

# Moral Luck and the Function of Results in Punishment<sup>1</sup>

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Most people believe that a person can be held responsible only for what is within his or her control. A person cannot be held accountable – legally or morally – for events over which he exerted no influence. This intuition is known as the Control Principle. However, the strict application of the Control Principle seems to diminish the scope of human agency to a vanishing point, and thus eliminate the possibility of moral responsibility. Cases of moral luck occur when events of luck or chance to play a substantial role in moral evaluation.

Put another way, whether or not someone is good or bad depend (at least in a large part) what that person does – not on what happens to that person. If we allow events of luck (things that the agent didn't control) to play a role in moral assessment, then the moral assessment of that agent depends, at least in part, on luck. But it seems odd to think that whether or not someone is blameworthy or praiseworthy is just a matter of luck.

## *Overview of the problem*

The Control Principle Cases of moral luck are particularly troubling in part because of the intuitively plausible idea that people cannot be

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morally culpable for events that they did not cause, or for events caused by factors beyond their control. It is easy to see why this idea is so appealing.

Moral evaluation does not stand independent of agents. When we exact a moral verdict, we are not judging a set of circumstances in the absence of an agent. The presence and actions of an agent are integral to moral evaluation.<sup>2</sup> Without a rational agent, we do not have an appropriate forum for moral evaluation; the actions of an agent are tied to moral assessment. The agent must have in some way caused (or played a role in causing) the thing that is subject to moral evaluation. We do not consider the lottery winner to be morally praiseworthy (insofar as he won the lottery), and we do not consider the innocent bystander at a car wreck to be morally blameworthy (insofar as he did not cause the wreck). In order to deserve praise or blame, the agent must have had control over the events in question.

This does not amount to a defense of or argument for the control principle, but rather an explication of its intuitive appeal. Indeed, it is difficult to imagine world in which we the ascription of moral responsibility did not require a causal connection between an agent and the actions or circumstances of moral evaluation; without such a restriction, any agent could be held responsible for any action or event.<sup>3</sup> Ann, sitting quietly reading, could justly be blamed for the baseball flying through the window of the library – as opposed to the

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2 Without claiming whether or not 'willing' can be properly called an action, let us use the word 'action' loosely so as not to exclude acts of willing.

3 This argument is based on common sense notions of causation. I accept that it is possible for rational agents to be directly responsible for specific actions in the broad sense that our actions are not merely the results of a series of electrical and chemical reactions in our brains, but rather the results of a rational deliberative process.

boys who let their outfield about the library. Or, to use a less hyperbolic case, imagine holding a doctor responsible for an infection after an operation, despite the fact that he operated flawlessly. The Control Principle is a basic part of our understanding how actions and events happen in the world – individual agents are responsible for causing them.

This intuition is, as I said, intuitively acceptable and appealing. The problem arises when

the condition of control is consistently applied, it threatens to erode most of the moral assessments we find it natural to make. The things for which people are morally judged are determined in more ways than we at first realize by what is beyond their control. And when the seeming natural requirement of fault or responsibility is applied in light of these facts, it leaves few pre-reflective moral judgments intact. Ultimately, nothing or almost nothing about what a person does seems to be under his control.<sup>4</sup>

As Thomas Nagel eloquently put it, once we examine exactly what it is that we have control over, it starts to look like we don't actually have control over very much. Nagel considers four kinds of cases in which this is true.<sup>5</sup>

### *Luck*

- Resultant luck. Much of how our actions actually wind up influencing the world is beyond our control. Two agents might take exactly the same actions, but each with totally different results. Smith and Jones both drive home intoxicated. They drive equally

recklessly, and are equally lacking in motor control. On Smith's route home, a little girl happens to be playing in the street, and he hits her. On Jones' route home, no one darted into the street. The two agents' actions were identical, but the results of their actions were quite different – and, vitally, the difference was caused by factors outside of the agents' control.

- Constitutive luck. Disposition and personality are beyond the influence of our will. While dispositions and inclinations might change over time, constitution in this sense refers to precisely the parts of personality that are beyond the scope of control. We can act kindly, but cannot have a kind personality by sheer force of will; our natural disposition is largely beyond our control and the result of fortune. Yet we are sometimes morally assessed for our disposition despite its being the result of fortune rather than our will.
- Circumstantial luck. To a large degree, the situations we face are beyond our control. Smith's path to work takes him past a lake where, one morning, a child is drowning. He has the opportunity to demonstrate his moral praise- or blame-worthiness. Jones' path to work, however, doesn't pass near the lake, and he is never faced with the same situation.
- Antecedent luck. The previous four sorts of luck push us to hold agents morally responsible for only the pure acts of will; after all, luck plays to great a role to hold them accountable for the results of their actions, or their character, or even their moral transcript. But their will itself may be the product of antecedent causes

<sup>4</sup> *Moral Luck* in *Mortal Questions*. Thomas Nagel. (New York: Cambridge University Press, 1979). 26.

<sup>5</sup> The following four varieties of luck are proposed by Nagel in *Moral Luck*.

outside the agent's control. The causal factors can range from concerns about strict determinism to more everyday things, such as who your third grade teacher might have been. Whether the worry is classic concerns of free will or more mundane causal factors, the 'acts of will' that we want to be responsible for could well be things that we have no control over at all.

After considering these four types of luck, it begins to look like we have control over very little of what we do. What makes the problem so challenging (and so interesting), of course, is that it arises from some very common-sense and intuitively acceptable notions. The very thing that leads us to the paradox – the Control Principle – was the thing that seemed at first to be an intuitive and elemental part of moral responsibility.

### *Facets of the problem*

#### I. Agency reduced to a vanishing point.

Moral evaluation aside for a moment, Nagel's lucid exposition of the problem reveals fundamental problems with our basic understanding of human agency. While he acknowledges the age-old problem of strict determinism, this is not the strength of his point. He makes no attempt to answer that question; instead, and more importantly, he highlights the ways in which more everyday varieties of chance seem to diminish the scope of human agency until it disappears.

This, of course, is a deeply unsettling thought. The problem of determinism is so deeply troubling precisely because it eliminates agency. But determinism has its stalwart opponents, and cogent arguments can be

marshaled against it. Nagel's points are so worrisome because they derive from perfectly ordinary, everyday concerns.

An all-encompassing answer to the worry of moral luck will paint a full, complete picture of human agency. Part of that must be a stand on how to understand causal factors. Such a discussion would be outside the scope of this project.

#### 2. Moral concerns

The puzzle of moral luck raises serious concerns about moral judgments. Moral evaluation is an integral part of everyday life. It expedites our interactions with the world; the system of rules and guidelines that morality affords us helps us avoid dealing with every situation on an ad hoc basis. Cases of moral luck pose a serious problem for our moral compass. They highlight what seems to be a paradox in morality: that the rigorous application of an intuitive feature of moral responsibility – control – winds up eliminating the very possibility of assigning moral responsibility.

Consider the following case, which serves to illustrate the problem:

**The drunk driver:** Consider Smith, who drives home from the pub after having drank quite a lot. He is in no condition to drive. On his trip home, he speeds, weaves all over the road, runs stoplights, and generally exhibits those signs that are consistent with drunk driving. But Smith makes it home without injuring anyone or harming anyone's property. He did endanger quite a few folks, including himself, but no tangible harm resulted from his drunken escapade.

Now imagine a second driver, Jones. Jones leaves the pub in the same condition as Smith; he's had too much to drink, and is in no condition to drive home. He drives home just as dangerously as Smith. We stipulate that the two men are equally drunk (have equally impaired motor functions), equally lacking in control of their vehicles (and that the vehicles are identical), etc. But while Jones is driving home, a little girl happens to be playing in the front yard of her house, and she runs into the road chasing her ball just as Jones is driving by. Being as drunk as he is, he cannot stop – he strikes and kills her.

Both Smith and Jones had the same level of control (or lack thereof) over precisely the same things: their decision to drink and drive, their ability react upon seeing a pedestrian, etc. It was strictly a matter of chance – outside the control of either driver – that there was (or wasn't) a little girl playing at the time he went by.

Yet Smith and Jones will (for the most part) be judged quite differently. Smith will not escape a negative moral evaluation – he endangered his own life and the life of those around him – but he will not be judged as harshly as Jones, whose actions resulted in the loss of a life. But again, the only difference between the situation of the two men – the presence or absence of the little girl – was completely and totally outside of each of their control; it was strictly a matter of luck.

The case presents the difficult question of what constitutes moral reactions (i.e., Jones is worse than Smith because he killed a girl), and what constitutes emotional reactions (i.e., Jones behavior sickens/angers me to a much greater extent than Smith's because it resulted in a loss of life). Perhaps the moral evaluation of the two agents should be identical – after all, they each took the same risks – and it is

appropriate that our emotional reactions should differ so much. The problem of differentiation is relevant to understanding what constitutes moral judgment.

I said earlier that the problem of moral luck poses challenges to moral evaluation. But it is not at all clear what moral evaluation is. When we say that, "Smith should be judged more harshly than Jones," what are we talking about? Are we morally evaluating Smith (or Jones), or Smith's actions in this particular case? Are we to understand Smith's poor decision-making and reckless driving as evidence of his character, or do we evaluate those actions independently of character? What is it that we are doing when we blame Smith and Jones, and is it the same thing as moral evaluation? And (this is perhaps the fundamental question of the problem of moral luck), why is it that we sometimes think that responsibility is necessary in order to assign blame? Efforts to answer the above questions about the nature of praise, blame, and moral evaluation will shed light on the role of the Control Principle in moral assessment, and help to resolve the problem of moral luck. I will take up these questions in Chapter 2.

### 3. Legal problems

While the problems that moral luck poses for morality are daunting, they are not the same as the problems posed to legal theory. While law does reflect morality in a very general way, the law must consider a variety of concerns with which moral theory need not bother (e.g., the practical viability of enforcement). Do questions of moral luck truly influence practical ethical dilemmas in the law? They do, but perhaps not to the same extent, nor in the same manner, that they influence the more theoretical aspects of moral theory. The

challenge posed to the law is somewhat less extensive than the challenge posed to common sense morality, but a challenge nonetheless.

The law, while not a direct correlate of morality, is nonetheless generally interested in setting standards of socially acceptable behavior. The law lays down rules of behavior, and works toward specifying the repercussions for those who fail to comply with those rules. It is tempting to look at law as the practical version of morality, or to try to link law and morality in a strict way. But while law and morality undoubtedly have links, they are not one and the same. As Justice Oliver Wendell Holmes put it in *Commonwealth vs. Kennedy*, "the aim of the law is not to punish sins, but is to prevent certain external results."<sup>6</sup> So methods and concerns of moral judgment do not necessarily transfer to the law.

Law, unlike pure philosophy, does not have the luxury of entertaining serious doubts about human agency. It must assume that individuals do possess free will, and are capable of rational deliberation about action. Given its practical aims, our legal institutions must also draw lines – lines that are usually implicit in the law itself, and in decisions of more difficult cases that highlight ambiguities in the law – about the limits of luck.

The practical aims of the law, though, are far from clear. Different schools of thought advance different aims for the law. Deterrence theorists argue that the law serves to maintain public good, and that punishment is both a personal and general deterrent to bad behavior. Retributive theorists maintain that crimes upset the balance of benefits and burdens in society, and that punishment serves to restore that balance. Others claim that punishment serves a rehabilitative purpose; criminals are punished so that they might learn why their behavior is

indeed a moral transgression.<sup>7</sup>

Under different conceptions of the purpose of the law and the purpose of punishment, the cases of moral luck resolve themselves differently. Some legal theorists argue that antecedent luck can and should enter into the law. The argument of these sort of theorists goes something like this: since antecedent causes form one's moral outlook, and since such antecedent causes are beyond an individual's control, the law must consider such causes exculpatory. Those who had the misfortune to be born into poor social situations cannot be held responsible for their skewed moral outlook; that skew was caused by factors beyond their control, namely their rotten social background. Thus, society is more to blame for the individual's moral flaws – society at large is responsible for its failures, such as the ghettos – than the individual himself. (Hence the argument for the role of prisons not as fundamentally punitive institutions, but rather as educational institutions).

While I will not surmise all of the arguments for and against such theories, the 'rotten social background' theory does serve to illustrate why concerns about moral luck do raise substantial challenges for the law. Fundamental questions about the purpose of law and punishment are pertinent to answering the questions that moral luck poses.

The way in which the moral luck problem raises questions about the law is actually quite similar to the way in which it raises questions about morality. Moral luck forces us to reconsider the basic questions about moral assessment: what is it, and why do we engage in it? Efforts to answer these questions will help us take a defensible stand on the moral luck cases. Similarly, the problems that moral

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<sup>6</sup> *Understanding Criminal Law*, Third Edition. Joshua Dressler. (New York: Lexis Publishing, 2001). 108.

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<sup>7</sup> See, for instance, Jean Hampton, *The Moral Education Theory of Punishment*, in *Punishment*.

luck poses to the law make us reconsider basic questions about what it is that the law is trying to accomplish. Efforts to answer that question will help us resolve the challenges to the law posed by moral luck.

Resultant luck in particular raises some difficult problems for legal theory. On the one hand, it seems bizarre to punish actions taken in good faith with good intentions, but which result in negative consequences due to factors outside an agent's control. To hold the agent legally responsible smacks of injustice, and is difficult to justify by either deterrence theory or retributive theory.<sup>8</sup> However, those negative consequences nevertheless were the results of the agent's actions, and it seems appropriate that a) we need to deter not only those sorts of consequences, but also that sort of risk-taking, and b) the balance of benefits and burdens has been upset, and must be restored. The problem here is not altogether dissimilar from the moral one.

Resultant luck brings to mind two legal concepts: negligence and strict liability. The concept of negligence features in both tort law and criminal law. Civil negligence is "a deviation from the standard of care that a reasonable person would have observed in the actor's situation."<sup>9</sup> Criminal negligence is "... a gross deviation from the standard of reasonable care... a person is criminally negligent if he takes a substantial, unjustifiable risk..."<sup>10</sup> The concept of negligence involves risk taking; when chance plays a role in determining the outcome of those risks, we have cases that look quite similar to moral luck. Negligence itself is a controversial topic of the criminal law. Some deterrence theorists argue that precisely

because negligence is the failure "to perceive the risks... of conduct," it cannot be deterred. Many retributivists believe that "the basis for just punishment is voluntary wrongdoing," and since negligence lacks a voluntary element, it cannot justifiably be punished.<sup>11</sup> Negligence (and its relevance to moral luck) will be further discussed in Chapter 4. A crime typically has two components: *mens rea* and *actus reus*. *Actus reus* is the 'physical or external portion of the crime,' and *mens rea* is the 'mental or internal' component.<sup>12</sup> This is just to say that crimes are willful, voluntary acts done intentionally by a rational agent that result in harm. Strict liability doctrine is an exception to this general principle: "a strict liability doctrine is a rule of criminal responsibility that authorizes the conviction of a morally innocent person for violation of an offence, even though the crime, by definition, requires proof of a *mens rea*."<sup>13</sup> Strict liability doctrine, when applied, allows individuals to be held criminally responsible for results that they did not intend; when those results came about (at least in part) as by chance, then we again have something that resembles a case of moral luck posing a challenge to the law.

There is a body of case history that involves instances in which resultant luck posed challenges to the law. Here I'll briefly describe one of those cases. It is a civil case, but it serves to illustrate how resultant luck can pose challenges to the law. [I hope to replace this with a criminal case, and eventually discuss only the criminal law. In the meantime, though, Palsgraf does illustrate the difficulty of causation, luck, and responsibility in the law.]

*Palsgraf v. The Long Island Railroad Co.*  
In *Palsgraf*, a man carrying a package rushed to board a train as it was departing the platform.

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8 That is not to say that it is impossible to justify. Both deterrence theorists and retributive theorists can marshal arguments to do just this. I discuss and argue against them in Chapter 3.

9 Dressler, 128

10 *Ibid.*, 130

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11 *Ibid.*, 128

12 *Ibid.*, 81

13 *Ibid.*, 143

The man nearly fell off the train, but a guard reached toward him and pulled him in as a guard on the platform pushed the man from behind. In the course of these actions, the package that the man was holding fell. Its outward appearance gave no clue as to what it was (it was wrapped in paper). It contained fireworks, which exploded when the package fell. The explosion caused scales at the other end of the station to fall, striking and injuring the plaintiff. The plaintiff wanted to hold the guard (and hence the railroad) responsible for her injuries.<sup>14</sup>

Palsgraf is a case of resultant luck. The relevant result (the scales falling and striking the plaintiff) of the guard's actions (trying to help a man board the train) was beyond his control. The court ruled that the guard could not have known what was in the package (nor, of course, could he have known that it would fall, although the risk of the package falling is entailed in helping him onto the train). The case is landmark, as it goes a long way toward explicating causation in the law. The guard's actions, while necessarily a link the chain of events that caused the plaintiff's injuries, were not the proximate cause of those injuries.<sup>15</sup>

As this brief sketch of the problem shows, moral luck poses challenges to a wide range of philosophical and legal questions. It touches on basic problems of free will and abstruse questions of liability in the law. A complete and total solution to the various facets of the problem would solve some of the most difficult philosophical dilemmas that have persisted for centuries. Perhaps most importantly, it would resolve the basic paradox posed by two common

sense notions of morality.

Here I wish to give a brief sketch of a possible solution for one very narrow aspect of the problem. As I described above, moral luck poses slightly different problems to legal theory as it does to moral theory. However, those legal problems are nonetheless quite important. I will attempt to raise some possible strategies that could be used to justify different punishments for identical acts with different results (cases of resultant luck).<sup>16</sup>

#### *The Function of Results Punishing for Negligence*

I want to be clear at the outset that the problem I am attempting to solve is not the moral one. Rather, I am concerned in this section with problems of resultant luck in the law. Specifically, how might we be justified in meting out different punishment to two agents whose identical actions resulted in quite different outcomes? I will assume as a background general deterrence theory. In addition, I take it to be clear that the state is justified in punishing in order to deter citizens from egregious risk-taking. With this as background, I'll proceed.

From a historical standpoint, results are vitally important to criminal law. As described above, the traditional definition of a crime must involve an actus reus – it is necessary that there be some harm that results from an agent's actions. In cases of resultant luck, however, it is mere chance that determines whether or not there is a harmful result (or the degree to which

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14 See *Philosophy of Law*, 598

15 Causation in the law is a thorny topic. A body of cases exists which goes a long way toward explaining the principles of causation in the law. It is too great to discuss here, but suffice it to say that those cases do not resolve the problem satisfactorily, else the problem of resultant luck in the law would no longer be challenging.

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16 I will leave out of this discussion any significant treatment of Nagel's main point – the diminishing of human agency to a vanishing point. It goes beyond the scope of this paper, and does not, as I discussed above, play as relevant a role in the legal problems as it does in the moral ones. The law does not have the luxury of taking those doubts overly seriously, lest law cease to be an effective means of molding behavior.

the result is harmful).

This definition – that a crime involves a mental state as well as certain physical actions and the relevant results – is central to the defense of different punishments for identical acts. Without both components, it will become necessary to draw a line about what degree of mental activity or physical result should merit a given punishment. However, the placement of such a line will always be arbitrary. The least arbitrary place to draw the line – and hence the most just – is at the differing results of actions. Here I will attempt to show, through a series of cases, why it becomes problematic to punish similar acts identically.

1. Consider Matt and Doug, who decide to get completely drunk at a party.<sup>17</sup> In this intoxicated condition, they find the host's rifle collection, and decide to see who is a better shot by trying to hit the streetlight. Neither hits the streetlight, but one of their bullets – they cannot tell whose – strikes and kills a bystander. Only sophisticated ballistics tests can determine which gun the bullet came from.

It is tempting to argue here that both Matt and Doug should suffer the same punishment. They took the same reckless actions, endangered the same people, and had control over the same factors. It seems as though there is no morally relevant difference between their actions; after all, it might have been either of them who killed the bystander. Even though only one of them is actually responsible for the loss of a life, the sole factor responsible determining which of them did so was pure chance.

2. Now imagine that, rather than both being completely drunk, Matt is slightly more sober

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17 This example is drawn from Richard Parker's *Blame, Punishment, and the Role of Result in Philosophy of Law*.

than Doug. When they discover the rifles, neither Matt nor Doug has any hesitation about shooting at the streetlight to test their prowess with firearms. But Matt, being slightly more sober, is capable of aiming more accurately. Though it is still impossible to tell without the sophisticated test which gun the bullet came from, it does turn out that it is Doug's gun, not Matt's.

Here there is a relevant difference in their behavior and capabilities, but it is not clear what impact that should have on their punishment. Matt, despite his relative sobriety, was still enthusiastic the reckless activity of shooting at the streetlight. While his aim was better, his judgment was not. Should he suffer a lesser punishment?<sup>18</sup>

3. Now imagine that Matt is completely sober, and Doug is completely intoxicated. Upon discovering the rifles, both Matt and Doug think that shooting is a good idea (Matt just has poor judgment). As above, it is Doug's bullet

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18 This variation on the case raises an interesting consideration: in many aspects, it is impossible to know whether any two individuals were indeed acting identically. In this case, perhaps the police at the scene could have administered BAC tests to determine that Matt was less drunk. But perhaps they didn't – how are we (or, more importantly, the jury) to know that he was less drunk? Perhaps the only evidence that we (or a jury) can have is the very fact that he didn't fire the shot that killed the bystander.

More generally, the argument goes that the result is the only sure way that we can justifiably judge someone to have been so lacking in control that they deserve the utmost punishment. Without the dead body, there is no way to measure just how much the agent was endangering people. Of course, on this view, individuals are not punished for *the results of their actions*, but rather for the endangerment (recklessness, etc.) that their actions caused. The result merely serves as evidence of the level of endangerment (i.e., that it was sufficient to result in harm). This is problematic, as we usually tend to believe that a murderer is punished for *murdering someone*, not for endangering someone to such and such a level that they could have (and did) die. See Norvin Richards, *Luck and Desert*.

that kills the bystander. But Matt, of course, is highly complicit in the course of events unfolding as they did; he not only failed to stop Doug, but also egged him on and participated himself. While Matt and Doug's actions are quite different, Matt is nonetheless a factor in the events that caused the bystander's death – and his behavior is just as morally blameworthy. Should his punishment be the same as Doug's? Probably not, but he is certainly not undeserving of blame, and perhaps even some punishment.

4. Here Matt is sober and Doug is drunk, and upon finding the rifles, Matt is cognizant that trying to hit the streetlight is a bad idea. He discourages Doug from trying. But Doug is a particularly belligerent drunk, and insists that they shoot. Matt storms away in frustration, leaving Doug to his own devices. One of Doug's shots strikes and kills a bystander.

Matt played a minor role here in events that caused the bystander's death, but he remains complicit. He failed to take the appropriate actions to stop Doug; he could have argued with him longer, been more forceful in his discouragement, or physically prevented Doug from taking the rifle.

5. In the last case, Matt takes the most responsible course of action. As Doug tries to get his hands on a rifle, Matt argues him out of it, eventually physically removing him from the room. Doug never gets the chance to demonstrate his poor aim, and the bystander remains unharmed.

The purpose of these cases is to highlight the difficulty and arbitrariness of drawing the line of when to punish two agents similarly. It is clear that in case five that Doug and Matt do not deserve the same punishment (indeed, since no crime has been committed, no one may be punished in case five) – yet nor are they

equally blameworthy. But case one tempts us to say that they should be punished identically. Does the change occur in case two? After all, they weren't equally drunk, and so they didn't endanger the bystander to the same degree. But epistemic considerations give us pause (see footnote 16); how do we know that they weren't equally lacking in control? How can we know the difference of degree to which they were endangering others? And how do we know that, in case one, there weren't some differences in the extent of their control? (Alternatively, how can we know that they were identically reckless?)

The difficulty in saying precisely where the shift occurs makes the necessary arbitrariness of drawing the line apparent. However, the result (in this case, knowing which gun the bullet was fired from) eliminates some of that difficulty. That is not to say that drawing the line at results is completely non-arbitrary. But the result certainly removes some of the epistemic difficulties as well as some of the arbitrariness of the problem. Being the least arbitrary, it is the most just. It provides the best basis – that is to say, the best evidence – for a decision on how to punish.

Another way of putting this (one that is intuitively appealing) is to say that, despite the fact that all appearances indicate that Doug and Matt acted identically, only one of them was actually responsible for the death of the bystander. Both caused significant endangerment; only one caused a death. Allowing the result to factor into the different punishment of the two agents satisfies an intuitive urge; it allows the special connection between an agent, his actions, and the results of those actions to remain intact.

I should note that this does not eliminate the controversy around negligence. In the series of cases illustrated above, neither agent had a *mens rea* – a guilty mind. Certainly

their actions were the proximate cause of the bystander's death, and those actions were voluntary, but they did not intend to bring about a death. The series of cases does demonstrate the intuitive appeal of criminal negligence – most would tend to think that drunkenly firing rifles into a populated area constitutes a crime – it does not amount to an argument.

*Some closing remarks*

Moral luck is a phenomenal problem. It touches on a tremendous range of philosophical problems, from esoteric questions about free will, to more common sense concerns about the scope of human agency, to questions about intuitive moral reactions (and the extent to which we can trust them), to legal questions that have a very real impact on the way our society functions.

Here I have attempted to give a comprehensive overview of all of those facets of the problem. While the questions of agency and the purely theoretical moral questions are not irrelevant, they are nonetheless not as pressing as the challenges posed to our legal system. I take the most significant of those challenges to be the claim that we should punish without significant regard for results. The aim of the law is to mold behavior of the individuals that make a society. Without taking a stand on the retribution versus deterrence debate, I think it is clear that neither pure deterrence nor pure retributivism suffices to defend out current penal institution.

Our current institution places high regard for proportionality of the crime to the punishment – both deterrence theorists and retributive theorists can agree on this. While endangerment without harmful result and endangerment with harmful result are both legally and morally condemnable, they are not

the same thing. To ignore that difference is to increase the arbitrariness of our legal system, and to decrease the extent to which we insist that evidence and fact determine punishment. Though it is tempting from a moral standpoint to ignore results and focus on intention and action, to do so would be so impractical as to result in a lesser degree of justice.