

LUCK, CULPABILITY, AND THE RETRIBUTIVIST JUSTIFICATION OF PUNISHMENT

by
Kenneth Einar Himma*

Thomas Nagel argues that the pervasive role that luck plays in conditioning behavior seems inconsistent with ordinary views about moral accountability and culpability. As many criminal justice practices seem to rely on these ordinary views, the pervasiveness of luck also seems inconsistent with the legitimacy of a number of criminal law practices. For example, the claim that people do not have direct control over the consequences of their acts and hence that the consequences of an act are conditioned by luck calls into question the legitimacy of the traditional practice of punishing unsuccessful attempts less severely than successful attempts; if the only difference between a successful and unsuccessful attempt is a matter of luck, then there can be no difference, other things being equal, in culpability between the two. In this Article, I argue that the pervasive role that luck plays in conditioning a person's acts calls into question the viability of retributivist justifications of punishment, which hold that punishment is justified insofar as deserved, for two reasons: First, a person is not culpable or deserving of punishment, according to ordinary views, for events beyond her control. But if the factors conditioning an agent's act are all matters of luck beyond the agent's control, then she is not deserving of punishment for the act. Second, the pervasiveness of luck in conditioning a person's acts creates insuperable problems with respect to making judgments of what is deserved.

* Part-time lecturer, University of Washington Information School and the School of Law. This study and Article was supported by The Tomsk State University Academic D.I. Mendeleev Fund Program in 2015.

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I. INTRODUCTION

The reliance of law on coercive enforcement mechanisms raises difficult issues of political morality. The very use of coercive mechanisms to enforce legal norms raises an issue of moral justification because the use of force presumptively violates our moral rights to autonomy. Intuitively, it is not entirely clear, at first glance, what would distinguish the state's use of these enforcement mechanisms, from the standpoint of morality, from a robber's use of a gun to coercively induce some desired behavior. Indeed, in some respects, the state's characteristic claims and operations seem more intrusive than the robber's demands: The state, unlike the robber, claims authority to regulate a broad range of behavior over the long-term; the robber simply wants to take the victim's money, disappear, and never see him again. For this reason, the characteristic use by states of coercive enforcement mechanisms requires an articulated moral justification.

The institution of legal punishment poses an especially difficult problem of justification because, as a conceptual matter, punishment involves as its *immediate* purpose the deliberate infliction of detriment, hard treatment, or discomfort on the subject. This is a conceptual feature of *torture*, and it is this element of torture that calls its moral legitimacy immediately into question. Insofar as punishment shares this feature as a conceptually essential property, its legitimacy is also in question, and this is true even if we assume that the very use of coercive mechanisms by the state, in and of itself, is not presumptively problematic. Legal punishment also has contingent properties that call its legitimacy into question: legal

punishment condemns and stigmatizes the recipient, resulting in ostracism that frequently extends beyond the duration of punishment, affecting an inmate's ability to find gainful employment upon completion of her punishment. There are coercive enforcement mechanisms, such as the restorative mechanisms of the civil law, that are not punitive in character and do not share these conceptual features or contingent effects. Legal punishment, then, has a number of special characteristics that raise issues of moral justification distinct from those raised by the use of coercive enforcement mechanisms in other contexts to regulate behavior.

There are a number of standard theories of legitimized punishment purporting to give a *moral* justification of *legal* punishment. For example, some theories hold that a legitimizing purpose of punishment is to produce effects that reduce the frequency and rate of criminal acts; the pursuit and achievement of that purpose provides the moral justification for legal punishment.¹ For example, one such suggested justification for legal punishment is to deter those who have been punished for criminal acts from committing future criminal acts.² Another suggested legitimizing purpose of punishment is to deter other would-be criminals from committing crimes.³ Deterrence is achieved in virtue of providing potential offenders with a coercive incentive not to commit punishable crimes and hence purports to provide a legitimizing purpose that morally justifies legal punishment.⁴

This Article challenges the viability of the retributivist justification of punishment, which might be the most commonly accepted theory of justified punishment. The thesis is that the pervasive role of luck in conditioning behavior problematizes retributivism as a justification of punishment. According to retributivism, the legitimizing purpose of punishment is to do justice by giving the convicted defendant the hard

¹ Kent Greenawalt, *Punishment*, J. CRIM. L. & CRIMINOLOGY 343, 351 (1983).

² *Id.* at 352.

³ *Id.* at 351.

⁴ *Id.* It is not entirely clear how one gets from the premises that purport to legitimize punishment to a conclusion that the *state* is morally justified in implementing certain legal structures of institutional punishment and in imposing punishment on a person to achieve these legitimizing purposes. The strongest relevant claim that can be inferred from the claim that punishment is morally justified is that it is possible that there is someone with moral authority who is justified in imposing the punishment in applicable cases. Indeed, given the distinct character of the justification needed for punishment, the claim that punishment is morally justified does not imply even that a legitimate state is justified in imposing it. The fact that a state is legitimate simply entails that it has a general moral permission to use the coercive machinery of the state to regulate behavior; it does not entail that every type of use of that machinery (in this case, uses that are expressly punitive in character) is morally justified. For our purposes, however, the legitimacy of state authority may be presupposed.

treatment she deserves.⁵ The thesis of this Article is that the disturbingly large role that luck plays in shaping our characters and the contexts in which we act creates two potential problems for retributivism: (1) such luck is incompatible with the retributivist idea that punishment is morally justified in virtue of being deserved; and (2) such luck dramatically diminishes our ability to make certain comparative judgments on which judgments of moral culpability or desert depend.

An observation about the two theses and the argument should be made at the outset here. Claim (1), above, is the stronger of the two claims—and is more likely to be greeted with pre-theoretic and theoretic objection. However, it is crucial to note that claim (2) is sufficient to defeat retributivism as a working justification for punishment in the following sense. Even if retributivism were objectively true, a justification is needed for its application as a guiding principle in determining what punishment should be given to any particular crime. That justification would have to make some reference to our ability to apply retributivism as a guiding principle, and that would surely require some reason to think our judgments of culpability and desert are sufficiently reliable to warrant guiding sentencing decisions.

II. TWO FORMS OF LUCK: MORAL AND LEGAL

There are two problems involving “luck” that should be distinguished. The first is the problem of *moral luck*. As Thomas Nagel defines “moral luck,” it refers to *moral* judgments about an agent’s acts where some “significant aspect of what [he] does depends on factors beyond his control.”⁶ The relevant issue, following Nagel’s definition, is whether moral luck is *possible*. If so, then these moral judgments can accurately be made; if not, then these moral judgments are problematic. In other words, if there is moral luck, then we can be judged for elements and circumstances of an act that are not within our direct volitional control. But, as Nagel puts the matter, “[a] person can be held morally responsible for only what he does; but what he does results from a great deal he does not do; therefore he is not morally responsible for what he is and is not responsible for.”⁷ This means that moral luck is impossible, but the impossibility of moral luck seems to imply that we cannot be judged for any of our acts since all our acts, according to Nagel, are conditioned by factors we cannot control and hence by luck.

There is a second form of luck—*legal* luck—involved in giving a justification of legal punishment. As David Enoch describes legal luck:

⁵ *Id.* at 347.

⁶ THOMAS NAGEL, *Moral Luck*, in MORTAL QUESTIONS 24, 26 (1991).

⁷ *Id.* at 34.

Our legal responsibilities, liabilities, etc., are often determined partly by matters that are not under our control. Whether or not there is a *moral* difference between the murderer [who successfully completes an attempted murder] and the [unsuccessful] attempted murderer, there is a *legal* difference between them, as the success of the attempt determines what offense the relevant person is criminally responsible for; whether one's partners in a robbery kill a guard determines whether one is criminally responsible for felony murder, regardless of whether or not one's moral status is influenced in a parallel way; whether a pedestrian jumped in front of one's car when one was driving negligently determines whether and to what extent one is liable in torts, and this regardless of whether or not this also influences one's moral status; all legal appearances of causation requirements—in criminal law and elsewhere—incorporate an element of luck; and so on. So it cannot be seriously doubted that there is legal luck. The only remaining interesting question about legal luck is whether there *should* be any legal luck.⁸

As Enoch points out, if there is any doubt about whether moral luck is *possible*, there is no such doubt about whether legal luck is possible; legal luck is clearly possible insofar as the law holds people liable for the consequences of their acts, something over which no one lacks complete control. The question of whether there is moral luck is a contentious meta-ethical issue that cannot be resolved without considering certain foundational ethical commitments that are not necessarily characterized as substantive rules of morality. The question of whether there is legal luck is a fairly easy empirical issue to resolve: it is clear that the law sometimes assigns liability for elements of an act over which the agent lacks direct volitional control.

The question, then, is not whether there is legal luck but whether, as a matter of political morality, there *should* be. Some legal theorists believe there might be a reason—one grounded in principles of political morality—to hold a person legally accountable in some cases for an act for which she is not morally accountable (or, less problematically, to decline to hold a person legally accountable in some cases for an act for which she is morally accountable). As Enoch puts the problem, “Perhaps some other, not blameworthy-related considerations differentiates them in a way that makes differential punishment morally justified.”⁹ To say that there should not be legal luck, then, is to make a claim grounded in political morality: in particular, to say that there should not be legal luck is to say that it is morally illegitimate for the state to hold persons legally accountable for a non-culpable violation of the criminal or civil law.¹⁰

⁸ David Enoch, *Moral Luck and the Law*, 5 PHIL. COMPASS 42, 48 (2010).

⁹ *Id.*

¹⁰ It is helpful to note that luck poses a special problem for *criminal* liability that it does not pose for civil liability. Remedies for criminal liability are frequently

Intriguingly, the claim that retributivism is incompatible with the pervasive role of luck¹¹ in conditioning behavior is, by itself, logically independent of any claim about whether there should be legal luck, at least as “legal luck” is defined by Enoch. There will be a moral issue concerned with whether a person should be held legally accountable for an act that is not culpable (or an act for which she is not morally accountable) regardless of whether retributivism is true. The claim that punishment is justified in virtue of being deserved obviously does not imply that undeserved punishment *is* justified but it also does not imply that undeserved punishment *is not* justified—unless, of course, the theory is that being deserved is not just a sufficient condition for justified punishment but is al-

thought to rest in part or even entirely on retributivist principles of giving people what they deserve. In contrast, remedies for civil liability are justified less by backward-looking considerations than by forward-looking considerations. Although breach of contract has a fault component, it does not play the role in determining the appropriate remedy for civil liability that it does in determining the appropriate remedy for criminal liability. The principle for addressing civil wrongs is *restorative* in character and the appropriate mechanism is compensation, which seeks to put the injured plaintiff in the position she would have been in but for the breach of duty by the defendant. The idea in a civil remedy is not (at least, not *necessarily*) that the defendant *deserves* to pay some particular amount to the plaintiff; rather it is that what the defendant did was culpable and should absorb the costs to the plaintiff—regardless of whether those consequences are beyond the defendant’s direct volitional control. Civil law has frequently been thought of as a mechanism for allocating the costs of risk; it could equally, and without much problem deriving it from a conception of civil law as a risk-allocation mechanism, be thought of as a mechanism for allocating the costs of *luck*, as in many civil suits, both plaintiff and defendant were both the recipients of something fairly characterized as bad luck.

But luck does cause problems for certain civil law practices. In particular, the pervasiveness of luck seems to problematize the legitimacy of strict liability in tort insofar as it imposes liability without fault. In one respect, a person who is held strictly liable for an accident exercises sufficient control over the relevant activities to enable her to prevent the accident; she can, after all, always stop the activity. In another more salient respect, such a person does not exercise sufficient control. It makes little sense to say that I have control over whether *unforeseeable* events occur because I am incapable of taking steps to prevent an event if I cannot foresee its occurrence. Fault and control come apart in some respects but they dovetail in others. What is important for our purposes is that the legitimacy of strict liability is not generally assumed; whether or not it is legitimate is a highly controversial issue among lawyers, judges, and legal theorists. Although it should be clear that luck poses problems for certain civil law practices, my concern in this Article is only with criminal law practices pertaining to punishment.

¹¹ I will generally use the term “luck” instead of “moral luck” to make the discussion clearer. Rather than address the issue in these somewhat opaque terms, I would rather, for clarity’s sake, refer to factors beyond the agent’s control that are significant constituents or determinants of the act as being the product of “luck” and then address the issue of whether, and to what extent, the agent’s act can be judged despite the fact that significant aspects of the act depend on what I call “luck” or should be considered culpable and punished by law.

so a necessary condition. Likewise, the claim that punishment is never justified in virtue of being deserved entails nothing, by itself, about whether undeserved punishment is justified. The problem of legal luck, as defined by Enoch, states a comparatively narrow problem that does not implicate the legitimacy of an institutional system of legal punishment.

To see this, it is helpful to consider the context in which, as traditionally formulated, the problem of legal luck arises. As the first quote by Enoch illustrates, and I should emphasize that there is nothing unusual or idiosyncratic about his treatment of the problem, the discussion of legal luck has largely been organized around a problem that one form of luck poses for the law of criminal attempts—namely, whether the traditional practice of punishing unsuccessful attempts less severely than successful attempts is morally justified.¹² The problem arises because the difference between an unsuccessful attempt and a successful attempt is determined by factors over which the offenders lack direct volitional control. Whether a bullet has the desired consequence of killing the intended victim, for example, depends on whether the latter moves, and this is not within the control of the shooter. Insofar as the difference between a successful and unsuccessful attempt turns entirely on matters of luck, successful and unsuccessful attempts are equally culpable and deserving of the same punishment. The role that luck plays in determining the consequences of an act, which is what conceptually distinguishes a successful and unsuccessful attempt, seems incompatible with punishing successful and unsuccessful attempts differently.

It is important to observe that discussions in the literature on the law of attempts rarely, if ever, address the question of whether retributivism is a viable moral justification of punishment. For his part, Enoch poses the problem of legal luck as it pertains to the law of attempts in terms that seem to *presuppose the viability of both retributivist and non-retributivist justifications of punishment*.¹³ To solve the morally normative problem that legal luck seems to pose for differential punishment of unsuccessful and successful attempts, Enoch argues that “some other, not blameworthy-related considerations differentiate them in a way that makes differential punishment morally justified” must be found to justify existing practices.¹⁴ This seems to presuppose not only that retributivist concerns legitimately govern these practices but also that other “not blameworthy-related considerations” do. As these latter considerations do not fall within the rubric of those concerns relevant with respect to retributivism, Enoch’s remark seems to presuppose a *mixed theory* of justified punishment that includes both retributivist and other non-retributivist legitimiz-

¹² Enoch, *supra* note 8, at 48–49.

¹³ *Id.*

¹⁴ *Id.* at 48.

ing purposes of punishment. As Enoch poses it, the problem here is to determine whether, all legitimizing purposes of punishment considered, the differential punishment of unsuccessful and successful attempts is justified. This is a radically different enterprise from that of this Article, which is concerned to show that retributivism, as a general matter, is not a viable moral justification for punishment.

Indeed, as will be seen, the problem that luck raises for the law of criminal attempts does not even bear on the issue of whether retributivism is justified. Although Nagel identifies three kinds of luck, only two of them problematize judgments of moral culpability on which retributivist justifications rely in justifying punishment. These two forms of luck, unlike luck with respect to the consequences of an act (*resultant luck*), have to do with events over which the agent lacks control that *precede* the act in time and, in some sense, conditions its performance. The consequences of an act follow the act and hence play no role in conditioning its performance; resultant luck, which is relevant with respect to the problem raised by traditional attempts practices, plays no role, then, in conditioning the performance of an act. If one is worried about the use in the criminal law of retributivist notions of desert and culpability, resultant luck is a red herring.

The thesis that retributivism fails to justify our punishment practices is both more and less ambitious than may initially appear. This claim is, in some sense, more ambitious than the usual claims about luck and differential punishment of successful and unsuccessful attempts in that it challenges the viability of retributivism as a justification for institutionalized legal punishment, and not just its application to the law of attempts. But the thesis of this Article is also more modest than might initially appear. In particular, the claim is *not* that legal punishment is morally illegitimate; rather, the claim is that, whether or not legitimate, retributivism fails to state a plausible purpose that would legitimize and hence justify legal punishment. Indeed, the claim that retributivism is false is logically compatible with the claim that unsuccessful attempts are legitimately punished less severely than successful attempts. As Enoch notes, such a position would have to be grounded in considerations not having to do with desert or culpability.¹⁵ Insofar as the arguments of this Article target only the viability of a retributivist justification, the thesis of this Article is consistent with the claim that there are other legitimizing purposes of punishment. But this thesis is also consistent with the claim that some of these other legitimizing purposes might be furthered by differential punishment of successful and unsuccessful attempts.

In any event, this Article poses two related challenges to retributivism that can be distinguished and clarified with the help of an example. A substantive moral theory that purports to identify what is good and bad

¹⁵ *Id.* at 49.

can be problematic in two different respects, corresponding to two different tasks the theory might purport to perform. Consider, for example, the act utilitarian principle that people are obligated to maximize utility. The point of this principle might be to *explain* what distinguishes right acts from wrong acts and what constitutes a right act as right and a wrong act as wrong. The idea would be that it is wholly in virtue of maximizing utility that an act is right. This construction of the act utilitarian principle sees the relevant project as identifying the properties that all and only right acts have that constitutes them as right acts and distinguishes them from everything else in the world that is not a right act. A second possible point of this principle might be to provide an account of how to *identify* and *distinguish*, as guides for one's behavior, those acts that are right and those acts that are wrong. Act utilitarianism might well provide the best explanation of what makes right acts right but not be very useful as an epistemic principle that identifies which acts are right and which acts are wrong. Indeed, utilitarianism is probably ill-suited as an epistemic guide because it requires abilities we do not have, such as the ability to predict long-term consequences and make interpersonal comparisons of subjective utilities (does, e.g., Sue get more pleasure out of some good dark chocolate than Fred?).

Although these two functions sometimes come apart, this is not the case with respect to the standard justifications of punishment. They are commonly couched in terms of some legitimizing purpose that can be achieved only at the cost of allowing the suffering caused by punishment. Deterrence justifications purport to explain, at least in part, what constitutes punishment as being morally justified.¹⁶ Insofar as a particular punishment maximally deters either the offender from reoffending or other people who might otherwise offend and is the least severe punishment needed to achieve this deterrent effect, that punishment is justified in virtue of having these effects.¹⁷ But deterrence justifications also serve the function of guiding our legal practices; in order to ensure a punishment is legitimate under the deterrence justification, we must be able to show that a certain level of punishment deters as much as is possible and that we cannot achieve the appropriate level of deterrence with a lesser punishment. Likewise, retributivism purports to identify a legitimizing purpose that justifies imposition of a specified punishment in a particular case: punishment is justified insofar as it *deserved*. But it also purports to guide our punishment practices: to be justified the offender must deserve the punishment. To guide our practices, we must be able to apply retributivism to individual cases, and this requires that we are able—at least to some roughly accurate extent—to determine what the offender deserves.

¹⁶ Michael Phillips, *The Justification of Punishment and the Justification of Political Authority*, 5 LAW & PHIL. 393, 395 (1983).

¹⁷ See generally *id.*

This Article challenges retributivism both as an explanation of what constitutes punishment as justified and as a viable principle for guiding our punishment practices, but the emphasis is on the epistemic role of retributivism in guiding our practices. The claim that punishment is justified insofar as deserved might be true but fails to tell us anything about whether our punishment practices can be justified on retributivist grounds. If we cannot ascertain to some requisite degree of accuracy what any given person deserves by way of punishment for a criminal act, then our punishment practices cannot be guided by the considerations of desert retributivism picks out as determining what is just punishment. Such a disability, of course, impacts just *our assessment* of whether a punishment is justified under retributivism; it does not tell us anything about whether a punishment is justified in virtue of being deserved, as a matter of objective morality. A punishment might be morally justified by retributivist considerations, after all, without our being epistemically justified in believing that it is morally justified by those considerations. Since retributivism can therefore play no guiding role in our punishment practices, we must look for other legitimizing purposes that can and should, as a moral matter, guide decisions about what “punishment” any particular offender should receive, as well as the appropriate conditions under which such treatment should be administered.

This should not, of course, be taken to mean that the Article does not directly address the issue of whether retributivism is true. The pervasive role of luck in conditioning behavior, as Nagel explains, seems incompatible with the idea that people are morally accountable in the sense of deserving of blame or punishment for wrongful acts. If the factors conditioning our acts are beyond our control, we are culpable for neither those factors nor the acts they help to condition and hence are not deserving of blame or punishment for wrongful acts. Retributivism, then, seems inconsistent with, as Nagel would put the matter, the impossibility of moral luck.¹⁸ Insofar as the argument of this Article is grounded in the considerations that lead Nagel to conclude that moral luck is impossible, it poses a direct challenge to retributivism. The focus on the implications of luck on the epistemic role of retributivism is intended to buttress such general concerns. But it is also intended to highlight the distinctive role that theories of punishment are contrived to play in legal practice, and to show that retributivism cannot play this role because we cannot make the requisite assessments of desert that condition its application. Thus, even if retributivism can be rescued as a substantive theory of justified punishment, it has no role to play in punishment practices and hence fails as a *practically viable* theory of justified punishment.¹⁹

¹⁸ NAGEL, *supra* note 6, at 27.

¹⁹ This is not an “evidential argument” in the sense that some of the defenses of the practice of punishing unsuccessful attempts less severely than successful attempts

The argument of this Article is structured as follows. Section III explicates the special difficulties associated with the problem of justifying legal punishment. Certain characterizing features of punishment, alluded to above, create special difficulties with respect to justifying this practice. Section IV discusses the two main lines of justification: backward looking theories of legitimate punishment—i.e., retributivism—and forward-looking theories of legitimate punishment. Section V discusses three types of luck identified by Nagel. Section VI shows how the various forms of luck problematize retributivist justifications of punishment. Section VII defends the “Control Condition,” which asserts that one is blameworthy or culpable only for those events and elements of an act that are within the agent’s direct volitional control. Section VIII applies the results of Sections VI and VII to retributivism, arguing that retributivism is not a viable theory of justified punishment. If punishment can be justified, it will have to be on the strength of forward-looking considerations having to do with the effects of punishment on some element of the common good. Section IX makes some concluding observations.

III. THE SPECIAL MORAL PROBLEM OF JUSTIFYING PUNISHMENT: DELIBERATIVE INFLICTION OF HARD TREATMENT OR DETRIMENT AS THE *IMMEDIATE* POINT OF PUNISHMENT

One of the most important problems in normative criminal theory involves providing a moral justification for institutional punishment, which is at the foundation of any existing legal system’s criminal justice practices.²⁰ It is not just that punishment implicates what we take to be our most important interests, such as interests in our continuing lives and liberty—although that is certainly part of what makes the problems associated with the legitimacy of criminal justice practices seem more urgent than those associated with the legitimacy of civil justice practices (such as in torts or contracts). It is rather that punishment has, as a conceptual

are. These defenses attempt to justify the practice by recourse to evidentiary uncertainties having to do with whether we can read a person’s intentions reliably off his acts. Thus, the idea is that we cannot be certain that someone who, e.g., shot at someone and missed did not, at the last instant, abandon his plan to kill the intended target. If he did do so, then he is less culpable than he would otherwise have been and hence deserves less punishment. To avoid the injustice of giving someone more punishment than is deserved, the argument concludes that the law of attempts should incorporate a principle that gives unsuccessful attempters something like a benefit of the doubt in determining the appropriate severity of punishment. The concerns advanced in this Article have nothing to do with the ability to produce specific evidence of a specific crime in a specific case. The relevant disability that seems to problematize retributivism is a general disability in making morally normative judgments of culpability and not a disability in a particular class of cases in making descriptive factual judgments about what happened.

²⁰ Phillips, *supra* note 16, at 393–94.

matter, a feature widely regarded as morally wrong in just about any other context: the very point of punishment is to inflict upon the recipient *hard treatment*—i.e., something that will be experienced as painful, unpleasant, or detrimental.²¹ If an act does not involve something reasonably characterized as “hard treatment,” then it is not, as a conceptual matter, punishment, whatever else it might be.

Indeed, the very definition of “punishment” entails that, as a conceptual matter, its immediate point is to inflict something experienced as detriment. For example, the OXFORD DICTIONARY defines “punishment” as follows:

- the infliction or imposition of a penalty as retribution for an offence: *crime demands just punishment*
- the penalty inflicted: *she assisted her husband to escape punishment for the crime; [count noun] he approved of stiff punishments for criminals*
- informal rough treatment or handling: *your machine can take a fair amount of punishment before falling to bits*²²

There are, of course, many other things done by people knowing it will cause pain to someone else. For example, a dentist routinely gives a patient a shot of Novocain before beginning a procedure and knows that this shot is painful. But it is not part of the purpose of giving the shot to inflict something experienced as discomfort on the patient. The intent for giving the shot is to alleviate the greater pain that accompanies the procedure. As there is no other way to secure that pain relief, the shot is given *despite* the fact that it is painful. In contrast, incarceration is imposed as punishment in part *because* it is painful.

It is true, of course, that one can conceive of other social practices that involve the deliberate infliction of discomfort as an immediate purpose. For example, a football coach wants to make practices as physically demanding as possible to get athletes in sufficiently good shape to perform at their peak, and avoid injury. At first glance, this might appear to pose a similar problem: the immediate purpose is to inflict discomfort that is justified, in part, by the ultimate end of protecting athletes from injury. But here is the difference: the football player is subject to such treatment only insofar as he consents, and this consent can be withdrawn unilaterally by the player at any time. This is an important part of the justification for such athletic practices—i.e., that the player subjected to the detriment freely agrees to accept it as a condition for playing on the team. In contrast, direct consent—and one that can be effectually withdrawn at the player’s discretion—plays no role in the justification of pun-

²¹ Greenawalt, *supra* note 1, at 346.

²² See *Punishment*, OXFORD ONLINE DICTIONARY, <http://oxforddictionaries.com/definition/english/punishment?q=punishment>.

ishment. One can, of course, make a social contract argument that citizens directly consent to being punished should they break a law but (1) these arguments are highly controversial;²³ and (2) such consent cannot be withdrawn effectually at the citizen's discretion. The imposition of punishment, for this reason, presents a problem of an entirely different moral order than that presented by deliberately demanding football practices.

In this respect, punishment resembles an act that has been nearly universally condemned in Western nations—torture.²⁴ By definition, torture involves the infliction of a special type of hard treatment of a person: *severe* mental and physical discomfort on a person—indeed, much more pain than is characteristically involved in punishment;²⁵ if it is not severely painful (or not reasonably contrived to be severely painful), it cannot be characterized as being “torture.”²⁶ Given this resemblance between torture and punishment and the widespread view that torture is always morally wrong, the need for a moral justification of punishment—and the importance of the problem—should be clear. As Antony Duff describes the problem:

What distinguishes punishment from other kinds of coercive imposition is that punishment is precisely *intended* to . . . : but to what? Some would say that punishment is intended to inflict pain or suffering; but that suggests that what matters is pain or suffering as such Others would say that punishment is intended to cause harm to the offender—adding, if they are careful . . . that what is intended is ‘prima facie harm’ rather than ‘all-things-considered harm’, to allow for the possibility that punishment might be, or might be intended to be, on balance beneficial to the offender. But some theorists would deny even this, since they would deny that punishment must be intended to be ‘intrinsically bad’ for the person punished. It is safer to say that punishment must be intended to be burdensome, and that is how punishment will be understood in what follows [Even on this conservative formulation of the concept of punishment, the question is h]ow . . . can the practice of criminal punishment, which infringes the freedom of those subject-

²³ Richard Dagger, *Social Contracts, Fair Play, and the Justification of Punishment*, 8 OHIO ST. J. CRIM. L. 341, 341 (2011).

²⁴ UN GENERAL ASSEMBLY, UNIVERSAL DECLARATION OF HUMAN RIGHTS (216 [III] A) (Dec. 10, 1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

²⁵ Of course, the infliction of that kind of pain has sometimes been used as punishment. I think it fair to characterize the amount of pain inflicted on a person, for example, through crucifixion as *punishment* to rise to the level of torture. The difference is simply that it is characteristic of torture, and not of punishment, that it inflicts such severe pain.

²⁶ David Hope, *Torture*, 53 INT'L & COMPARATIVE L. Q. 807, 825 (2004).

ed to it, which not only burdens them but aims to burden them, be justified?²⁷

The question is a difficult one precisely because the practice of criminal punishment, like torture, “infringes the freedom of those subjected to it, which not only burdens them but *aims to burden them*.”²⁸ Like torture, the immediate point is to impose something likely to be experienced as a detriment or a deprivation of some kind, and it is this conceptual feature of punishment that creates a problem distinct from the normative problems created by the existence of a legal system that characteristically regulates behavior with the help of coercive enforcement mechanisms.

It is worth noting here that, although it is commonly believed that torture is absolutely wrong (i.e., wrong without exceptions), some theorists argue that torture can be justified—in a comparatively rare class of cases—insofar as it succeeds in extracting information that (1) cannot be extracted in any other way; and (2) will be used by those extracting the information to save many innocent lives from a culpable act of severe violence.²⁹ On this not entirely counterintuitive line of reasoning known as the “ticking time-bomb argument,” torture is, from the standpoint of morality, a necessary evil that is justified in virtue of being the only way to save the lives of some theoretically significant number of innocent people.³⁰ The familiar strategy here is to identify an ultimate legitimizing purpose of torture that outweighs or, so to speak, redeems a *prima facie* problematic immediate purpose of inflicting discomfort.

Theories of justified punishment follow theories that purport to justify torture in certain circumstances by identifying an ultimate point that has a moral value that outweighs the moral disvalue associated with the immediate point of inflicting hard treatment on an offender.³¹ As discussed in Section IV below, each of the standard theories of justified punishment proceed by identifying, so to speak, a greater good that out-

²⁷ Antony Duff, *Legal Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), <http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/>.

²⁸ *Id.*

²⁹ See Seumas Miller, *Torture and Counterterrorism*, 53 IYUN 83, 93 (2006); Ben Juratowitch, *Torture is Always Wrong*, 22 PUB. AFF. Q. 81, 82 (2008).

³⁰ Jamie Mayerfield, *In Defense of the Absolute Prohibition of Torture*, 22 PUB. AFF. Q. 109, 110 (2008).

³¹ See Fritz Allhoff, *Terrorism and Torture*, 17 INT'L J. APPLIED PHIL. 105, 106 (2003); Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTL. J. LEGAL PHIL. 95, 106 (1999); Alex J. Bellamy, *No Pain, No Gain? Torture and Ethics in the War on Terror*, 82 INT'L AFF. 121, 132–33 (2006); Daniel J. Hill, *Ticking Bombs, Torture, and the Analogy with Self-Defense*, 44 AM. PHIL. Q. 395, 395–96 (2007); Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 137–41 (1978).

weighs the presumed disvalue of deliberately inflicting distress on a person in the form of hard treatment.

IV. RETRIBUTIVISM, DESERT, AND THE CONTROL CONDITION

Theories of justified punishment identify some good or purpose achieved by institutional legal punishment that legitimizes and thereby justifies the imposition of hard treatment on offenders for the immediate purpose of causing distress or discomfort.³² These theories are generally classified according to the nature of the purpose (or purposes) thought to legitimize punishment.³³ Each can be held singly as a reductive theory articulating the sole legitimizing purpose of punishment or as part of a mixed theory picking out multiple legitimizing purposes.³⁴

So-called forward-looking theories hold that punishment is justified in virtue of the desirable social consequences of doing so, where the notion of what is *desirable* picks out some objectively favored or valuable state of affairs.³⁵ On these theories, then, punishment is justified in virtue of producing social consequences that maximally promote this objectively favorable state of affairs. Forward-looking theories differ from one another according to the objectively valuable state of affairs they identify as legitimizing institutional legal punishment.

In general, there are four forward-looking theories of punishment. Although they can be held together, they can be held separately, as each identifies a different salutary effect on the common good as a legitimizing purpose. First, punishment provides a *general deterrent* to crime in the sense that other persons than the offender will regard the prospect of being punished as a good (and, one hopes, decisive) prudential reason not to perform the same act for which the subject is being punished. Second, punishment provides a *specific deterrent* to crime in the sense that the person who is punished will find punishment sufficiently unpleasant to lead him to refrain from repeating the same act to avoid experiencing such hard treatment again. Third, punishment (specifically, incarceration) protects society from further acts of wrongdoing by a dangerous offender by removing her from society so that she cannot commit further crimes that would harm free and law-abiding citizens. Fourth, punishment, properly structured, reforms and rehabilitates inmates, preparing them for productive re-entry into society.³⁶

³² Greenawalt, *supra* note 1, at 347.

³³ *Id.*

³⁴ *Id.*

³⁵ TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS REVISITED 174–75 (revised ed. Pluto Press 2006).

³⁶ “Rehabilitation” should be understood to mean “the process of helping a person to readapt to society or to restore someone to a former position or rank.” See Kathryn Campbell, *Rehabilitation Theory*, 2 ENCYCLOPEDIA OF PRISONS AND

There is one backward-looking theory of justification of punishment, called *retributivism*, which is perhaps the most widely accepted justification for punishment—at least among philosophical laypersons.³⁷ The standard story looks something like this. Retributivism “looks” back to the effect of the wrongful act on what is metaphorically called the *balance of justice*.³⁸ The idea is that a criminal act disturbs the balance of justice and thereby creates a moral debt that must be paid to restore this balance, insofar as possible, to what it was prior to the commission of the criminal act.³⁹ This balance is restored, at the most general level, by giving the offender the treatment she *deserves* for the wrongful act, which satisfies the moral debt and thereby, so to speak, evens the score.⁴⁰ By ensuring that the offender gets what she deserves for the act, justice is served; after all, it seems nearly a truism that justice is a matter of ensuring that people get what they deserve.⁴¹

CORRECTIONAL FACILITIES 831, 831 (Mary Bosworth ed., 2005), <http://marisluste.files.wordpress.com/2010/11/rehabilitation-theory.pdf>.

³⁷ Greenawalt, *supra* note 1, at 347.

³⁸ See Robert S. Gerstein, *Capital Punishment—“Cruel and Unusual”? A Retributivist Response*, 85 ETHICS 75, 77 (1974); Judith Lichtenberg, *The Ethics of Retaliation*, 21 PHIL. & PUB. POL’Y Q. 4, 4–5 (2001).

³⁹ Zachary Hoskins, *The Moral Permissibility of Punishment*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/m-p-puni/>.

⁴⁰ *Id.*

⁴¹ There are two other types of theory that have been characterized as “retributivist.” First, fairness-based retribution is grounded in the idea that someone who violates the criminal law has expropriated to herself a benefit that she should not have, as a matter of fairness. *Id.* The idea is that punishment is a legitimate mechanism for restoring a pre-existing distribution of burdens and benefits that was disturbed by a criminal act. Second, forfeiture-based retributivism is grounded in the idea that a person forfeits rights that would otherwise protect against state imposition of hard treatment as punishment simply in virtue of voluntarily performing a criminal act. *Id.* The performance of the criminal act, in essence, constitutes consent to waiving the relevant rights. As this Article is concerned with how luck impacts assessments of desert and culpability on which the relevant form of retributivism relies, only “desert-based retributivism” is considered in this Article.

It is worth briefly noting that these other forms of retributivism are problematic. To begin, forfeiture-based retribution is not a backward-looking theory at all. Forfeiture-based retributivism attempts to justify punishment of offenders on the ground offenders have impliedly but voluntarily waived their rights to be free of punishment in virtue of committing the criminal act. The problem, however, is that merely waiving a right that A not be done does not entail that it is morally permissible to do A; my consenting to Joe’s killing me does not entail that it is permissible to kill me. Some forfeiture-based retributivists acknowledge, as they must, that it is not enough to justify punishment that the offender has forfeited rights that would protect against the kind of hard treatment she is likely to get in the form of punishment. In addition, punishment must serve a socially useful purpose to be justified. As Alan Goldman puts the point, “[w]hen a person violates rights of others, he involuntarily loses certain of his own rights, and the community acquires the right to impose a punishment, *if there is a social benefit to be derived from doing so*.” Alan Goldman, *The*

It is important not to be misled by the use of term ‘effect’ here. It should not be thought that retributivism is a forward-looking justification in virtue of the role that effects play in justifying punishment. Retributivism is usually grounded in *metaphysical* (or, more specifically, meta-ethical) considerations having to do with the balance of justice in the world and what must be done to restore the balance of justice after being altered by behavior that disturbs the balance. Forward-looking theories look to the effects of punishment, not on some abstract metaphysical balance of justice, but rather on human behavior. Insofar as punishment results in the net reduction of wrongful acts, it is justified; the concern here is with effects on behavior that are contingent because they rely on features of human psychology that vary from person to person and can change over time. In contrast, retributivism is concerned with the settlement of *moral* debts by restoring the balance of justice—without regard to effects on contingent features of human behavior or psychology.

Retributivism is thus grounded in the principle that punishment of a person is morally permissible if she *deserves* it. The idea that underwrites a retributivist justification of punishment is what appears to be, from an intuitive standpoint, an ordinary principle of justice—namely, the principle that it is *intrinsically* good that people get what they deserve. According to retributivism, doing justice by giving the offender what she deserves resolves the moral debt created by a criminal act and therefore restores this metaphorical balance of justice that was disturbed by the act. As Antony Duff puts it:

Paradox of Punishment, in PUNISHMENT 32 (A. John Simonds, et al. eds. 1995) (emphasis added). But this makes forfeiture-based retributivism a forward-looking theory of punishment insofar as it is the production of a desirable future state of affairs that justifies punishment.

Further, the operative notion of fairness in fairness-based retributivism seems applicable only with respect to distributive justice. The idea is that punishment is justified in virtue of the offender having unfairly expropriated a benefit from someone else. But the appropriate remedy for this kind of injustice seems to be something other than punishment. The appropriate remedy would be to deprive the offender of the benefit and restore it to the person from whom it was expropriated, and not to punish the offender. Depriving someone of her freedom might sometimes have the effect of depriving her of some benefit, but not always: if I have nothing to eat and I steal something and eat it, incarcerating me does not deprive me of the benefit. (Further, even when punishment does deprive the offender of the benefit, it does not restore the benefit to the person from whom it was expropriated, and hence cannot restore the world to its pre-existing balance of justice). Only a restorative mechanism like compensation can do this; the punitive mechanisms of the criminal law cannot—and restorative justice is the province of the civil law, and not the criminal law. For this reason, fairness-based retribution seems to fail as a theory of justified punishment—and will not be considered further in this Article. For a more comprehensive discussion of these other theories see, e.g., DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* (2008).

[R]epributivism is typically expressed in the language of penal desert. The guilty, those who commit criminal offences, deserve to be punished: which is to say, for the positive retributivist, not merely that we must not punish the innocent, or punish the guilty more than they deserve, but that we *should* punish the guilty, to the extent that they deserve: penal desert constitutes not just a necessary, but an in principle sufficient reason for punishment (only in principle, however, since there are very good reasons—to do with the costs, both material and moral, of punishment—why we should not even try to punish all the guilty). A striking feature of penal theorising during the last three decades of the twentieth century was a revival of positive retributivism—of the idea that the positive justification of punishment is to be found in its intrinsic character as a deserved response to crime....⁴²

Whereas the forward-looking considerations sometimes thought to justify punishment are *instrumentally* good in the sense of being a means to maximally promote some socially desirable consequences, retributivism is frequently couched as producing the *intrinsic* good of, depending how the relevant retributivist theory is structured, restoring the balance of justice or, what might amount to the same thing, giving the wrongdoer what she deserves. Either end is considered intrinsically good and is hence regarded as an end-in-itself. Retributivism justifies punishment on the ground that punishment of those who deserve it is intrinsically good, while forward looking theories justify punishment on the ground that punishment is instrumentally good insofar as it produces socially desirable consequences, which results in a state of affairs that is intrinsically good.⁴³

⁴² Duff, *supra* note 27.

⁴³ One might nevertheless argue that retributivist theories and non-retributivist theories are instrumentalist in the sense that really matters, namely that they all identify punishment as a means to some valuable end; however, retributivism is distinct in one very important respect that is of special importance for purposes of this Article. The forward-looking theories hold that punishment *causally contributes* to the production of some intrinsically valuable state of affairs. In contrast, the retributivist holds that the imposition of punishment *constitutes* the intrinsically valuable state of affairs; it is intrinsically valuable that offenders get what they deserve because that restores, so to speak, the balance of justice. Notice that it would be incorrect to say that on the retributivist view punishment *causes* the balance of justice to be restored; the balance of justice is not a physical object and hence not subject to causation. It is the imposition of punishment that constitutes the intrinsic good; it is intrinsically good that the offender is punished. The forward-looking theories hold that punishment causally conduces to an intrinsically valuable state of affairs but that intrinsically valuable state of affairs is something distinct from the offender simply being punished. If punishment does not deter or rehabilitate anyone, then it fails to produce the intrinsic good. In contrast, the very imposition of deserved punishment for the retributivist constitutes the intrinsic good that justifies punishment. If retributivism is true, it is not possible for punishment not to realize its justifying

Many of the concepts used to express the retributivist theory of punishment are interrelated, if not synonymous. Consider, for example, the concept of desert: what, exactly, determines what is *deserved* by an offender? One simple answer is that what is deserved is determined by moral blameworthiness or *culpability*, but there are different answers to the question of what constitutes the level of blameworthiness:

One view is that there are two ingredients determining our moral blameworthiness, the kind of wrong we do and the culpable mental state in which we do it. On this view, the worse the consequences we bring about by our actions and the less the justification for bringing about such consequences, the more wrongful our actions. The more wrongful the action we either intend, foresee, or risk doing, and the less excuse we have for choosing to act nonetheless, the more culpable we are. The two together—wrongdoing and culpability—jointly determine an offender’s overall moral blameworthiness. A second view restricts blameworthiness to culpability alone. On this view what determines our blameworthiness is the degree of wrong we think we are doing in our own mind, not whether we actually succeed in doing such a wrong in the real world. Those who without justification or excuse shoot at another, trying to kill him, are as morally blameworthy if they miss as if they hit and kill their victim.⁴⁴

These two views reflect radically different views about what features of an act constitute a person as *blameworthy* or *deserving of punishment*. The first view holds that there are two determinants of blameworthiness: (1) the severity of the consequences of the relevant act; and (2) the qualities of various mental states that accompany or condition the act in question. Both the “severity” of the consequences and the “qualities” of the mental states are assessed in moral terms. The more severe the consequences from a moral point of view, other things being equal, the more blameworthy the act: death is a more severe consequence from a moral point of view than merely causing fear in a person; therefore, a person is more blameworthy, other things being equal, for causing a death than she would be for merely causing fear. Similarly, the worse a mental state accompanying or conditioning a wrongful act is from a moral point of view, other things being equal, the more blameworthy the act: someone who wrongfully causes death and intends this consequence is, other things be-

intrinsic good. Thus, it would be incorrect to think of forward-looking and backward-looking theories as instrumentalist in the same sense.

⁴⁴ Michael Moore, *Retributivism*, in 3 JUVENILE JUSTICE: JUVENILE COURT RURAL CRIME, USA ENCYCLOPEDIA OF CRIME AND JUSTICE 1342 (Joshua Dressler ed., 2d ed. 2002).

ing equal, more blameworthy than someone who wrongfully causes death and does not intend this consequence.⁴⁵

The second, and more plausible, view holds that there is just one determinant of blameworthiness (or *culpability*, as I use the term) and the degree of blameworthiness—namely, the mental states conditioning and accompanying the relevant act. This influential view, which differs from Kant's view but has its historical roots in what seems to be the most common interpretation of Kant's moral theory, holds that an act is blameworthy solely in virtue of the agent's instantiation of certain mental states, which usually include subjective intentions and motivations.⁴⁶ For reasons that will be discussed later, Kant held that the consequences of an act do not play a role in determining the culpability of the act; indeed, on Kant's view, the consequences of an act are *never*, as a metaphysical matter, relevant in determining the moral value of an act.⁴⁷

This second view presupposes an extremely intuitive principle called the *Control Condition* (CC).⁴⁸ As Thomas Nagel describes CC:

Prior to reflection it is intuitively plausible that people cannot be morally assessed for what is not their fault, or for what is due to factors beyond their control. Such judgment is different from the evaluation of something as a good or bad thing, or state of affairs. The latter may be present in addition to moral judgment, but when we blame someone for his actions we are not merely saying it is bad that they happened, or bad that he exists: we are judging him, saying he is bad, which is different from his being a bad thing. This kind of judgment takes only a certain kind of object. Without being able to explain exactly why, we feel that the appropriateness of moral assessment is easily undermined by the discovery that the act or attribute, no matter how good or bad, is not under the person's control. While other evaluations remain, this one seems to lose its footing. So a clear absence of control, produced by involuntary

⁴⁵ The term 'culpability', as used by Moore, is intended, somewhat misleadingly, to pick out the wrongfulness of the mental states. As a matter of ordinary usage, 'blameworthy' and 'culpable' are usually synonymous. On the ordinary usage, which is the one that I adopt here, X is blameworthy for a particular act insofar as, and only insofar as, X is culpable for that act.

⁴⁶ Hoskins, *supra* note 39.

⁴⁷ IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 10–14 (TK Abbott, trans. Dover Publications 2005) (1873).

⁴⁸ As will be discussed in Section VIII, the first view above—i.e., that the degree of culpability turns not only on the nature of certain mental states attending the wrongful act but also on the moral severity of the consequences—is inconsistent with CC because we do not have control over the consequences of our acts. This, as will be argued in Section VII, speaks against the first view and in favor of the second insofar as CC seems to be a foundational moral commitment underlying so many basic moral practices that it cannot be discarded without rejecting the supported practices.

movement, physical force, or ignorance of the circumstances, excuses what is done from moral judgment.⁴⁹

As far as its relevance to the topic of punishment is concerned, CC holds it is a necessary condition for being blameworthy for *E*, an event or act, that the agent has direct volitional control over *E*. In other more intuitive terms, we do not hold people accountable for what they cannot help doing or what they cannot freely and directly control. What is beyond a person's *direct volitional control*, other things being equal, is not that person's *fault*; and it is a necessary condition for being justifiably punished for a criminal act that the agent is at fault for the act.⁵⁰

One potentially serious problem with retributivism arises on the assumption that CC is a valid moral principle. If CC is true, then what people *deserve* by way of punishments for criminal acts is defined only by elements of their criminal acts that are within their direct volitional control. As will be discussed in more detail below, two people can perform criminal acts that are qualitatively indistinguishable with respect to what elements of the act fall within the agents' direct volitional control but differ with respect to elements of the act that do not fall within the agents' direct volitional control. This causes problems for retributivism because certain punishment practices suggest that people are being held accountable for elements of an act over which they exercise no control and hence do not *deserve* punishment for those elements. Indeed, as we will see, the implications of CC seem incompatible with retributivist justifications of our legal punishment practices.

V. THREE DIFFERENT KINDS OF LUCK: RESULTANT, CIRCUMSTANTIAL, AND CONSTITUTIVE LUCK

Nagel identifies three different types of luck: resultant luck, circumstantial luck, and constitutive luck. *Resultant luck* is concerned with luck having to do with the results or consequences of one's acts.⁵¹ That is, re-

⁴⁹ NAGEL, *supra* note 6, at 25.

⁵⁰ There is one situation that might incorrectly be thought to be a counterexample. Someone who voluntarily becomes sufficiently intoxicated to impair judgment and injures another person might be thought not to have direct volitional control over the act that causes injury. This is false. Such a person, strictly speaking, has not lost the volitional ability to exercise control over the act; rather, that person has compromised his physical ability to control the movements that constitute the act with sufficient precision to avoid causing injury. The condition of an intoxicated person is more accurately characterized as having diminished capacity (construed to include impairment of judgment and impairment of motor skills). Further, the fault-based element, arguably, consists in the decision, made during conditions of undiminished capacities and full volitional control, to consume the intoxicants in irresponsible quantities.

⁵¹ Carolina Sartorio, *Resultant Luck*, 83 PHIL. & PHENOMENOLOGICAL RES. 63, 63 (2012).

sultant luck has to do with morally salient effects of an act that are beyond the control of the agent. Whether, for example, *A* succeeds in shooting *B* to death depends on whether *B* is wearing a bulletproof vest. But whether *B* is wearing a bulletproof vest is beyond *A*'s control. Thus, whether *A* succeeds in killing *B* is a matter of resultant luck.

Circumstantial luck involves luck with respect to the particular features of the circumstances in which an agent finds herself having to decide how to act.⁵² That is, circumstantial luck has to do with the features of an agent's situation (1) that contribute to conditioning⁵³ what the agent does and (2) that are beyond the agent's control. As Nagel puts it, "[t]he things we are called upon to do, the moral tests we face, are importantly determined by factors beyond our control."⁵⁴ For example, whether or not a person does something courageous depends on whether that person ever finds herself in a situation requiring a courageous act. As Nagel describes this form of luck:

The things we are called upon to do, the moral tests we face, are importantly determined by factors beyond our control. It may be true of someone that in a dangerous situation he would behave in a cowardly or heroic fashion, but if the situation never arises, he will never have the chance to distinguish or disgrace himself in this way, and his moral record will be different.⁵⁵

Someone with courage, then, might never have an opportunity to act on it because she might never encounter the appropriate circumstances. She might never, for example, find herself in circumstances where she can run into a burning building and save lives because she never happens to find herself in the presence of a burning building.

Constitutive luck refers to luck with respect to what abilities, disabilities, tastes, preferences, desires, and values, as well as what psychological and character traits, the agent has.⁵⁶ That is, constitutive luck has to do with (1) abilities and dispositions of the agent (2) that are beyond the control of the agent and (3) that condition what the agent does. There are two kinds of constitutive luck. What I will call "hard constitutive luck" involves luck with respect to the agent's *natural* endowments—those abilities and traits that are determined to some extent by genetics. How much native intellectual ability an agent is born with would be an example of

⁵² Enoch, *supra* note 8, at 43.

⁵³ By my use of the term "conditioning," I do not mean to suggest that these features causally determine in some mechanistic fashion what the agent does. As I use the term here, a feature of the agent's situation that, to put it obliquely, *influences* the outcome of the agent's deliberation would be a feature that conditioned the agent's act and should hence be compatible, in principle, with our having free will.

⁵⁴ NAGEL, *supra* note 6, at 33–34.

⁵⁵ *Id.* at 28.

⁵⁶ *Id.*

hard constitutive luck. What I will call “soft constitutive luck” involves luck with respect to social or environmental factors that contribute to what abilities and dispositions an agent has. Whether one’s mother and father are good loving parents is a matter of soft constitutive luck.

VI. THE PROBLEM OF LEGAL LUCK AND MORAL CULPABILITY FOR CRIMINAL ACTS

A. *Legal Luck, Culpability, and Punishment: Resultant Luck and Moral Culpability for Successful and Unsuccessful Attempts*

At first glance, it seems clear that the consequences of a behavior *sometimes* contribute to constituting the moral worth or value of an act. For example, the consequences on human wellbeing seem to figure into constituting the moral worth of an act of heroism. Such acts are not morally required but nonetheless (at least sometimes)⁵⁷ have positive moral worth. What positive moral worth such an act has will depend on many features of the act, including the risks to the agent of acting, but it clearly depends to some extent on the consequences on wellbeing. Other things being equal, if *A* and *B* run into a burning building to help others and *A* saves 100 human lives and *B* saves the life of a puppy, it seems clear that *A* deserves more praise than *B* and that is because, although *B*’s act might be morally good,⁵⁸ *A*’s act is better than *B*’s act. One reason for this, arguably, has to do with the fact that *A*’s heroism results in better consequences from the standpoint of morality.

It is important to note that this is a weaker claim about the role of consequences in constituting the moral value of an act than is made by moral consequentialists. For the consequentialist, the *only* constituent of an act’s moral worth is its effects with respect to bringing about some objectively favored state of affairs—such as, for example, the state of affairs in which human pleasure, happiness, or wellbeing is maximized. The consequentialist thus holds that nothing else matters with respect to determining an act’s moral value.

The modest claim that *sometimes* the moral worth of an act is *partly* constituted by something other than the consequences of the act in bringing about some favored state of the view is the distinguishing thesis

⁵⁷ It might be possible for a heroic act to result in morally undesirable consequences. In such cases, it is not clear how to evaluate the act; it is not clear that a heroic act that has bad consequences should be characterized as “morally good” or as something that “should” be done.

⁵⁸ One might argue *B* acted irresponsibly and hence wrongfully by risking her own life to save the life of just a puppy. Of course, the final judgment on the issue would require information as to whether *B* knew that she would save only a puppy. If not, then the judgment would be, I think, more favorable than it would be if *B* knew that she was risking her life for the life of just one puppy. For what it is worth, I doubt it matters how cute or well behaved the puppy is.

of a class of moral theories called *deontological theories*. As we have seen, these theories hold that at least *some* acts are (perhaps just partly) wrong in virtue of *intrinsic* or *inherent* characteristics and hence are inherently wrong.

Kant's moral philosophy is distinguished by a number of novel theoretical commitments. Chief among these, for our purposes, is his rejection of the view that consequences even sometimes figure into constituting the moral value of an act—a very surprising view, at first glance. On Kant's view, the moral worth of an act is entirely constituted by a particular type of mental state—the good will—that ideally explains the performance of an act.⁵⁹ An act with positive moral worth has it, according to Kant, wholly in virtue of its being motivated by a good will or an attitude of respect for the moral good, which is unconditionally and hence inherently good and thus has absolute moral worth.⁶⁰ As Kant explains his view:

A good will is good not because of what it performs or effects, not by its aptness for the attainment of some proposed end, but simply by virtue of the volition; that is, it is good in itself, and considered by itself is to be esteemed much higher than all that can be brought about by it in favour of any inclination, nay even of the sum total of all inclinations.⁶¹

This explanation is not quite as clear as could be hoped for, but the point seems to be that an act motivated by the good will has positive moral worth regardless of whether the intended purpose or effects are realized. Presumably, an act motivated by a bad will is bad regardless of whether the intended purposes or effects are realized.

Kant's view is *prima facie* counterintuitive and inconsistent with ordinary moral practices (such as, e.g., involving supererogatory acts), but there is an interesting reason for thinking that the consequences of an act are irrelevant in determining its moral worth. There is no set of consequences that *necessarily* result from any particular act, considered *by itself*, without regard to any of the circumstances defining the context of the act. For example, pointing a loaded gun at someone's heart does not necessarily result in killing, or even injuring, the intended victim. I might point a gun at someone and pull the trigger, intending to kill him, but fail to do so for a variety of reasons: the gun might misfire; the intended target might move as I pull the trigger; and so on. Of course, the explanation as to why I miss in any of these cases might consist entirely of causal claims involving the state of the gun at the time, the movement of the target, etc. But there is no particular set of consequences that necessarily occurs simply in virtue of my having pointed a loaded gun at someone and pulled the trigger; the consequences are, from my vantage point

⁵⁹ KANT, *supra* note 47, at 10, 13–14.

⁶⁰ *Id.* at 10.

⁶¹ *Id.*

as an agent with limited control over how things turn out, contingent. There are other factors—factors beyond my control and hence *extrinsic* to anything over which I exercise control—that contribute to determining what the consequence of my discharging the gun turn out to be. In this sense, the connection between any act and a particular set of consequences is, we might say, *accidental* and *extrinsic*.

What this means is that all that is within the agent's direct volitional control, if anything is, are certain of the mental states that condition and explain the act. Suppose, for example, that Dee and Dum are simultaneously pointing guns at exactly the same spot on Tweedle's heart. Indeed, although each gun has a functioning laser scope to identify the precise entry point of the bullet, there is only one red dot, indicating that the bullets from both guns will hit that one spot.⁶² Either bullet will kill Tweedle instantly. Suppose that they fire simultaneously, and that Dee's bullet hits Tweedle and kills him instantly, while Dum's bullet is deflected from its path by a bird that flew into its path. It should be clear that neither Dee nor Dum exercises direct volitional control over whether the bullet hits and kills Tweedle. It should also be clear that, if Dee and Dum have direct volitional control over anything, it is limited to some of the mental states that precede, accompany, and presumably produce the act of shooting at Tweedle—such as, for example, the volition (or willing) that caused the bodily movements partly constituting the act.

One common reaction to this case is a strong and persistent intuition that Dum and Dee are equally culpable. It was beyond both Dum's and Dee's control—and hence a matter of *luck*—whether a bird would fly into the path of one of the bullets. But it is hard to see how a difference in culpability could possibly turn on a difference in *luck*. Dee and Dum performed exactly the same act as far as the act's essential constituents are concerned; indeed, they had exactly the same motives for wanting to kill Tweedle and exactly the same intentions and background beliefs. The only difference is that the bird happened to fly in the path of Dum's bullet and not Dee's; and this was purely a matter of luck because beyond the direct control of either agent. It is, however, difficult to see how a difference in the comparative blameworthiness of Dum's and Dee's acts could be grounded entirely in a difference in pure luck.

Such considerations seem to support Kant's view that the consequences of an act are irrelevant with respect to the moral worth of an act.

⁶² This example is discussed in NAGEL, *supra* note 6, at 31. The proper names "Dum" and "Dee" come from a more general example discussed by David Lewis in David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53, 53 (1989). As Lewis describes the example: "Dee takes a shot at his enemy, and so does Dum. They both want to kill; they both try, and we may suppose they try equally hard. Both act out of malice, without any shred of justification or excuse. Both give us reason to fear that they might be ready to kill in the future. The only difference is that Dee hits and Dum misses." *Id.*

If Dee and Dum are equally culpable because their acts were qualitatively indistinguishable with respect to those factors over which they exercised control, and, as a general matter, people do not exercise the requisite control over the consequences of an act, then the consequences of their acts play no role in determining the moral worth of what they did. The same will be true with respect to the moral worth of all other acts, since the same considerations apply equally to other acts. But if this is so, it seems to follow that people are not *morally* accountable for events beyond their control.

The issue of whether a person is morally accountable for events beyond her control is different from the issue of whether a person should, as a matter of political morality, be held legally accountable for an event beyond her control. As Thomas Bittner explains in a recent article:

[E]ven if you agree with the moral judgment about Dee and Dum and you agree that their case generalizes to a correct moral claim about all criminal attempts, you might still resist the inference to the conclusion about legal policy because you think that there is an important gap or difference between morality and the criminal legal system. That is, you might reasonably believe that it is a mistake to try to make our legal policies always conform to what morality requires.⁶³

Nagel is aware of this, pointing out that this would amount to a practice of strict *legal* liability for criminal acts⁶⁴ and would hence present a different moral problem—one of legitimacy—than the problem of whether individuals are *morally* accountable for events over which they lack direct volitional control.⁶⁵ Thus, as Nagel puts it, there might be some “legal use” that would *morally warrant* or *legitimize* what would, in effect, be a policy of strict legal liability.⁶⁶ The problem of the legitimacy of this practice is, of course, a problem of morality—albeit one of political morality; the underlying issue is simply whether a policy of imposing strict legal liability for some class of criminal acts is morally justified.

Although Bittner seems to believe that there is some kind of legitimizing rationale for differential treatment of successful and unsuccessful attempts, this would not help much with the problem as he has framed it. Bittner takes himself to be addressing the issue as it arises with respect to *moral luck* and how legal punishment practices should be structured given the facts and arguments concerning luck and desert, *as Nagel frames them*.

⁶³ Thomas Bittner, *Punishment for Criminal Attempts: A Legal Perspective on the Problem of Moral Luck*, 38 CAN. J. PHIL. 51, 57 (2008).

⁶⁴ In the case of the law of attempts, a person would be strictly liable for the consequences of a successful attempt—despite the fact that an agent lacks volitional control over the consequences of her acts.

⁶⁵ NAGEL, *supra* note 6, at 31.

⁶⁶ *Id.*

But the problem of moral luck, strictly speaking, bears *directly* only on retributivist justifications of punishment, insofar as it challenges the underlying notions that we can make sense of what is *deserved* by an agent or of what determines how culpable the agent is.

Indeed, the attempts case is a red herring. If there are other legitimizing purposes of punishment than to give offenders what is deserved, then it should be obvious that it might be morally justified to hold a person *legally liable* for an act or event over which she lacked control and hence for which she is not *morally accountable*. If there are other legitimizing purposes, such as the forward-looking considerations discussed above, achieved by differential punishment of successful and unsuccessful attempts, then it is obvious that the achievement of these other purposes—if sufficiently valuable to outweigh the disvalue of giving people more than they deserve or less than they deserve—might justify the practice of punishing successful and unsuccessful attempts differently. But the attempts case is interesting precisely because it challenges the idea that differential punishment of successful and unsuccessful attempts can be justified on the strength of true claims about what people *deserve*; that there might be forward-looking legitimizing purposes that validate these practices does nothing to address the real problem here—and the real problem has to do with the viability of retributivism as a general justification of punishment.

This is not to say that the attempts case poses no interesting problems. It does; after all, the question of whether traditional attempts practices can be morally justified if unsuccessful attempts are no less culpable than successful attempts presents an important theoretical puzzle. But, as should be evident, the importance of this question derives from the underlying challenge to the idea that punishment is justified only insofar as it is deserved—and this is not a problem, as we will see in the next two subsections, that arises only for the criminal laws grounding traditional attempts practice. Rather, this is a problem that arises in connection with the justification of institutional systems of legal punishment, calling retributivism (and, possibly, the very legitimacy of punishment) into question. According to the retributivist, punishment is justified insofar as it is *deserved*; and, as far as traditional attempts practice is concerned, it seems clear, from the standpoint of ordinary intuition, that Dum *deserves* no lesser punishment than Dee on the assumption that the only differences between the two acts are matters of luck neither could control.⁶⁷ If this is

⁶⁷ Bittner fudges a bit on this important element of the example, which he needs to successfully address Nagel's argument:

But, for many other kinds of attempts, there is no question that the actors deserve different punishment, because they do different things. Murder, for example, is a crime of harmful result, but in many other crimes, the harm (if there is one) is not a result of the actions of the criminal, but rather the harm is in the actions of the criminal. So, for example, Dee and Dum [are not] a good model

correct, then traditional attempts practice cannot be justified on the strength of retributivist concerns—a problem that, as we will see in the next two sections, arises in connection with other crimes.

The money claim here (i.e., that Dee and Dum *deserve* the same punishment) is grounded in pre-theoretic intuitions about how the concept of desert applies to such cases—a concept in critical need of philosophical explication. At first glance, one plausible way to explicate the concept of desert is to analyze it in terms of the concept of a moral debt. On this account, wrongful acts disturb the “balance of justice” that obtains among a community of persons by creating new “moral debts” that must be paid. If *A* does something that wrongs *B*, *A* has altered the balance of justice in such a manner as to create a moral debt that *A* owes to *B*. Accordingly, what *A* deserves by way of punishment, on this attempt to flesh out the notion of desert, is what is needed to settle the moral debt *A* owes to *B*, which was created by *A*’s wrongful act.

at all for burglary (breaking and entering), larceny (theft), sexual assault (rape), kidnapping, hostage taking, incest, piracy, bigamy, trespass, and so forth. In all these cases, the completed crime involves by definition a different act than the attempted crime. For example, burglary requires that the criminal actually enter the house, while in attempted burglary the criminal [does not] enter the house (he [is not] able to, he is interrupted as he is about to, he sees something that deters him just as he is preparing to, etc.). For another example, incest requires that sexual intercourse take place, while in the normal case of attempted incest, there is no sexual intercourse. There can be no Dee and Dum of attempted burglary or of any other offence outside the scope of the crimes of harmful result.

Bittner, *supra* note 63, at 57–58.

This seems false. As for attempted burglary, if Dee and Dum are trying to get inside two different houses by breaking a window in exactly the same manner of the house and Dee succeeds while Dum fails because the window in the latter case is made of stronger material, it seems clear as to the breaking and entering element of burglary Dee and Dum have done exactly the same thing, and would seem to deserve—from a *retributivist* point of view—equal punishment for that element of burglary since what they did with respect to what they had control over is exactly the same. It is, of course, possible for two different people to go about breaking and entering in very different ways, and those ways might make a difference with respect, from a retributivist perspective, to how much punishment each should receive. But the idea that it is not possible for two people to commit burglary in a manner that would form an analogue to the Dee and Dum case is simply and patently false.

Indeed, the suggestion that it is improbable that we can break classes of cases down in a very general way that allows us to say of any unsuccessful attempt of felony that it should be punished as harshly as any successful felony of the same degree actually calls attention to some of the problems with a retributivist theory of punishment as it regards successful and unsuccessful attempts. Culpability, or what is deserved, depends on a wide variety of factors that simply cannot be reproduced in some simple scheme that would partition unsuccessful and successful attempts and justify punishing the former less severely than the latter. Bittner seems to have misunderstood the character of the problem raised by Nagel, Williams, and this Article, seeing it as a matter of nothing more than finding a justification limited to the appropriate punitive response to successful and unsuccessful attempts.

This attempt to flesh out the notion of desert is problematic, as the very notion of a moral debt is unclear and itself in need of a philosophical explication that does not rely on notions, such as “desert” or “balance of justice,” that are equally in need of philosophical explication. One of the more worrisome problems here is, of course, to try to make rigorous the intractably metaphorical language of a “disturbance in the balance of justice” that underwrites the idea that some kind of moral debt is created by a wrongful act that is paid off by punishment.

Perhaps the most promising attempt to define “moral debt” in a way that denies the Kantian claim that consequences are never relevant in determining the moral worth of an act is to consider the burdensome consequences of the criminal act to the victim as included in the moral debt that must be paid to the victim. Since, returning to the example, Dee’s bullet caused the death of Tweedle while Dum’s did not, her moral debt includes, while Dum’s does not, Tweedle’s death. Since the debts are, other things being equal, otherwise equivalent in amount, Dee’s debt is larger and would thereby justify punishing her for a longer period of time.

There are a couple of problems with this attempt to flesh out the concept of moral debt. To begin, if being killed figures into the magnitude of the moral debt created, then there would be some intuitive ground for thinking that Dee should be punished more severely than Dum. After all, it was her bullet that succeeded in killing Tweedle, and the intuition stubbornly persists that it makes a difference from the standpoint of determining how much punishment is deserved whether the victim dies. Even so, this plausible intuition is problematic. The problem is that any moral debt would, for this notion to make any sense within the existing conceptual framework for addressing moral issues, be created through the violation of some moral norm, and it appears that *both Dum and Dee violated exactly the same moral norms!* The mere attempt to kill Tweedle constitutes a violation of the moral norm that prohibits intentionally killing persons known to be innocent. It is not as if there are two relevant moral norms here that would distinguish successful and unsuccessful attempted killings as separate transgressions. The Ten Commandments, for example, contain only one norm regarding intentional killing, and it is “Thou shalt not kill”; there does not appear to be a second independent moral norm that is expressed by “Thou shalt not try to kill.” If one creates moral debts only by violating moral norms and two people violate exactly the same set of moral norms, it is hard to see how one person could create a larger moral debt that requires greater punishment to settle the debt. From the standpoint of all relevant moral norms, the two persons have done the same thing.

Further, and more importantly, this attempt to flesh out the concept of moral debt begs the question. One could be liable for a moral debt in a sense that would include moral accountability for the consequences of

an act only insofar as one is morally accountable for elements of an act that are beyond one's direct volitional control. But the claim that one is morally accountable for things beyond one's control is exactly what is ultimately at issue here.

In any event, it is crucial to note that Nagel's arguments pose a serious challenge to retributivism as a legitimizing purpose of punishment; that is the real problem here, and it is a different problem from the problem of justifying traditional criminal justice practices regarding attempts. It might be true, as Bittner suggests, that there are other moral reasons for permitting differential legal punishment of unsuccessful and successful attempts. If so, then those reasons might form the basis of an argument that *legitimizes* punishing successful and unsuccessful attempts differently. But the real problem that the various types of luck pose for punishment practices—and this cannot be emphasized enough—is a direct challenge to the idea that people can be assessed as culpable and deserving of punishment to begin with, which underlies retributivism. The real challenge that luck poses is therefore directed at the very viability of retributivism as successfully defining a legitimizing purpose of punishment. The puzzle of justifying traditional attempts practices admittedly highlights the difficulty but it also tends to distract attention from the fact that the problem these practices pose is one that arises with respect to a retributivist justification for punishing *any* crime. And it is the latter that is the direct and natural target of Nagel's concerns about luck; the focus on traditional attempts practice is something of a distraction or side issue.

Suppose, for example, that one could give a justification of the common practice of punishing successful and unsuccessful attempts differently in terms of forward-looking considerations. This would show only that some other legitimizing purpose than to restore the balance of justice provides a moral justification for differential punishment of successful and unsuccessful attempts. Even so, it would still not be clear how to make sense of the notions of desert, culpability, and debt that provide the intuitive foundation for retributivism. Giving a forward-looking justification for differential punishment of successful and unsuccessful attempts would not do anything to address the problem that this practice poses for *retributivism* and the underlying principles implicating the notions of desert, culpability, and justice that provide its intuitive foundation.⁶⁸ For his part, Bittner gives no reason to think differential treatment

⁶⁸ For what it is worth, however, differential punishment of successful and unsuccessful attempts is no more easily grounded in forward-looking legitimizing purposes. For starters, there seem to be no reasons grounded in the moral value of *general deterrence* for supposing that Dee should be punished more severely than Dum. It is not as if would-be successful murderers need a greater deterrent than would-be unsuccessful murderers; after all, anyone who is genuinely attempting to kill someone is trying to succeed. Likewise, someone who is locked up for an unsuccessful

of successful and unsuccessful attempts can be grounded in a retributivist theory of punishment. For this reason, Bittner fails to address the problem posed by luck for not only our ordinary moral practices but for our legal practices regarding institutional punishment—*insofar as these practices are grounded in a retributivist conception of punishment as justified in virtue of being deserved*.

B. *Legal Luck, Culpability, and Punishment: Circumstantial Luck*

It seems clear that what an agent decides to do at some particular time depends on circumstantial luck. What situation in which an agent finds herself at any given moment plays an obvious role in defining which acts are viable at that moment; after all, it is the special features of any contingent situation an agent encounters that condition the range of relevant acts available to her. But the specific circumstances of a situation in which a person finds herself are beyond her direct volitional control; no one has the ability to freely choose every aspect of a situation she finds herself in. No one, then, has the ability to choose all aspects of a situation that will condition the range of behavioral options available to her.

Suppose, for example, I book a particular itinerary to San Francisco for the weekend, reserve a particular hotel room for my stay, and I spend the weekend in my hotel room there. It might appear that I have freely chosen every element of my situation, but this is false. It might well turn out, even given what substantial control I seem to have, that there is someone hiding in the closet of my room waiting to ambush and hurt me. If we suppose this to be the case, then this element of my situation is not only beyond my free control but also conditions what behavioral options are available to me. Perhaps, the intruder will attack when I arrive thereby requiring me to perform acts I otherwise would not perform in defense of myself. But if this is so, then the salient options available to me are defined and limited, at least in part, by specific elements of my situation that were beyond my control. As there is nothing special about the nature of these circumstances that would distinguish this example from other situations in which one might find oneself, it is reasonable to con-

attempted murder, like Dum, is as much in need of reform, rehabilitation, or a coercive incentive (i.e., *specific deterrence*) not to attempt to kill some other person as someone, like Dee, who is locked up for a successful attempted murderer. Finally, society clearly needs as much protection from Dee as from Dum, other things being equal. The world is not divided up into two classes of would-be murderers with radically different moral properties: would-be successful murderers and would-be unsuccessful murders. Everyone who sincerely attempts to commit murder is attempting to do so successfully—and that is why CC grounds such a plausible challenge to the criminal law differentiating successful and unsuccessful attempted crimes. If a justification of the common practice of punishing unsuccessful attempts less severely than successful attempts depends on being grounded in the standard forward-looking considerations, this practice is not easily justified.

clude, as Nagel does, that circumstantial luck always, at the very least, partly conditions what acts I choose to perform.

This means, of course, that circumstantial luck can sometimes condition the performance of an act that is morally wrongful. Suppose that I manage, during a desperate and terrifying struggle with the intruder, to take his gun from him. Although I am confronted, through no fault of my own, with a threat that was beyond my control to prevent, this piece of bad circumstantial luck, along with my now being in possession of his gun (which depends on both resultant and circumstantial luck), makes certain morally salient responses available that would not be options otherwise. If, without thinking, I pull the trigger as he makes a desperate attempt to escape through the window and my bullet hits him in the back, then I have done something morally significant (and probably criminal) I would not have done had there not been special features of my circumstances, beyond my control, that defined the salient behavioral options. In particular, if the intruder were not there in the first place, something over which I have no control, then I would never have made the mistake of shooting him as he was attempting to escape.

This presents some difficulties in thinking about what, in the example above, I deserve as a matter of morality. There is nothing in the example that suggests I walk around with a character flaw that makes it especially likely I will do something culpable that kills someone and hence something that *deserves*, from the standpoint of *individual* morality, a substantial punishment. Had it not been for the bad luck of my choosing that particular hotel room, I might have gone my entire life without ever having wrongfully hurt someone. Unfortunately, my choice of hotels was a matter of bad luck and, in consequence, I performed what might be a criminal act and hence might have to spend much of what life remains to me locked up in a prison cell—and these are consequences that tend to define my identity to the community of non-offenders or free persons: should I be convicted of a criminal violation, I am and will forever be a convicted felon. This will have a number of prudentially and morally significant social effects on my life upon re-entry into society, which include effects that detract from my ability to find gainful employment upon release.⁶⁹ I will also suffer a host of psychological consequences of both moral and prudential significance: remorse, guilt, depression, self-loathing, and so on.⁷⁰

⁶⁹ Christy Visher et al., *Employment After Prison: A Longitudinal Study of Releasees in Three States*, URB. INST.: JUST. POLICY CENTER 1 (2008), <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.pdf>.

⁷⁰ Robert T. Muller, *Death Becomes Us: The Psychological Trauma of Killing*, PSYCHOL. TODAY (Feb. 21, 2014), <https://www.psychologytoday.com/blog/talking-about-trauma/201402/death-becomes-us-the-psychological-trauma-killing>.

Many of these effects, moreover, are likely to be significant over the long term. What emotional effects I experience in consequence of my killing the intruder will surely continue over the long term; while the emotional effects of some wrongful acts are more likely to be transient, wrongful acts resulting in severe harm usually have long term psychological consequences (one extreme example would be post-traumatic stress disorder).⁷¹ The psychological effects I experience will likely continue for most of what remains of my conscious life, even if I am not convicted.

Of course, if I am convicted, then there will be a host of other obviously long-term effects. A conviction for some type of homicide is likely to result in being sentenced to prison for an extended period, which will be a source of mental and physical distress.⁷² During this period, I will routinely be exposed to threats of prison violence and will likely be its victim at some point.⁷³ After being released, my attempts to become assimilated into society will likely be hindered by the social ostracism and stigma that usually attends a felony conviction.⁷⁴ Among other things, I will likely face difficulties finding employment that will enable me to support myself without having to resort to crime.⁷⁵

One natural reaction is to bemoan the seeming *unfairness* (perhaps in just the sense that is meant when we have the casual thought “life isn’t fair”) of my having to suffer such terrible consequences for an event that would not have happened but for some very unlikely bad luck. It seems, in some sense, unfair or unjust that I should suffer, given the circumstances in the example, the hard treatment associated with punishment for a felony conviction and the lingering ostracism that attends such a conviction. This, at the very least, is not the kind of thing that would happen in what is, from a moral standpoint, the best of possible worlds; one has the sense that such an event (especially if out of character) leaves, as it were, a moral stain upon the universe.

Although this natural reaction is explicitly concerned with the fairness of my having to suffer such severe consequences, it is likely grounded, at least in part, in some kind of intuitive assessment of what I deserve.

⁷¹ *Id.*

⁷² Craig Haney, *The Psychological Impact of Incarceration: Implications For Post-Prison Adjustment*, U.S. DEPT. OF HEALTH & HUM. SERV. 4 (2001), <https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment>; Jason Riley, *After 54 years, Kentucky's Longest Serving Inmate has Chance for Release*, WDRB (Jul. 14, 2014), <http://www.wdrb.com/story/25999947/sunday-edition-after-54-years-kentuckys-longest-serving-inmate-has-chance-for-release>.

⁷³ *Violence and Sexual Assault in Prison*, ZOUKIS PRISONER RESOURCE, <https://www.prisonerresource.com/prison-survival-guide/special-tactics/violence-sexual-assault/>.

⁷⁴ The Editorial Board, *Labels Like ‘Felon’ Are an Unfair Life Sentence*, N.Y. TIMES (May 7, 2016), <https://www.nytimes.com/2016/05/08/opinion/sunday/labels-like-felon-are-an-unfair-life-sentence.html>.

⁷⁵ Visher, *supra* note 69.

Killing someone is always a matter of grave moral import, and this is equally true of killing persons who are engaged in wrongful acts, such as the intruder; that is, in part, what explains the intuition that self-defense rights are limited to situations in which force is *necessary* to negate a culpable threat. The moral gravity of wrongful killing would ordinarily point in the direction of greater culpability and hence of being deserving of more severe punishment. But other relevant considerations point in the other direction. The absence of any violence in my past suggests that I lack any culpable violent dispositions that might otherwise justify imposing such severe hardship on me as punishment. The fact that the intruder wrongfully created a terrifying situation is also relevant, from the standpoint of ordinary intuitions, in assessing my culpability. The intruder posed an immediate and unjustified threat to my life, putting me under tremendous stress, making some sort of violent act considerably more likely at that moment. Given that my shooting at the intruder was conditioned by a highly stressful situation wrongfully created by the intruder and given that I have no culpable or salient violent dispositions that might explain my decision to shoot, I do not seem to *deserve* the life-changing and long-term consequences described above. Although I performed an act that is gravely wrong, my culpability is, at the very least, diminished by what is known about my psychology, the stressful character of the situation, and the fact that the intruder is at fault for putting me in this situation. Fairness and desert are conceptually distinct and subject to different norms but part of what explains the reaction that it is unfair that I experience the hardship associated with a felony conviction seems to be a widely shared deep-seated belief that my act does not *deserve* such hardship.

This gestures in the direction of a more serious problem in assessing how culpable or deserving of punishment I am—one that creates a potentially fatal problem for retributivism.⁷⁶ One natural and widely accepted device for assessing *P*'s culpability for doing something is to attempt to put oneself in *P*'s position and ask whether one would do the same thing under those circumstances. I suspect that few, if any of us, could say with an acceptable level of confidence that we would *not* shoot at the intruder under the exigency and pressure of such potentially dangerous circumstances. It is plausible, then, to hypothesize that what will explain, in many cases, the intuition that I do not deserve such hardship is uncertainty on the part of the person making the assessment as to whether she would do the same thing under the same circumstances. Once the assessor puts herself in my position in the example with all the relevant information available to her, what I did will seem *more* reasonable, or less

⁷⁶ This, of course, potentially calls into question the very legitimacy of legal punishment, depending on whether there are any forward-looking legitimizing purposes of punishment.

unreasonable, than it might otherwise have seemed. This is not to say that my act will seem reasonable. Rather, it is to say only that my act will seem *more* reasonable once the specifics of my situation are taken into account than it would otherwise have seemed. Insofar as an assessor cannot say with confidence that she would not shoot the intruder in my position, it is probably because the act seems so much more reasonable upon consideration of the specifics of my situation that the assessor cannot say with confidence that it is *unreasonable*.

But such considerations, if correct, call into question our ability to accurately assess moral culpability. Whether I am deserving of punishment for shooting the intruder depends in part on whether my act is *reasonable* (as opposed to merely *rational*) under the circumstances. But it is hard to see how we could determine whether my act is reasonable if we cannot determine how likely it is that we (and other people) would respond in the same way under similar circumstances. Part of what warrants assigning blame to a person for an act is that the act is something that reasonable persons (or “ordinary” persons, who are presumed to be reasonable in the relevant sense) would refrain from under those same circumstances. Insofar as we cannot make that assessment in the example above, we are not in an epistemic position to assess culpability.⁷⁷

What causes the difficulty in assessing culpability is precisely the additional information regarding events beyond my direct volitional control and the fact that it is clear that these events are beyond my control. These unlucky events significantly increased the probability that I would do something wrongful that would result in the intruder’s death. Further, these events increased the probability of such an outcome so much that we can no longer say with confidence either that (1) we would not do the same thing in those circumstances or (2) such an act is unreasonable given the circumstances defined by these events. Our ability to assess culpability is diminished to such an extent that it would be morally unaccepta-

⁷⁷ The claim that an act has occurred in violation of a criminal statute, by itself, tells us nothing at all about how culpable the wrongdoer is for the violation. Culpability is determined by a number of factors having to do with special characteristics of the situation and agent. These factors frequently include what the law specifies as aggravating and mitigating circumstances but they also include considerations having to do with reasonableness of the relevant act. See, Paul Bergman, *Aggravating Circumstances in Sentencing*, NOLO, <https://www.nolo.com/legal-encyclopedia/aggravating-circumstances-sentencing.html> (last visited Jul. 5, 2018). Whether an act is reasonable is determined, in part, by how ordinary people would respond in the same class of circumstances. From the standpoint of ordinary intuitions, it seems morally problematic to hold an agent legally liable for an act that would not have occurred but for highly unusual circumstances when most ordinary people would do exactly the same thing in the same circumstances. Indeed, this intuition expresses a moral principle that probably also plays a role in judgments that I do not deserve the usual hardship associated with a homicide conviction for killing the intruder.

ble to ground any punitive consequences in considerations of my culpability—and the only form of luck that has been considered here is circumstantial luck; as we will see in the next subsection, there are other kinds of luck that arguably pose even greater problems for our ability to assess culpability and hence for a retributivist foundation for punishment.

Another example would be helpful to show how deeply luck complicates the assessments of culpability on which a system of punishment guided by retributivist principles depend. Many, if not most, soldiers on the front lines of a war are young people between the ages of eighteen and twenty-four who are, other things being equal, less equipped than older people with the psychological resources needed to manage the intense stress of war. Two factors explain this comparative disability. First, younger people tend to lack the kind of experience with stress that enables them to develop effective coping strategies; coping with stress in a constructive way is a skill that is acquired, in part, through experience.⁷⁸ Second, and more importantly, the brains of these eighteen to twenty-four-year-olds fighting our wars are not fully developed in respects that would enable them to refrain from acting on dangerous impulses that can arise after prolonged and continuous exposure to severe stress.⁷⁹ In particular, the crucial prefrontal cortex is not fully developed until about the age of twenty-five. The prefrontal cortex is crucial to decision-making and self-restraint, as it is this particular structure that functions to suppress impulses, regulate emotions, assess risks, and organize projects and priorities. As Sandra Aamodt explains the developmental changes that the brain is undergoing between the ages of eighteen and twenty-five:

[T]he changes that happen between 18 and 25 are a continuation of the process that starts around puberty, and 18 year olds are about *halfway through that process*. Their prefrontal cortex is not yet fully developed. That's the part of the brain that helps you to inhibit impulses and to plan and organize your behavior to reach a goal.⁸⁰

People between the ages of eighteen and twenty-five are ill-equipped to face the intensely stressful conditions faced by United States soldiers fighting wars against people who wear nothing distinctive that would identify them as enemy combatants. From the standpoint of a U.S. soldier, everyone looks like a civilian, which effectively leads soldiers to regard every person they see as potentially a threat to their lives. In consequence of the comparative anonymity of the Iraqi or Afghani insurgents or combatants, soldiers must live under the constant psychologically de-

⁷⁸ Pamela Braboy Jackson & Montenique Finney, Note, *Negative Life Events and Psychological Distress Among Young Adults*, 65 SOC. PSYCHOL. Q. 186, 186 (2002).

⁷⁹ Tony Cox, *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011), <http://www.npr.org/templates/story/story.php?storyId=141164708>.

⁸⁰ *Id.*

bilitating stress of being prepared every moment of every day for an attack that might very well kill or maim them. The difficulties young people face in making good decisions under such conditions are not fully explained by their lack of experience in managing the stress of this kind of combat. Those difficulties are also caused by the fact that they lack the neurophysiological resources to handle such stressful conditions.

How, then, do these new rules of engagement interface with what is plausibly characterized as neurologically-based *disabilities* of young soldiers? The answer is a disconcerting one, as far as ordinary judgments and attributions of culpability, blameworthiness, and desert are concerned. If a person *A* is placed in a highly stressful situation of life-threatening danger without the neurological hardware to enable her to cope in a constructive way, the probability that *A* will act in a wrongful way is increased by a significant margin. That is to say, the likelihood that *A* will be overwhelmed by the discomfort and anger produced by the stress and act on a violent impulse is sufficiently high that it seems unfair to place *A* in such a stressful situation. Indeed, as far as the ethics of war is concerned, it seems unfair to place the burden of fighting our wars on people who do not yet have fully formed brains that would provide more resources for managing such stress.

More to the point, many of these young people—at least those who do not enter the armed forces with some antecedent pathological predisposition to violent behavior—would have gone their entire lives without ever having committed a violent act had they not found themselves in conditions of war. Yet these kids (and, make no mistake about this, these soldiers are, from the standpoint of emotional and cognitive development, still “kids”) might face life-changing consequences for an act that they would never have committed except that they found themselves, beyond their control, in a situation that elicited a bad decision conditioned by the ordinary cognitive disabilities of youth. At the very least, it should seem somewhat problematic, from the standpoint of morality, to treat these kids as fully accountable for their acts.

It is important to understand the character of the argument here. The point of the argument here is not to identify mitigating factors that warrant a judgment of diminished culpability and hence imposition of a lesser punishment than soldiers would face under existing law. Such matters are—and *should be*—considered mitigating factors by the legal system.⁸¹ But, construed thus, the argument would do nothing to challenge the retributivist justification of punishment; indeed, a retributivist could deploy such considerations to justify imposition of a lesser punishment on a soldier than would otherwise be warranted.

⁸¹ Micah Schwartzbach, *Mitigating Circumstances in Sentencing*, NOLO, <https://www.nolo.com/legal-encyclopedia/mitigating-circumstances-sentencing.html> (last visited Jul. 5, 2018).

The argument above is intended to pose a direct challenge to the viability of retributivist justifications of institutional punishment—and it is the same problem discussed in connection with the first example involving the hotel room. None of us can say with an adequate degree of confidence that were we placed in the same situation and faced with the same stresses with the same transient disabilities of neurophysiological immaturity that we would not respond violently to the same situations—which, again, are beyond our control to prevent. Many fully developed adults suffer from stress problems beyond their direct control that lead them to make ill-advised decisions they would not otherwise make.⁸² Subject this same set of *fully formed* adults with their sensitivity to stress to the same stresses, and they are more likely to make a grievous mistake than they would in less stressful situations. Such persons are significantly more likely to make a grievous mistake if they lack full development of the pre-frontal cortex that controls emotion and impulse control.

This bears on judgments of culpability in a different way than resultant luck bears on judgments of culpability—and the difference here is important. This is not just a matter of two of us having attempted the same criminal act (e.g., murder) where only one of us has succeeded. In a case where only resultant luck seems relevant, it seems that we can assess all the morally salient characteristics of the acts to arrive at some sort of reasoned judgment about comparative culpability or deserts, which would include consideration of intentions, background beliefs, and other subjective mental states, among other things.

In contrast, we cannot begin to do this reliably with respect to the situation of the young soldier who has committed a war crime because the soldier was unable to handle the intense stresses of battle. Most of us are not, and have never been, in a situation that even remotely resembles that of a young soldier who has snapped and committed a war crime under the unprecedented pressures of fighting war subject to the conditions and rules of engagement in the U.S. wars in the Middle East. Again, none of us can say with an adequate degree of epistemic confidence that we would not react in the same way that the soldier did to the same circumstances. This might be because we know we would act in the same way or we are uncertain about what we would do; however, either way, we lack the comparative foundation to ground an appropriate assessment of the soldier's culpability.

This poses a different challenge for retributivist justifications of punishment than is posed by the common practice of punishing unsuccessful attempts less severely than successful attempts. There is something wrong

⁸² Georgina Laurybel Moreno, *The Effects of Stress on Decision Making and the Prefrontal Cortex among Older Adults* (Spring 2015) (unpublished Ph.D. dissertation, University of Iowa) (on file with Iowa Research Online, University of Iowa, <https://www.nolo.com/legal-encyclopedia/aggravating-circumstances-sentencing.html>).

with attributing culpability to one person for doing something that most people would do if facing the same circumstances. In some sense, an act that is done, when conditioned to a significant extent by the situation, is likely to be done as it seems a *natural*, if not *reasonable*, response to that situation if it is likely that ordinary persons would do the same thing in the same situation. It is true, of course, that there are many young soldiers who do not break under the pressure and murder innocent civilians. But it is also true that rates of both severe mental illness and unauthorized violence are unusually high at the present time among soldiers deployed in the Middle East.⁸³ Much of this violence is self-directed, as the suicide rate among U.S. soldiers has reached the highest level in history.⁸⁴ Further, the unprecedented rates of mental illness among soldiers is evidence of the extraordinary stress faced by soldiers; indeed, it would not be implausible to say that even severe cases of post-traumatic stress disorder is a natural response to such stress among antecedently healthy people.⁸⁵ More importantly, for our purposes, there is no reason to believe that those young soldiers who manage to get through the stresses of modern war without committing acts of violence have experienced the same circumstances as those young soldiers who succumb to the stress and wind up committing wrongful acts of violence. Arguably, the difference between most of us and the young soldier who breaks under the pressure and commits a wrongful act is pure luck; that is to say, the difference between the two of us is largely explained by a matter of factors that are beyond the control of either of us and is, as the term has been defined in this Article, a matter of luck. And the difference here, again, is distinct from the difference between the unsuccessful attempter and the successful attempter: we are not in the position of the soldier who has acted badly and cannot know whether, given the intense stresses associated with that position, we would react the same way under similar circumstances.⁸⁶

⁸³ Kate Kelland, *Combat Soldiers More Likely to Commit Violent Crime: Study*, REUTERS (March 14, 2013), <https://www.reuters.com/article/us-military-violence/combat-soldiers-more-likely-to-commit-violent-crimes-study-idUSBRE92E00220130315>.

⁸⁴ Joseph Dao & Andrew Lehen, *Baffling Rise in Suicide Plagues the Military*, N.Y. TIMES (May 15, 2013), http://www.nytimes.com/2013/05/16/us/baffling-rise-in-suicides-plagues-us-military.html?_r=0.

⁸⁵ Val Willingham, *Study: Rates of Many Mental Disorders Much Higher in Soldiers than in Civilians*, CNN (Mar. 4, 2014), <https://www.cnn.com/2014/03/03/health/jama-military-mental-health/index.html>.

⁸⁶ There is another way to see the problem here. Historical theories of distributive justice assess the justice of a particular distribution by, in principle, tracing the history of each person's holdings back to original acquisition of whatever related materials are relevant from the commons. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 150 (1974).

One of the most serious problems of distributive justice that arises in connection with original acquisition and property rights is that there is no longer a material

Now one might be tempted to think that the argument illicitly trades on intuitions regarding two cases with salient features that are highly unusual even among criminal acts, but this does not help. The same considerations that apply to these cases clearly apply to other more, so to speak, mundane acts that violate the criminal law. Whether or not someone driving under the influence of an intoxicant has an accident involving another person depends on whether the circumstances in which she is driving drunk include the presence of another car at the relevant time and place; this, of course, is not within the driver's control. Accordingly, since whether or not a drunk driver hits another car is a matter of luck, a drunk driver who hits another car is no more culpable and hence deserving of no greater punishment, other things being equal, than a drunk driver who does not.

Indeed—and this is a sobering thought—these considerations apply to things that most of us have done. An increasing number of deaths are being caused by people who text while they are driving. Texting while driving increases the risk of having an accident by a multiple of 23!⁸⁷ Studies show, for example, that the leading cause of death for teen drivers is texting while driving.⁸⁸ But the accidents that occur because people text while driving also cause the deaths of *other* people. For example, one man was killed when his car was hit when a car headed in the other direction veered over the center lane because the driver was distracted by tex-

“commons” (i.e., material resources that are for common use and hence owned by no one); the resources that were in the commons have been exhausted by people who had the good luck of having been born before us. *Id.* at 149–50. The problem is that it seems unjust or unfair that others who simply came before us, by accident of birth and through no merit of their own, can acquire an entitlement to something that excludes those with the bad luck of being born later. It might not be true that everyone would be as industrious under conditions of original acquisition, but it is surely true that every rational person would take affirmative steps to acquire objects in the common for her exclusive use and control. *Id.* at 160–61. If it is possible to acquire property rights, as the scope and duration of these rights is traditionally understood, in objects in a commons (i.e., if there are any moral property rights), the acquisition of a justified property right in an object has nothing whatsoever to do with what is *deserved*.

One can see the plight of the psychologically unequipped young soldier in a similar way. If what distinguishes us from him is nothing more than accident of circumstances and most of us would under similar (though not necessarily qualitatively indistinguishable) circumstances would buckle under the pressure and respond with wrongful acts, then it is hard to see how the young soldier who actually committed a criminal act under those circumstances is uniquely culpable in a way that supports the idea that he is uniquely deserving of punishment.

⁸⁷ *DWI: Driving While Intoxicated*, TEXTINGANDDRIVINGSAFETY.COM, <http://www.textinganddrivingsafety.com/texting-and-driving-stats/> (last visited Jul. 5, 2018).

⁸⁸ Delthia Ricks, *Study: Texting While Driving Now Leading Cause of Death for Teen Drivers*, NEWSDAY (May 8, 2013), <http://www.newsday.com/news/nation/study-texting-while-driving-now-leading-cause-of-death-for-teen-drivers-1.5226036>.

ting; the driver received one year in prison for vehicular homicide.⁸⁹ It is a matter of luck, and not something over which we exercise control, whether another car happens to be in front of ours while we are texting and driving. The problem is that many people text while driving; more than half of teen drivers admit to having used a cell phone while driving and 77% of teenagers believe they could do so safely.⁹⁰ Moreover, 27% of adult drivers admit to having texted while driving.⁹¹ Indeed, 20% of drivers of *all ages* admit to having surfed the web while driving.⁹²

The difference between those of us—and, yes, I have texted while driving—who have hit and killed someone while texting and driving and those of us who have not hit and killed someone while texting while driving is a matter of luck. Texting while driving is culpable, insofar as we can assess such matters, because it negligently puts at risk the lives of other people—and the wrongfulness of such an act is grave. If ordinary intuitions about desert are correct and retributivism is true, then every one of us who has ever texted while driving is equally as culpable and deserving of punishment as those persons who are serving a prison sentence for having hit and killed someone while texting and driving. For this reason, if CC is true, it makes no difference with respect to what one deserves or what punishment one should get that one's wrongful act results in death, injury, or not. Every such act is, from a moral standpoint, equivalent because they share exactly the same wrong-making properties.⁹³

This problematizes the judgments of culpability that underlie the retributivist justification of punishment, as well as any system of punishment that incorporates retributivist principles as governing punishment.⁹⁴

⁸⁹ Philip Caulfield, *Mass. 18-Year-Old Gets 2 Years for Texting-While-Driving Death*, N.Y. DAILY NEWS (June 7, 2012), <http://www.nydailynews.com/news/national/mass-18-year-old-2-years-texting-while-driving-death-article-1.1091576>.

⁹⁰ DWI, *supra* note 87.

⁹¹ *Id.*

⁹² *Id.*

⁹³ It is important to note that the concerns expressed above about the lack of control people have over the consequences of their acts supports no stronger claim about our legal practices than that, as a matter of political morality, unsuccessful attempts should not be punished, in principle, less severely than successful attempts. Unlike the concerns about the pervasive role of other kinds of luck, consequential luck poses no general problems for retributivist justifications of punishment. Kant was surely aware of this, as he was clear in thinking punishment justified on retributivist grounds: "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Ladd trans., Bobbs Merrill 1965) (1797).

⁹⁴ By itself, this is not to say that, for example, that the young soldier who commits murder should not be punished or receive something that resembles

Although attributions of culpability are usually grounded in only the circumstances and features of the person being assessed from a moral point of view, such attributions seem, as argued above, constrained to some extent by comparative factors. If it is the case, as we have seen, that most ordinary persons in situation *C* would perform the same wrongful act *p* that some other person did and is being punished for doing, it seems irrational to think that the latter person is distinctively culpable relative to the rest of us. While it might well be justified to subject the person who committed the wrongful act to some kind of coercive response, such as punitive responses like incarceration, it seems problematic to ground such a response wholly in an attribution of culpability, as a reductive retributivist justification would do.⁹⁵ This calls into question whether retributivism can bear the weight it must carry to justify punishment in such cases.

C. Legal Luck, Culpability, and Punishment: Constitutive Luck

Constitutive luck poses the biggest problem for retributivist justifications of punishment. As will be recalled, constitutive luck refers to factors beyond the agent's control that condition her personality traits, desires, preferences, etc.—i.e., those factors that determine what kind of person the agent will become.⁹⁶ These factors include accidents associated with one's upbringing and station, including place of birth and other environmental factors, genetic predispositions, as well as the character, maturity, and abilities of one's parents.⁹⁷ Insofar as an agent's character and

punishment. It is merely to make a point about the notion of culpability that underwrites retributivist reasoning.

⁹⁵ Zachary Hoskins, *Multiple-Offense Sentencing Discounts: Score One for Hybrid Accounts of Punishment*, in *SENTENCING FOR MULTIPLE CRIMES* 88 (Jesper Ryberg et al. eds., 2017).

⁹⁶ NAGEL, *supra* note 6, at 28.

⁹⁷ Although Kant did not speak in terms of the role of luck in producing certain traits, he explicitly took the position that certain of what we take to be morally desirable character traits do not figure into determining the moral worth of an act:

To be beneficent when we can is a duty; and besides this, there are many minds so sympathetically constituted that, without any other motive of vanity or self-interest, they find a pleasure in spreading joy around them and can take delight in the satisfaction of others so far as it is their own work. But I maintain that in such a case an action of this kind, however proper, however amiable it may be, has nevertheless no true moral worth, but is on a level with other inclinations, e.g., the inclination to honour, which, if it is happily directed to that which is in fact of public utility and accordant with duty and consequently honourable, deserves praise and encouragement, but not esteem. For the maxim lacks the moral import, namely, that such actions be done from duty, not from inclination.

KANT, *supra* note 47, at 14. It is not entirely clear what Kant finds problematic in the idea that sympathy and compassion determine the moral worth of an action but one idea seems to be that the person who does something otherwise good out of such

abilities are beyond her control, she is not responsible for them. If, however, she is not responsible for these traits and abilities, which nevertheless condition her acts, it is hard to see how she could be responsible for her acts. But one can be *culpable* and hence *deserving* of blame or punishment for an act only if she is responsible for an act.⁹⁸ Constitutive luck thus seems, immediately out of the blocks, to raise problems for the idea that punishment is justified insofar as it is deserved.

To appreciate the extent of the problem constitutive luck poses to retributivism, it is helpful to consider an extreme case. Robert Alton Harris murdered two teen-aged boys in 1978.⁹⁹ He and his brother, Daniel, had come on to the parking lot of a fast-food restaurant to find a vehicle to use in a bank robbery. Robert jumped into a car in which the teen-aged boys were about to begin eating their sandwiches and ordered the driver to take them to a specified location, promising to release the boys without harm. The driver agreed without hesitation and they departed with Daniel following in another car. Once the driver arrived at the location, Robert ordered the boys to get out of the car and shot them both. According to Daniel's testimony, Robert Harris ridiculed the boys before shooting them, berating them for their "weakness." After executing the boys, Robert took their hamburgers home and ate them while boasting about the murders. He and Daniel were subsequently arrested using the car he stole from the murdered boys in the course of attempting a bank robbery. Robert was convicted of their murders and sentenced to death.¹⁰⁰

The death penalty might seem a comparatively unobjectionable punishment in a case with facts like these. Robert's commission of the murders seem to exhibit an appalling moral callousness, cruelty, and indif-

inclinations is, in essence, simply doing what she wants; and there is nothing especially praiseworthy in doing what one wants to do. *Id.*

If that is Kant's rationale, it is not far removed from the considerations of constitutive luck that, as will be seen below, create perhaps the most obstinate difficulties for a retributivist view of punishment. After all, what inclinations and desires an agent has will be determined by a host of factors over which the agent lacks control. For example, all of the aforementioned accidents (i.e., of birth, of genetic characteristics, of selection of parents) are the results of luck because, as the notion is defined here, they are accidents over which no agent exercises control. Whether or not Kant has seen the connection between luck with respect to the consequences of his act and luck with respect to the inclinations one has, the connection between the two emerges from Kant's own works.

⁹⁸ NAGEL, *supra* note 6, at 28.

⁹⁹ CAL. DEP'T OF CORRECTIONS & REHABILITATION, CAPITAL PUNISHMENT: INMATES EXECUTED, https://www.cdcr.ca.gov/Capital_Punishment/inmates_executed/robert_harris.html (last visited Jul. 5, 2018).

¹⁰⁰ Dan Morain, *From Birth to Death Row, Violence Surrounded Harris: History: Abused as a Child, He Became an Abuser. He Killed a Neighbor Before the Murders of Two Teen-agers Brought Him to Face the Gas Chamber*, L.A. TIMES (April 21, 1992), http://articles.latimes.com/1992-04-21/news/mn-608_1_robert-harris.

ference to the value of human life that would arguably warrant the death penalty. But even on the assumption that the death penalty is morally wrong, this much seems true: if anyone *deserves* the death penalty, it is Robert Alton Harris.¹⁰¹ If anyone is culpable of a capital offense and hence deserving of execution, it is Robert Alton Harris. Even if institutionalized capital punishment is morally illegitimate, its particular application in the Harris case might not seem morally objectionable given the undisputed facts of the case.

As reasonable as such a reaction might seem, the Harris jury had compelling reason to question the underlying claims about desert and culpability. There was considerable evidence at trial that Robert was abused severely enough as a child to call into question his capacity for culpability. Among other things, the jury knew:

He was born three months premature after his mother was kicked so brutally in the abdomen by an angry husband, that she began hemorrhaging . . . [B]oth parents inflicted frequent beatings, the father with his fists, causing a broken jaw when Robert was not yet two. Sitting at the table, if Robert reached out for something without his father's permission, he would end up with a fork in the back of his hand. For sport, father would load his gun and tell the children they had 30 minutes to hide outside the house, after which he would hunt them like animals, threatening to shoot anyone he found.¹⁰²

Robert's father was especially abusive, believing Robert to have been fathered by another man and resenting Robert as the living embodiment of his wife's infidelity. Indeed, Robert was born three months prematurely after his father kicked his mother in the stomach.¹⁰³ He had numerous run-ins with the law and was known to have abused animals.¹⁰⁴ The developmental connection between the violence he experienced as a child and the violence he perpetrated should have been clear: neither the judge nor any juror could possibly have doubted that she would have been very different had she been raised under similar conditions. Robert was nonetheless sentenced to death on March 6, 1979.¹⁰⁵

¹⁰¹ Indeed, one might think this even if one is opposed to the death penalty. If, for example, one is opposed to the death penalty on the strength of the possibility of executing an innocent person, then one can still take the position that various offenses *deserve* the death penalty and could permissibly be executed if there were a general procedure for ensuring that innocent persons are never executed.

¹⁰² David C. Chamberlain, *The Primal Roots of Violence: A Tale of Two Criminals*, APPAH NEWSLETTER (Spring 1995), <http://www.primal-page.com/roots.htm>.

¹⁰³ Jennifer McNulty, *Crime and Punishment*, 37 U.C. SANTA CRUZ REV. 8, 12 (2000), http://review.ucsc.edu/summer.00/crime_and_punishment.html.

¹⁰⁴ Morain, *supra* note 100.

¹⁰⁵ CAL. DEP'T OF CORRECTIONS & REHABILITATION, *supra* note 99.

But supporters of a 1992 clemency hearing, which included Mother Teresa, produced yet more evidence that should have dispelled, at least, the idea that Robert was fully culpable for the murders and deserving of the death penalty.¹⁰⁶ Robert's brain was damaged during pregnancy by his mother's excessive consumption of alcohol; a number of neurologists testified that his mother's pre-natal drinking caused "organic brain damage" to that part of the brain responsible for the ability to empathize with other people.¹⁰⁷ Then-Governor Pete Wilson¹⁰⁸ had what strikes me as overwhelmingly good reason to believe Robert's culpability was mitigated by both his past family experience and the brain damage he sustained because of his mother's alcohol consumption during pregnancy.

Indeed, the evidence, if accepted as veridical, provides reason to think that Robert should have been considered neither culpable nor deserving of punishment. Clearly, the probability that Robert would perform some kind of violent wrongful act was comparatively high, given the circumstances of his birth and early life.¹⁰⁹ Robert's capacity for empathy—a capacity that is necessary for experiencing such emotions as warmth, compassion, and any sense of moral connection—was severely damaged by both his mother's alcohol consumption and by the abusive treatment he received at the hands of his family.¹¹⁰ It is not surprising that Robert wound up committing murder given his compromised capacity for emotions that form the basis for forming genuine psychological and emotional connections with other people. Nor is it unreasonable to think that any of us who suffered such damage to a capacity that is fundamental for moral motivation would have also committed crimes of comparable severity. The circumstances of Robert's birth and early life might not have *guaranteed* that Harris would sooner or later commit a violent criminal act but they made the likelihood of such an event sufficiently probable to question whether the law should treat him as being capable of forming a culpable mental state. If criminal culpability requires, as a matter of law, knowing the difference between right and wrong, as the matter is sometimes put, it is hard to see how Robert could "know" in the relevant sense that what he did was wrong without a capacity that would enable him to feel empathy, compassion, or any other altruistic regard for other people. If most of us would have done something grievously wrong under the same circumstances, it is hard to see how Robert could be culpable in a sense that deserves punishment.

¹⁰⁶ *Mother Teresa? My Name is Gotti . . .*, TIME MAGAZINE, April 27, 1992, at 13.

¹⁰⁷ *See California Revives the Death Penalty*, TIME MAGAZINE, April 27, 1992, at 15.

¹⁰⁸ *Id.*

¹⁰⁹ JOSÉ B. ASHFORD & MELISSA KUPFERBERG, DEATH PENALTY MITIGATION: A HANDBOOK FOR MITIGATION SPECIALISTS, INVESTIGATORS, SOCIAL SCIENTISTS, AND LAWYERS 157 (2013).

¹¹⁰ *Id.*

Robert Harris's hard constitutive luck, as is readily apparent, was anything but good. His mother's excessive consumption of alcohol severely damaged the structures of the brain that are responsible for creating the capacity of empathy—i.e., the abilities to recognize that other human beings are like one in terms of experiences and capacities and to understand how other people feel and have an appropriate emotional response. Robert lacked this capacity, and likely saw his victims—at least to some extent—as “people” or “like him” in only a technical sense that had little to no normative significance.¹¹¹ Arguably, the result of Robert's very bad luck was being born with a brain hardwired to see people, to put it in Kantian terms, as nothing more than creatures or things to be used, and not as beings valuable for their own sake.

Robert experienced no better fortune with respect to soft constitutive luck. As will be recalled, soft constitutive luck refers to social determinants of personality traits, such as the environment in which one is raised, the quality of one's parents, and the traits of people one comes to view as one's peers.¹¹² Robert was born to an inescapably abusive family with no respite from the abuse, as his mother, father, and siblings all abused Harris physically and psychologically. This abuse, coupled with the relative poverty into which he was born, is strongly correlated in the psychological and sociological literature with increased probabilities of non-violent and violent criminal activity.¹¹³ Putting the specifics of Harris's luck with soft and hard constitutive features together, it starts to seem that it was all but inevitable that he would kill someone—if not these boys.

Despite what should appear to any reasonable fair-minded person as at the very least *mitigating* factors that should operate to reduce his punishment, Robert was executed in 1992 after the death penalty was reinstated following a brief moratorium.¹¹⁴ Indeed, then-Governor Wilson, who reinstated the death penalty in California, heard Harris's appeal for clemency and rejected it, even as he admitted for the record that Robert's life was “a living nightmare.”¹¹⁵

Some sort of punitive or punitive-like response might well be justified; however, the punishment of Robert Alton Harris seems indefensible on *retributivist* grounds. Robert clearly did not deserve or earn the disabilities that seem to a decisive extent to have contributed to the acts that resulted in his conviction and in his punishment. Moreover, those disabili-

¹¹¹ Strictly speaking, this is an empirical hypothesis that needs psychological or sociological evidence; nevertheless, it is an eminently plausible hypothesis.

¹¹² See *supra* note 54–56 and accompanying text.

¹¹³ GARY WATSON, AGENCY AND ANSWERABILITY: SELECTED ESSAYS 241 (2004).

¹¹⁴ Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 225 (1992).

¹¹⁵ *California Revives the Death Penalty*, *supra* note 107.

ties seem to have played a significant role in whatever deliberations or impulses led him to commit the murder. Indeed, as we have seen, it is not unreasonable to think, at the very least, a sufficiently large percentage of people, if born into the circumstances into which Robert was born, would likely commit similarly grave acts of violence. This problematizes the judgments of culpability on which retributivist justifications depend because it becomes increasingly difficult to characterize an act as culpable and deserving of punishment if a significant percentage of reasonable decent persons would have also committed such acts if born into the same circumstances. This kind of violence seems natural or even *reasonable* when factors of constitutive luck are considered—and it is difficult to see how it can be justified to punish an act that is natural in the relevant sense given the circumstances. It seems clear, as argued in the last subsection, that it is unjustified or irrational to punish acts that are *reasonable* under the circumstances.

One criminal case that perennially elicits confusion among laypersons and students the first time they read it concerns two sailors on a lifeboat carrying a total of four sailors who, after twenty days with nearly no food or water, killed the youngest (and weakest) sailor to ensure that others remain alive until rescued.¹¹⁶ The court convicted the two and sentenced them to death despite having accepted the following facts:

That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life by killing someone for the others to eat.¹¹⁷

Ordinary intuitions tend to question the legitimacy and justice of the conviction in this case, which appears in many casebooks on criminal law and anthologies on legal philosophy.¹¹⁸ The intuition is that the sailors should not have been convicted because nearly anyone in the same situation would have done the same thing. While tragic, killing someone seems in this most unlucky of circumstances to be not unreasonable and

¹¹⁶ *Survival on a Lifeboat: The Queen v. Dudley and Stephens*, in READINGS IN THE PHILOSOPHY OF LAW 360–64 (John Arthur & William H. Shaw eds., Pearson Prentice Hall 5th ed. 2010).

¹¹⁷ *Id.* at 361.

¹¹⁸ Caminker & Chemerinsky, *supra* note 114, at 225; *See generally*, Deirdre J. Cox, *Criminal Procedure—The Robert Alton Harris Decision: Federalism, Comity, and Judicial Civil Disobedience*, 23 GOLDEN GATE U. L. REV. 155 (1993).

might very well seem to be *reasonable*. And it seems unfair to convict the sailors for doing what seems “reasonable” and therefore a necessary or justified evil.

Similar things can be said about Robert Harris’s crime. It seems unjust to convict Robert because it is only natural that he would commit some kind of violent act given the factors shaping his character over which he lacked control. Again, anyone who experienced the same bad constitutive luck as Robert would probably commit a similarly violent act. Indeed, Robert’s act should seem not only reasonable from the standpoint of his own compromised point of view but also inevitable (or very probable) given his neurological disabilities. Of course, the claim that an act is inevitable (or highly probable) does not entail it is reasonable from some objective point of view; but, even so, it seems relevant in attempting to get a handle on Robert’s culpability. If Robert’s neurological disabilities make some sort of violent act inevitable or much more highly probable than it would otherwise be, they diminish Robert’s culpability in virtue of doing so.

Of course, one might take the position that what the sailors did was reasonable from both their own subjective and objective points of view (or, at the very least, reasonable from the point of view of an ordinary person standing outside those circumstances), while what Robert did is reasonable only from his own idiosyncratic subjective point of view, which was compromised by the damage done to his ability to understand moral requirements and regard them as validly binding him. But the point here is to call attention to the relationship between judgments of culpability that underlie retributivist assessments of justified punishment and judgments about what is reasonable to do under the circumstances. This relationship, I am arguing, problematizes the viability of retributivist theories of justified punishment.

Although the Robert Alton Harris case might present a highly unusual example, it nonetheless illustrates an important general point. What any person does at any given time is a function of tastes, preferences, dispositions, character traits and other psychological properties. People who are strongly disposed, for example, to be honest are much more likely, other things being equal, to tell the truth than people who are not strongly disposed to be honest. And whether one is strongly disposed to be honest depends to a disconcerting attempt on constitutive luck. No one rears herself; and it is doubtful any person could raise herself to be a good person without some a- or anti-social desires. What we all do in any given situation seems to depend far less on factors we can choose or control than it does on *antecedent* factors we cannot choose or control.

In this connection, it is worth noting that *resultant* luck poses the least serious problem for retributivism—even though it receives the most attention in the literature because of its association with the law of criminal attempts. If we had direct volitional control over the particulars of the

situations we find ourselves in and over the determinants of our character, the only problem luck would pose for punishment would be to call into question the legitimacy of punishing unsuccessful attempts less severely than successful attempts. Indeed, the general viability of retributivism seems undermined by just constitutive and circumstantial luck, since those two factors are the elements that prevent us from assessing whether an act is reasonable under the circumstances. The consequences of the act do not seem to matter at all in making that judgment. For all the attention the law of criminal attempts has received because we lack control over the consequences of our acts, resultant luck is irrelevant with respect to the problem of justifying an institutional system of legal punishment.

To see this, it is helpful to consider some remarks Nagel makes about the connection between the various forms of luck and free will. He asks,

[i]f one cannot be responsible for consequences of one's acts due to factors beyond one's control, or for antecedents of one's acts that are properties of temperament not subject to one's will, or for the circumstances that pose one's moral choices, then how can one be responsible even for the stripped-down acts of the will itself, if *they* are the product of antecedent circumstances outside the will's control?¹¹⁹

It is hard to see how our not being responsible for the consequences of our acts could have anything to do with whether we have free will. As Nagel points out (though he poses the statement as a question), the problem arises with respect to holding someone responsible for the stripped down acts of the will because "they are the product of *antecedent* circumstances outside the will's control." The problem arises with respect to accountability because the relevant acts are conditioned by *antecedent* circumstances beyond the agent's control; it is what comes *before* the act that is relevant with respect to whether the act is free or one for which the agent is accountable. The consequences of an act are irrelevant with respect to these questions because they are not part of the antecedent circumstances of the act. Resultant luck (and the implications for the law of criminal attempts) does not at all implicate the general viability of retributivist justifications of institutionalized legal punishment. The law of attempts, which is the most common vehicle for raising the problem moral luck raises for punishment of crime,¹²⁰ turns out to be something of a red herring.

¹¹⁹ NAGEL, *supra* note 6, at 35.

¹²⁰ See generally, Nils Jareborg, *Criminal Attempts and Moral Luck*, 27 ISR. L. REV. 213 (1993).

VII. DEFENDING CC: THE PLAUSIBILITY OF CONTROL OVER AN ACT, EVENT, OR ELEMENT AS A NECESSARY CONDITION FOR DESERVING PUNISHMENT FOR THAT ACT, EVENT, OR ELEMENT

Retributivism is called into question by CC precisely insofar as it conflicts with the normative claim that, as a general principle of morality, one is not morally responsible, accountable, or culpable for events beyond one's direct volitional control. One possible move, then, that might be made in defense of retributivism would be to deny CC. As Nagel puts it, "Why not conclude, then, that the condition of control is false—that it is an initially plausible hypothesis refuted by clear counter-examples?"¹²¹

The problem with this rescue strategy is that CC seems not only to harmonize with paradigms of core moral and legal practices, but also seems to explain the correctness of these practices.

What rules out this escape is that we are dealing not with a theoretical conjecture but with a philosophical problem. The condition of control does not suggest itself merely as a generalization from certain clear cases. It seems correct in the further cases to which it is extended beyond the original set. When we undermine moral assessment by considering new ways in which control is absent, we are not just discovering what would follow given the general hypothesis, but are actually being persuaded that in itself the absence of control is relevant in these cases too. The erosion of moral judgment emerges not as the absurd consequence of an over-simple theory, but as a natural consequence of the ordinary idea of moral assessment, when it is applied in view of a more complete and precise account of the facts. It would therefore be a mistake to argue from the unacceptability of the conclusions to the need for a different account of the conditions of moral responsibility. The view that moral luck is paradoxical is not a mistake, ethical or logical, but a perception of one of the ways in which the intuitively acceptable conditions of moral judgment threaten to undermine it all.¹²²

The idea here is precisely that CC seems to be so central to ordinary moral and legal practices that its rejection would seem to undermine and hence require the rejection of these ordinary moral practices, which would include those that are grounded in the traditional idea of moral agency with its emphasis on requiring, so to speak, agent authorship of an act as a necessary condition for agent accountability for that act.

One such set of core moral and legal practices involves the attribution of liability for acts that are compelled. A person *P* is typically considered neither morally accountable nor legal liable for doing *a* if someone

¹²¹ NAGEL, *supra* note 6, at 26.

¹²² *Id.* at 26–27.

or something *compelled* *P* to do *a*.¹²³ Here it is crucial to note that *compulsion* is different from *coercion*. Suppose, for example, that I put a gun to *P*'s head, threatening to kill him unless he gives me his money. If *P* gives me his money out of fear of I will kill him, *P*'s doing so has been coerced but has not been compelled. Assuming that people have the ability to choose freely, *P* can still choose not to give me his money; it is, however, obviously not a rational choice from the standpoint of prudential rationality. What I have done by way of coercing *P* is to wrongly place him in a situation he would ordinarily not be in where it is prudentially rational to incur a significant detriment by giving me his money to avoid a more harmful detriment.

The boundaries of the application-conditions for "compulsion" are not entirely clear but consideration of a borderline case will help to show that there is a salient difference between *compulsion* and *coercion*. Suppose that I implant a computer chip into *P*'s brain that will produce any neurophysiological state I select by inputting a few commands. Suppose, further, that I input a command to produce the neurophysiological state that results in the act of pointing a gun at a person, *Q*, standing in front of *P* and pulling the trigger. Certainly, *coercion* plays no role in explaining *P*'s pulling the trigger. It is at least arguable that *P* is *compelled* to pull the trigger, as the computer chip deterministically causes a brain state that produces the act of pointing the gun and pulling the trigger and thereby circumvents *P*'s capacity to freely decide for himself whether to point and shoot.

It is an obvious that we hold people morally accountable and legally liable for at least some acts that are coerced but not for "acts" (or, more accurately, bodily movements) that are compelled. If *A* takes *B*'s husband hostage, threatening to kill him unless *B* kills *C*, and *B* complies with *A*'s demand by killing *C* to save her husband, she will be regarded as morally accountable and legally liable for killing *C*. That *B* was coerced will likely figure into mitigating *B*'s culpability and hence in a reduction of her punishment, from the standpoint of both ordinary moral and ordinary legal practices. But *B* will nonetheless receive some punishment and deservedly so, at least on ordinary moral intuitions, and will hence have been held morally accountable and legally liable even though the relevant act is coerced.¹²⁴ In contrast, we do not hold people either morally accountable or legally liable for compelled bodily events that would otherwise constitute morally culpable acts. In the case where I implant a computer chip in *P*'s brain and instruct the chip to produce the neurophysiological state that results in *P*'s shooting and killing *Q*, *P* would be

¹²³ MORITZ SCHLICK, *PROBLEMS OF ETHICS* 150 (David Rynin trans., Dover Publications 1962) (1939).

¹²⁴ The fact that the act was coerced would likely, and should, count as a factor mitigating culpability. Indeed, it mitigates culpability insofar as it makes the offending act seem more reasonable.

held neither morally accountable nor legally liable. In that case, I am the culpable party—and this is precisely because I am, from a moral and conceptual point of view, the ultimate and responsible cause of the killing of *Q*.

What differentiates the case of compulsion from the case of coercion is precisely that the coerced agent still has direct volitional control over whether she pulls the trigger while the compelled agent has no volitional control whatsoever over whether she pulls the trigger. The same would be true, for example, if I tied *P* to a chair with his figure secured to the trigger of a gun pointed at *Q* and then sent an electric shock through *P*'s body that caused his finger to tighten on the trigger, discharging the gun and killing *Q*. If our existing practices are any indication, we would not so much as be tempted to hold *P* either morally accountable or legally liable for the killing of *Q*.

This suggests that what explains the differential treatment of wrongful acts that are coerced and wrongful acts that are compelled is nothing more than the fact that someone whose act is coerced has control over whether she performs the act while someone whose “act” is compelled has no control over whether the movement occurs. It does not matter what kind of connection there is between the compelling stimuli and the compelled responses. If the stimulus has the effect of removing the relevant movements from the agent's volitional control, then the agent is neither morally accountable nor legally liable. The salient difference between the compelled and coerced act has to do with whether the movement is within the control of the agent—which coheres tightly with CC and speaks to its plausibility.

CC harmonizes not only with these ordinary substantive moral intuitions and associated legal practices but also with meta-ethical considerations having to do with the necessary conditions for moral accountability—or, otherwise put, being a moral agent.¹²⁵ For example, the capacity of being a moral agent—i.e., a being subject to evaluation according to standards of morality—depends on the instantiation of two qualities: (1) the ability to control one's behavior by freely choosing one's acts; and (2) the ability to “tell right from wrong” in, at the very least, the sense of knowing how to accurately apply general moral standards to certain paradigm cases. Thus, the very concept-term that denotes the status of being morally accountable for one's behavior presupposes the capacity to control one's behavior.

Although only (1) asserts this directly, (2) seems to pick out the capacity by which behavior is controlled. In particular, (2) asserts that a necessary condition of moral accountability is the ability to think about

¹²⁵ It is a conceptual truth that one is a moral agent if and only if one's acts are appropriately governed by moral standards to which one is held accountable for one's behavior.

certain norms and values that include moral norms but will also take into account prudential considerations. After all, the accurate application of moral standards in paradigm cases will require knowledge of moral rules, including the norm that a moral obligation is binding regardless of the desires or prudential interests of the person obligated by the rule. Accordingly, the characteristic way to control what one does—and perhaps the only possible mechanism for doing so compatible with a being's having the capacity to freely choose—is to rationally weigh the options, which will include deliberation about the relevant moral norms and prudential considerations. As the very status of being accountable depends on CC's being satisfied, it is reasonable to surmise—although this is not logically implied—that the only features of an act for which one can legitimately be held accountable are those features of an act that are within one's direct volitional control.

The critical importance of agent control in moral evaluation is at least two different levels should be clear—and it is no coincidence that the idea of control is so important at each of these different levels. As far as the level on which substantive moral theorizing takes place, control is of obvious significance: it seems clear that it is *unfair* or *unjust*—both moral notions—to hold someone accountable for something over which they exercise no control. Control is also of obvious significance at the level of meta-ethical theorizing: it seems equally clear that it is *irrational*—a normative notion that might be fleshed out by moral standards but also derives content from prudential, legal, and logical standards—to hold someone accountable for something over which they exercise no control.

CC seems to be at the very center of, forming part of the very foundation for, our ordinary moral judgments and practices. Whether CC is ultimately correct is one question; however, it seems clear that these arguments are enough to shift the burden back to those who would challenge CC. That CC coheres as well it does with other foundational assumptions that support ordinary practices with respect to judging persons for certain acts and with respect to attributing to persons the capacity of moral agency is enough, at the very least, to warrant accepting it as an assumption that requires a compelling rebuttal.

CC is so central to ordinary moral practices that its rejection would seem to undermine and hence require the rejection of these ordinary moral practices, which would include those grounded in the traditional conception of moral agency with its emphasis on requiring agent authorship of an act as a necessary condition for agent accountability. CC, thus, enjoys a presumption of correctness that requires a sustained philosophical argument to rebut. One cannot simply “bite the bullet” in a way that preserves most ordinary moral practices by giving up CC. The considerations adduced above explicate this seeming foundational dependence of ordinary moral practices on CC, and establish CC's status as foundational

and enjoying a presumption of correctness that can be rebutted only by a sustained philosophical defense.¹²⁶

¹²⁶ There are other interpretive difficulties that would have to be addressed before this type of move can succeed in grounding a plausible case against CC. One important difficulty is to identify the class of persons to whom the criminal owes a moral debt in virtue of her act. The most natural candidate for the class is the direct victim of the crime. If, for example, *A* culpably and unlawfully hits *B* in the face breaking his nose, *A* would owe a moral debt to *B* that arises out of both the character of the act and its consequences. One problem with this suggestion is that it would appear that *A*'s moral debt, thus conceived, can *wholly* be paid through other legal mechanisms than punitive measures, such as incarceration. After all, *B* has an actionable cause in tort against *A* for compensation in money damages, and the point of compensating a person for injuries culpably caused by a breach of duty in tort is to restore him to the position she would have been in had the tort not occurred and resulted in injury.

Another problem with the idea that the moral debt created by *A*'s criminal act is owed to *B* is that it is inconsistent with existing legal practice. According to the relevant practices incorporated into the content of the law, it is the *state*, and not the direct victim (*B*, in this case), who is the plaintiff in a criminal case representing the commonwealth. The injury to the commonwealth is often described as a breach of the peace, a criminal disruption of what is otherwise expected to be a mutually beneficial and peaceful system of cooperation by a breach of a duty incorporated into the law. But if we assume that the consequences of the victims are relevant in determining the blameworthiness of the offender, the relevant consequences would not include those normally thought to accompany a certain type of act. Thus, the broken nose of an assault victim does not count as one of the consequences of the offender's act that is blameworthy and warrants a moral response in the form of punishment; it is rather the disquieting effects of the act on the public peace that, taken together, define the culpability of the offender and the appropriate punitive response of the state. This suggests that the relevant moral debt the offender must pay is not the debt owed to his intended victim but rather the debt owed to all citizens for having breached the public peace.

This is, of course, a feature of existing legal practice that should seem counterintuitive. On this account, a murderer is not being punished for *committing a murder* per se; rather a murderer is punished for simply doing something that constitutes a breach of the public peace or for the disquieting effects of such a breach on the society's citizens. While it so happens that the murderer's criminal act is murder, the punishment appears to be for nothing more specific than the breach of the peace. After all, given that the state represents the commonwealth as plaintiff in a criminal case, the interests of all the victims—i.e., the citizenry—all belong to the same category. The debt the murderer owes to me is the same, on this account, as the debt the murderer owes to her victim.

But it is difficult to see in what non-question-begging sense a successful murder *creates a disturbance of the peace* that is more serious, from a moral point of view, than an unsuccessful murder. As far as causing fear to people in the community is concerned, an unsuccessful attempt is as effective as a successful attempt. It is true that a successful attempt will have many psychological effects that an unsuccessful attempt will not. A successful murder, for example, will produce grief; however, it is important to note that grief is not the sort of discomfort that is contemplated by the idea of a breach of the public peace. The public peace is a non-violent equilibrium in which people freely and without violent conflict conduct their lives. Any breach to the peace

Indeed, the rejection of CC and hence the core practices that have CC as their justificatory practice seems to imply an “error theory” of morality insofar as it implies that our ordinary moral views and practices are systemically mistaken. One cannot simply bite the bullet on an error theory; any claim that implies an error theory requires a sustained philosophical defense of an order that not only has not been met but also is not likely to be met because it would require rejecting too many foundational assumptions that provide crucial intuitive support for the entire structure of our existing moral practices.

VIII. THE PROBLEM WITH RETRIBUTIVISM

It should now be crystal clear that the problem that the various forms of luck pose for punishment goes well beyond the law of attempts. Resultant luck, which is the form that implicates the law of attempts, is just one type of luck, and a comparatively minor one at that. As we have seen, one could attempt to respond to the problem posed for the law of attempts by simply arguing that there are other legitimizing goods that can be secured only by punishing unsuccessful attempts less severely than successful attempts; indeed, one can address this problem without taking any kind of position on retributivism. One can (1) deny retributivism and justify the law of attempts in terms of forward-looking considerations; (2) accept retributivism as part of a mixed theory of justified punishment and justify the law of attempts in terms of forward-looking considerations; or (3) accept retributivism as providing the only legitimizing purpose of punishment and *reject* the existing body of law that punishes unsuccessful attempts less severely than successful attempts.

In this connection, it is worth thinking about the structure of the discussion on luck and the law of criminal attempts. The proponent of differential punishment of successful and unsuccessful attempts does not—and could not plausibly—offer that practice as a counterexample to CC. One proposition *A* can function as a counterexample to another *B* only insofar as either (1) *A* is epistemically justified (in some way) and *B* is not; (2) *A* is needed to explain some entrenched assumed feature of a practice which is inconsistent with *A* and less plausible; or (3) *A* is intuitively more plausible than *B*. The legitimacy of punishing successful and unsuccessful attempts differently is not viewed as having some privileged intuitive or epistemic status that would confer on it some special pre-

is problematic, on the theory being considered here, insofar as it increases the likelihood of unsanctioned societal violence. While grief can lead to emotions that may lead someone to commit a violent act, grief itself does not usually incorporate emotions, although they might be present, into the grieving state. Further, while a person’s death can give rise to emotions of vengeance that culminate in prohibited self-help remedies like personal revenge, an unsuccessful attempt to kill the person can give rise to the same emotions.

sumption of correctness. It differs, say, from the normative claim that it is wrong to intentionally kill an innocent person, which seems incompatible with act utilitarianism under certain highly stylized circumstances. For example, act utilitarianism seems to require that a transplant surgeon kill an innocent person if doing so would maximize utility (as is would, for example, in a case where the surgeon has five highly productive but compatible patients who need organs immediately and the person who will be killed is miserable); the transplant example is properly contrived to function as a counterexample in this case. The claim that it is wrong to intentionally kill innocent persons has the right kind of epistemic status to underwrite a counterexample to the somewhat less intuitively plausible idea that only consequences figure into determining the moral worth of an act. In contrast, the claim that differential punishment of successful and unsuccessful attempts is legitimate simply does not have a privileged status that would justify inferring the falsity of a normative claim on the ground that it conflicts with this practice.

This is why existing practices regarding criminal attempts are treated as creating a puzzle, rather than as counterexample to CC. CC has a privileged presumptive status of correctness because it coheres with, and explains, a number of basic moral principles that ground paradigmatic moral practices. The very capacity for moral accountability, as we have seen, is defined in terms of the agent's control over her acts; free will—the ability to control one's acts by choosing them freely—is typically thought to be a necessary condition for moral agency and hence for being morally accountable.¹²⁷ Likewise, substantive moral and legal norms frequently incorporate a control requirement as a necessary condition of liability. Neither moral nor legal norms impose liability on a person for bodily events that are compelled—and hence not within the agent's control. Persons are accountable, morally and legally, for acts that are coerced but the fact of such coercion operates as a mitigating factor that diminishes culpability. No one is liable in tort for injuries caused by an accident that was beyond anyone's power to prevent.¹²⁸ Indeed, CC is so

¹²⁷ Greenawalt, *supra* note 1, at 344–48.

¹²⁸ The law, of course, sometimes holds persons strictly liable for accidents that were not the result of negligence. But this does not entail that a liable defendant could not have prevented the accident. Strict liability is imposed when injuries are proximately caused, for example, by an *unforeseeable* accident occurs during an unusually dangerous activity. The defendant could, had she foreseen the accident, always have prevented it by not engaging in the activity. In strict liability cases, it is not that the defendant has no control over the activity; rather, it is that the defendant lacks the knowledge that would give rise to a duty of reasonable care. The defendant has the requisite control but is not held liable because she cannot be at fault for failure to take reasonable precautions against *unforeseeable* accidents. Lacking knowledge that X might occur and having control over the occurrence of X are two different things. One needs the relevant knowledge to know *when* to exercise control.

deeply entrenched in ordinary moral practices that it does not take a child very long to learn that “I couldn’t help it” is a defense to a charge of wrongdoing.

Compare CC and act utilitarianism in this regard. Act utilitarianism is grounded in a plausible intuition that pleasure/happiness/wellbeing is morally valuable but the act-utilitarian’s reductive claim that an act’s effect on the balance of pleasure/happiness/wellbeing is the only determinant of its moral value is far from intuitively plausible; that is why, act utilitarianism must be argued for. Indeed, this latter claim is no more intuitively plausible than Kant’s claim that an act’s effect on the balance of pleasure/happiness/wellbeing contributes nothing at all to determining the act’s moral value. This explains why act utilitarians do not typically “bite the bullet” and simply accept the implications of a putative counterexample; instead, they try to show that act utilitarianism does not really have the implications presupposed by the deployment of the example as a “counterexample.” This also explains why many persons reject act utilitarianism; act utilitarianism seems to be inconsistent with a variety of moral principles that have a more trustworthy epistemic status.

Nothing like this is true of the various examples discussed above. The differential treatment of unsuccessful and successful attempts does not create a problem for CC the way the principle that it is wrong to kill innocent persons does (via, say, the transplant example) for act utilitarianism. The bite-the-bullet response, as we have seen, might be available to the defender of act utilitarianism,¹²⁹ but it is not available to the defender of differential treatment of unsuccessful and successful attempts.

Indeed, the rejection of the general principle that it is wrong to intentionally kill innocent persons comes at a cost, but it is a manageable one. First, the situations that are offered as counterexamples are highly unlikely to occur. The probability of a state of affairs where a transplant surgeon can take organs from one healthy but very unhappy man to save five compatible utility-maximizing patients who need a donor organ immediately is vanishingly small. Second, it is not utterly implausible to think that one innocent life might be sacrificed to save five innocent lives if doing so maximized utility. Scarce life-saving medical resources must frequently be allocated in situations where the demand exceeds the supply; the relevant principles of allocation take considerations of utility into account.

But one can have control over an event without knowing everything about its consequences, etc. that might cause harm.

¹²⁹ After all, the transplant case is not one that is likely to arise, so it is not likely to result in a complete subversion of paradigmatic moral practices. Moreover, one can coherently hold that the life of an innocent person might be sacrificed to save more innocent persons if doing so maximizes happiness. Of course, to say that this move is available is not to say it is *attractive*. It is somewhat rare to see act utilitarians biting bullets in response to the many cases submitted as putative counterexamples.

The rejection of CC comes at a much bigger theoretical and intuitive cost than the rejection of the legitimacy of traditional criminal attempts practices. It is helpful here to recall Nagel's explanation of the structure of the problem that the various examples of luck cause for certain moral and legal practices:

Why not conclude, then, that the condition of control is false—that it is an initially plausible hypothesis refuted by clear counterexamples? . . . What rules out this escape is that we are dealing not with a theoretical conjecture but with a philosophical problem. The condition of control does not suggest itself merely as a generalization from certain clear cases. It seems correct in the further cases to which it is extended beyond the original set. When we undermine moral assessment by considering new ways in which control is absent, we are not just discovering what would follow given the general hypothesis, but are actually being persuaded that in itself the absence of control is relevant in these cases too. The erosion of moral judgment emerges not as the absurd consequence of an oversimple theory, but as a natural consequence of the ordinary idea of moral assessment, when it is applied in view of a more complete and precise account of the facts. It would therefore be a mistake to argue from the unacceptability of the conclusions to the need for a different account of the conditions of moral responsibility. The view that moral luck is paradoxical is not a mistake, ethical or logical, but a perception of one of the ways in which the intuitively acceptable conditions of moral judgment threaten to undermine it all.¹³⁰

The difference between CC and act utilitarianism in this regard is that act utilitarianism is less plausible than, and not as widely accepted as, the principles that generate the putative counterexamples while CC is more plausible and more widely accepted than any principle that would justify, for example, the practice of punishing unsuccessful attempts less severely than successful attempts. Likewise, the strong intuitive plausibility and epistemic status of CC is being deployed to undermine a retributivist principle that is less plausible and far less widely accepted; there are few theorists who reject CC but many who reject retributivism.¹³¹ It should be clear that CC creates a serious problem for retributivist justifications of punishment.

Moreover, the problem CC creates for *legal* accountability (and hence punishment) under the *criminal* law is exactly the same as the

¹³⁰ NAGEL, *supra* note 6, at 26–27.

¹³¹ See generally Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 Nw. U. L. Rev. 843 (2002); Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley*, 11 HOFSTRA L. REV. 273 (1982); John Shook, *Dewey's Rejection of Retributivism and His Moral-Education Theory of Punishment*, 35 J. SOC. PHIL. 66 (2004).

problem CC creates for moral accountability.¹³² As Enoch expressed the problem of “legal luck,” the question is whether someone should, as a matter of political morality, be held legally accountable for an act for which they are not morally accountable.¹³³ But the claim that people should sometimes be *punished* for acts for which they are not morally responsible or culpable is a counterintuitive claim. One would think that it is a necessary condition for the state to be *morally* justified in punishing *A* for performing an act *p* that *A* is neither morally responsible nor culpable for performing. It might be that a criminal act is inherently bad—or inherently culpable—in virtue of the act’s being antecedently wrong (i.e., *malum in se*); or it might be that a criminal act is bad in virtue of the extrinsic contingent fact of having been prohibited by criminal law (i.e., *malum prohibitum*). But, even so, one would think that it is, at least, presumptively wrong to impose a punishment (with its deliberate hard treatment, expressed condemnation of the act, and an ostracism and stigmatization that affects an offender’s prospects for re-integrating with society upon release from prison) on someone who does not deserve it. CC seems to entail that, absent special circumstances, legal luck cannot be morally justified by retributivist considerations having to do with culpability and what is deserved.

The only way, then, to justify the claim that there should be legal luck with respect to punishment is to argue that there are greater moral goods that can be secured only by the morally undesirable imposition of punishment for an act for which the agent is not culpable—and this requires that one adopt a forward-looking legitimizing purpose for punishment. Moreover, it is quite reasonable to think there are forward-looking considerations that plausibly justify punishing offenders for acts they are not culpable for performing. One might think that punishment should be imposed even when undeserved as a matter of changing dangerous and anti-social dispositions and traits in the offender.

But none of this helps the retributivist. The problem that constitutive luck and circumstantial luck creates for the retributivist is a general one that strikes at retributivism’s theoretical foundation. If punishment is to serve a retributivist purpose by giving offenders the hard treatment they deserve, it must be possible for us to assess culpability to some rough threshold degree of accuracy. But the pervasive influence of constitutive and circumstantial luck seem to call into question our ability to do this: if we cannot tell whether an act is reasonable under the circumstances (e.g., the kind of thing that we would do under the same circumstances), then we cannot assess culpability to the requisite degree of accuracy. The

¹³² Again, I should emphasize here that I am concerned with the problem of luck as it pertains to *criminal justice practices*. I am not concerned in this Article with how the pervasiveness of luck in conditioning behavior might bear on areas of civil law.

¹³³ Enoch, *supra* note 8, at 50–51.

problem that luck creates for retributivism is not something that can be repaired by tinkering.

The only way to rescue retributivism is to deny CC. But it is hard to see how rejecting CC could be justified. First, as we have seen CC in Section VI and elsewhere, many of our core moral practices and principles seem to be grounded in CC. While rejecting CC does not obviously entail that the associated core moral practices and principles should be abandoned, it is hard to see what other justification they could have. The rejection of CC might not entail the rejection of these other practices and principles but it calls them all suddenly into question—without any solid intuitive grounds for thinking them problematic. Second, it is hard to see how to reject CC on intuitive principled grounds. Retributivism, for example, is far less intuitively plausible than CC; for this reason, rejecting CC to preserve retributivism has an unpersuasive *ad hoc* bite-the-bullet feel to it. As it stands, the problem luck raises for retributivism seems a fatal one; CC is an intuitively plausible foundational claim that explains many core moral practices, and it appears to be inconsistent with a retributivist theory that can muster far less by way of intuitive support. If retributivism is not dead, it is on its deathbed—where it belongs.

IX. CONCLUSIONS: THERE BUT FOR THE GRACE OF GOD GO I

“There but for the grace of God go I” is a familiar, if also a somewhat unfortunate saying among Christians in response to encountering someone who has experienced great misfortune. For our purposes, what this remark rightly calls attention to is the fickle, even arbitrary, quality of luck in conditioning what we do.

Some people, as we have seen, have very bad luck with respect to the consequences of their acts, the circumstances in which they find themselves having to make choices, and those factors that condition what kinds of psychological propensities and abilities that constrain their decision-making processes. Any of us, for example, could have been born into the same circumstances in which Robert Alton Harris was born; if so, our lives would very likely have turned out in much the same tragic way Robert’s did, leaving a legacy, as he did, of violence, pain, and suffering. Likewise, any of us could snap under the pressure of elements of a highly stressful situation that are beyond our ability to control. Factors determined by constitutive and circumstantial luck seem characteristically to play a role in determining whether or not a person does something bad in a given situation. Anyone who believes she can reliably say that she would not do the same terrible thing that Robert did under the same circumstances has been intoxicated by a particularly pernicious strain of moral narcissism.

One might think that the counterfactuals associated with luck do not tell us much morally but this seems mistaken. People commonly—and

correctly—attempt to assess a person’s behavior by considering counterfactuals about what they would do under similar circumstances. “Put yourself in her shoes” and “never judge someone until you have walked in their shoes” are heuristic devices frequently deployed as a mechanism to ensure that one’s moral judgments are fair and take into account possible explanations that might, under pre-theoretic conceptions of accountability, mitigate culpability; these devices, in effect, tell us whether behavior is reasonable under the circumstances and hence whether it is culpable. The examples discussed in this paper illustrate just how many potential factors conditioning behavior that are beyond direct volitional control. That is, the arguments in this Article call attention to the fact that the more comprehensive is our consideration of factors beyond the agent’s control that condition her behavior, the more reason we have to doubt our initial, less informed, assessments of culpability that influence decisions about what punishment the agent *deserves*. Pushed to the appropriate limit, such assessments call into question the idea that anyone can be said to deserve punishment and hence problematize retributivism, which presupposes, as a theoretical matter, that people do deserve punishment and, as a practical matter, that we can assess what is deserved to a sufficient degree of accuracy to warrant imposing punishment on the strength of such an assessment. The latter idea is an especially dangerous conceit, given the apparent tendency of people to rush to negative judgments and then act on them.

Those of us who are not in prison have simply been lucky. We were lucky in the sense that we were born without the neurophysiological disabilities afflicting Robert Harris that, on my view (indeed, on any remotely plausible view), *inevitably* culminated in a tragically vicious act. We have also been lucky in a host of more mundane ways. Perhaps no one walked in front of our car when we looked away from the road when driving (e.g., to text, reach in the glove compartment, put a CD into the changer). If you are not in prison, it is because you have been the beneficiary of much more good luck and avoided much more bad luck than you have probably realized. It is hard to make sense of the idea that those persons rightly convicted of felonies and doing lengthy prison bids are uniquely culpable relative to all of us who are not in prison but would probably have wound up there under the same relevant circumstances.

Indeed, if the arguments of this Article succeed in showing nothing else, it should convince people to be more charitable in their moral assessments of culpability—and that is the deeper truth picked out by the commonplace “there but for the grace of God go I.” To put it bluntly, there is nothing morally special about you that was within your control and explains why you are not in prison.¹³⁴

¹³⁴ The same, of course, is true of me; I have been very lucky in many ways and on many occasions.

But these considerations clearly pose a serious challenge to retributivism and its viability as an epistemic principle guiding punishment decisions. If, as has been argued above, (1) the various forms of luck play a sufficiently large role in determining what people do in any given situation and (2) people who are similarly situated with respect to constitutive and circumstantial factors would act in similar ways, then judgments of culpability are problematized in ways serious enough to call into question the viability of retributivist justifications of punishment. The more likely it is that wrongful behavior is conditioned by the determinants of behavior that fall within the various categories of luck, the less sensible it is to make judgments of culpability that attribute primary responsibility to the choice of the agent.

This should not be taken to imply that offenders should suffer none of the consequences typically associated with punishment. Whether or not a violent person is culpable for her violence, there is good reason to think that she should be segregated for the protection of other people and treated or reformed to ensure that she can function productively in society upon being released; these are greater moral goods that punishment is needed to secure. The discussion above is thus not intended as an argument against such treatment—although it might ultimately be an argument for something that involves hard treatment that should be characterized as something other than “punishment,” such as, perhaps, “treatment.” Rather, it is principally intended to show that the judgments of culpability and desert on which retributivism relies to justify punishment are too dubious to ground the deliberate infliction of detriment that is a conceptual feature of punishment.