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MORAL AND LEGAL LUCK

Luck and Identity

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Luck and Identity

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I take a close look at Bernard Williams's paper "Moral Luck," which put this notion on the philosophical agenda. Williams's focal example is the painter Paul Gauguin. According to Williams, Gauguin's morally dubious decision to desert his family so as to pursue an artistic career can be redeemed only by his partially fortuitous success as a painter. This is shown by the consideration that a successful Gauguin would not be able to regret his decision, whereas failure would have prompted regret. I suggest that the best way to understand this claim is to see Gauguin's decision to become an artist as a constitutive decision, which launches what for him proved to be a defining project. One cannot coherently regret the realization of such a project or the decision that gave rise to it because that would amount to wishing to be someone else: conditions of personal identity set the limits on the counterfactuals about ourselves that we can intelligibly entertain. However, not being able to regret the constitutive elements of one's life is not the same as approving of these elements. So I disagree with Williams's ultimate conclusion that the inability to regret a decision signals some justification for it, no matter how attenuated.

Like many other preoccupations of contemporary moral and by extension legal philosophy, the topic of moral luck originated with Bernard Williams. "Moral Luck" is not only the eponymous essay in one of Williams's well-known collections,¹ but also inspired the book's fetching cover, a rather striking painting by Paul Gauguin.² The reason of course is that the essay's central example is Gauguin's decision to start in remote Tahiti a new life

* For their helpful comments and criticisms, I would like to thank the participants in this conference, in particular David Enoch and my commentator Andrei Marmor, and the members of The Bay Area Forum for Law and Ethics (BAFFLE).

1 BERNARD WILLIAMS, *Moral Luck*, in MORAL LUCK 20 (1981).

2 "D'où Venons Nous . . . Que Sommes Nous . . . Où Allons Nous?"

devoted to painting, in derogation of the pressing human claims made on him by his family and other people he had left behind. According to Williams, our assessment of Gauguin's decision crucially depends on its outcome, on whether he succeeded or failed. Williams's main claim is that "in such a situation the only thing that will justify [Gauguin's] choice will be his success itself."³ Since many fortuities bear on whether Gauguin's venture succeeds, the justification is a matter of luck.

In this paper I revisit Williams's argument, specifically his discussion of Gauguin. My aim is partly critical, partly constructive. In Part I, I examine Williams's treatment of the Gauguin example, and point out some difficulties that arise. In Parts II and III, I suggest an alternative account of Gauguin's case, an account which I believe better upholds Williams's main insights, specifically his central claim regarding the connection between Gauguin's success and the possibility of regret. In the final Part I draw from my own account implications which depart from some of Williams's conclusions.⁴

I.

The fact that Williams has put the notion of moral luck on the philosophical agenda creates a potentially distorting lens through which to see his paper. One is inclined to seek in the paper, in vain as it turns out, a defense or a demonstration of moral luck. Indeed, seen as a vehicle for demonstrating moral luck, the Gauguin example, around which Williams's argument revolves, would be a curious choice. Much more common examples abound of what would ordinarily strike one as the role of luck in moral judgment, such as the by now proverbial negligent drivers, only one of whom runs over a pedestrian who happens to cross the street at the critical moment. Why then focus on such a *recherché* example as Gauguin's?

Gauguin's case does in fact serve Williams's goals well, but to see this we must be clearer about what these goals are.⁵ As I see it, they are both methodological and substantive. The methodological purpose served by the example concerns Williams's insistence on providing a philosophical

³ WILLIAMS, *supra* note 1, at 23.

⁴ Although I end up in disagreement with some of the views expressed in Williams's paper, I take this to be a friendly disagreement: my account is faithful to the spirit if not always to the letter of Williams's positions, and my variation on his themes shows them to yield outcomes that Williams may have welcomed.

⁵ Williams further clarified his intentions in this article in Bernard Williams, *Postscript*, in MORAL LUCK 251 (Daniel Statman ed., 1993).

demonstration of the role of luck, instead of resting his case on a direct appeal to our intuitions. The stock example of the two drivers that I have just mentioned is a case in point. The discussion of such cases often amounts or rather escalates to not much more than a contest of intuitions, with some writers affirming and others denying the relevance of fortuity to culpability. Unlike these cases, Gauguin's more complicated example provides Williams with the context for an *argument* designed to show why luck plays an indispensable role. The substantive point is that Williams is not primarily interested in the relevance of luck to *moral* judgments, but rather in a broader question regarding the role of luck in human life. He alludes at the start of the paper to "a strain of philosophical thought which identifies the end of life as happiness, happiness as reflective tranquility, and tranquility as the product of self-sufficiency," and to "certain doctrines of classical antiquity" which promised, at least to the sage, an immunity to luck.⁶ According to Williams, Kant's moral theory is a modern variation on this ancient aspiration to extricate central aspects of ourselves and our lives from the vagaries of luck. The challenge that Kant's moral theory purports but fails to meet is accordingly twofold: not only to display *some* conception of morality as luck-free, but to do so with respect to a conception of morality that occupies a central or superior position within the self and within human life. Only such a conception of morality can satisfy the ancient yearning to eliminate luck from central, not just peripheral, aspects of ourselves. Gauguin is in this respect an apt example not because his is a particularly clear case of *moral* luck, but rather because luck seems to play such a decisive role in his life. This feature of Gauguin's case helps bring out the tension between the two desiderata that Kant's moral theory tries to meet. We must either view the justification afforded to Gauguin by his success as a *moral* justification, and thus acknowledge the existence of moral luck, or else we must accept that Gauguin is inescapably dominated by non-moral factors which compete with morality and may displace or overcome it, thereby relegating morality, free of luck as it may be, to a more peripheral position than we ordinarily ascribe to it.

It is, however, easier to state Williams's goals than it is to fill in the steps he takes to meet them. In broad outline the argument is clear enough. Gauguin faces a dilemma as to whether or not to desert his family in order to pursue his artistic aspirations. As Williams depicts him, Gauguin is fully aware of the conflicting considerations as well as the uncertainty of the outcome. When Gauguin decides to go to Tahiti, he accordingly takes the risk that his painterly ambitions may fail. Williams is not primarily

6 WILLIAMS, *supra* note 1, at 20.

concerned with the decision itself, however, but rather with its retrospective evaluation by Gauguin. This perspective, according to Williams, naturally brings in the notion of regret. Ordinarily, a bad decision is a *pro tanto* ground for *agent-regret*. The appropriateness of regret can accordingly serve as a test of the badness of a decision. When we apply this test to Gauguin, we find that whereas failure "must leave him with the most basic regrets,"⁷ regret would be incoherent in the case of success. Whether Gauguin fails or succeeds, however, and hence whether or not he comes to regret his decision, is in part a matter of luck, and to that extent the retrospective justifiability of the decision is also a matter of luck.

As this summary makes clear, the crucial step in the argument is the appeal to regret and the claim that the successful execution of his artistic project by Gauguin prevents it. But when we look closely at this claim, some troubling questions arise. One question concerns the very appeal to regret: using regret as a measure of the justifiability of the decision seems either perverse or otiose. In order to tell whether regret is appropriate it appears that we must first be able to assess the decision as *regrettable*, that is to say as in some respect bad or undesirable. Trying to derive the existence or absence of justification from the appropriateness of subsequent regret seems to have things backwards. An even more troubling question concerns the argument's central claim: why can't a successful Gauguin coherently regret his decision to become an artist? A seemingly obvious answer is that Gauguin values being an artist so highly that he cannot in good conscience wish that he had not become one; and for this reason he cannot regret the decision that led to this career either. But although some of the things that Williams says lend support to this simple answer, it is not really convincing, and stands at odds to other claims. Three difficulties in particular arise.

First, to say that Gauguin would not regret his decision simply because of the importance he attaches to his artistic success is to beg the question as to how his interest, even a dominant one, ought to compare and compete with those of others whom he has injured or wronged. Moreover, we know from the start that Gauguin was willing to sacrifice the interests of others even in the face of the mere possibility of success; why then should there be any expectation that he would come to regret the decision when success did strike? What could this absence of regret possibly teach us that we did not know already at the time of the decision? Indeed, Williams's main point is not that a successful Gauguin is unlikely or disinclined to regret his decision, but that he cannot *coherently* do so; the simple interpretation we're

⁷ *Id.* at 36.

considering sheds no light on this stronger claim. The second difficulty is closely related. Williams insists that there is a discontinuity between the ex ante standpoint of decision and the ex post standpoint of evaluation, a discontinuity that makes it impossible for the deciding Gauguin to fully anticipate the position from which the assessment will be made. Since luck bears some of the responsibility for Gauguin's eventual success, it also must bear some of the responsibility for a genuine shift in the normative state of affairs. But no discontinuity between the two temporal standpoints and no shift in the normative situation seem to occur if success consists of nothing more than the realization of Gauguin's earlier hopes. When making the decision, Gauguin can anticipate the two scenarios of success and failure, as well as the great importance that artistic success would have in his life; all the factors that bear on the justifiability of the decision thus seem to be present at the time of the decision. Finally, on the simple interpretation, the distinguishing mark of Gauguin's decision is its great importance in his life: the value he assigns to it outweighs the harm to others he has caused. But importance is a matter of degree, whereas Williams insists that Gauguin's decision is qualitatively and not just quantitatively distinct. What precisely is the distinguishing mark of Gauguin's decision that sets it apart from ordinary ones?

These difficulties present a challenge. We need an account that (1) points out what is distinctive about Gauguin's decision, (2) so as to explain the gap between the prospective standpoint of decision and the retrospective standpoint of assessment, as well as (3) the special significance that attaches to the possibility of regret, (4) rendering regret in the case of success not just less likely, but incoherent.

II.

In attempting such an account, my point of departure is another query: what kind of luck precisely is Gauguin claimed to have enjoyed? Early in his paper, Williams contrasts two types of luck: "constitutive luck" and "incident luck." Though he doesn't quite define the terms, his import is quite clear. The theme of moral luck, Williams maintains, grows out of an older strain in Western philosophy, which sought to free the good life from the "contingent enemies of tranquility."⁸ But such a life was thought to be open only to the sage, and, as Williams points out, "it was a matter of what

8 *Id.* at 20.

may be called constitutive luck that one was a sage or capable of being one."⁹ As I've already mentioned, Williams associates a more modern outgrowth of this older theme with Kant, who offered a conception of morality as a distinct area from which all luck, even constitutive luck, is eradicated, since "the successful moral life . . . is presented as a career open . . . to a talent which all human beings necessarily possess to the same degree."¹⁰ Williams himself, however, believes that "the aim of making morality immune to luck is bound to be disappointed" because "the dispositions of morality, however far back they are placed in the direction of motive and intention, are as 'conditioned' as anything else."¹¹ Though this leads Williams to conclude that "morality is subject, after all, to constitutive luck,"¹² this conclusion, he says, is not what he's going to discuss. Rather, against the backdrop of Kant's attempt to purge morality of luck, Williams wants to consider "the agent's reflective assessment of his own actions," specifically whether "at the ultimate and most important level" it can be a matter of luck "whether he was justified in doing what he did."¹³ As we have already seen, Gauguin's case is designed to provide an affirmative answer.

At first blush it does indeed appear that, as treated by Williams, Gauguin's story is not about constitutive luck. Constitutive luck, as this term is used by Williams and as it has come to be widely used by others since, would have come up had Williams probed the *reasons* for Gauguin's decision, such as perhaps superior talent or great ambition. Others less talented or ambitious would not be as attracted to an artistic life or as lured by the prospect of glory and fame, and so would be less disposed to embark on a similar venture to their family's detriment. The distinctive course followed by Gauguin would on this account be a product of constitutive luck. But Williams focuses on the *consequences* of Gauguin's decision rather than its origins. Given Williams's binary distinction, this puts Gauguin's good fortune in the category of *incidental* luck, specifically, to use a further subdivision that has taken hold, of a *consequential* variety.¹⁴

9 *Id.*

10 *Id.* at 21.

11 *Id.*

12 *Id.*

13 *Id.* at 22.

14 Also referred to as *resultant luck* and *outcome luck*. See, e.g., Margaret Urban Walker, *Moral Luck and the Virtues of Impure Agency*, 22 METAPHILOSOPHY 14 (1991), reprinted in MORAL LUCK, *supra* note 5, at 235; Ken Levy, *The Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action that Causes It*, 24 LAW & PHIL. 263 (2005).

However, this characterization misses the main point of Gauguin's case and trivializes it. The trouble lies in the underlying classification, which juxtaposes consequential luck to constitutive luck. Rather, Gauguin's is a case of what we may call *constitutive consequential* luck. The case suggests that a person's constitution can be related to an action or decision in two ways: not only as its *ground*, but also as its *product*. Just as being a sage is the constitutive ground for certain actions and decisions that are the manifestations of sagacity, so being a painter is the constitutive product of Gauguin's decision to leave for Tahiti. The common denominator is that being a painter stands to Gauguin in the same constitutive relation as being a sage stands to the sage. My suggestion accordingly is that what distinguishes Gauguin's decision to devote himself to painting from "the 'normal science', so to speak, of the moral life,"¹⁵ is that Gauguin's is what I will call a *constitutive decision* which launched a *defining project*. As I will try to show, this best explains why a successful Gauguin cannot coherently have regrets.

But what does it mean to say that being a sage or a painter is *constitutive* of a person? What is a *defining project* and what does it define? To answer these questions I need to distinguish two broad conceptions of the relationship between a person's identity and his or her life. On the first of these, personal identity is fixed antecedently to or independently of the course of one's life. Fixed by what? Perhaps by the spatiotemporal career of a particular biological organism or by a noumenal self or a pure ego. But a long and variegated tradition suggests a different conception. The view that "man has no essence" and must create his own, though originating at least as far back as the fifteenth century,¹⁶ was given new impetus and significance in the twentieth by such otherwise diverse schools of thought as existentialism, postmodernism, and communitarianism. We can distinguish in this large body of thought two themes regarding the ways human beings define who they are, *self-constitution* and *social construction*. Both converge in the proposition that as human beings we create ourselves, with the *we* interpreted either distributively — each individual is the author of her own identity — to yield the first theme, or jointly — social practices, discursive and otherwise, shape our selves — to yield the second. In either way, but most likely through some combination of both, the human subject is formed or constituted in the course of her life and by actual experiences and events, which forge a self

15 WILLIAMS, *supra* note 1, at 35.

16 GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN (A. Robert Caponigri trans., Regency Gateway 1956) (1486).

seen as a more or less unified or integrated narrative or dramaturgical whole. Whether we think of the self as *constituted*, at least in part, by a person's life, or as *shaped* by it, the main conclusion is that an individual's essence, the answer to the question of who she is, cannot be entirely detached from the actual life she leads.¹⁷ I'll call this the *constructive view*.

The difference between the two conceptions I have contrasted can be helpfully drawn in terms of the kinds of counterfactuals it is possible to entertain regarding individual human beings. On the first view, which separates a person's identity from his or her life, it should be possible for the same individual to have lived a radically different life; all we need imagine to make this intelligible is that a particular organism (or noumenal self, or pure ego) has undergone a very different course of experiences. Not so on the constructive view. If people's identities are fixed in the course of their lives, the variations on the actual course of a person's life which we can intelligibly imagine while retaining the person's identity, that is the variations that would still count as variations on the life of *the same person*, are limited. If the imaginary departure exceeds a certain threshold, no sense can attach to the claim that we're still imagining the same person.¹⁸ The notions of a constitutive decision and a defining project can now be understood in these terms. A decision is constitutive when it launches a defining project. A project is defining when it plays a sufficiently dominant role in the person's identity. This in turn means that a counterfactual in which this project is eliminated would be an identity-disrupting counterfactual, that

17 To say that one's identity depends on the content of one's life is not to deny that other factors, such as bodily identity, are necessary too; the relevant claim here is only that they are not by themselves sufficient.

18 Though to simplify matters I talk about identity in binary terms, the constructive view is consistent with the scalar picture of the self advocated by Derek Parfit. Though Parfit is concerned for the most part with temporal identity, whereas our present inquiry primarily concerns what we may call *compositional identity*, the two issues are closely related. On Parfit's view, temporal continuity is a matter of degree, so that a former self can be more or less connected to a later one. The same scalar picture can apply to compositional identity as well, so that different putative features of a person and her life may be more or less integral or peripheral, allowing for considerable indeterminacy. Parfit suggests that we can nonetheless preserve the binary logic that he associates with the concept of identity by legislating a clear-cut if arbitrary criterion. Doing so, he maintains, is harmless provided we also revise the prevailing attitude toward the self by diminishing the normative significance we attach to its identity. An alternative approach, however, is to retain the ordinary normative significance that we attach to our identity, while espousing a looser conception of identity that accommodates the self's scalarity and indeterminacy. See DEREK PARFIT, REASONS AND PERSONS 199-350 (1984).

is to say, it would no longer be a counterfactual about the same person as the one in whose life the project plays a defining role.

To clarify the point, consider the following example.¹⁹ Instead of going to law school I could have gone to medical school, or joined the navy, or taken up the violin. I could have been a physician, sailor, or violinist. Now, on the constructive view, in hindsight these options were not really mine, because having followed any option other than the one I did would have resulted in a different identity. But this poses a puzzle. Even if it makes sense to deny that I could have *been* a sailor, it seems undeniable that I could have made the choice of *becoming* one; after all "choosing to go to law school" is an event within *my* life, and at the time this was a genuine choice. However, the following consideration weighs against this conclusion. "Can choose X" entails "can carry out (or attain) X." It would make no sense to say that I could have chosen filet mignon if the restaurant were out of it or if I could not afford it. So since I could not have been a sailor, I could not have chosen to be one either.

In order to reconcile these contradictory conclusions, we need to distinguish two different interpretations of a sentence such as "I could have been a sailor" (or "I could have chosen to become a sailor"): either as a report in the past tense referring to a historical state of affairs, or as a tenseless statement of a counterfactual about myself. Some sentences of this form are amenable to both interpretations. If I go to London on vacation and it constantly rains, I can say: "I could have been in the Bahamas instead," referring to the fact that my travel agent had suggested the possibility, that seats on the flight and a room in a resort were available, and so on. But I could also be making the counterfactual claim that had I made the right choice, I would now be basking in the sun. My claim regarding statements of this form that pertain to important, identity-forming factors is that such statements are amenable only to the first, the historical interpretation, but not to the counterfactual one. The life of a sailor that I am imagining could not have been truly mine, because the subject of that life would not have been me. Comparing my actual life as, let us say, a lawyer to the life of a sailor would not be very different from comparing it to the life of a medieval knight or a Hebrew prophet. In the counterfactual, as distinguished from the historical sense, being a sailor was not an option for *me*, and thus not

¹⁹ Adapted from my *Conceptions of Choice and Conceptions of Autonomy*, 102 *ETHICS* 221 (1992), reprinted in MEIR DAN-COHEN, *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 125 (2002).

something that I can miss not being, any more than I could miss not being a knight or a prophet.

Although Williams does not explicitly endorse the constructive view, some of the things he says come pretty close, two of which bear mention. One is his rejection of Rawls's "model of rational deliberation as directed to a *life-plan* . . . which is that of one's life as a rectangle, so to speak, presented all at once and to be optimally filled in."²⁰ This model, Williams argues, is false since "it implicitly ignores the obvious fact . . . that the standpoint of that retrospective judge who will be my later self will be the product of my earlier choices."²¹ Even more instructive is the function that Williams assigns in other writings to people's projects. Williams maintains that having a project "is a condition of [a person] having any interest in being around" and that without any project "it is unclear why [we] should go on."²² To see the present relevance of this view, contrast it with the view that our clinging to our lives is a matter of brute survival instinct, which we share in common with other animals. Though attachment to one's own life is indeed likely to have some such biological origins, Williams's view is a reminder that here as elsewhere biological provenance is superseded by distinctly human phenomena, in this case the recognition that one's existence is optional and amenable to reflective assessment. For the ordinary affirmation of one's own existence to have such normative significance, it must have some evaluative grip. And what in turn provides the necessary traction is some *content* that we take to be our own and that we value as such.²³

Apart from its conformity with some of Williams's positions, the constructive view provides answers to the questions that were posed at the end of Part I. We are now in a better position to see what is distinctive about Gauguin's decision; why a gap exists between the *ex ante* and the *ex post* standpoints; what the point is of focusing on regret as a test or measure of justification; and, most importantly, the ground for Williams's central claim that only a failed Gauguin but not a successful one could coherently

20 WILLIAMS, *supra* note 1, at 33.

21 *Id.* at 34.

22 BERNARD WILLIAMS, *Persons, Character, and Morality*, in MORAL LUCK, *supra* note 1, at 1, 12-14.

23 Harry Frankfurt has objected, however, that making the willingness to go on contingent on the execution of a project is the mark of the seriously depressed, suggesting instead that people are propelled by the sheer love of life. HARRY G. FRANKFURT, *TAKING OURSELVES SERIOUSLY & GETTING IT RIGHT* 27, 36-39 (Debra Satz ed., 2006).

regret his decision. In light of the answers to these questions, we will also be in a better position to reconsider the matter of luck.

To begin with, seeing Gauguin's decision as constitutive and his project as defining elucidates some of Williams's comments about what distinguishes this decision from more ordinary ones. Williams notes that in the case of "many decisions which are part of the agent's ongoing activity, . . . [o]neself and one's viewpoint are more basically identified with the dispositions of rational deliberation, applicable to an ongoing series of decisions, than they are with the particular projects which succeed or fail on those occasions."²⁴ Not so in the kind of situation exemplified by Gauguin. Here, according to Williams, one identifies more fully and more fundamentally with the project on which one embarks than with the process of deliberation itself. Williams does not much elaborate what is involved in the two patterns of identification that he contrasts, but what he says echoes an approach, most famously associated with the writings of Harry Frankfurt, according to which *identification* names a process of self-constitution by means of which the self is formed and its boundaries drawn.²⁵ One important result mentioned by Williams of Gauguin's identification with his artistic career is that this project provides him with his "stand-point of assessment": Gauguin's evaluative judgments are inescapably shaped by the fact that his life "derives an important part of its significance for him"²⁶ from being a painter. In the same vein, Williams denies the existence of "some currency of satisfactions, in terms of which it is possible to compare quite neutrally the value of one set of preferences together with their fulfilments, as against a quite different set of preferences together with their fulfilments."²⁷ Instead, our satisfactions are a matter of having our preferences satisfied, and what those preferences are is determined by the kinds of projects illustrated by Gauguin's case.

We can also see now why Williams attaches special significance to the possibility of regret. Regret, or more accurately agent-regret, is first-personal and retrospective. Both of these features are essential to Williams's argument. Privileging the agent's own point of view is easy to understand when we

²⁴ WILLIAMS, *supra* note 1, at 35.

²⁵ See HARRY G. FRANKFURT, *Identification and Externality*, in THE IMPORTANCE OF WHAT WE CARE ABOUT 58 (1988); *Identification and Wholeheartedness*, in *id.* at 159; and THE REASONS OF LOVE (2004).

²⁶ WILLIAMS, *supra* note 1, at 35.

²⁷ *Id.*

recall Williams's well known position that only internal reasons exist.²⁸ This position relates to a view of rationality as, roughly speaking, an agent's disposition to act on the balance of reasons that apply to her. Reasons can be said to apply to an agent, however, only if they are rooted in the system of her own values and desires. We accordingly cannot charge an agent with the irrationality of failing to abide by reasons, unless the putative reasons are internal to the agent in this sense. The insistence on the relative independence of the retrospective standpoint of assessment from the prospective standpoint of decision can also be understood in these terms. Artistic success brings in its wake the domination of Gauguin's life by a system of values and considerations that would not otherwise be his. Since the shift in Gauguin's life brought about by his decision to go to Tahiti concerns identification, it's a shift in what is internal to him, and therefore in what is available to him, from a first-person perspective, as a basis for evaluative judgments. There is, on this view, a fundamental difference between the hypothetical and for this reason merely external possibility of being an artist, on the one hand, and the internal reality of actually being one, on the other. It is not enough, accordingly, for deciding-Gauguin to anticipate the standpoint of artistic success, since he cannot as yet identify with that standpoint; it is not yet his. Or, to put this in reverse, he is not yet the person who will eventually come to occupy that standpoint if success does strike.

Though this explains the significance Williams attaches to the possibility of regret, the main question still remains: why not only is a successful Gauguin unlikely to regret his decision, but cannot coherently do so? Even if the considerations that bear on the retrospective assessment of his decision differ from those available to him at the time of making it, it is not clear how the later standpoint rules out regret. The constructive view offers an answer to this question. To see it clearly, we must first recall Williams's remarks about regret in general and about agent-regret in particular. This is what he says:

The constitutive thought of regret in general is something like 'how much better if it had been otherwise', and the feeling can in principle apply to anything of which one can form some conception of how it might have been otherwise, together with consciousness of how things would then have been better But there is a particularly important species of regret, which I shall call 'agent-regret', which a person can feel only towards his own past actions. . . . In this case the supposed

28 BERNARD WILLIAMS, *Internal and External Reasons*, in *MORAL LUCK*, *supra* note 1, at 101.

possible difference is that one might have acted otherwise, and the focus of the regret is on that possibility, the thought being formed in part by first-personal conceptions of how one might have acted otherwise. . . . There can be cases of regret directed to one's own past actions which are not cases of agent-regret, because the past action is regarded purely externally, as one might regard anyone else's action.²⁹

For Gauguin to regret the decision it is accordingly not enough for him to have misgivings about his ill-gotten gains; he must wish that things were otherwise, that he had made a different decision. But in light of his identification with his artistic career and the defining role it came to occupy in his life, on the constructive view such regret cannot be rationally entertained for two related reasons.³⁰ The first reason concerns the outcome of Gauguin's decision. Suppose that the alternative to going to Tahiti involved becoming a bank-teller in France. For Gauguin to wish that he had pursued this option would be to opt for an impermissible, identity-disrupting counterfactual, which amounts to the incoherent wish that he were someone else. Given that Gauguin's identity came to be defined by his artistic career, it makes no more sense for him to have been a bank-teller than for him to have been Lloyd George. The second reason concerns the later Gauguin's relationship to the choice between the two options that he faced. For Gauguin to have agent-regret regarding his decision, he must relate to it internally rather than "purely externally, as one might regard anyone else's action." But this condition cannot be satisfied either. To take seriously the idea that the later Gauguin is shaped or constituted by his artistic career is to maintain that no internal relation can link him to a different decision, since following the other prong of the choice he faced would have given rise to an identity different from his. Wishing he had followed the other option is not to express agent-regret since it involves assuming an external perspective on the decision he faced and treating it as alien, as at least potentially belonging to someone else.³¹

²⁹ WILLIAMS, *supra* note 1, at 27.

³⁰ Although, following Williams, I focus here exclusively on regret, the constructive view imposes corresponding constraints on other attitudes, most notably on envy.

³¹ Parallel issues arise in connection with so-called "wrongful life" cases, in which the limits of intelligible counterfactuals in relationship to a person's identity play an important role. Especially illuminating in this regard are the writings of David Heyd, in particular, for present purposes, *From Wrongful Life to Wrongful Identity*, 9 ANN. REV. L. & ETHICS 173 (2001).

III.

Various objections to this account come to mind, but not all of them are relevant to my present goal. Some of the objections arise in opposition to what I call the constructive view, and my primary aim is not to defend that view but merely to draw out some of its implications. Only to the extent that these implications are found illuminating and otherwise salutary does my argument also provide the constructive view with some indirect support. Even so, a few questions and objections arise in regard to this relatively modest goal as well; the following clarifications and elaborations are designed to address them.

A. We must first distinguish the limits imposed by the person's conditions of identity on permissible counterfactuals from the related but nonetheless different limits on *change* that these conditions may also impose. In Gauguin's case, the claim concerning counterfactuals is that given his artistic career, it makes no sense to think of the very same person as one that may have stayed in France to become, say, a banker. This is not, however, to maintain that had the actual Gauguin gotten tired of painting and decided to work for a bank, this decision would have disrupted his identity, so that we would have to think of the late-life banker as a different person from the early-life artist.³² The distance between an artist's life and a banker's is not so large that it cannot be traversed within a single life. An artist, say following a midlife crisis, might decide to "start a new life" by joining a bank. Significantly, the colloquial expression in quotes indicates that the contemplated change is not trivial, and that it may indeed stretch the limits of identity. All the same, the change is feasible, all the more so due to the stipulated midlife crisis. Some such circumstance may be needed, and at any rate is helpful in lending coherence and thereby unity to the conjunction of the dissimilar life-periods. If, following such a radical but identity-preserving life-change, we were asked to spell out this hypothetical Gauguin's identity, to say who he was, we would have to mention both periods and both occupations. This Gauguin isn't just a painter, nor just a banker, but a painter-turned-banker. So understood, the aspiration to "start a new life" or "turn a new leaf" by changing the course of one's life is quite different from that expressed by the counterfactual thought

³² Note that since Gauguin did not in fact make such a transition, this way of posing the hypothetical may be misleading; it's not a counterfactual about him!

"I'd like to have been someone else," which, if taken seriously, wears its incoherence on its sleeve.³³

B. A possible objection to the suggestion that successful-Gauguin (SG) is a different person from the hypothetical failed-Gauguin (FG) concerns a problem of transitivity. It might be pointed out that both SG and FG share the same youth, up to the point of the decision. Call that common stretch young-Gauguin or YG. Now clearly SG and YG are one and the same person; similarly, FG and YG are also one and the same. But if so, how can SG not be the same person as FG? There are two kinds of answers. One is to assimilate this situation to cases in which a form of life, actual or imaginary, takes a branching form. They raise corresponding difficulties, and the various ways of handling them, such as espousing in these contexts a looser notion of identity that can accommodate them, can be applied to our situation as well. I will not pursue this track any further both because the case of human identity does not present a distinctive problem that might bring in novel considerations in this regard, and because a more appealing response is available. It consists in contesting the objector's picture of how life's temporal segments belong together. The objection assumes a straightforwardly additive picture: a life consists in the sequential accumulation of temporal segments. However, on an alternative conception, human life, like a text, is to be understood holistically rather than additively and sequentially. In such a holistic picture, each segment is what it is, has meaning or significance, in virtue of its relationship to all other segments of the life to which it belongs, past and future. Just as the beginning of a story is not inert to what follows, so also it is a mistake to detach the young-Gauguin from the subsequent life and consider the former as a common segment of both the successful and failed Gauguin. Rather, matters here are the other way around: given that SG is a different person from the hypothetical FG, we must conclude that they are different persons all the way back, and so deny that they share a common early identity.

C. Another possible reason for identifying, contrary to my argument, the actual and the hypothetical Gauguin, is linguistic. Following Williams and common usage, I have been referring all along to Gauguin's failed alter ego by the same name as its actual bearer. Isn't this an admission that I do in fact consider the actual and the counterfactual figures as one as the same? The usage is indeed liable to mislead by creating the impression that the present

33 Since on my construal it amounts to saying: "I'd like to have been I and not-I."

discussion concerns the modal logic of proper names. My claim that, given that Gauguin was a prominent painter, he could not have failed, may be construed in this vein to mean that the name *Gauguin* necessarily refers to a successful painter, and so as subscribing to the so-called, and now mostly discarded, "famous deeds" conception of the reference of proper names. Though I doubt that the last word has been said about these issues, and in particular that this conception has been conclusively refuted, I need not in fact enter this fray.³⁴ The reason is that I don't consider the line of reasoning I am pursuing to be about the name *Gauguin* at all but about the person. That the name Gauguin successfully fixes the initial reference to a particular painter is not at issue here. Once this has been accomplished (in terms of whatever theory one favors as securing such reference), the questions regarding the status, relative to this person, of the counterfactual failed version no longer involve the use of the name since they can be, and indeed as we have seen are, considered primarily from the first-person perspective. The thoughts whose coherence we're trying to assess, specifically those regarding regret, would be entertained by that person without resort to a name, but rather by using the pronoun "I." From his standpoint, the fact that the counterfactual figure would bear the same name as his is no more relevant to his identity than, say, Golda Meir is to mine.

D. Since successful-Gauguin is defined by his artistic success, he cannot regret his decision. What about his hypothetical alter ego, though? Regarding the unsuccessful Gauguin, Williams asserts that "his standpoint will be of one for whom the ground project of the decision has proved worthless, and this . . . must leave him with the most basic regrets."³⁵ It might be objected, however, that my account effaces this contrast by rendering the two cases symmetrical. Just as success is constitutive of the actual Gauguin, so failure supposedly is of his counterpart. For the latter to regret his decision would accordingly be no less self-defeating or undermining than it would be for the actual Gauguin. This is not the case, however, since success and failure

³⁴ Probably the most influential text here is SAUL KRIPKE, *NAMING AND NECESSITY* (1972). Kripke maintains that an object's, including a person's, essential properties can be discovered empirically. He then asks rhetorically: "How could a person originating from different parents, from a totally different sperm and egg, be *this very woman*?" He famously concludes that "anything coming from a different origin would not be this object." *Id.* at 110-13. The constructive view need not deny this point, insisting, however, that in the case of persons there are additional properties that accrue over a lifetime, and are cumulatively necessary.

³⁵ WILLIAMS, *supra* note 1, at 35-36.

are not symmetrical in this regard. If successful-Gauguin had made a different decision it would indeed have deprived him of his defining project. But making a different decision would not have had the same effect on failed-Gauguin. The reason for the asymmetry is that defining projects do not form contrasting, oppositional pairs. Specifically, while "painter" is a recognizable project, there is no corresponding project of "not-painter" that plays a defining role in most peoples' lives. To be sure, people may turn failure into a vocation and a way of life. If failed-Gauguin were to wallow in his artistic failure and allow it to fester long enough, this indeed could become his defining project. In that case the wish that he hadn't made the fatal decision would indeed become hollow.³⁶ But in the more likely scenario, realizing that being an artist is not in the cards, Gauguin would have turned to other pursuits. In this case, the artistic aspiration will have never evolved into a defining project; it will have turned out to have been just a fantasy or a mirage.

E. Not many individuals are as clearly identified with a pervasive and all-consuming project as Gauguin, and even fewer make a move as dramatic and as consequential as his departure for Tahiti. The appeal of Gauguin's example lies precisely in providing a stark illustration of a constitutive decision that launches a defining project. But this appeal is also a limitation. How typical is Gauguin's case and how representative of the human condition as a whole? How valuable is the lesson it teaches us and how far does it generalize? I believe that though Gauguin is an outstanding and therefore an unusual figure, he amplifies and thus helps recognize important features of other, more ordinary lives as well. First, even if one's life-story is more diffuse, consisting of multiple themes and the product of numerous relatively inconsequential actions and decisions, it is a life *story* all the same. It might be easier within such a story to identify different smaller projects and engagements, different relatively independent subplots as it were, and it would be possible for the agent to regret them selectively and piecemeal. But the impossibility illustrated by Gauguin of wholesale regret that addresses a large concatenation of such fragments remains. One cannot coherently wish away the life one has had in favor of another while retaining one's identity, regardless of the constituents and composition of one's life. Secondly, even piecemeal regret over what appears at first sight as relatively discrete junctures in one's life may be barred by similar considerations. Things are often intricately interconnected, and a seemingly inconsequential decision may turn out to have led in fact to much of what has become of

³⁶ His position would then resemble that of the swindler I discuss in Part IV.

great significance to us. Our lives form a web, and by pulling on a marginal thread, the whole may sometimes unravel.

F. Though Gauguin's example thus amplifies a more general feature of human life, the fact that his is a decidedly simplified version raises another problem. In the absence of a dominant defining project, it becomes much more difficult to distinguish between identity-preserving and identity-disrupting counterfactuals, and correspondingly to devise a threshold of regret beyond which it will have lost its subject. Whatever the distinction and the threshold, we should not imagine them as clear-cut. The most we can do in this area is post some warning signs alerting people to a broad and ill-defined yet significant danger zone, in which certain attitudes that are perfectly intelligible outside of it lose their coherence.

IV.

My account thus far supports Williams's main claim, asserting a connection between Gauguin's artistic success or failure and the possibility of regret. But since the grounds I have offered for this claim depart in certain ways from Williams's, some further implications of my account differ as well. The difference concerns, in the first place, the issue of luck. I have argued earlier that Gauguin's case belongs to the category of constitutive luck, albeit of a consequential variety. Now, in designating an aspect or property of a person "constitutive," all one may mean is that this aspect or property is enduring and important. However, as used by Williams in regard to the sage, and as I have been using it in the present context, "constitutive" acquires a stronger sense. The term designates an aspect or property, or a cluster of aspects or properties, which forms a necessary component of the person's identity. It is doubtful that what is constitutive in this strong sense can be a matter of luck.

The reason for this doubt is simple. Luck is an evaluative term, pertaining to "the fortuitous happening of events favorable or unfavorable to the interests of a person."³⁷ So luck has to be ascribed to a subject, and implies an assessment, positive or negative, of an event relative to that subject and his or her interests.³⁸ Accordingly, luck can be intelligibly attributed only to a stable subject who retains his identity with and without the lucky event. But constitutive luck does not satisfy this condition. That one is who one is,

³⁷ OXFORD ENGLISH DICTIONARY (2d ed. 1989).

³⁸ The issue of luck should accordingly be distinguished from another theme that runs

is not a stroke of good luck or bad *for that person*; who else could one be? There is in this respect a close analogy between the logic of luck and of agent-regret. Similar considerations to the ones that tell against the possibility of agent-regret regarding a constitutive decision also weigh against viewing identity as a matter of luck.³⁹ Williams himself mentions the possibility that Gauguin presents a case of constitutive luck, adding that "it might be wondered whether that is *luck* at all."⁴⁰ Williams does not develop this thought, however, but goes on to point out that even if Gauguin's artistic accomplishments are due to constitutive luck, and so perhaps are not really a matter of luck, Gauguin is nevertheless the beneficiary of *epistemic luck*: the lucky circumstance of his having made a correct assessment of his artistic talent that made his project viable. My account removes this element of luck as well. On the constructive view, retrospectively, Gauguin could only have devoted himself to art. That he possessed the requisite insight, determination, courage, as well as talent, are all constitutive elements without which he would not have become the person that he was.

Denying on conceptual grounds that Gauguin is a beneficiary of luck is however of limited interest. We must rather consider this issue in light of the substantive concerns that motivate our exploration of the question of luck in the first place. Why does it matter whether or not Gauguin's artistic career is to be seen as the product of luck? What is at stake? In considering these questions we are apt to see them as raising the issue of *moral luck*, and specifically as testing Kant's effort to purge morality of luck. But as I have already mentioned, although Williams does indeed engage in this inquiry, this is not his main interest. Rather, Williams situates Kant's ambition to rid morality of luck within a broader context: an ancient aspiration to secure for people a measure of *tranquility* by keeping the vagaries of luck at bay. This is the sense in which the sage mentioned by Williams is a precursor of Kant's noumenal self. Now when the question of luck is posed in these terms, it turns out that the reasons that inhibit Gauguin's regret are, in respect of tranquility, equivalent to the denial of luck.

through much of the literature from which the constructive view is derived, that of *contingency*.

39 For a similar view, though one attached to a different conception of human identity from mine, see Nicholas Rescher, *Moral Luck*, in *MORAL LUCK*, *supra* note 5, at 141, 155. For an argument that at least some versions of the idea of constitutive moral luck lead to absurdities, see Michael Zimmerman, *Luck and Moral Responsibility*, in *MORAL LUCK*, *id.*, at 217, 222-24.

40 WILLIAMS, *supra* note 1, at 25.

Many people, even those whose lives have gone reasonably well, can nonetheless recognize with hindsight numerous wrong turns and missed opportunities. Aware that this is the only life they have, they are unsettled by such recognitions, and by the ardent wish that things were otherwise, that they had taken a different turn. The line of thought I have suggested can serve as a palliative or antidote by reminding them (us) that these wishes and fantasies have their limit: they are constrained by the conditions of human identity. If the counterfactual reveries become extravagant and so exceed a certain threshold, they are no longer reveries about the agent himself and turn into the thought that someone else might have existed instead. The realization that one could not have been fundamentally different from what one has turned out to be is at the end of the day (and it is of importance that the thought is fully available only toward the end of the day) a source of a certain comfort and tranquility.

The measure of comfort and tranquility this realization can buy is limited, but then, relative to other contenders, it comes at a low price. Some strategies to remove luck so as to attain tranquility require radically narrowing the range of one's concerns by withdrawing into an austere and barren inner citadel; others involve a belief in some form of fatalism or predestination, which tends to induce a listless, resigned, *que sera sera* mentality. By comparison, the identity-based, retrospective essentialism I have described provides its measure of tranquility, such as it is, on the cheap. Prospectively, the future is open-ended and, up to a point, up to me. There is nothing in the constructive view to chill enthusiasm or ambition in the conduct of one's life and in the venture of self-constitution. Only in retrospect is the thought available that things could not have been radically different *for me*. To be sure, given that the thought awaits us toward the end of the road, we can anticipate it earlier on. But this, if anything, increases its value without the undesirable side-effects. We still have every reason to make the best choices, knowing that they will determine how we live as well as who we are, but with some reduced anxiety: we know that the foregone options will eventually lose their relevance to us, since they will one day seem like steps on someone else's road. This anticipatory thought may accordingly allow us to borrow in advance against the fund of later-day, retrospective acceptance and tranquility and to some extent benefit from it without detriment to our choices and projects.

Whatever the degree of tranquility thus attained, however, tranquility is not the same as contentment or satisfaction, let alone happiness; its contrasting terms are agitation and turmoil rather than discontent, dissatisfaction, or unhappiness. This reminder is important not only to avoid false advertisement, but also because of its bearing on the matter of

justification. As I've mentioned earlier, Williams treats Gauguin's inability to regret his decision as an indication or a criterion of a measure of justification against the moral charges that can be brought against him. This justification proceeds essentially from the agent's point of view, supposedly because this point of view provides a benchmark for a certain kind of criticism that is of special interest to Williams. By pointing out that a decision is defective in light of considerations that are available to the agent herself, so that she is in a good position to recognize the defect, we ascribe to the agent a failure of rationality of sorts; we are hoisting her by her own petard, so to speak. The inability to regret gives the agent a defense against this charge, since it negates the allegation that the decision falls short *by the agent's own lights*. Williams largely leaves open the specifically *moral* significance of this charge and this justification; neither does he give much guidance concerning the weight of this type of justification. My aim, however, is not to explore these issues, but only to point out that my proposed account further erodes the level of justification afforded by the inability to regret.

Gauguin's case is somewhat misleading in this regard. Since being a great artist is admirable, the constitutive considerations that prevent his regret coincide for him with a sense of satisfaction. But a defining project need not be laudable. We can imagine instead a lifelong swindler who in old age wakes up to the nastiness and wastefulness of his life. On the constructive view, he can regret his life no more than Gauguin could regret his. But this, one would think, does not give the swindler even the modicum of justification that Williams claims for Gauguin. The reason is that not wishing for an alternative to a state of affairs is not the same as approving of it. This obvious truth is sometimes obscured by a pervasive conception of choice as consisting in ranking the members of a choice-set in light of one's preferences, and then opting for the highest ranking item. On this model all valuation is relative to the composition of the choice-set.⁴¹ But this tends to efface a crucial experiential difference we all know firsthand between a choice among good options and bad ones. Though choosing the lesser evil is just as rational as choosing the greatest good, one's attitude to the outcome in the two choice situations is markedly different: a lesser evil is still an evil, and though one may be relieved that one is not burdened with an even worse situation, one should not be expected to like the result. When the swindler realizes that a life of probity he now values would not have been his, and concludes that the only life he had is, broadly speaking, the best he could have had (assuming

41 For an elaboration of this point see my *Conceptions of Choice and Conceptions of Autonomy*, *supra* note 19.

that he is not so desperate as to prefer not to have existed at all),⁴² he is not committed to approving of his life and judging it worthy. Inability to regret is one thing, approval, satisfaction, contentment, another. As we saw, regret involves a past-oriented *desire*: one actively wishes for an alternative state of affairs, while rebelling or protesting against the actual one. And since the desire is unsatisfiable, one is unsettled by an enduring frustration that cannot be relieved. The line of thinking I have described extinguishes in the swindler's case any such desire and so removes the frustration, leaving however room for a cooler and more somber critical judgment.⁴³ This is true of Gauquin as well. As we can now see, the fact that he may not coherently regret his decision does not imply that he need approve of it. He too may realize that this decision was responsible for what he has become, and so not regret it, while also recognizing that his life, successful in some respects as it was, imposed on others unjustified costs.

Finally, the swindler brings us back to moral luck. The issue of moral luck typically arises when the fortuitous consequences of a decision are deemed relevant to its moral assessment by aggravating or mitigating the agent's blame. Such instances of (arguably) moral luck are ubiquitous so long as the decisions and the consequences have a relatively limited significance within the agent's life. The main interest in the swindler's and by analogy Gauquin's case is that they draw attention to a different kind of assessment in which constitutive elements of a person's life are put on the scales. Such a case presents us with a standpoint beyond regret and, for corresponding reasons, beyond luck, but one that is well within the scope of morality. Since a person's constitution or identity is not a matter of luck, when the target of moral assessment involves constitutive elements, luck drops out of the picture. This conclusion of course doesn't help us cope with the problem of moral luck when it does arise. But given the intractability of the problem,⁴⁴ it is welcome news that its scope is somewhat narrower than we may tend to think, and that the person who put the notion of moral luck on the philosophical agenda can be seen, perhaps somewhat unexpectedly, to have identified a range of moral judgments to which this notion does not apply.

42 See BERNARD WILLIAMS, *Resenting One's Own Existence*, in MAKING SENSE OF HUMANITY 224 (1995).

43 A similar distinction between regret and a critical judgment underlies Rüdiger Bittner, *Is It Reasonable to Regret Things One Did?*, 92 J. PHIL. 262 (1992). Prof. Bittner deems all regret unreasonable because of the suffering it involves, but believes that forswearing it is compatible with maintaining a critical attitude toward one's past actions.

44 See Thomas Nagel, *Moral Luck*, in MORTAL QUESTIONS 24 (1979).