



WOJCIECH JANKOWSKI



University of Gdańsk (Poland)



0000-0002-5431-027X



wojciech.jankowski@prawo.ug.edu.pl

One-armed Bandit

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Abstract:

The article presents a thought experiment about a slightly queer planet of Losoria. On this planet, responsibility for certain types of crime is assigned in a completely random manner. The experiment is designed to strengthen our moral intuitions advocating the principle of control in the dispute over so-called moral luck. In addition, it stimulates reflection on non-moral rationales for differentiating criminal responsibility for the consequences of actions beyond the subject's control. The author points out that a possible solution to some of the aporias arising from the result luck is to adopt restorative justice as a form of rationalizing of punishment.



Keywords:

moral luck, legal luck, restorative justice, principle of control



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To immerse ourselves in the story's atmosphere, let us imagine that it takes place on a planet reminiscent of Stanisław Lem's "Star Diaries." We observe the behaviour of its inhabitants just like Ijon Tichy, who, with the detachment befitting a researcher, tries to understand the motivations of the natives without haste in judging their customs.¹ On this planet—let us call it Losoria—enormous devices resembling our earthly slot machines stand on every corner. In the event of a win, which happens relatively often, a sweet treat favoured by the Losorians is dispensed. However, using the machine involves some risk. In each of these machines, there is a randomly chosen Losorian, for whom absolutely nothing is a threat in 999 out of 1000 machine usage cases. Yet, in the one-thousandth case, using the machine triggers a mechanism that decapitates the unfortunate captive (for Losorians, just as for humans, beheading causes invariable death).

Knowledge of the potential consequences of using the machines is widespread on the planet. However, due to the low probability of the horrific outcome, some citizens still choose to use them. The authorities of Losoria, aware of the potentially dreadful consequences of using the machines, have decided to prohibit its use under any circumstances. It is unclear why, but the machines cannot be fenced off, and anyone can use them at any time (there are very likely religious reasons for this). Due to the low number of personnel in the Losorian police, the control over whether someone uses the machine is selective. However, the most surprising thing is the penalties prescribed by Losoria for its citizens. When someone is caught using the machine, and the game results in the dispensing of a cookie, they are sentenced to a fine which is not very severe. However, if the game results in the death of a Losorian imprisoned inside the machine, the punishment is deportation to a penal colony for at least 15 years. As visitors from another planet, we

¹ For nonpolish readers or those unfamiliar with the works of Stanisław Lem, I suggest imagining that you are reading a chapter from a hitchhiker's guide to the galaxy.

happen to witness two friends approaching the machine in the hope of getting something sweet. The first one pulls the lever and, after a moment, receives the coveted treat. However, when the second one pulls the lever, three skulls appear on the machine—a sign of loss. As it happens, this particular machine was being observed by the Losorian police. Therefore, the first friend receives only a warning and a fine, while the second one is to expect long years in a penal colony.

Undoubtedly, the behaviour of the Losorian authorities described above would likely provoke protests in an Earthly observer. However, would a visitor from contemporary Earth, when criticising the justice system and morality of Losoria, not expose themselves to the charge of hypocrisy? If we are to blame Losoria, we need to revise our judgments on certain Earthly matters first.

Back on Earth

A month before writing this text, all of Poland was shaken by an accident on the highway in which a family with a young child lost their lives. The cause (or perpetrator) of the accident was likely the driver of a BMW, who significantly exceeded the speed limit². Reading the comments regarding this tragic incident, one might have the impression that society is unanimous in condemning the perpetrator's actions. The so-called public opinion also demands an exceptionally severe punishment for the perpetrator. However, as research shows, most motor vehicle users often exceed the speed limit. A report by Bartosz Józefiak titled “Wszyscy tak jeżdżą” (Everyone Drives Like That) accurately addresses the frivolous approach to traffic regulations in our country. Isn't this, however, a manifestation of moral schizophrenia? It

² „Probably”, as at the time of writing this article, the proceedings are still ongoing, and according to Article 42(3) of the Constitution of the Republic of Poland, everyone is presumed innocent until their guilt has been established by a final court judgement.

is highly likely that individuals expressing categorical moral judgments about the “BMW killer” ignore speed limit signs, treating them more as guidelines than real prohibitions. However, does the BMW driver really have a higher moral responsibility than someone who similarly exceeds the speed limit but without tragic consequences? Another matter, at least for now, is their legal responsibility. But should it be that way? These questions are related to one of the more intriguing debates in 20th-century moral philosophy and pertain to the issues of moral luck and legal luck.

The problem of moral luck pertains to whether factors beyond an individual’s control should influence their moral evaluation. The intuitive response to this problem is often to deny it and strongly adhere to the principle of control. According to the principle of control, one can take responsibility only for factors under their control. Immanuel Kant, for example, advocated the principle of control: “A good will is not good because of its effects and consequences, nor because of its ability to achieve some intended goal, but only because of the will.” (Kant, 1785/1998, p. 8 [4:394]) The problem with the principle of control arises when we realise that circumstances beyond the individual’s control strongly influence many situations in which we attribute credit or blame to people. This leads to a conflict of our intuitions. On one hand, in cases like that of the BMW driver, we want to hold them responsible. On the other hand, we don’t want to abandon the principle of control. Thomas Nagel presented this problem most effectively in his essay “The View from Nowhere” (Nagel, 1979). Nagel argues that if we applied the principle of control consistently, we might ultimately conclude that attributing responsibility will never be possible. He illustrates this observation with several thought experiments (at the same time distinguishing different types of moral luck).

Types of Moral Luck

The first type of moral luck is the luck of the result. It can be illustrated using an example of two drivers who, under the same conditions, significantly exceed the speed limit. However, only in the case of one of them does a pedestrian step onto the road, resulting in an accident. Intuitively, we may be more inclined to blame only the driver who caused harm, even if both drivers were equally reckless. However, by differentiating their responsibility, we reject the principle of control because the only thing that sets these perpetrators apart from each other are the consequences of their actions, over which they had no control.

The second type of moral luck is called the luck of circumstances. Suppose two teenage twin brothers were separated in the early 1930s. One of them went to study in Argentina, while the other stayed in their native Germany. As a result, the first one spent the war in Buenos Aires without causing harm to anyone. The other, however, committed many atrocities as an SS officer. We can assume that if the circumstances had changed and both brothers had gone to Argentina, none of them would ever have committed those crimes. If we wanted to consistently adhere to the principle of control, we would have to assess both brothers in the same way. However, this is in strong conflict with our basic intuitions.

The third type of moral luck, identified by Nagel, is called constitutive luck. It relates to the fact that genetics, upbringing, and various life experiences significantly influence the kind of person we become. Our character and temperament, which play a crucial role in our moral decisions, are largely not of our own choosing. For example, there is increasing evidence of the genetic basis of many pathological behaviours. An example is the so-called MAOA gene, which has earned the nickname the “warrior gene.” The warrior gene, in combination with childhood in a violent domestic environment, is said to be responsible for a tendency toward aggression and reduced self-control. We have no control over the environment in which we grow up, let alone the genes we were born with. However, if these factors are the main “causes”

of our actions, then, adhering to the principle of control, it would be difficult to assign responsibility to anyone for anything.

The above argumentation challenges the persistent adherence to the principle of control. According to this argumentation, if we can only be held responsible for factors under our control, then ultimately, no one could ever be held responsible—because, upon closer examination, virtually nothing would remain under our control. If we do not accept the complete abandonment of attributing responsibility to people, then we are forced to, at least to some extent, reject the principle of control. Nagel's conclusion is the necessity of accepting the role of luck in our moral assessments.

Towards the strong principle of control

The thought experiment presented at the beginning of this essay has a different purpose. It reduces the consequences of rejecting the principle of control to absurdity (at least in the case of luck of the outcome). If we negatively assess the Losorian legal practice, it means we accept the principle of control. It seems that at least in the case of luck of the outcome, if we were to accept luck as influencing our moral judgments, we should evaluate the actions of the two friends using the slot machine and even the friends themselves in a radically different way. However, in that case, making moral judgments begins to resemble playing a slot machine.

Referring to the earlier question, our condemnation of the Losorian practice would mean we should also consider certain solutions in our earthly reality. The slot machine experiment is meant to allude to the problem of car accidents. The reward in the form of a cookie is just as small as the reward of the time saved by driving very fast. The probability of killing someone on the slot machine and that of killing someone on the road due to speeding are (intended to be) similar. However, it seems that, at least in the case of luck of the outcome, we should accept the principle of control. So, if someone accepts the principle of control

(at least in the case of luck of the outcome), there is a chance that they will critically assess the criminal legal system on both Losoria and Earth. Why should two individuals, whom we would morally judge in the same way, face such drastically different legal consequences?

Here lies the problem of legal luck. The rejection of luck in the moral reality does not necessarily imply its rejection in the legal reality. There may be non-moral reasons for differentiating the legal liability of two individuals for factors beyond their control. It may be, for instance, the preventive aspect of punishment. However, two fundamental doubts arise here. First, can we accept the incorporation of the scapegoat institution into our legal system (because that's what the unlucky one from our cases would actually be)? Second, will such prevention be effective? When deciding on such actions, both a person speeding and the Losorian pulling the lever probably only consider the penalty for speeding or pulling the lever, not the penalty for causing death. Someone convinced of the need to eliminate luck from the law (or at least from criminal law) due to the above consideration would have to choose one of the following three possibilities:

1. We raise low penalties, i.e., both the Losorian who got a candy bar and the one who caused death go to a penal colony for 15 years.
2. We lower high penalties, i.e., the Losorian who got a candy bar and the one who caused death receive only a fine.
3. We average the penalties, i.e., both culprits go to a penal colony for one year.

Would we decide on one of the above procedures here on Earth? The first one seems draconian (though probably effective for preventive purposes). The last one would not satisfy our seemingly very strong need to assign responsibility for the resulting tragedy. So, the middle ground remains. In each of these cases, however, the one who would pose a threat on the road would be held accountable only for the degree of that threat but not for whether any actual consequence occurred. However, one can consider another solution in which, while the punishment is indeed based only on the act of the perpetrator

and remains similar for both subjects, what undergoes differentiation is the liability for damages. It seems to be an optimal solution, as it retains the principle of control in criminal law while introducing an element of accident into civil law (within which the risk element is accepted with much greater freedom). Therefore, the answer to the problem of legal accidents seems to be adopting a restorative justice model (Jankowski, 2021).

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