Mind the Gap: A Reply to Ripstein

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Arthur Ripstein’s *Closing the Gap* is a dense and rich article anchored in the author’s extensive work in legal theory. In this brief Comment, I will limit myself to three points regarding the notion of luck. I believe these points have implications for Ripstein’s general account of the nature of law, but spelling out these implications here would take us far beyond the concerns of moral and legal luck.

I. LEGAL LUCK AND MORAL LUCK

Ripstein says explicitly that his focus is on legal rather than on moral luck and, indeed, the argument he develops relies heavily on legal theory rather than on moral philosophy. This separation between moral and legal luck is crucial to the proposed solution because it enables Ripstein to make progress in neutralizing legal luck without first having to offer a solution to the puzzle of moral luck. He seems to assume that whether or not luck poses a problem for morality, it does not pose any problem in the legal sphere. However, in the conclusion of his article, Ripstein seems to contend that it refutes Nagel’s argument on moral luck. This, I believe, is an unwarranted claim. On Nagel’s view, ethics requires the existence of a luck-free domain of agency and activity, which flies in the face of the fact that much of what feeds into our agency and activity is beyond our control, i.e., a matter of luck, hence the paradox of moral luck. Ripstein’s view regarding the non-instrumental nature of law offers neither a solution to this paradox, nor a remedy.

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2 Id. at 64.
Ripstein might concede that solving, or better, dissolving the puzzle of moral luck does, indeed, require an additional argument, but insist that the lack of such argument does not affect his present line of reasoning. I doubt, however, whether this is possible, for the reason that if luck is at all disturbing in law, it is because we see law within the prism of our moral concepts, which are heavily influenced by the Kantian, luck-free, moral tradition. Because we have moral expectations of the law and take for granted that the law reflects moral distinctions, we are troubled when we find traces of luck within it. The distinction between attempted and completed crimes is troubling because it seems *unfair* that their respective agents should be treated differently, given that moral responsibility should not outrun control. The puzzle of legal luck, then, is not distinct from that of moral luck, as Ripstein seems to assume, but simply an illustration or an application of the latter. That being the case, it is doubtful whether the puzzle of legal luck can be solved without first solving the puzzle of moral luck. And it is even more doubtful whether a solution of the former that relies on some specific theory of law can also be used to solve the latter.

II. TORT LIABILITY AND LUCK

In Ripstein’s non-instrumentalist view of the law, tort liability "is not a tool for achieving some further result," but "simply the protection of the underlying rights that private persons have against each other." If I take a piece of property from you, you don’t thereby lose your entitlement to the property. Instead, your entitlement takes the form of a right to compel me to return your property. If I don’t actually take your property, but only wish or attempt to take it, there is no sense in which you can be said to have a right to compel me to return your property. Hence, there is a clear distinction between attempts to take the property of another and the actual taking of it, wherefore luck poses no problem. Similarly with injury: When I injure you, I violate your right to use the means you have in ways that you see fit. But rights cannot be denied or destroyed, and hence you are still fully entitled to those means. The remedy I owe you, i.e., means equivalent to those you have lost, "is just the underlying right in a new form." This again explains why tort law is interested only in actual injury rather than in attempts to cause such injury and why — as a corollary — luck has no grip in the field. Or so Ripstein argues.

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3  *Id.* at 74.
4  *Id.* at 77.
The example of the need to return property to its owner sounds quite convincing, but its application to cases of injury is less so. As Ripstein construes the example, if I take the piece of property "by mistake," the owner has a valid right to compel me to return it even if the mistake was completely innocent, one for which I had no moral responsibility whatsoever. This makes perfect sense: The property is yours, and it does not cease to be yours just because I took it. My obligation to return it needs no external rationale. It's merely the remedial form of the same right that I violated. So far, so good. But this seems to imply that in cases of injury, too, it makes no difference whether or not the injury was brought about intentionally, negligently, or in circumstances for which the doer bears no responsibility whatsoever. If damages, as Ripstein says, "are nothing more than the remedial form of the right that the defendant violated," then — precisely as in the case of property being taken — the violator ought to pay them even when the injury results from non-dangerous conduct, namely, when it is below the threshold of risks that people inevitably impose on each other in the "crowded conditions of modern life."

Ripstein explicitly objects to this conclusion, insisting that only wrongful injury, injury that results from dangerous behavior, is a violation of rights in the relevant sense of imposing a correlative duty of remedy. But as the analogy to the property case shows, this qualification is unwarranted. If tort law were a tool for minimizing risk-imposing behavior, then the qualification would make sense, but this option is inconsistent with Ripstein's non-instrumentalist view of law. Within such a view, it makes more sense to say that whenever I violate another person's right to the means she has, I need to give her back those means, regardless of whether the violation was my fault or not. Such reasoning is reminiscent of Judith Thomson's famous argument about self-defense in the case of an innocent attacker.7 In Thomson's view, innocent or not, the attacker violates the right of the potential victim, and therefore the latter has a right to kill the attacker, if necessary, in order to save her life. Similarly, one would think that if damages "are nothing more than the remedial form of the right that the defendant violated," then they should be paid regardless of the extent of the defendant's fault. Ripstein's insistence that only wrongful injury is liable in tort seems to re-open the gap that he tried to close, and to make tort law vulnerable to the puzzles of luck.

5 Id. at 80.
6 Id. at 76, 77 (quoting Bolton v. Stone, [1951] A.C. 850, 867 (H.L.) (appeal taken from Eng.)).
According to Ripstein, puzzles about luck in punishment stem from the same fundamental mistake that infects most thinking about law, namely, that law is an instrument for achieving ends that are separable from it. In his view, punishment is not a tool either to reduce crime or to implement retributive justice, but is simply "the prohibition in remedial form." Hence, just as in tort law, criminal law cares only, or mainly, about the actual performance of prohibited acts, not about mere intentions or attempts to perform such acts. That the unsuccessful murderer gets off the hook has nothing to do with luck, but follows from the fact that punishment, properly understood, responds to the law’s actual prohibitions, and therefore has no interest, or only a secondary interest, in attempts to kill.

This analogy between criminal and tort law, however, breaks down at a critical point. In tort, actual injury is caused to somebody in violation of her rights, and the obligation to pay damages can plausibly be described as "the remedial form of the right that the defendant violated." But given that crimes do not necessarily cause harm to anybody, we might ask: whose rights are violated by them, rights which then require remedy in the form of punishment? Ripstein’s answer is that state authority is violated, or its lawmaking power. But in what sense exactly is state authority violated, and, moreover, how exactly does punishment neutralize this violation and enable law to "survive the wrong against it"? The only way I can understand these statements is in a causal sense. Typically, as a result of the law’s violation, respect for law diminishes both in the offender and among other citizens who may learn about the violation. When law is violated, its power to regulate behavior is weakened in a real sense. The aim of punishment is to remedy this result and return to the law those powers that were taken by the criminal. "The rationale for punishment," says Ripstein, "is simply that the law’s generality survives the wrong against it." But this again makes sense only in causal terms. Punishment is supposed to restore law’s entitlement to determine which powers are available to whom. And this restoration must be real, not symbolic, corresponding to damages paid in tort. But if all this is true, then the conclusion seems to be the opposite of the one advanced by Ripstein. Why is this so? Because the law’s entitlement to determine which

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8 Ripstein, supra note 1, at 89.
9 Id. at 80.
10 Id. at 89.
powers are available to whom is threatened not only by actual violations of the law, but by attempts too. Unsuccessful attempts to violate the law send the same dangerous message as successful attempts, i.e., that the law does not demand respect. They equally weaken the law’s power to regulate behavior, hence they ought to be punished equally in order to help law survive the threat against its authority.

Ripstein himself comes close to this point when he talks about the criminal as "setting himself up as above the law." Indeed that is the problem with the criminal, the position he takes, the way he sets himself above the law, not the actual violation of it. Law cannot survive if citizens ignore it in making their plans. Whether their unlawful plans actually work out or not is less important. At least in criminal law, attempts seem to be primary rather than secondary, bringing us back to the puzzles of luck of which Ripstein tried to rid himself.

To sum up: I have raised three points in my discussion of Ripstein’s article. First, the problem of legal luck is just an aspect of the problem of moral luck and, thus, cannot be solved without first solving the latter. A fortiori solutions to the puzzle of luck in law which are based on legal theory are unlikely to solve the puzzle of luck in morality. Second, Ripstein’s account of the importance of actual injury in tort does, indeed, purge tort law of luck, but fails to explain why only wrongful injury counts. And finally, if the purpose of punishment is to enable the law to survive challenges to its authority by citizens who set themselves above it, then punishment should apply primarily to attempts, and only secondarily to actual violations.

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11 Id. at 94.