned earlier, of a husband who is shot at by his wife, is not injured, but dies in a car crash while driving away hurriedly from the scene of the assassination attempt. How do we determine whether the wife actually brought about this result? If responsibility is correlated with outcomes, it matters a great deal whether we can tie the agent to the results, yet it is hard to find reliable tests for establishing this

causal link (if the example presented seems unproblematic, one could conjure up others. X shoots Y in an open field but misses. Y faints from terror. X leaves him for dead. While Y is lying unconscious in the field he is struck by lightning/attacked by wild animals, and dies). The point of the argument is that only by disregarding consequences can we avoid proximate causation puzzlers.¹⁸

Finally, it is interesting to note an attempt to provide empirical grounding for the moral superiority of intention-based judgments. On the basis of research conducted by developmental psychologists from Piaget onwards, Yoram Shachar attempts to establish that harm-based moral judgment represents a lower level of moral development than judgments founded on intentions. The former are taken to rely on instincts, while the latter are assumed to be grounded in rational consideration. The studies he quotes allegedly confirm that both types of judgment exist concurrently, but that harm-based judgments are characteristic either of children in early stages of their development or of adults acting without full rational consideration.¹⁹

A detailed exposition and evaluation of this intriguing attempt is beyond the scope of this paper. For our present purposes it is enough to note that the effort to ground moral hierarchies on empirical data is not without problems. Even if the studies do establish that judgments based on harm are instinctual and those based on intention are rational, that cannot establish the general superiority of reason over instinct. People have been known to act laudably on the basis of instincts and despicably on rational grounds.

¹⁷ Alexander, p.12

¹⁸ See generally S. Sverdlik "Crime and Moral Luck", American Philosophical Quarterly, Vol. 25 Num. 1 , 1998 p. 79, and Alexander pp. 14-17

¹⁹ See generally, Shachar.

2.2 The objectivist view

As I have already indicated, objectivists do not deny that intentions have a role in the allocation of moral blame and punishment. Some writers even go so far as to state explicitly that while the existence of a criminal intention is both independently necessary and independently sufficient for punishment, the existence of harm in itself is neither.²⁰ Nevertheless, the gist of the objectivist argument is that the amount of harm caused by an agent's act can and should serve as a factor in our judgments of that act.

The argument begins by challenging the subjectivist contention that results are an improper factor in determining responsibility since they are beyond our control. Any reasonably foreseeable outcomes, so the argument goes, are ones that we have full control over. Following Hart and Honore, Moore gives the following four scenarios to demonstrate this point: 1. D culpably throws a lighted cigarette into a group of bushes. The bushes catch fire, but would burn themselves out if not for a standard breeze that begins blowing and causes the fire to spread to a nearby forest. 2. Same as 1. except the intervening force is not a normal breeze, but a freakish and rare storm. 3. Same as 1. but this time the intervening factor is a would be extinguisher of the fire who catches fire himself and runs to the forest, causing the forest to burn down. 4. Same as 1. except that P, upon seeing that the bushes are about to burn themselves out, creates a trail of gasoline from the locus of the fire to the forest. None of the factors 1-4 were in D's control. Nevertheless, because he could have reasonably foreseen the occurrence of 1 and 3, he can be held responsible for the resulting destruction of the forest in those cases.²¹ In

²⁰ M.S. Moore, "The Independent Moral Significance of Wrongdoing", Journal of Contemporary Legal Issues, Vol. 5, pp.238, 280-281

²¹ Ibid, pp. 254-258

short, there is no real problem of moral luck with outcomes that are reasonably predictable. Objectivists, then, take the separation between actions and consequences made by the subjectivists as artificial. As Moore claims, when we contemplate possible courses of action we contemplate their possible outcomes at the same time. Results (or at least the predictable ones) are taken to be integral parts of our activity.²²

To this Moore adds a *reductio* argument according to which if people can't be held responsible for the consequences of their actions, they can't be held responsible for any earlier stages of activity either. If factors like velocity of wind etc. negate control over whether our shot actually hits its target, factors influencing our opportunity to shoot (such as visibility, and whether or not the victim can be easily located etc.) may be said to extinguish our control over actually performing an activity. Similarly factors prior to forming the decision to assassinate may eliminate our control regarding the decision itself, and so on until any form of responsibility is completely obliterated.²³

The metaphor of a 'penal lottery' is used to ground the next argument²⁴, which proceeds something like this: upon attempting to commit a crime all perpetrators have an equal chance of succeeding and, consequently, of being punished. Therefore, there is no unfairness involved in the heavier punishment of those who actually brought about the harm. Lighter punishment represents good luck, not less guilt. The obvious objection, as Kadish effectively presents it, is that "the two offenders end up being punished differently even though they are identical in every non-arbitrary sense"²⁵.

²² Moore p. 270; R.A. Duff in "Acting, Trying, and Criminal Liability" as quoted by Ashworth p. 109.

²³ Moore, pp. 271-274

²⁴ Kadish, pp. 691

²⁵ Ibid

A fourth attempt to justify the objectivist view is based on the need for frugality in punishment. Punishment, so the argument goes, is a necessary evil inflicted on people, and therefore, if there is a manner in which it can be used economically while still achieving its purposes, that way must be pursued. Thus for instance, if we examine crimes of intent, we discern that they represent instances in which the offenders expect to achieve their purpose. Now, if such perpetrators have not been deterred by the punishment for success why would they be deterred by equal punishment for failure? If this is the case, lighter punishment of those who fail can economize on the usage of punishment without loss in terms of deterrence.²⁶

Another, stranger, version of the frugality argument runs as follows: since there is a larger chance that the public would become aware of those crimes that actually succeeded, punishing them more severely than attempts, would be profitable both in terms of deterrence and in terms of frugality.²⁷ In other words, by punishing attempts lightly, one economizes in punishment without losing in deterrence, since attempts are bound to attract less attention. The argument, in both versions, raises some burdensome empirical questions: is it in fact the case that all perpetrators of crimes of intent are so focused on achieving the harmful results that they would not consider the possibility of failure and its relative cost? Kadish mentions cases “where potential offenders know there is a greater chance of being caught and punished if they fail than if they succeed” as a counter example.²⁸ Treason and Sting operations are given as examples. Secondly, is it indeed the case that the public is always more aware of completed offenses than it is of

²⁶ Kadish, p. 686.

²⁷ J. Stephen, History of Criminal Law of England, as quoted in Shachar pp.14-15

²⁸ Kadish p.686

attempts? What then would we make of the attempted murder of celebrities? The first version of the argument raises a further, non-empirical question: what is the rationale for singling out the attempter (rather than perpetrator of the completed offense) for lighter punishment? If both have their minds set on bringing about the harmful consequences, how does frugality determine that it is the attempter who should be punished lightly?²⁹

The fifth argument simply states that our own sentiments are a competent index for determining the amount of punishments perpetrators deserve. We feel more resentment at successful wrongdoing than we do at mere attempts and creation of risks. This enhanced sense of outrage serves as an indication that completed offenses merit a higher level of moral condemnation than attempts³⁰. The objection is obvious: can peoples' feelings of outrage serve as a reliable guide for moral evaluation of action? People have been known to feel delight at atrocities and outrage at morally commendable developments. Quite often, their amount of indignation is inappropriate given the circumstances. Thus people may feel more resentment at the burning of a flag than at the murder of a homeless person. Does this indicate that the former is morally graver than the latter? Furthermore, what is there to guarantee that this emotional index, once applied to the evaluation of punishment would not be turned towards other aspects of public policy? Would we want to live in a place where it was? All of this is of course separate from the proposition that legal systems must adhere, to some degree, to public sentiment in order to maintain their legitimacy and efficacy. This may be true, but it is a strictly descriptive point, not a claim regarding the probative value of such sentiments.

²⁹ Shachar p.15

³⁰ Moore pp. 267-268

A related argument concerns the moral weight of private (as opposed to public) sentiments. We feel, so the argument goes, more guilt for successful wrongdoing on our part than for attempts. A variation of the argument is the claim that we feel guilt when we cause damage, but only shame when we fail to bring it about. Yet another variation is that the person who did not bring about the harm may feel a sense of relief that the person who did cannot.³¹ Again, sentiments (this time our own attitudes towards our actions) are taken as competent indicators of the gravity of the act. Apart from the previous objection, this argument seems much more applicable to cases of risk creation vs. realization than to cases of attempts vs. completed offenses. If Max actually kills any of his passengers, he will, indeed (assuming that he is generally of a normal mental constitution), feel far more guilty than if the accident ends without any casualties. But can the same be said of an attempted murderer? Isn't it plausible that he would feel regret for not fulfilling his original intention rather than relief? Furthermore the capacity to feel shame and guilt assumes internalization and consent with social norms. It is not obvious that violators of the law, who often originate from social groups that feel they have not benefited from the existing social structures, would easily adopt such attitudes.³²

Finally, let us consider the argument from the communicative or declarative functions of criminal law. The argument claims that by inflicting lighter punishment on attempters we communicate a sense of relief that a worse state of affairs has been

³¹ For the different variations of this argument see Moore 268-269, G.P. Fletcher Rethinking the Criminal Law (Oxford, 1978) p. 483, and R.A. Duff in Intention, Agency and Criminal Liability as quoted in Ashworth pp. 112-113.

³² Criminological research shows that a preponderance of criminal offenders see themselves as victims of systematic injustice on the part of the legal system. This being the case, why should we assume that they feel guilt for their actions rather than rage, or even satisfaction for injuring a social structure they conceive as unfair? As a reference for criminological findings see David Matza, Delinquency and drift, (New York: John Wiley & Sons, Inc., 1964).

averted.³³ A reformulation would be that dispensing equal punishment for attempts and completed offenses sends a message according to which the causation of harm does not matter³⁴. This, the argument asserts, is the wrong message to send out. Kadish's criticism of the first formulation of this argument seems in order. It is quite unlikely that most of us need the criminal law in order to tell us that a criminal act ending in death creates a worse state of affairs than one ending in light injury.³⁵ As for the second formulation, it seems a bit too strong. Equating the punishments for attempts and completed offenses conveys that harm does not matter for allocating guilt and punishment, not that it does not matter, period.

3. Arguing Away a Paradox?

There is something strange about taking sides in the debate sketched above. Nagel's insight about 'moral luck' is descriptive rather than prescriptive. He claims that the way we make moral judgments is paradoxical: we hold people responsible only for what they can control, but tend to judge and punish them on the basis of what they cannot. To be an objectivist or a subjectivist is to argue away one side of this paradox. The resulting simplicity might be tempting, but, to use vaguely Aristotelian language, it does not do justice to the phenomenon. In order to make well-informed legal decisions we need to understand rather than obscure the complexities inherent to our intuitions about punishment. If these intuitions are paradoxical, we must do everything we can to comprehend rather than discard of the paradox.

³³ R.A. Duff in "Auctions, Lotteries, and the Punishment of Attempts", as quoted in Kadish pp. 694-695.

³⁴ R.A. Duff in "Intentions, Agency and Criminal Liability", as quoted in Ashworth pp. 112-113

³⁵ Kadish p. 695

In light of this, I opt out of the debate and concentrate on further description of the problem. I am not claiming that it is impossible to take sides on this issue. I am even willing to admit that there are circumstances under which one should. We might want to tighten or loosen our punishment practices for public policy reasons. An administration interested in increasing its tax revenues might push for legislation imposing more severe penalties for inaccurate tax returns, regardless of criminal intent. Such an approach disregards our subjectivist intuitions, but may still be effective in obtaining policy goals. Philosophically, however, the best that can be done for a paradox is to further elucidate and explain the manner in which it operates. This is what I propose to do here. In section 3.1. I make explicit an important distinction underlying the moral luck paradox. In section 3.2. I illustrate how other varieties of moral luck (beyond outcome luck) shape the criminal law.

3.1 Anger and Blame

It seems that the problem of moral luck comes about largely because our intuitions regarding blame and the manner in which we become angry often pull us in opposing directions. It is worthwhile, then, to say a bit more about this tension.

Our feelings of anger and blame can overlap, but they don't have to. It is possible to blame someone without being angry at her, just like it is possible to be angry with no one to blame. Perhaps the following taxonomy can help clarify this:

1. *Blame without anger.*

I decide to risk parking my car in a forbidden spot in Cambridge and end up getting a ticket. Abstracting from the fact that this would probably be defined as a strict liability

offense, I have committed a culpable act. I can be blamed for it. But my act generates very little, perhaps even no anger on the part of those who learn about it.

2. Overlap between blame and anger.

Yigal Amir cold bloodedly murders Yitzhak Rabin. We blame him for Rabin's death. We are also outraged with him for killing Rabin. Our feelings of anger at Amir more or less overlap with the degree of blame we attribute to him. Everything that happened to Rabin is Amir's fault. We are angry at Amir because of everything that happened to Rabin.

3. Surplus Anger

Sam pushes Kate lightly in order to intimidate her, but Kate, due to a rare neural anomaly affecting her sense of balance, falls, hits her head on the curb, and dies.

We are outraged with Sam because of Kate's death, although he can only be blamed for wanting to intimidate her.³⁶ We are angry at Sam for more than he can be blamed for.

Let's call the increment of anger beyond the amount that would be felt for an act of intimidation 'surplus anger'.

4. Blameless Anger

Mark's entire family is wiped out in a natural disaster, or he gets a rare and untreatable form of cancer at the age of 30, or his parked car is hit and damaged by another driver who was trying to avoid a cat, or his young son trips (through no fault of his own) and breaks an expensive vase. Mark will be angry in all these cases (to varying degrees), in spite of the fact that there is no one to blame for the events. I call this kind of anger 'blameless anger'.

³⁶ I tried to pick an example in which Sam could not foresee the consequence of Kate's death, in order to meet Moore's objection according to which we can be held responsible for those results we could have predicted.

While the problem of moral luck does not arise in categories 1 and 2, categories 3 and 4 must be examined more carefully. The extra increment of anger over blame that is evident in categories 3 and 4 is quite natural, perhaps even necessary. It makes perfect sense to be mad at Sam for more than just wanting to scare Kate, just like it makes perfect sense for Mark to be very irritated by the sight of his disfigured car. The ability to enjoy our possessions, our bodies, and our friends depends on their physical integrity. In other words, the persistence of anger at the sight of damage, even when there is no one to blame for it, is very natural. It springs from the knowledge that harm hinders the preconditions for usage and pleasure. We cannot drive our smashed cars nor delight in the company of our dead friends. These states of affairs are distressing regardless of the fact that there is no one to blame for them. Perhaps the fact that there is no one to blame for them makes them even more distressing.

The four categories sketched above allow us to crystallize the question underlying the problem of moral luck: when we experience *surplus anger* or *blameless anger*, are we angry at an agent or at a state of affairs? If the latter is the case, can anger which is directed primarily or exclusively at a state of affairs, serve as the basis for punishing an agent? If it can't, why do our practices suggest otherwise?

3.2 Other categories of moral luck

Perhaps the most peculiar feature of the debate outlined in this paper is the fact that it focuses, for the most part, on Nagel's fourth category of moral luck, namely outcome luck. The question whether constitutive, circumstance or causal luck have any important bearings on the criminal law is almost completely overlooked. I am not sure why this is the case. Perhaps it is due to the fact that both sides share a compatibilist

assumption concerning the relationship between free will and determinism. According to such a view, the first three categories do not raise serious moral problems, as they all concern fortuity prior to choice. We may be constituted in certain ways, we may be lucky to live under these or other circumstances, we may encounter different causal factors that influence our choices, but none of these negates our ability to choose, which is the basis for responsibility. It is possible that we would not have killed if we were more tolerant by nature, or if we had grown up in a different neighborhood, or if there had not been perfect visibility on the day of the event; nevertheless, none of these factors *made* us kill, we could have still avoided killing if we had so chosen, and therefore we are still accountable.³⁷ Bad luck prior to choice is just bad luck on this view. It cannot affect our responsibility.

But it seems that the law does pay a good deal of attention to fortuity before choice (and thus to Nagel's first three categories). In what follows I try to make good on my promise to further describe the workings of Nagel's paradox by pointing out the significance of constitutive luck and circumstance luck in the criminal law.

3.2.1 Constitutive luck

Defenses against criminal responsibility often involve proving an element of reasonability. If I kill my neighbor after an incident in which he severely provoked me, I might be able to avoid a murder conviction if I successfully establish a claim of 'provocation'. To do so I would have to demonstrate that any reasonable person would have been similarly provoked. If I wish not to be charged with murder for shooting my daughter's boyfriend, as he climbed through her window, I would need to show that

³⁷ Evidence of the general acceptance of compatibilism on both sides of this argument can be found in Kadish pp. 689-691 and in Moore's *reductio* argument, pp. 271-278.

someone else would have mistaken him for a burglar too. To be successful in such a claim I need to establish that the fact pattern I assumed to exist was reasonable.

Now the test for reasonability might be more or less subjective. It might pertain to a reasonable person under circumstances similar to my own (perhaps I am naturally more prone to provocation because of a brain tumor, or perhaps I am more prone to making mistakes because of a certain neurotic tendency I possess), or it may pertain to a reasonable person, regardless of those circumstances. The main point is this: the more subjective the test for reasonability, the more it takes into consideration questions of constitutive luck. A subjective test would take the tumor or the neurosis into account when assessing the reasonability of my actions. It would not allow my physical or mental constitution, which is largely beyond my control, to determine my level of guilt. An objective test, on the other hand, would mean that such factors would be ignored. The tumor or the neurosis would be considered irrelevant. That, of course, amounts to allowing bad constitutive luck to determine my fate.

3.2.2. Circumstance luck

The 'normal science' of provocation claims requires that the defendant's action be an immediate response to a provocation carried out by the victim. Buffered reactions do not usually satisfy this requirement. We can, however, imagine scenarios in which the demand for temporal contiguity could be eased. Suppose the defendant is a battered woman who has taken the life of her husband. In such a case a judge might see the husband's history of violence as constituting sufficient provocation (even if he was not violent just before he was killed). The wife would be charged with manslaughter rather than murder. This would signal that sometimes peoples' actions are a result not so much

of their choice, as of the circumstances under which they live. A refusal to ease the requirement of temporal contiguity would imply that such circumstances are irrelevant for determining guilt. In that case the battered wife's conviction and punishment is, to a significant degree, the result of bad circumstance luck.

Take another example that has to do with the authority to grant clemency: Dudley Stephens and Parker were shipwrecked for days. At a certain stage, Dudley and Stephens reverted to murdering and cannibalizing the ailing Parker in order to survive. Upon their return to England they were convicted of murder and sentenced to death, only to have their sentence commuted to a mere six months by the queen.³⁸ The two spent six months in jail because they had bad circumstance luck. On the other hand, they were not executed because someone had acknowledged their bad circumstance luck. They were spared, in other words, because the queen realized, like we all do, that misfortune can present people with moral tests they simply cannot pass.

Daniel Katz was the owner of a successful firm providing private security services. Due to the nature of this line of work, he was licensed to carry a gun. On the 13th of December 1998, Daniel planned to take his family to a wedding party. He returned from work early that evening, and handed his pistol to Mona, his wife, expecting she would put it away in the safe while he took a shower. This had been the long standing routine between the couple. But Mrs. Katz was in a rush: she could not find her earrings, the kids were half dressed, and there wasn't really enough time to go up to the third floor

³⁸ 14 Q.B.D. 273 (1884)

and start fidgeting with the safe's combination. So she put the gun in her purse, and proceeded to scold her daughter for endlessly vacillating between her different outfits.

Three hours later the family was back home. Daniel, who needed to use the restroom urgently, was the first one through the door. As he was washing his hands a sharp, loud noise rang through the elegant duplex. Mr. Katz darted out of the bathroom and up the stairs. What he saw froze the blood in his veins. His wife of 15 years was lying motionless on the floor of the master bedroom, a gunshot exit wound visible beneath her left shoulder. His 6-year-old son, Tom, was standing next to her, screaming. On the floor next to his feet rested a smallish black 9 millimeter CZ pistol.

The Police investigation yielded a partial picture of what had happened. According to testimony gathered from the boy and his 9-year-old sister, who witnessed the events, Mona stepped into the bedroom, removed her evening dress, and sat in front of the bedside mirror to wipe off her make-up. She left her purse on the bed. Little Tom followed Mona into the bedroom, looked through the bag and found the handgun. He played with the weapon until it misfired, hitting and killing his mother.

What do we do with Mr. Katz³⁹? How is the law to 'process' his case? We could indict him for negligent manslaughter. After all, he is largely to blame for his wife's death. The gun was his, and he should have taken better care in handling it. But something seems awry with putting him on trial. We shudder at the thought. It breaks our heart. Nevertheless, simply letting him off the hook does not sit too well with us either. Perhaps, we think, all that really matters is Daniel Katz's reckless conduct, his casual attitude towards human life. After all, if his son had played with the gun during the

wedding rather than after it, if he had killed one of the guests rather than his mother, we would be inclined to indict Mr. Katz!

Somebody is going to have to decide. It might be a prosecutor with the authority to close the case, or a judge with the power to determine the punishment. Either way, a well-balanced decision would have to be rooted in an understanding of complexity rather than in strict adherence to rules: it would have to consider Daniel's recklessness, as well as the horrific misfortune that befell him; both subjectivist and objectivist considerations will have to be taken up. Eventually something will tip the scales. The law will deal with Daniel. But a mature legal answer should be the result of recognizing rather than overcoming the problem of moral luck. It must signify the realization that there are situations in which one important moral intuition can only be served by discarding another. In these cases there is no triumph of one sort of principle over another. There is only imperfect, incomplete, unsatisfying human justice.

³⁹ The events described here took place in Tel Aviv in 1998. They are taken from an actual case I was involved in evaluating (and eventually closing) while working as a junior prosecutor at the District Attorney's office. Names have been changed to protect the privacy of those involved.