

# Two Dimensions of Responsibility in Crime, Tort, and Moral Luck

*Benjamin C. Zipursky\**

*Parallel moral luck problems exist in three different normative domains: criminal law, tort law, and conventional moral thinking. In all three, the normative status of an actor's conduct seems to depend on matters beyond the actor's control. Criminal law has historically imposed greater punishment on the murderer who kills his intended victim than on the identically behaved would-be murderer whose shot fortuitously misses. Tort law imposes liability on the negligent driver who injures someone, but no liability if, through good fortune, the negligence injures no one. And, as Bernard Williams and Thomas Nagel have famously argued, conventional moral thinking often attributes greater blame to an actor for wrongful conduct if that conduct ripens into a terrible event than if it fortuitously causes no harm at all. This Article distinguishes two different dimensions of responsibility and then uses this distinction to explain the problem in all three areas. One dimension is called "fault-expressing responsibility": it is a matter of the degree to which one's acts constitute conduct that can express one's character or faultiness. A second dimension of responsibility is called "agency-linking responsibility." In this dimension, the degree to which a person is responsible for some event is dependent upon whether that event is an action of that person. Responsibility can differ in the agency-linking dimension even if it remains the same in the fault-expressing dimension.*

---

\* Professor & James H. Quinn Chair in Legal Ethics, Fordham University School of Law. I am grateful to the Fordham University School of Law for research support and to the participants of the Cegla Center conference on Moral and Legal Luck for helpful comments. Tom Baker, Michael Baur, John Drummond, David Enoch, John Goldberg, Christopher Gowans, Youngjae Lee, Jeffrie Murphy, Antonia New, Arthur Ripstein, and Jeremy Waldron have provided very helpful comments.

## INTRODUCTION

Why are completed crimes punished more severely than attempts? Why, for example, is the would-be murderer whose bullet is obstructed by the happenstance of a bird's flight typically punished less severely than an identical shooter whose bullet hits and kills his intended victim? The putatively significant distinction between attempts and completions in criminal law is but an example of a broader phenomenon in both legal and moral thought. This phenomenon was dubbed "moral luck" by Bernard Williams, and famously explored in a "Moral Luck" article to which Thomas Nagel wrote an equally famous reply.<sup>1</sup> In Nagel's memorable example, a man who leaves his baby in the bathtub to answer the telephone has done something careless and irresponsible, but his action is of far less moral gravity if there are no consequences to the baby in the ensuing few minutes than if the baby drowns during that time. Similarly, in the law of torts, a careless driver who speeds down a busy street will face no tort liability if he is lucky enough not to hit anyone, but if he does he will face very substantial tort liability. In all three cases — the attempted homicide versus the completed homicide, the unharmed baby versus the drowned baby, and the inconsequential careless driving versus the serious car accident — the actor had no control over the facts that determined whether the wrongful conduct was inconsequential or not. And yet the normative system — criminal law, conventional morality, and tort law — seems to assign an entirely different level of responsibility to the actor depending on how things turn out. In this sense, the nature and magnitude of moral or legal responsibility (and sometimes whether it exists at all) seem to turn on sheer fortuity: hence the label "moral luck." While Nagel and others have distinguished a number of different forms of moral luck,<sup>2</sup> all three of the examples above involve the fortuity of whether a potentially injurious act actually does cause an injury. This particular species of moral

---

1 BERNARD WILLIAMS, *Moral Luck*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980*, at 20 (1981); THOMAS NAGEL, *Moral Luck*, in *MORTAL QUESTIONS* 24 (1979). Both book chapters are revisions of essays bearing the same titles, which were originally published in 1976 in the *Proceedings of the Aristotelian Society*.

2 NAGEL, *supra* note 1, at 28. The problem I refer to as "causal luck" pertains to "luck in the way one's actions and projects turn out." *Id.* In a forthcoming article, John Goldberg and I discuss two variants of causal luck in tort law, as well as a form of moral luck we refer to as "compliance luck," which we regard as not quite captured by Nagel's classifications. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 93 *CORNELL L. REV.* (forthcoming 2007).

luck — causal luck — has received the most attention in scholarly literature, and it will be the form of moral luck explored below.

A principal aim of this Article is to explain why it is defensible for these three normative systems — tort law, conventional morality, and criminal law — to differentiate the responsibility attributed to an actor for an act depending on whether the act ripens into injury. In this sense, I might be called an apologist for moral luck. At the same time, I aim to articulate why moral luck seems paradoxical. The larger and overarching goal is to utilize the problems of causal luck to foster a better understanding of the nature of concepts of responsibility and blameworthiness.

The account varies somewhat among the three areas, but all three share the same basic structure. In all three areas, the applicable concept of an actor's responsibility for his acts should be understood as having two dimensions, not one. The first and most salient dimension of responsibility for one's acts, in today's moral discourse, is what might be called (with some distortion) "fault-expressing responsibility." The idea is that one's responsibility for one's acts is fundamentally a matter of the degree to which one's acts constitute conduct that expresses one's character or faultiness.<sup>3</sup> A second dimension of responsibility is what I shall call "agency-linking responsibility," and it relates to a different notion — the notion that the degree to which a person is responsible for some event is dependent upon whether that event is a doing, or an action, of that person. A defendant's liability in tort law hinges on causal luck because it depends on both fault-expressing responsibility and agency-linking responsibility. The blameworthiness of an actor for his conduct, in our conventional moral practices, likewise depends on both dimensions of responsibility, and therefore displays causal luck. And punishability of crimes depends on the blameworthiness of the actor's conduct, and therefore criminal law depends on causal luck too.

Causal luck seems paradoxical only when we assume that responsibility,

---

3 Neither (negative) "attributes of (moral) character" nor "faultiness" is an adequate term to denote exactly what I mean to refer to by "character-expressing" responsibility, because "character" connotes too great a requirement of psychological depth and enduringness, and "faultiness" is too tort-like. The issue of exactly how to characterize what this dimension of responsibility and blameworthiness does express is of course important, but not one I shall try to resolve further in this Article. To the extent that the Article refers to "character-expressing" responsibility or blameworthiness, readers should bear in mind that this is intended principally to refer broadly to an attribute of the person expressed by the action, in light of which the actor herself is being more (or less) critically judged; it is not intended to carry the moral-theory baggage of any particular account of character, virtues, or vices.

liability, blameworthiness, and punishability are and ought to be dependent entirely on faultiness expressed and choices made, for the same degree or kind of fault is manifested or expressed whether the act ripens into injury or not. However, what a person is responsible for having done and what she may be blamed for doing are also a function of whether various untoward events are not simply events, but actions of that person. On this level, it matters a great deal whether wrongful conduct ripens into injury. The most difficult challenge of the Article is to explain why there is a dimension of responsibility that is agency-linked, what it means for a dimension of responsibility to be agency-linked, why this idea has such a strong grip on our moral practices and our moral thinking, and why its place in our moral and legal thinking is justifiable.

The challenges are met by depicting concepts of responsibility as concepts that are used to give guidance, structure, and principle to patterns of responding to various kinds of actions, injuries, and events. The question of whether someone is responsible, and to what degree and in what way, for some unwelcome event is a question of whether a kind of response to the event may legitimately be visited upon that person, whether that person may be responded to in certain ways. Whether the actor is appropriately vulnerable to such responses is a function both of whether the event was linked appropriately with the agency of the actor and whether the actor's conduct displayed fault or certain other character attributes. Neither is sufficient.

The word "responsibility" is notoriously plastic, and the plan set out above might therefore seem both unremarkable and unpromising as an effort to explain moral luck. There is no doubt that, as Hart pointed out, ordinary language permits various usages of the clause, "x is responsible for y," including one in which the speaker refers primarily to a causal connection between x and y,<sup>4</sup> but that is not what the causal luck version of the moral luck problem is about; it is about whether the actualized injury flowing from a potentially injurious wrongdoing alters the blameworthiness of the actor who performed the act. Readers should not despair. A central section of this Article is devoted to causal luck within conventional moral thinking, specifically addressing two dimensions of *blameworthiness*, not simply responsibility. I choose the label "responsibility" for these introductory remarks in part because it nicely covers three parallel phenomena: liability in torts, blameworthiness in conventional moral thought and discourse, and punishability within criminal law.

---

4 H.L.A. Hart, *Varieties of Responsibility*, 83 LAW Q. REV. 346 (1967).

There is another reason for beginning the discussion by using the cover term "responsibility." For the explanation of causal luck in all three domains is fundamentally about the normative classification of kinds of *responses* to events, injuries, and actions. In this (and probably other) respects, the Article displays a significant philosophical connection to Strawson's work.<sup>5</sup> The questions that we answer using notions of liability, blameworthiness, and punishability are about when a person may be *responded to in certain ways for certain events, injuries, or actions*. These notions are therefore depicted in terms of a person's vulnerability to certain kinds of response. But the vulnerability in question is not factual; it is not the same as whether a person is likely to be infected by a virus or a country is likely to be conquered by an enemy. It is about whether a *person* is properly vulnerable to a response by another: whether someone's failure to comply with a regulation *would properly render* her a target of sanction or punishment; whether someone's failure to notice the cyclist before running into him *would properly render* her a target of tort liability for the injury; whether someone's humiliating insult *would properly render* him a target of moral blame for the family quarrel that ensues. In this sense, punishability, liability, and blameworthiness are depicted as concepts of *normative vulnerability*.<sup>6</sup> The explanation of moral luck offered here goes hand in hand with a more general theory of responsibility as a concept of normative vulnerability.<sup>7</sup>

The Article proceeds in a somewhat indirect manner: from tort to criminal law to conventional moral discourse, and back to criminal law. Part I begins by presenting the causal luck problem in torts. This is largely because most of my prior work on the problem of causal luck has been in tort law, and I believe the solution to the problem there is quite straightforward. The nature of the solution in tort law, however, only seems to sharpen the problem in criminal law, which is the focus of Part II. Section II.B revisits tort law, and sets out in more abstract terms what the tort analysis suggests about the place of actual injury within the structure of notions of

---

<sup>5</sup> P.F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962).

<sup>6</sup> Cf. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 114 *passim* (1995). Although not connected substantively, my distinction between factual and normative vulnerability resembles, and was in part precipitated by, Weinrib's distinction between factual and normative gains and losses.

<sup>7</sup> It is possible to understand the concept of responsibility in terms of normative vulnerability while also supposing that there is an objective moral basis underlying what renders an actor responsible for an action. Indeed, I am inclined to adopt an objectivist view of responsibility analogous to that which I have taken on a variety of normative concepts elsewhere.

responsibility, and how this might eventually connect to the problem within criminal law. Section II.C sets the agenda for the remainder of the Article: analyze punishability in criminal law in terms of moral blameworthiness in conventional moral thinking, and explain the causal luck problem as it applies to moral blameworthiness in conventional moral thinking.

Part III therefore turns to the problem of causal luck within conventional moral discourse and moral thinking. A distinction central to the Article is laid out in Section III.A: that between injury-abstracting and injury-embracing acts. Although, as Section III.B indicates, this distinction makes available a coherent defense of the use of language of blameworthiness that tracks moral luck intuitions, this Article does not rest on a conventionalistic defense of moral luck. Indeed, Part III develops, for dialectical purposes, a strong and coherent critique of conventional intuitions that do not accept the existence of moral luck. It turns out that what Nagel and several other scholars have sometimes suggested is the core of a moral luck critique — the argument from control<sup>8</sup> — is unsound in its most straightforward form. However a closely related argument — the argument from the fault-expressive nature of action — is not fallacious, and is quite powerful.

Part IV turns to the positive account. It argues that there are two dimensions of blameworthiness: a fault-expressive dimension and an agency-linking dimension. Although relative to the fault-expressive dimension, the distinction between potentially harmful actions that are unrealized and harmful actions that are realized is irrelevant — at least as a matter of principle — the distinction is of great importance in the agency-linking dimension of blameworthiness. I argue that the agency-linking dimension of blameworthiness is of moral importance, that it is real, that it is not an artifact of instrumental considerations, and that it is satisfactorily well-formed from a meta-ethical point of view. In addition, I argue, contra David Enoch and Andrei Marmor, that the agency-linking dimension of blameworthiness is a primary form of blameworthiness, and not derivative of a larger scheme of instrumental considerations that rely upon the fault-expressive dimension.

Part V returns to the criminal law. The account in terms of moral blameworthiness translates quite easily into an account of differential levels of punishability of crimes. However, a new problem arises, because the existence of different levels of punishability does not entail that there should be a difference in actual punishment, and so a new form of causal luck critique

---

<sup>8</sup> NAGEL, *supra* note 1, at 25; David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 *LAW & PHIL.* 405 (2007) (referring to "the control condition" and assuming that something like the control condition is justifiable).

in criminal law arises — one directed to the prosecutor and legal officials who select actual punishments from within a range of possible punishment levels. Part V concludes by sketching a broader account of punishment that takes seriously the distinction between attempts and completed crimes.

## I. CAUSAL LUCK IN TORTS

Causal luck in tort law is less puzzling and less paradoxical than it might at first appear.<sup>9</sup> A defendant's liability in tort turns on a particular kind of judgment about responsibility. We want to know whether a defendant is responsible for negligently injuring the plaintiff. This is because we want to know whether a certain kind of response to the defendant, which the plaintiff is aiming to accomplish, should be permitted — whether the defendant is properly the object of that response. The effort of the plaintiff is a redressive effort; the plaintiff is acting against the defendant to exact money through the legal system. Tort law requires that the defendant have injured the plaintiff if the defendant is to be deemed a proper object of this response. This is because tort law requires a breach of a duty of non-injury, not simply a breach of a duty of non-injuriousness. It does this because the nature of a redressive response is such that a defendant ought not to be vulnerable to this kind of response unless he breached a duty of non-injury. This, in turn, is because the ground of his vulnerability to this response by the plaintiff is that he breached such a duty to the plaintiff, according to the legal principles underlying tort law.

Causal luck appears as a problem in tort law for a combination of two reasons: one relating to confusion about different levels of duty, the other, about different kinds of responsibility. As to duty, the problem is clearest in negligence law. It arises if one confuses the breach of a duty of non-injuriousness (acting in a negligent manner) with a breach of a duty of non-injury (injuring the plaintiff through acting in a negligent manner). Because the former involves a breach of duty under negligence law, the question naturally arises whether the requirement that there must be a breach of duty by the defendant, if the defendant is to be held liable for what he has done, is a requirement that is met by the breach of duty of non-injuriousness. Now when we think of evaluating responsibility as rating

---

<sup>9</sup> For a much more detailed discussion of causal luck — and more generally moral luck — within tort law, see Goldberg & Zipursky, *supra* note 2; see also Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214 (Gerald Postema ed., 2001).

the level of culpability attaching to the chooser's volitional act, it seems quite obvious that responsibility for what is done must be responsibility for what has been chosen. Thus, the breach of the duty of non-injuriousness seems to capture the relevant sort of wrongfulness to ground responsibility. It becomes a mystery why the result matters at all.

The mistake, in tort law, is that the act for which the plaintiff is seeking to hold the defendant responsible is an injuring, not simply an incomplete or volitionally captured breach of duty. This goes hand in hand with the fact that the type of reaction to and act upon the wrongdoer that is proposed is an act of redress against the wrongdoer. In a system that restricts the right to act against another to those who have been wronged, the act's being a breach of a duty of non-injury is critical.

We shall later address the question whether tort law is as it should be; whether this distinction, at the end of the day, should be asked to bear as much weight as it does. Our aim is to identify the concepts, to explain how they hang together, and to defend the claim that they do hang together as a relatively coherent set. The point is that if responsibility means being a proper object of response, and if a restriction on being a proper object of response is that one have breached a duty of non-injury to the plaintiff, then the requirement of actual injury is cogent. The reasons for this requirement go to a social contract framework that contends that there are rights of action in tort by private parties only to offer an avenue of civil recourse to those who have been wronged.

What is critical here is that a tort action holds a defendant responsible for having wrongfully injured the plaintiff. The holding-responsible is not, as Honoré and Perry suggest, for an outcome. Nor is it, as Schroeder, Waldron, Judge Andrews, Prosser, and many others have supposed, for a breach of a duty of non-injuriousness — negligence in the air. It is holding responsible for a complex, result-embracing act — a breach of a qualified duty of non-injury — the negligent injuring of the plaintiff by the defendant. And it is literally a responding-to — an exacting of damages from — the defendant who injured the plaintiff. This responding-to by the plaintiff of the defendant is not something a court should empower the plaintiff to do if the defendant has not done a wrong — breached a duty of non-injury — to anyone. For the state is empowering the plaintiff to respond to the wrong.<sup>10</sup>

The wrong here is an act, the defendant's having negligently driven his

---

<sup>10</sup> Benjamin C. Zipursky, *The Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623 (Jules Coleman & Scott Shapiro eds., 2002).



car into the plaintiff, for example. Note that referring to it as an act is not simply a trick of language that involves crafting a phrase that will simultaneously refer to action and a result that the action leads to. The phrase refers to conduct by the defendant that reaches out all the way to the injuring of the plaintiff. The injuring of the plaintiff is part of the act that the defendant did. Likewise, the duty not to do certain acts is a broad duty that prohibits a class of acts that includes this act. The act is prohibited by a norm of conduct within tort law that enjoins legal actors from treating each other in certain ways (negligently injuring one another). The defendant is legally responsible (in tort) to the plaintiff for having injured her because his injuring of her was an instance of a breach of a legal duty not to injure her.

It has gone largely unchallenged that the plaintiff must have been injured by the defendant in order for the defendant to be liable to the plaintiff in tort. This is because when a plaintiff asserts a cause of action in tort, one would assume that the plaintiff was claiming that the defendant had injured her, and seeking to hold her liable for having injured her. The act of having injured her is the one the defendant is being held responsible for. The issue which courts debated was whether the defendant's having injured the plaintiff is an act the defendant could be held legally responsible for in tort. This issue, in essence, concerns whether the tort response of a cause of action against the defendant by the injured party for damages is something to which the defendant is properly vulnerable. The answer our system gave was that the defendant is properly vulnerable to this response by the injured party for the defendant's having injured her only if the injuring of her was a wrong to her — a breach of a relational norm of conduct that enjoins treating the plaintiff in this way. In so structuring responses, our system says that causes of action to exact damages in tort are available only as redress for a wrong done to one. There is no question (legally) that the action for which the plaintiff holds the defendant responsible is an injuring of her. The only question has been whether it must be a wronging of her, and the answer has been — overwhelmingly — yes.

Note that if one views a plaintiff as a delegee of the state's power to regulate and issue regulatory sanctions — as a private attorney general seeking to hold the defendant liable for fines under a regulatory prohibition that the defendant had violated — the breach of legal duty might not be a duty of non-injury; it might be a duty of non-injuriousness (or simply a regulatory duty). The vulnerability of the defendant to the response by the plaintiff would be conditioned on the plaintiff's being properly empowered and the defendant's having genuinely engaged in the proscribed conduct.

In the two cases, the court is asking itself a question about an act of

the defendant to which the plaintiff is seeking to respond. In both cases, therefore, the structure of the question about responsibility is whether a defendant is properly held vulnerable to an agent that is seeking to act upon him in a certain way, through the legal system. In the first, the type of act is an injuring of the plaintiff; in the second it is not. In both cases, the courts require that a legal norm have been violated, but they are different types of legal norms. In one case, the legal norm imposes duties of non-injury, in the other, duties of non-injuriousness (perhaps). In this respect, both require wrongs. But wrongs of the first kind must be completed, whereas wrongs of the second need not be.<sup>11</sup>

Responsibility-for-injuring in Anglo-American law today is overwhelmingly based on a wrongs model. There are, in my view, a few areas in which the notion of a legal wrong is stretched beyond recognition, but these are very much the exception.<sup>12</sup> On the other hand, there is liability and responsibility for the regulatory infraction of, for example, speeding or driving without lights on. Wrongful injuring of another and violations of regulatory rules designed to ensure that people drive in non-injurious ways are both responded to in the law, but they are responded to in different ways: the former by an individual plaintiff through tort law, the latter by the state through regulatory (or traffic) law. The moral luck problem in tort law stems, in part, from the failure to appreciate the differences between these two different modes of response within the legal system — tort liability being a holding-responsible for a breach of duty of non-injury, and regulatory liability being a holding-responsible for a breach of a duty of non-injuriousness.

## II. LUCK IN CRIMINAL LAW: THE PROBLEM

### A. Completion Asymmetry

The causal luck problem within criminal law has gone by numerous names.

---

11 Of course, it is an important question whether the law of torts could define the imposition of the risk of physical injury as itself a completed wrong, even if that risk does not ripen into a physical injury. John Goldberg and I have examined this question in detail in John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636-60 (2002). Briefly, there are overwhelming obstacles to taking this view as an interpretive matter with regard to the law of torts as it has been and is even in the most free-form jurisdictions, and there are serious normative and pragmatic problems with the proposal that tort law ought to be so changed.

12 Goldberg & Zipursky, *supra* note 2.

Sanford Kadish calls it "The Harm Problem";<sup>13</sup> Michael Moore calls it "The Independent Moral Significance of Wrongdoing";<sup>14</sup> a wide range of moral philosophers and criminal law theorists who have made thoughtful contributions to a substantial literature have simply discussed the problem under their own labels, treating it as a version of a moral luck problem.<sup>15</sup> I shall sometimes refer to the problem as one of "completion asymmetry"; the idea being that a completed crime is punished more severely than an unsuccessful attempt, even where the success or failure of the attempt is entirely outside of the actor's control, and is merely a matter of fortune.

Without purporting to have a precise head count, it is fair to say that there is substantially greater support among leading criminal theorists for the view that *an asymmetry in punishment based on whether a crime is an unsuccessful attempt, as opposed to a successful attempt, is indefensible* than there is for the view that *a completion asymmetry is defensible*.<sup>16</sup> The usual argument against the asymmetry is simple: there is no sound basis for a distinction in blameworthiness attributable to whether the attempt succeeds, and there is no basis other than blameworthiness (such as deterrence) that would justify such an asymmetry. From H.L.A. Hart and Joel Feinberg to Sanford Kadish and Stephen Schulhofer and the American Law Institute's Model Penal Code, scores of leading thinkers have rejected the defensibility of such an asymmetry. Indeed, even some who purport to defend the asymmetry — like Michael Moore — do so in an uncharacteristically half-hearted way.<sup>17</sup> I should say, however, that I have been significantly influenced in my views by those of John Gardner, one of the few prominent philosophers of criminal law who unabashedly defends the completion asymmetry.<sup>18</sup>

---

13 Sanford Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994).

14 Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237 (1994).

15 Michael J. Zimmerman, *Luck and Moral Responsibility*, 97 ETHICS 374 (1987).

16 I rely, in part, on Michael Moore's authoritative characterization of the lay of the land on this question. Moore, *supra* note 14 (citing H.L.A. HART, PUNISHMENT & RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 129 (1968); JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 33 (1970); Kadish, *supra* note 13; Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974); MODEL PENAL CODE § 5.05(1) (Proposed Official Draft 1962)).

17 Moore, *supra* note 14. Moore rejects all of the leading attempts to justify the asymmetry, and puts in place a somewhat apologetic mix of reflective equilibrium, intuitionism and foundationalism.

18 In a series of important and illuminating articles, Gardner accepts versions of causal luck in criminal law, tort law, and moral thinking. For criminal law, see especially

Ironically, the completion asymmetry in criminal law comes into sharper focus set against the backdrop of my analysis of causal luck in tort law in terms of duties of non-injuriousness and duties of non-injury. For our legal system does indeed punish breaches of duties of non-injuriousness. There plainly are inchoate crimes and this is why. Yet the discrepancy between punishment for completed crimes and punishment for inchoate crimes suggests that perhaps criminal law, like tort, does focus on whether a duty of non-injury has been breached. And so we are pulled in two different directions. In order to explain liability for inchoate crimes and many victimless offenses, one needs to treat breach of a legal duty of non-injuriousness as sufficient for the imposition of criminal punishment, and, indeed, sufficient to realize the very idea of a crime. And yet traditional approaches toward punishment treat completed crimes more seriously, in a way that suggests that breaches of a legal duty of non-injury is of special importance to the magnitude of the crime committed and, therefore, to the punishment deserved. And so the problem arises, because: if breaches of duties of non-injuriousness are criminal and punishable, what is it about the completion of the crime — even when out of the criminal's hands — that permits or justifies greater punishment?

### **B. Interlude on Tort Theory**

In several prior articles, I have argued that, while compensation is central to tort law, tort theorists — especially corrective justice theorists — have fundamentally misconceived how it is central. They have taken the plaintiff's right to compensation as the ground of the state's imposition of liability upon the defendant. Defendants are held liable for compensatory damages because the whole point of tort liability is that if one has wrongfully caused certain damages, then one is responsible for these damages, and if one is

---

John Gardner, *Crime: In Proportion and in Perspective*, in *FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH* 31, 44-48 (Andrew Ashworth & Martin Wasik eds., 1998). While my own work (some with Ripstein, some with Goldberg, some solo) has utilized a distinction between duties of non-injuriousness and duties of non-injury, Gardner (independently) developed a distinction between duties to try and duties to succeed. On torts and on moral concepts (and the duty-to-try/duty-to-succeed distinction) more generally, see John Gardner, *Wrongs and Faults*, 59 *REV. METAPHYSICS* 95 (2005) and John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY* 111, 112-43 (John Gardner & Peter Cane eds., 2001). On moral luck and Kant, see especially John Gardner, *The Wrongdoing that Gets Results*, 18 *PHIL. PERSP.* 53 (2004) [hereinafter Gardner, *The Wrongdoing that Gets Results*].

responsible for them, one should have to pay for them. The plaintiff is the one who, without legal intervention, bears the cost, so the point of legal intervention is to require the tortfeasor, who is responsible for the costs, to compensate the plaintiff, who is wrongly bearing it.

The fundamental shortcoming of this view is that tort liability is not fundamentally loss-based, but wrongs-based.<sup>19</sup> The courts recognize a right to some damages because the defendant has wronged the plaintiff, not because the plaintiff has sustained a loss that the defendant must compensate her for. There are tort actions with no damages, tort actions for injunctive relief, and tort actions for punitive damages. And even where there are damages, they are not really understood as covering costs that are otherwise being borne by the plaintiff, but as permitting the plaintiff to exact a remedy limited by what jurors judge to be make-whole damages. Finally, there are plenty of foreseeable wrongful losses that do not generate tort actions. It is the wronging of the plaintiff under the law that generates a right of action, not the holding of the defendant responsible for the injury. Now once there is a right of action predicated upon the defendant's wrongful action, the measure of damages is normally make-whole, or compensatory. The compensatory damages limitation is a part of the common law of tort, but one that sounds on remedies, not on the question whether there should be any liability at all.

On this view, explaining why injury gives rise to liability by saying that liability is responsibility for the costs of injury is to get things backwards. The basis of liability is the plaintiff's injury because it is having been wrongfully injured that generates a right to redress the wrong. The redress is usually, but not essentially, shaped by a compensatory notion. Where the wrongful injury is in fact constituted by a proprietary taking or tangible damages incurred — as is most concrete in Ripstein's example of the tort of conversion,<sup>20</sup> but evident throughout much of personal injury law — the law of course does take care to shape the remedy to fit the cost of the loss. But throughout tort law, from battery to defamation to fraud to nuisance to medical malpractice and garden variety negligence, the inquiry into the appropriate scope of remedy is both formally and pragmatically quite distinct from the inquiry into whether the defendant has wronged the plaintiff in such a manner as to warrant some right of action against the defendant.

A fundamental criticism that I have leveled against corrective justice theory is that it is too defendant-focused, and insufficiently plaintiff-focused.

---

19 See especially Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L.J.* 695 (2003).

20 Arthur Ripstein, *Closing the Gap*, 9 *THEORETICAL INQUIRIES L.* 61 (2008).

The key to tort liability, I have argued, is that plaintiffs have rights to act against defendants, *not* that defendants have prior legal duties of repair to plaintiffs. Although I stand by both of these points, I now see that it was somewhat misleading to say that corrective justice theorists were too defendant-focused. The fundamental analytical problem is not that there was a focus on the defendants in explaining liability, but that the analysis of the structure of liability was wrong. Liability is not best explained as a form of duty to those whom one has wronged, but rather as a form of vulnerability to the one who has been wronged. A key idea rendering tort law a form of private law is that the vulnerability is *to* a private party. And a central normative reason for having a form of law like this is that the empowerment of private parties who have been wronged to an avenue of recourse against the wrongdoer is part of a social contract, softening the force of a more general prohibition on retaliation against wrongdoers. To the extent that civil recourse theory, in torts, is a theory of the privacy of private law, and one that emphasizes the value of empowerment, it is entirely understandable that I have emphasized the relative importance of the plaintiff. But the fundamental analytical point about the nature of liability can be equally well articulated from either end: the power of a private person, mediated by the state, against the wrongdoer, to exact a remedy, *or* a vulnerability to a private person, acting through the state, to exact a remedy.

The explanation of luck within tort law can be rephrased largely in defendant terms. A defendant faces tort liability for wrongful conduct only if his conduct was a breach of a duty of non-injury. This is because vulnerability to tort actions is predicated on having committed such a breach. And that is, in turn, because the permissibility of such actions by tort plaintiffs is predicated on such a wrong having been committed (against them). The vulnerability to an action by another turns on whether a completed wrong was committed, because the appropriateness of the reaction to the defendant — here, a tort action — turns on the completed wrong having been committed.

### **C. Agenda for Solving the Causal Luck Problem in Criminal Law**

This analysis suggests a broader approach toward understanding responsibility, and why our normative categorization of wrongdoers' conduct depends on whether that conduct ripens into injury. The appropriate or permissible level of vulnerability to certain kinds of reactions by others may be higher where the action to which others are reacting is an injuring by the defendant. In the criminal scenario, this would mean that a more punitive reaction by the state to something a defendant has done may be permissible.

From a moral point of view, this would mean that a person who has not only acted badly, but whose wrongful conduct has injured others, may be properly vulnerable to a higher level of blame. More precisely, I shall try to construct an interpretive account in both the criminal and the moral areas that explains the endorsement of a completion differential in terms of the notion of proper vulnerability to reactions of others.

One more methodological preliminary: I am inclined to believe that each of the three areas — tort, conventional morality, and criminal law — contains a distinctive form of holding others responsible for wrongs: suing for damages and enforcing a judgment in tort, imposing punishment in crime, and blaming the wrongdoer for what he or she has done, in conventional morality. Tort liability, punishability, and blameworthiness are all greater for completed wrongs (to say the least; in tort, it increases from 0 to something). This is the causal luck puzzle, or three variations of it. I would hope, in future work, to be able to show that these three forms of responsibility are parallel to one another, and similar in structure, but that none is fully an application of the others. In this Article, however, I wish to take a somewhat simpler view of the relationship between criminal punishability and blameworthiness. I wish to take the expressivist/retributivist view that punishment expresses a society's blame of an actor for his criminal action.<sup>21</sup> Expressive theories of punishment, while controversial, are certainly not novel. The novelty of this Article (such as it may be) lies not in linking punishment with blameworthiness, but in offering an account of blameworthiness that deals adequately with the causal luck critique. For most criminal law scholars, embracing expressivism on the completeness issue is like jumping from the frying pan into the fire. This is because the moral luck issue — the completeness asymmetry viewed within moral theory, in terms of a question of blameworthiness — seems the most philosophically challenging. Indeed, it is fairly common for moral philosophers to explain away the legal analogues as resting on instrumental reasons or indirect values, and to reject the purely moral versions. Here, I plan

---

21 I do not mean to suggest that retributivism and expressivism are the same, but (at this stage) only to gesture to a range of views of punishment that take retributive judgments of deservingness to be centrally connected to the institutions of punishment. Murphy and Hampton's important book, JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988), has, among its many virtues, the capacity to illuminate issues regarding punishment without necessarily selecting a particular set of ontological commitments between the metaphysical moral realism of retributivists like Moore and the far more pragmatic orientation of leading expressivists. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

to go the other way around. So we turn, now, to the moral luck problem within conventional moral judgments.

### III. CONVENTIONAL MORAL JUDGMENTS

#### A. Result-Abstracting Versus Result-Embracing Actions

Within conventional moral discourse, we frequently ask whether someone's injury really was someone else's fault. Thus, for example, imagine that Paul, a friend and houseguest who is visiting from out of town, offers to load and run the dishwasher while we are vacuuming and cleaning up from a dinner party. In the morning, I find a favorite, handcrafted ceramic bowl (made individually by a recently deceased friend) in the dishwasher, cracked in half. My friend apologizes for having broken the ceramic bowl, which should not have been put in the dishwasher. I say not to worry; it was not his fault, because most ceramic bowls today are dishwasher-proof, and I should have mentioned that this one was not, and that it had great sentimental value. What is going on here is that there is a shared understanding that my friend broke the ceramic bowl by placing it in the dishwasher; there is a debate over whether my friend can be blamed by me for having done so, under the circumstances. A shared premise in the debate is that this depends in part on whether my friend was careless in putting it in the dishwasher. In effect, we are discussing whether my friend is appropriately vulnerable to my blame for the act of breaking the fragile and sentimentally significant dish. We are discussing whether my friend is morally responsible for breaking the bowl.

Now imagine a second case, in which I implore my friend just to go to sleep and leave the dishes to me, and I explain the sentimental value of the bowl and the importance of not putting it in the dishwasher. Let us suppose that my friend puts it in the dishwasher anyway because my admonition has slipped his mind. In that case, my friend's breaking of the bowl is an act of his, an act for which he would be morally responsible — to blame. He would appropriately be blamed for the act of carelessly breaking my bowl by putting it in the dishwasher. He would appropriately feel (somewhat) guilty for the act of having broken the bowl. The words, "Oh I am sorry, that's my fault" would belong on his lips, as would the effort to fix it or see if it could be fixed.

The third case is a variation on the second: I implore my friend to go to sleep and leave the dishes to me; I explain the sentimental value of the bowl and the importance of not putting it in the dishwasher. And my friend puts it in the dishwasher anyway, forgetting what I said. Shortly after he turns



on the dishwasher, there is a short blackout in my neighborhood, and the dishwasher goes off, leaving the dishes dirty overnight. In the morning, I find my favorite ceramic bowl, intact, unharmed, and dirty, in the dishwasher. In this case, my friend has arguably acted badly (albeit in a fairly minor way), and there is arguably responsibility for the act of carelessly putting my favorite bowl in the dishwasher, after being asked not to do so. But there is no responsibility for the act of breaking the bowl, because the bowl was not broken, and so there was no such act. And, even if we do not view the breaking of a favorite bowl as a very substantial wrong, the careless placing of a bowl in the dishwasher — unaccompanied by any injury or damage — is an act of even lesser gravity. To vary Nagel's example, if my friend absent-mindedly put the bowl in the dishwasher and realizes his mistake as we approach the closed dishwasher after the blackout, he will realize that he will have committed a more significant act if the bowl turns out to have broken notwithstanding the fortuitous blackout than if the blackout turns out to have spared the bowl.

What this example illustrates is that we can describe acts in a way that abstracts away from whether some sorts of results do or do not occur, but we can also describe acts in a manner that embraces the injuries that do or do not occur. As John Gardner has pointed out — and as Nagel conveyed in his original article — it is not justifiable to suppose that the referents of the act description that abstracts away from results are for that reason somehow metaphysically prior to the referents of the act description that embraces the injury. In short, the world contains result-embracing acts, not simply result-abstracting acts.

Note that some moral luck commentators are attracted by the idea that responsibility is simply a cover for having a duty to compensate the injured party for the damage done. Here the bowl's irreplaceable nature and my sentimental attachment to it are meant to forestall that objection; those who believe repairing the bowl is still a possibility should contemplate a hypothetical example in which it is a handblown glass bowl made for me by an ex-lover that shatters into sand while in the dishwasher. The responsibility is vulnerability to reproach and blame and entails, at some level, the appropriateness of guilt; such vulnerability to reproach and blame could entail vulnerability to proper demands for compensation or the propriety of an offer to repair or compensate, but the appropriateness or requirement of repair is not the very essence of the responsibility, because responsibility exists even where there is no possibility of repair.

That we are really talking about moral responsibility, and not some knock-off of property concepts, is shown by the following example. Bob offers to baby-sit for his friend's seven-month old baby, Tim, while his

friend goes to her job interview. Instead of pouring Tim's eight ounce bottle from the milk carton in the fridge, he pours it from the eggnog carton, which is laced with several ounces of rum. Let's suppose that Bob should have known, both by the label and by the smell, that this was not milk; he did so negligently (or perhaps with gross negligence). He leaves Tim in his crib with the bottle and sits down to read in a chair next to the crib, falling asleep until Tim's mother returns. Now suppose that Tim gurgles a few sips and falls asleep, no harm done. Bob is responsible for the act of giving a baby a toxic and potentially lethal beverage, and this reflects very poorly on him from a moral point of view. But if Tim had consumed much of the bottle and consequently died, then Bob would be responsible for poisoning — and killing — Tim. Bob would, indeed, have done something of far greater moral gravity. The act for which he would then be responsible — killing Tim — is one that he did not do in the first scenario, where Tim quickly falls asleep.

Now it is both obviously true and startlingly false to say that responsibility for how Bob acted cannot — without absurdity — vary in the two cases. If "how Bob acted" includes only the act of pouring the laced eggnog into the baby bottle, giving it to Tim, and going to sleep, then it is the same act in both cases and responsibility for that act, in each of the two cases, cannot vary. On the other hand, there is an act — killing Tim by poisoning him with alcohol — that Bob did in one scenario but not the other, and he is responsible for it in one and cannot possibly be in the other. Moreover, this act is part of what could be referred to by "how Bob acted." And so it is startlingly false that there is no difference in the moral responsibility attributable to Bob for how he acted in the two cases.

## **B. The Moral Luck Critic and the Fault-Expressive Conception of Blameworthiness**

### *1. The Inadequacy of Capturing Convention*

In one sense, this analysis gives us everything moral luck philosophical discussion asks for: an explanation why our intuition that there is moral luck seems to be self-contradictory, and an explanation why it is in fact cogent — as Quine would say, a characterization of moral luck in terms of a veridical paradox.<sup>22</sup> There really is moral luck, and it seems paradoxical only if one makes the understandable mistake of individuating actions only at a level that abstracts away from results. Since we do not in fact limit ourselves to this type

---

22 W.V.O. QUINE, *THE WAYS OF PARADOX* (1962).

of individuation in ordinary moral speech and thought and patterns of affect and social practices, any more than we do in legal practices, moral luck comes up all the time. In short, as John Gardner has explained, different treatment of the successful and unsuccessful criminal seems peculiar if one unjustifiably ignores that responsibility is in respect of acts, and the successful criminal has performed an act that the unsuccessful one has not.

Unfortunately, I believe this is too quick a treatment of moral luck. For the moral luck critic does not deny that we talk this way or even that we think this way, and certainly does not deny that we engage in practices of blame or sanction-imposition that track such thinking and speaking. In some sense, this is to put a finger on the problem itself. The moral luck critic thinks that it makes no sense to have moral responsibility for an act-result union that exceeds responsibility for the act described in a way that abstracts from results outside of the actor's control. He can concede that the language of acts can be comfortably extended to that point, and that responsibility for such acts can comfortably be made to fit. But he will not concede that blameworthiness levels for acts can vary depending on different ways the natural world — beyond the actor's control — makes the act take shape. Insofar as there is something morally cogent to talk about when we talk about a blameworthiness level in agents for actions, it does not make sense to talk about it extending this far. It is this very idea of a culpability level that Nagel and Williams both identify at the root of Kant's idea of the good will.<sup>23</sup> In this sense, the moral luck debate is not about whether certain patterns of talking and thinking, giving the appearance of paradox, can coexist, and can attach to actions that are individuated in a metaphysically cogent way. It is about whether one of these ways of talking and thinking is deploying a conception of responsibility and blameworthiness for acts that is morally indefensible.

## 2. *The Argument from Control*

The most straightforward argument behind this position is the one initially articulated by Nagel and most recently put forward by David Enoch and Andrei Marmor in their article, *The Case Against Moral Luck*.<sup>24</sup> It might be called "the argument from control": "Prior to reflection," Nagel writes, "it is intuitively plausible that people cannot be morally assessed for what is not their fault, or for what is due to factors beyond their control."<sup>25</sup> Enoch and Marmor

---

23 NAGEL, *supra* note 1, at 25.

24 Enoch & Marmor, *supra* note 8.

25 NAGEL, *supra* note 1, at 25.

assert (understatedly) that "there are good reasons to confine assessments of people's conduct to those aspects of it which are within the person's control."<sup>26</sup> One quite powerful basis for this argument is the premise that a necessary condition for the attribution of responsibility for an act is that one have had control over whether one performed that act. Then one can add the premise that whether the harm-stopping or harm-facilitating condition existed was outside of the actor's control. And one could draw the intermediate inference that whether one performed the injury-embracing act was also outside of the actor's control. The conclusion then drawn is that whether one performed the injury-embracing act as opposed to the inchoate act cannot alter the blameworthiness of one's conduct. The fact that my friend did not have control over whether there was a blackout — and therefore did not have control over whether the bowl was actually broken — is used as a ground for denying his control over whether he performed the act of breaking the bowl by putting it in the dishwasher. It therefore seems to follow that the blameworthiness of his conduct cannot differ based on whether or not it resulted in the breaking of the bowl.

This argument, as so stated, is unsound. As detailed and powerful analyses by Stephen Perry, John Gardner and Michael Moore (separately) have argued, control over whether an initial act was performed (or not) will suffice for any version of this control principle that makes sense, at least where the initial duty was one to refrain from performing the potentially injurious act, and one of the reasons for this duty was the duty to refrain from causing the injury.<sup>27</sup> The relevant control condition is whether it was under the actor's control to avoid doing the act, and whether there was a duty to avoid doing the act. If there was, and if the result was inside of the range of reasonable foreseeability that would be attached to the act under its voluntary description, and if a reason for the duty to avoid performing the act was to avoid the consequence whose occurrence would otherwise be outside of the actor's control, then whether the result occurred is within the actor's control in the relevant sense. All of these conditions are easily satisfied in the cases considered above and, indeed, in all of the moral luck pairs we have seen. It is a fallacy to argue from the lack of control over which of two ways an act (described in a manner that abstracts from results) will play out, to the lack of control over whether one has done the act (under a description that embraces

---

<sup>26</sup> Enoch & Marmor, *supra* note 8, at 405.

<sup>27</sup> Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS*, *supra* note 9, at 72; Moore, *supra* note 14; Gardner, *The Wrongdoing That Gets Results*, *supra* note 18.

the consequences). For the moral plausibility of the control condition has to do with the principle that one ought to have been able to avoid doing some action if one is to be held responsible for having done it. One can avoid doing the injury-embracing act so long as one can avoid doing the injury-abstracting act, which is true by hypothesis in all of the moral luck pairs. As Gardner and Moore have both recognized, Nagel's efforts to generate a conflict between Kant's theory of the uniquely unconditioned value of the good will and the causal luck pairs is similarly untenable, because the irrelevance of luck to the value of the good will has no clear implications for the assessment of those who have acted wrongly by breaching duties of non-injuriousness, which both members of the moral luck pairs have done. This is not to say that there is no moral luck problem, only that the control condition does not quite flesh it out.

### *3. The Fault-Expressive Conception of Moral Responsibility*

The core argument of the moral luck critic derives, I believe, from a conceptual analysis of what moral blameworthiness for acts is. On this view, moral blameworthiness for an act is essentially a matter of moral fault as expressed by the act. Acts are, it might be said, both expressive of and epistemically relevant to fault and the quality of moral character.<sup>28</sup> Judgment of blameworthiness for an act is, at least in part, judgment of the person that performed the act, with regard to her performance of it. But the moral luck critic can accept Gardner's point — which is particularly important if we are going to be turning to criminal law, eventually — that the judgment is really of the act, not of the actor.

In judging moral culpability of actors for actions, our focus is more on the action than on the actor, even if we are conceiving of the action as expressive of the actor's abilities. In this sense, moral judgment (according to the moral luck critic) has a similar structure to that of, for example, judgment of gymnasts in the Olympics. Here, too, even if the performance is viewed as an expression of underlying abilities, for a variety of reasons, the focus is on the performance or the action, more than the actor as such. Some of these reasons are pragmatic and evidentiary: any alternate means of judging quality would be less reliable, and open to various kinds of distortions. Some of them are institutional: we structure the means of adjudication not only to enhance accuracy, but to ward off systemic distortions in adjudication that might undermine the candidates' entitlement to be given a fair and equal shot at winning. Some of them relate to larger social goals, such as

---

<sup>28</sup> Readers should be aware of the caution in footnote 3, that "character" and "fault" are used loosely for the purposes of this Article.

entertaining the public with spectacles, and enhancing social adhesiveness by making evaluation dependent on a large public performance. Some of them relate to the very nature of the underlying abilities being judged: part of being a great gymnast is being able to perform in competition under high pressure. And one reason, of course, is the ineliminable aspect of what the enterprise of having a competition, or a race, is about: who will *perform* the best gymnastic routine, not who *is* the best gymnast; who will *run the 100-metre dash fastest*, not who is the fastest runner.

For all of these kinds of reasons — both because it is constitutive of what we want to be judging (actions), and because the enterprise of judging fault in other ways is less reliable, more fickle, and less satisfactorily connected to the practices for which moral judgment of others is used — there are often good grounds for focusing on particular actions that express actors' moral fault, rather than simply judging moral fault, using a variety of acts and other matters as evidence. Of course, just as a person deciding who should be a gymnastics coach may care more about a generic judgment of ability than about any particular performance, so a sentencing judge or a voter, employer, or prospective spouse might care more about the moral fault of the person they are scrutinizing than about any particular action. But in the enterprise of judging moral responsibility or blameworthiness for action, it really is action-as-expressive-of-fault that is being judged.

Let us suppose that I am correct that this is the sort of position the moral luck critic would take on the objects of judging moral responsibility or blameworthiness for action. If so, then it is quite understandable why moral luck seems unacceptable. The critic can accept that acts may be individuated in both the injury-abstracting and the injury-embracing way. But the blameworthiness level of the act should not differ based on the consequences. Of course, we may choose, in meting out consequences, reward, penalties, et cetera, to attend to the result-embracing descriptions, for a variety of pragmatic and institutional reasons. But on the question of the blameworthiness attributable to the act as expressive of moral fault, as applied to an individual case (rather than a category of cases), when there is no question of epistemic access to the actor's knowledge or state of mind or circumstances, how the act played out is irrelevant to the blameworthiness of the act.

The Olympics analogy might seem an odd one to assign to the moral luck critic, because in competitive sports, quality of subjective effort is not a particularly important criterion for appraisal. The analogy is intended to give the moral luck critic the most charitable account, and also to cast the discussion in a manner that is most realistic from the point of view of the completion asymmetry in criminal law. For in criminal law, it is ultimately

concrete external acts — coupled with mental states — that constitute attempts. So the moral luck critic is really not insisting on avoiding concrete actions, and is in this sense analogous to the athletics judge. The most charitable version of the moral luck critic, for the purposes of the debates at issue here, depicts him as agreeing that external performances are the objects of evaluation, but opposing the claim that whether that performance ripens into harm for reasons unrelated to the performance itself should have an impact on our judgment of the performer.

#### **IV. AN AGENCY-LINKING CONCEPTION OF BLAMEWORTHINESS**

##### **A. First Cut**

One sort of defense of moral luck would begin with a critique of this conception of blameworthiness. That is not my aim here, or anywhere else, for I believe that such judgments are cogent, and defensible, and cut to an important part of moral reality; not coincidentally, I also believe such judgments — or at least some domain of judgments as applied result-abstracting actions like those described above — play an important and worthwhile role in a range of legal and non-legal practices. Rather, it is the implied claim of exclusivity for this form of blameworthiness judgment that I am rejecting. For recall that the moral luck critic must concede that we talk and think in a manner that draws this distinction, and we do so cogently on the basis of a difference in the individuation of actions. The critique simply asserted that there can be no different blameworthiness or responsibility for the completed action than there was already for the result-abstracting action, and that the result-abstracting action was performed even in the case with a harmless result. This follows only if the only sense in which a person's acts could be judged for blameworthiness and responsibility is that captured by the Olympic analogy.

Consider again the case of Paul and the broken bowl. If I really loved this bowl, I will likely be both disappointed and angry that it broke. Suppose that I remember Paul doing the dishes, but I cannot remember whether I informed Paul of its sentimental value and its fragility. Then I will probably not be angry at Paul, and probably not regard him as responsible for breaking it. Indeed, if I think that I forgot to tell Paul, then I will regard myself as responsible for permitting it to be placed in the dishwasher and broken. But now suppose that Paul apologizes, telling me it was his mistake, since I had told him not to do so. In this case, I now come to see Paul as responsible for having broken it, and I may find myself occupying an attitude of blame

toward Paul. Trying to figure out what Paul knew and whether Paul acted in a careless manner toward something important to me is important to ascertaining whether Paul is to blame or responsible for breaking the bowl. Responsible, here, means properly vulnerable to my attributing to him the unfortunate and regrettable breaking of the bowl as one of his actions, as something he carelessly did. It may, too, go along with various linguistic or non-linguistic acts toward him, such as telling him how much this bothered me, criticizing him, expressing my dismay, or being less welcoming as a host on this or future occasions. Virtually none of these will occur (or occur in the same way) in the blackout scenario. The question of responsibility for breaking the bowl does not arise, because plainly there was no act of breaking the bowl.

Although the question of someone's blameworthiness or responsibility for an act may be about the sense and degree to which the act is an expression of the moral fault of the agent, the blameworthiness question may be something else too: what I will call an "agency-linking" aspect of responsibility. It may be a question about the extent to which our responses to an event that occurred are properly directed toward the event as an action of an agent, as opposed to something that simply happened. To put it slightly differently, one sort of responsibility inquiry is about the extent to which an act is expressive of an agent's fault level or character; another is about the extent to which an event is, or is a part of, an act of an agent. Sometimes, when we are deciding how much to blame someone, we are trying to decide the extent to which an act of that person should be regarded as an expression of his character and, if so, what degree of fault should be assigned. At other times, however, when we are deciding how much to blame someone, we are trying to decide whether something that happened was a doing of his, an agent's action, not simply an event. And, of course, sometimes we are trying to do both: to decide whether the event was a doing of the agent; and to decide whether it was an expression of fault, and, if so, what culpability should be assigned.

Moral concepts of blame and responsibility govern the appropriateness of responses to bad things that happen, in particular to injuries or damage incurred. We ask ourselves to what degree a bad thing that happens or an injury is properly met with a negative response of a certain sort to a person. The question of responsibility is to some extent a question of responsibility *for what has happened*. But the question is really whether the injury is something that should be regarded as merely having happened, or as an action for which a person is responsible, an injuring of someone by someone. Given that the negative consequences did indeed occur, then if certain agency conditions are met, it will be regarded as a doing of the



person who injured the complainant. Then we can move to the next question, if we wish, of the degree to which this is a reflection of certain aspects of the agent's faultiness. As mentioned, there is a sense in which the answer to this question would be the same if things had not ripened into injury. But the attribution of responsibility and blame is not simply about the nature of the character or fault expression through the conduct of the actor. It is also about the specification of the set of actions for which they are to blame and for which they are responsible, and whether the sets of actions differ in the two cases.

Let's return to the case of the broken ceramic bowl. Assume that I know all the facts and the facts are that Paul forgot what I had said because of a combination of tiredness, drunkenness, and sheer carelessness. If the bowl breaks I will blame Paul for destroying this precious possession. I will be angry at him, to some extent, and I will regard him as responsible, and deserving of blame, for carelessly destroying my precious and irreplaceable possession. If he puts it in the dishwasher and turns on the dishwasher, but there is a blackout and the bowl does not break, I will not blame him for this because he will not have broken the bowl. I may blame him for carelessly placing it in the dishwasher, but that does not involve the magnitude or kind of blame and responsibility attribution that would occur if he had broken the bowl. Blaming him for breaking the bowl involves packaging negative affect and reactions associated with the loss of this bowl, and mentally bundling them into an understanding of what occurred according to which the breaking of the bowl was not just an occurrence, but an action — and indeed a wrongful one — done by Paul. For it to be true that Paul is responsible for negligently breaking the bowl is for it to be the case that this response is one to which Paul is properly subject — it is a matter of Paul's being a proper object of this blaming response, of this specially packaged (and hopefully circumscribed) resentment attached to the loss of this bowl.

There is thus a distinction between two ways of responding to what Paul has done, and the different dimensions of responsibility are explicable by reference to these two different types of response. One sort of response is analogous to that of the gymnastics judge: it is an evaluation of a certain performance as an expression of the actor's underlying qualities. This might be called an "appraisal" of the actor's action: because it concerns moral qualities and moral responsibility, it might be deemed a moral appraisal of the action. The term "appraisal" is intended to connote the sense in which it is not only an evaluative response, but one that purports to be a sort of rating of quality, conducted from a detached point of view. Appraisals relate to the fault-expressive aspect of responsibility.

A second way of responding involves moral vocabulary and moral thought

and evaluation too, but is best described not as an appraisal of the action as an expression of moral fault or character. It is more of a reactive judgment than a detached rating, or appraisal of the action. The reactive judgments of blaming someone for breaking one's bowl, squandering one's money, damaging one's reputation, hurting one's feelings, breaking one's leg, or killing one's child or one's countrymen — although not principally appraisals of fault, are judgments. They involve the application of concepts, the regarding of a case as falling under a concept, and propositional attitudes that take in the actor, the action, and the injury in one fell swoop: I am angry at Paul for breaking my bowl; I resent Paul's breaking my bowl; and I blame Paul for breaking my bowl. Paul's breaking of my bowl is something I am angry at Paul for. Reactive judgments of blaming someone can involve apprehending an unfortunate and unhappy event as an agency-linked event — that is, as a doing of an agent.

The concept of responsibility involves being *appropriately responded to* in a certain way for a certain action. Now the two types of responses — appraisals and reactive judgments — involve apprehensions of the actions in different ways: appraisals are apprehensions of an action as expressive of fault, while reactive judgments involve apprehensions of actions in their agency-linking way. If appraisals and reactive judgments are two types, then there are two types of responses whose appropriateness one may be querying when one asks whether an actor was responsible for doing something: the appraisal response, pertaining to fault expressiveness, and the reactive judgment response, pertaining to agency-linkage. So, for the act of breaking the bowl, we may ask whether Paul was morally responsible for breaking the bowl, meaning whether Paul's breaking the bowl was something that warrants a negative appraisal, or we may ask whether Paul's breaking the bowl was something that warrants a negative reactive judgment. Let us suppose that the answer is that Paul is responsible in both respects. Now in one respect, Paul's moral responsibility for breaking the bowl is no greater than his moral responsibility for negligently loading it in the dishwasher: the moral responsibility is equal if we are looking at *the appraisal sense of moral responsibility*. However, his moral responsibility for breaking the bowl is greater than his moral responsibility for loading the dishwasher, if we are looking at *the reactive judgment sense of moral responsibility*, because the negative reactive judgment of Paul in connection with his breaking the bowl is obviously inappropriate if the bowl was not broken.

The same point can be made more sharply with respect to blameworthiness. The concept of blameworthiness is ambiguous between a fault-expressive sense and an agency-linking sense. An act is blameworthy in the

first sense if certain negative appraisals are in order; in the second sense, if certain negative reactive judgments are appropriate.

The critical point is that evaluation of blameworthiness and responsibility may well have a different place in different practices. The evaluation of blameworthiness in the fault-related sense is useful for certain purposes, and makes sense against a background of a set of values and expectations regarding what one's duties of non-injuriousness are and a sort of conception of fault and fault-expressing actions as a domain of moral evaluation yielding significant information about a person: what kind of person, how good or bad or thoughtful or respectful a person is. The evaluation of blameworthiness in the agency-related sense is not useful in this way, except insofar as it is directly or indirectly linked to the fault-related sense. Knowing whether he was responsible for breaking the bowl as opposed to merely knowing that he was responsible for putting the bowl in the dishwasher, notwithstanding my directions, is not useful in thinking about how Paul will act in the future, or whether to recommend him, etc. On the other hand, it may well provide information about why I relate to Paul in a certain way, and it may add to a picture of Paul's relationship with his friends, his history as a houseguest, and his capacity to take responsibility for what he has done.

Of course, these differences are magnified when we switch to the example of Bob, the eggnog and Baby Tim. That Bob is responsible and blameworthy for having killed Tim is a hugely important fact in his life and in Tim's life and in Tim's mother's life, far more important than the fact of his having negligently or wrongfully given him laced eggnog. That he is responsible for the death of a friend's baby — that it was his fault and that he is to blame for having killed his friend's baby — are very important moral facts about him. That he is responsible for having done this and to blame for having done this is an important part of his history as a person, and obviously a critical fact in his friend's understanding of him and attitude toward him.

In regulatory law, we can ascertain whether a person would be liable for having behaved in a certain way (speeding down a city street), independently of whether he has in fact been cited and fined for doing so. It is a question of whether he has violated the relevant legal rule. Similarly, we can ascertain in theory whether there would be liability in tort for what a defendant did. If he negligently injured the plaintiff, then there would be liability if the plaintiff were to bring an action and ably carry her evidentiary burden. The potential legal liability for this conduct is analogous to blameworthiness in the moral cases. It exists as an attribute of being properly vulnerable to these responses — the fault-related sense of blameworthiness and the agency-related sense of blameworthiness. When someone — the injured party or another — blames Paul for putting the bowl in the dishwasher, he

is doing something analogous to giving him a ticket. The blameworthiness is the deservingness of the blame. Similarly, when someone — typically the injured party — blames Paul for wrongfully breaking the bowl, he is doing something analogous to exacting damages from him in tort. His blameworthiness for the action of negligently breaking the bowl is a matter of whether he is properly vulnerable to this blaming, the deservingness of this blame. In our non-legal moral practices, just as in our legal ones, proper vulnerability to responsibility-imposing practices of the second sort is dependent on whether there was a breach of a duty of non-injury, not just on whether there was a breach of a duty of non-injuriousness.

### **B. Developing an Agency-Linking Conception of Blameworthiness**

Just as it is more appropriate to be very upset about a stovetop fire that destroys my house than it is to be upset about a stovetop fire that results in a charred frying pan and no further damage, it is more appropriate to feel intense resentment of someone for negligently burning down my house than it is to feel intense resentment of them for charring my frying pan. The burning down of my house is more *upsetting* or *lamentable* than the charring of my pan, and if George is responsible for burning down my house, then George's doing so is not only more upsetting and lamentable, but also more resentable and blameworthy, than George's charring my pan.

Now there is no problem in regarding certain events as upsetting, lamentable, tragic, or calamitous, and others as not so. We know perfectly well what is being said here. Although some of these terms — such as "upsetting" — explicitly connote some emotional response, they are normative-dispositional rather than descriptive-dispositional concepts (like desirable or loathsome). To regard some event as lamentable is to regard it as worthy of being lamented. To regard something as tragic is, in part, to think of its happening as calling for a profound sadness of a certain kind. There is no problem understanding that it is not tragic that little Tim slept longer than he should have, so his mother will have a hard night with him, whereas it is tragic that little Tim died from alcohol poisoning.

The differential blameworthiness of actions that are identical in the fault-expressive dimension is a differential in the degree to which it is appropriate to regard or react to these actions, in light of the gravity of what the actor did, in a certain negative and resentful manner. Bob's careless drugging of Tim so that he slept too long during the day is somewhat blameworthy, but Bob's careless killing of Tim is far more blameworthy. We do not regard these occurrences as simply tragic *events*, for they are not

just things that *happened*: they are acts with an author, and therefore we regard them as acts for which the author is blameworthy.

If we vary the case of Bob and Baby Tim in different ways, we will quickly see that our judgments of how blameworthy Bob is for his treatment of Tim are quite nuanced and sensitive to different reasons, and in need of a thoughtful conception of blameworthiness and responsibility. Thus, if Bob gives Tim the rum-laced bottle, but the baby drinks some and falls asleep and dies of a bizarre allergy to eggs, it is not clear how blameworthy Bob is for killing Tim. If Tim dies after a seizure caused by something other than the eggnog, but Bob did not wake up from his nap, it is again not clear whether Bob has killed Tim and, if so, how blameworthy he is for it. If Bob simply provided the bottle that Tim's mother left, and it was she who mistakenly put the eggnog in it, but Bob entirely failed to notice the smell of the eggnog, again, his blameworthiness for killing the child is in question. If Bob did notice that the child was poisoned due to the eggnog and rushed the child to the hospital, where the child fully recovered in a few hours, perhaps Bob should not be blamed at all; but what if Bob rushed Tim to the hospital, where incompetent pediatric residents ended up failing to save the child's life (which they ought to have been able to do); what if Bob was the child's father, just having returned from war to see his newborn child — in all of these cases, whether the child's dying under these circumstances is something that Bob ought to be blamed for and, if so, to which degree, are difficult questions. All this is meant to illustrate is that the degree to which an event is appropriately regarded as a doing by an individual for which he is responsible is sensitive to many circumstances, and this is further illustration that the blameworthiness of a person's conduct goes far beyond attributes of his character or fault.

There are numerous semantic, epistemological, and metaphysical concerns that can be raised about an account of blameworthiness and responsibility predicated on how actions are appropriately responded to. My inclination here is twofold. First, to analyze the concepts of responsibility and blameworthiness in terms of normative vulnerability to certain kinds of responses is not necessarily to offer a reductive account of it, nor is it to take the view that these are in some sense secondary qualities (although I do not wish to rule out such a view). Offering an analysis of how we utilize these concepts does not necessarily entail taking a stance as a conventionalist, an idealist, a naturalist, or a moral realist about the nature of the properties of blameworthiness or responsibility; I have only been talking about the structure of the concepts we use to get at blameworthiness and responsibility, whatever they might be. The second thing to say is that there are important ideas from Aristotle through Hume, Strawson and McDowell that suggest

that such an avenue of thought — understanding certain moral concepts in terms of the role they play in guiding morally appropriate responses to the objects of moral judgment — might be fruitful, and counsel against any quick dismissal of such a view on epistemological or metaphysical grounds.

I do not wish to add to the list of philosophical problems that I have already imprudently bitten off in this Article. Rather, I want to raise two more particular and interesting challenges to the proposal that an agency-linking dimension of blameworthiness exists and should be taken seriously through an analysis of the appropriateness of differential levels of blame for acts depending upon the injuries those acts embrace. These problems are, I shall argue, inextricably linked to delicate moral questions about the nature of blameworthiness for injury-embracing acts. But while these questions about blameworthiness for injury-embracing acts are in the first instance best understood as normative, they turn out to require significant nuance in the analysis of the structure of blameworthiness as a concept.

The two additional problems are: *The Problem of Perspective* and *The Problem of Forgiveness*. Let's return to the example of the broken ceramic bowl. I have claimed that what Paul did is less blameworthy if there is a blackout in which the ceramic bowl is fortuitously spared than if there is not. And I explained this by saying that in the latter case, Paul performed the blameworthy act of breaking the bowl whereas in the former case he did not. So the act of negligently putting the special bowl in the dishwasher and breaking it is more blameworthy than the act of negligently putting it in the dishwasher and not breaking it. And now this is analyzed in terms of *the appropriateness of a resentful reaction of a certain sort toward Paul*, in light of his breaking the bowl.

The italicized noun phrase above highlights the problem: it does not indicate who would appropriately have such a resentful reaction. The dispositional property of yellow is definable by reference to what a normal observer would see. The arguably dispositional property of a blameworthy character is a character that a normal moral judge would appropriately blame. But it is not clear whether Paul's employer or brother or just some person on the street would appropriately have a resentful attitude toward Paul, in light of his breaking the bowl. It is bad enough for Paul to have to face the bowl-owner with the bad news; why should everyone else resent him too?

It would be nice if we could simply solve the problem by identifying the victim of the wrong as someone who is implicitly picked out by the concept. Perhaps we will eventually arrive at some such view, but at the moment it does not seem very promising. Some blameworthy acts have no obvious victim, despoliation of the environment being a good example. Other acts

clearly have a victim, but it is appropriate for other people (e.g., the victim's parent) to have such resentment. And in many cases with a victim — murder, for example — it is appropriate for many unrelated to the victim to have such resentment too. Simply putting in an existential qualifier — "Someone could appropriately resent him" — will not do, for too much will turn out to be blameworthy (the jilted ex-girlfriend could appropriately resent the new bride for marrying her ex; but she is not blameworthy for doing so). We may need something complex, like: "prima facie, appropriately resented for committing the wrong, by one who rightly takes interest in whether the wrong is done." The point here is not to get the right formula, but to point out that the perspective of the resentful party is a real complexity in thinking about this form of blameworthiness.

The second problem is simpler but equally deep. Often it is appropriate for someone who is injured by the wrongful conduct of another to forgive the other, even where the other was blameworthy. If Paul cooked and put up with an entire dinner party of my workplace friends, hand-washed dozens of crystal wineglasses (despite being a teetotaler), and ended up breaking a repairable but very ugly bowl because he forgot to hand-wash it, I probably should not be resentful of his breaking the bowl; I should probably forgive him. But it may well be true that his breaking of the bowl was blameworthy. This seems to show that blameworthiness is not a matter of being appropriately resented for a wrong.

Both problems raise separate issues, each of which invites substantial and careful normative theorizing that I am not going to undertake here. My broad response is the same, however: the *blameworthiness* of an actor for an action (at least in the agency-linking sense) is not a matter of whether one ought to blame the person, but whether blame is something the person is appropriately vulnerable to. In this sense, blameworthiness in the agency-linking sense is like the *creditworthiness* of a potential debtor; the question of creditworthiness is not whether a lender should lend, but whether the debtor is among those who could appropriately be given a loan and relied upon. The non-satisfaction of culpability conditions or agency conditions or responsibility conditions or wrongfulness conditions could render someone non-blameworthy for an action. If all of these conditions are satisfied, the person's doing something is blameworthy, which is to say that he is fair game for blame, in the agency-linked sense. *Who* is appropriately situated to do the blaming, *whether* forgiveness or stoicism or blaming would be the best response — these are separate questions which are not answered by the question of whether the actor's doing of the act was blameworthy.

It is an interesting question whether blameworthiness in the fault-expressing sense works the same way as creditworthiness works, or rather

the way loathsomeness works — to say that someone is "loathsome" is not to say that they could be loathed, but that they should be. If anything, blameworthiness in the fault-expressing sense seems to have a conceptual structure more similar to loathsomeness (or "being adorable") than to creditworthiness. This is one of many reasons why it is easier to treat blameworthiness in an objective manner if one focuses only on the fault-expressing dimension.

Finally, it must be said that the distinction between "blameworthiness" in the fault-expressing sense and "blameworthiness" in the agency-linking sense is an artificial creation of this Article. What people talk and think about is whether actions and actors are blameworthy, full stop. My contention is that there are two dimensions of blameworthiness, and that the two dimensions hidden within the concept explain the appearance of a paradox of moral luck. If one is conceiving of blameworthiness only in the fault-expressing sense — which is what the causal luck examples draw the reader into doing — then one will be inclined to conclude that there is equal blameworthiness. But when one recognizes that one would have done something more blameworthy if one had actually killed the baby, for example, one is in effect recognizing that some acts are more blameworthy than others even if they are expressive of the same fault level or character, and one is looking at the agency aspect of blameworthiness. In ordinary life, we think of blameworthiness in an undifferentiated way. There are doubtless numerous synergistic effects between the two sorts of blameworthiness, and numerous puzzles that arise because of their synergies and their differences.

### C. Conventional Ways of Treating Wrongdoers

Several scholars have pointed out that there are blame-related practices — such as punishment, retaliation, criticism, verbal and non-verbal expression of negative affect, demand for compensation, and fraying relationships — that are engaged in for some conduct and not others, and that the ripening of wrongful conduct into harm is often relevant to the justifiability of such practices.<sup>29</sup> To put it differently, there are practical reasons for such practices, and acting upon these reasons often involves utilizing the distinction and attending to whether the actor's conduct did in fact cause harm.

In their recent critique of moral luck, David Enoch and Andrei Marmor have distinguished between attributes of conduct that warrant, epistemically, an assertion of greater blameworthiness and attributes of conduct that —

---

<sup>29</sup> Enoch & Marmor, *supra* note 8; Zimmerman, *supra* note 15.



for pragmatic or instrumental reasons, justify a different kind or degree of blame-related practices. Their point has been that the lure of the idea that more blameworthiness attaches where there is a negative result is that different and greater blame-related practices are appropriate. But this is exactly backwards, they argue: the differential in justifiability of practices, according to whether it is a completed wrong or not, does not make sense for reasons related to aspects of the actor or action that are inherent and merit more blame. On the contrary, there are practical reasons why responses after the fact should vary according to results, even if in fact the actual blameworthiness is identical. The idea that there is a difference in actual blameworthiness as anything other than a provisory conclusion is both indefensible and unnecessary. So goes the argument.

It should be evident that the position developed here aims to make room for result-dependent differences in how we treat actors without explaining away differences in instrumental or reductive ways. Moreover, it is now available to say that part of the reason for treating differently those who have breached duties of non-injury is that their acts were more blameworthy. Of course, there may be other reasons for the blame-related practices differing in the two cases. But there is no need for an instrumental or blameworthiness-independent explanation of these differences. This is intended to be faithful to the powerful moral phenomenology put forward by Nagel, that there is a difference in blameworthiness and in moral quality. Additionally, we do in fact justify extra criticism and punishment, et cetera, on the ground of extra blameworthiness.

Enoch and Marmor concede for the purposes of argument the tenability of a notion of blameworthiness whose meaning is cashed out in terms of the appropriateness of blame-related practices.<sup>30</sup> However, they argue that making sense of blameworthiness, on such a model, would still require distinguishing between certain aspects of actions — which they call "core" — and other aspects, which they call non-core. For if we are to use the notion of blameworthiness to gain any kind of critical purchase on our actual practices — and why else would we want such concepts — then we must have a two-level system in which we subject to criticism the second, non-core layer

---

<sup>30</sup> Enoch & Marmor, *supra* note 8, at 412-20. For reasons suggested briefly above, I do not believe that an appropriateness-of-response based account of the concept of responsibility commits one to a reductive or anthropomorphic account of what makes conduct blameworthy. For this, and in light of the figures from Aristotle and Hume through McDowell who have adopted some form of this view, I do not find their metaethical reasons for rejecting this type of view to be persuasive; I think the reworked two-level response is more challenging.

of blame-related practices based on how well they are justified by reference to the appropriateness of the core reaction. Enoch and Marmor then argue that the intuition that more blame is due for a completed crime could be recharacterized as a perception that — for instrumental, or, say, epistemic reasons — more punishment is appropriate for completed crimes, but the appropriate amount of resentment or social condemnation could be the same. Critically, however, they give no reasons for saying that the appropriate resentment level on such an account could not or would not vary based on completion. The account of the agency-linked aspect of blameworthiness presented in this Article is, of course, intended to supply the argument that the permissible resentment level could and would vary with results.

## V. REVISITING CAUSAL LUCK IN CRIMINAL LAW

### A. Punishability and Injury: The Basic Idea

The interpretive problem of causal luck in criminal law can be explained in a fairly straightforward manner. Punishment in criminal law is, in part, a concrete expression of blame by society for the crime of the criminal.<sup>31</sup> Limitations on punishment corresponding to the crime committed are therefore, in part, limitations on the amount of blame that can appropriately be placed on the defendant for his crime. If some crimes are more blameworthy than others, then the limits on their punishment should be higher.

Our puzzle — the completion asymmetry — was why completed crimes may be punished more severely than parallel inchoate crimes. The answer is that they are more blameworthy, for the reasons described. The defendant's act does not simply display bad character or fault in the defendant. Its blameworthiness is not simply a matter of the defendant's disposition to act in prohibited or wrongful ways. The act is blameworthy because the

---

<sup>31</sup> See, e.g., MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997). In using the phrase "a concrete expression of blame by society" I do not mean to embrace a form of expressivism that is in tension with the objectivist type of retributivism put forward by Moore and others. The suggestion is not that criminal law is useful because it performs the function of letting us get our bad feelings out. Like Moore and, for example, Jean Hampton in MURPHY & HAMPTON, *supra* note 21, I believe that the nature of punishment is best explained in terms of its being an institution that places blame; the placing of blame through the criminal law is a concrete, institutionalized version of what individuals and groups do informally, with language, when they express blame through words.

injuring that occurred did not simply happen. The homicide victim has not simply died or died because a bullet hit him. The homicide victim has died because the shooter killed him. The shooter's killing him is an act of the shooter, for which he is responsible. We do not simply *regret the event of the victim's being hit by a bullet and dying*. We *blame the shooter for killing him*. If, as hypothesized, the shooter is responsible for the act of shooting him, and if the other conditions rendering him properly vulnerable to blame for the killing line up, then it is the case that his killing of the victim is a blameworthy killing of the victim. Because degree of punishability is linked to degree of blameworthiness, it is appropriate that the shooter be vulnerable to a level of punishment that is commensurate with this level of blameworthiness.

The moral luck critic protested that a shooter who hit his target should not be punished more than a shooter who missed, but only because of a bird flying by: that the crime of homicide should be punished no more than the crime of attempted homicide (except to the extent that instrumental and epistemic concerns might warrant such additional punishment). Overwhelmingly, such critics have in fact quite comfortably retreated to the blameworthiness level of moral discourse to justify their critique. The point is that the successful murderer is no more blameworthy than the unsuccessful one. We are now in a position to see why, even though there is more than a grain of truth in this statement, it is false. There is more than a grain of truth in it, because if we are looking at a single dimension of blameworthiness — what I have called fault-expressing blameworthiness — the blameworthiness level is identical. However it is false because there is more than one dimension of blameworthiness. Indeed, we are looking at whether the actions of the shooters in the two cases differ in blameworthiness. The answer is that they plainly do, because the successful killer has performed a blameworthy act that the unsuccessful one has not, and this act exceeds in blameworthiness the act which they both have performed (aiming and pulling the trigger, trying to kill the victim). The unsuccessful killer obviously cannot be blamed for the act of killing, because he has not performed such an act.

### **B. The Permissiveness of Punishability and the Executive Moral Luck Critique**

The explanation of the completion increment offered here is an explanation of punishability in terms of the agency-linking dimension of blameworthiness. Recall, however, that the agency-linking aspect of blameworthiness was a permissive notion, not a mandatory notion. Being blameworthy for having wrongfully injured someone is a matter of being an appropriate object of

blame for having done so. However, to be appropriately vulnerable to blame is not the same as requiring blame, or calling for blame. Blameworthiness in the agency-linking dimension, like creditworthiness, does not speak to the question of whether one should actually blame the actor for what he has done, even if he is responsible for doing it. Perhaps more to the point, blameworthiness of a certain degree is a matter of the object of blame being properly *vulnerable* to blame to that degree, not a matter of whether the inflictor of the blame *should* blame to that degree.

The completion increment in punishability should and does, I believe, work just the same way. Their having committed the completed crime — their actually having killed someone — renders them normatively vulnerable to a certain level of punishment, just as tortfeasors' having negligently injured someone renders them normatively vulnerable to a cause of action in tort for damages to a comparable degree. However, that the legal system does and should leave defendants vulnerable to that level of liability does not yield an answer to the question whether a plaintiff should sue. Sometimes forgiving, forgetting, or letting a defendant's vulnerability remain unactualized may well be the appropriate course of conduct. That I could blame Paul for breaking my bowl does not mean I should resent him, and even if I should (in my own mind), that does not mean that I should express these feelings to Paul. Similarly, in criminal law the state's power to punish someone, or to punish him to a certain degree, does not entail that the power should be exercised. Nor does their normative vulnerability to such punishment entail that they should be punished to that degree.

For this reason, the moral luck problem in criminal law rears its head again, but now in a slightly different form. The moral luck critic now argues that the state should not punish someone more for a completed crime than for an incomplete crime, even if, in some sense, the former is more blameworthy. And the reason is that the blameworthiness in question is not such as to demand or require blaming, but such as to render it not inappropriate or impermissible or excessive.

To clarify, it will help to draw in a somewhat over-schematic way. One could regard the judiciary and the legislature as setting forth boundaries or limitations of punishment, and one could imagine that the normative principles underlying these are principles regarding what renders persons convicted of crimes vulnerable to punishment, why, and how much punishment it renders them vulnerable to. This is the familiar idea of conditions on the permissibility of punishment. However, there is a second question, which is more easily associated with the prosecutor and the executive branch. The prosecutor decides, as to each case, what punishment to seek, and this is to some extent a discretionary choice within bounds.

And so the moral luck question that rears its head is: why should greater punishment be imposed on the successful criminal than on the one whose choices and convictions and seriousness and physical and mental actions are all identical, but who happens to miss?

All of the purposes for punishment seem to line up with the moral luck critic. If punishment is viewed as deterrence, there is an argument that the punishments should be equal. If punishment is meant to signify the government's attitude toward the culpability of character that is expressed through the act, then again they should be equal, because the culpability of character and the character are equal. And the same holds true for rehabilitation. Of course, there may be administrative, evidentiary, and instrumental reasons, but the moral luck critic has always admitted that. We are looking for reasons of principle. Speaking of which, there seems affirmatively to be a reason of principle for imposing the same punishment: equally bad moral characters, and equally culpable expressions of the will, deserve equally severe responses. A failure to treat them identically is arguably a violation of a norm of evenhandedness in punishment.

### **C. Normative Considerations for the Executive: A Response to the Revised Moral Luck Critique**

At the deepest levels, the revised moral luck critique calls for sustained attention to the theory of punishment as a whole — a theory of what makes punishment a legitimate activity of the state, when it is such, what functions it serves, and what restraints it ought to be subjected to. I am not about to undertake that enterprise here. But several quite general points can be made to indicate why I believe that the revised moral luck critique, while worthwhile, by no means returns us to where we were, or succeeds in re-problematizing the idea of a completion increment in punishment.

First, and foremost, the fact that the concept of blameworthiness characterized as "normative vulnerability" is a permissive rather than mandatory idea does not entail that blaming for the completed crime, in the manner that is enhanced because of the agency-linked dimension, is never normatively warranted or even mandatory. That the idea of a plaintiff's right to sue a defendant is a permissive idea is completely consistent with the idea that sometimes, plaintiffs really should do so; similarly, it is consistent with the idea that sometimes defendants really do have a moral obligation to pay.

There are various reasons why the state should sometimes seek to punish more for the killing itself than it would for the attempt, and conversely, sometimes seek to punish less for the incomplete crime than for the complete

one. The most straightforwardly retributivist reason is that sometimes, the state ought to be blaming someone for injuring another, in light of the culpability of the actor and the seriousness of the injury they have caused. The real need for serious blame and punishment, for the standard retributivist, has more to do with the seriousness of what the defendant has done and less to do with the culpability of character. Imagine a drunk driver driving at fifty miles an hour through a neighborhood street, hitting no one. There is wrongful and reckless and dangerous conduct that needs to be deterred. Now imagine a punishment for it: \$1,000 fine and 6 points on a driver's license, as well as a misdemeanor conviction on his record. Now imagine the identical case, in which an old man and old woman walking together are run over and killed because of the drunk driver's inattentiveness. The same punishment will arguably not suffice: what is warranted by way of punishing and expressing the driver's blame is much more, in this case, because the driver has done much more: he has killed someone. It is not simply that more punishment would be permissible, it would also be appropriate. Just as a hero is appropriately rewarded not simply for what she has tried to do in saving someone, but for what she has actually accomplished, so a scoundrel is appropriately blamed not simply for trying to commit a wrong, but for succeeding.

The account in this Article is intended to be receptive to the straightforward retributivism of the prior paragraph, but not to be in any way reliant upon it, for there are numerous reasons beyond this for the state to select a higher punishment.<sup>32</sup> One is that the degree of punishment imposed has social meaning: it is conventionally understood as an expression of the victim's valuing of the injury. Notoriously, the most striking race-based disparities in the American criminal law have more to do with the race of victims than the race of perpetrators. Killers of whites have historically been punished more severely than killers of victims of African-American descent. The point here is that degree of punishment expresses degree of blame, which often relates to the respect and value attached to the victim. In short, in a context where the degree of punishment is understood, in part, as a statement expressing the recognition of the value of what was lost, the fact that the criminal actually killed the victim becomes a reason pushing toward a more significant punishment.

In the third place, the state has a monopoly on force in the criminal justice system, and therefore aggrieved individuals are forbidden from acting upon their injurer, except insofar as tort law provides a civil means of recourse.

---

<sup>32</sup> Moreover, the reasons described in the text go far beyond the instrumental reasons that Hart reached to at an analogous juncture in his analysis of punishment.

The state in fact prohibits redressive action. And yet many people — victims in particular — do in fact blame, and desire to respond to, the wrongdoer who injured them. As I have argued at length in the area of torts,<sup>33</sup> the state's prohibition of retaliatory responses carries with it an imperfect obligation on the part of the state to respond to wrongs in a manner that respects the victims and takes seriously both the injury that has been done to them, and the strength of the blaming reaction they understandably experience and endorse.

More generally, there is a variety of reasons that are either instrumental or otherwise individualized, why a different treatment might be justifiable. Moreover, there is no clear demarcation, as individual cases arise, between instrumental and non-instrumental reasons for punishing toward the limit of one's rights to punish. Once we now bring in evenhandedness reasons for punishing similarly those who have committed similar offenses, it should be evident that there will be substantial reasons for exercising the power to punish to the extent of the blameworthiness.

Finally, I believe part of the appeal of the moral luck argument is the misleading vague assumption that, when we appreciate the alleged unjustifiability of a completion/inchoateness differential, we will be disinclined to add a premium of punishment for bad results. In fact, I believe the opposite is at least as likely to be true. Receptiveness to moral luck critiques has at least as great a likelihood of inflating the punishment for those who have committed incomplete crimes, so that it matches what we believe to be the limits of punishability for the complete crimes.

## CONCLUSION

The moral luck problem within conventional moral practices, tort, and criminal law boils down to the same problem, and roughly the same solution works across the board. The problem is that blameworthiness in moral practices, liability, and punishability all seem to be properly calibrated to the attributes of moral fault or character that are expressed through the action in question. Because the fault expressed cannot vary dependent on the results of the action, and because the judgment of appropriate response hinges on the fault level or character, it would seem that the judgment of appropriate response cannot vary with completion or inchoateness.

The solution, suggested most clearly by the structure of tort law, is to reject the claim that assignment of liability is meant to be calibrated

---

<sup>33</sup> See, e.g., Zipursky, *supra* note 10; Zipursky, *supra* note 19.

single-mindedly to attributes of moral character or fault assessed. Liability is actually about whether the plaintiff is entitled to exact a remedy from the defendant. Defendant's fault is not central enough to bear the weight of resolving this question. What we care about as much in tort is what the defendant has done to the plaintiff; whether the defendant breached a duty of non-injury to the plaintiff. Such a breach is what generates the possibility of a right of action, and the possibility of imposition of liability. Surely, we do see the imposition of liability in tort as responsibility recognition in a sense. What is striking is that the responsibility recognition is not about recognizing nuanced shortcomings in character. It is about vulnerability to an action of the other (through the state); about the respects in which she is fair game to be acted upon (sued, and have a damages award assessed and exacted).

The most difficult version of the problem is the blameworthiness differential within moral conventions itself. The problem is that when we stand back to decide blameworthiness judgments, we conceive of them as meaningful and objective only in connection with the idea that they are judgments of persons' fault-level or character as expressed through acts. And the same is true of criminal punishment; we try to calibrate punishment to fault displayed or culpability. In all of these areas, the very idea of a culpability level suggests that blameworthiness and moral quality must go together with fault expressed.

The fault-expressive aspects of blameworthiness engage a remarkable capacity of moral thought, one in which we associate an action with a person to a certain extent, and make a complex judgment about the crucible of the action, as emerging from the actor. When we assess the responsibility and blameworthiness of actors for actions we are, in part, parsing the actor and the action; we are arriving at an appraisal of the actor for the action. It is hard to see how, in that process, it could be relevant whether the action turns out to ripen into injury. Because the concepts of blameworthiness and responsibility are concepts that guide us in shaping our judgments of people's actions, it seems that results must be deemed irrelevant to blameworthiness.

The problem with this line of thought, I have argued, is that it tells only part of the story of our remarkable capacities of moral thought. Being a thinking and reactive person is not just a matter of seeing the connections between people and actions, but also of seeing the connections between actions and events — between what people do and what just happens. Using concepts of responsibility and blameworthiness to construct in cogent and appropriate ways the world around us is not just a matter of figuring out how we link actions with persons. It is also a matter of how we link events with actions. The agency-linking aspect of blameworthiness and responsibility is



exactly that part of those concepts through which we forge the connection between the bad, and sometimes terrible, things that happen and the actions that others take. For these terrible happenings are sometimes terrible actions. We blame others and hold them responsible for what they have done when that occurs.

Of course, the moral syntheses that we work with when we hold people responsible for their actions and blame them for their actions bring together both the fault-expressing and the agency-linking aspects of our moral thought. The response to, the blaming of, persons for their actions is a moral and legal enterprise that comes with both the deeply entrenched and potent tools of moral language and concepts, and the even more obviously powerful machinery of the criminal justice system. Our concepts of punishability, responsibility, blameworthiness, are concepts that guide, control and shape those processes. The vulnerability of supposed wrongdoers to resentment, blame, and punishment is very great indeed. For these reasons — and even apart from the manifest lure of the paradoxes of moral luck — much work remains to be done in the endeavor to understand, clarify, strengthen, moderate, tame, and rationalize the concepts we use to guide our responsive practices to the actions of others.

