

Punishment for the Failed Criminal

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In the ongoing conversation about punishments and their justification, it is necessary that all punishments be considered, including punishment meted out for failed attempts at crimes. Most take it to be an intuitive truth that a crime that produces less harm ought to net the criminal less punishment. Here we will argue the opposite. Examination of the justification for how and when a criminal deserves punishment shows that a person who attempts a crime and fails (we will call them the failed criminal) is deserving of just as much punishment as someone who attempts the crime and succeeds.

Before beginning to assess justifications for punishing failed attempts, we must first outline a justification for punishment in any capacity. It stands to reason that if we can not justify punishment at all, then we can not say failed attempts ought to be punished either, so we can end the conversation there. Thankfully for the proponent of punishment, there are such justifications.

For the most part, we will be working with the *retributive theory of punishment*, which claims that punishment can be justified on the basis of just deserts – what the offender deserves. There are of course other theories such as the deterrence theory; deterrence theory is concerned with the consequences of punishment, its ability to deter anti-social and criminal behavior, arguing that the evil of punishment is justified insofar as it prevents wrongdoing in the future. The retributivist does not make use of such a forward-looking principle and instead argues that punishment is the deserved consequence for those who choose to do wrong.

Applying this theory now to our main consideration of whether punishment can be justified for failed attempts, we can say that there is at least the possibility that punishment *may* be justified in this situation. Our new question becomes whether the person who attempts to commit a crime but fails, *deserves* punishment. To answer this question we must consider the justification behind the claim of desert.

One could argue that a person who attempts to commit a crime and succeeds (we will call him the successful criminal) deserves to be punished in order to be treated with the respect that a free moral agent deserves. We may go so far as to argue that the successful criminal has a *right* to be punished (an idea developed by Herbert Morris in *Persons and Punishment*) as punishment acknowledges the individual's agency over their actions and fate. Punishment for the sake of conditioning a wrongdoer into refraining from the prohibited actions treats them like an animal or like an agent whose actions must be influenced externally, thereby depriving them of their humanity and the respect that a free agent deserves. This only explains why one justification for punishment should be favored over the other; it does not explain why we must settle for either, and can not simply neglect to penalize any actions, for either reason.

To this, we may respond with another justification of the theory of desert: punishment may be used to restore the balance between the benefits the wrongdoer enjoys and the costs others bear. In order

for large groups of individuals to coexist peacefully, they must make a number of sacrifices to maintain the peace. For example, in return for the promise that others will do the same, I relinquish my freedom to kill others so that we may coexist without fear of being killed by each other. James Rachels explains this in his article "Punishment and Desert". This justification is built on the principle that, "Social burdens and benefits should be equally distributed" (Rachels, 8). Equal distribution allows people to "control their own fates" (Rachels, 8) by earning good or bad treatment but it is upset by those who commit crimes. Retributive punishment can "correct things in the direction of greater equality" and "restore the balance" (Rachels, 9). Those who engage in wrongdoing secure for themselves an unfair benefit as they violate their promise to refrain from problematic behavior. Retributive punishment rights the balance of benefits that they have upset. The theory of desert says that a wrongdoer deserves punishment to counterbalance the freedom they have claimed by breaking the social contract. We have sufficiently clarified the conditions for deserving punishment, and can further explore the case of the failed criminal.

When the successful criminal engages in prohibited activities, it is easy to see how they meet the criterion set by the principle of desert. They have exercised their faculties of reason and free will in such a way that they have chosen to unfairly take liberties not allowed to the rest of society and have committed a crime. Therefore, they are deserving of a punishment that can compensate for this unfair gain while also treating them like the free agent they are. They are then punished, ultimately as a result of their actions that they chose. When the failed criminal engages in prohibited activities there is a key difference: no actual harm is produced. I do not believe this is a reason for lessening their punishment as this absence of harm does not stop the failed criminal from meeting either of our criteria for desert.

First of all, regardless of the outcome of the attempt, both criminals chose freely and rationally to attempt to commit the crime. The failed criminal is then no less deserving of punishment than the successful by way of being no less a morally free agent. Sanford H. Kadish speaks to this issue especially in his article, "The Criminal Law and the Luck of the Draw". He elaborates on the role that luck plays in the outcome of the criminal's attempt. Kadish argues for "the incompatibility of luck and desert" on the basis that "fault depends on [the criminal's] choice ... not on what is beyond their control" (Kadish 688-689). The point Kadish is making is that luck is the determining factor in the success of a criminal endeavor, not their choice or intention. What a person deserves is based on what they chose to do, and what they are directly at fault for, not on something random and out of their control. If a person decided, for example, to commit a murder and goes through all the necessary steps to plan and execute the crime, but a bird lands on the tip of their gun before they pull the trigger and they miss, they have done nothing different from the person who luckily (or unluckily) avoided attracting birds that day. The factor of luck has caused a different outcome but both have engaged in the same actions, were directly in control of, and chose to execute the same actions. Both have freely attempted a crime. It follows, then, that the failed criminal and the successful criminal deserve the same punishment as they are at fault for the same actions, i.e., attempting the crime, and have exerted their will and reason in the same way. Their respective luck or

unluckiness does not warrant a reduction or increase in fault.

The mention of “moral luck” may strike some readers as odd in the context of this argument, given that the influence of luck in our actions is often used to argue *against* the justification of punishment. In his essay *Moral Luck*, Thomas Nagel outlines four different ways in which a person's actions are subject to the whims of luck. From this, he draws the conclusion that, due to the overwhelming degree of external determinants in someone's actions, “nothing remains which can be ascribed to the responsible self,” rather, there are only events that can be, “deplored or celebrated, but not blamed or praised” (Nagel, 10). If these influences of luck can be accounted for, there is no need for moral luck to defeat the idea of fair and just punishment.

Nagel presents four types of luck: (1) constitutional luck, (2) luck in a person's circumstances, (3) luck in “how one is determined by antecedent circumstance” and (4) luck in the outcome of one's actions and attempts. The first type, or constitutional luck, refers to how a person is. It is assumed that a person's inclinations and temperament are based on pure luck and can not be controlled by will or reason. The second type refers to what kinds of situations and conflicts one faces, and what opportunities for moral success and failure one is given. The third type refers to how one's actions have been influenced/caused by the preceding chain of causal events. To consider these as determining factors in one's actions assumes a lack of free will. If individuals lack free will, it is clear that neither of the criminals in question are able to meet our first criterion of desert, which is that they chose freely to attempt the crime. If this is the case, there is no need to go so far as to consider how a person's luck affects their deservingness of punishment as we have already lost any meaningful personal responsibility. As Nagel puts it, “Determinism obliterates responsibility” (Nagel, 10). If we do have free will, then these types of luck can be responded to in a similar manner. We may say that these things, at most, *influence* action, or our motivations and inclinations towards certain action, however, so long as the individual is still freely able to make the choice to attempt a crime, punishment and desert remain unaffected by this luck. They may not be able to control their inclinations but so long as they can freely choose their actions in spite of them, their constitutional luck does not alleviate responsibility. Furthermore, in response to the second type of luck, it is not the role of punishment to punish actions one *would* have committed but rather to punish those they *have* committed. Regardless of the moral challenges a person must face, it is still up to them to choose how they act in response to them. As their actions are freely chosen, they can thus be justly punished for wrongdoing.

The question of free will is a far greater topic than can be discussed in this paper, so here I will simply frame my argument as a conditional statement: if we have free will, then these types of luck fail to diminish the deservedness of punishment. The exercise of free choice is being punished, not what has influenced that choice, or the context in which that choice was made.

The fourth type of luck, and arguably the most important to consider in our exploration of the failed criminal, is the outcome of one's actions and attempts. Nagel makes an argument similar to the one

outlined above: punishing based on the success of a crime allows the amount of punishment to vary based on luck or chance, which is unfair. This can be accounted for if the failed criminal is punished the same as the successful criminal. Then this type of luck no longer influences their punishments as they are both being punished only for what they have freely chosen to do: attempt the crime.

Both criminals also meet our second criterion of desert as both engage in prohibited behavior and thus gain an unfair advantage not allowed to the rest of society. Let us examine the example of the planned murder once again. The average citizen has forfeited the freedom to commit or attempt murder. The successful criminal unfairly assumes a freedom that he ought to forfeit, viz. to commit murder. The failed criminal has also unfairly assumed a freedom to attempt murder. One may attempt to seize upon an observable difference between the criminals and argue that the successful criminal deserves *more* punishment as they make use of the unfair freedom to attempt murder whereas the failed criminal has only the freedom to attempt a murder, not its use. This can be easily responded to by examining the functional differences between these two “freedoms.” In order to decide to attempt a murder, one must assume that one will succeed, or at least that one has a probable chance at succeeding. Otherwise, it would not make sense to even bother attempting the action. The actions of the criminals leading up to murder and their intentions are identical until the moment of the murder. The freedoms both have unfairly allowed themselves are identical as well, as it would be irrational to attempt a murder without assuming one could also possibly or probably succeed. The only difference appears at the moment of the blunder where one criminal does not get to *take full advantage* of the freedom he has allowed himself. This does not cause the freedoms he assumes to be fundamentally any different from those which the successful criminal assumes. The successful criminal does not secure for themselves a *greater* freedom but rather *exercises* his unjustly secured freedom more successfully. Both have unjustly attempted, only one has done so successfully. Both then seem to deserve the punishment of the successful criminal, as punishment for their attempts.

Another similarity between the cases of the successful criminal and the failed criminal has to do with the risk of harm they create. Regardless of whether the attempted crime is successful, an attempt at a crime produces a possibility and risk of harm. The mere creation of this risk, it can be argued, is deserving of punishment. If a person decides to operate a vehicle under the influence of drugs and alcohol, they are deciding to put others at risk. If they accidentally harm someone, this risk is actualized and becomes harm. This difference in manifestations of harm ought not to change the amount of punishment deserved. This relationship seems to apply whenever potential is created by our actions. For example, when a lottery ticket is purchased, a price is applied to the potential victory. The actualization of this potential does not change the value of the original ticket. It would be ludicrous to go back and demand to get money back for a losing lottery ticket, similarly to how one would not go back and pay *more* after realizing they had purchased a winning ticket. The value of the potential for victory does not change depending on the outcome of the lottery. Similarly, the fault and punishment deserved ought not change depending on the outcome of the harm risked. Both criminals willingly chose to create the potential for a harmful outcome,

and therefore both deserve equal punishment regardless of whether that potential takes the form of actualized harm.

But shouldn't actual harm increase the punishment deserved for a crime? It does seem, intuitively, that an action that creates harm ought to warrant more punishment. Consider two people firing guns. Both fire recklessly, and one shatters a window. It would seem that the person who shattered the window ought to be responsible for the damages whereas the lucky shooter has not caused damages to be responsible for. But this is not incompatible with our theory of punishment. The meaningful difference we see here relates to *harm created* and *harms repaired* rather than wrongdoing and deserved punishment. Punishment is deserved for having done wrong. In this case, both shooters have created an equal amount of risk and freely engaged in the same prohibited behavior (i.e. recklessly discharging a firearm). They deserve the same *punishment*, but one of them may *also* be responsible for repaying the owner of the window for the damage. This does not mean they deserve more punishment, rather that they have another obligation resulting from the harm done.

The difference between harms done and misdeeds committed becomes even more obvious once we consider a case of harm done *without* any wrongdoing. Consider a person who trips walking down the stairs and bumps into a window, shattering it. Let us also assume that the stumble was not caused by any carelessness on the part of the owner of the building or the person themselves. It was a true accident. No wrongdoing has occurred and yet harm is done. This person would be responsible for repaying the damages but would not be considered to have done any wrong, and thus not deserving of any punishment. The meaningful difference between two actions with different amounts of actual harm impacts what the victims deserve in recompense, rather than how much punishment the criminal deserves. Harm is something entirely different from wrongdoing, which is all that punishment ought to concern. Otherwise, we would be returning to the issue of punishing bad luck or accidents, which is undeserved and unfair.

Another objection may arise when considering how to identify a failed criminal. To do this one must answer an important question: What constitutes an attempt? One may wish to argue that one reason a successful criminal deserves more punishment is that their wrongdoing can be confirmed. It had observable consequences. The failed criminal can not be identified so easily. Mere intent can't constitute an attempt as punishment for something a person did not do is unfair and undeserved. Furthermore, it would be impossible to prove that they would have gone through with the crime. Even if a person intends to rob a bank and goes so far as to buy a ski mask and weapons and locates a blueprint of the vault, they could still change their mind the moment they walk through the bank doors and go home having committed no crime. There is a point of no-return where one can no longer turn back and thus remain innocent – a point in the process of attempting the crime where luck or circumstance takes over and they are no longer in full control of the outcome of the crime. I believe the person with criminal intent becomes the criminal (successful or not) once he crosses that line.

Consider the attempted murderer once more. They load the gun, find their target and take aim. At

this point they still have the ability to turn around and walk away. The moment they pull the trigger however it is, quite literally, out of their hands. Whether the bullet reaches its intended mark, they have crossed the threshold into criminality, and attempted the crime.

This “point of no-return” concept is also helpful for considering how this theory applies to rewards. Given that this theory of punishment is built on the concept of just deserts, it would seem it should apply to deserved rewards as well. This, at first glance, goes against our intuitions. Consider two firemen in a burning building. There are two doors. Behind one, there are people to save. Each checks behind a different door. One finds people in danger and brings them to safety whereas the other does not find people in danger. Intuitively, we would not think that both deserve the same reward. But this is not because the theory does not apply to rewards but because in this example, the fireman who has not saved anyone has not done enough to be considered as virtuous as the other. He has not gone beyond the point of no return. It is completely possible that had there been people to save in the room he entered, he would choke under pressure and fail to save them. He has not displayed the same verifiable virtuousness or courage that the other fireman has. Consider now if there had been a mannequin in the room. Through all the smoke and heavy protective goggles, it was impossible for the fireman to distinguish this from an actual human being. One fireman saves an actual person whereas the other “saves” the mannequin. In this case, both deserve the same reward. Both saved what they thought were human beings, exemplified great courage in the face of danger, and did the same. The only difference is, one got lucky and grabbed the person. It does not seem right to reward them more for their luck.

Furthermore, should reward be solely based on benefit created, or harm avoided, the system of desert and reward would be reduced to the level of mere transaction. Benefit is given only where benefit is received. Reward ought, instead, to be given where goodness is exemplified, similar to the way punishment is given where wrongdoing is done.

After having considered thoroughly both cases, it is clear that the failed criminal should be punished as harshly as the successful criminal. Based on the retributivist theory of punishment, we may say that the failed criminal deserves to be punished for rationally and freely creating the same harm and taking the same unfair freedoms as the successful criminal, and both ought to be punished.

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