

Moral Luck and the Law

Daniel Teehan

Essay

In Florida in 2003, a 20-year-old woke up after a night of drinking, gave his roommate permission to borrow his car, and went back to sleep. For his actions that morning, he was convicted of felony murder and sentenced to life in prison.¹ Just over ten years later in Cleveland, a different man intentionally shot and killed a twelve-year-old child within seconds of encountering him. He was recently spared even the possibility of being found guilty of murder or spending a day in jail.² There was nothing extralegal or illegal in the administration of either trial. However objectionable to individual observers, both outcomes were entirely justifiable within the established legal processes of the jurisdictions where they were adjudicated. And yet, there is something intuitively paradoxical about the notion that society officially designates the car-lender a murderer, and the child-killer not.

To understand how this could be the case, it helps to consider the notion of moral luck, especially as it is articulated by the contemporary American philosopher Thomas Nagel. Nagel's formulation of moral luck complicates our intuitive assignments of blame and guilt by forcing a consideration of the ways that luck – in, among other things, outcomes and antecedent circumstances – affects an actor's personal culpability for a certain outcome.³ And while Nagel's argument certainly has far reaching theoretical implications for philosophy, it also poses pressing practical questions for the administration of criminal law. An examination of criminal justice policies in the United States reveals that, without formally acknowledging them as such, aspects of the law implicitly take certain forms of moral luck into account already. And to the extent that having bad moral luck is an exculpatory – or at least mitigating – factor in the eyes of

¹ Liptak, Adam. 2007. "Serving Life for Providing Car to Killer." *The New York Times*, December 4.

² Cahill, Teddy. 2015. "Calls for Calm after Grand Jury Declines to Indict Officers in Death of Tamir Rice." *The Washington Post*, December 29.

³ Nagel, Thomas. 1991. "Moral Luck." In *Mortal Questions*. Cambridge University Press.

the law for some people but not others, the US criminal justice system manifests internal incoherence.

Moral Luck

“Ultimately, nothing or almost nothing about what a person does seems to be under his control.”

- Thomas Nagel⁴

In his essay, “Moral Luck,” Nagel presupposes a simple but critical framework for thinking about moral judgments, which rests upon the notion of control. Succinctly put, people should be judged based upon what they freely and intentionally do. It would seem unfair to judge someone based on things that happened to them, or for outcomes influenced by factors outside their control. And yet, Nagel points out, “the things for which people are morally judged are determined in more ways than we at first realize by what is beyond their control.”⁵ Nagel identifies four such ways that factors beyond an actor’s control frequently modulate the degree of blame that is assigned to them. These are his forms of moral luck: luck in outcomes, luck in circumstances, luck in antecedent events, and constitutive luck.⁶ Taken together, these forms of luck complicate almost every situation of moral judgment. The implications of this make moral luck’s strength as a concept clear. As Nagel puts it, “the area of genuine agency, and therefore legitimate moral judgment, seems to shrink under this scrutiny to an extensionless point.”⁷ And yet, on the other hand, the near-infinite extensibility of this concept also proves to be its greatest challenge – if almost every negative moral judgment unfairly blames an actor for her bad luck, how are we to make fair, consistent moral judgments at all? Nagel does not give an answer to this question – perhaps he thinks it unanswerable. But as a society tasked with doling out blame

⁴ Ibid, 26.

⁵ Ibid.

⁶ Ibid, 28.

⁷ Ibid, 35.

and apportioning punishment in response to such situations, we don't have the luxury of avoiding it.

The examples Nagel uses to illustrate his forms of moral luck convincingly demonstrate that our intuitive judgments of a person can be modulated by factors outside of that person's control. Take one of his parable-like cases for luck in outcomes. The degree to which we judge a drunk driver can depend more on her surroundings and the behavior of those around her than on her personal irresponsibility in driving drunk. Were the driver to swerve onto the sidewalk and fatally strike someone, she would be judged much more harshly than were she to swerve without inflicting damage.⁸ Were she to hit and kill a mother and child, the judgment would be harsher still. And yet the act for which she is responsible – driving while drunk and losing control of her car – has not changed. The case is simple, but illustrative in how a consideration of luck complicates formation of moral judgment. One either ignores bad luck and judges a person for the uncontrollable outcome of her action (unfair judgment), acknowledges luck and judges her solely on her personal responsibility, without regard to outcomes (strict fairness), or arrives at some middle ground of judgment that straddles the harsh and lenient options (calculated blame).⁹ The strictly fair choice seems plausible enough, until Nagel introduces other forms of moral luck that undermine the existence of personal responsibility.

In the same way that people are regularly subject to unfair judgment for outcomes that were beyond their control, Nagel shows that people are judged for choices they made that were themselves conditioned by circumstances beyond their control.¹⁰ These pre-action conditions are Nagel's other three forms of luck – luck in circumstances (conditions of the environment), in personal constitution (mental/physiological features), and antecedent circumstances (other factors that condition the will to make certain choices). As with luck in outcomes, aspects of this

⁸ The set up for this example comes in Nagel, 29. Some of the embellishments on the situation are mine.

⁹ These parenthetical terms are ones that I have made up in an attempt to talk about Nagel's concepts in a more rigorous/sustained way throughout the paper.

¹⁰ Nagel's extension of situations in which moral luck applies and reduction of personal responsibility happens mainly on pages 35-37. The ensuing examples are ones that I formulated.

argument are simple to grasp. If someone is genetically predisposed to alcoholism, they have bad moral luck: there is a factor outside of their control that informs their decision making process when drinking. Placing sole blame on them for negative outcomes that resulted from their drunkenness would be unfair. But Nagel goes farther than asserting that some decisions are influenced by factors outside a subject's control – he suggests that *all* decisions are determined by such factors.¹¹ The argument, familiar to determinists, that actions are not elected by some inner self but are rather preconditioned by extrinsic events and preceding circumstances, has expansive implications. As Nagel phrases it, “the effect of concentrating on the influence of what is not under his control is to make this responsible self seem to disappear, swallowed up by the order of mere events.”¹² According to the above definition of strict fairness, in the absence of personal responsibility, there can be no moral judgment.

Nagel ends his essay grappling with the implications of this dissolution of the responsible self. What he is left with, philosophically, is a world view somewhat akin to Buddhism.¹³ What he leaves us with, practically, is a conundrum. It is clear how reasoning using moral luck could be used to absolve people of responsibility for tragic outcomes in individual cases. But it is unclear how moral luck should be factored into judgments in a way both practical and fair: given the various forms of moral luck at play in any situation, strict fairness *could* be used to absolve everyone of judgment. But it is not, and probably should not, be used. Employing unfair judgment – that is, ignoring luck, is unfair to exceptionally unlucky individuals. And calculating blame leaves the calculators with the task of parsing out how much of an outcome is attributable to a person's willing action, and how much to luck.

That bad luck can be incorporated into judgments in these three different ways – completely, to exculpate; partially, to mitigate; or not at all, to indict – puts a significant amount

¹¹ On 35, Nagel asks, “how can one be responsible even for the stripped-down acts of the will itself, if *they* are the product of antecedent circumstances outside of the will's control?”

¹² *Ibid*, 36.

¹³ I found the ways in which Nagel's final section articulated a view of the self (or lack thereof) strikingly similar to Buddhist philosophical tenets of non-self and an understanding of how the conception of self arises from conditioning factors. Of course, this isn't quite the paper to explore that aspect of things.

of discretion in the hands of the person or system doing the judging. This flexibility of application could be a good thing. It could lead to fairer outcomes, where egregious or systemic instances of bad luck are accounted for, while tendentious claims to innocence are ignored. But when we turn our consideration to the criminal justice system – the institution tasked most explicitly with dealing with these questions – it is clear that this flexibility, rather than counterbalancing the vagaries of luck, facilitates outcomes ranging from the inconsistent to the unfair.

Luck in Law

Moral luck is a useful concept, but it leaves us with a problem. Nagel convincingly makes the case that luck complicates our moral judgments in almost every situation, but provides no clear instructions on how to use the concept practically to make consistent and fair judgments. For individuals, this tension challenges personal notions of fairness towards others. But for society, which passes moral judgment on individuals' actions through the criminal justice system, it calls into question the legitimacy of the foundational principle of equal justice. While Nagel's argument concludes without a clear prescription for applying moral luck, it does provide the tools to analyze instances of moral judgment through the lens of luck (and the attendant notions of control and fairness). Using this lens to examine the ways that our society navigates moral luck through criminal law may provide insight into both the criminal justice system and the rigor of moral luck as a practical concept.

Considering criminal justice through the lens of luck makes it clear that the system already incorporates luck – both in outcomes and in preconditions – in certain situations. But the way that luck is currently used in adjudicating guilt and punishment appears arbitrary at best and biased at worst. While a statistical approach to the question is beyond the scope of this inquiry, consideration of three different cases is enough to confirm that the judicial response to situations in which a defendant did not have complete control runs the gamut from unfair

judgment to calculated blame to strict fairness. In the case of “felony murder,” absolutely no consideration is given to bad luck in outcomes in cases where it clearly applies. Through the ruling of “not guilty by reason of insanity” (NGRI), strict fairness is applied and the court formally recognizes constitutive bad luck as an exculpatory factor. And through judicial consideration of the impressionable circumstances of youth, calculated blame is apportioned to non-adult offenders. These cases, when taken together, show that the courts are capable of incorporating the concept of luck into their judgments, but do not do so in a consistent way.

Felony murder is a statute in many jurisdictions in the U.S. It takes the notion that people engaged in felonies are responsible for any ill effects of their actions – no matter how unpredictable, unintended, or uncontrollable – and codifies it into law.¹⁴ It is frequently applied to people engaging in collective misdeeds. If several people are burglarizing a house or store and one of them kills someone in the process, everyone involved can be charged with felony murder. Likewise, if someone dies as a result of a felony, the person committing the felony is deemed the murderer as a result of this statute. The latter form of reasoning led to a shoplifter being charged with murder when the security guard struggling to handcuff him collapsed and died. While the charge of felony murder can be used as simply a prosecutorial bargaining chip or eventually overturned by higher courts, legal history is full of cases where a person with no intent to kill or control over a death was convicted of murder. Felony murder thus represents not just unfair judgment, but juridical weaponizing of bad luck as a tool to increase criminal responsibility.

If felony murder represents a refusal to attribute bad outcomes to bad luck, then NGRI is a legal concession that constitutive bad luck can override an individual’s responsibility for a crime. It is significant that the plea, if accepted, does not merely excuse an insane person from the consequences of their actions – it rules that they are substantively not responsible for them. This conclusion is in line with Nagel’s emphasis on conditions of control: an insane person does not have full control over their actions, so it does not make sense to judge them for those

¹⁴ Liptak, “Serving Life”; Madar, Chase. 2014. “A Blood Sacrifice for the NYPD.” *Jacobin*, August 8; Thompson, Christie. 2015. “Charged with Murder Without Killing Anyone.” *The Marshall Project*, November 24.

actions. However, it is unclear why a lack of control due to insanity is more relevant than a lack of control over outcomes manifested in felony murder. The case of special juvenile considerations adds even more confusion to the mix by introducing a situation where blame is effectively divided between circumstances and individual agency.

The legal treatment of juvenile responsibility is less clear cut than that of insanity or felony murder. As cited in the Marshall Project, research indicates that “until about age 25, adolescents and young adults lack a fully developed brain.”¹⁵ This constitutive trait makes youth less reflective, more impulsive, and more likely to be influenced by their surroundings. Young people who end up committing crimes must then be suffering from at least some level of bad luck – constitutively and circumstantially. Some jurisdictions ignore this reality altogether, applying what seems to be unfair judgment to youth offenders. New York, for example, automatically tries 16 and 17 year olds as adults for all crimes, and kids as young as 13 as adults for homicide, rape, and some other serious offenses.¹⁶ In general, however, the national trend has been to acknowledge bad luck by treating youth as a mitigating – but not exculpatory – factor. This manifests through shorter sentences, banning of the death penalty for juveniles, and even the trying of youth cases in family court instead of criminal court. This (very slight) leniency reflects a stance that kids, while not absolved of responsibility for their actions, at least share that responsibility with the bad luck of their youthful circumstance.

Felony murder, NGRI, and juvenile justice collectively demonstrate that the law is capable of acknowledging the role of bad luck in contributing to outcomes, but doesn't do so in a consistent or comprehensive way. Indeed, beyond the inconsistent treatment of luck between the cases, there is discretion and degrees of difference within each category. Juveniles facing family court can be waived to criminal court by a judge, people with severe mental impairments can be deemed competent to stand trial, and tenuous charges of felony murder can be overturned by higher courts or negotiated down to lower charges. This level of discretion in the

¹⁵ Goldstein, Dana. 2015. “What’s Justice for Kids Who Kill?” *The Marshall Project*, July 23.

¹⁶ *Ibid.*

system facilitates cases of both extreme unfairness and exceptionable charitability. Indeed, it also subjects defendants to an additional, meta-layer of moral luck. For if the resonance of moral luck arguments in a defendant's case depends on such factors as the quality of her lawyer, the receptiveness of her judge, and the capriciousness of the prosecutor in bringing certain charges, her guilt or innocence in the eyes of the law is further dependent on factors beyond her control. That a poor youthful defendant facing charges of felony murder in adult court in front of an unsympathetic judge has a higher chance of being deemed guilty and getting a life sentence than a wealthy youth being tried in a family court for non-murder charges for the same action seems a particularly unfair consequence of moral luck. While these hypotheticals may seem like extreme extensions of a benign principle, real life juxtapositions such as that posed in the introduction to this essay demonstrate the importance of luck in determining how the state judges individual actors.

Kid-Killer and Car-Lender

"No car, no crime. No car, no consequences. No car, no murder."

-Ryan Holle's Prosecutor¹⁷

Let's return, then, to the cases of Ryan Holle, the young man convicted of felony murder for lending his car to a friend, and that of Timothy Loehmann, the man – and police officer – who was spared charges in the shooting of an unarmed 12-year-old, Tamir Rice. The two cases are illustrative insofar as they demonstrate the ways that discretion – when it comes to incorporating luck into moral judgment – facilitates hugely disparate outcomes in the criminal justice system.

Holle had incredibly bad luck. Because the car that he innocently lent to a roommate was used in the commission of a crime that resulted in a death, prosecutors were able to use the felony murder statute to charge him as an accomplice and a murderer. His circumstance would

¹⁷ Quote originally reported in Liptak. "Serving Life."

be a laughable *reductio ad absurdum* of the notion of unfair judgment, were it not a real case of a young man being sentenced to life in prison. For a situation over which he had minimal control, Holle was assigned maximum responsibility. Loehmann, on the other hand, was absolved of responsibility for a killing over which he had almost complete control. There were certainly forms of bad luck at play in his case – the circumstances he faced as a police officer put him in a position of moral peril, and the information available to him at the moment he acted inclined him to believe that deadly force was justified. But to acknowledge that these minor forms of bad luck absolve Loehmann of any personal responsibility for Rice’s murder extend to him a degree of charitability completely absent in Holle’s case. That Loehmann and Holle’s cases can coexist in our system of laws is clear proof that we do not deal with situations of moral luck in a consistent or fair way.

Extreme discretion when it comes to parsing out the contributions of luck and will to a crime is a problematic aspect of our criminal justice system. As long there is flexibility to absolve certain actors of responsibility altogether, and to prosecute others completely out of proportion to their individual contribution to a crime, that flexibility will manifest unfair outcomes such as Holle’s and Loehmann’s. And as with many cases where there is broad discretion, that discretion will inevitably facilitate various individual and societal biases. Loehmann was not just morally unlucky to be put in the situation for which he has garnered attention – he was morally lucky to be a cop. For all of the uncertainty surrounding forms of moral bad luck in the criminal justice system, the moral good luck of being in law enforcement seldom fails to deliver.

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Author Commentary

Daniel Teehan

This essay, written as a final paper for REL 320: The Problem of Evil, coalesced a few different concepts I was trying to work through when I was given the assignment. As making arguments in essays is effectively a form of disciplined thinking, I try to pick essay topics that pertain to problems I am already thinking about, so as to better understand them. In this case, I had spent much of winter break trying to work through some of the thoughts and emotions I had in response to the non-indictment of Tamir Rice’s murderer, the police officer Timothy Loehmann. I was also really struck by reading about the concept of moral luck for the religion class I was in, and the concept’s seemingly broad extensibility to the realm of ordinary and institutionalized moral judgments. Finally, I had read a really provocative article in *Jacobin* about the bizarre and worrying existence of felony murder statutes, which in retrospect seemed curiously related to moral luck. With those three pieces I had the makings of an essay about the role of luck in the criminal justice system.

My instructor for the class, Professor Liane Carlson, helped immensely in developing the ideas for this essay, and maintaining a realistic scope – mainly by talking through the ideas and helping make what was essentially a long-form article into an essay that grapples more substantively with a philosophical concept. The end result is still inflected by my background in journalism – especially the narrative form of the opening and the punchy ending – mainly because I wanted to keep the essay focused on the very real lives it addresses. The essay, in the end, deals with social biases rather less than I initially intended, but hopefully it still accomplishes the intended effect of prompting people to reconsider the ways that their own moral judgments can be shaped. At the very least, I hope to introduce moral luck as a discursively useful concept for engaging in the ever present and always difficult conversations around crime and punishment and disparate prosecution in this country.

Fellow Commentary

Kelly Rafey

Some essay topics are inherently engaging. Thomas Nagel’s philosophical theory of “moral luck” is probably not one of them. But in the journalistic hands of Daniel Teehan, his rigorous analysis of moral luck is not only clear and well argued, but relevant and engaging.

In “Moral Luck and the Law,” Teehan grapples with Nagel’s theory of moral luck—that people’s actions, hence their culpability for those actions, are inseparable from their personal circumstances. Teehan examines this theory against modern America’s criminal justice system, **arguing** that criminal law incorporates moral luck into its judicial process implicitly, granting benefits to those who have moral good luck while disadvantaging those who are morally unlucky.

To **motivate** his critique of moral luck and its role in criminal justice, Daniel frames his essay with two contrasting murder cases: Ryan Holle, convicted of a murder he did not commit, and Timothy Loehmann, cleared of all charges after willfully murdering a child. By beginning his essay with an overview of each case, the philosophical content of the essay takes on real urgency. From the very start, the reader has real motivation to read on—to understand how in these two cases the criminal justice system appears to institutionalize injustice.

But in a crucial addition, Daniel does not rely on this motivating framework to carry the rest of his essay. As he walks the reader through his argument, introducing **key terms** such as moral luck and explaining key concepts with brief case studies, he **motivates** his argument throughout. In the opening paragraph of the section “Luck in Law,” for example, he articulates a problem with Nagel’s philosophy: it outlines a theory without acknowledging any practical applicability. By pointing out this issue, Daniel carves out space to insert his own argument into Nagel’s theoretical framework, writing: “Using [Nagel’s] lens to examine the ways that our society navigates moral luck through criminal law may provide insight into both the criminal justice system and the rigor of moral luck as a practical concept.” In this sentence, Daniel not only **orients** the reader to the next part of the paper—which they can now assume will examine moral luck in light of the criminal justice system—he states the implications of his argument—that it will clarify both moral luck *and* the criminal justice system.

In setting up his argument against a backdrop of these two murder cases, Daniel makes a promise to his reader. He pledges to use the rest of his paper to show how moral luck is integrated into the criminal justice system, and to ultimately show why in these two instances the nonmurderer was convicted and the real murderer released. And in his conclusion, Daniel fulfills his promise. He returns to his framing case studies to evaluate them against the role of moral luck in the criminal justice system, bringing his essay full circle.

From start to finish, Daniel’s essay leads the reader through a logical and well-substantiated argument, motivated throughout with a combination of popular and scholarly motive—real-world events and philosophical, academic questions. His essay challenges an institutional system along philosophical grounds and ends on a note that is not only insightful, but inciting.