

Legal Luck

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What is Legal Luck?

Subject to some qualifications (discussed in the closing section), “legal luck” obtains where one’s legal status – such as legal rights, obligations, liabilities, and culpability – turns on facts not under one’s control (Enoch 2008: 28).¹ A full account of “control” is beyond our scope but basically the idea is that we are often in control of conduct and of outcomes that we bring about when acting in our capacity as practical agents.

The two instances of legal luck most explored in the literature critical of legal luck involve the tort of negligence (Feinberg 1962; Waldron 1995; Schroeder 1997) and the criminal law of attempts (Feinberg 1962; Davis 1986; Lewis 1989; Kessler 1994; Kadish 1994; Alexander 1994).

The classic scenario for exploring luck in negligence involves two equally negligent drivers. While both are driving carelessly, one accidentally hits a pedestrian who, as luck would have it, happens to cross the road at that exact moment, while the other driver hits no one. It is stipulated that while failing to pay attention to the road was within the control of both drivers, the consequences of their respective failures to do so were not. In terms of what was under the drivers’ control, it was similarly a matter of luck whether anyone crossed the road at the same moment of their carelessness. Now, although the two drivers are alike with regards to what is within their control, tort law judges them very differently. The unlucky driver is held liable for hitting a pedestrian while the second driver – who was equally negligent yet fortunately hit no one – is not liable at all. To recover damages in negligence, it is not enough to prove that the defendant’s negligent behaviour put one at unreasonable risk of harm; the law also requires that the plaintiff prove that the defendant’s risky conduct actually harmed one. Accordingly, the stark difference in the legal statuses of the two drivers turns on facts similarly outside of their control, entailing that legal liability for negligence can turn on luck.

On to the law of criminal attempts. In many jurisdictions, punishment for a completed crime is more severe than it is for a failed attempt at completing the same crime. And whether an attempt is successful often turns, at least to a degree, on facts beyond one’s control. For example, if a sudden gale serendipitously alters the trajectory of an assassin’s bullet

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thereby saving the target's life, the would-be assassin is guilty of attempted murder, even though the charge would have been full-fledged murder but for the unexpected gust of wind. Accordingly, differences in legal culpability and punishment between the successful and the unsuccessful criminal may turn on facts similarly beyond their control, thereby grounding the extent of criminal culpability in luck.

Having detailed two of the literature's specific examples of legal luck, there are three general types of legal luck. Thomas Nagel offers a taxonomy of morally salient types of luck (Nagel 1993). Although Nagel is focused on "moral luck" (a concept explained below), his categories are helpful for conceptualizing different types of legal luck. Most prominent in the literature on legal luck is "resultant luck,"² which involves legal liability for certain uncontrolled outcomes of one's conduct. Another form of luck is "circumstantial," which is luck in the circumstances of conduct where those circumstances are both beyond one's control as well as influence what one does. Accordingly, circumstantial legal luck involves legal status turning on circumstances rather than on agency. Nagel also explores what is known as "constitutive luck." Often our actions are influenced by our character traits, dispositions, capacities, talents, and natural inclinations, none of which are subject to our control, at least not readily, and are often moulded by forces also largely beyond our control, such as our genes and the circumstances of our upbringing. Constitutive legal luck involves legal status turning on facts arising out of such constitutive features.

Regardless of the type of legal luck involved, the literature is mostly myopic to the variance in degrees in legal luck. Much of the literature on luck and the law comes from moral philosophy, which tends to view law as a reservoir of examples of moral luck, often glossing over the legal details. Yet ignoring the law's nuances might result in an inflated conception of the extent of legal luck.

Legal luck admits degrees. Control is a matter of degree – one can have more or less control over her actions and their outcomes. And given that legal luck involves legal status turning on facts beyond one's control, it follows that one's legal status may involve more or less legal luck based on the given level of one's control over the relevant facts, such as the extent to which one can raise or reduce the probability of an occurrence.

As reflected in the paradigmatic examples of legal luck presented above, the type of legal luck most often explored is the resultant luck found in legal causation. Causation in law is normally predicated on a conjunction of two tests. Typically, first comes what is known as the "but for test" which asks whether *X* would have transpired but for the defendant's conduct. If the answer is "no," then the defendant's conduct did not – as a matter of law – cause *X*. If, however, the answer is "yes," then the defendant's conduct is what lawyers call a "factual cause" of *X*. Yet in order to prove as a matter of law that the defendant caused *X*, the

plaintiff must also establish that the defendant's conduct was a "proximate cause" of *X*.

The tests for proximate causation are several and still evolving, and may vary in nuance among different branches of the law. Yet they all function to pick out from the vast chains of factual causes leading up to *X* those causes that warrant legal liability. Presently the most common test for determining proximate causation is the "reasonable foreseeability" test, which asks whether a reasonable person under similar circumstances would have foreseen *X* as a likely outcome of said conduct. Other tests turn on whether an outcome is too "remote" or "accidental" to count as legally caused by the defendant's conduct.

Accordingly, the law of causation removes from the scope of liability most instances of potential resultant legal luck. As a matter of factual causation, our legally wrongful (or otherwise liability grounding) conduct invariably contributes to numerous causal chains leading to any number of harmful or otherwise destructive outcomes – most of which too remote to imagine let alone control. Were we liable for the unforeseeable or remote factual outcomes of our legal wrongs, the extent of luck's role in determining our liability would have been crushing. Thankfully liability does not extend to all such outcomes.

Important for our purposes is that tests such as the foreseeability test have a measure of control built into them. Ability to foresee an outcome provides the opportunity not only to learn of the likelihood of the outcome but often also thereby provides the opportunity to take action to avoid that outcome or, at least, to reduce the probability of it occurring, thereby providing for a measure of control over that outcome. This suggests that the luck inherent in legal causation involves a relatively lower degree of resultant luck than may seem at first blush. Especially given that most people have a predictive capacity approximating what the courts normally determine as "reasonable foreseeability." Accordingly, by limiting liability to what we can reasonably foresee the law at least often significantly diminishes luck's role in determining liability.

Another often discussed instance of legal luck involves the constitutive luck found in tort law's "reasonable person standard." Legal negligence involves a breach of a duty of care which then causes harm to the person to whom that duty was owed. Courts normally construe "care" as what a reasonable person would have done under the same circumstances. Thus, if one causes (foreseeable) harm to a person to whom one owes a duty of care, one is normally liable for the harm, provided that one caused it while acting unreasonably.

Now, what of people whose capacities and abilities fall short of the capacities and abilities of the "reasonable person," making it much harder or even nearly impossible for them to meet the law's standard of conduct? Are such people liable for harms they cause while acting "unreasonably"? But for a handful of exceptions, such as children and

people with physical disabilities, the answer is “yes.” The reasonable-person standard is what the law calls an “objective standard,” applying to everyone regardless of idiosyncrasies. In the words of Oliver Wendell Holmes:

“If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.”

(Holmes 1881: 86-87)

One could scarcely imagine a starker rendition of a rather strict version of constitutive legal luck.

Then again, like in the case of legal causation, here too the literature at times gives an exaggerated impression of the extent of legal luck. When determining the contours of the reasonable person’s reasonableness courts typically take a variety of considerations into account, including not only social policy and judges’ objectives for how people should behave, but also social custom and approximations of the actual abilities and limitations of the citizenry. Rarely does the law adopt a standard so aspirational that most people would find it highly difficult let alone nearly impossible to follow. As described in a leading treatise, the reasonable person “... has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules ...” (Winfield & Jolowicz 2010: 93).

Thus, although the reasonable person standard is normative rather than sociological, frequently it is designed to approximate – at least partially – the abilities of the common person. This is quaintly reflected in a classic description of the reasonable person as “[t]he man on the Clapham omnibus ... The man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves...” (Hall v Brooklands Auto Racing Club 1933).

Accordingly, while the law of negligence involves the potential for rather harsh constitutive legal luck, in practice such luck mostly arises in the fringe cases of people lacking the full capacities ascribed to the reasonable person.

At times, however, law does wholeheartedly adopt higher degrees of legal luck. An example is the “thin skull” exception to the rule of proximate causation, according to which liability may attach to those who cause others personal injury even if the *extent* of the injury was not reasonably foreseeable. This doctrine applies if the (extra) unforeseen harm resulted from a concealed frailty in the victim. The classic example is of a victim with a latent medical condition – such as haemophilia – suffering serious injury as the result of a minor battery.

Given that such (extra) harm is considered too remote to reasonably foresee, causing it is largely beyond one's control. This is because control has epistemic conditions as well as metaphysical ones, and the foreseeability test speaks to the former. Holding one liable under such circumstances for unforeseeable harms involves, therefore, a significant measure of resultant legal luck.

Regimes of "strict liability" also involve a high level of legal luck. Strict liability is liability for what one does or causes faultlessly. In other words, it is liability for conduct and outcomes that may have been *unreasonable* to avoid or prevent. For instance, the doctrine of "respondent superior" holds faultless employers liable for harms resulting from their employees' negligence when performed within the scope of the employment. "Product liability" is another example. In many jurisdictions, manufacturers are liable for harms caused by a defect in their product, even when faultless in making the product defective. The tort of trespass to land also turns on strict liability, imposing liability even on unintentional trespassers who took all reasonably available precautions to avoid encroaching upon another's property.

Now that we have a sense of what legal luck is, we turn to the matter of its justification.

What is Moral Luck?

The literature on legal luck is often intertwined with the philosophical literature on "moral luck," a term referring to luck's putative role in determining a person's moral record, including blameworthiness, praiseworthiness, accountability, and culpability (Statman 1993: 1-35; Nelkin 2013). In fact, the notion of legal luck is very much the legal corollary of moral luck. Moral luck negates what is known as the "control principle," under which what goes on a person's moral record is conditioned on what is under that person's control. Accordingly, one is not appropriately subject to moral assessment for that which is beyond her control. Moral luck is therefore at odds with the control principle. Now, whether there really is moral luck is a contested matter. For every supporter of moral luck there are at least as many detractors. Luckily, litigating the matter is not central to understanding *legal* luck. What is important for our purposes are the implications of whether or not moral luck exists on the justification of legal luck. To which we turn next.

Moral Luck and Legal Luck

For those accepting the existence of moral luck there appears nothing problematic in legal luck *per se*. This remains the case even when one's legal status ought to somehow track one's moral record. Because if one accepts moral luck, then the mere fact that one's legal status is not fully sensitive to what is under one's control does not necessarily entail that the law does not track one's moral record. In fact, as explained below,

accepting moral luck may yield an argument in favour of instances of legal luck.

In contrast, for those denying the existence of moral luck – thereby holding the view that a person’s moral record is necessarily grounded in control – legal luck raises potential moral concerns. These arise in cases in which one’s legal status ought to somehow track one’s moral record. Because given that legal luck entails legal status divorced (at least to an extent) from control, and given the premise that control grounds moral record, it follows that legal luck involves legal status divorced (at least to an extent) from moral record.

As explored below, whether one’s legal status ought to somehow track one’s moral record is a normative question touching on the moral grounds of law. In this section, it’s assumed that there are some instances of legal status in which moral record ought to have such a role. Notice that the locution “somehow track one’s moral record” is purposely vague. One’s legal status in relation to *Y* may track one’s moral record in relation to *Y* in more than one way: explicitly turning on moral record; turning on the same facts that ground moral record; coincidentally corresponding to moral record; and so on. For our purposes, it is enough that some such tracking relation ought to obtain to raise concerns with legal luck.

Returning to the example of the two drivers, in the eyes of those rejecting resultant moral luck the unlucky driver is not blameworthy or culpable for the *outcomes* of his driving, as they are outside of his control. Now, if in such cases one’s legal liability for the outcomes of one’s conduct ought to track one’s moral record *vis-à-vis* those outcomes, then the luck inherent to legal causation in such cases seems wrongful, because such luck involves legal liability divorced from moral record.

Yet notice that even for hardened devotees of the control principle, the measure of wrongness of different instances of legal luck may differ. Under the control principle – in those cases where one’s legal status ought to somehow track one’s moral record – more legal luck is worse than less. Given that control and, therefore, luck come in degrees, and given that moral record turns on control, it follows that cases of less legal luck involve more control and, therefore, more sensitivity to moral record than cases of more legal luck involving less control. Thus, assuming the control principle and rejecting moral luck, all else being equal, legal doctrines of strict liability are typically morally worse than doctrines such as legal causation and negligence – at least when legal status ought to track moral record.

Is Legal Luck *Pro Tanto* Wrong?

David Enoch argues that for those rejecting moral luck *any* instance of legal luck is *pro tanto* wrong (Enoch 2008:31-8). Here is why. Legal luck entails legal status wholly or partially divorced from control.

Assuming that moral record is grounded in control, and further assuming that one's moral record in relation to certain facts is always relevant for what one's legal status ought to be in relation to those facts, it follows that legal luck is always *pro tanto* wrongful. This does not entail that all cases of legal luck are, all things considered, wrong, but does entail that there is always some reason counting against legal luck. Whether any instance of legal luck is *all things considered* wrongful turns also on various other potentially competing reasons germane to the particular case and to the type of legal status at hand.

Key to Enoch's argument is that one's moral record *vis-à-vis Y* is always a reason for what one's legal status ought to be *vis-à-vis Y*. As Enoch writes:

“[I]t just seems basically unfair to have one's interests influenced profoundly by the law in ways that have nothing to do with one's (relevant) moral status ... The way the law treats me (with regard to a certain incident, or case, or action, or whatever) should be sensitive, it seems to me, to what my moral status is (with regard to that incident, case, action, or whatever)” (Enoch 2008: 36-7).

For Enoch's argument to work, *all* legal luck must impact its subjects. And for his argument to escape the charge of negligibility that impact must often be significant, otherwise other considerations for and against legal luck would regularly drown out Enoch's *pro tanto* reasons.

Yet not all possible instances of one's legal status impact one's interests – for example, culpability under an unenforceable and little-known law or a legal entitlement that is more bother pursuing than it's worth. And whether there is something specific to the type of legal statuses involved in cases of legal luck necessarily impacting one's interests is unclear. What is clear is that the definition of legal luck as legal status turning on facts beyond one's control does not establish such a necessary relation between legal luck and interests. And to make his argument Enoch must establish such a connection.

Thus, as it stands, the view that there is an ever-present reason counting against any instance of legal luck proves too broad. That said, even if legal luck's obliviousness to moral record does not *always* count against it, obviously often it does. As reflected in much of the literature referenced above, legally caused deprivation not grounded in fault often seems deeply unfair.

Legal Luck and Agency: Is Legal Luck *Pro Tanto* Justified?

Counting in favour of accepting luck as a part of the moral landscape is the fact that the control principle seems to entail a diminished human agency (Nagel 1993: 66; Urban-Walker 1993: 239-247; Williams 1993; Statman 2014: 103-107). If true, this line raised by proponents of the view that moral luck exists may help bolster an argument in favour of certain instances of legal luck.

As stipulated at the outset, controlled action is the type of action that one performs as an agent. The view that moral record turns on control is based on the view that agency grounds moral record, that is, we are only blameworthy, praiseworthy, or culpable for that which we do or bring about as agents. Now people are part of a complex causal web, inhabiting a world governed by the natural laws of cause and effect. Thus, much of what we appear to do or bring about is in fact not under our control, be it wholly or partially, and, therefore, does not seem to involve our agency, at least not entirely. Thus, purifying moral record of luck threatens shrinking agency to an “extensionless point” (Nagel 1993: 66). Even our will and intentions – seemingly inhabiting agency’s inner citadel – are not always entirely free of causal determinants (Feinberg 1963: 349-50). Accordingly, agency without moral luck seems largely inert. That is, most of what we imagine as *our* actions – in the sense that we are accountable, blameworthy, and praiseworthy for them – are in fact events in which our agency is affected by factors outside of our control, at least to a substantial degree. This entails that while our lives are ours in the sense that we live them, they are far less *ours* in the sense of active practical agents.

Relatedly, purifying agency from luck entails a highly contracted and faded self. Bernard Williams puts the point well:

“One’s history as an agent is a web in which anything that is the product of the will is surrounded and held up and partly formed by things that are not, in such a way that reflection can go only in one of two directions: either in the direction of saying that responsible agency is a fairly superficial concept, which has a limited use in harmonizing what happens, or else that it is not a superficial concept, but that it cannot ultimately be purified – if one attaches importance to the sense of what one is in terms of what one has done and what in the world one is responsible for, one must accept much that makes its claim on that sense solely in virtue of its being actual.” (Williams 1993: 44-45).

This truncated picture of the self is troubling. To use Williams’ terms, we do attach importance to what we are in terms of what we have done. We experience ourselves and give meaning to our lives as active agents. Accordingly, what we do as agents – our choices, failures, successes – and what credit and blame we deserve for them, take part in forming our life story and “who we are.” Purifying agency from any luck leaves us, therefore, with very little agency, thereby shrinking our existence as fully-fledged active selves as well as dissolving much of the meaning that we find in that existence.

If these reflections are broadly correct, adopting the control principle and rejecting moral luck clash with rather basic conceptions and premises that we hold true about the nature and parameters of agency and the self, which, according to proponents of the idea of moral luck, gives reason for believing in moral luck and for rejecting the veracity of

the control principle. It is the fact of moral luck that enables the type of agency that can robustly exist in the actual world – recognizing that some of our conduct and some of its outcomes are ours as agents, thereby influencing our moral record, even though they arise out of luck and are fully or at least partially beyond our control.

Given all this, building on Honore’s ideas on luck in tort law and assuming, for the sake of argument, that moral luck exists, I submit that moral luck’s purported role in forming agency and the self is relevant to the justification of legal luck. Writing on resultant luck, Honore claims that society’s norms allocate accountability according to the luck-dependent outcomes of our conduct. And we are in effect forced to “bet” on those outcomes when we act, without certainty as to whether things will end up to our credit or discredit (Honore 1988: 540). Moreover, Honore believes that we are better off living with a luck-infused moral record, because although it might entail discredit for failures and misdeeds that we are not (at least not fully) responsible for, it also credits us with our many successes for which are similarly not morally responsible for. And, in the process, we gain a full fledged self (Honore 1988: 542-543).

How do we come to know the scope of our actions, successes, failures, praise, and culpability? Relatedly, how do we come to appreciate and live by the parameters of our agency and self? The answer is that these occur – to a significant degree – through the inculcation of social norms. Law is central to such social norms. Perhaps more than any other social institution it is the law that directs us on matters of accountability, instructing us on what we are credited with and discredited for, how far our culpability extends, what we deserve, and to what we are entitled given our conduct. The law thereby contributes to forming and to informing our sense of the breath of agency and of where our self begins and where it ends.

To perform this task, the law must incorporate luck into the conditions of legal status, mirroring our luck-infused moral records. Were legal status devoid of luck – turning purely on what is within our control – the law would have painted a faded and inert picture of agency and conveyed a narrow conception of the self. Now the law of course never entirely mirrors moral record – nor should it. Even at the price of projecting a false image of the breadth of agency. My point is only that in incorporating luck into legal status, the law can and often does perform this task. And that this counts in favour of the law incorporating a measure of legal luck. Notice that none of this of course establishes that legal luck is *pro tanto* justified. Even assuming moral luck exists, legal luck neither necessarily reflects moral record nor necessarily captures the nature of agency.

Justifying Legal Luck

Having explored reasons for and against legal luck in general, we now turn to the justification of legal luck as it appears in specific branches of

the law. When reflecting on the justification of an instance of legal luck, the key issue is whether the law – in that instance – ought to track one’s relevant moral record.

Let’s begin with tort law. Much of the literature on luck in tort law attempts to vindicate legal luck, arguing that personal moral record – such as fault and desert – are just not part of the grounds and logic of tort law. Working within a Kantian paradigm, Arthur Ripstein views law as a systematic realization of equal freedom guaranteed by reciprocal (and coercive) limits. The role of tort law under this picture is to protect people’s reciprocal rights in their “means,” such as in their person and property (Ripstein 2008: 69). Oriented towards rights, tort law therefore typically ought to respond to violation of such rights, whether or not such violations spring from moral fault (Ripstein 2008 & 2016). John Goldberg and Benjamin Zipursky view tort law as devoted to securing victims of certain wrongs a legal recourse for responding to and for extracting a remedy from those who wronged them. Focused more on wrongs to victims, this goal does not turn on whether or not the wrongdoing, which ought to trigger a legal right of action, involved fault (Goldberg & Zipursky 2007; Zipursky 2008). Gregory Keating views accident law as ideally devoted to the fair and favourable balancing of liberty and personal security (Keating 2006). Pursuant to this Rawlsian view, tort liability ought to spring from accidental disruptions to that balance, whether negligent or faultless.

Moreover, whether or not explicitly engaging the issues of legal and moral luck, there are still other accounts of the grounds of tort law that are also potentially hospitable to legal luck, such as the view that tort law ought to maximise social wealth and, accordingly, function to impose liability in ways that minimise the costs of accidents (Calabresi 1970) and incentivize economically optimal conduct (Posner 1972; Landes & Posner 1987). Under such views, so long as torts of strict liability and negligence deliver economic efficiency, their incorporation of luck is immaterial and even desirable.

Even in criminal law – wherein moral desert is undoubtedly a central consideration – the case against legal luck is not clear cut. The strongest case against incorporating legal luck in criminal punishment is predicated on retributive justice. Retributivism is the view that punishment ought to be meted out to fit people’s just deserts. That is, punishment should be meted out for the relevant aspects of defendants’ moral record. Accordingly, for those rejecting moral luck – thereby adopting the control principle for moral record – retributive justice counts against legal luck in punishment because legal luck entails punishment regardless of moral desert. And, were retribution the *sole* consideration animating the justness of punishment, it would follow that legal luck in punishment is wrong. Even those who are not retributivists (that is do not view desert as reason in favor of punishing) yet do view desert as a necessary condition for or a ‘side-constraint’ on just punishment (H.L.A. Hart 1968), would deem legal luck wrong when prescribing punishing beyond the constraints of desert.

Yet not everyone is a retributivist, and even among retributivists retribution does not necessarily stand alone among the grounds of just punishment. And these other grounds do not necessarily cut against legal luck in punishment. Thus, at least for some, just punishment is not necessarily incompatible with legal luck, even if we were to reject moral luck.

For instance, removing dangerous recidivist criminals from society is a goal of punishment oblivious to whether or not the crime is within a defendant's control (Eiskovits 2005; Kadish 1994: 685-6). Deterrence is another often-mentioned goal of punishment, which also does not necessarily count against legal luck (Lewis 1989: 55-56; Kadish 1994: 685-687; Eiskovits 2005). For example, while attempting to deter people from doing what is out of their control may seem futile, sometimes punishing those lacking in control may serve to deter others who do possess the requisite control (Shavel 1990).

There are still other efforts to justify legal luck in punishment (Hart 1968; Davis 1986; Kenny 1988; Moore 1997: 192-247; Katz 2000; Ripstein 2009). I will mention two. Arguing noncommittedly from the value of fairness, David Lewis suggests lessening the sting of the luck inherent to the criminal law of attempts (Lewis 1989). According to Lewis, when attempting to commit a crime one effectively enters a lottery for what punishment one will face if caught and convicted – if successful one will face harsher punishment than if one's attempt falls short. Given that only the attempt is under one's control and given that whether or not one's attempt succeeds is a matter of luck, whether or not one will face a harsher sentence is also a matter of luck. Yet this type of legal luck is putatively fair because anyone who attempts to commit a crime is subjected to the same lottery.

Another argument in favour of different punishment for failed and successful attempts involves criminal law's purported communicative goal (Duff 2001). Some argue that criminal punishment is and ought to be a vehicle of condemnation, wherein the community expresses its values and censure to criminals as well as to their victims and to the general citizenry. Arguing from the expressivist paradigm, Antony Duff believes it important for the law to communicate that a completed crime is worse than a failed attempt at the same crime, because only then does law communicate the added disvalue of completed crime. Equal punishment for successful and for failed attempts would signal that the law – and thereby the community – is oblivious to such added disvalue, such as the harm to the victims and the costs to society at large (Duff 1990: 31-37).

The Bounds of Legal Luck

I close with the question with which we began: what is legal luck? Conceiving of legal luck as we have thus far solely in terms of “facts beyond one's control affecting one's legal status” is too expansive.

Numerous facts that are beyond our control impact our legal rights and obligations. Construing “legal luck” to encompass them all seems to dilute the category, losing sight of the type of cases that have drawn the scholarly attention enumerated above. For example, the contractual right for payment that a lottery ticket holder has against the lotto company only vests once she wins the lottery, which is clearly beyond her control. Is hers really a case of what we have in mind when thinking of “*legal* luck”? Or, is my status as a murderer a matter of “*legal* luck” given that numerous circumstances not under my control contributed to my success in killing my victim? Such as, once I aimed and pulled the trigger my pistol did not jam or misfire, my target did not bend over to tie his shoelaces just as I fired, and a flock of birds did not fly by just in time to absorb my fire. Yet, although I may be a “lucky murderer,” am I *legally* lucky? Seems not. At least not in the sense of the literature we are trying to understand here. Accordingly, if we took “legal luck” to mean only “facts outside of one’s control affecting one’s legal status,” then given that most of life’s circumstances involve a measure of lack of control, it would follow that the category of “legal luck” is ubiquitous, including numerous cases that seem outside the scope of the literature on legal luck.

This raises two related challenges. One is to better delineate the bounds of “legal luck,” capturing those instances of luck that have drawn philosophical attention and differentiating them from other less relevant cases of luck impacting legal status. A second challenge is normative – explaining whether this tighter conception of “legal luck” warrants the special scholarly attention it has received. Does the category of “legal luck,” as distinguished from other cases of luck impacting legal status track anything of distinct moral significance or concern, such as the fairness concerns explored above?

Setting out to delineate the bounds of legal luck, Enoch draws a distinction between legal luck and what he calls “plain luck that carries legal implications” (hereinafter “plain luck”) (Enoch 2008: 38-44). According to Enoch, the “luck” in “legal luck” is internal to the law. It is, if you will, luck that the law itself creates. In contrast, where plain luck is at issue, the law is merely sensitive to non-legal circumstances that involve luck, thereby making the law indirectly susceptible to the effects of luck that already exist regardless of the law. Another way Enoch puts the distinction is that legal luck is luck that the law creates intentionally, while plain luck is luck that the law merely foresees or allows to have legal implications. For example, whether or not an attempt at *X* succeeds in *X*-ing is often a matter of resultant luck. Given that law draws a legal distinction – explicitly turning on the outcomes of actions – between the crime of *X*-ing and the crime of attempted *X*-ing, the law intentionally creates (in Enoch’s terms) a legal distinction turning on resultant luck. Or, assuming that people’s natural capacities and inclinations, such as intelligence, carelessness, accuracy etc., are a matter of constitutive luck, if the law then draws a legal distinction that explicitly turns on such capacities and inclinations – as in the legal distinction between a “reasonable person” and an “unreasonable person”

– the law is actively and intentionally determining legal status based on luck.

Yet, Enoch distinction does not help us with the two challenges set out above. As for the normative challenge, Enoch explains that his distinction between legal luck and plain luck does not track any intrinsically morally significant difference (Enoch 2008: 53). And as for delineating “legal luck,” the distinction between plain luck and legal luck does not always comfortably fit all clear-cut cases of “legal luck.” Here is an example. A recent election for a seat on the Virginia State Legislature was ruled a tie, and, pursuant to Virginia law, a lottery decides the winner. I take this as a clear-cut case of luck affecting legal status that is not a case of what the literature on “legal luck” has in mind (perhaps because the Virginia law seems fair). Nevertheless, the Virginia example is, I think, exactly what Enoch has in mind by “legal luck.” As it is a case of the law actively and intentionally creating a lottery to determine legal outcome.

Moreover, Enoch’s distinction between “legal luck” and “plain luck” is brittle. For one thing, as Enoch himself concedes, the distinction is vague. For instance, considering that different judges sometimes rule differently on similar cases, does the fact that judges are often assigned cases randomly not suggest that judicial rulings can turn not on one’s relevant actions but rather on which judge one was assigned (Waldron 2008)? In such cases does the law foresee/allow luck to determine legal status or does it intend/make it so? It seems unclear. In addition, often the distinctions between what the law does or allows and between what the law intends or foresees seem mostly a matter of description. At least to me, it rings just as true to say that the tort of negligence allows rather than makes it so that constitutive luck in one’s natural capacities has legal implications. After all, any time a fact affects one’s legal status it does so due to the law, as it is always and only law that vests facts with legal significance. And whether this is something that the law does/allows or intends/foresees often seems mostly due to framing. Relatedly, law neither intends nor foresees; neither does law act nor allow things to happen, at least not in any straightforward way. The law is a system of norms and institutions, and although the law necessarily involves people who act, omit, and have mental states, such as intending and foreseeing, the law itself is not an agent. Moreover, even when we can claim in some sense that law intends or acts – be it through the law’s human organs or otherwise – this is surely not true of all laws involving luck.

Yet, but for Enoch’s essay, there is a dearth of scholarship on delineating the parameters of legal luck. One possible avenue forward is to find inspiration in attempts to draw the bounds of *moral* luck. I will close with a suggestion.

Robert Hartman argues that delineating the bounds of moral luck is best achieved looking not to the concept of “luck,” but rather to the tension in our beliefs out of which the notion of “moral luck” was born

(Hartman 2017: 23-31). As Williams and Nagel point out (Williams 1993; Nagle 1993), on the one hand we believe that people's moral record is not impacted by that which is not under their control. Yet on the other hand, purifying moral record from all that is not under one's control entails unintuitive conclusions about our agency and moral records. Under Hartman's approach, the question of moral luck therefore arises when this tension manifests – that is, when facts outside of one's control seem, nevertheless, to impact one's agency and moral record.

When is that the case? According to Barbara Herman not all facts that are outside of one's control – even if influencing one's actions and/or their outcomes – impact moral record. Herman believes that lack of control does not influence moral record when the facts outside of one's control are abnormal or irregular (Herman 1995: 147). A view she shares with Michael Moore (1997: 211-218). Herman explains that we assume a baseline of effective control which includes much that we do not control, making normal action – performed against the backdrop of that baseline – a matter of course, even though what we control is never in and of itself sufficient to effect our ends. According to Herman:

“Whether or not the world cooperates in our efforts is out of our control, but it is not a matter of luck, if luck marks the introduction of something arbitrary from the moral point of view. It is an ordinary component of rational agency that we act on the assumption that things are as they seem. That we are not, say, in an environment where ordinary causal connections are disrupted ... Because it is reasonable to trust that normal actions will not misfire, we are not lucky when they succeed, even though, as we know, there may be a littered field of ‘almost mishaps’ in our wake.” (Herman 1995: 147).

Perhaps something similar is true for delineating the breadth of legal luck. Possibly it is only when law holds that irregular occurrences – that are outside of one's control – affect one's legal status, that the phenomenon scholars have labelled “legal luck” arises. This would explain why, for example, if one's natural capacities are under the reasonable-person standard it seems like a case of constitutive legal luck, while the normal case of falling within the standard does not. Or why a would-be assassin missing his target due to a mosquito landing on his nose – causing him to flinch – seems a case of resultant legal luck, while the normal cases in which no mosquito unexpectedly appears to save the day are not discussed as involving luck at all. Or why proximate causation – turning on foreseeable outcomes – involves far less legal luck than the thin skull doctrine which provides for liability for unforeseeable outcomes.

Moreover, adopting something like Herman's approach suggests that in cases of legal luck – unlike cases of plain luck – legal status turns on luck in facts that do not impact one's moral record, raising normative concerns in cases wherein legal status ought to somehow track moral record. Which may explain the possible moral drawback inherent to

legal luck, thereby vindicating “legal luck” as a category worthy of special moral reflection.

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¹ In adopting a control-based account of “luck” I follow the literature on both “moral luck” and “legal luck.”

² The term is Zimmerman’s (1987).