Murder, Attempt, and the Luck in Between

Looking at Luck and Legal Responsibility

Julia Patricia O'Brien

B.A.

Macquarie University

Department of Philosophy

Submitted 10 October, 2014

This thesis is submitted in partial fulfilment of the requirements for the degree of Master of Research (MRes).

Contents

Abstract

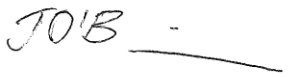
In this thesis, I assess the justifiability of legal luck in the area of criminal attempt. Specifically, I address the question of whether, other things being equal, it is justifiable to accord different punishments to offenders who successfully complete crimes, and offenders who perform the final act necessary to complete a crime, yet fail in their attempt solely due to factors beyond their control (call these 'last act attempters'). As my case study illustrates, the penal distinction between murder and attempted murder makes a significant difference to the lives and sentencing of offenders. It is thus important that we consider whether the impact of legal luck is justified, and hence whether we ought to equalise the punishment of last act attempts and completed crimes as a matter of justice.

Some scholars attempt to determine the justifiability of legal luck by appealing to a separate debate, arising within moral philosophy, about the existence of 'moral luck'. They claim that the justifiability of legal luck is established simply by resolving the question of whether moral luck exists. I argue that the link between the moral luck and legal luck debates is more complex than these scholars assume. Adopting a mixed theory of punishment, I contend that the justifiability of legal luck is determined not only by our view about the existence of moral luck, but also by practical 'non-retributive' considerations relevant to the aims of the criminal law. On the basis of the non-retributive considerations assessed, I conclude that legal luck is justified in the area of attempt, despite assuming the view that moral luck does not exist. Significantly, this conclusion implies that we should uphold a penal distinction between last act attempts and completed crimes, even if we consider the agents committing these crimes to be equally morally blameworthy.

Declaration

I hereby declare that the work presented in this thesis has not been submitted for a higher degree to any other university or institution. To the best of my knowledge this submission contains no material previously published or written by another person, except where due reference is stated otherwise. Any contribution made to the research by others is explicitly acknowledged.

Signed



Julia O'Brien

Department of Philosophy

Faculty of Arts

Macquarie University

October 2014

Acknowledgements

I acknowledge and thank my thesis supervisor, Professor Jeanette Kennett, for her support and guidance. I thank her for the interest she took in my work, and for reading and commenting on multiple drafts of this thesis. Jeanette's advice and feedback has been invaluable.

I also thank my father, Paul, who took the time to read virtually my entire first draft. Paul's feedback has been very useful to me, particularly with respect to technical legal issues. I am truly grateful for the interest Paul takes (and always has taken) in my learning.

Lastly, I thank my mother, Jennifer, and brother, Timothy, for their love, support, and encouragement. I have a habit of raising hefty philosophical issues at the dinner table. Happily, Jenny and Tim have always been willing to participate in 'compulsory' dinner time philosophy.

Introduction

On 1 May, 2014, Carlos Carromero appeared before the Supreme Court, Bronx County, on a charge of murder.[1] The hearing, presided over by Acting Justice Steven Barrett, was set to determine whether the indictment should be dismissed. Thirty years earlier, in 1984, Carromero attempted to murder the victim, John Pugh, by shooting him in the back. The bullet lodged in Pugh's spine, paralysing him from the waist down. Carromero was charged with attempted murder. He pleaded guilty, and served almost ten years in prison for his crime.

Yet when Pugh died from sepsis in 2013, Carromero was faced with further criminal charges. A medical expert confirmed that Pugh's septic condition stemmed from "infectional complications"[2] caused by the gunshot wound in Pugh's spine. Police arrested Carromero and charged him with murder. In court, Carromero argued that the murder charge violated the Double Jeopardy Clause of the US Constitution.[3] Under this clause, a defendant cannot be prosecuted twice for the same crime. Upon examining this argument, Justice Barrett found that the causation of death distinguishes the offences of murder and attempted murder.[4] He thus held that Carromero's prosecution did not constitute double jeopardy, because Carromero had effectively been charged with two separate offences. Carromero's motion was thereby dismissed, and the case was permitted to proceed to trial. The trial is yet to be heard in the US.

1. Legal Luck

Carromero's story illustrates the 'legal luck problem' arising within a criminal justice system. 'Legal luck' refers to the determination of legal responsibility by factors beyond an agent's control. As my case study illustrates, it is clear that legal luck exists. Carromero's charge of murder, and his potential conviction of that crime, depended upon his causation of a particular consequence: namely, the death of the victim. But the actual causation of death was ultimately beyond Carromero's control. Whilst Carromero freely and culpably chose to commit an attempt on Pugh's life, he could not control the failure of this attempt in 1984. Nor could he could control the fact that a life-threatening infection would develop from the gunshot wound almost thirty years later. If the infection had never developed - if Pugh instead had died from

[1] *People v Carromero* 2014 NY Slip Op 50714(U).
[2] *People v Carromero* 2014 NY Slip Op 50714(U).
[3] *United States Constitution* amend V.
[4] *People v Carromero* 2014 NY Slip Op 50714(U). To support this proposition, Barrett J cited the following legislation and authorities: NY Crim Proc Law § 40.20(2)(d) (2014); *People v. Latham*, 83 NY 2d 233, 238-9 (1994); *People v. Rivera*, 60 NY 2d 110, 115 (1983). In NSW, Australia, the causation of death is included in the legislative definition of murder: *Crimes Act 1900* (NSW) s 18(1)(a).

isolated natural causes - Carromero could not be prosecuted for murder, but would instead remain liable for the lesser crime of attempt. Carromero's criminal responsibility is thus impacted, at least in part, by factors beyond his control. To this extent criminal responsibility may be regarded as the product of legal luck.

In this thesis, I seek to answer the normative question of how the law should respond to the impact of legal luck in the area of criminal attempt. Specifically, I will be exploring whether we are justified in distinguishing the criminal punishment of offenders who successfully complete crimes, and offenders who attempt to complete crimes but fail solely due to factors beyond their control. Note that my assessment of the justifiability of legal luck is limited to a critique of the *penal* distinction between attempts and completed crimes. I will not be examining the separate (but related) issue of whether we should collapse the terminological *legal* distinction between attempts and completions (that is, whether we should categorise them as a single criminal offence).[5] Note also that my analysis is restricted to a critique of the penal distinction between completed crimes and 'last act attempts'.[6] 'Last act attempts' are attempts in which agents have performed the final act they believe is necessary to complete an offence. In these cases, it is clear that the attempt has failed solely due to factors beyond the offender's control: the offender has done everything in their power to complete the attempt, and is thwarted only by the occurrence of some external obstructing factor.

As my case study indicates, the justifiability of legal luck within attempt law is a question of immense social significance. This significance is apparent when considering the gap in penalty for murder and attempted murder in both Australia and the United States. In New South Wales, Australia, the maximum penalty for attempted murder is twenty-five years in prison,[7] whilst the penalty for murder is imprisonment for life.[8] The stakes are even higher in the US. Under the federal *United States Code* - and in no less than thirty two American states[9] - a conviction for first degree murder may incur the death penalty.[10] The penal distinction

[5] Joel Feinberg suggests that murder and attempted murder could jointly be categorised as 'Wrongful Homicidal Behaviour': Joel Feinberg, 'Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against it', *Arizona Law Review* 37(117), 1995: 117-133, see pp. 119-121. For further discussion, see: Andrew Ashworth, 'Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law', *Rutgers Law Journal* 19 (725), 1988: 726-772, see p. 770.
[6] I derive this term from Gideon Yaffe, *Attempts In the Philosophy of Action and the Criminal Law* (New York: Oxford University Press, 2010), pp. 25-26; 310. Yaffe also defines 'non-last act attempts', which refer to attempts in which an agent has failed to perform the final act necessary for successful crime commission: see pp. 25-26.
[7] *Crimes Act 1900* (NSW) ss 27-30.
[8] *Crimes Act 1900* (NSW) s 19A.
[9] Death Penalty Information Center, 'States With and Without the Death Penalty', *DPIC* (2014), URL = http://www.deathpenaltyinfo.org/states-and-without-death-penalty.
[10] 18 USC § 1111 (2013). The maximum penalty for attempted murder, however, is twenty years in prison: at § 1113.

between last act attempts and completed crimes, as grounded in the impact of luck, therefore has extensive ramifications for the lives of offenders. Given this, it is important that we consider whether legal luck in the area of criminal attempt is justified, and hence whether we ought to reform attempt law to equalise the punishment of last act attempts and completions.[11]

2. Moral Luck

The legal luck debate is not about whether legal luck exists - as we have seen, it clearly does exist - but rather addresses the normative question of whether legal luck is justified.[12] The legal luck debate hence concerns whether we *ought* to permit luck to determine our degree of legal responsibility. It addresses, for instance, whether we ought to maintain a penal distinction between last act attempts and completed crimes, where the difference between these crimes boils down to lucky results.

Many philosophers attempt to determine the justifiability of legal luck by appealing to a separate debate, arising within moral philosophy, about the existence of 'moral luck'. The 'moral luck debate' concerns the nature of moral blameworthiness. Specifically, it is about whether moral responsibility is impacted by factors beyond our control. In philosophical terms, this amounts to the question of whether the purported phenomenon of 'moral luck' exists. Some philosophers deny the existence of moral luck. In so doing, they identify with the basic moral intuition that we can only be held morally responsible for factors within our control. Other scholars contend that moral luck does exist. In subscribing to this view, they argue that our intuitive moral judgments reveal that we do, in fact, attribute moral responsibility on the basis of uncontrollable factors. The moral luck debate can hence be framed as a clash of fundamental moral intuitions: the first intuition embodies control, whilst the second rejects it.[13]

My thesis is not concerned with resolving the moral luck debate. Rather, my focus is on how the moral luck debate has been used to inform arguments about the justifiability of legal luck. Many philosophers assume that their views about the existence of moral luck directly determine the question of whether legal luck is justified.[14] They argue that because moral luck

[11] Note that, barring murder and some other exceptions, NSW legislation now equalises the punishment of attempts and completed crimes for the majority of offences: *Crimes Act 1900* (NSW) s 344A. However in practice, offenders charged with attempting crimes other than murder still tend to receive lighter sentences: see David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney: The Federation Press, 4th ed, 2008), p. 1077.
[12] David Enoch, 'Moral Luck and the Law', *Philosophy Compass* 5 (1), 2010: 42-54, see p. 48
[13] Enoch, 'Moral Luck and the Law', p. 48.
[14] For a general discussion of this assumption, see Enoch, 'Moral Luck and the Law', pp. 48-49.

either does (or does not) exist, it follows automatically that legal luck either should (or should not) be retained within our legal system. This view implies that there is a straightforward connection between the moral luck and legal luck debates. It presumes that conclusions drawn within the moral luck debate track directly on to the legal luck debate, and that no further argument is needed to ground the justifiability of luck within our legal system.

However, it is problematic simply to assume, without further argument, that the justifiability of legal luck is determined simply by forming a view about whether moral luck exists. There is hardly any discussion in the philosophical literature about how the moral luck and legal luck debates connect.[15] This lack of discussion is detrimental. How can philosophers use the moral luck debate to inform conclusions drawn within the legal luck debate, without explaining what they think the relation is between the two debates? I argue that in failing to clarify or defend their view of the link between moral luck and legal luck, scholars risk formulating incomplete arguments that do not fully expose the premises upon which they rely. In answering my central research question, I thus seek to articulate and defend my own view about the relation between moral luck and legal luck. In so doing, I hope to make some small contribution towards filling this gap in the philosophical literature.

To determine the connection between moral luck and legal luck, I claim that we must first answer a preliminary question about the broader relation between moral responsibility and legal responsibility. Within the context of the criminal law, this question may narrowly be rephrased as follows: what connection (if any) exists between criminal responsibility and moral blameworthiness? It is necessary for us to answer this broader question, because the moral luck debate is, as stated, essentially about the nature of moral desert: it concerns whether our moral culpability is impacted by factors beyond our control. I hence assert that we cannot determine whether the existence of moral luck is relevant to the justifiability of legal luck in the area of criminal attempt, without first articulating and defending a particular conception of the relation between moral desert and the criminal law.

3. Thesis Structure

The above discussion suggests that to answer the central question of whether legal luck is justified in the area of criminal attempt, we must first address two preliminary sub-questions.

For examples of scholars adopting the assumption, see: Leo Katz, 'Why the Successful Assassin is More Wicked than the Unsuccessful One', *California Law Review* 88 (791), 2000: 791-812; and Michael Zimmerman, 'Taking Luck Seriously', *The Journal of Philosophy* 99(11), 2002: 553-576, see p. 571.

[15] The few papers I have encountered that discuss this connection include: David Enoch, 'Luck between Morality, Law, and Justice', *Theoretical Inquiries in Law* 9 (1), 2008: 23-59; Enoch, 'Moral Luck and the Law', pp. 42-54; and Arthur Ripstein, 'Closing the Gap', *Theoretical Inquiries in Law* 9, 2008: 61-95.

The first sub-question concerns the nature of the general connection between moral blameworthiness and criminal responsibility. The second sub-question is about the narrower link between the moral luck and legal luck debates within a criminal law context. In this thesis, I address each of these sub-questions – and the overarching question about the justifiability of legal luck within attempt law – in three separate chapters. The structure of these chapters is outlined briefly below.

In the first chapter, I investigate the broader connection between moral blameworthiness and criminal responsibility (that is, sub-question one). I address this sub-question by outlining and critiquing three major theories of criminal punishment.[16] For reasons outlined in the chapter, I adopt the third theory, known as a 'mixed theory of criminal punishment'.[17] This theory holds that criminal responsibility is determined partly by moral blameworthiness, and partly by 'non-retributive' (that is, non-blameworthiness-related) considerations relevant to the aims of the law. In adopting this mixed account, I lay the necessary foundations for my analysis of the connection between moral luck and in legal luck in chapter two.

In the second chapter, I consider the link between the moral luck and legal luck debates within a criminal law context (that is, sub-question two). I commence the chapter with a brief explanation of the moral luck problem, followed by a selective review of the key arguments launched within the moral luck debate. I then move to a discussion of whether - and if so, how - views about the existence of moral luck should be used to determine the justifiability of legal luck within the criminal law. Having subscribed to a mixed theory of punishment, I maintain that the existence of moral luck is only partly relevant to the justifiability of legal luck. Broadly, I argue that an offender's degree of moral responsibility - as impacted, or not impacted, by luck - places 'retributive' limits on a range of sanctions that may justly be imposed for their offence. Within this retributive range, I claim that non-retributive considerations (such as deterrence) may operate to distinguish the punishment of equally culpable offenders. As explained in the chapter, it follows from this that legal luck may theoretically be justified on non-retributive grounds, even if we hold the retributive view that moral luck does not exist.

[16] My discussion of these theories is derived from the following general accounts: Antony Duff, 'Legal Punishment', *The Stanford Encyclopedia of Philosophy* (2013), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/; R.A. Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001), pp. 3-34; and C.L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (New York: Oxford University Press, 1987).
[17] Specifically, I adopt Yaffe's mixed account: see Yaffe, *Attempts*, pp. 313-316.

In the third chapter, I return to a direct consideration of the overarching practical question posed by Carromero's case study: namely, whether we ought to maintain the luck-based penal distinction between last act attempts and completed crimes. To resolve this question, I apply the theoretical conclusions reached in chapters one and two about the 'mixed' connection between the moral luck and legal luck debates. For the purposes of this chapter, I assume the view that there is no moral luck, and hence that there is no distinction between the moral blameworthiness of last act attempters and completers.

In line with my analysis in chapters one and two, I argue that the retributive view that moral luck does not exist implies that last act attempters and completers are subject to the same range of sanctions insofar as they are equally morally culpable. It does not, however, entail that they must be accorded the exact same sanction, as we may have valid non-retributive reasons for distinguishing their punishments within the range. I thus analyse two key non-retributive considerations that have been raised to support a penal distinction between last act attempts and completions. The first consideration is the importance of acknowledging, through punishment, the greater loss suffered by both victim and society when a crime is completed.[18] The second consideration is the principle of economy of punishment.[19] In assessing these considerations, I reach the preliminary conclusion that the luck-based penal distinction between last act attempts and completed crimes is justified. I therefore conclude that the court's acceptance of the impact of legal luck in Carromero's case was ultimately justified (although the case may be challenged on other grounds).

4. Methodology

Before commencing my argument, it is important to say a few words with respect to methodology. In this thesis, I employ three basic philosophical methods, all of which are theoretical in nature. First, I use intuitions as a starting point for philosophical enquiry. Whilst there are valid arguments questioning the reliability of intuitions in grounding philosophical conclusions,[20] it seems to me that intuitions play an important epistemic role in exposing philosophical problems (such as the moral luck debate, for example).

[18] See R.A. Duff, 'Auctions, Lotteries, and the Punishment of Attempts', *Law and Philosophy* 9 (1), 1990: 1-37, see pp. 33-37; Duff, *Punishment, Communication, and Community*, pp. 27-30; and Yaffe, *Attempts*, pp. 325-326.
[19] See Ashworth, 'Criminal Attempts', pp. 746-748; and Stephen Schulhofer, 'Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law', *University of Pennsylvania Law Review* 122 (1497), 1974: 1497-1607, see pp. 1562-1585.
[20] See Joel Pust, 'Intuition', *The Standford Encyclopedia of Philosophy* (2012), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2012/entries/intuition/.

Second, I use counterfactuals to identify and test the fundamental intuitions at play within the moral luck and legal luck debates. Carromero's case study constitutes a real life counterfactual scenario: it allows us to compare our intuitions about Carromero's criminal responsibility before the victim died, with our intuitions after the victim died. Note that counterfactuals should be distinguished from thought experiments insofar as they retain a realistic quality. Thought experiments tend to comprise wholly imaginary and/or impossible hypothetical scenarios, whilst counterfactuals are based on situations that may arise in real life.[21] I prefer counterfactuals as a mode of testing moral intuitions, because they avoid the objection, mounted against thought experiments, that the intuitions prompted by fantastic scenarios cannot give us reliable information about the real world.[22]

Third, I use the philosophical method of 'reflective equilibrium' to draw balanced conclusions within my thesis. Reflective equilibrium refers to the synthetic process of balancing one's intuitions against broader theoretical principles and considerations, with the aim of producing a coherent philosophical theory.[23] The method of reflective equilibrium thus facilitates the critical analysis of philosophical intuitions. I employ reflective equilibrium consistently throughout my thesis. For example, I reach a conclusion about the relation between criminal responsibility and moral desert by balancing fundamental moral intuitions against rational considerations about the practical purposes of punishment, to attain the best compromise between the two.

As stated, the above constitute purely theoretical or 'armchair' methods of philosophy. This is appropriate given the theoretical nature of this thesis. Yet I acknowledge that there may be scope to conduct (or at least analyse) empirical studies in a larger PhD work. As noted in chapter three, a more accurate assessment of the potential consequences of equalising the punishment of last act attempts and completed crimes would require us to analyse empirical studies testing the reactions of ordinary people to the collapse of this penal distinction. I lack the space to assess or perform such empirical studies here, and so note that my theoretical argument is subject to methodological limitations.

[21] James Robert Brown and Yiftach Fehige, 'Thought Experiments', *The Standford Encyclopedia of Philosophy* (2011), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/fall2001/entries/thought-experiment/.
[22] Brown and Fehige, 'Thought Experiments', URL = http://plato.stanford.edu/archives/fall2001/entries/thought-experiment/.
[23] Norman Daniels, 'Reflective Equilibrium', *The Stanford Encyclopedia of Philosophy* (2013), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2013/entries/reflective-equilibrium/.

Chapter 1: Connecting Moral Blameworthiness and Criminal Responsibility

In this chapter, I take a step back from the problem of legal luck to investigate the broader connection between moral blameworthiness and criminal responsibility. Specifically, I examine whether - and if so, to what extent - an offender's criminal responsibility is determined by their level of moral culpability. Criminal responsibility involves both considerations of criminal liability (that is, whether an agent has committed a crime), and of criminal punishment (namely, the extent to which a perpetrator should be sanctioned for their crime).[24] Moral blameworthiness may be a relevant factor in determining both aspects of criminal responsibility, and it is possible that different considerations may apply in each instance. Note, however, that in this thesis, I explore criminal responsibility and moral blameworthiness predominantly from the perspective of criminal punishment. In doing so, I assume that the connection between moral luck and legal luck in the area of criminal responsibility is sufficiently exposed through a consideration of key theories of criminal punishment.

To explore the general connection between moral responsibility and criminal responsibility, I thus conduct a concise critique of three major theories of criminal punishment. The first theory holds that moral blameworthiness is entirely irrelevant to criminal responsibility. The second theory provides that criminal responsibility is determined solely by degrees of moral blame. The third theory, which I adopt, states that criminal responsibility is determined by a combination of retributive (that is, blameworthiness-related) and non-retributive (non-blameworthiness-related) considerations.

By surveying these theories of criminal punishment, I seek to lay the foundations for my more specific exploration the connection between moral luck and legal luck in the following chapter. The provision of this context is necessary because many scholars simply assume that there is a direct connection between the moral luck and legal luck debates. However, as the present chapter highlights, there are a variety of theories about the link between moral responsibility and the criminal law, and each of these theories has different implications for our view of the relation between moral luck and legal luck. It is thus important that scholars participating in the moral/legal luck debate consider, and clarify, which theory of the connection between moral blame and criminal responsibility they adhere to.

[24] Michael Davis, 'Why Attempts Deserve Less Punishment than Complete Crimes', *Law and Philosophy* 5, 1986: 1-32, see p. 4.

1.1. The General Connection Between Law and Morality

Prior to my review of three main theories of criminal punishment, a few words should be said about a more general debate concerning the relation between morality and law. This debate is about whether law must be inherently moral, or meet moral standards, to be valid law.[25] This question is particularly significant when considered in light of the Nazi regime. In the aftermath of World War II, German courts had to determine whether immoral actions performed in accordance with Nazi law could be prosecuted and punished after the Nazi regime collapsed.[26] Those facing prosecution argued that their actions were technically legal at the time of commission. However, the German courts found that Nazi law did not constitute valid law, because it contradicted fundamental moral principles. They stated that actions committed under the Nazi regime therefore did not hold a protected legal status.

Philosophers of jurisprudence have developed various theories about whether unjust or immoral laws should be regarded as legally valid. Contrary to the opinion of the German courts, positivist philosophers claim that law and morality are conceptually separable (this is termed the 'separability thesis').[27] Broadly, positivists assert that law is grounded in social criteria of legal validity. They argue that law is grounded in 'social facts' - such as the enactment of a statute, or an authoritative judicial decision - and that these social facts do not necessarily incorporate moral principles. Whilst 'inclusive positivists'[28] hold that social criteria of legal validity *may* incorporate moral norms, but do not have to; 'exclusive positivists'[29] contend that law and morality are *necessarily* separate. There is thus disagreement within positivism about whether law and morality may coincide contingently. Nonetheless, all positivists maintain that there is at least a conceptual distinction between the way the law is, and the way the law ought to be.[30] The positivist position hence implies that Nazi law was, indeed, valid law; although it was 'bad law' that should have been resisted.[31]

Natural law theorists, by contrast, argue that there is an essential connection between morality and law.[32] They hold that law cannot be valid unless it meets certain moral standards. Various

[25] Denise Meyerson, *Jurisprudence* (Victoria: Oxford University Press, 2011), p. 69.
[26] See: Lon Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart', *Harvard Law Review* 71, 1958: 630-672, see pp. 652-657; and H.L.A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (4), 1958: 593-629, see pp. 618-621.
[27] Meyerson, *Jurisprudence*, pp. 25; 69. For a general overview of positivism, see: Meyerson, *Jurisprudence*, pp. 69-106.
[28] See, for example: Hart, 'Positivism ', pp. 593-629.
[29] See, for example: Joseph Raz, 'Authority, Law and Morality', *The Monist* 68 (3), 1985: 295-324.
[30] Hart, 'Positivism ', pp. 593-600; Meyerson, *Jurisprudence*, p. 69.
[31] Hart, 'Positivism', pp. 618-621.
[32] For an overview of natural law theory, see: Meyerson, *Jurisprudence*, pp. 107-134.

arguments have been lodged to support this view.[33] For example, Lon Fuller[34] asserts that morality is internal to the process of law-making. He states that a legal system cannot govern effectively unless it embodies 'order', and that order is, by its very nature, 'good' or moral. To illustrate his meaning, Fuller constructs an example of a despotic monarch.[35] This monarch creates laws which are drafted so ambiguously that his subjects cannot understand or follow them. In failing to state laws clearly, the monarch undermines his own attempt to rule his subjects. Fuller hence concludes that valid laws must comply with various 'principles of legality',[36] which ensure that subjects are capable of following them. He claims that these principles are inherently moral, presumably because they respect subjects as autonomous and responsible agents.[37] Fuller's natural law theory therefore implies that Nazi laws were invalid, because they did not incorporate the inherently moral principles of legality.[38] This affirms the view held by subsequent German courts that Nazi laws were never laws at all.

In this thesis, I do not propose to enter the positivist/natural law debate about whether law and morality are conceptually separable. Instead, I assume simply that there is some connection between morality and law, at least within the Australian legal system. This position is compatible with both inclusive positivism and natural law theory. I do not submit that the connection between morality and Australian law is either contingent or necessary, only that Australian law does, as a matter of fact, incorporate moral principles into its criteria of legal validity.

1.2. Three Theories of Punishment

I turn now to a consideration of three key theories of criminal punishment. These are: 1) pure consequentialism; 2) positive retributivism; and 3) a mixed theory of punishment.[39] My analysis of these theories is not exhaustive, but is intended simply to ground my discussion of the appropriate connection between moral luck and legal luck in the following chapter.

---

[33] Meyerson distinguishes between 'procedural' and 'substantive' natural law theories: Meyerson, *Jurisprudence*, p. 107. Procedural theories hold that moral principles are inherent to the process of making and applying law. Substantive theories instead focus on whether the actual content of laws are moral and just.
[34] Fuller, 'Positivism and Fidelity to Law', pp. 630-672. Note that Fuller's theory is categorised as procedural.
[35] Fuller, 'Positivism and Fidelity to Law', pp. 644-645.
[36] Meyerson, *Jurisprudence*, p. 125.
[37] Meyerson, *Jurisprudence*, p. 126.
[38] Fuller, 'Positivism and Fidelity to Law', pp. 648-661.
[39] My description and critique of each theory is informed by the summaries of R.A. Duff and C.L. Ten. See: Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/; Duff, *Punishment, Communication, and Community*, pp. 3-34; and Ten, *Crime, Guilt, and Punishment*.

1.2.1. Pure Consequentialism

Pure consequentialist theories evaluate social practices solely by reference to the consequences they produce. These theories hold that a practice is justified only if it contributes to the attainment of an ultimate, overarching good (such as happiness, for example).[40] Under a pure consequentialist account, then, punishment is justified solely by its promotion of beneficial consequences. But consequentialists maintain that it is not enough to show that punishment produces *some* benefits: it must also be established that punishment produces more benefit than harm. Punishment is an inherently burdensome social practice. It responds to the commission of crime by deliberately inflicting suffering on the perpetrators.[41] Pure consequentialists therefore determine the justifiability of punishment by weighing its benefits against its burdens. If punishment is found to produce greater benefit overall - and if it is found to be more beneficial and cost-effective than other social alternatives - then it is justified under a pure consequentialist theory.[42]

What are the beneficial outcomes that punishment is said to promote? Different consequentialist theories posit different 'final goods' as the ultimate end towards which all action should be directed. But many consequentialist accounts evaluate punishment in terms of its contribution towards more immediate, non-final goods (which are held ultimately to promote the final goods posited by different consequentialist accounts).[43] Most consequentialists recognise 'crime prevention' as the core immediate benefit produced by punishment.[44] It is claimed that by preventing crime, we prevent the harm - and the attending threat of harm - that results from criminal actions.

Consequentialists argue that punishment serves the goal of crime prevention in three key ways.[45] First, it is proposed that punishment prevents crime by deterring offenders. This deterrence occurs on both a 'specific' and 'general' level.[46] At a specific level, the infliction of punishment deters the person punished from reoffending. At a general level, the threat of punishment deters other potential offenders from committing crimes, lest they be punished also. Deterrence therefore reduces crime by providing agents with a prudential incentive to refrain from crime commission.

---

[40] Duff, *Punishment, Communication, and Community*, p. 3.
[41] Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/.
[42] Duff, *Punishment, Communication, and Community*, p. 3.
[43] Duff, *Punishment, Communication, and Community*, pp. 3-4.
[44] Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/; Duff, *Punishment, Communication, and Community*, p. 4.
[45] Duff, *Punishment, Communication, and Community*, pp. 4-5; Ten, *Crime, Guilt, and Punishment*, pp. 7-8.
[46] Duff, *Punishment, Communication, and Community*, p. 4; Ten, *Crime, Guilt, and Punishment*, p. 7.

Second, consequentialists submit that punishment may prevent crime through reforming and rehabilitating offenders. Reform consists of altering an offender's values and motives, so that they willingly refrain from crime. Rehabilitation refers to developing an offender's skills and capacities to assist their re-entry into society.[47] The process of reform and rehabilitation, as purportedly furthered by punishment, thus reduces crime by changing offenders' attitudes towards re-offending.

Lastly, consequentialists argue that punishment contributes to crime prevention through its incapacitative effects. Certain types of punishment, such as imprisonment, remove offenders from free society. This removal makes it logistically impossible for offenders to commit crimes against the general public, at least temporarily.[48] Through incapacitation, then, punishment is able physically to prevent the commission of crime by those who remain both undeterred and unreformed.

A major moral objection has been launched against pure consequentialist theories of punishment.[49] This moral objection concerns the capacity of pure consequentialism to accord proper recognition to the fundamental rights of innocent people. The objection runs as follows: pure consequentialists claim that punishment is justified solely by its beneficial results. But if this so, it follows that the rights of the innocent should be sacrificed if this would produce the best possible outcome. That is, pure consequentialism mandates that we should deliberately 'punish' innocent people - or punish the guilty more than they deserve - in cases where so doing would best promote the crime preventive purposes of the criminal law.[50] Yet this notion contradicts the seemingly fundamental intuition that agents should only be punished according to their desert. This intuition holds that punishing innocent people, and disproportionately punishing the guilty, is intrinsically wrong, regardless of the beneficial consequences it might produce.

[47] Duff, *Punishment, Communication, and Community*, p. 5.
[48] Duff, *Punishment, Communication, and Community*, p. 5; Ten, *Crime, Guilt, and Punishment*, p. 8. As Duff points out, offenders are not prevented from committing crimes against other offenders in prison.
[49] Duff, *Punishment, Communication, and Community*, p. 8; and Ten, *Crime, Guilt, and Punishment*, p. 13. Another key objection, which I do not mention here, disputes the empirical efficacy of punishment as a means of crime prevention: see Duff, *Punishment, Communication, and Community*, p. 6; and Ten, *Crime, Guilt, and Punishment*, pp. 8-13.
[50] For an example of a hypothetical scenario in which pure consequentialism appears to mandate the punishment of the innocent, see: Ten, *Crime, Guilt, and Punishment*, p. 13.

Pure consequentialists typically respond to this moral objection by arguing that their theory does recognise the rights of the innocent, at least when it comes to real cases.[51] This argument comprises two elements. First, pure consequentialists claim that punishing an innocent person would never produce the best possible consequences in real life.[52] They assert that if the public ever found an out that an innocent person was being deliberately punished (as a scapegoat, for example), fear and outrage would ensue, and respect for the law would be undermined. It is contended that pure consequentialism therefore mandates that the punishment of innocent people should be regarded as though it were an intrinsic wrong, since this ultimately will produce the best consequences overall.[53] Second, pure consequentialists submit that their theory only validates the punishment of the innocent within far-fetched hypothetical scenarios designed by critics to 'trap' the consequentialist into admitting the implications of their theory.[54] Pure consequentialists maintain that these scenarios are unlikely ever to arise in the real world, and so are irrelevant to practical moral argument.

In my view, the pure consequentialist's response is insufficient to meet the moral objection outlined above. This is because pure consequentialism necessarily renders the protection of the rights of the innocent contingent upon the actual or expected consequences of punishment. This is illustrated by the hypothetical examples advanced by critics. Whilst these examples are unrealistic, they reveal the primary ethical commitment of consequentialist theory: namely, to maximise beneficial consequences.[55] So long as consequentialism is preoccupied solely with the maximisation of benefit, it cannot recognise the wrongfulness of punishing the innocent as a fundamental moral principle. Under a pure consequentialist account, the protection of the rights of the innocent will always be subordinate to the production of beneficial consequences. Hence, even if punishing the innocent would never be optimal in the real world, pure consequentialists are still committed to the view that such punishment is theoretically acceptable if it would promote the best outcome. I therefore reject pure consequentialism as a complete justificatory theory of punishment, because it cannot adequately take account of the strength of our ethical commitment to the principle that punishment must be connected with moral desert.

[51] Other responses have been lodged by pure consequentialists, but I am unable to recount them due to limitations of space. For a full account, see: Duff, *Punishment, Communication, and Community*, pp. 8-10; and Ten, *Crime, Guilt, and Punishment*, pp. 14-32.
[52] Duff, *Punishment, Communication, and Community*, p. 9; Ten, *Crime, Guilt, and Punishment*, pp. 17-18.
[53] Duff, *Punishment, Communication, and Community*, p. 9.
[54] Ten, *Crime, Guilt, and Punishment*, pp. 18-32.
[55] Ten, *Crime, Guilt, and Punishment*, pp. 19-32.

It is important to note here that if, despite my contrary view, pure consequentialism is to be preferred as a general theory of criminal punishment, it has obvious implications for my subsequent analysis of the connection between moral luck and legal luck in the following chapter. That is, if we accept the view, entailed by pure consequentialism, that the moral blameworthiness of an offender is entirely irrelevant to their criminal responsibility, it follows that the existence or non-existence of moral luck must also be irrelevant to a consideration of whether legal luck is justified. I return to a direct discussion of this issue in chapter two.

1.2.2. Positive Retributivism

Positive retributivist theories seek to justify criminal punishment as an intrinsically appropriate response to an offender's moral desert. Before elaborating this claim, it is useful to highlight the difference between 'positive' and 'negative' retributivist accounts.[56] Negative retributivism does not provide an active justification for punishment, but simply imposes a desert-based limitation on pre-existing justificatory theories. According to negative retributivism, whatever positive justification for criminal punishment we adopt, we cannot mandate the punishment of innocent people, and we cannot punish the guilty more than they deserve. Negative retributivism therefore implies that we *may* justifiably punish the guilty, but does not positively contend that we *should* do so. At most, negative retributivism maintains that we cannot punish those who do not deserve it. Moral desert is hence a *necessary* condition for criminal punishment under a negative retributivist account.[57]

Contrastingly, positive retributivist theories advance a *positive* justification for the punishment of guilty offenders. This positive justification is grounded in the notion of desert. In a nutshell, positive retributivists claim that the guilty should be punished just because they deserve it. They submit that punishment is an intrinsically appropriate response to crime commission: if an offender commits a crime, they deserve to be punished, and should be punished as a matter of justice. Positive retributivists thus hold that moral desert is a *sufficient* condition for criminal punishment.[58] They maintain that the guilty should in principle be punished, even if their punishment will not produce any consequential benefit. Furthermore, positive retributivists assert that the state has a *duty* to punish guilty offenders.[59] Whilst this duty is not regarded as absolute - it must compete with other demands placed upon the legal system - it is nonetheless a duty that the state must strive to uphold.

---

[56] Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/; Duff, *Punishment, Communication, and Community*, pp. 12; 19.
[57] Duff, *Punishment, Communication, and Community*, p. 19.
[58] Duff, *Punishment, Communication, and Community*, p. 19.
[59] Duff, *Punishment, Communication, and Community*, p. 19.

Positive retributivist accounts of punishment hence imply that there is a direct correlation between criminal responsibility and moral desert. They claim that offenders ought to be punished because they deserve it, and that offenders must be punished to the degree they deserve (no more, no less). An example of a positivist retributivist account is Duff's 'communicative theory of punishment'.[60] Briefly, Duff maintains that the purpose of punishment is to communicate deserved censure for the commission of an offence. He argues that we respond to crime by inflicting punishment, because this communicates to the offender our societal condemnation of the offence committed.

Duff states that the punitive communication of censure is owed to the victims of crime as a manifestation of concern for them and the harm they have suffered. It is also owed to society, whose values have been undermined by the commission of the offence. Finally, the punitive communication of censure is owed to the offender, who deserves to be treated as an agent who is morally accountable for her own wrongdoing.[61] Duff therefore holds that punishment is essential to the process of moral communication, and so constitutes an intrinsically appropriate or deserved response to the commission of an offence. It should be noted here that whilst Duff's communicative theory of punishment is solely retributivist, not all communicative theories need be.[62] As will be seen in chapter three, the idea that punishment serves a communicative purpose can also be framed non-retributively.

The positive retributivist claim that criminal punishment is justified solely in terms of moral desert raises two significant questions.[63] First, it may be wondered why the infliction of suffering should be regarded as an intrinsically appropriate response to crime commission. In other words, why do guilty offenders necessarily deserve to suffer?[64] Second, even if we establish that the guilty do deserve to suffer, and hence that some form of 'punishment' should be imposed upon them, it is unclear why it should be the role of the state to inflict this suffering.

The above two questions boil down to the assertion that positive retributivism cannot, on its own, justify why we should respond to crime commission through a state administered system of criminal punishment. First, there is nothing intrinsic to the notion of desert that implies that we must respond to crime by making offenders suffer. If offenders deserve censure for their

[60] Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/; and Duff, *Punishment, Communication, and Community*, pp. 27-30.
[61] Duff, *Punishment, Communication, and Community*, pp. 28-29.
[62] Duff, *Punishment, Communication, and Community*, p. 27.
[63] Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/.
[64] Duff, *Punishment, Communication, and Community*, pp. 20-21.

crimes, why must this censure take the form of punishment? We could, theoretically, respond to the culpable commission of crime through verbal condemnation. Courts could publicly denounce offenders for their crimes - and denounce them to the degree that they deserve - without issuing any penalty.[65] Second, positive retributivist accounts do not explain why it is that the *state* (as opposed to the victims of crime and their families, for example), must take action to ensure that offenders get what they deserve. The notion that the guilty deserve to suffer - which, I have argued, is simply an assumption - does not support any view about who has a duty to impose this suffering (if, indeed, anyone should).[66]

I therefore contend that positive retributivist accounts lack the tools wholly to justify the imposition of state punishment as an appropriate response to the commission of crime. Positive retributivism cannot explain: a) why we should respond to crime in the form of punishment; and b) why it should be the state's role to impose this punishment. In my view, the most straightforward answer to these questions lies in the pursuit of consequentialist aims. A key reason why we respond to crime through the infliction of punishment is that this is an effective means of crime prevention.[67] The mere verbal denunciation of offenders, which may well be all that they deserve, would not effectively deter offenders from crime commission. Nor would it enable us to incapacitate offenders who pose a substantial risk to the community. Additionally, by endowing the state with the right and duty to punish offenders, we further the consequentialist aim of maintaining social order. Society would be dangerous if ordinary citizens were allowed to take the law into their own hands. The criminal law thus plays an important social role in 'displacing' the potentially harmful retaliatory urges of those directly affected by crime.[68]

A complete justification of criminal punishment should, in my opinion, therefore take account of both retributive and non-retributive considerations. That is, I consider criminal responsibility and punishment to be determined not only by an offender's degree of moral desert, but also by practical, non-retributive considerations relevant to the aims of the law. I thus reject positive retributivism as a complete justification of criminal punishment. Importantly, this conclusion has implications for my assessment of the connection between the moral luck and legal luck debates in the following chapter. In rejecting the view that criminal responsibility is determined solely by an offender's degree of moral desert, I also

[65] Duff, *Punishment, Communication, and Community*, p. 29; Ten, *Crime, Guilt, and Punishment*, pp. 40-41.
[66] Duff, *Punishment, Communication, and Community*, pp. 20-21.
[67] Ten, *Crime, Guilt, and Punishment*, pp. 38-65.
[68] John Gardner, 'Crime in Proportion and in Perspective', in Andrew Ashworth and Martin Wasik (eds.) *Fundamentals of Sentencing Theory*, (New York: Oxford University Press, 1998): 31-52, see pp. 31-33.

reject the position, assumed by many, that the justifiability of legal luck is determined solely according to the existence of moral luck.

1.2.3. Mixed Theories of Punishment

Mixed theories of punishment come in a variety of forms.[69] The mixed structure that I will be focussing on in this subsection posits both retributive principles (that is, considerations of moral blameworthiness) and non-retributive principles as individually necessary, and jointly sufficient, to ground a justification for criminal punishment.[70] This type of mixed theory typically accommodates both retributive and non-retributive considerations by positing retributive values as 'side-constraints' or limitations upon the pursuit of beneficial consequences. For this reason, the theory has also been termed 'side-constrained consequentialism' or 'negative retributivism'.[71]

'Side-constrained' mixed theories ground the positive justification for criminal punishment in consequentialist values. They assert that punishment is ultimately justified as a cost-effective means of promoting beneficial outcomes, such as crime-prevention. However, adherents to mixed theories also argue that the pursuit of consequentialist aims is subject to two retributive side-constraints. These constraints are: 1) that we must not punish the innocent; and 2) that punishment must be proportionate to the severity of the crime committed.[72] By positing these side-constraints, mixed theorists avoid the objection, lodged against pure consequentialism, that the pursuit of consequentialist aims requires the sacrifice of retributive (that is, desert-based) values. Yet by grounding the positive justification for punishment in consequentialist aims, mixed theories also purport to avoid the objection, directed towards positive retributivists, that the notion of moral desert cannot justify punishment as a response to crime. Mixed theories of punishment therefore claim to incorporate the best features of both pure consequentialism and positive retributivism, whilst circumventing the major objections launched against either account.

Note that whilst mixed theorists consider an offender's desert to be a necessary condition for criminal punishment, they may permit this condition to be overridden under special circumstances. These circumstances involve cases in which the relatively minor punishment of an innocent person is the only way to prevent the suffering of far greater harm by other

[69] Ten, *Crime, Guilt, and Punishment*, pp. 66-85.
[70] Ten, *Crime, Guilt, and Punishment*, pp. 78-79.
[71] Duff, *Punishment, Communication, and Community*, p. 11.
[72] Duff, *Punishment, Communication, and Community*, p. 11.

innocent people.[73] The side-constraints posited within a mixed theory of punishment hence are not *absolute*, but may be applied flexibly.[74] By positing retributive values as side-constraints upon the pursuit of ordinary consequential benefits, mixed theories of punishment are able to acknowledge that the sacrifice of these values invokes a moral cost.[75] They may compatibly recognise that punishing an innocent person is intrinsically wrong, whilst still maintaining that it might be justified in extreme cases.

A recent example of a mixed theory of punishment has been articulated by Gideon Yaffe.[76] In his account, Yaffe explains how a mixed theory might be used to determine the appropriate level of punishment to be distributed to guilty offenders. He begins by observing that, justified or not, the state censures offenders through the use of sanction.[77] That is, he claims that the state expresses moral condemnation of criminal conduct by imposing punishment. Given this, Yaffe argues that the role of punishment in expressing censure places an important side-constraint upon the level of sanction that may justly be imposed for an offence.[78] According to this side-constraint, punishment should not exceed, or fall short of, expressing the appropriate degree of censure incurred by a criminal act. In other words, punishment should reflect an offender's degree of moral culpability in committing an offence.

What does it mean to assert that a sanction must express the appropriate degree of censure for a crime? To clarify this claim, Yaffe asks us to imagine that censure is ranked on a scale of one to ten (ten being the greatest censure, one being the least).[79] He also asks us to conceive of sanction as existing on a parallel scale: a rating of ten incurs the highest sanction (such as life imprisonment), whilst one incurs the lowest sanction (for example, a small fine). Yaffe then poses the question of whether a crime censured at degree seven must also incur a sanction of degree seven, or whether it might justifiably incur sanctions ranging from levels six through eight. In other words, is an offender's degree of moral desert the sole determinant of their criminal responsibility, or could a range of sanctions, partly determined by non-retributive considerations, suffice to reflect a fixed degree of moral culpability?

Yaffe argues that a fixed level of censure may appropriately be expressed through a range of justifiable sanctions. To support this claim, he constructs an example in which a minor traffic offence, such as rolling through a stop sign, is accorded the same level of punishment as

[73] Ten, *Crime, Guilt, and Punishment*, p. 79.
[74] Duff, *Punishment, Communication, and Community*, p. 11.
[75] Duff, *Punishment, Communication, and Community*, p. 11.
[76] Yaffe, *Attempts*, pp. 313-316.
[77] Yaffe, *Attempts*, p. 313.
[78] Yaffe, *Attempts*, p. 314.
[79] Yaffe, *Attempts*, p. 314.

littering in a park (say, a $100 fine).[80] Yaffe states that these offences attract different levels of censure: the state censures the traffic offence more highly than it does the act of littering. Despite this, the two offences incur the same sanction. Why? According to Yaffe, the answer to this question lies in the promotion of beneficial consequences. He argues that littering is sanctioned at a higher level than is necessary to express the degree of censure it attracts, because this furthers the consequentialist aim of increasing deterrence.[81] Whilst a single act of littering does not by itself cause a great amount of harm, collective instances of littering lead to immense environmental damage.[82] Yaffe thus claims that it is necessary for the state to deter individual acts of littering by imposing a higher sanction for the commission of the offence. The imposition of a higher sanction provides an additional motive for individuals to refrain from littering, and so furthers the consequentialist aim of crime prevention.

Yaffe therefore maintains that non-retributive considerations play a role in determining where within the deserved range an offender should be sanctioned. These non-retributive considerations include, but are not limited to, the deterrence of conduct.[83] Yaffe also notes that some sanctions are, irrespective of context, simply too low or too high to express the appropriate level of censure for a crime.[84] It clearly would be unjustifiable to sanction the crime of littering by imposing the death penalty, for example, even though this sentence would likely be a highly effective deterrent. Yaffe hence argues that retributive considerations determine the deserved level of censure for a crime, and so place upper and lower limits upon a range of sanctions that may justly be imposed for an offence.[85]

For the purpose of this thesis, I choose to adopt Yaffe's mixed theory of punishment as a model for the connection between moral blameworthiness and criminal responsibility. I have adopted Yaffe's theory because I consider it to be the most relevant and persuasive recent account in which the proponent has addressed directly the question of whether the penal distinction between last act attempts and completed crimes is justified. Applying Yaffe's theory, I claim that a central goal of criminal punishment is the promotion of beneficial consequences (such as crime prevention), but moral blameworthiness underpins the criminal law by imposing retributive constraints upon the extent to which agents may be punished to promote consequentialist aims. According to these retributive constraints, we cannot hold agents criminally liable unless they are morally culpable or guilty in breaking the law, and we

[80] Yaffe, *Attempts*, pp. 314-315; 324.
[81] Yaffe, *Attempts*, pp. 314-315.
[82] Yaffe, *Attempts*, pp. 314-316.
[83] Yaffe, *Attempts*, pp. 316; 323.
[84] Yaffe, *Attempts*, p. 315.
[85] Yaffe, *Attempts*, pp. 315-316.

cannot punish guilty offenders to a lesser or greater degree than they deserve. I therefore argue that it is morally permissible for the criminal law to pursue consequentialist aims through punishment, so long as its pursuit of these aims does not transgress the constraints imposed by an offender's degree of moral culpability. Significantly, this implies that criminal responsibility is determined by both retributive and non-retributive considerations, and hence that moral blameworthiness is partly, but not solely, relevant to the distribution of criminal responsibility and punishment.

Note that in subscribing to Yaffe's account, I do not claim to have provided a complete defence of mixed theories of punishment. Various objections have been lodged against mixed accounts, but I lack the space to discuss them here.[86] Instead, I assert simply that, for the reasons outlined above, mixed theories are to be preferred to pure consequentialist or positive retributivist accounts of punishment. I hence adopt a mixed view of the connection between moral blameworthiness and criminal responsibility, because I consider both retributive and non-retributive considerations to be relevant to the justifiability of criminal punishment.

My adherence to a mixed theory of the connection between moral responsibility and criminal responsibility has implications for my view of the connection between moral luck and legal luck, articulated in the following chapter. In arguing that criminal responsibility is determined by both considerations of moral blameworthiness, and non-retributive (non-blameworthiness-related) considerations, I contend that our conclusions about the existence of moral luck are only partly relevant to the question of whether legal luck is justified.

1.3. Concluding Comments

In this chapter, I explored the broader connection between criminal responsibility and moral blameworthiness by outlining three major theories of criminal punishment. The first of these theories, known as 'pure consequentialism', holds that criminal punishment is justified solely by its promotion of beneficial consequences. I reject the pure consequentialist account because it fails adequately to recognise the fundamental retributive intuition of the wrongfulness of punishing innocent people. The second theory, labelled 'positive retributivism', maintains that punishment is justified as an intrinsically deserved response to

[86] Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/; Duff, *Punishment, Communication, and Community*, pp. 12-18. According to Duff, the main objection lodged against mixed accounts is that such accounts fail to treat offenders as responsible agents, or as 'ends in themselves'. Critics argue that insofar as mixed theories justify punishment partly in consequentialist terms, they imply that offenders are to be used as 'mere means' towards the promotion of consequentialist ends. Note that this objection is grounded in Kantian ethics: see Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor and Jens Timmermann (United States: Cambridge University Press, 2012), 4:429.

culpable criminal acts. Positive retributivist accounts hence ground the justification for criminal punishment solely in the notion of desert. I claim that positive retributivism cannot, by itself, explain why offenders deserve *punishment*, as opposed to some other form of non-punitive censure. I therefore conclude that a complete justification of criminal punishment must take account of both retributive and non-retributive considerations, and so settle on the third theory, known as a 'mixed theory of punishment', as an adequate model for the relation between criminal responsibility and moral blameworthiness. In adopting this mixed account - and, specifically, Yaffe's mixed account - I hold that moral blameworthiness underlies the criminal law by imposing retributive constraints upon the degree to which consequentialist aims may be pursued through punishment. I do not claim to have provided a complete defence of mixed theories of punishment here, but assert merely that they should be adopted in preference to the other alternatives discussed.

The purpose of this chapter is simply to lay the foundations for my upcoming examination of the specific connection between moral luck and legal luck. I thus do not purport to provide a conclusive analysis of each theory of criminal punishment. There are, undoubtedly, theories and objections that I have not discussed, and a complete justification of criminal punishment would need to take these into account. This overview is intended simply to provide a basic justification of my view of the relation between criminal responsibility and moral blameworthiness. Having provided this general background, I turn to an examination of the specific connection between moral luck and legal luck in the following chapter.

Chapter 2: Linking Moral Luck and Legal Luck

Do the moral luck and legal luck debates connect; and if so, how do they connect? To rephrase the question: to what extent should our views about the existence of moral luck determine our conclusions about the justifiability of legal luck (if at all)?

The connection between the moral luck and legal luck debates is, I claim, an issue that remains under-discussed in the philosophical literature. Whilst many scholars use the moral luck debate to inform their conclusions about the justifiability of legal luck, they rarely articulate or defend their view of the relation between these two kinds of luck. This lack of articulation and defence is problematic, particularly when scholars appear to assume a direct connection between the moral luck and legal luck debates. That is, some scholars implicitly adopt the premise that the justifiability of legal luck is determined solely by whether moral luck exists.[87]

This chapter comprises two sections. In section one, I conduct a selective review of key arguments in the moral luck debate. My review of the debate is confined largely, but not exclusively, to arguments about the existence of resultant moral luck, as it is this type of luck that is most relevant to my case study in the following chapter. Whilst I conclude that the moral luck debate is probably irresolvable because it involves a clash of fundamental moral intuitions,[88] it is nonetheless necessary to survey the debate before making any reasoned assessment of its connection with the legal luck debate.

In the second section, I move to a specific examination of the connection between moral luck and criminal legal luck. I ground my view about the relation between these two kinds of luck in a mixed theory of criminal punishment. Note that my analysis does not extend to the link between moral luck and legal luck in areas of civil law. This is because the relation between civil liability and moral blameworthiness may well be different to that existing between criminal responsibility and moral desert.[89]

2.1. The Moral Luck Debate

The moral luck debate is about the nature of moral blameworthiness. It concerns whether moral blameworthiness is impacted by 'luck'; that is, by factors beyond an agent's control.

[87] See, for example: Katz, 'Why the Successful Assassin is More Wicked than the Unsuccessful One', pp. 791-812; and Zimmerman, 'Taking Luck Seriously', pp. 553-576.
[88] Enoch, 'Moral Luck and the Law', p. 48.
[89] Enoch, 'Luck between Morality, Law, and Justice', pp. 36-37; Enoch, 'Moral Luck and the Law', p. 50.

Imagine, for example, that an agent intends to commit murder, and does everything in her power to achieve this intention. If 'luck' is irrelevant to moral culpability, then the agent's moral position is fixed at this point, regardless of the outcome. If, however, 'luck' is morally relevant, then the moral responsibility of the agent for her action will depend on whether the action succeeds (and a murder is committed) or the action fails (in which case there has only been attempted murder).[90] This amounts to the question of whether luck may, at least partially, determine the moral or retributive status of agents. The moral luck debate thus concerns whether luck makes a difference to moral responsibility.

The notion that moral responsibility is impacted by luck contradicts the (allegedly Kantian)[91] intuition that we may only be held morally responsible for factors within our control. This intuition has been termed the Control Principle.[92] The Control Principle mandates that luck cannot impact the moral blameworthiness of agents. It follows from this that two agents - for example, an agent who intends to commit murder and does so, and another agent who intends to commit murder but fails - must be regarded as equally morally responsible if the only difference between them is due to luck; that is, to factors that they could not control.[93]

The Control Principle seems intuitively appealing, and it appears to be embodied in many of our ordinary moral judgments. In practice, we often withdraw blame for otherwise culpable behaviour, when we perceive that the behaviour is brought about by factors beyond the control of the causing agent. For example, if we discover that the person who hit us was pushed by another agent (and so injured us involuntarily), we are likely to cease blaming that person for directly causing our injury.[94]

Yet despite the intuitive appeal of the Control Principle, it has been argued that luck does, in fact, impact our moral responsibility, and that many of our ordinary moral judgments reflect

---

[90] For those unfamiliar with the moral luck debate, the use of the word 'luck' may seem counterintuitive. It is important to note that in the literature, a moral luck believer is considered to be a philosopher who argues that the outcome of an action at least in part determines the agent's moral responsibility. A moral luck denier considers the outcome of the agent's intended action to be irrelevant, on the basis that the outcome is beyond the agent's control. The term 'luck' in the moral luck debate often refers to a fortuitous negative outcome (for example, the agent's act succeeds in killing the victim). In general parlance, 'luck' usually refers to a fortuitous positive outcome. I emphasise this point merely because those unfamiliar with the moral luck debate may find the terminology at times contrary to intuition.

[91] See Kant, *Groundwork of the Metaphysics of Morals*, 4:394. Thomas Nagel cites this Kantian passage in his paper: Thomas Nagel, 'Moral Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 57-71, see p. 57.

[92] Dana Nelkin, 'Moral Luck', *The Stanford Encyclopedia of Philosophy* (2008), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.

[93] Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.

[94] Enoch, 'Moral Luck and the Law', p. 43; Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.

this. Bernard Williams[95] and Thomas Nagel[96] assert that many of our intuitive moral judgments are subject to the purported phenomenon of moral luck. They maintain that we correctly judge an agent who commits murder to be more morally culpable than an identical agent who intends to commit murder but fails to do so because of factors beyond the agent's control. Moral luck occurs when it is correct to form a moral judgment of an agent on the basis of factors outside their control.[97] The claim that moral luck exists thus constitutes the view that luck makes a real difference to the moral or retributive status of agents.

Nagel argues that luck is incorporated into our moral judgments in a variety of ways. He constructs a taxonomy of different 'types' of moral luck.[98] Briefly, these include:[99]

1. Resultant luck; or luck in the uncontrollable outcome of our chosen actions. If we think that the murderer is more morally culpable than the attempted murderer, even when the attempter's failure results from the occurrence of some uncontrollable event - such as a bird flying across the path of a bullet - then this appears to be a case of resultant moral luck.[100] The view that resultant moral luck exists thus entails that the lucky result of an action determines, at least in part, an agent's degree of moral desert.
2. Circumstantial luck; or luck in the morally relevant features of our surrounding context and the situational moral tests with which we are presented. An example of circumstantial moral luck is the moral test encountered by the citizens of Nazi Germany.[101] These citizens had the opportunity to behave morally by opposing the Nazi regime, or to behave immorally by supporting it. Yet citizens of other nations, such as Argentina, were not subjected to this same moral test. If we correctly regard a Nazi collaborator to be more morally culpable than an Argentine who *would* have collaborated had they been living in Nazi Germany, we have a case of circumstantial moral luck.

---

[95] Bernard Williams, 'Moral Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 35-55.
[96] Nagel, 'Moral Luck', pp. 57-71.
[97] Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[98] Nagel, 'Moral Luck', pp. 60-69. See also: Enoch, 'Moral Luck and the Law', pp. 43-44; and Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[99] I have excluded a discussion of Nagel's fourth category of moral luck; namely, causal luck. Causal luck refers to the determination of our will by 'antecedent circumstances': see Nagel, 'Moral Luck', pp. 60; 66. I do not discuss this type of moral luck here, because it inevitably raises the problem of free will or determinism. An analysis of the free will debate lies beyond the scope of this thesis. Note that David Enoch also excludes a discussion of causal luck in his paper, for the same reason: Enoch, 'Moral Luck and the Law', pp. 43; 52.
[100] Enoch, 'Moral Luck and the Law', p. 43; Nagel, 'Moral Luck', p. 61; Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[101] Nagel, 'Moral Luck', pp. 58-59; 65-66; Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.

3. Constitutive luck; or luck in the kind of person we are. Constitutive moral luck occurs if we correctly form a moral judgment of an agent with respect to personality traits or dispositions that are beyond their control. We have a case of constitutive moral luck if we correctly blame a person for being cowardly, even though their possession of this trait is ultimately the product of their genetic makeup.[102]

The above discussion indicates that there are two key positions adopted within the moral luck debate. The first position is to deny that luck makes a difference to moral responsibility. This amounts to the philosophical view that moral luck does not exist. Adherents to this view, whom I term 'moral luck sceptics', affirm the intuition contained in the Control Principle. The anti-moral luck view hence implies that we should revise our moral judgments to exclude the impact of luck (and that the murderer and attempted murderer are equally morally culpable). The second key position adopted in the moral luck debate is to accept that luck does make a difference to moral responsibility. Adherents to this view argue that the retributive impact of luck is accurately reflected in our intuitive moral judgments (and that there is therefore no need to revise these judgments to exclude the impact of luck). In philosophical terms, this amounts to the view that moral luck exists (call adherents to this view 'moral luck believers'). Note that philosophers are not always uniform in their denial or acceptance of all types of moral luck. Philosophers may accept some types of moral luck, whilst denying others.[103]

I turn now to a review of the key arguments launched within the moral luck debate. My review of this debate focuses primarily on arguments about the existence of resultant moral luck. I describe two arguments lodged by the moral luck believer to support the existence of moral luck. I then examine the moral luck sceptic's response to these arguments. Note that other arguments have been raised in the moral luck debate, but that I lack the space to discuss them here.[104]

2.1.1. Argument 1: Moral Luck Best Explains Our Particular Judgments

The first major argument lodged by the moral luck believer to support the existence of moral luck - that is, to support the view that luck makes a real difference to moral responsibility - is

[102] Nagel, 'Moral Luck', pp. 64-65; Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[103] Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[104] Notably, I have excluded discussion of Darren Domsky's recent psychological argument against moral luck: see Darren Domsky, 'There is No Door: Finally Solving the Problem of Moral Luck', *The Journal of Philosophy* 101 (9), 2004: 445-464. I also lack space to discuss Margaret Urban Walker's argument supporting moral luck: see Margaret Urban Walker, 'Moral Luck and the Virtues of Impure Agency', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 235-250.

that the existence of moral luck best explains our intuitive moral judgments in particular cases.[105] In the case of resultant luck, the moral luck believer contends that the reason we find it so intuitive to consider the causation of harm to be more culpable than the failure to cause harm is that the 'lucky' (that is, the uncontrollable) result of our actions - the actual wrongdoing we commit - *is* an independent determinant of our moral responsibility.[106] The moral luck believer holds that the best explanation of why lucky results *appear* to impact our ordinary moral judgments is that lucky results *do*, in fact, make a difference to moral responsibility (that is, that resultant moral luck actually does exist).

Michael Moore asserts that the real existence of resultant moral luck is the best explanation of many of our particular moral judgments and experiences.[107] These particular judgments and experiences include our tendency to judge that greater punishment is deserved in cases where harm is caused. Moore states that we tend to consider more punishment to be deserved when an attempt to cause harm succeeds, as opposed to when it fails. He claims that the best explanation for this intuitive response is that 'lucky' results do in fact determine our degree of moral desert.[108] Additionally, Moore argues that most of us feel greater resentment towards agents who successfully cause harm; that we tend to experience greater guilt when we are causally responsible for harmful results; and that we feel that the consequences of our decisions determine, at least partly, whether those decisions are morally justified.[109] Again, Moore maintains that the best explanation for these intuitive responses to the causation of harm is that the principle that lucky results matter to moral responsibility - namely, the principle that resultant moral luck exists - is, in fact, true.

2.1.2. Response: Explaining Away the Moral Luck Intuition

The main response that the moral luck sceptic makes to the contention that the existence of moral luck is supported by our particular intuitive judgments is that which I have termed the 'Explaining Away' response.[110] The Explaining Away response rejects the premise that our

---

[105] See Michael Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (New York, Oxford University Press, 2009), pp. 29-30; and Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (New York: Oxford University Press, 1997), pp. 225-233.
[106] Moore states that the other determining component of moral responsibility is our degree of culpability: Moore, *Placing Blame*, p. 226.
[107] Moore, *Placing Blame*, pp. 225-233.
[108] Moore, *Placing Blame*, pp. 225-226.
[109] Moore, *Placing Blame*, pp. 229-233; Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[110] Other responses employed by the moral luck sceptic are the 'Chicken or Egg Response' (see, for example, Stephen Morse, 'Reason, Results, and Criminal Responsibility', *University of Illinois Law Review*, 2004: 363-444, see pp. 416-417); and the argument that the Control Principle (not the moral luck intuition) best explains our particular moral judgments (see, for example, Stephen Sverdlik, 'Crime and Moral Luck', in Daniel Statman

particular judgments do embody a commitment to moral luck. There are two versions of this response. The first version explains away the apparent manifestation of moral luck in our particular judgments by distinguishing multiple notions of blameworthiness.[111] For example, Thomson[112] argues that agents are blameworthy in two senses (*blame-1* and *blame-2*), and that it is only the second sense of blame that matters to moral responsibility. Agents are to blame in the sense of '*blame-1*' for their actual causation of a negative event through their performance of some wrongful act. *Blame-1* is thus impacted by luck: if I drive negligently and hit someone, I am causally more to blame than I would be if I had not hit someone. However, Thomson holds that agents are blameworthy in the second sense only to the extent that we have reason to consider them bad people. This notion of blame is immune to luck: two agents driving equally negligently have displayed equally poor characters, and so are equally to blame in the sense of '*blame-2*', even if they cause different results.

The second version of the sceptic's response is to explain away the apparent incorporation of moral luck into our particular judgments by distinguishing moral blameworthiness from the appropriateness of 'blame-related reactions'.[113]Proponents of this view claim that moral blameworthiness itself is not subject to luck, but that our blame-related reactions - such as our practices of punishment, social condemnation, and feelings of guilt or resentment -[114] are impacted by factors beyond our control. For example, Richards[115] claims that our personal experience of greater guilt when we cause actual harm, and our experience of greater resentment towards harm causers, should be regarded as non-retributive emotional reactions to the harm caused, not as a moral judgment of the causing agent. Hence, he argues that we would experience great distress upon encountering the 'neighbour girl' who dropped our baby and broke its neck, despite being aware that it was not the girl's fault that the baby fell.[116] Richards asserts that our experience of this emotional reaction constitutes our non-retributive response to the harm caused, rather than a retributive judgment that the agent deserves moral blame. He therefore concludes that it is not our moral judgments that are subject to luck, but our non-retributive emotional reactions to the resulting harm.

(ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 181-194). These other responses employed by the sceptic do not add to the debate in a manner relevant to the present paper, so I have elected not to discuss them.

[111] See Judith Jarvis Thomson, 'Morality and Bad Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 195-215; and Zimmerman, 'Taking Luck Seriously', pp. 553-576.

[112] Thomson, 'Morality and Bad Luck', pp. 200-203.

[113] David Enoch and Andrei Marmor, 'The Case Against Moral Luck', *Law and Philosophy* 26 (4), 2007: 405-436, see p. 412.

[114] Enoch and Marmor, 'The Case Against Moral Luck', p. 412.

[115] Norvin Richards, 'Luck and Desert', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 167-180, see pp. 177-180. See also Thomson, 'Morality and Bad Luck', p. 213.

[116] Richards, 'Luck and Desert', pp. 178-179.

Moral luck sceptics have also contended that it is not our moral desert, but rather the epistemic clarity of our desert that is subject to luck.[117] For example, Richards states that we may not have sufficiently clear evidence of a reckless driver's desert until the driver actually injures someone.[118] It is only then that the driver's culpable mental state is revealed to us, and hence only then that we may justifiably treat the driver the way he deserves to be treated by engaging in the blame-related reactions of social condemnation and punishment. Accordingly, it is claimed that the lucky results of our actions do not determine our moral responsibility, but simply provide evidence of an agent's culpable mental state.

In my view, both the moral luck believer's argument and the sceptic's response to this argument are reducible to the mere re-statement of the fundamental moral intuitions at stake within the moral luck debate. To support the view that moral luck exists, the moral luck believer cites our intuitive moral judgments and experiences, which appear to accord moral significance to 'lucky' results. In response to this, the sceptic attempts to explain away the apparent role of luck within our moral judgments, thus upholding the intuition contained in the Control Principle. The moral luck debate may hence be viewed as having reached a form of stalemate,[119] insofar as both sceptic and believer appeal to fundamental, yet conflicting, moral intuitions to support their position.

2.1.3. Argument 2: Attacking the Control Principle

The moral luck sceptic - the person who claims that luck does not make a difference to the moral or retributive status of agents - embraces the Control Principle. To recap, the Control Principle mandates that moral blameworthiness is not impacted by factors beyond our control. It follows from this that two agents must be considered equally morally blameworthy if the only differences between them are due to factors beyond their control.[120]

The moral luck believer, who maintains that luck does affect our degree of moral blameworthiness, may respond to the moral luck sceptic's claim by launching an attack upon the Control Principle itself. In a nutshell, the moral luck believer argues that a consistent application of the Control Principle produces absurd results. Note that this argument is

---

[117] See Nicholas Rescher, 'Moral Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 141-166, see pp. 154-156; Richards, 'Luck and Desert', pp. 170-172. Recently, this argument has been made by Neil Levy, who adds his own evolutionary twist to the mix: Neil Levy, Agency and Moral Cognition Network Meeting, Macquarie University, Dissolving the Puzzle of Resultant Moral Luck, May 2014.
[118] Richards, 'Luck and Desert', p. 171.
[119] Enoch, 'Moral Luck and the Law', p. 48; Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[120] Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.

targeted at a particular kind of moral luck sceptic. This sceptic denies the existence of resultant moral luck *only*. He or she does not deny that circumstantial and constitutive moral luck exist. In other words, this sceptic holds that lucky results *cannot* make a difference to moral responsibility, whilst simultaneously claiming that luck in an agent's formative circumstances and constitution *does* affect an agent's moral desert. Not all moral luck sceptics subscribe to a mixed application of the Control Principle. Some sceptics, such as Michael Zimmerman,[121] deny the existence of all types of moral luck. Zimmerman asserts that the results of our actions, as well as our circumstances and constitution, are all beyond an agent's control. He thus contends that a strict application of the Control Principle entails that we must revise our moral judgments to exclude the impact of resultant, circumstantial and constitutive luck.

The view that we must revise our moral judgments to exclude the impact of all types of moral luck appears impractical insofar as it threatens to reduce our moral responsibility practices to an "extensionless point".[122] If results, circumstances and constitution cannot impact our moral responsibility because all these factors are strictly beyond our control, it is arguable that we cannot be held morally responsible for anything, or at least that the attribution of moral responsibility to an agent would become almost practically impossible. To avoid this radical conclusion, some moral luck sceptics restrict their application of the Control Principle to the area of results. They seek to draw a line between refusing to accept the impact of resultant moral luck, and accepting the moral impact of other types of luck that precede the formation of our moral choices.[123]

Moral luck believers, such as Michael Moore,[124] claim that it is incoherent to deny the existence of resultant moral luck, whilst accepting the impact of other types of moral luck. According to Moore, our lack of complete causal control over the results of our actions is matched entirely by our inability to completely determine our surrounding circumstances and the nature of our constitution. Moore thus maintains that if we argue that results are irrelevant to moral blameworthiness because we cannot control them, we must also rationally conclude that the other forms of moral luck, being equally beyond our control, should be excluded from calculations of moral blame. He therefore concludes that the moral luck sceptic cannot draw a rational line in refusing to accept the impact of moral luck: the sceptic must either accept or deny all types of moral luck. As stated, the uniform denial of moral luck may lead, in Moore's

[121] Zimmerman, 'Taking Luck Seriously', pp. 553-576.
[122] Nagel, 'Moral Luck', p. 66.
[123] Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[124] Moore, *Causation and Responsibility*, p. 25; Moore, *Placing Blame*, pp. 233-246.

view, to the impractical conclusion that we cannot be held morally responsible for anything,[125] or in my view to the equally impractical conclusion that any attribution of moral responsibility becomes an impossibly complex exercise. To avoid moral scepticism, it hence seems that we must accept that all types of moral luck exist (and so reject the Control Principle entirely).

2.1.4. Response: Drawing a Line

The moral luck sceptic (the person who believes we are only morally responsible for factors within our control, and that any 'luck' affecting the consequences of our actions has no moral impact) may respond to the moral luck believer's attack on the Control Principle by attempting to 'draw a line'[126] between the rejection of resultant moral luck and the acceptance of other forms of moral luck.[127] This requires the sceptic to construct an argument that distinguishes a lack of control over the results of our choices from a lack of control over the factors determining the formation of our choices. An example of such an argument has been articulated by Stephen Morse.[128]

Morse claims that our moral responsibility practices are underpinned by rational capacities. He states that even if we are causally determined by factors beyond our control - such as our formative circumstances and constitution - we may still be held morally responsible for our actions if we retain a minimal capacity to be guided by reason.[129] Hence, Morse states that although we may not have determined the circumstances or character according to which we made a choice, if it is true that we made the choice as a rational agent, then we are rightly held morally responsible for it. Morse thus accepts the impact of circumstantial and constitutive moral luck upon us, because he claims that these types of luck do not undermine our capacity to make rational choices for which we should be held morally responsible.

Yet Morse maintains that while our chosen actions are guided by reason (and so can be attributed to us as moral agents), the results of our actions cannot be guided by reason, and so

---

[125] Moore, *Placing Blame*, p. 234.
[126] Nelkin, 'Moral Luck', URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.
[127] Of course, the moral luck sceptic may also respond by accepting the allegedly extreme implications of a consistent application of the Control Principle. In other words, the sceptic may accept that the Control Principle entails that we must revise our moral judgments to exclude the impact of all types of moral luck (including circumstantial and constitutive luck), and that this revision of our moral judgments is unavoidably radical. As stated above, this is the approach adopted by Michael Zimmerman: Zimmerman, 'Taking Luck Seriously', pp. 553-576.
[128] Morse, 'Reason, Results, and Criminal Responsibility', pp. 383-384. For other arguments, see: Sanford Kadish, 'Forward: The Criminal Law and the Luck of the Draw', *The Journal of Criminal Law and Criminology* 84 (4), 1994: 679-702, see p. 690; and David Lewis, 'The Punishment that Leaves Something to Chance', *Philosophy and Public Affairs* 18 (1), 1989: 53-67, see pp. 55-56.
[129] Morse, 'Reason, Results, and Criminal Responsibility', p. 383.

lie beyond the scope of our moral desert.[130] Morse argues the results of our choices do not add to our moral responsibility above and beyond our moral responsibility for the choices themselves. This is because results may be influenced by contingencies - 'luck' - beyond our reason or control. He hence maintains that we must revise our moral judgments to exclude the impact of lucky results. Morse therefore denies that luck in outcome (resultant moral luck) is relevant to our moral responsibility, but accepts that other categories of moral luck (circumstantial and constitutive luck) may impact our moral desert.

2.1.5. Conclusion on Moral Luck

As this brief survey reveals, in essence the moral luck debate may be framed as a clash of fundamental moral intuitions. The moral luck believer asserts the strength of the moral luck intuition by attacking the Control Principle. In response, the sceptic defends the control intuition by arguing that it does not produce absurd implications. It thus seems to me that the moral luck debate may be so close to 'moral bedrock'[131] that neither position will ever come out on top. In other words, I maintain that the moral luck debate may ultimately be irresolvable.

One consequence of this conclusion is that the outcome of the moral luck debate - which I regard as indeterminate - cannot automatically imply a resolution to the problem of legal luck. However, any reasoned assessment of the link (if any) between moral luck and legal luck cannot proceed without at least some understanding of the parameters of the moral luck problem. We cannot determine whether legal luck is justified in the area of criminal attempt, and the extent to which the existence of moral luck is relevant to this, without first establishing whether the moral luck debate can conclusively be resolved one way or the other.

Having examined some of the key arguments in the moral luck debate, I have concluded that the question of whether moral luck exists cannot be definitively determined. For this reason, I merely assume a view about the existence of moral luck, and trace the implications of this view for our conclusions about the justifiability of legal luck. This is the course I undertake in the following chapter, where I consider the justifiability of legal luck in the area of criminal attempt. To foreshadow, I assume the view that moral luck does not exist, and then consider the extent to which this view challenges the present penal distinction between last act attempts and completed crimes. As discussed in chapter three, I assume the sceptical position because it poses a more interesting challenge to current legal practice than if we assumed the view that

[130] Morse, 'Reason, Results, and Criminal Responsibility', pp. 383-384.
[131] Enoch, 'Moral Luck and the Law', p. 48.

moral luck does exist (which provides straightforward retributive support for the penal distinction between last act attempts and completions).

2.2. Connecting Moral Luck and Legal Luck

In this section, I explore the connection between moral luck and legal luck within the context of the criminal law. One of the few scholars who has directly considered the relation between moral luck and legal luck - and who has formulated his own premise with respect to this relation - is David Enoch.[132] Enoch contends that philosophical arguments about the justifiability of legal luck tend to presuppose one of three main premises about the connection between the moral luck and legal luck debates.[133] I outline these three premises briefly below, and explain how they may be grounded in the broader theories of criminal punishment discussed in chapter one.

The first premise about the relation between moral luck and legal luck posits a direct connection between the two debates. According to this view, the existence (or non-existence) of moral luck automatically determines the justifiability of legal luck.[134] This premise is underpinned by a positive retributivist theory of punishment. Positive retributivism contends that criminal responsibility is determined solely by moral blameworthiness. It follows from a positive retributivist account that the question of whether moral luck exists - that is, of whether moral blameworthiness is impacted by factors beyond our control - directly determines the question of whether legal responsibility should also be impacted by factors beyond our control. Hence, under a positive retributivist theory, the view that moral luck exists - and that moral responsibility is therefore impacted by luck - straightforwardly implies that legal luck is justified. And the inverse argument is true with respect to the denial of moral luck. Positive retributivism thus entails that the solution to the legal luck debate lies in our answer to the moral luck problem. Accordingly, the theory holds that the justifiability of legal luck is determined solely by whether moral luck exists.

The second premise about the relation between moral luck and legal luck is that the two debates are entirely unrelated. Proponents of this position argue that conclusions about the existence of moral luck are irrelevant to determining the justifiability of legal luck.[135] This

[132] Enoch, 'Luck between Morality, Law, and Justice', pp. 31-38.
[133] Enoch, 'Moral Luck and the Law', pp. 48-52.
[134] Various scholars assume that a direct connection holds between the moral luck and legal luck debates. See, for example: Katz, 'Why the Successful Assassin is More Wicked than the Unsuccessful One', pp. 791-812; and Zimmerman, 'Taking Luck Seriously', p. 571.
[135] Enoch, 'Moral Luck and the Law', pp. 51-52.

view of the connection between moral luck and legal luck may be grounded in a pure consequentialist theory of punishment.[136] Pure consequentialists claim that criminal responsibility and punishment is justified solely by its promotion of beneficial consequences. They thus consider moral blameworthiness to be entirely irrelevant to criminal responsibility. Under a pure consequentialist account, then, the question of whether an offender's degree of moral responsibility is impacted by luck is wholly distinct from the question of whether their criminal responsibility should also be subject to luck. A pure consequentialist would hold that even if moral luck does not exist - which entails that factors beyond our control, such as the lucky results of our actions, do not affect our degree of moral blameworthiness - it does not necessarily follow that legal luck is unjustified. Rather, the justifiability of legal luck is a separate issue that should be determined solely by non-retributive considerations, such as whether the retention of luck within our legal system has overriding beneficial consequences.

The third premise about the relation between moral luck and legal luck is that the two debates share a partial connection.[137] According to this premise, the justifiability of legal luck is determined by both retributive and non-retributive considerations. This view is embedded in a mixed theory of criminal punishment. Side-constrained mixed theorists hold that criminal punishment is justified ultimately by its promotion of non-retributive aims (such as deterrence). Yet they submit also that the pursuit of these non-retributive aims is limited fundamentally by an offender's degree of moral culpability. It thus follows from a mixed account that conclusions about the existence of moral luck are only partly relevant to the justifiability of legal luck. They are relevant insofar as they determine our views about the nature and extent of moral responsibility - namely, whether moral responsibility is impacted by luck - and so impose retributive limits upon the range of sanctions appropriate to an offence.

I adhere to a mixed view of the connection between criminal responsibility and moral desert. I hence adopt the third premise about the link between the moral luck and legal luck debates. I maintain that the existence of moral luck and the justifiability of legal luck are partially connected, because criminal responsibility is determined by both retributive and non-

[136] Although note that this premise does not necessarily have to be grounded in pure consequentialism. See, for example, the work of Arthur Ripstein, who grounds this same premise in a non-instrumentalist theory of punishment: Ripstein, 'Closing the Gap', pp. 82-83.

[137] Scholars who appear to adopt this assumption include: Ashworth, 'Criminal Attempts', pp. 726-772; Kadish, 'Forward', pp. 679-702; Morse, 'Reason, Results, and Criminal Responsibility', pp. 363-444; Richard Parker, 'Blame, Punishment and the Role of Result', *American Philosophical Quarterly* 21 (3), 1984: 269-276; and Schulhofer, 'Harm and Punishment', pp. 1497-1607.

retributive considerations. Note that in adopting this mixed premise, I subscribe specifically to the framework inherent in Yaffe's mixed theory of criminal punishment.[138]

Yaffe's mixed theory implies that the existence or non-existence of moral luck is relevant to the justifiability of legal luck insofar as it determines the range of sanctions that may justly be imposed for the commission of an offence.[139] Say we adopt the view that moral luck does not exist. Under Yaffe's account, the non-existence of moral luck entails that two offenders who culpably perform the same action, but (due to factors beyond their control) cause different results, are equally morally blameworthy. They thus deserve the same degree of censure for their crimes. Yet Yaffe contends that a fixed level of censure may be expressed through a range of permissible sanctions: precisely where in the range an offender should be sanctioned may be determined by consequentialist considerations. It follows from this that two offenders of equal moral culpability may receive different punishments on consequentialist grounds, so long as these punishments do not exceed the limits imposed by their shared degree of moral desert.[140] Hence, Yaffe's account implies that it may be morally permissible to uphold legal luck on the basis of non-retributive factors, even if we adopt the view that moral luck does not exist. The reverse conclusion is, of course, true with respect to the view that moral luck does exist: there may be valid non-retributive reasons to exclude the impact of legal luck, even if we think that there is moral luck.

This mixed view of the connection between moral luck and legal luck will inform my assessment in the following chapter of the justifiability of legal luck in the area of criminal attempt. I intend to use Yaffe's account to determine whether the penal distinction between last act attempts and completed crimes is justified, assuming the view that moral luck does not exist. My theoretical discussion in this chapter of the relation between the moral luck and legal luck debates will hence have important practical implications for my analysis of the case study described in the introduction to this thesis.

2.3. Concluding Comments

In this chapter, I examined the specific connection between the moral luck and legal luck debates. This is a connection that, I claim, remains under-discussed in the philosophical literature. I commenced the chapter with a review of the moral luck debate. I argued that the debate is reducible to a clash of fundamental moral intuitions, and so may ultimately be

[138] Yaffe, *Attempts*, pp. 313-316.
[139] Yaffe, *Attempts*, pp. 322-324.
[140] Yaffe, *Attempts*, p. 315.

irresolvable. I thus intend simply to assume a particular view about the existence of moral luck for the purposes of the following chapter.

In the latter part of the chapter, I outlined three main premises about the relation between the moral luck and legal luck debates. The first premise, underpinned by positive retributivism, holds that the moral luck and legal luck debates are directly connected. The second premise, grounded in pure consequentialism, provides that the moral luck and legal luck debates are entirely unrelated. The third premise, derived from a mixed theory of punishment, states that moral luck and legal luck are partly connected insofar as retributive and non-retributive considerations are both relevant to criminal responsibility.

I adopt a mixed view of the connection between the moral luck and legal luck debates (and so adhere to the third premise listed above). In adhering to this mixed view, I claim that conclusions about the existence of moral luck set retributive limits upon a range of sanctions that may justly be imposed for an offence. However, non-retributive considerations are also relevant to the justifiability of legal luck insofar as they may determine the precise sanction to be imposed within the appropriate punitive range. The existence or non-existence of moral luck is hence not the sole determinant of whether legal luck is justified. This mixed view of the connection between moral luck and legal luck implies that it is consistent to accept the justifiability of legal luck despite holding the view that moral luck does not exist. This implication becomes relevant to my analysis of the justifiability of legal luck within attempt law in the following chapter.

Chapter 3: Evaluating Legal Luck in Attempt Law

As Joel Feinberg[141] once said, the justifiability of legal luck in the area of criminal attempt is a question that every "bona fide philosopher of law" should try to address, at least once. This question is whether, other things being equal, we are justified in distinguishing the criminal punishment of offenders who successfully complete crimes, and offenders who perform what they believe is the final act necessary to complete a crime, yet fail in their attempt solely due to factors beyond their control (call these 'last act attempters').[142]

The justifiability of the penal distinction between last act attempts and completed crimes is called into question by the factual case study raised in the introduction to this thesis.[143] In this case study, the defendant (Carromero) committed a last act attempt on the victim, Pugh's, life. When this attempt failed due to 'luck', that is, factors beyond his control, Carromero was convicted of the lesser crime of attempt. However when his attempt succeeded through chance some thirty years later, Carromero was re-arrested and charged with murder. In upholding the indictment, the Supreme Court of Bronx County affirmed the impact of resultant legal luck in the area of criminal law. They stated that the element of resultant death distinguishes the crimes of murder and attempt, and that Carromero's additional prosecution was therefore lawful.

Contrastingly, a recent Australian attempt case[144] restricted the impact of resultant legal luck. In 2005, Tanya Herman attempted to murder her lover's wife, Maria Korp, through strangulation. Despite her best efforts, Herman's attempt initially failed, and Korp was found barely alive in the boot of a car. Korp was taken to hospital, where she was placed on life support. In the meantime, Herman pleaded guilty to attempted murder, and was sentenced to twelve years in prison. Soon after Herman was sentenced, Korp died in hospital from the injuries Herman inflicted. Despite the eventual success of her attempt, Herman's charge was not upgraded to murder. The ultimate result of her attempt on Korp's life hence did not affect her degree of criminal responsibility (and so the impact of legal luck was restricted in her case).

These two case studies present an interesting contrast with respect to the impact of legal luck within attempt law. Whilst the ultimate result of Carromero's attempt altered his liability for

[141] Feinberg, 'Equal Punishment for Failed Attempts', p. 117.
[142] Yaffe, *Attempts*, p. 310.
[143] *People v Carromero* 2014 NY Slip Op 50714(U).
[144] *R v Herman* [2005] VSC 234.

criminal prosecution, the ultimate result of Herman's attempt did not affect her degree of criminal responsibility. Which of these responses to the impact of legal luck is the most justifiable? My answer to this question is informed by my mixed view of the connection between moral luck and legal luck, as grounded in Yaffe's mixed theory of criminal punishment. In line with Yaffe's theory, I argue that the justifiability of legal luck within criminal attempt law is determined by the balancing of retributive (blameworthiness-related) and non-retributive (non-blameworthiness-related) considerations.

For the purpose of this chapter, I assume the retributive position that moral luck does not exist, and hence that the moral culpability of Carromero and Herman was established when they attempted to murder their victims, irrespective of the ultimate outcome of their actions.[145] If this assumption is not made, and the outcomes of intended actions are relevant to moral culpability - that is, if moral luck exists - then morality provides a reasonably direct basis of support for legal distinctions between last act attempters and completers (in other words, the existence of moral luck tends to support the existence and justifiability of legal luck). However, if moral luck does not exist, then the justification for legal luck must find its support in non-retributive (although not necessarily non-moral) foundations.

I commence this chapter with a brief review of Australian attempt law. I then conduct a small-scale assessment of whether attempt law ought to be reformed to exclude the impact of legal luck. In conducting this assessment, I weigh the retributive view that moral luck does not exist against two key non-retributive considerations to determine whether, on the balance of reasons, attempt law ought to be reformed to exclude the impact of legal luck. I conclude in the final section that a luck-based penal distinction between last act attempts and completed crimes is justified. Note that this conclusion is merely provisional because I lack the space to discuss all considerations potentially relevant to the justifiability of legal luck within attempt law.

3.1. Australian Attempt Law

Before we can assess whether attempt law ought to be reformed to exclude legal luck, and in what way it may conceivably be reformed, we must first outline the present state of the law of attempt. My discussion in this section focuses mainly on the law of NSW.

[145] I adopt this position not because it constitutes my actual philosophical conclusion with respect to the existence of moral luck, but because it appears to challenge the retention of a penal distinction between last act attempts and completed crimes. Note also that the majority of philosophers contributing to the legal luck debate subscribe to the view that moral luck does not exist: see Moore, *Placing Blame*, pp. 193-195.

Attempt is an offence arising at common law. It requires proof of both mens rea (fault element), and actus reus (physical element). As a general principle, the requisite mens rea for attempt is an intention to commit the complete offence.[146] An offender cannot be convicted of attempted murder, for example, if they fire a gun with reckless indifference as to whether death will be caused. The offender must have *intended* to commit murder to be convicted of attempted murder.[147]

To commit an attempt, an agent must also have performed acts to further their intention to complete a crime.[148] The relevant issue to be determined by courts and juries is at precisely what point, in a series of acts, an agent has performed the actus reus for attempt. That is, they must distinguish acts of mere *preparation* (which do not constitute attempt), and acts of *perpetration* (which are attempt).[149] Courts have developed no single test for determining this distinction.[150] Generally, it appears to be established that an agent's action must be "sufficiently proximate" to the commission of the crime to constitute an attempt, and the question of whether an act is sufficiently proximate ultimately depends on the facts of each case.[151]

The penalty for attempt is prescribed by legislation. In NSW, the majority of attempt offences incur the same maximum penalty as that incurred by the corresponding completed offence.[152] Generally, then, the legislation operates to exclude the impact of legal luck by raising the penalty for attempt to the same penalty as that incurred by completed crimes. Yet the legislation does admit of some exceptions,[153] the most notable of which is the difference in penalty for murder and attempted murder (stated in the introduction).[154] Additionally, it should be noted that although legislation fixes the maximum penalty for attempt at the same

---

[146] *Alister* (1984) 154 CLR 404, 421-3 (Gibbs CJ); *Britten v Alpogut* [1987] VR 929; *DPP v Stonehouse* [1978] AC 55, 68; *Knight v The Queen* (1992) 175 CLR 495; *McGhee* (1995) 130 ALR 142, 144 (Brennan J); *Mohan* [1976] QB 1. The exception to this rule is attempted rape. Intention is not required to commit this offence: *Evans* (1987) 48 SASR 35; *Khan* [1990] 1 WLR 813. For a theoretical explanation of why intention is necessary to commit an attempt, see: Yaffe, *Attempts*, pp. 47-71.

[147] Interestingly, this means that the mens rea for attempt is narrower than the mens rea for the corresponding completed offence. An offender firing a gun with reckless indifference will be guilty of murder if the victim dies, but cannot be convicted of attempted murder if death does not result: *Alister* (1984) 154 CLR 404, 421-3 (Gibbs CJ); *Knight v The Queen* (1992) 175 CLR 495.

[148] For a theoretical account of acting upon intentions, see: Yaffe, *Attempts*, pp. 90-98.

[149] Brown et al, *Criminal Laws*, pp. 1079-1080.

[150] Courts have laid down a number of formulas, including the 'last act test' (see *R v Eagleton* (1855) 6 Cox CC 559, 571); the 'unequivocality test' (*R v Barker* [1924] NZLR 865, 874); and the 'substantial step test' (*DPP v Stonehouse* [1978] AC 55). For a theoretical discussion, see: Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Sydney: Thomson Reuters (Professional) Australia Limited, 2010), pp. 451-454.

[151] *DPP v Stonehouse* [1978] AC 55. See also: Brown et al, *Criminal Laws*, p. 1080.

[152] *Crimes Act 1900* (NSW) s 344A. This is the same at the federal level: *Criminal Code Act 1995* (Cth) s 11.1.

[153] Some of the lesser known exceptions include: attempted incest (*Crimes Act 1900* (NSW) s 78B; compare with s 78A); and attempted bestiality (*Crimes Act 1900* (NSW) s 80; compare with s 79).

[154] *Crimes Act 1900* (NSW) ss 19A (murder), 27-30 (penalty for attempted murder).

level as that for the completed offence, it does not mandate that judges must impose the maximum sentence. In practice, judges tend to impose more lenient sentences for attempts than for completed crimes.[155]Legal luck hence appears to retain a practical influence on the sentencing of attempts, despite its restricted impact within the legislation.

It is clear, then, that Australian law recognises legal luck: first, by drawing a distinction between the crime committed by an attempter and a completer of a criminal act; second, by generally imposing a lesser sentence on the attempter than the completer.

3.2. Should we Reform Attempt Law to Exclude Legal Luck?

3.2.1. The Moral Luck Issue

At first glance, the view that moral luck does not exist seems to provide a strong retributive reason wholly to collapse the penal distinction between last act attempts and completed crimes. If, as the anti-moral luck view maintains, the results of our actions have no impact upon our moral responsibility, it follows that the last act attempter and the successful completer are equally morally blameworthy insofar as they perform the same action with the same degree of moral culpability. And to the extent that these two types of offender share the same degree of moral desert in performing identical acts, it may seem only fair that they incur the same level of sanction. This retributive idea appeals to the intuitive 'principle of equal treatment',[156] which mandates that, as a matter of justice, like cases ought to be treated alike. Note that adherence to the principle of equal treatment requires that we equalise the punishment of last act attempts and completed crimes in one of two ways. We must either: 1) lower the penalty for completions to the same level as that accorded to last act attempts; or 2) raise the penalty for last act attempts to the same level as that incurred by completions, thereby effectively removing the distinction between the two crimes.[157]

Of course, if we adopt the position that moral luck exists (which is not the position assumed here), it follows that the results of our actions impact our degree of moral responsibility, and that there is hence a moral or retributive distinction between the last act attempter and completer. The view that moral luck exists thus tends to provide a retributive foundation for

[155] Brown et al, *Criminal Laws*, p. 1077.
[156] Ashworth, 'Criminal Attempts', pp. 746-748; Schulhofer, 'Harm and Punishment', pp. 1562-1569.
[157] To technically remove the distinction at the level of criminal liability (rather than at the level of punishment), one could abolish the separate categories of attempts and completed crimes, and replace them with a single criminal offence. For example, as noted in the introductory footnotes, Feinberg suggests that we could abolish the crimes of murder and attempted murder, and replace them with the single crime of 'Wrongful Homicidal Behaviour': see Feinberg, 'Equal Punishment for Failed Attempts', pp. 119-121.

the present penal distinction between last act attempts and completed crimes. That is, it provides reasonably direct support for the justifiability of legal luck within attempt law. Whilst our analysis of the justifiability of legal luck would not end here - as discussed below, it is also necessary to consider whether legal luck is justified on the balance of non-retributive considerations - it is more likely that we will conclude that the penal distinction between last act attempts and completed crimes is justified, if we hold the view that moral luck exists.

However, even if moral luck does not exist, and there is no moral distinction between the last act attempter and the completer of a crime, it does not automatically follow that legal luck should not be recognised. In other words, even if there is no moral distinction between attempt and completion, we might still argue that a penal distinction between the two categories is entirely justifiable. As discussed in previous chapters, I adhere to a mixed view of the connection between moral luck and legal luck. This mixed view is grounded in Yaffe's theory of criminal punishment. Contrary to the principle of equal treatment, Yaffe holds that a fixed degree of moral desert may be expressed through a range of sanctions. Under Yaffe's mixed account, the view that moral luck does not exist - and hence that there is no moral distinction between the attempter and completer - does not mandate that last act attempts and completed crimes should be subject to the same penalty. Rather, it entails that they be subject to the same maximum and minimum penalties within a shared range of sanctions. Within this shared punitive range, Yaffe claims that it may be morally (that is, retributively) permissible to distinguish the punishment of equally culpable offenders on the basis of valid non-retributive considerations (so long as the punishment of these offenders does not exceed the penal limits imposed by their shared degree of moral desert). I therefore contend that it may be morally permissible to uphold legal luck in the area of criminal attempt for non-retributive reasons, even if we assume the retributive view that moral luck does not exist. In other words, I assert that the principle of equal treatment may justifiably be compromised if we have valid non-retributive reasons to retain a penal distinction between completed crimes and last act attempts.

What are some of the non-retributive considerations that might justify a luck-based penal distinction between last act attempts and completions?[158] I raise two important non-retributive

[158] Non-retributive considerations raised in the literature include: deterrence; economy of punishment; the epistemic value of results; public support for the current distinction between attempts and completions; the role of results in limiting bias in administrative discretion; and the importance of acknowledging the loss suffered by victim and society when a crime is completed. These non-retributive considerations are discussed across a range of papers. See, for example: Ashworth, 'Criminal Attempts', pp. 726-772; Davis, 'Why Attempts Deserve Less Punishment than Complete Crimes', pp. 1-32; Duff, 'Auctions, Lotteries, and the Punishment of Attempts', pp. 1-37; Kadish, 'Forward', pp. 679-702; Morse, 'Reason, Results, and Criminal Responsibility', pp. 363-444; Parker,

considerations here. The first is the non-retributive value of acknowledging the greater loss suffered by society and victims of completed crimes. I claim that lowering the penalty for completed crimes to the same level as that accorded to last act attempts minimises the greater loss inflicted by complete offences. We thus should not seek to equalise the punishment of last act attempts and completions by lowering the penalty for the latter. The second non-retributive consideration is the principle of economy of punishment. This principle holds that punishment should be limited or economised where possible, due to its inherently burdensome nature. I argue that the principle of economy of punishment is compromised by raising the penalty for last act attempts, and that this mode of equalising the punishment of last act attempts and completions should hence also be rejected.

I therefore conclude that punishing last act attempts less than completed crimes strikes the best possible balance between the non-retributive considerations of acknowledgement of loss and economy of punishment. Whilst this conclusion entails the abandonment of the principle of equal treatment (assuming the view that moral luck does not exist), it remains morally permissible under Yaffe's mixed account. As stated, this is because Yaffe maintains that a range of sanctions may adequately express a fixed degree of moral desert. It follows from this that, on the balance of reasons assessed, legal luck is justified in the area of criminal attempt, even if we assume the retributive view that moral luck does not exist.

3.2.2. Acknowledging the Greater Loss

In this subsection, I argue that an important non-retributive reason to uphold a penal distinction between last act attempts and completed crimes is that it permits us to express or acknowledge the greater loss suffered by both victim and society when a crime is completed. I claim that by lowering the penalty for completed crimes to the same penalty as that imposed for last act attempts, we fail to accord adequate recognition to the fact that objectively greater harm is caused when a crime is successfully completed. To understand this claim, it is helpful to frame it as two separate questions. First, *what* is meant by contending that punishment permits us to 'acknowledge' the 'greater loss' suffered by society and victim? And second, *why* is it important to acknowledge this greater loss through punishment?

'Blame, Punishment and the Role of Result', pp. 269-276; and Schulhofer, 'Harm and Punishment', pp.1497-1607.

What?

In asserting that punishment permits us to 'acknowledge' the 'greater loss' suffered when a crime is successfully committed, I mean to say that it communicates the fact that a significantly worse state of affairs comes to pass when a crime succeeds. In other words, I claim that punishment plays a role in communicating the objective seriousness of the harm caused by crime.[159] In punishing last act attempts less severely than completed crimes, we communicate to both offender and society that, although the last act attempter is just as morally culpable as the completer, their failure to bring about the intended consequence makes the crime less objectively serious than it could have been.[160] It follows from this that equalising the punishment of last act attempts and completions communicates the message that the success or failure of an attempt is of no real importance to us. In punishing murder and attempted murder equally, we convey that it does not matter to the law whether Carromero or Herman succeeded in killing their victims: whether the victim lives or dies, we say, makes no real difference.[161]

The claim that punishment facilitates the acknowledgement of greater loss inflicted by complete offences should thus be interpreted as an assertion about the communicative role of punishment in conveying the objective seriousness of harm caused by crime. Note that this claim is adapted from Duff's 'communicative theory' of punishment, outlined in chapter one.[162] As was made clear in the chapter, Duff's communicative theory is retributivist: he holds that the purpose of punishment is to communicate *deserved* censure for the commission of an offence. For the purposes of this section, however, I do not adopt the retributive implications of Duff's theory. I do not propose that the harm caused by a complete offence increases an offender's moral culpability, and that completers therefore *deserve* more punishment than last act attempters. This would contradict the assumption that moral luck does not exist, from which it follows that there is no retributive difference between the last act attempter and completer. Instead, I assert simply that punishment should reflect the objective fact that more serious harm is caused when a crime is completed. It should reflect our non-retributive relief that, due to the lucky failure of an attempt, no greater harm was caused.

[159] I derive this claim from Duff's communicative theory of punishment (but, as stated below, I do not adopt the retributive implications of his theory). See: Duff, 'Auctions, Lotteries, and the Punishment of Attempts', pp. 33-37; and Duff, *Punishment, Communication, and Community*, pp. 27-30. See also: Yaffe, *Attempts*, pp. 325-326.
[160] Duff, 'Auctions, Lotteries, and the Punishment of Attempts', pp. 33-37. See also Kadish, 'Forward', p. 695.
[161] Duff, 'Auctions, Lotteries, and the Punishment of Attempts', p. 36.
[162] See: Duff, 'Auctions, Lotteries, and the Punishment of Attempts', pp. 33-37; and Duff, *Punishment, Communication, and Community*, pp. 27-30.

Why?

Having explained what is meant by the claim that punishment should acknowledge the greater loss suffered by society and victims of a complete offence, it is now necessary to address *why* acknowledging this loss is important. There is, of course, a preliminary question as to why *punishment* - as opposed to some other form of non-punitive treatment - should be used to communicate the fact that greater harm is caused when an attempt is successful.[163] This issue was discussed in the first chapter, where the use of punishment was defended on the grounds that it effectively promotes the consequentialist aim of crime prevention.[164] Assuming, then, that punishment is a consequentially justified means through which to express the greater loss suffered when a crime is completed, I consider now some of the immediate negative consequences of failing to acknowledge this greater harm.

Fundamentally, equalising the punishment of last act attempts and completed crimes is detrimental insofar as it *minimises* the greater loss suffered when a crime is completed. Failing to distinguish the punishment of last act attempts and completions by lowering the penalty for the latter sends the negative message to both victim and society that we regard the infliction of more serious harm as relatively unimportant. To the victim, and the victim's friends and family, we convey a lack of recognition and concern for the more extensive, and often irreversible, harm that the victim suffers when an attempt is successful.[165] To wider society, we communicate the message that the law places little importance upon whether an attempt succeeds or fails. Equalising the punishment of last act attempts and completions by lowering the penalty for the latter therefore minimises the objective seriousness of the greater harm suffered when a crime is committed, and so fails to do adequate justice to both the victim's rights, and society's values.

Reducing the penalty for completed crimes to the same level as that accorded to last act attempts therefore minimises the greater loss suffered when a crime succeeds. Aside from being unjust in itself, this minimisation of loss also risks the negative consequence of undermining general respect for the law. The view that the law should reflect societal consensus about the significance of harm, as opposed to the minority opinions of an

[163] Duff, *Punishment, Communication, and Community*, pp. 27-30.
[164] The claim that punishment is an effective mode of crime prevention may, of course, be disputed on empirical grounds. For an analysis of the empirical effectiveness of punishment as a mode of crime prevention, see: Ten, *Crime, Guilt, and Punishment*, pp. 8-13. It might be argued that a more effective way to prevent crime would be to redress the social problems that lead to its commission (such as social and economic disadvantage).
[165] Duff, 'Auctions, Lotteries, and the Punishment of Attempts', p. 34; Yaffe, *Attempts*, pp. 325-326.

"intellectual elite",[166] has been raised frequently in the philosophical literature.[167] It is argued that popular morality incorporates the moral luck intuition: the majority of people, it is said, consider completed crimes to be more morally culpable than last act attempts. This being the case, it is contended that the law should reflect our popular moral perceptions by upholding a penal distinction between last act attempts and completions (even if legal philosophers consider this distinction to be rationally or retributively indefensible).[168]

In line with this democratic view, I maintain that failing to accord penal significance to the harm caused by completed crimes threatens to undermine societal respect for the law through contradicting popular retributive beliefs. Individuals may come to disrespect the law if they consider it to be unjust in terms of its recognition of the greater harm caused by completed crimes. In extreme cases, this loss of respect for the law could threaten to undermine social order. Individuals could decide to take the law into their own hands if they do not think that the law will accord proper significance to the harm caused by a complete offence.[169] A penal distinction between last act attempts and completed crimes may thus be important for maintaining respect for the law, and general social order. On these grounds, I submit that the importance of acknowledging the greater loss inflicted by completed crimes is a valid non-retributive reason for maintaining legal luck in the area of criminal attempt, even if we assume the view that moral luck does not exist.

Many scholars respond to this argument by asserting that equalising the punishment of last act attempts and completions is unlikely to undermine respect for the law in the way assumed.[170] These scholars adopt a 'reformist'[171] position insofar as their view implies that we should change Australian attempt law to collapse the penal distinction between last act attempts and completed crimes entirely. First, reformist scholars claim that the significance of harm is not as entrenched in public morality as is advocated. Stephen Schulhofer submits that the apparent popular retributive emphasis on harmful results may be due simply to a lack of public awareness about the impact of legal luck.[172] He speculates that if the public were made aware that the result of a last act attempt is due to factors beyond an attempter's control,

[166] Feinberg, 'Equal Punishment for Failed Attempts', p. 125.
[167] For an influential articulation of this argument, see: Kadish, 'Forward', pp. 699-702.
[168] Kadish, 'Forward', pp. 699-702.
[169] Gardner, 'Crime in Proportion and in Perspective', pp. 31-33; Schulhofer, 'Harm and Punishment', pp. 1511-1512.
[170] Morse, 'Reason, Results, and Criminal Responsibility', pp. 427-428; Schulhofer, 'Harm and Punishment', pp. 1511-1514.
[171] Feinberg, 'Equal Punishment for Failed Attempts', p. 119.
[172] Schulhofer, 'Harm and Punishment', p. 1513.

popular support for the penal distinction between last act attempts and completed crimes might dissolve.

Second, reformists argue that even if popular adherence to the moral luck intuition does run deep, it does not follow from this that it should be upheld in the law.[173] It is submitted that if the penal distinction between last act attempts and completed crimes is rationally and retributively indefensible, the criminal law should correct public opinion by collapsing the distinction. Schulhofer therefore claims that unless it can be established that the abolition of legal luck in the area of criminal attempt would have the detrimental effects anticipated, public perceptions of the moral significance of results should be ignored, and the law should be changed to reflect sound rational principles.[174]

Two brief comments may be made in response to the above counterargument. Before making these comments, note that at this stage of my research, any discussion of the potential consequences of collapsing the penal distinction between last act attempts and completed crimes remains somewhat speculative. Whether equalising the punishment of last act attempts and completed crimes would undermine respect for the law or cause social upheaval is a question that can only be answered conclusively by conducting empirical studies. Keeping this methodological limitation in mind, I detail two responses to the reformist's argument below.

First, it may be observed that the reformist's contention that we should ignore 'erroneous' popular retributive intuitions rests on the assumption that the non-existence of moral luck is rationally indisputable. Whilst the non-existence of moral luck is assumed for the purposes of this chapter, it was suggested previously that the moral luck debate is far from being resolved. A strong argument supporting the existence of moral luck would entirely undermine the reformist's claim that popular retributive intuitions ought to be corrected, and the present state of the law overridden. Reformists should therefore not be so quick to dismiss the moral luck intuition as rationally unsound. They would also do well to strengthen their arguments against the justifiability of legal luck by citing additional non-retributive considerations that support the equalised punishment of last act attempts and completions.

[173] Ashworth, 'Criminal Attempts', pp. 748-749; Feinberg, 'Equal Punishment for Failed Attempts', pp. 125-127; Parker, 'Blame, Punishment and the Role of Result', p. 274.
[174] Schulhofer, 'Harm and Punishment', p. 1514.

Second, one may dispute Schulhofer's assertion that the onus lies with the scholar seeking to retain the present state of the law (that is, the 'retentionist'),[175] to establish that collapsing the penal distinction between last act attempts and completed crimes would indeed produce the negative consequences anticipated. It is a general principle of evidence law that the person who brings a claim must bear the onus of proof. The reformist claims that we should change the law to collapse the penal distinction between last act attempts and completed crimes entirely. This implies that we should equalise the penalty for murder and attempted murder, and that we should remove judicial discretion to distinguish the punishment of last act attempts and completions. Insofar as the reformist advocates these legal changes, it seems that they should bear the 'evidentiary burden' of establishing that such changes will not produce negative consequences. I hence contend (contra Schulhofer) that the 'onus of proof' lies with the reformist, not the retentionist. It follows from this that the present penal distinction between last act attempts and completed crimes should be retained until the reformist can demonstrate that the collapse of this distinction will not produce negative social effects.

Note that one further argument is available in this area to the reformist. This argument holds that we may be able to acknowledge the extensive loss suffered when a crime is successfully completed whilst still equalising the punishment of last act attempts and completions. This could done by raising the penalty for last act attempts to the same level as that incurred by completed crimes.

3.2.3. Economising Punishment

If we were to raise the penalty for last act attempts to the same level as that incurred by completions, it might be possible to acknowledge the substantial loss inflicted by complete offences whilst still upholding the principle of equal treatment. On the one hand, retaining a high penalty for completed crimes conveys the message that we consider these offences, and the harm they cause, to be extremely serious. On the other, raising the penalty for last act attempts to the same level as that accorded to completions adheres to the retributive principle that like cases ought to be treated alike. It may hence be claimed that imposing harsher penalties for last act attempts is optimal insofar as it accommodates both the principle of equal treatment, and the non-retributive consideration of acknowledging the extensive harm inflicted by complete offences.

[175] Feinberg, 'Equal Punishment for Failed Attempts', p. 119.

However, raising the penalty for last act attempts to the same level as that accorded to completions conflicts with an important non-retributive consideration; namely, the principle of 'economy of punishment'.[176] The principle of economy of punishment is grounded in the consequentialist idea that punishment is inherently undesirable, and so should be used only when necessary, and to the degree that is necessary, to attain consequentialist and retributive goals.[177] As discussed in chapter one, punishment comprises the deliberate infliction of hard treatment: it is intended to burden those who are subjected to it.[178] Punishment imposes burdens in various ways. It may deprive individuals of valued items, such as their property or liberty, or it may require individuals to perform actions that they would not ordinarily wish to perform, such as unpaid community service.[179] Given the inherently burdensome nature of punishment, then, it may be argued that as a matter of justice, punishment should be limited or economised in cases where so doing would not substantially detract from retributive or consequentialist aims (such as the adequate expression of censure, or the goal of crime prevention).[180]

Raising the penalty for last act attempts to the same level as that accorded to completions would clearly increase our overall use of punishment: we would be imposing a harsher sentence upon a broader range of offenders. Equalising the punishment of last act attempts and completed crimes by raising the penalty for last act attempts therefore undermines the principle of economy of punishment. For the reasons indicated above, I argue that economy of punishment is a principle we should strive to uphold. Given the inherently burdensome nature of punishment, it is only just that we should seek to limit it where possible. It also seems unnecessarily harsh to punish individuals to a greater degree when we have the option of punishing them less. Increasing the penalty for last act attempts to the same level as that accorded to completed crimes should therefore be rejected insofar as it conflicts with the justified goal of minimizing punishment, and so may lead to the unnecessary imposition of harsher criminal justice practices.

[176] This is also known as the 'principle of frugality of punishment'. For a discussion of this principle, see: Ashworth, 'Criminal Attempts', pp. 746-748; Kadish, 'Forward', pp. 686-687; Moore, *Placing Blame*, pp. 202; 209; and Schulhofer, 'Harm and Punishment', pp. 1562-1585.
[177] Schulhofer, 'Harm and Punishment', p. 1562.
[178] Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/.
[179] Duff, 'Legal Punishment', URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/.
[180] Schulhofer considers whether economising punishment through imposing a lesser penalty for failed attempts diminishes deterrence. He argues that it does: see Schulhofer, 'Harm and Punishment', pp. 1581-1582. For a shorter discussion, see: Kadish, 'Forward', pp. 686-688. Note that I do not consider the issue of deterrence in this paper.

If, as argued, economising punishment is a legitimate non-retributive aim of our criminal justice system, in what ways might this aim be promoted within attempt law? One way that punishment could be economised is through reducing the penalty for completed crimes to the same level as that presently imposed for last act attempts. This approach could produce a number of benefits. First, it would permit us to maintain the retributive principle of equal treatment through equalising the punishment of last act attempts and completions. Second, it has the potential to economise punishment more effectively than our present legal system does, if, statistically, a higher proportion offenders are convicted of completed crimes than of last act attempts.[181] If more offenders are charged and convicted of completed crimes than the number of offenders who are charged and convicted of attempts, it follows that we will attain greater economisation of punishment overall if the penalty for completions, rather than for last act attempts, is reduced.

Despite its potential benefits, I argue that the above approach should not be adopted as a mode of economising punishment within our legal system. This is because reducing the penalty for completions to the same level accorded to last act attempts conflicts with the non-retributive consideration of acknowledging the greater loss inflicted by completed crimes. The importance of this non-retributive consideration was discussed in the previous subsection. By substantially lowering the penalty for complete offences, we minimise the greater loss suffered when a crime succeeds. This risks the production of negative social consequences, such as undermining respect for the law.

Another way that punishment could be economised within the area of attempt is through decreasing punishment when a last act attempt fails. This is, of course, the mode of economisation that our legal system presently adopts. Our mode of economisation is grounded in the absence of harm: we punish offenders less when their culpable attempts fail to produce intended harmful results. To the extent that the result of a last act attempt is ultimately produced by factors beyond an offender's control, this approach appears somewhat arbitrary.[182] It conflicts with the retributive principle of equal treatment insofar as the last act attempter and successful completer are equally morally culpable (assuming the view that moral luck does not exist).

However, as argued at the beginning of this section, the principle of equal treatment may justifiably be compromised under a mixed theory of the connection between the moral luck

[181] Schulhofer, 'Harm and Punishment', pp. 1582-1585.
[182] Ashworth, 'Criminal Attempts', p. 747; Schulhofer, 'Harm and Punishment', pp. 1562-1581.

and legal luck debates. Yaffe's mixed theory of punishment holds that a fixed degree of moral desert may be expressed through a range of permissible sanctions. Yaffe asserts that within this penal range, we may justifiably differentiate the punishment of equally culpable offenders on the basis of non-retributive considerations. It follows from this that it is morally permissible to distinguish the punishment of last act attempts and completions on valid non-retributive grounds, even if we hold the retributive view that moral luck does not exist (and hence that last act attempters and completers are equally morally blameworthy). Within the permissible range I therefore contend that the principle of equal treatment yields to the non-retributive aim of economy of punishment. Under Yaffe's mixed theory, compromising the principle of equal treatment does not undermine the retributive aims of our criminal justice system.

3.3. Conclusion: Justifying Legal Luck on the Balance of Retributive and Non-Retributive Considerations

I commenced this chapter by considering which of the approaches adopted in two case studies - Carromero's case,[183] and Herman's case[184] - constitutes a justifiable response to the impact of legal luck within criminal attempt law. In Carromero's case, legal luck was permitted to determine the defendant's liability for criminal prosecution. In Herman's case, the impact of legal luck was restricted. Which of these responses to the impact of legal luck is most justifiable?

For the purposes of this chapter, I assumed the retributive view that moral luck does not exist. This view entails that last act attempters and completers are equally morally culpable, and that the ultimate outcome of an attempt is hence irrelevant to an offender's degree of moral blameworthiness. Yet the view that moral luck does not exist does not automatically imply that legal luck is unjustified. Adopting Yaffe's mixed theory of punishment, I claim that a fixed degree of moral desert may be expressed through a range of sanctions. Within this permissible range, Yaffe submits that non-retributive considerations may operate to distinguish the punishment of equally culpable offenders. It follows from this that it may be morally permissible to distinguish the punishment of last act attempts and completed crimes on non-retributive grounds, even if we hold the retributive view that moral luck does not exist. That is, I argue that the justifiability of legal luck is determined by both retributive and non-retributive considerations (not just by our view of whether moral luck exists).

[183] *People v Carromero* 2014 NY Slip Op 50714(U).
[184] *R v Herman* [2005] VSC 234.

Of course, if we assume the view that moral luck *does* exist, and that there is hence a moral difference between the last act attempter and completer, it follows that we have an additional retributive reason to retain legal luck within attempt law. In other words, the view that moral luck exists provides direct support for the retention of a penal distinction between last act attempts and completed crimes. Note that under a mixed theory of punishment, our analysis of the justifiability of legal luck would not end here. Even if we assumed that moral luck exists, we would still need to consider whether legal luck is justified on the balance of non-retributive considerations. In my view, the non-retributive considerations raised in this thesis support, rather than oppose, the retention of a luck-based penal distinction between last act attempts and completed crimes.

As stated, in this chapter I assumed the position that moral luck does not exist. I then evaluated two non-retributive considerations that have been raised to support the retention of legal luck within attempt law. The first consideration, which I term 'acknowledgement of loss', provides that the present penal distinction between last act attempts and completed crimes enables us to recognise, and pay tribute to, the objectively greater loss suffered when a crime is completed. I argued that lowering the penalty for completed crimes to the same level as that accorded to last act attempts prevents us from adequately acknowledging this greater loss, and so risks the production of various negative social consequences. I thus assert that we should not seek to equalise the punishment of last act attempts and completed crimes by lowering the penalty for the latter.

I then considered the further possibility that equalising the punishment of last act attempts and completed crimes may still be compatible with acknowledging the extensive loss suffered when a crime is completed. If we were to raise the penalty for last act attempts to the same level as that accorded to completions, we might acknowledge the extensive harm caused by completed crimes whilst preserving the retributive principle of equal treatment. However, I maintain that raising the penalty for last act attempts conflicts with the non-retributive principle of economising punishment. This principle mandates that punishment is inherently undesirable, and so should be limited in cases where so doing would not substantially compromise retributive or consequentialist aims. I hence contend that we should not seek to equalise the punishment of last act attempts and completed crimes by raising the penalty for the former.

I therefore conclude that punishing last act attempts less than completed crimes permits us to strike the best possible balance between the non-retributive considerations of economy of

punishment, and the importance of acknowledging greater loss suffered. That is, I argue that legal luck in the area of criminal attempt is justified on the balance of non-retributive considerations. Whilst this conclusion requires us to accord different punishments to equally culpable offenders (thus undermining the principle of equal treatment), I maintain that it is nonetheless compatible with the retributive aims of our criminal justice system. A fixed degree of moral desert may be expressed through a range of permissible sanctions. It is hence morally permissible to differentiate the punishment of last act attempters and completers on non-retributive grounds, even if we consider these offenders to be equally morally blameworthy.

Significantly, the above conclusion implies that the response to legal luck embodied in Carromero's case study is justifiable. It entails that the court's decision to uphold Carromero's indictment on the basis of the eventual success of his attempt is supported by non-retributive considerations. Conversely, it follows that Herman could justifiably be viewed as being culpable for the results of her actions (murder) rather than merely her attempt. Of course, the outcome of Carromero's recent court case may be challenged on grounds other than the justifiability of legal luck. We may, for instance, query whether legal causation is truly established after a thirty year time gap. But I claim that if we are to dispute the court's decision, it cannot be on the basis that legal luck is unjustified. As the judge stated, the "consummating element of death"[185] distinguishes the offences of murder and attempt - and rightly so.

[185] *People v Carromero* 2014 NY Slip Op 50714(U).

Conclusion

In this thesis, I addressed the central question of whether legal luck is justified in the area of criminal attempt. Specifically, I assessed the justifiability of maintaining a penal distinction between last act attempts and completed crimes. As Carromero's case illustrates, this penal distinction is ultimately the product of factors beyond an agent's control. Once he performed the final act necessary to complete his attempt on Pugh's life, Carromero could not control whether the attempt would succeed or fail. Yet the ultimate success of his attempt has rendered him liable for the greater charge of murder.

The social significance of the impact of legal luck in the area of criminal attempt cannot be understated. By distinguishing the penalty for last act attempts and completed crimes in both a legislative and practical sense (that is, in terms of the lighter attempt sentences accorded by judges), we permit luck to make a substantial difference to the lives of offenders. It is therefore important for us to consider whether luck *should* be permitted to make this difference to criminal responsibility and punishment. If we conclude that it should not, it follows that we ought to equalise the punishment of last act attempts and completed crimes as a matter of justice.

As discussed throughout this thesis, many philosophers use their arguments about the existence of moral luck to draw conclusions about the justifiability of legal luck. I hence propose that the question of whether legal luck is justified within attempt law raises two preliminary sub-questions. The first sub-question, addressed in chapter one, concerns the nature of the general relation between moral blameworthiness and criminal responsibility. By resolving this sub-question, I set the groundwork for my later assessment of the more specific connection between moral luck and legal luck. In chapter one, I argued that a mixed theory of punishment constitutes a preferable model of the relation between criminal responsibility and moral desert. Under a mixed account, an offender's degree of moral blameworthiness limits the range of sanctions that may justly be imposed for their offence, whilst non-retributive considerations determine the precise sanction to be imposed within the appropriate punitive range.

In chapter two, I addressed the second sub-question, which concerns the specific link between the moral luck and legal luck debates. To determine this link, I applied the mixed theory of punishment defended in chapter one. Specifically, I argued that the moral luck and legal luck debates are partly connected insofar as criminal responsibility is determined by both moral

blameworthiness (that is, retributive considerations) and non-retributive considerations. The existence or non-existence of moral luck thus determines the range of sanctions that may justly be imposed for an offence. The view that moral luck does not exist hence implies that equally culpable offenders are subject to the same punitive range. Yet this does not entail that they must be accorded the same sanction: as stated, we may have valid non-retributive reasons for distinguishing their punishment. I therefore contend that it is theoretically compatible to hold the view that moral luck does not exist, whilst nonetheless maintaining that legal luck is justified.

Finally, in chapter three, I returned to an examination of the justifiability of legal luck within criminal attempt law. My approach to answering this central research question was informed by my mixed view of the connection between the moral luck and legal luck debates, as articulated in chapter two, and grounded in chapter one. For the purposes of the chapter, I assumed the retributive view that moral luck does not exist, and that last act attempters and completers are therefore equally morally blameworthy. I then applied a mixed theory of punishment to determine the extent to which this retributive view has practical implications for the justifiability of legal luck within attempt law.

Under a mixed account, the justifiability of legal luck in the area of attempt is determined by considering whether there are any valid non-retributive reasons to distinguish the punishment of last act attempts and completed crimes. This punishment must be distinguished within a shared range of sanctions delineated by the equal moral culpability of last act attempters and completers. For reasons outlined in the chapter, I assert that there are at least two valid non-retributive reasons to maintain a penal distinction between completed crimes and last act attempts. The first reason is the non-retributive importance of acknowledging the greater loss suffered by victims and society when a crime is successfully completed. The second reason is the value of upholding the principle of economy of punishment. On the balance of these non-retributive considerations, I reached the provisional conclusion that legal luck is justified in the area of criminal attempt. To formulate a final conclusion with respect to this issue, I would need to evaluate a broader range of non-retributive considerations, and analyse empirical evidence about the potential social impact of equalising the punishment of last act attempts and completed crimes.

I conclude this thesis with a few short words about potential directions for future research. Here, I have provided a snapshot analysis of the justifiability legal luck within criminal attempt law. There are, however, other questions left to ask about the role of luck within our

legal system. One possible research path would be to examine the impact of other types of moral/legal luck upon our legal responsibility. A relevant and important question is how the criminal law should respond to the impact of circumstantial luck in the sentencing of socially disadvantaged offenders.[186]

Beyond the criminal law, we might also assess the justifiability of legal luck in areas of civil liability. Such an assessment would require us to investigate the broader connection between moral blameworthiness and civil legal responsibility, which may be quite different from the link existing between criminal responsibility and moral desert. Some analysis has already been conducted with respect to the justifiability of legal luck in the area of tort.[187] Broadly, philosophers have investigated the extent to which agents should be held civilly responsible for the uncontrollable results of their negligent actions. However, as Enoch notes, there has been very little discussion of the impact of legal luck in other areas of civil liability, such as contract or property law.[188] It seems to me that this gap in the literature must be filled if we are to construct a comprehensive account of how the law should respond to the impact of lucky factors. My small scale assessment in this thesis of the justifiability of legal luck within criminal attempt law may provide a starting point for conducting wider research in this field. But for now, I limit my analysis to murder, attempt, and the luck in between.

[186] Enoch, 'Moral Luck and the Law', p. 50.
[187] See, for example: Ripstein, 'Closing the Gap', pp. 72-80; and Benjamin C. Zipursky, 'Two Dimensions of Responsibility in Crime, Tort, and Moral Luck', *Theoretical Inquiries in Law* 9(97), 2007: 97-137, see pp. 103-106; 108-110. For a general discussion, see: Enoch, 'Moral Luck and the Law', p. 50.
[188] Enoch, 'Moral Luck and the Law', p. 50.

Bibliography

A *Articles/Books/Conferences*

Ashworth, Andrew: 'Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law', *Rutgers Law Journal* 19 (725), 1988: 726-772.

Bronitt, Simon and McSherry, Bernadette: *Principles of Criminal Law* (Sydney: Thomson Reuters (Professional) Australia Limited, 2010).

Brown, David et al: *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney: The Federation Press, 4th ed, 2008).

Brown, James Robert and Fehige, Yiftach: 'Thought Experiments', *The Standford Encyclopedia of Philosophy* (2011), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/fall2001/entries/thought-experiment/.

Daniels, Norman: 'Reflective Equilibrium', *The Stanford Encyclopedia of Philosophy* (2013), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2013/entries/reflective-equilibrium/.

Davis, Michael: 'Why Attempts Deserve Less Punishment than Complete Crimes', *Law and Philosophy* 5, 1986: 1-32.

Domsky, Darren: 'There is No Door: Finally Solving the Problem of Moral Luck', *The Journal of Philosophy* 101 (9), 2004: 445-464.

Duff, Antony: 'Legal Punishment', *The Stanford Encyclopedia of Philosophy* (2013), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/.

Duff, R.A.: 'Auctions, Lotteries, and the Punishment of Attempts', *Law and Philosophy* 9 (1), 1990: 1-37.

Duff, R.A.: *Punishment, Communication, and Community* (New York: Oxford University Press, 2001).

Enoch, David and Marmor, Andrei: 'The Case Against Moral Luck', *Law and Philosophy* 26 (4), 2007: 405-436.

Enoch, David: 'Luck between Morality, Law, and Justice', *Theoretical Inquiries in Law* 9 (1), 2008: 23-59, see pp. 31-38.

Enoch, David: 'Moral Luck and the Law', *Philosophy Compass* 5 (1), 2010: 42-54.

Feinberg, Joel: 'Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against it', *Arizona Law Review* 37(117), 1995: 117-133.

Fuller, Lon: 'Positivism and Fidelity to Law - A Reply to Professor Hart', *Harvard Law Review* 71, 1958: 630-672.

Gardner, John: 'Crime in Proportion and in Perspective', in Andrew Ashworth and Martin Wasik (eds.) *Fundamentals of Sentencing Theory*, (New York: Oxford University Press, 1998): 31-52.

Hart, HLA: 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (4), 1958: 593-629.

Kadish, Sanford: 'Forward: The Criminal Law and the Luck of the Draw', *The Journal of Criminal Law and Criminology* 84 (4), 1994: 679-702.

Kant, Immanuel: *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor and Jens Timmermann (United States: Cambridge University Press, 2012).

Katz, Leo: 'Why the Successful Assassin is More Wicked than the Unsuccessful One', *California Law Review* 88 (791), 2000: 791-812.

Levy, Neil: Agency and Moral Cognition Network Meeting, Macquarie University, Dissolving the Puzzle of Resultant Moral Luck, May 2014.

Lewis, David: 'The Punishment that Leaves Something to Chance', *Philosophy and Public Affairs* 18 (1), 1989: 53-67.

Meyerson, Denise: *Jurisprudence* (Victoria: Oxford University Press, 2011).

Moore, Michael: *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (New York, Oxford University Press, 2009).

Moore, Michael: *Placing Blame: A General Theory of the Criminal Law* (New York: Oxford University Press, 1997).

Morse, Stephen: 'Reason, Results, and Criminal Responsibility', *University of Illinois Law Review*, 2004: 363-444.

Nagel, Thomas: 'Moral Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 57-71.

Nelkin, Dana: 'Moral Luck', *The Stanford Encyclopedia of Philosophy* (2008), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/fall2008/entries/moral-luck/.

Parker, Richard: 'Blame, Punishment and the Role of Result', *American Philosophical Quarterly* 21 (3), 1984: 269-276.

Pust, Joel: 'Intuition', *The Standford Encyclopedia of Philosophy* (2012), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2012/entries/intuition/.

Raz, Joseph: 'Authority, Law and Morality', *The Monist* 68 (3), 1985: 295-324.

Rescher, Nicholas: 'Moral Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 141-166.

Richards, Norvin: 'Luck and Desert', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 167-180.

Ripstein, Arthur: 'Closing the Gap', *Theoretical Inquiries in Law* 9, 2008: 61-95.

Schulhofer, Stephen: 'Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law', *University of Pennsylvania Law Review* 122 (1497), 1974: 1497-1607.

Statman, Daniel: *Moral Luck* (New York: State University of New York Press, 1993).

Sverdlik, Stephen: 'Crime and Moral Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 181-194.

Ten, C.L.: *Crime, Guilt, and Punishment: A Philosophical Introduction* (New York: Oxford University Press, 1987).

Thomson, Judith Jarvis: 'Morality and Bad Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 195-215.

Walker, Margaret Urban: 'Moral Luck and the Virtues of Impure Agency', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 235-250.

Williams, Bernard: 'Moral Luck', in Daniel Statman (ed.) *Moral Luck*, (USA: State University of New York Press, 1993): 35-55.

Yaffe, Gideon: *Attempts In the Philosophy of Action and the Criminal Law* (New York: Oxford University Press, 2010).

Zimmerman, Michael: 'Taking Luck Seriously', *The Journal of Philosophy* 99(11), 2002: 553-576.

Zipursky, Benjamin C: 'Two Dimensions of Responsibility in Crime, Tort, and Moral Luck', *Theoretical Inquiries in Law* 9(97), 2007: 97-137.

B *Cases*

Alister (1984) 154 CLR 404.

Britten v Alpogut [1987] VR 929.

DPP v Stonehouse [1978] AC 55.

Evans (1987) 48 SASR 35.

Khan [1990] 1 WLR 813.

Knight v The Queen (1992) 175 CLR 495.

McGhee (1995) 130 ALR 142.

Mohan [1976] QB 1.

People v Carromero 2014 NY Slip Op 50714(U).

People v. Latham, 83 NY 2d 233 (1994).

People v. Rivera, 60 NY 2d 110 (1983).

R v Barker [1924] NZLR 865.

R v Eagleton (1855) 6 Cox CC 559.

R v Herman [2005] VSC 234.

C *Legislation*

Crimes Act 1900 (NSW).

Criminal Code Act 1995 (Cth).

New York Criminal Procedure Law (2014).

United States Code (2013).

United States Constitution.

D *Other*

Death Penalty Information Center: 'States With and Without the Death Penalty', *DPIC* (2014), URL = http://www.deathpenaltyinfo.org/states-and-without-death-penalty.