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RETHINKING PUNISHMENT AND LUCK

Jaime Malamud Goti*

I.

To state that some outcome you bring about is luck's work is to deny you are either responsible or commendable for its occurrence. Control or luck; this is how most regard the alternative in every field. If I tell you it was by pure luck that you made a great discovery, that you won the tennis match, or that the salmon you broiled tastes so good, I mean you have no right to gloat over your performance as a scientist, as a tennis player, or as a chef. This language reflects the notion that luck excludes praise and responsibility because desert—good and bad—is grounded in the control of our will over events. Thus, under this standard view, it makes no sense to either praise or blame you for what happens beyond your control. I set out to dispute the validity of this belief.

Philosophers and theologians debate what in our lives is apportionable to responsibility or luck. Some maintain we are not responsible for anything, including what we suppose we deliberately do with our bodies. Fatalists believe that all the things occurring in the world have been set into motion—and steered—by some external force or hand. For them, our will is impotent to alter the course of events whether or not they should course through our body.¹ The universe is run by fate, such that no occurrence in our life is of our own doing.

There are also those who support the opposite view, such as J.L. Borges's character, Otto Dietrich zur Linde, who reminds us of the metaphysical belief that each one of us has prefigured every single thing that takes place in our lives, including those that we mistakenly suppose happen *to* our lives.² In allusion to this conception, Borges writes in *Deutsches Requiem*:

[A]ll things that can occur to a man, from the moment of his birth to the moment of his death, have been predetermined by him. Thus, all inadvertence is deliberate,

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1. See Bernard Williams, *How Free Does the Will Need to Be?*, in *Making Sense of Humanity and Other Philosophical Papers, 1982-1993*, at 3, 11 (Cambridge U. Press 1995).

2. Jorge Luis Borges, *Deutsches Requiem*, in *Collected Fictions* 229, 231 (Andrew Hurley trans., Viking 1998).

every casual encounter is an engagement made beforehand, every humiliation is an act of penitence, every failure a mysterious victory, every death a suicide.³

Most of us hold a less radical stand that allows room for both responsibility and luck. We believe we are responsible for some events under our control, but not for others that we attribute to happenstance. As he does with every central aspect of criminal responsibility, George Fletcher lays out an interesting view on luck and responsibility.

In *Rethinking Criminal Law*,⁴ in my opinion the most creative work on criminal responsibility of its time, Fletcher maintains that the harm we cause is morally relevant, and therefore warrants harsher penalties than harmless attempts. We are—or may reasonably be held—more responsible if we bring about harm than if we just set out to cause it but end up failing. Outcomes increase our responsibility even if these outcomes are beyond our control. Fletcher writes:

[I]t would be plausible to argue that attempts at the early stages should be punished less severely than attempts in which the actor has done everything in his power to bring about the harm. But the act in this latter category of last-step attempts is the same as the act that produces the harmful consequence. The only difference is that a causal process beyond the actor's control sometimes generates harm and sometimes not. The problem is explaining why this factor of chance, extrinsic to the wrongful act, should influence the gravity of the wrong and the level of punishment.⁵

To establish the moral relevance of harm, Fletcher couches his position in emotivist terms. Thus, we ought not treat others in ways we would resent to be treated ourselves. Thus, we ought not punish an agent as if he had in fact caused harm that did not happen.⁶ To place ourselves in some other person's place is a well-seated method for testing the objective validity of moral claims. If it is not good or right in my case that I am treated so, then it is not good or right that I should treat you that way. In essence, I agree with Fletcher's view on the relevance of outcomes with the caveat that the procedure he has chosen to validate his view renders the appeal to the emotions superfluous. My thesis draws on the practice of blame and holds that emotions play an essential background role.⁷ I first distinguish between events that fall within and beyond our control at two different levels: First, I tackle the issue of luck at the level of common social beliefs and practices. Second, I broach the same issue at a philosophical or conceptual level, one of (more) rigorous reflection upon what we actually do

3. *Id.*

4. George P. Fletcher, *Rethinking Criminal Law* (Little, Brown & Co. 1978).

5. *Id.* at 474.

6. *Id.* at 482-83.

7. See Stephen P. Garvey, *The Moral Emotions of the Criminal Law*, 22 QLR 145 (2003). In supporting the difference thesis, Professor Garvey's view is that emotions play out in a different manner when we cause harms than when we don't. On this basis, Garvey distinguishes between different kinds of guilt and between guilt and responsibility. Based on my own intuition, I agree with his distinctions but doubt that they should hold independently from another, stronger intuition. The latter refers to succeeding and failing to cause harm. My sense is that that falling back on intuitions about guilt and shame may mean hitching the cart before the horse.

control beyond experience. I then lay out the reasons that turn blame into a practice essential to our social interaction. Finally, I explain the reasons why blame should be grounded in control in the first, common social practice approach to the distinction between control and luck.

I refer to “doing” and “actions” as just basic bodily movements and exclude causal processes beyond the agent’s body. By luck, I rather loosely mean whatever happens in—and to—our life beyond our control. I take on after Thomas Nagel’s well known article *Moral Luck*⁸ to distinguish three kinds of luck: *constitutive luck*, *situational luck*, and *outcome luck*.⁹ The first, constitutive luck, consists in the kind of persons we are: our physical makeup, innate tastes, talents, and inclinations. We had no say on whether we would be affectionate and sensitive or taller than six feet. Situational luck consists in the circumstances in which our life develops beyond our will. Some people sail through a safe and undisturbed existence while others are forced to face crucial situations on a daily basis. Some of us are born into harmonious and ordered families and communities, whereas others are raised in poverty and violent neighborhoods or trapped in a merciless war. Finally, outcome luck lies with how our projects work out; with what transpires in the world once we willfully move our bodies. In establishing responsibility, moral and criminal law theorists are usually sensitive to facts that fall within the first two categories. Tragic choices impinge on our autonomy and, consequently, on our responsibility too. I later show there are connections between the moral assessment of our actions and these three kinds of luck.

The central topic of this paper is outcome luck. What happens after we do what we believe can further a certain goal is a matter of luck. I may have missed the shot that decided the archery contest because a hare sprang between my arrow and the target. Unlike your victim, mine survived because the ambulance driver knew every shortcut in town and the surgeon was the best in town. Outcome luck is particularly controversial among moral and criminal law theorists, and this may be because it tackles two contradictory intuitions: first, that only control warrants reproach and, second, that what happens in the world outside us matters. Some scholars espouse the view I call the *irrelevance thesis*. They claim that the outcomes of what we do should not affect the extent of our moral responsibility. Strictly speaking, causing damage and pain are beyond our control and should not affect the agent’s responsibility. That you wore a bulletproof vest when I fired the gun trained on your chest is beyond my intent and control. I am not sure what a champion of this thesis would say about achievements that we praise, but they prove to be unwavering when it comes to moral and criminal condemnation. They maintain it makes no sense to hold people responsible for occurrences they cannot avert or change. Once the perpetrator has left the poisoned water on your bedside table, it’s entirely up to you whether the murderous plan succeeds. If the

8. Thomas Nagel, *Moral Luck*, in *Moral Luck* 57 (Daniel Statman ed., S.U.N.Y. Press 1993).

9. *Id.* at 60. Nagel includes a fourth kind of luck related to how we are conditioned to act by precedent circumstances. *Id.*

irrelevance thesis were true, not only should we reject the impact of luck in relation to events and states of affairs it brings about in our lives, but we would also have to make sure luck in no way seeps into our own judgments so that they remain impervious to chance.¹⁰

Contrary to the irrelevance thesis, the *difference thesis* maintains it is morally different to try to kill a person than to actually cause this person's death. Though immediately appealing, this thesis is difficult to support. We tend to consider our will to be the only object of our moral judgments, and this approach makes the irrelevance thesis trivially correct. But turning our will into the necessary and sufficient reason for blame misplaces the question. It tackles the issue of responsibility from the point of view of private rather than political morality. I shall devote a good part of Part II of this paper to demonstrate why the former approach misplaces the problem.

II.

Most criminal codes in the western culture punish criminal intent more severely when the agent succeeds in bringing about the harm. This trend seems to match a common perception in the western culture that the difference thesis is morally correct. It seems clear, however, that in establishing the limits of responsibility, ordinary moral perceptions are suspect from the outset. The real challenge is whether we can justify this intuition by appealing to principles of critical morality, detached from the community's beliefs.

My purpose here is modest. I do not believe criminal outcomes ought invariably to elicit a stronger condemnation of the agent or his deed. I only maintain that stronger condemnation is not, as defenders of the irrelevance thesis maintain, necessarily unreasonable, let alone irrational. I thus set out to support the difference thesis but, in searching for a view outside individual morality, I overlook theories based on the advantage of either thesis in fitting a positive legal order.¹¹ The reason lies in that such a theory would assume that which we aim to demonstrate: a just legal order should be shaped after the most acceptable moral thesis.

10. Bernard Williams, *Moral Luck*, in *Moral Luck: Philosophical Papers, 1973-1980*, at 20, 21 (Cambridge U. Press 1981). Williams also maintains that morality must constitute a supreme value system. *Id.* at 21-22.

11. Steven Sverdlik, for instance, claims that the irrelevance thesis is more suitable than the difference thesis to address certain kinds of mistakes. Suppose *A* shoots *B* instead of *C* because either *A* was mistaken about the direction of the bullet or thought *B* was in fact *C*. In either case, we find it quite problematic to establish *A*'s criminal responsibility under the difference theory. Similarly, we encounter serious difficulties to adequately punish *A* if he shoots *B* with the intent to kill him but actually kills him when, believing his victim to be dead, *A* throws *B* out the window to conceal his crime, and *B* dies from the fall. In these three cases, we should convict *A* only of an attempt although *B* winds up dead. This seductive argument is based on ordinary positive legal provisions in western legislation and is thus unsatisfactory to answer our basic question of justifying law itself. See Steven Sverdlik, *Crime and Moral Luck*, in *Controversies in Criminal Law: Philosophical Essays on Responsibility and Procedure* 68, 68-78 (Michael J. Gorr & Sterling Harwood eds., Westview Press 1992).

Most generally, there are two levels at which we may discuss what does and what does not fall under the control of the agent. We may ground this notion in a common sense approach (CSA) that considers it essential the way we ordinarily value our actions and their consequences. Control at this level is essentially empirical. We control what we foresee as a regular occurrence. At the second level experience is inessential; the issue here is now conceptual in that our concern is what, if anything, necessarily falls under our command, whatever this means. I call the latter the philosophical approach (PA) and seek to establish what processes are in no way subject to chance. CSA has been convincingly put forward by R.A. Duff¹² and also persuasively challenged by Andrew Ashworth.¹³

Duff maintains that if we were to accept the irrelevance thesis, all we can predicate about what we do is that only actions remain under our control. We can only say we try insofar as the outcomes of our actions are placed beyond this control. It follows that the social world of moral responsibility would not be one of *achievements* but only of “tryings.”¹⁴ We would not only talk about ourselves as “trying” to steal other people’s property and sell someone else’s car pretending it is our own. Because the efficacy of all actions is contingent upon circumstances external to us, we would also only try to comb our hair and drive our car. Now this would sound strange. Such language would not report accurately on how we interact with others. The language of trying is applicable only when failure is highly probable. To say I will try to comb my hair or do the laundry is either artificial, misleading, or both. It strongly suggests, when referring to everyday activities, there are covert reasons that may hinder our pursuit. Indeed, CSA points to the way in which we refer to our actions and stresses that reference to our purposes and intentions suggests we seriously doubt that the outcome will come about. I say you have gone home to sleep if that is the reason you provide when you leave the party. To declare that you “intend”—or “try”—to go home and get some sleep sounds pessimistic or eccentric, or it suggests you are relatively unfit to pull off a rather simple undertaking. That could well be Antonio, who has just taken up driving, had several vodka shots, and is new in town. In his case, it will be natural to refer to his effort on a journey through the city as just trying. Reference to the agent’s intent is appropriate when we underscore our serious worry about the projected outcome.

We live in a social world in which almost everything we do belongs to the first category, to undertakings that allow us to take success for granted.¹⁵ Thus, we assume, as does the law in our culture, that criminals are usually successful too.¹⁶

12. See R.A. Duff, *Criminal Attempts* 327-47 (Clarendon Press 1996) [hereinafter Duff, *Criminal Attempts*]; R.A. Duff, *Subjectivism, Objectivism and Criminal Attempts*, in *Harm and Culpability* 19 (A.P. Simester & A.T.H. Smith eds., Clarendon Press 1996); R.A. Duff, *Acting, Trying, and Criminal Liability*, in *Action and Value in Criminal Law* 75 (Stephen Shute, John Gardner & Jeremy Horder eds., Clarendon Press 1993) [hereinafter Duff, *Acting*].

13. See Andrew Ashworth, *Taking the Consequences*, in *Action and Value in Criminal Law* 107 (Stephen Shute, John Gardner & Jeremy Horder eds., Clarendon Press 1993).

14. Duff, *Acting*, *supra* n. 12, at 85-88.

15. *Id.* at 90-93.

16. Duff, *Criminal Attempts*, *supra* n. 12, 284-85; Duff, *Acting*, *supra* n. 12, at 102-06.

It is therefore natural to presuppose that in the abstract we—through criminal provisions—condemn successful actions. We mention it expressly when we punish more leniently unsuccessful wrongdoing, thereby signaling that we don't condemn the action quite as strongly. But these are only exceptions to the rule according to which we expect ourselves and others to succeed at what we set out to do unless it is particularly complex or confronts us with special difficulties and risks. Laid out this way, the difference thesis derives its plausibility from ordinary beliefs grounded in experience. In our common parlance, we assume that the agent is in control of events even after, detached from her body, the causal process takes its own course. We still believe causal processes will work out just as the agent thought they would. This view seems to make a lot of sense, but so does Ashworth's critique.¹⁷

The problem with CSA, Ashworth maintains, is that it doesn't tell us much more than does an average member of our community.¹⁸ CSA originates in the same source as our common beliefs about the good and the correct. CSA may, I insist, be as impregnated with prejudice as our neighbor's opinion about sex out of wedlock and polygamy in Senegal. To reach this idea about the extent and meaning of control, we don't really need to develop a whole theory. We already know how our opinionated neighbors would respond to our queries on whether causing someone's death is worse than just trying to kill him. Our mission is to filter these widely shared beliefs through articulate principles detached from those of the community. To set the limits of moral and criminal responsibility on the basis of ordinary moral beliefs, says Ashworth, means consecrating moral populism.¹⁹

Thus, it seems, we need to appeal to a bias-proof notion of luck and control: PA. The issue now is to establish an untainted and consistent conception of control under PA and determine how far our will is in command of what happens around us. Indeed, we will see, very little really is. Thomas Nagel has stressed that, strictly speaking, we can only control our mental states, not our body.²⁰ Thus far, according to PA, the practice of blaming for the actions we do is largely grounded in the illusion that we can fully trust our bodies. But beyond empirical CSA, we cannot fully trust our muscles, for they may fail to obey us when we command them to stretch and contract. The fact that my body should move in certain ways does not depend only on my will. It is also conditioned upon certain biological processes that govern the relationship between mind and body. It follows that, under PA's strict notion of control, judgments about our responsibility cover an extremely small portion of our lives. PA, in Nagel's view, reduces the field of moral reproach and condemnation to that of just our will.²¹ But I believe we are even more limited than that.

17. See Ashworth, *supra* n. 13, at 111.

18. See *id.* at 110-13.

19. See *id.* at 113-14.

20. Nagel, *supra* n. 8, at 58-59, 63.

21. *Id.* at 65-67.

Luck also pervades our mental processes. The meaning and validity of a great deal of our mental activity depends on other people's beliefs and attitudes which, in turn, these individuals cannot themselves control. Let me quickly survey two examples of this limitation on the ability to control our minds. The first is what John Searle calls "collective intentionality."²² The second lies with the notion of interaction and a distinction on which Nagel's contention is based: the distinction between mind and object, subjective and objective. The first case shows that the meaning of our beliefs is dependent not only on external facts, but also on what happens in other people's minds. The latter blurs the distinction between subject and object. I start with the notion of collective intentionality.

By collective intentionality, I refer to that reality external to my mind, whose existence depends not only on certain preconditions in the world of material objects but also upon the beliefs and attitudes of other people. You are ready to trade your book with me because you think the piece of paper I offer you is money—and a sufficient supply of money. Unlike cats and lakes, the existence of money is contingent, as Searle points out, on our own—and other people's—beliefs and attitudes.²³ The value of what I offer you does not depend entirely on the existence of a certain material object nor, at least not entirely, on my own beliefs and acts. It also hinges upon whether you—and a number of other people—believe that it has a certain exchange value. Thus, this piece of paper ceases to be money the moment a number of people stop treating it as such. This applies to institutional facts too. The existence of presidents and weddings also depends on other people's attitudes and mindsets. The same happens with objects we define by the function we assign to them: I believe these objects are chairs, books, and radios, but the fact is that the truth—and nature—of my belief depends on whether or not other people concur in assigning the same purpose to them. Beliefs and attitudes that shape my own reality are "objective" in the sense that they take place outside my mind. But they are not objective insofar as they are not corporeal. They are subjective in the sense that they exist only inside a mind—your mind or theirs.

What follows is that the true value and meaning of my beliefs lie beyond my own control and are thus, strictly viewed, contingent upon luck. The point here is that the validity of my beliefs—and of others' beliefs—should often themselves be included among the conditions of the validity of the same beliefs—yours and mine—and the appropriateness of our resulting attitudes and actions. This becomes visible with most forms of human interaction which, as we tend to think of them, erase the strict boundaries distinguishing subjective and objective.

It is customary among anthropologists to describe the scene in which they meet the subject of their research in terms such as the following: "I am looking at him, looking at me, looking at him, looking at me" This scene depicts the researcher in the process of interviewing someone whose psychology and behavior

22. See John R. Searle, *The Construction of Social Reality* 37-51 (Free Press 1995).

23. *Id.*

she seeks to understand. In this act, the researcher is trapped in a position from which she can only watch the subject when—and as—the subject watches her. She is watching the subject, who is watching her. Beyond (and surely against) her will, the researcher has somehow incorporated the subject's behavior as a part of her own behavior. Subjective and objective no longer remain separate. The presence and behavior of the subject are reflected in the present (and consequent) behavior of the anthropologist, and vice versa. The researcher's behavior becomes part of the subject's behavior. In this situation, the anthropologist discovers—mostly to her chagrin—that she cannot elude incorporating her own behavior into that of the research subject. As a consequence of this process, the subject loses its epistemic "purity" or independence, and the researcher loses the desired neutrality by having incorporated the subject's behavior into her own.

This proves to be a circular process, inherent to humans' varied and everyday examples of interaction.²⁴ Think of the effectiveness of voodoo curses in some parts of the world.²⁵ If voodoo black magic does not lie on supernatural evil powers—as I truly hope it does not—its efficacy depends on the victim's beliefs and also upon the beliefs of members of the victim's human environment. The effectiveness of the voodoo witch in killing his victim depends on these people's attitude, which usually consists of treating the targeted victim in a certain way: first as ailing, and later as inevitably dying. This is in fact a self-fulfilling prophecy. It is belief—and the subsequent reflection of this belief—that asserts its own validity.²⁶ The witch's assumption that he will kill the targeted victim is neither true nor false. It turns out to be true if—and only if—the victim and those who surround her believe it is true.²⁷ Processes like this, it seems, have played an important role in the politics of the Caribbean, among other places, and some historians attribute the abolition of slavery to this practice.²⁸

But this is not just a particularity of voodoo black magic. Every observer visible to her subject is an actor, but so is the person observed who becomes an actor too. The notion of an action as part of an interplay between these two agent-subjects strongly points to a necessary change in paradigm. The notion of an action no longer fits the usual atomistic model, quite dear to moralists and legal scholars. In this view, the simultaneity of interaction incorporates in each agent's mindset that of the other agent and expresses how the meaning and consequences of what we do is contingent upon other people's mental processes. I can only suggest that the consequence of this logic is that the measure of control over our

24. See Rolf Breuer, *Self-Reflexivity in Literature: The Example of Samuel Beckett's Novel Trilogy*, in *The Invented Reality: How Do We Know What We Believe We Know? Contributions to Constructivism* 145 (Paul Watzlawick ed., W.W. Norton & Co. 1984); see generally, Paul Watzlawick et al., *Pragmatics of Human Communication: A Study of Interactional Patterns, Pathologies, and Paradoxes* chs. 1, 2, 4 (W.W. Norton & Co. 1967).

25. See a synthesis approach in Laënnec Hurbon, *Los Misterios del Vudú* (Claves no date).

26. See Paul Watzlawick, *Self-Fulfilling Prophecies*, in *The Invented Reality: How Do We Know What We Believe We Know? Contributions to Constructivism* 95 (Paul Watzlawick ed., W.W. Norton & Co. 1984).

27. *Id.* at 106.

28. See a very brief version of this development in Hurbon, *supra* n. 25.

own reasoning and will limits our control over ourselves even further than Nagel suggests. It thus seems that, if strict control is a necessary condition of responsibility, we are left with practically no grounds open to reproach and condemnation. Very little is left to reproach and condemn, as we understand these terms, under PA. The question that arises is whether, genuinely concerned about justice and fairness, we should give up blaming to the extent of what PA has left us with.

III.

Since the 1980s, a number of governments throughout the world have declared their responsibility for human rights violations perpetrated by previous regimes. This has been the case with several Latin American and Eastern European governments. The same trend has been followed by organizations and civic groups for crimes perpetrated by individuals with whom these groups identified themselves. The victims were members of other ethnic and religious groups as well as political opponents from within and without the community of the perpetrators. Swiss banks, for instance, formally expressed their contrition for misappropriating gold entrusted to them by Jewish escapees to whom the Swiss government denied political asylum during the Nazi era.²⁹ In Argentina, Chile, and South Africa, politicians and military leaders eventually acknowledged that forces under their authority and command perpetrated crimes against certain ethnic and religious groups and dissident segments. Similarly, in the United States, several civil rights organizations have publicly expressed their regret for the suffering of Native Americans and descendants of African slaves. Contrary to this, the Turkish government has been repeatedly censored for its reluctance to formally acknowledge the 1915 slaughter of Armenians.

I believe the significance of these admissions of responsibility, decades after the wrongdoings, is not self-evident. Some acknowledgements and apologies are quite perplexing. Take the case of remorse and guilt conveyed to descendants of slaves more than a century and a half after abolition. In most cases, several generations have passed and the direct agents (politicians, officials, and military leaders) are now long retired, and many of them dead. This is indeed intriguing, and I don't think looking at the direct victims and their descendants—nor at the perpetrators and their progeny—will shed sufficient light on the meaning of these acts. I don't believe the answer can be found by looking at either perpetrators and their descendents or at the victims. What is most illuminating about institutional apologies is understanding the uneven nature of the relations among agents and victims that self-blame is addressed to remedy. This requires the vantage point of political morality, a point of view that zeroes in on institutional relations and on the kind of intra-community relations these institutions are designed to bring about. In what follows, I draw upon the example of the African American

29. See Elazar Barkin, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* ch. 5 (W.W. Norton & Co. 2000).

community and attempt to shed some light on the meaning of the admissions of blame.

The comparatively dismal situation of African Americans today is well known. By comparison to citizens of European descent in the U.S., members of the former often have access to fewer opportunities for quality education and employment. It has been noted in the past that one out of every four African Americans has been arrested.³⁰ Furthermore, the material and status disadvantages of this minority heavily impinge upon its members' self-respect and self-esteem. Given this state of affairs, apologies from the more advantaged segments—mostly those of European ancestry—makes sense. Acknowledgment and apologies are means of allocating the blame on the person or group that issues them. Like any adjudication of guilt for active wrongdoing, an apology sanctions a single cause explanation for certain outcomes and states of affairs.³¹ By single-cause explanations, I intend to explain that blame simplifies reality. Acknowledgment that you are guilty of what is happening to me implies that we don't need any further explanation. We take blame to be a sufficient cause of some outcome or state of affairs. This means we have turned the culpable (responsible) agent into the cause of your predicament. Also, emotions you experience, such as shame and vindictive resentment, are now largely explicable and warranted. The cause of your plight is that I have wronged you. Insofar as we accept this premise, you, the victim, are in no way responsible for this situation.

Blame entails a see-saw way we look at past events and what resulted from them. You are in this situation today because of how my behavior played out, so that you now suffer from great *disadvantages*.³² The way my projects have turned out fashioned your fate. In terms of luck, the outcome luck of my action is now your situational—and perhaps your constitutive—luck. To a great extent, the relevant issue lies with the nature of the positive wrongdoing, not just with my present failure to correct the effects of the wrongdoing. The combined reasons lie in the harm done and the inequality you endure today. An explanation based on the failure to correct ongoing injustices would beg the question of why apologize to the descendents of slaves and not other disadvantaged minorities.³³ It is

30. Lawrence M. Friedman, *Crime and Punishment in American History* 378 (Basic Bks. 1993).

31. I confine this statement to "positive" wrongdoing. Admissions of guilt for omissions are not conclusive in this sense in that they allow enough room for other explanations. Pledging remorse for failing to avert the harm you suffered does not preclude admission of important causes relevant to understanding your plight. Thus, U.N. Secretary General Kofi Annan's admission that the U.N. failed to prevent the Rwandan genocide in 1994 does not suggest that we are not to meaningfully inquire about the nature of active wrongdoing by members of the Hutu majority. See *Annan Expresses Regret over Genocide*, Chi. Trib. C10 (Mar. 28, 2004); Warren Hoge, *Annan, at Rwanda Memorial Admits U.N. Blame*, 153 N.Y. Times A7 (Mar. 27, 2004).

32. Interestingly, this notion of *disadvantage* is narrowly related to what George Fletcher calls a victim in his victim-centered justification of punishment: one who in some sense remains under the domination of the perpetrator. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 Buff. Crim. L. Rev. 51, 55-56 (1999) [hereinafter Fletcher, *Place of Victims*]. An interested reader should also see George P. Fletcher, *Basic Concepts of Legal Thought* 79-93 (Oxford U. Press 1996) [hereinafter Fletcher, *Basic Concepts*].

33. In fact, some authors believe the central claim African Americans have for rectification of the enduring harms caused by slavery lies in the omission by modern generations to rectify past

because the issue is not just one of present day inequalities. Indeed, overlooking the issue of how the damage came about cannot answer the question of why apologies should be addressed to the African American and not other communities also suffering from injustice. If inequality were the central reason for the present stance, one would perhaps ask why not apologize to the Central Americans and their descendants. What explains the admission of guilt is the long years of slavery and the enduring suffering and inequity the historic institution still causes today. Yet for those who support the irrelevance thesis, there is a problem with this conclusion.

Supporters of the irrelevance thesis resist the inclusion of the consequences of luck as conditioning the moral assessment of our actions and practices.³⁴ Our own evaluation of the practice of slavery, this thesis stresses, cannot be altered by outcomes that were not—and still are not—under the agent's control. The irrelevance thesis would not make much sense if, for whatever reason, we were to censure and condemn the wrongdoers for those consequences that happen beyond their sphere of domination. Thus, it is worth noting that the present plight of African Americans would be different today if slave ships, having lost their course, ended up in India, or if the original victims of slavery fled once they landed in America. Addressed at the slave descendents, we would be ill at ease to justify self-condemnation for their predicament and not for other disadvantaged citizens. Let me stress once more that (self-) condemnation is grounded in the practice of chattel slavery, which led to the present inequalities. One can think of this process by linking up past and present in terms of the different kinds of luck I earlier mentioned.

The outcome luck of my forbears is now your situational luck; yours, as an African American born in the 1970s or 1980s. This view, which originates in the perspective of political morality, is also valid applied to actions and outcomes of common, present day offenses. Given the single-cause explanatory nature of moral condemnation, the declaration that I am to blame means that my guilt for your plight renders other explanations superfluous. These explanations could consist of every hint—psychological, biological, etc.—that could lead to understanding your predicament. Insofar as we accept (self-) blame for the outcomes, these explanations are now superfluous because my wrongdoing accounts for your ill fate. Thus, apologies mean “dis-covering” that which remained concealed in the official language. As George Fletcher has done,³⁵ I have elsewhere claimed that allocating blame places the victim and the

wrongdoing. For an excellent defense of this view, see Rahul Kumar & David Silver, *The Legacy of Injustice. Wronging the Future, Responsibility for the Past*, in *Justice in Time: Responding to Historical Injustice* 145 (Lukas Meyer ed., Nomos Verlagsgesellschaft 2004).

34. It is important to notice that we find the irrelevance thesis interesting insofar as we also consider that (1) luck ought not to modify our moral judgments, and (2) moral values should reign above all other values. The irrelevance thesis would not make much sense if these conditions were not valid. See Williams, *supra* n. 10.

35. See Fletcher, *Place of Victims*, *supra* n. 32, at 51-52; see generally Fletcher, *Basic Concepts*, *supra* n. 32.

perpetrators on an equal footing.³⁶ Trials of state criminals strongly suggest that, unlike revenge, this process re-dignifies the victims, and this feature becomes central to the justification of punishment.³⁷

Single-cause accounts of outcomes such as court convictions and formal declarations of regret play the political role of explaining states of affairs. Both punishment and contrition elucidate why things are *now* the way they are. Athena absolves Orestes of killing his mother because, in her view, the relevant account does not begin with the death of Clytemnestra. Athena, as the judge, is mindful of a story that commences when Helen leaves Menelaus or when Agamemnon sacrifices Iphigenia.³⁸ We may better explicate the point from the opposite perspective. Reactive attitudes such as blaming and condemning (a person or a group) serves the purpose of freeing the community from blame, because blame differentiates the responsible individual agent—or group—from the larger community.³⁹ Politicians may render their country responsible if they fail to prosecute a pilot that shot down another country's aircraft. Blame taints, yet also absolves. This is the reason, Feinberg points out, that, in sexist communities, parents often compel their daughters to press rape charges against their male companions. This procedure is apt to keep their young women clear from what they view as staining sexual practices.⁴⁰

It is important to observe the way in which one agent's outcome luck becomes another actor's constitutive and situational luck. We can only understand Hecuba's behavior by bearing in mind that the man she blinds is the treacherous killer of her child. The latter's death is Polymestor's luck, turned into Hecuba's situational luck.⁴¹

IV.

I have attempted to explain the meaning of blame and condemnation from the point of view of certain states of affairs that result from wrongful actions and activities. This attempt should be valid for every condition generated by an offense insofar as it engenders a victim who suffers from disadvantages generated by criminal wrongdoing.⁴² Insofar as the practice of blame is concerned, a proponent of the irrelevance thesis may claim that, in relation to the individual or

36. Jamie Malamud Goti, *Equality, Punishment, and Self-Respect*, 5 *Buff. Crim. L. Rev.* 497 (2002).

37. For a discussion of this topic in the field of state criminals, see Jaime Malamud Goti, *The Moral Dilemmas about Trying Pinochet in Spain*, in *Justice in Time: Responding to Historical Injustice* 299 (Lukas Meyer ed., Nomos Verlagsgesellschaft 2004); and Christian Tomuschat, *Comments on: Jaime Malamud Goti, "The Moral Dilemmas of Trying Pinochet in Spain,"* in *Justice in Time: Responding to Historical Injustice* 315 (Lukas Meyer ed., Nomos Verlagsgesellschaft 2004).

38. For a similar interpretation, see Joseph Tussman, *The Burden of Office: Agamemnon and Other Losers* 26-53 (Talonbooks 1989).

39. See Joel Feinberg, *The Expressive Function of Punishment*, in *Doing and Deserving: Essays in the Theory of Responsibility* 95, 105 (Princeton U. Press 1970).

40. *Id.*

41. For an excellent account of Hecuba's luck, see Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* 41-47, 413-15 (Cambridge U. Press 1986).

42. See Fletcher, *Place of Victims*, *supra* n. 32, at 51-52; see generally Fletcher, *Basic Concepts*, *supra* n. 32; Malamud Goti, *supra* n. 36, at 497-508.

the group condemned, this practice is unjust or irrational. I don't have much to say to someone who raises the point based on a certain metaphysical conception of our place in the world. Nor do I have an answer to the contention that we haven't, thus far, provided definitive reasons for autonomy. This is the reason that political morality becomes essential. It tells us how critical blame is and what it means to our interpersonal dealings.

The question here is how we intend to live with others in a community in which we celebrate the fact that people win prizes and awards for achievements we attribute to their merits, and blame and condemn others for (intentionally) causing harm to other individuals and groups, imposing risks and suffering upon them. As one aspect of political and retributive justice, responsibility should be anchored in the community because it is there that events take place, and not in the vast world of philosophers and criminal law scholars. Justice is about distributing benefits and burdens among members of different communities. As such, we may sponsor abstract principles and values applicable to all. As far as our concrete actions and institutions are concerned, principles and values vary from place to place. The relevant community, in relation to burglary, may be our city or our neighborhood. The whole world may be the community in relation to Hitler's abuses.

Thus, I believe I have shown the impossibility of establishing a realistic practice of blame based on PA, because it would lack the requisite support in reality. Very little in our lives happens beyond luck. A realistic thesis on outcome luck must therefore ground itself in some notions close to CSA. This may be the reason that, in spite of reifying the will, Kant acknowledges the relevance of outcomes of the actions that result from the exercise of this will.⁴³

It is on the basis of our political relationships I suggest that our expectations about who we are, how we relate to one another, and how responsible we should consider ourselves must be modest and even more limited. It is also from this starting point that I propose a solution close to CSA if—and only if—as the social situation demands we examine the outcomes of our actions. My main premises are that it is a good thing that we acknowledge each other as autonomous individuals, but, at the same time—and not without contradiction—that we understand ourselves as acting under the power of the world of causes and effects. We may be mental beings, but we also are like everything else that we can touch and feel—including the existing copies of *Rethinking Criminal Law*—particles of the natural universe.

43. Immanuel Kant, *The Metaphysics of Morals* 19 (Mary Gregor trans., Cambridge U. Press 1991).

