

Luck Between Morality, Law, and Justice

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In this Article, I elaborate on and defend the following argument:

- (1) There is no moral luck.*
- (2) If there is no moral luck, there should be no legal luck.*
- (3) Therefore, there should be no legal luck (from (1) and (2)).*
- (4) If there is no normatively significant difference between the law (or the state) doing and allowing, or intending and foreseeing, then there is no normatively significant difference between legal luck and just plain luck that has legal implications.*
- (5) There is no normatively significant difference between the law (or the state) doing and allowing, or intending and foreseeing.*
- (6) Therefore, there is no normatively significant difference between legal luck and just plain luck that has legal implications (from (4) and (5)).*
- (7) Therefore, plain luck should have no legal implications (from (3) and (6)).*

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I. THE ARCH-ARGUMENT

Let me not waste your time. Here is the argument I will be defending:

- (1) There is no moral luck.
- (2) If there is no moral luck, there should be no legal luck.
- (3) Therefore, there should be no legal luck (from (1) and (2)).
- (4) If there is no normatively significant difference between the law (or the state) doing and allowing, or intending and foreseeing, then there is no normatively significant difference between legal luck and just plain luck that has legal implications.
- (5) There is no normatively significant difference between the law (or the state) doing and allowing, or intending and foreseeing.
- (6) Therefore, there is no normatively significant difference between legal luck and just plain luck that has legal implications (from (4) and (5)).
- (7) Therefore, plain luck should have no legal implications (from (3) and (6)).

This argument, it seems to me, is rather uncontroversially valid. But none of its premises is as uncontroversial. Most of what I do in what follows, then, is clarify and support the argument's premises.

Now, I think that the argument (with the "shoulds" in (2), (3), and (7) to be read as "pro-tanto shoulds") is sound and its conclusion true. But even if you are unconvinced of this, the argument could have some value, for it serves to highlight certain conceptual and logical connections that may be of broader interest. And as is the case with valid arguments in general, the "let-me-not-waste-your-time" clause should be reciprocated. If you do not accept the conclusion, which of the premises do you reject, and why?

The discussion proceeds as follows. In the next Part, I present some conceptual preliminaries, clarifying the notions of moral and legal luck that are central to the defense of my argument. In Part III, I briefly comment on premise (1) of the arch-argument, the denial of moral luck. I do not properly defend it here, though, and in that section I also explain why. Part IV argues for the claim that, if there is no moral luck, then there is at least a pro-tanto moral reason to see to it that there is no legal luck either (premise (2)). In Part V, I revisit a distinction briefly introduced in Part II, between legal luck on one side and just plain luck which bears legal implications on the other side. I argue that this distinction, when properly understood, comes down to the (perhaps notorious) intending-foreseeing distinction, or perhaps the (just as notorious) doing-allowing distinction, or some related distinction. In Part VI, I leave the topic of luck to argue more generally that

the intending-foreseeing and doing-allowing distinctions have no intrinsic normative weight, at least when applied to state action. Part VII draws together the results of the preceding two Parts, thus establishing proposition (6) in the arch-argument, and in Part VIII, I comment on the scope of the argument's conclusion. Objections to each step are considered along the way. In Part IX, however, I discuss an independent worry: the thought that, while each premise in my arch-argument has some intuitive appeal, they nonetheless fail to be *jointly* appealing. In particular, it may be thought that premise (2) expresses deontological intuitions, while premise (5) flirts dangerously with consequentialism. It is crucial for my argument that this not be so, and I show that it in fact isn't, in Part IX.

II. CONCEPTUAL PRELIMINARIES: MORAL LUCK, LEGAL LUCK, AND JUST PLAIN LUCK

A. Moral Luck

To insist that there is no moral luck is to endorse a supervenience claim: moral status of a certain kind (blameworthiness and praiseworthiness, responsibility, culpability, what goes in one's moral ledger,¹ what is to one's discredit,² etc.) supervenes on what is under one's control, so that, necessarily, there are no two persons alike in all features that are under their control yet whose moral status (of the relevant kind) nevertheless differs. To accept moral luck is to reject this supervenience claim.³

This characterization is most directly relevant to the debate about resultant moral luck, or moral luck in consequences.⁴ If both Ann and Bill drive equally

1 This way of speaking is drawn from Michael J. Zimmerman, *Taking Luck Seriously*, 99 *J. PHIL.* 553 (2002).

2 This is Thomson's favorite way of putting things. Judith J. Thomson, *Morality and Bad Luck*, 20 *METAPHILOSOPHY* 203 (1989), *reprinted in MORAL LUCK* 195 (Daniel Statman ed., 1993). In what follows, when referring to sources that are collected in this collection, I refer to the page numbers there.

3 Because the debate has often been conducted in a way that is not as precise as may be hoped for, the characterization in the text of what is at issue is not canonical. But I think it nicely captures what the debate is about, and in any event, this is how I use the words "moral luck" in my arch-argument and throughout the Article. There are in the literature, of course, many different kinds of supervenience claims, but we need not disambiguate the supervenience claim in the text for the purposes of this Article.

4 The distinction between moral luck in consequences, circumstantial moral luck, and constitutive moral luck comes from Thomas Nagel, *Moral Luck*, 50 *PROC.*

negligently, and if all other things are equal except for the fact that a pedestrian happens to pass in front of Bill's car on the street but not in front of Ann's, then the supervenience claim above entails that there is no difference between Ann's moral status and Bill's, so that their moral status is not held hostage to what, for them, is a matter of luck (that is, not under their control). Things get a bit more complicated in cases of circumstantial luck, or luck in the morally relevant circumstances one finds oneself in, in the moral tests one undergoes. If Judge Charlie regularly takes bribes, and Judge Dana has retired from the bench without ever having taken a bribe but would have taken a bribe had she been offered one,⁵ and if there are no other relevant differences between the two, then an opponent of moral luck (in circumstances) would say that they are alike in their (relevant) moral status. It is not immediately clear how this conclusion follows from the supervenience claim I started with, because, after all, there are many differences between Judge Charlie and Judge Dana that are under their control. Yet there is obviously *a certain sense* in which the difference between them is a matter of luck. While picking up the money-filled envelope was under Charlie's control, and not making a similar (though pointless, because there was no envelope in front of her) gesture was under Dana's control, being in the relevant circumstances was, nevertheless, under the control of neither (so we assume), and all subsequent differences between them are a consequence of this difference. To cover such cases, then, let us say that to deny moral luck is to insist that what is necessary for a difference in moral status is that there is *no true description of the case* that makes the relevant difference between the two agents a matter of luck, a matter that is not under their control.⁶

This way of putting things will cover also cases of constitutive luck, luck in the character, dispositions, talents, etc., you simply find yourself with, as it were, when arriving at the morally relevant scene. If Emma is naturally kind and generous in her inclinations and Fred is not, and if, because of this difference, Emma gives to charity and Fred does not, then there is a sense in

ARISTOTELIAN SOC'Y (SUPP.) 137 (1976), *revised and reprinted in MORAL LUCK*, *supra* note 2, at 57.

⁵ Thomson's example, in Thomson, *supra* note 2, at 207.

⁶ This way of putting things highlights the fact that we are dangerously close to the problem of free will here, for if there is a true deterministic description of all events, the sentence in the text entails that (if there is no moral luck) there is no difference in the moral status of any two agents. I will not discuss the free-will problem here, of course, but will note that incompatibilists will tend to accept this result. If you are a compatibilist, however, feel free to add in the text something like, "If there is no *sufficiently high-level* true description of the case," or "if there is no *intentional* description of the case," or something of the sort.

which this latter difference is under their control, but also a sense in which it is not (Emma is simply lucky to possess such a good inclination). This is sufficient for the revised supervenience claim to yield that there is no difference in their respective moral status.⁷

This characterization of the moral-luck debate has the advantage of making it completely clear that the debate is essentially about a comparative issue. The relevant questions are not (as they are sometimes put) "What is an agent responsible for?" or "Am I responsible only for the risk I knowingly create or also for the consequences when it materializes?" The relevant questions, rather, are always comparative, as in "When two agents knowingly create a risk and the risk materializes in one case but not in the other, is there a difference in the moral status of the two agents?" Now, the judgments I will need about control — like the claim that there is no difference between Ann and Bill as far as what is under their control — are rather obvious and uncontroversial ones (whereas the non-comparative question whether Bill had control in the relevant sense over the death of the pedestrian he hit does not have an answer that is as obvious and uncontroversial). So focusing on the comparative questions allows us to proceed without a full-blooded theory of what control consists in.

Another feature of such a characterization of the debate is that it depicts it as an all-or-nothing debate, at least for the opponents of moral luck. If you accept the supervenience claim, you reject any kind of moral luck. Some opponents of (some kinds of) moral luck may view this as a shortcoming.⁸ I do not, however. The philosophical motivations for denying moral luck seem, to me, to go all the way. The main such motivation is the immediate plausibility of the Control Condition on moral responsibility, namely (somewhat roughly) that one can only be held morally responsible for what is under one's control. If one accepts the Control Condition, one seems committed to denying any kind of moral luck. If, on the other hand, one rejects the Control Condition, one no longer has, it seems to me, any philosophical motivation for rejecting even some kinds of moral luck. Compromise positions maintaining that there

7 Of the relevant kind, again. This does not mean that there is no difference in, say, how admirable their character traits or even actions are. In terms of Zimmerman's distinction between deontic, aretaic, and hypological judgments, the relevant kind of status is the kind directly relevant to hypological judgments. Zimmerman, *supra* note 1, at 554.

8 Thomson, *supra* note 2, for instance, denies moral luck in consequences and circumstances, but — because of her commitment to a character-based theory of blame — may be (tacitly) committed to constitutive moral luck.

are some but not other kinds of moral luck may thus be logically consistent, but they seem to me philosophically unmotivated.⁹

B. Legal Luck

I suggest that legal luck be understood as analogous to moral luck. To insist that there is no legal luck is to insist that an agent's legal status (of the relevant kind) supervenes on what is under that agent's control (with an analogous complication to that discussed in the context of circumstantial and constitutive luck). It's just that no one, as far as I know, accepts such a supervenience claim. The interesting philosophical question regarding *moral* luck is, of course, whether it does or can exist. But there can be no doubt that *legal* luck exists: there are often different penalties for an attempt and completed offense or for driving negligently and vehicular homicide, but such differences are often a function of factors that are not under the relevant agents' control. Tort liability is notoriously subject to luck. And so on. The interesting question about legal luck is, then, not whether it exists, but whether it *should* exist. Put in terms of the supervenience claim, the interesting question is whether we should reform our legal doctrines and practices so as to *make* the supervenience claim true, whether we should see to it that legal status supervenes on what is under the relevant agent's control.

C. Just Plain Luck

Claims about both moral and legal luck need to be distinguished from claims about just plain luck. If my child is seriously ill, I am certainly unlucky. And if you win the lottery, you are certainly lucky. But this is — absent some further story, at least — just plain luck, not moral or legal luck.¹⁰

9 For a similar point, albeit framed as an initial argument *for* moral luck, see Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 CAL. L. REV. 791, 798 (2000).

10 As even these examples show, just plain luck can have profound effects on how well someone's life goes. Denying moral luck does not entail denying that luck can influence how well someone's life goes. So those — like me — who believe there is no moral luck but who admit that plain luck can have a profound impact on how well one's life goes are not vulnerable to Williams's accusation (perhaps historically in place) that the motivation behind the denial of moral luck is the immature hope of rendering our lives or whatever is important about them immune to luck. Bernard Williams, *Moral Luck*, 50 PROC. ARISTOTELIAN SOC'Y (SUPP.) 115 (1976), reprinted in MORAL LUCK, *supra* note 2, at 35.

The crucial thing to note here is that this distinction holds even when the relevant plain luck has moral or legal consequences. Having won the lottery, perhaps you are now morally required to give more to famine relief. My duties as a parent (and perhaps my moral and legal rights and duties more generally) undergo a profound transformation if my child is seriously ill. But these are cases where just plain luck bears moral and perhaps also legal implications. These are not cases of moral and legal luck.¹¹ More will have to be said on this distinction later on. For now, though, let me emphasize just the following two points.

First, the question of moral (and legal) luck only arises with regard to responsibility, or blameworthiness, or culpability, or something along those lines. It has no direct bearing on practical questions — about what we should do, for instance. In the examples in the previous paragraph, what is directly subject to luck are practical questions rather than questions relevant to the discussion of moral luck. Of course, such practical questions may be *indirectly* relevant to moral luck: if, for instance, you win the lottery and fail to give enough to famine relief and if I never win the lottery, but, had I won, would not have given more than you, then if there is no moral luck (in circumstances), there is no difference in our respective moral status (of the relevant kind). But the mere fact of winning the lottery remains a case of plain (and not moral) luck, even if it has moral implications.

Second, even without a more explicit characterization of the distinction between moral and legal luck, on the one side, and just plain luck with moral and legal implications, on the other, surely we can use paradigmatic examples (of the kind mentioned above) to get an initial grasp of what the distinction is meant to capture. And for now, such an initial understanding will do.

III. THERE IS NO MORAL LUCK

I believe in the Control Condition on moral responsibility, praiseworthiness, blameworthiness, and the like. I believe that an agent's moral status supervenes on what is under her control. I do not believe in moral luck. But all this, of course, is autobiography, not argumentation.

¹¹ A point missed by Urban-Walker, from whom I take the sick-child example. Margaret Urban-Walker, *Moral Luck and the Virtues of Impure Agency*, 22 *METAPHILOSOPHY* 14 (1991). Superson also misses the distinction between moral luck and plain luck that has moral implications. Anita M. Superson, *Moral Luck and Partialist Theories*, 30 *J. VALUE INQUIRY* 213 (1996).

It is very hard to argue for — or, indeed, against — moral luck, because — as is often noted — the necessary conclusions for either position are extremely close to the relevant premises. The Control Condition seems to many — myself included — to be moral bedrock. But so does — to others, and sometimes to the very same people¹² — the fact that we do and presumably should judge people for what they do and don't do, not just for what they would have done,¹³ and likewise for other kinds of moral luck. So we find ourselves at a bit of an impasse here.

Luckily, though, it is not as though nothing can be said. Perhaps we can dig deeper still to find the *real* bedrock underlying some of these views. Perhaps, for instance, we can unearth the conception of action and agency presupposed by proponents and opponents of the Control Condition, respectively, and evaluate them critically. And even if with the Control Condition we really *have* reached bedrock, still we need not be at a loss for words. Perhaps, for instance, the intuitions purportedly supporting moral luck should be reviewed carefully, and once so reviewed it becomes clear that they can be accommodated consistently with the denial of moral luck.¹⁴ Perhaps, for instance, in some cases, what is subject to luck is not the moral status of the agent but rather the evidence spectators have regarding that moral status.¹⁵ Or perhaps luck is a factor not in determining the moral status of the agent but, rather, in what should be done with — or to — the agent¹⁶ (a point I return to below). Or perhaps some of these intuitions are best described (or perhaps re-described) as judgments of admirability and the like and not judgments of responsibility.¹⁷ And so on. To the extent that the project of accommodating the moral-luck intuitions with the denial of moral luck succeeds, these intuitions presumably lose their force as evidence for the existence of moral luck.

12 Perhaps Nagel, *supra* note 4, is a case in point.

13 *Id.* at 65-66.

14 This is the project I pursue together with Andrei Marmor in David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 *LAW & PHIL.* 405 (2007).

15 See, e.g., Norvin Richards, *Luck and Desert*, 65 *MIND* 198 (1986), reprinted in *MORAL LUCK*, *supra* note 2, at 167; Nicholas Rescher, *Moral Luck*, 64 *PROC. AM. PHIL. ASSOC.* 5 (1990), reprinted in *MORAL LUCK*, *supra* note 2, at 141; Brian Rosebury, *Moral Responsibility and Moral Luck*, 104 *PHIL. REV.* 499 (1995).

16 See, e.g., Henning Jensen, *Morality and Luck*, 59 *PHIL.* 323 (1984), reprinted in *MORAL LUCK*, *supra* note 2, at 131; Richards, *supra* note 15; Michael J. Zimmerman, *Luck and Moral Responsibility*, 97 *ETHICS* 374 (1987), reprinted in *MORAL LUCK*, *supra* note 2, at 217, 229-30.

17 See, e.g., John Greco, *A Second Paradox Concerning Responsibility and Luck*, 26 *METAPHILOSOPHY* 81 (1995); Zimmerman, *supra* note 1, at 557.

Another possible line of inquiry is at least partly psychological. We can explore the psychological sources of the intuitions on either side of the debate and then see which of these looks more like a debunking explanation, one that presents the relevant intuitive judgments in a bad epistemic light, as beliefs whose sources have nothing to do with their purported truth.¹⁸

But in this Article, I will take none of these paths. For there is another thing we can do given the bedrock-impasse just mentioned. We can inquire about the implications of there being — or not being — moral luck. And the plausibility of the implications can then — to an extent, at least — reflect back on the plausibility of our starting point.¹⁹ It is in this spirit that I offer my arch-argument. If you believe in moral luck, you may find the arch-argument a useful *reductio* of its first premise. If, on the other hand, you believe there is something wrong with legal luck, and if I convince you of the normative connection between legal luck and moral luck, you may think that the arch-argument serves to increase the plausibility of the denial of moral luck. And so on.

Whatever the case may be, then, in what follows I will be assuming that there is no moral luck.²⁰

IV. THE NORMATIVE RELATION BETWEEN MORAL AND LEGAL LUCK

But none of this applies directly to the law, of course. We must be careful — as some of the literature on moral luck unfortunately fails to be²¹ — not to

18 See, e.g., Edward Royzman & Rahul Kumar, *Is Consequential Luck Morally Inconsequential? Empirical Psychology and the Reassessment of Moral Luck*, 17 *RATIO* 329 (2004); Darren Domsky, *There Is No Door: Finally Solving the Problem of Moral Luck*, 99 *J. PHIL.* 445 (2004). For some doubts, see Daniel Statman, *Doors, Keys and Moral Luck: A Reply to Domsky*, 102 *J. PHIL.* 422 (2005); David Enoch & Ehud Guttel, *Cognitive Biases and Moral Luck* (July 2007) (unpublished manuscript, on file with author).

19 This strategy will, however, have to face the difficulty Sverdlik mentions, namely, that the results each side offers as a *reductio* will not be judged more absurd (by that side) than the very claim the discussion started with — that there is or isn't moral luck. This is, again, the problem of being too close to bedrock. Steven Sverdlik, *Crime and Moral Luck*, 25 *AM. PHIL. Q.* 79 (1988), reprinted in *MORAL LUCK*, *supra* note 2, at 181, 183.

20 And, as Kevin Toh suggested to me, perhaps even if there is moral luck, there is at least a pro-tanto moral problem with legal luck. I will not pursue this interesting suggestion here.

21 See, e.g., Daniel Statman, *Introduction to MORAL LUCK*, *supra* note 2, at 1, 14; Kimberley D. Kessler, *The Role of Luck in the Criminal Law*, 142 *U. PA. L.*

move too freely between claims about moral luck and claims about legal luck. Any inferential move from claims about the former to claims about the latter should be supported by substantive premises regarding the relation between morality and law.

Let's start, then, with a relatively easy case. Think about criminal punishment, and assume a most extreme retributivist view. On this view, criminal punishment should reflect — perhaps given some background conditions — only moral blameworthiness.²² This means, first, that no one should be held criminally liable for an action (or omission) unless he or she is also morally blameworthy for having committed it and, second, that the appropriate punishment for an action is proportional only to how blameworthy the agent was in performing it.

Given such a view, and assuming that there is no moral luck, it seems clear that there should (morally) be no legal luck, at least when it comes to criminal punishment. If, for instance, Ann and Bill (the two negligent drivers) are equally morally at fault (because there is no moral luck), and if criminal punishment should reflect only moral fault (under the extreme version of retributivism), then both should be subject to the same punishment.²³

REV. 2183, 2215 (1994). Williams, *supra* note 10, at 54 n.2, warns against the mistake of moving too freely here from claims about (even justified) law to claims about morality, but later seems to forget this warning. Bernard Williams, *What Has Philosophy to Learn from Tort Law?*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 487, 495 (David G. Owen ed., 1995). For similar warnings, see Rosebury, *supra* note 15, at 522-24; Dana K. Nelkin, *Moral Luck*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, at § 4.1.1 (2004), <http://plato.stanford.edu/entries/moral-luck/>. For a more careful claim about the relation between moral and legal luck — that the two issues cannot be wholly divorced — see Gregory C. Keating, *Strict Liability and the Mitigation of Moral Luck*, 2 *J. ETHICS & SOC. PHIL.* at 3 (2006), http://www.jesp.org/PDF/StrictLiability_FinalVersion.pdf.

22 Nothing hinges, of course, on how the word "retributivism" is used. Some use it to denote a view of punishment different from the one sketched in the text. All that is needed for my purposes is for the claim in the text to be supported by the kind of intuitive considerations that are associated with the retributivist tradition. And I think it most clearly is so supported.

23 I think this is the main argument in Feinberg, though he settles for implicitly assuming that there is no (relevant) moral luck. JOEL FEINBERG, *Criminal Attempts: Equal Punishments for Failed Attempts*, in *PROBLEMS AT THE ROOTS OF LAW* 77 (2003).

Questions remain, of course, about what sameness of punishment consists in. In particular, one can think here of equality in nominal punishments (say, how many years in prison one is sentenced to), or in punishments in terms of well-being (so that one prison-year for a weak person may actually be equal to two prison-years for a strong one), or for some intermediate option. I do not need, I think, to take a stance on this interesting issue (though I return to it briefly below).

Similarly — and *much* more problematically — if bribe-taking Judge Charlie and would-have-taken-bribes Judge Dana are equally morally blameworthy, and if criminal punishment should only reflect moral blameworthiness, then they should be subject to equal criminal sanctions.

None of this, of course, gets us as far as premise (2) of the arch-argument, the claim that, if there is no moral luck, there should be no legal luck. To get there, we need to broaden the scope of the discussion from criminal law to the law in general (I will get to this shortly). Just as importantly, we need to discharge the implausible assumption that criminal punishment should reflect *only* moral blameworthiness.²⁴ This can be done rather easily. Consider the much weaker, and much more plausible, sort-of-retributivist claim that *one* of the things criminal punishment should reflect is moral blameworthiness, that punishment should not be indifferent to the degree of moral blameworthiness involved in the relevant act. This claim, it seems to me, is almost uncontroversial. Even consequentialists would agree, I think, that blameworthiness is relevant for punishment, if only in a derivative way. And this weak retributivist thesis, together with the denial of moral luck, suffices to establish the claim that there is a pro-tanto moral reason to see to it that Ann and Bill receive equal punishment and, more generally, that there should be no legal luck (in punishment).

Thus, given a rather modest — though substantive and possibly controversial — claim about the normative relations between morality and (criminal) law, the denial of moral luck entails that, given two criminal acts for which the two agents are equally morally blameworthy, the two should (pro-tanto) receive equal punishment. Now, because it is the weak retributivist view we are assuming, there is room here for many other reasons as well: if it can be shown that considerations of deterrence count strongly

²⁴ Suppose we believe that, while punishment should not reflect only moral blameworthiness, there is still a deontological constraint against punishing a person significantly more severely than is proportional to his moral blameworthiness for committing the crime. Suppose, in other words, that we believe that other considerations are relevant for punishment, but that they are only relevant up to the punishment that is proportional to the criminal's blameworthiness. Does it then follow from the denial of moral luck that there should be no criminal-legal luck? It seems to me that the answer is no, and all that then follows is that lucky factors should not increase the punishment beyond the proportionality constraint. This result is not insignificant: It seems to me, for instance, that a prison-term is disproportionate to the blameworthiness involved in many cases of negligent driving, even those resulting in serious harm. If so, then even on the view sketched at the beginning of this note the criminal punishment for them should be reduced significantly, even if not exactly to the level of the punishment for (luckily uneventful) negligent driving.

in favor of punishing Bill more severely than Ann (or perhaps the other way around), or if it is practically impossible to know whether a judge whose honesty was never tested would have taken a bribe had opportunity knocked, or if the administrative costs of running a no-luck criminal law system are too high, then perhaps legal luck here is all-things-considered justified. So we cannot conclude that there should — all-things-considered — be no legal luck, even in the context of criminal law (I return to this point in Part VIII). But we *can* conclude that no-legal-luck should be the normative starting point, that there is moral reason to see to it that there is no legal luck (in the criminal case), that there should — pro-tanto — be no criminal legal luck.

The point I am trying to make here using the weak retributivist thesis is thus not merely a negative one. It is not just that blameworthiness considerations that sometimes serve to distinguish morally between different cases fail to do so in the case of, e.g., Ann and Bill. If this is all it had amounted to, nothing would have followed about the pro-tanto wrongness of legal luck. All that would have followed would be that a type of consideration that sometimes justifies differential treatment does not apply to these cases, not that there is something positively wrong — even if just pro-tanto wrong — with legal luck. Instead, my weak retributivist thesis aims at much more. What it says is that moral blameworthiness is always a positively relevant factor, so that if two people are alike in moral blameworthiness, there is a (pro-tanto) positive reason to treat them alike.

To see this point more clearly, it may be helpful to consider the following example. When grading papers, one of the relevant considerations one should bear in mind is that of the intellectual achievement incorporated in the paper. Perhaps this is not the *only* relevant consideration: perhaps, for instance, how much effort was put into the paper, or how well it is written, or whether it was handed in on time are also relevant considerations. Now suppose you are grading two papers that are roughly alike in the intellectual achievement they incorporate but, say, one indicates a considerable effort while the other does not (and assume that this, too, is a relevant consideration when grading papers). The fact that they both incorporate a roughly equally valuable intellectual achievement is not just of negative significance here, in that a consideration that sometimes distinguishes between different papers does not do so on this occasion. Rather, it is positively relevant: given the roughly equally valuable intellectual achievement in each of the papers, there is a positive pro-tanto reason to grade them equally. This is still only a pro-tanto reason — perhaps the need to reward serious effort outweighs this reason in the circumstances — but it is a positive reason nonetheless. To see this, note that if intellectual achievement were only relevant in

the described negative way, so that sometimes it justifies a distinction but in our case it does not, then even the weakest of reasons would justify differential grading for papers that are alike in terms of the intellectual achievement they incorporate. But, of course, this is not the case. Not just any old reason will outweigh considerations of intellectual achievement in grading papers. It will take a *strong enough* countervailing reason to justify giving significantly different grades to papers that incorporate intellectual achievements that are roughly equally valuable. And what this means²⁵ is that considerations of intellectual achievement are always positively relevant when grading papers. When two papers incorporate roughly equally valuable intellectual achievements, you have a pro-tanto reason to give them roughly the same grade.²⁶

Returning, then, to (criminal) legal luck: the weak retributivist thesis I

25 In some contexts, similar observations are taken to indicate incommensurability or incomparability (for instance, if Mozart is not a better composer than Brahms, nor is Brahms a better composer than Mozart, nor are they equally good, then it doesn't follow that someone slightly better than Mozart would be better than Brahms). But the point in the text cannot be exhaustively accommodated by judgments of incomparability, because even assuming that the two papers *are* of equal intellectual quality, still the intuition used in the text stands.

26 Fortunately, I do not have to decide here a controversial issue that comes up in the literature on equality. Some think that equality itself is of value, or that there is reason to distribute resources equally. Others, however, think that equal distribution is called for — when it is, that is — not for a separate reason to distribute resources equally, but rather because the needs of each person equally call for the allocation of resources. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 217-44 (1986); Harry G. Frankfurt, *Equality as a Moral Ideal*, 98 *ETHICS* 21(1987), *reprinted in* HARRY G. FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT* 134 (1988). Applied to our context, those who believe in independent equality-related reasons would argue that there is an independent reason for giving equal grades to equally good papers. Those — like Raz and Frankfurt — who reject such independent equality-related reasons would argue that no comparative reason of this sort is involved and that all that is going on here is that we have reasons to give the first paper a certain grade, and we have reasons to give the second paper a certain grade, and these grades (the ones supported by reasons of each case separately) are equal.

It is important to note that this is a different topic from the one discussed in the text. All I argue in the text is that there is a positive pro-tanto reason to give grades that are in fact equal to two papers that are alike in the intellectual achievement they incorporate. For my purposes here, it does not matter if this reason is a separate reason to treat the two cases equally or, rather, the normatively epiphenomenal result of the reasons there are to give each paper its appropriate grade.

This point also applies, of course, to the case of legal luck, to which I return in the text.

employ is that considerations of moral blameworthiness are always positively relevant to justified punishment. And note that this weak retributivist thesis retains its intuitive appeal when understood in this way. Here too, for instance, just like in the paper-grading case, not just any old reason can justify differential treatment for cases that are alike in moral blameworthiness. To do that, the countervailing reason has to be strong enough. When two criminals have acted in a way for which they are roughly equally morally blameworthy, you have a pro-tanto reason to punish them equally severely. If there is no moral luck, then, there should (pro-tanto) be no legal luck either.

So far, though, I have only discussed the case of criminal punishment. And it may be argued that the kind of substantive bridge-principle I am after — something that licenses a move from the denial of moral luck to the wrongness of legal luck — is more easily established in the criminal context. Indeed, there I used as a bridge-principle a retributivist line of thought that is not easily generalizable to non-criminal contexts. What can be said, then, in support of a general connection between there not being moral luck and the moral wrongness of legal luck?

My argument for this generalization will consist of two points: the strength of the intuition against legal luck and the weakness of the conclusion I am after. I will start with the first. Criminal law undoubtedly has some features that make it unique, and criminal conviction and punishment may very well have features that make them different from other ways in which one's interests may be set back. Nevertheless, this uniqueness should not be overstated. People's interests are influenced — in profound ways — by the rest of the law as well. A finding of liability in torts may be just as devastating to one's interests as a criminal conviction in some contexts, as may a ruling in family law or regarding personal status. And it just seems basically unfair to have one's interests influenced profoundly by the law²⁷ in ways that have nothing to do with one's (relevant) moral status.²⁸ If

27 Is it unfair to have one's interests influenced *other than by the law* in ways that have nothing to do with one's moral status? I am not sure. For my argument it is sufficient that it is unfair when one's interests are so influenced by the law, and this seems a rather plausible claim. And note that if my arch-argument is sound, then the law should (pro-tanto) see to it that even lucky differences that do not originate with the law have no legal implications. In other words, the law should compensate even for such non-law-based differences.

28 Waldron applies such fairness-intuitions to argue against legal luck (in consequences) in tort-law. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 21, at 387.

George and Harriet are alike in their extent of blameworthiness for a breach of contract, and if there are no other relevant differences between them, then it seems there is a *pro-tanto* reason for contract law to treat them alike. The way the law treats me (with regard to a certain incident, or case, or action, or whatever) should be sensitive, it seems to me, to what my moral status is (with regard to that incident, case, action, or whatever). Considerations of moral status or standing of the relevant kind are always positively relevant to the law.

But aren't we familiar enough with counterexamples to this claim? Whether or not one is proclaimed an unfit parent may depend — and, more importantly, *should* depend — on many factors that are not necessarily connected to one's moral status (and so, even if there is no moral luck, may and should depend on matters that are not under one's control). Even if Ian and Jane are equally morally blameworthy for the circumstances that triggered the inquiry into their fitness as parents, indeed even if they are alike in everything that is under their control, a court may still quite justifiably find Ian unfit (say, because of a severe psychosis he suffers from) and Jane fit as a parent. Does this not show that there need be nothing wrong with legal (non-criminal) luck?²⁹ In order to see that the answer is "no," it is important to remember how weak a conclusion I am after. For all I am trying to establish is that there is a *pro-tanto* reason against legal luck. The unfit-parents example shows only that some legal luck may be *all-things-considered* justified. And so it is not a counterexample of premise (2). Furthermore, premise (2) (even together with premise (1)) allows for more than just countervailing reasons. It allows also for second-order, perhaps exclusionary reasons. In some contexts, there may be reasons not to act on the reasons against legal luck (a point I return to towards the end of the Article). Even this is consistent with there always being something *pro-tanto* problematic with legal luck.

Indeed, in our context I think what is unique to the criminal law is not the *pro-tanto* reason against legal luck, but rather the strength of this reason and, therefore, the strength of the countervailing reasons required to defeat (or perhaps undermine) it. Because of the special features of criminal law, criminal legal luck may be *especially* problematic.³⁰ But it remains

29 Perhaps this case should be understood as a case of plain luck that has legal implications. As I proceed to argue, I do not think there is a normatively significant difference between such luck and legal luck. Nothing in the argument in the text depends here on how the example is classified.

30 In a related context, Keating, *supra* note 21, argues that from the point of view of the problem of luck, a negligence tort regime is *more* problematic than strict liability because, roughly speaking, the former but not the latter involves criticizing conduct.

somewhat problematic and in need of defense everywhere else — indeed, even where our legal practices are completely insensitive to luck-related problems, presumably because other reasons have much more force in the contexts relevant to these practices.³¹ Given the weakness of the claim I want to defend — that the absence of legal luck is the normative default position, that there is something problematic in legal luck, that (sometimes strong) reasons are needed to justify it — the fairness intuition emphasized above seems strong enough to support it.³² There should (pro-tanto) be no legal luck.³³

V. LEGAL LUCK AND JUST PLAIN LUCK, AGAIN

It is time to revisit the distinction between legal luck and just plain luck and try to understand it in more precise and explicit terms. To this end, it will be helpful to again consider the parallel distinction with regard to morality. Consider a paradigmatic case of moral luck — if there is such a thing — like the (purported) difference in moral status between Ann and Bill (the two negligent drivers) or between someone who has committed murder and someone who has failed in her attempt to commit murder. Now consider,

Whatever else it does, the criminal law certainly criticizes conduct and so may be more luck-problematic in this respect than those parts of the law that do not.

31 I thank Jules Coleman for relevant discussion here.

32 I am not sure I understand what desert is or how it is related to the topics discussed in this Article. But the point in the text here may be equivalent (or otherwise closely related) to a rejection of the claim that desert is relevant to questions of retributive justice but not to questions of distributive justice. For some doubts about this often taken-for-granted asymmetry, see Jeffrey Moriarty, *Against the Asymmetry of Desert*, 37 *NOUS* 518 (2003). For an attempt to defend the asymmetry, see Saul Smilansky, *Control, Desert and the Difference Between Distributive and Retributive Justice*, 131 *PHIL. STUD.* 511 (2006). Note, however, that Smilansky, too, defends only a weaker asymmetry, namely, the claim that desert considerations are — though relevant to all matters of justice — not as strongly relevant to matters of distributive justice as they are to those of retributive justice. And for the claim that luck often plays a role in determining whether a given case is classified as a case of distributive or retributive (or corrective) justice, see Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 *LEGAL THEORY* 181 (2006).

33 Note that this claim says nothing about the law's function or point or telos or anything of the sort. It just highlights a normative consideration that applies to the law. And this suffices, I think, to show that it is not vulnerable to Ripstein's critique of "instrumentalist" views of law, Arthur Ripstein, *Closing the Gap*, 9 *THEORETICAL INQUIRIES L.* 61 (2008), even if such critique is generally successful (which I very much doubt).

for comparison's sake, a paradigmatic case of plain luck (that may have moral implications): Suppose, for instance, that both Karol and Larry wear expensive suede jackets that will be ruined if dipped in water, that a baby is drowning in a pond very close to where Karol is standing, and that nothing of the sort happens in the pond by which Larry is standing³⁴ (and none of this is of Karol's or Larry's doing or in some other way under their control). Compared to Larry, Karol is unlucky here, and in a morally relevant way: She is now morally required to act in a way that — as she knows — will ruin her favorite jacket. But this is not — not yet, anyway — a case of moral luck. How are we to understand the way in which this case differs from paradigmatic cases of moral luck?

The underlying intuition is, I think, as follows³⁵: In paradigmatic cases of (purported) moral luck, the luck is *internal* to morality; morality itself draws a distinction that is a function of luck. In cases such as Karol's and Larry's, however, morality is sensitive to non-moral circumstances, and because the latter are partly a matter of luck, morality is sensitive to luck as well. But here the luck is external to morality, and it is only morality's sensitivity to non-moral circumstances that incorporates the effects of luck — of things, that is, that are not under the control of the relevant agents — back into morality.

Getting back to the law, then: In paradigmatic cases of legal luck — say, differing criminal sanctions for instances of negligence depending on the harm caused — the luck is internal to the law; it is, as it were, the law's own doing. In paradigmatic cases of plain luck that carries legal implications, though, the law is simply sensitive to non-legal circumstances and, so, indirectly to luck. This is a fair characterization, I think, of the legal situation with regard to Karol and Larry, in a jurisdiction in which there is a legal duty to aid in such cases. What, in concrete terms, this legal duty requires is sensitive to the circumstances and, therefore, partly a matter of luck. But the luck is external to the law; it does not originate with the law; it is something the law responds to or has to deal with, not something it creates. Or consider another example (to which I will return shortly): A punishment

34 This example is loosely based on one found in PETER UNGER, *LIVING HIGH AND LETTING DIE: OUR ILLUSIONS OF INNOCENCE* 9 (1996).

35 I do not know of an explicit discussion in the literature trying to characterize and precisify the distinction between moral luck and just plain luck that has moral implications, but of course, this distinction does come up in a less explicit way from time to time. See NAFSIKA ATHANASSOULIS, *MORALITY, MORAL LUCK AND RESPONSIBILITY: FORTUNE'S WEB* 6 (2005) for an example of an initial discussion of this distinction.

lottery³⁶ — where, after conviction, the judge uses some kind of lottery in order to decide the convicted person's punishment — seems as clear a case as any of legal luck. In such a system, the law itself introduces luck by employing a randomizing device that determines the legal outcome. If Mary and Neil are both convicted for the same offense in the same circumstances and they get different punishments³⁷ as an outcome of the lottery, the difference between them is obviously a case of legal luck. But if Mary and Neil commit the same offense and Mary gets caught but Neil doesn't because of factors — like the police's enforcement policy and budget constraints — that are not under Mary's or Neil's control, then there is still a sense in which Neil, compared to Mary, is very lucky. But this is no longer a case of legal luck. It is a case of plain luck that bears (quite serious) legal implications. Here, the law deals with background-luck rather than (intentionally) introducing the luck-related factors, as in the case of the punishment lottery.

These examples make it clear, I think, that when we unpack the semi-metaphorical formulations — whether or not the luck is the law's doing, whether the luck is internal or external to the law, whether the luck is something the law introduces or a background-condition the law responds to — we are left with the well-known moral distinctions between doing and allowing or perhaps between intending and foreseeing. When the law designates a different punishment for murderers and attempted-murderers, the luck involved — or its legal relevance — is something the law does (and could easily avoid doing). When the law requires that we aid others (in certain circumstances), the law allows the lucky differences in circumstances to have legal implications. Perhaps even more clearly: a punishment lottery intentionally creates the luck-determined outcome, whereas a selective law-enforcement policy merely foresees such luck-determined outcomes.³⁸ The difference between legal luck and just plain luck that has legal implications

36 For instance, of the kind discussed by David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53 (1989), reprinted in DAVID LEWIS, PAPERS IN ETHICS AND SOCIAL PHILOSOPHY 227 (2000).

37 What *is* their punishment — the (say) 80% risk of death imposed on both or death for Mary (who lost in the punishment lottery) and nothing for Neil (who won)? Lewis flirts with the view that there is really no reason not to treat the risk as the punishment, so that the punishment lottery satisfies retributivist concerns about proportionality and equality. But I do not think that he is convincing on this point.

38 That the intending-foreseeing distinction is involved is even clearer when we distinguish between inequality in punishment introduced by a punishment lottery and inequality in the real price of punishment, which is a function of how people "take" it. See R.A. Duff, *Auctions, Lotteries and the Punishment of Attempts*, 9 LAW & PHIL. 1, 23 (1990). I return to this example later on.

comes down to something like the doing-allowing, or perhaps intending-foreseeing, distinction. Naturally, then, if there is no normatively significant distinction between the law doing and allowing, or between the law intending and foreseeing, then there is no normatively significant distinction between legal luck and just plain luck that has legal implications. Premise (4) of my arch-argument is true.

Before proceeding to argue for the antecedent of this conditional, let me make the following three points:

First, I do not want to pretend that the distinction between legal luck and plain luck that has legal implications is perfectly clean or clear-cut. As with almost all distinctions, there are, of course, borderline cases. But — again, here as elsewhere — that a distinction is vague does not entail that it is flawed in some deeper or more troubling way. What we need from an account or explication of this distinction is for it to match well enough the paradigmatic cases on both sides of the distinction, to be theoretically productive, and — ideally — to shed some light on the borderline cases. I think that understanding the distinction between legal luck and plain luck bearing legal implications in terms of the distinctions between doing and allowing or intending and foreseeing satisfies these desiderata: as can be seen from the examples above, it does match the paradigmatic cases both of legal luck and of plain luck that has legal implications; as will be shown in the next Part (if the argument there succeeds), it is theoretically productive; and I think it holds promise regarding the borderline cases. Perhaps, for instance, it is genuinely unclear whether the luck you have in which judge happens to try your case³⁹ is a case of legal luck or of plain luck with legal implications. But then, it seems to me the indeterminacy (if it is that) here inherits from the indeterminacy with regard to the doing-allowing distinction, for it is genuinely unclear whether the difference between two litigants whose cases are tried by different judges is a difference that the law creates or, instead, one that the law somehow allows to have legal effect.

Second, there may be room here for more serious conceptual worries about the distinction between legal luck and plain luck with legal implications than merely its vagueness. For upon reflection, it is not even completely clear whether we should describe, for example, the difference in punishment between a complete offense and an attempt — presumably a paradigmatic case of legal luck rather than plain luck that has legal implications — as

³⁹ See Menachem Mautner, *Luck in the Courts*, 9 THEORETICAL INQUIRIES L. 217 (2008); Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES L. 185 (2008).

a case where the law creates luck or as one where the law just allows the lucky (or unlucky) non-legal circumstances to make a legal difference. But such doubts do not, I think, pose a serious problem for my arch-argument. For I proceed to argue, in the next Part, against the normative significance of the distinction between legal luck and plain luck that has legal implications. There, I will focus on *normative*, not *conceptual*, doubts about the distinction. But the conceptual doubts of the kind just mentioned will nevertheless be relevant and, indeed, will strengthen my arguments there.

Finally, let me return, for comparison, to the distinction between moral luck and plain luck that has moral implications. Unlike the law, morality is not an institution. Morality, I take it, is a set of propositions,⁴⁰ and — again, unlike the law — moral requirements do not apply to it. While it makes perfectly good sense to say that there are powerful moral reasons to see to it that the law says so-and-so, it does not make any sense to say that there are moral (or, for that matter, any other) reasons to see to it that morality says so-and-so. This is so, because what morality says is not up to us in any way remotely similar to the way in which what the law says is up to us.⁴¹ Relatedly, morality is not an agent (in what sense it can be said that the law is an agent is a question to which I return below). So while it makes sense to speak of the law doing and allowing, or intending and foreseeing, it makes no sense at all to say similar things of morality. What, then, can be made of the distinction between moral luck and plain luck that has moral implications, if it cannot be understood as a distinction between morality doing and allowing, or intending and foreseeing?

Problematic though it may be, it cannot be seriously denied that there

40 This way of putting things sounds as though I am assuming a realist metaethics. Now, I *am* a metaethical realist and have argued for this view elsewhere, David Enoch, *An Argument for Robust Metanormative Realism* (2003) (unpublished Ph.D. dissertation, New York University), *available at* <http://law.msc.huji.ac.il/law1/newsite/segel/enoch/index.html>; David Enoch, *An Outline of an Argument for Robust Metanormative Realism*, 2 OXFORD STUD. METAETHICS 21 (2007). But I am not assuming anything controversial about the nature of morality here. If you are unhappy with moral propositions, feel free to talk of moral judgments instead (when it is understood that we are talking about the contents of the judgments, not about the act of making or avowing a judgment). And I am assuming nothing at all here about the *nature* of moral propositions or judgments (for instance, whether or not they are response- or practice-dependent).

41 Okay, here I *am* making some metaethical assumptions, but not highly controversial ones. Even most antirealists, subjectivists, relativists, and the like do not think that we can bring about a change in the content of (the relevant) morality by something like a legislative procedure.

is an important distinction between moral luck and just plain luck that has moral implications. It is, after all, not at all controversial that what moral requirements apply to us is at least partly a matter of the circumstances we find ourselves in, and so it should not be controversial that plain luck sometimes has moral implications. But it *is* controversial whether there is — and even can be — moral luck.⁴² So I'm afraid that with regard to moral luck, we are left with the intuitive and somewhat metaphorical way of understanding the distinction, as one between luck that is internal to morality and luck that is external to morality. And perhaps this casts some doubt on the claim above that the distinction between *legal* luck and luck that has *legal* implications is best understood as an instance of the doing-allowing or perhaps intending-foreseeing distinction: since the distinctions in the moral and legal case seem very closely analogous and this is not a good way of understanding the distinction in the case of moral luck, then perhaps it is not a good way of understanding the distinction in the legal case either. Let me weaken, then, the conclusion of this Part: I do not want to commit myself to the claim that the distinction between legal luck and plain luck that has legal implications is *conceptually reducible* to something like the doing-allowing, or perhaps intending-foreseeing, distinction. Rather, I settle for what can be called *normative* reducibility, namely, the claim that if there is no normatively significant difference between the law doing and allowing, or intending and foreseeing, then there is no normatively significant difference between legal luck and just plain luck that has legal

⁴² Here is another way in which the distinction between moral luck and plain luck that has moral implications can be theoretically useful. One of the things Williams, *supra* note 10, at 44-45, draws attention to in his discussion of moral luck is that we often do, and sometimes should, feel "agent-regret," something in-between regret and remorse that can and should be felt by a non-negligent driver who causes harm but that cannot be felt by a spectator (who may feel pain over the loss just as much as the driver). Similarly, agent-regret differentiates between two negligent drivers when only the negligence of one of them caused serious harm. And Williams hints that there is no way, consistent with the denial of moral luck, of accounting for the appropriateness of agent-regret. But utilizing the distinction between moral luck and plain luck that has moral implications, we can accommodate the appropriateness of agent-regret in a different way. We can say that while the two drivers are equally at moral fault, still — because of lucky circumstances — morality places them under different requirements, so that one is required to apologize, say, or feel agent-regret, whereas the other is not. In this respect, the situation is no different from the case of Larry and Karol who — with a baby drowning next to only one of them — are now placed under different moral requirements. But this is just plain luck that has moral implications, not moral luck. I think something along the lines of this thought here is present in Susan Wolf, *The Moral of Moral Luck*, 31 PHIL. EXCHANGE 5 (2001).

implications. And this normative claim, as well as the argument for it, survives even if the conceptual relations between its two parts are more complicated than analytic reduction.

VI. DOING, ALLOWING, INTENDING, FORESEEING, AND THE STATE

It is, of course, controversial whether the intending-foreseeing distinction, or indeed the doing-allowing distinction, has any intrinsic moral significance. Consequentialists, for instance, seem to be committed to a negative answer to this question, though they can try to come up with consequentialist-friendly proxies for these distinctions. But I do not want to enter this very general debate here. Rather, I want to argue that, whether or not we accept these distinctions as intrinsically normatively relevant in general, we should not do so when the relevant agent (or "agent") is the law or the state (such considerations may, of course, be *extrinsically* relevant, a point to which I will return). I argue for this conclusion, first, by discussing in some detail the case of the intending-foreseeing distinction and, then, by commenting briefly on why the doing-allowing distinction is unlikely to do any better.

A. Intending, Foreseeing, and the State⁴³

The intending-foreseeing distinction actually consists in two different — though perhaps related — distinctions. One is the distinction between two mental states, intending a certain outcome and merely foreseeing it. The other is a distinction between two causal structures: the difference between an (intended) means to an end and a (merely foreseen) side-effect. Let me raise two worries, then, about the applicability of the intending-foreseeing distinction to the state, one in the mental-state reading of this distinction, the other in the causal-structure aspect.

There are in the literature well-known doubts about the moral relevance of the agent's mental states to the moral permissibility of the relevant action. Judith Thomson, for instance, brings the following example: Think about a hard medical decision — say, whether to give a suffering patient a deadly dose of morphine in order to relieve his pain (at the price of his likely death). And assume that, in typical circumstances, with a reasonably well-intended physician, the (medically and also morally) right thing to do is to give

⁴³ This Section draws on David Enoch, *Intending, Foreseeing, and the State*, LEGAL THEORY (forthcoming).

that dose of morphine. Now add the following piece of information: the physician actually making the decision and administering the procedure in our case derives perverted pleasure from killing patients. If she gives the patient the morphine, she will do so intending to experience such perverted pleasure from the act. She foresees that the patient's pain will be relieved, but this is not why she acts as she does. Of course, now that we know these disturbing facts about the doctor and her relevant mental states, we will morally judge *her* accordingly and will no doubt try to ensure that someone else decides on the appropriate procedure. But — and this is the crucial point in our context — should this information make us change our mind regarding the permissibility of the relevant *action*? Could facts about these mental states of the doctor giving the morphine make us take back our initial judgment that this is the appropriate action in the circumstances? The answer, it seems, is no, and Thomson suggests that we learn from such examples that the agent's mental states are simply irrelevant for the moral permissibility of the relevant action. They are very relevant, of course, for the evaluation of the *agent*, but this is an entirely different story. And because mental states are irrelevant for the moral status of the action, the intending-foreseeing distinction, understood as a distinction between two mental states and applied to the moral evaluation of actions, lacks any moral weight.⁴⁴

Perhaps, though, this is too quick. Or perhaps you are not convinced. But whatever you think about the strength of such examples in general, surely there can be no intrinsic moral significance in determining the permissibility

⁴⁴ See, e.g., Judith J. Thomson, *Physician Assisted Suicides: Two Moral Arguments*, 109 *ETHICS* 497, 514-16 (1999); Judith J. Thomson, *Self-Defense*, 20 *PHIL. & PUB. AFF.* 283, 293-94 (1991). For a similar line of thought, see James Rachels, *More Impertinent Distinctions and a Defense of Active Euthanasia*, reprinted in *KILLING AND LETTING DIE* 139 (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994). For the contrary claim, supported by intuitions about specific cases rather than by independent argument, see Joseph Shaw, *Intentions and Trolleys*, 56 *PHIL. Q.* 63, 81 (2006). William Fitzpatrick claims that Thomson in fact argues here against a straw man, as the Doctrine of Double Effect is best understood not as claiming that the moral permissibility of an action depends on the intentions with which it is performed, but rather on the intentions with which it can be performed. But then it seems Fitzpatrick owes us a story of why it is that some actions can and some cannot be performed with such intentions, and the only available answer appears to me to be one referring to the different causal structures involved. So Fitzpatrick seems to understand the intending-foreseeing distinction in the causal-structure rather than the mental-state way. See William J. Fitzpatrick, *Acts, Intentions and Moral Permissibility: In Defense of the Doctrine of Double Effect*, 63 *ANALYSIS* 317 (2003).

of an action (or a policy or legal arrangement) to the mental (or "mental") states of artificial agents, such as corporations and states.⁴⁵

The problem is not that states and state-like agents do not have mental states. In many circumstances and for many purposes, we happily ascribe mental states to corporations, institutions, and, indeed, states. Perhaps this is all a great big mistake on our part. Or perhaps such mental-state ascriptions should be understood as mere metaphors. Or perhaps there is a perfectly acceptable, philosophically respectable sense in which, quite literally, states have mental states. I want to sidestep these issues here, though, both because discussing them would carry me too far into the philosophy of the mind⁴⁶ and because deciding them is not necessary for the point I want to make here. So let me concede for the sake of argument that sentences ascribing mental states to states, corporations, and the like can be quite literally true. We are assuming, then, that a state has intentions, a will, and the like. But now think about the nature of such mental states — they are determined by features of decision-making mechanisms, by intentions of individuals, by matters of institutional design, by internal power struggles. They are, in other words, highly complex and, in a sense, also artificial. And though they may nevertheless — as we are now assuming — merit being classified as bona fide mental states, still they seem very poor candidates for intrinsic normative significance. Perhaps, in other words, there is some intuitive plausibility to the thought that, in the case of individuals, there is something particularly good about the good will, that regardless of other factors, "like a jewel, it would still

⁴⁵ For a related point, see Seana V. Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1182 (2003). But Shiffrin then proceeds to argue that the Doctrine of Double Effect should be understood as distinguishing between intentions more objectively understood, say, in terms of the rationales or reasons for the relevant action, and that, thus understood, the problem goes away. It is not entirely clear to me what Shiffrin has in mind here when she talks of intentions more objectively understood.

⁴⁶ If, for instance, functionalists are right about mental states, then given some plausible empirical claims about states — that they have decision-making mechanisms, that their decisions can have some coherence over time, etc. — there seems to be no principled difficulty in ascribing mental states to corporations and states. If, however, having a phenomenology is a necessary condition for having mental states, then assuming, as seems plausible, that there's nothing it's like to be France, France cannot have mental states (unless, that is, phenomenological states are themselves best understood functionally). And there may be other possibilities as well.

shine by itself, as something that has its full worth in itself."⁴⁷ This intuitive plausibility does not extend to the will of states and similar agents.

To repeat, my point here is not metaphysical — I do not seek to present necessary conditions for having mental states in general, or intentions in particular, and then check to see whether states and perhaps other political institutions satisfy these conditions.⁴⁸ Nor is my point epistemological — I am perfectly happy to assume that, at times, we know all there is to know about the mental states of political institutions. My point, rather, is *normative*: Even if states and other political institutions have mental states, these are not plausible candidates for intrinsic moral significance. Even if the relevant agent's mental states are, in the end, not irrelevant to the moral status of actions performed by individuals, it is exceedingly hard to believe that they are morally relevant when the action is performed by something like a state.

It may be tempting to try and solve this problem by taking the state out of the picture altogether and focusing instead on the mental states of the (real, natural, individual) decision-makers. *Their* mental states are, after all, the mental states of individuals and so purportedly better candidates for normative significance. But this temptation should be resisted, for reasons familiar from discussions, for instance, of legislative intent.⁴⁹ Decision-making bodies are often multi-member forums; there is a strong feature of division of labor; the institutional setup has significant weight in determining the output of the decision-making process, etc. Whose intentions are to be attributed to the state once a decision has been reached? In multi-member decision-making organs there is often no one person whose intentions we can plausibly attribute to the organ as a whole. Members of such bodies vote on principle, on interests, according to strategic alliances, compromises, and so on. The institutional setup may have implications that are — in the specific case — quite arbitrary (say, what kind of majority is needed for what decision). And so on. Now, even in such circumstances — not uncommon circumstances, it seems to me, when we are talking about state action — we may be willing to attribute intentions as underlying the relevant state action.

47 IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 8 (Mary Gregor ed., Cambridge Univ. Press 1997) (1785) (4:394).

48 For some discussion along these lines, see, for instance, Philip Pettit, *Akrasia, Collective and Individual*, in *WEAKNESS OF WILL AND PRACTICAL IRRATIONALITY* 68 (Sarah Stroud & Christine Tappolet eds., 2003), and the references there. Pettit — here and elsewhere — is strongly sympathetic to the literal attribution of mental states to political bodies.

49 See, e.g., ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 155-84 (1992); JEREMY WALDRON, *LAW AND DISAGREEMENT* 119-45 (1999).

But it is very hard to believe that such mental states — the artificial functions of all these very different input-intentions and other factors — are of intrinsic moral significance.

Perhaps with regard to some state-actions this conclusion can be resisted (say, because some actions that can be attributed to the state are simply the actions of individuals, and in some of these cases we can rather unproblematically attribute the individual's intention to the state). But we are not here concerned with all state-actions but, rather, with those that are relevant for legal luck and plain luck that has legal implications. We are primarily concerned, then, with the establishment of legal arrangements (like what the tort regime will be, whether the punishment for attempts will be similar to that of completed offenses, how progressive the taxation system should be, etc.). And with regard to those, the conclusion above clearly applies. The mental states of states, or legislatures, or the law are, to the extent they exist, not of intrinsic normative significance. For this reason, then, at least in our context, the intending-foreseeing distinction is not of intrinsic moral significance.

This is thus one line of thought that supports the claim that there is no intrinsically or ultimately normative difference between intending and foreseeing when this distinction is applied to the state in general, or at least to the law. Let me add another — perhaps related — line of thought.

Suppose someone has to make a decision. Having found out about the relevant consequences of the suggested action — say, one person will be killed, five saved — she proceeds to ask about the causal structure of the case and, in particular, whether the death of the one person will be on the causal way to the saving of the five (and, so, presumably, an intended means) or causally posterior to it (and, so, merely a foreseen side-effect).⁵⁰ Such a question, I think, would be inappropriate, out of place, indicative of flawed moral character. And the flaw exhibited in asking such a question seems to me to be a kind of attempt to evade responsibility. Trying to find out about the causal order of the (foreseen) consequences looks here not so much as an honest attempt to unearth the morally relevant features of the circumstances but as an attempt to prepare a line of defense.⁵¹ Once you know about the consequences of your actions (or inactions), an attempt to pick and choose

50 This proto-example is inspired, of course, by the discussion of cases such as Trolley and Transplant. For more discussion, and many references, see Enoch, *supra* note 43.

51 For a similar point, see HENRY SIDGWICK, *THE METHODS OF ETHICS* 202 (Hackett Publ'g Co. 1907) (1874); ROBERT E. GOODIN, *UTILITARIANISM AND A PUBLIC PHILOSOPHY* 49 n.5 (1995) (and the references there).

among them those you are more and those you are less responsible for (those you intend and those you merely foresee, respectively) looks like an attempt to evade responsibility for the merely foreseen consequences. A responsible agent, it can be argued, accepts responsibility for all (foreseen) consequences of her actions, intended and unintended alike.

This consideration — however weighty in general — seems to me *very* weighty when applied to state action. For perhaps it may be argued that individuals are not required to adopt a global perspective, one that takes into account equally all foreseen consequences of their actions. Perhaps, in other words, individuals are entitled to (roughly) settle for having a good will, and beyond that they can let the chips fall where they may. But this is precisely what legislators — and certainly legislatures and states — are not entitled to settle for.⁵² In making policy decisions, it is precisely the global (or at least state-wide, or nation-wide, or something of this sort) perspective that must be undertaken. Perhaps, for instance, an individual doctor is entitled to give her patient a scarce drug, without thinking about tomorrow's patients who may need the drug just as much (I say "perhaps" because I am genuinely not sure about this), but surely when a state committee tries to formulate rules for the allocation of scarce medical drugs and treatments it cannot hide behind the intending-foreseeing distinction, arguing that, if it allows⁵³ the doctor to give the drug to today's patient, the death of tomorrow's patient is merely foreseen and not intended and so, normatively, a less weighty factor. When making a policy decision, this is clearly unacceptable.

States and legislatures bear far more comprehensive responsibilities than do individuals. Hiding behind the intending-foreseeing distinction thus more clearly constitutes an evasion of responsibility in the case of the former. Therefore, the evading-responsibility worry has much greater force against the intending-foreseeing distinction when applied to the state.

B. Doing, Allowing, and the State

I can afford to be quicker, I think, with regard to the application of the doing-allowing distinction to the law and the state, for a number of reasons.

First, the suspicion that the doing-allowing distinction lacks any intrinsic normative weight when applied to the state has already been pursued in the

⁵² Goodin emphasizes similar points, in GOODIN, *supra* note 51, at 10.

⁵³ That the committee does not administer the drug itself, but rather allows someone else to do so may be of importance here, because it may show that the doing-allowing distinction also encounters problems when applied to policy decisions and state action. I return to this point below.

recent literature, and so I can (partly) settle for a reference to Sunstein and Vermeule's relevant discussion.⁵⁴

Second, and as Sunstein and Vermeule emphasize, there are conceptual problems in applying this distinction to the law (or the state or the legislature). Think again about the example of a state committee that has to decide on the allocation of a scarce drug. Suppose they decide to give the drug to Olga rather than to Peter, with the (foreseen) results of Olga surviving and Peter dying. Presumably, the committee (and the state) has not killed Peter and, at most, has let him die. But it is not clear that the committee has saved Olga's life and not instead, for instance, allowed Olga's physician to save her life. And as noted above, some paradigmatic legal-luck cases can be plausibly redescribed as cases where the law merely allows plain luck to have effect rather than cases where the law creates or introduces lucky factors. Arguably, the primary — maybe even only — way in which the law acts is by allowing others (individuals as well as other institutions) to act. If so, perhaps the doing-allowing distinction does, after all, apply to the law, but — somewhat counterintuitively — everything the law "does" is on the allowing, rather than the doing, side of this distinction. And note also that, if this is so, and if the distinction between legal luck and plain luck that has legal implications is best understood as an instance of the doing-allowing distinction, then all cases of (seemingly) legal luck are really cases of plain luck that has legal implications (and this is sufficient, of course, for my arch-argument to go through). So worries about how to draw the conceptual boundaries of doing and of allowing — concerns that are troublesome even when the doing-allowing distinction is applied to individuals⁵⁵ — are much more troublesome when trying to apply this distinction to what the law does or allows to take place.

⁵⁴ See Cass R. Sunstein & Adrian Vermeule, *The Ethics and Empirics of Capital Punishment: Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2006). But note that their discussion is at times confused and that they conflate the doing-allowing and intending-foreseeing distinctions. (Responding to criticism on this point, they do better. See Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847, 849-52 (2006).) And let me also stress here that nothing in what I say or think commits me to the empirical part of Sunstein's and Vermeule's argument for the death penalty. For a convincing empirical criticism, see John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2006).

⁵⁵ See, for instance, the discussion of these conceptual worries (and their normative significance) in Warren Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 PHIL. REV. 287 (1989), reprinted in WARREN QUINN, *MORALITY AND ACTION* 149 (1993); Frances Howard-Snyder, *Doing vs.*

Third, and putting aside now conceptual worries about the doing-allowing distinction, it is unclear how the *normative* significance of the distinction — applied to the law — can be defended from close analogues of the objections to the intending-foreseeing distinction from the previous Section. The second objection — the one from the inappropriateness of evading responsibility — straightforwardly applies, it seems to me. And while the first objection — from the irrelevance of the state’s mental states — does not apply as it stands, because the doing-allowing distinction is not explicitly a distinction between mental states, similar worries nonetheless arise here too. For once we think about what is involved in the law (rather than an individual) doing something or allowing something to happen, we may resort to mental states after all (in which case, the objection clearly applies), and if we don’t use mental states again, it will be exceedingly hard to believe that what we are left with is something that has intrinsic normative significance.

C. Other Distinctions?

Whatever your general views, then, about the normative significance of the distinctions between intending and foreseeing and doing and allowing, it is very hard to believe that these distinctions are (intrinsically) normatively significant when applied to state action or, even more so, when applied to the law.⁵⁶

None of this, of course, directly shows that no other distinction in this vicinity can do better. Perhaps, for instance, a more complicated distinction (or set of distinctions) amongst mental states or causal structures can be introduced, and perhaps such a distinction can be utilized to distinguish in a normatively significant way between legal luck and plain luck that has legal implications. So let me not pretend that the work here is done. But at this point it does seem — if you are convinced, that is, by what has been

Allowing Harm, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 21, <http://plato.stanford.edu/entries/doing-allowing/>.

⁵⁶ When, in a tort case, the court decides for the defendant, does it thereby find the plaintiff liable? The answer, it seems to me, is that it does not issue such a finding, but that (intrinsically) it might as well have issued it. It does not issue this finding, because the conceptual distinction between the law doing and allowing is not completely without content. It might as well have issued it, because this distinction is not (intrinsically) normatively significant. For some discussion regarding this controversy — though not in precisely the terms I offer here — see Waldron, *supra* note 28, at 395-96, and the references there.

said so far — that no relative of the doing-allowing or intending-foreseeing distinctions will fare much better.⁵⁷

VII. NO NORMATIVELY SIGNIFICANT DIFFERENCE BETWEEN LEGAL LUCK AND PLAIN LUCK THAT HAS LEGAL IMPLICATIONS

If the arguments in the previous Parts are roughly right, then, there is no intrinsic normative difference between the law intending and foreseeing a certain outcome or between the law doing something and allowing something to happen. And if I was right in the points argued for in Part V, this entails that there is no intrinsic normative difference between legal luck and plain luck that has legal implications.

But this does not mean, of course, that there is no normatively relevant difference *whatsoever* between legal luck and plain luck that has legal implications. There may be important differences between these two kinds of luck, and they may be normatively significant, just not intrinsically so. Perhaps, for instance, it can be shown that — as a matter of psychological fact — many find legal luck more troubling. If so, and assuming that we have independent moral reason not to offend people (and not to have the law offend people), then there is something more problematic about legal luck compared to plain luck that has legal implications.⁵⁸ Or perhaps there are some second-order, institutional reasons that distinguish — extrinsically — between intending and foreseeing even with regard to the state and so can serve

⁵⁷ For some more support here, see Enoch, *supra* note 43.

⁵⁸ The point in the text here can be seen as a caricature of a host of expressive considerations that may serve to outweigh the anti-luck reason I have been arguing for. Less caricatured treatments of expressivist theories will have to take into account the fact that such theories do not emphasize the *instrumental* effect of some expressions (as hurting people's feelings, for instance) but, rather, claim that some actions can be wrong simply by virtue of the attitudes they express, regardless of the expression's consequences. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). But even assuming such theories can be made to work (and this, it seems to me, is a major assumption), and further assuming that there *are* such non-instrumental expressivist reasons to distinguish between legal luck and plain luck with legal implications (yet another major assumption), there is still no threat to my thesis. For such a way of supporting the normative relevance of the distinction will yield only extrinsic — though non-instrumental — moral weight for the distinction. And my thesis is merely that the distinction has no intrinsic moral weight.

to distinguish also between legal luck and plain luck that has legal implications (though a proponent of this claim would have to argue for it, of course). But my point is that the very fact that one is a case of legal luck and the other of plain luck that has legal implications is not of moral significance. Assuming that — as I have argued above — there is something morally problematic about legal luck, there is something morally problematic also about plain luck that has legal implications. Perhaps, at the end of the day, some extrinsic factors make it so that legal luck is more problematic than plain luck that has legal implications. I am not sure about this, and I return to this point in the next Part. But if legal luck really is pro-tanto wrong, so is plain luck that has legal implications. Plain luck should thus have no legal implications.⁵⁹ The conclusion of my arch-argument is true.

VIII. THE SCOPE OF THE CONCLUSION

Legal luck is fairly common. Plain luck that has legal implications, however, is ubiquitous. Which judge you get is not (usually) under your control and so a matter of luck in the sense that I have been using this word here. And even if this is not a case of legal luck exactly, clearly this luck has legal implications. Whether your tortfeasor is rich is not typically under your control, but will have profound legal (and other) implications on your future. Whether you are caught or not when you commit a traffic violation is not (usually) under your control and is a fact that will have legal implications. And — switching now to the case I find most interesting — whether or not you are born into a rich family, what education you get, indeed, what talents you are born with are not matters that are under your control. But because the law recognizes, for instance, (inheritable) property rights and because it allows you (to an extent, at least) to reap the fruits of your talents and education without sharing them with others, these lucky circumstances have profound legal implications. If my arch-argument succeeds, though,

⁵⁹ Mark Greenberg noted the following interesting point: My argument starts with a kind of a symmetry — there is no moral luck, and therefore there should be no legal luck. But now the symmetry breaks, for while plain luck should have no legal implications, plain luck does have — and perhaps cannot avoid having — moral implications. So while we can bring the law more in line with morality by eliminating legal luck, by eliminating the legal effects of plain luck we actually make the law more different from morality. All of this seems exactly right to me: If my argument is sound, there are good reasons to make the law more like morality in the former sense, and less so in the latter.

all these cases of (presumably) plain luck carrying legal implications are pro-tanto wrong. Absent some fairly strong justifying story, they are all wrong because plain luck should (pro-tanto) have no legal implications, just as there should (pro-tanto) be no legal luck.

And so, in the case of distributive justice,⁶⁰ we have a new argument for an old conclusion: The kind of plain luck that is involved in the distribution, for instance, of talents, should not be allowed to have legal implications. The only distributive-relevant differences that should be allowed to have legal implications are those that are under the relevant persons' control. Once applied to the case of distributive justice, then, my arch-argument constitutes an argument for the underlying intuition of a position sometimes referred to as luck egalitarianism.⁶¹ And though this specific argument for this view is, I think, new, it captures nicely a well-known thought, namely, that we are not

⁶⁰ Coleman and Ripstein discuss the relations between corrective and distributive justice, primarily in the context of a discussion of luck. Their discussion seems to me to conflate legal luck and plain luck that has legal implications, a conceptual conflation that — if I am right — has no normative implications. Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995), reprinted in TORT LAW 319 (Ernest Weinrib ed., 2002).

⁶¹ For a preliminary discussion of the connections between discussions of moral luck and luck egalitarianism, see Nelkin, *supra* note 21, § 2.2.

Let me emphasize here the following qualifications: First, the argument in the text at most establishes that bad distributive luck should be compensated for, not that this is *all* our distributive schemes should do (nothing here commits me either way, then, regarding the desirability of a decent minimum that cannot be compromised even by poor choices). For a similar point in defense of luck egalitarianism, see Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271 (2008). Second, my argument at most establishes a pro-tanto reason to compensate for (even natural) lucky inequalities, and this reason may be outweighed by other reasons. Indeed, my argument does not even establish that the reason to compensate for (even natural) inequalities enjoys the kind of priority Nagel associates with matters of justice. Thomas Nagel, *Justice and Nature*, 17 O.J.L.S. 303 (1997). Again, then, the strength of my conclusion is limited. Third, nothing in my argument commits me to the specific details of luck-egalitarian positions in the current literature, such as the details that make them vulnerable to Anderson's famous objections in Elizabeth S. Anderson, *What Is the Point of Equality*, 109 ETHICS 287 (1999), and in her contribution to this volume, Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES L. 239 (2008). Indeed, I tend to reject at least two such common features — a preference-based conception of well-being and the supposedly normatively relevant distinction between brute luck and option luck (on this issue, I hold — and my arch-argument supports — a view much like the one outlined in Kasper Lippert-Rasmussen, *Egalitarianism, Option Luck, and Responsibility*, 111 ETHICS 548 (2001), especially *id.* at 571).

entitled to what we get from the social as well as the natural lotteries (which are, of course, not under our control and so a matter of luck) and that, therefore, differences that are due to these lotteries should be compensated for by the state.

The scope of my conclusion, then, is — because plain luck so often has legal implications — very broad.⁶² Thus, it is important to emphasize again that my conclusion, though broad in scope, is relatively weak. For my arch-argument establishes merely the *pro-tanto* wrongness of (legal luck and) letting plain luck have legal implications. So if a luck-egalitarian public policy will create highly inefficient incentives or if it sends a wrong, demeaning message, these considerations can outweigh the strength of the luck-related consideration. My point is merely that something like such countervailing reasons must apply for anything but luck egalitarianism to be justified, that luck egalitarianism (or at least the underlying luck-egalitarian intuition emphasized above) is, then, the normative default position.⁶³ Similarly, if the costs of an "egalitarian" law-enforcement policy (what would it even take for such a policy to be egalitarian?) are high enough, then these costs can outweigh the presumptive moral reason against letting luck have legal implications.⁶⁴

Let me give two more examples of how such countervailing considerations can take away some of the bite of my conclusion. First, with regard to the natural lottery: Here, perhaps unlike the case of the social lottery, there is no real option of not allowing plain luck to have legal implications. So what luck egalitarians have to say — and have been saying — is that the

⁶² Indeed, it may be broader still. For it follows from my argument that there is no intrinsically normatively significant difference also between legal luck and legal arrangements that have (perhaps unintended, but foreseen) lucky implications. This is the case, I think, with nominally equal punishments for similar offenses, where the punishment is much harder for one criminal to bear than for the other (for some discussion, see Duff, *supra* note 38, at 23). Such cases are not, I think, cases of legal luck, strictly speaking, nor are they cases of plain luck that has legal implications. Rather, they are cases of legal arrangements that have lucky implications. But if the intending-foreseeing distinction does not apply to the law, then they are *pro-tanto* on a par with cases of punishment lottery.

⁶³ Though, again, see the qualifications in *supra* note 61.

⁶⁴ For a comparative discussion of the luck involved in punishment lottery and selective law-enforcement policy — in which the distinction between legal luck and plain luck that has legal implications is not evoked but in which there is an attempt to justify the difference in our intuitive responses to such practices on purely consequentialist, deterrence-related grounds — see Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. & ECON. REV. 276 (1999).

state should compensate for such inequalities, putting people roughly in the economic places they would have occupied had the natural lottery been much more egalitarian. But compensation practices are highly complex, and many further factors are involved in determining their normative status. For instance, such redistributive compensatory schemes may have their own administrative, and perhaps also symbolic and educational, costs, on top of the obvious incentive-related effects. And these may very well outweigh — sometimes, at least — the anti-luck consideration I have been emphasizing. Similarly, a compensatory mechanism that attempts to equalize the situation of caught criminals to that of those who are not caught or between those whose case is tried by a sympathetic judge and those whose case is tried by an antagonistic one would also be unjustifiable. But this does not mean that thinking about such cases in terms of luck is not to the point. For if my arch-argument goes through, we should, at the very least, treat the luckiness that remains as a problem, as an unfortunate characteristic of our legal system, as something that — if the costs are not prohibitive — we should get rid of.

Second, I want to show how a certain kind of consideration can mitigate the problem of legal luck, even though it cannot significantly reduce the paradoxicality of moral luck. Recall Ann and Bill, the two negligent drivers, with Bill unluckily hurting a pedestrian and Ann luckily arriving safely home. Can we not say that both of them have taken a chance, so that Bill cannot complain if the risk he knowingly created and imposed on others materialized and he is held responsible? It is as if both Ann and Bill have gambled knowing the risks and chances involved, but Ann won and Bill lost. In such a case the latter can certainly not complain about having lost his gamble. Such considerations cannot solve the problem of moral luck, of course, because we should still ask whether Bill is more morally blameworthy than Ann, both having created the same risk, and if we believe that there is no moral luck, we are committed to a negative answer. But such considerations may have some force with regard to the law. If it can be shown that other considerations make such a gambling scheme — where people create risks and pay for them only if they materialize — instrumentally (or even intrinsically) justified, then perhaps the law should treat Ann and Bill differently, even though they are (because there is no moral luck) morally on a par.⁶⁵ The situation is similar to one where two players

⁶⁵ One way of reading Honoré is as hinting at such an argument. Tony Honoré, *Responsibility and Luck*, 104 *LAW Q. REV.* 530, 537-43 (1988). The thought in the text is the way I would suggest dealing with many cases of option luck (paradigmatically exemplified by the gambling case). And note, of course, that this

assume a risk (say, in risky bidding while playing bridge), where one of them wins and the other does not: because there is no rational luck, we should not criticize the loser more than the winner (if the latter's decision was justified, so was the former's). But if the relevant risk-taking activity is one people should engage in (because, say, bridge is so much fun), then the relevant bridge-luck is justified. Indeed, there may be different normative relations amongst the relevant reasons. Perhaps some reasons having to do with the value of bridge-playing *exclude* the reasons counting against bridge-related luck.

Thus, though the scope of my conclusion is, again, very broad, its strength — because of the pro-tanto qualification and the availability of countervailing reasons (and perhaps even exclusionary reasons that exclude the anti-luck reasons) — is not as impressive. But it is not, I think, without value. For at the very least, it places the burden on those attempting to justify some legal luck or, indeed, allowing some plain luck to have legal implications to show such countervailing reasons. The nature and strength of the available exclusionary or countervailing reasons available, as well as the strength of the reasons needed to outweigh the anti-luck consideration, may, of course, vary from context to context, perhaps even in some systematic way. Perhaps, for instance, it can be shown that luck is more of a problem when it occurs in criminal law than elsewhere in the law or, indeed, that there are some reasons why legal luck is typically more problematic — and so, if it is to be allowed, has to be supported by more weighty countervailing reasons — than cases of plain luck that has legal implications. Or perhaps it can be shown that there are very good second-order reasons not to consider such anti-luck considerations in some contexts or in the framework of some political institutions. But all of this has, indeed, to be shown. Our starting point with regard to luck in the law should be the one I have been arguing for all along: legal luck, as well as plain luck that has legal implications, is pro-tanto wrong. There should be no legal luck, nor should plain luck have legal implications.

way of thinking about option luck does not amount to declaring it unproblematic: it *is* pro-tanto problematic, but quite possibly all-things-considered justified.

IX. AN INDEPENDENT OBJECTION: CONSEQUENTIALISM OR DEONTOLOGY?

In contexts in which we have conflicting intuitions, it is easy to construct unacceptable valid arguments with only intuitively plausible premises. This can be done because, in such contexts, we can be separately intuitively drawn to each of two propositions even though their conjunction is implausible (indeed, even inconsistent). Consider, for instance:

- (a) It is not true that there are as many natural numbers as there are even natural numbers.
- (b) If there is a 1-1 correlation between two sets, then there are as many members in one set as there are in the other.
- (c) Therefore, there is no 1-1 correlation between the set of natural numbers and the set of even natural numbers.

The problem, of course, is that we are confused in our intuitions about the "as many as" relation. Both (a) and (b) have intuitive force, but this is because each presupposes a different conception of "as many as" and we are drawn to both. But if we combine (a) and (b), the necessarily false (c) follows. We should decide about the conception of "as many as" we endorse before we reach this argument, as it were; once we have done that, only one of (a) and (b) will be available to us, and then (c) would not follow.

It can be argued that my arch-argument is guilty of a similar flaw. Consider premise (2), namely that if there is no moral luck, there should be no legal luck, and premise (5), namely that there is no normatively significant difference between the law (or the state) doing and allowing, or intending and foreseeing. It may be thought that we find both (2) and (5) intuitively plausible only because our moral intuitions are confused. The intuitive plausibility of premise (2) is based on the intuitive plausibility of some deontological-looking retributivist or fairness-related line of thought. The intuitive plausibility of premise (5) (or of the arguments suggested above in support of it) derives from the intuitive plausibility (in some contexts, at least) of consequentialist theories. And we find both intuitively plausible because we are sensitive to the intuitive strengths both of deontology and of consequentialism. But we should decide which way we go here, and once we do only one of the premises, (2) or (5), will be available to us, and then the arch-argument will not go through.⁶⁶

⁶⁶ Here is a semi-formalization of the objection: Consequentialism (C) and Deontology (D) cannot both be true. So not-C or not-D. But if not-C, then not-(5), and if not-D,

Now, it is true that if nothing like the intending-foreseeing or doing-allowing distinctions has any (intrinsic) normative force when applied to the law, then the only remaining normative considerations applying to the law are likely to be broadly-speaking consequentialist ones.⁶⁷ And while you don't *have* to be a consequentialist in order to accept (5) — for (5) is perfectly compatible with rejecting consequentialism as the true morality for individuals — if you do accept it, you cannot wholeheartedly apply deontological considerations to the law, which is apparently what is going on in (2). So the objection is not without merit. But I think it can be resisted by noting that premise (2) can be motivated even on broadly-speaking consequentialist grounds.

The crucial thing to note here is that proxies to deontological considerations may be available even to consequentialists. This is clearest, of course, with rule-consequentialism, whose rules may imitate, to an extent at least, deontological constraints. And even act-consequentialists are likely to act on some weaker rules, simplified and defeasible rules of thumb that yield — on the whole — optimal (or close to optimal) consequences. If a consequentialist theory can be defended, it is likely to be of the kind that can approximate the sort of fairness consideration underlying (2). And then there need be no tension between the philosophical motivations for (2) and (5).

Of course, this is very sketchy, and that there *may be* a consequentialist-friendly justification for (2) does not entail that there *is* one. But these sketchy remarks suffice, I think, to show that the objection discussed in this Part can be dealt with.

then not-(2). So not-(5) or not-(2). So my arch-argument is unsound. What I proceed to argue in the text is that the premise "if not-D then not-(2)" is false.

⁶⁷ I argue for this claim in the Appendix of Enoch, *supra* note 43.

