# If at First You Don't Succeed: Moral Blameworthiness and Multiple Attempts

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**Abstract**

Joel Feinberg argued that a legal distinction between murder and attempted murder where the only difference is outcome luck was not justified. Instead, he proposed replacing both crimes with a charge of 'Wrongful Homicidal Behaviour' (WHB). I argue that Feinberg ignores a significant difference between attempted and successful murders: it is possible to commit attempted murder multiple times on the same person. I argue that this feature is sometimes morally relevant, and therefore WHB is too simplistic.

## Defining Terms and Outlining the Reformist Position

In reality, there are many potential differences between successful and attempted murders, but in this paper I only wish to refer to cases where the only difference is outcome luck. Feinberg's example is illustrative:

Case 1: A1 lines up a rifle to shoot B1 with the conscious objective of killing her. A1 shoots and B1 dies as a result.

Case 2: A2 lines up a rifle to shoot B2 with the conscious objective of killing

her. A2 shoots, and although the shot is on target, a bird flies in front of the bullet, and B2 is unharmed and escapes.[1]

The traditionalist position supports a punishment differential (PD, I borrow this term from Christopher, 2014) between A1 and A2 while the reformist position opposes the PD, and argues that A1 and A2 should receive identical sentences. Feinberg justifies the reformist position on the principle of proportionality (PP): which requires that the severity of the punishment be proportional to the moral blameworthiness of the offense. [2] His argument could be formalised as follows:

1. If two offenders are equally blameworthy of an offence, then they deserve an equal punishment. (PP)

2. The only difference between attempted and successful offenders is the consequences produced.

3. The consequences produced do not affect the blameworthiness of offenders.

4. Attempted and successful offenders are equally blameworthy. (2, 3)

5. Attempted and successful offenders should receive an equal punishment. (1, 4)

Why is (3) true? Feinberg argues that a PD based on consequences allows punishments to be determined not by their deserts but by luck, plain and simple. [3] A2 should not receive a gentler sentence than A1 when A2 committed an equally abhorrent act, but was lucky (or unlucky) enough that his victim did not die.

Feinberg's alternative proposal is that the causal condition is removed from criminal liability, so that for a crime to occur it is not necessary that some consequence results from the action. The crimes of murder and attempted murder would be changed to Wrongful Homicidal Behaviour (WHB), which would be much like a murder charge, except without the condition that the victim dies.[4]

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[1] Feinberg, Joel, *Problems at the Roots of Law* (New York: Oxford, 2003), 77-78
[2] Feinberg, *Problems at the Roots of Law*, 78
[3] Ibid., 78
[4] Ibid., 79

## Repeated Attempts

My argument suggests that (2) is false; there is a difference between attempted and successful murders besides the consequences: you can murder an individual only once, whereas you can attempt to murder an individual multiple times. I will attempt to illustrate why this distinction undermines Feinberg's argument with 2 additional cases:

Case 3: A3 lines up a rifle to shoot B3 with the intention of killing her. A3 shoots, and although the shot is on target, a bird flies in front of the bullet, and B3 is unharmed and escapes. The next day A3 lines up a rifle once more to shoot B3 with the intention of killing her, this time A3 succeeds: B3 is killed.

Case 4: A4 lines up a rifle to shoot B4 with the intention of killing her. A4 shoots and kills B4. The next day A4 lines up a rifle to kill C4 with the intention of killing her. A4 shoots and kills C4.

Under Feinberg's proposal, A3 and A4 are guilty of two counts of WHB, and presumably then deserve equal punishment. However, we can clearly see the falsity of (2) now as there is a crucial difference here between the two cases besides the consequences. A3 could not have made the second attempt without having failed the first, whereas A4's second attempt was not contingent on the failure of the first. Is this feature morally relevant, however? There are three possible views:

a. A3 and A4 are equally blameworthy.

b. A3 is more blameworthy than A4.

c. A4 is more blameworthy than A3.

(b) seems to be patently absurd, neither the reformist nor the traditionalist would support it. (a) appears to be the position of the reformist, but it seems somewhat to go against the very basis of Feinberg's reformist position; note that Feinberg criticises a PD in case 1 and 2 because:

The full explanation of how identical intentions produce importantly different

results in these cases must appeal to factors that were beyond the control of one or another of the wouldbe assassins.[5]

It was not in the control of A3 that his first attempt failed; while it was in his control to decide to make the second attempt, it is still the case that A3's first attempt failing was causally necessary for A3s second attempt. Therefore, attempting to explain why A3 and A4 should receive identical sentences, one has to appeal to factors that were beyond the control of A3, which should lead Feinberg to favour interpretation (C), and accept a PD in this case.

It seems there is also an additional reason that A4 is more blameworthy; he has an intention to kill two people, whereas A3 only has an intention to kill one person. In of itself, regardless of the consequences, this gives us a reason to argue that A3 is less blameworthy than A4. Compare:

Case 5: A5 has an intention to kill B5, he knows that B5 is going to donate a kidney to C5 and thus save C5's life. A5 does not want to kill C5, but his only opportunity to kill B5 is before the transplant is done. A5 kills B5, and C5 dies as a result of not getting the kidney.

Case 6: A6 has an intention to kill B6, he knows that B6 is going to donate a kidney to C6 and thus save C6's life. A6 also want to kill C6, so decides to kill B6 before the transplant is done. A6 kills B6, and C6 dies as a result of not getting the kidney.

The consequences produced by A5 and A6 are identical, but it seems there is a good case to see A5 as less blameworthy than A6, as A5 only intends to kill one person, and although he foreseeably ends up causing two people to die, the second death was not intended, but inevitable by virtue of him fulfilling his intention of killing B5. A6, by comparison, intends to take the lives of both B6 and C6, and therefore specifically acts at a time where he can ensure that both of them die. Similarly, with A3 and A4, although they both commit two acts of WHB by Feinberg's account, it seems to be important to consider the fact that A3 only has the intention of killing one person, while A4 intends to kill 2.

The argument thus far then suggests that in certain cases, the PP does not

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[5]   Ibid., 78

imply that there should not be a PD between attempted and successful murders. In situations where someone attempts to murder a person more than once, application of the PP suggests there should be a lesser sentence than someone who attempts to or successfully murders two different people.

## An Objection

A potential way to defend Feinberg's argument is to argue that in truth A3 is equal in blameworthiness to A1 because he only made a single attempt on B3's life over the course of the two days. We might draw an analogy with firing an automatic weapon at someone to attempt to kill them; we would not regard each individual round fired as an attempted murder (or even a WHB), but the whole action as an attempt/WHB. A3 is therefore guilty of the same crime as A1, i.e. one count of WHB, while A4 is guilty of two counts, and hence we have now explained why A4 is more blameworthy than A3 without falsifying Feinberg's argument.

I dont think this argument can be reasonably sustained. Assume a society which accepts Feinberg's argument and has no PD for attempted and successful murders, and look at the following case:

Case 7: A7 lines up a rifle to shoot B7 with the intention of killing her. A7 shoots, and although the shot is on target, a bird flies in front of the bullet, and B7 is unharmed and escapes. A7 is arrested and sentenced for WHB for 20 years. 20 years later A7 is released and then attempts once more to kill B7 and this time A7 succeeds: B7 is killed.

If you think A3 only really made one attempt on B3's life you end up with a dilemma: has A7 only made one attempt on B7's life? If yes, then its clearly not legitimate to sentence A7 for murdering B7 because he's already been punished for the attempt. This is patently unacceptable. If no, then we have to draw some arbitrary expiry date for attempts such that A3 (who had a day between his attempts) and A7 (who had 20 years between his attempts) can be distinguished. Both outcomes are far less intuitive than just accepting that A3 and A7 made two separate attempts. Even if one favours the latter option, we can

just increase the duration between A3s two attempts until it passes whatever arbitrary threshold is set.

## Limitations and Implications

However, the reformist is not out of options. They can produce some cases in which the PD obviously cannot be justified on the grounds that attempts can be performed multiple times:

Case 8: A8 lines up a rifle to shoot B8 with the intention of killing her. A8 shoots, and although the shot is on target, a bird flies in front of the bullet. B8 however independently dies of bird flu moments later. A8 sees this and desists from further shots. B6 is dead, and A8 knows it, and hence cannot make any further attempt on B8's life. What could justify the PD between A1 and A8? Such a case certainly escapes my criticism, and hence I think if we accept the PP, A1 and A8 should get equal sentences. My examples therefore fail to establish a general principle that attempts should be punished less harshly than successful murders.

Similarly, I have only shown that A3 is less blameworthy than A4, this does not logically imply that A1 is more blameworthy than A2 in and of itself. I only show that an attempt and a successful murder on the same person is less blameworthy than two successful (or attempted) murders on two different people. It might well be the case that an argument can be made that A2 is less blameworthy than A1 on the basis that attempts are repeatable, but I am not sure such an argument is possible.

Furthermore, it is an obvious point that other crimes that are not murder can be performed multiple times, so my objection fails to establish any justification of the PD in such cases. My case is not necessarily exclusive to murder (say you attempt to cut off someone's right arm), but I generally accept this criticism; I do nothing to justify the PD in such cases.

The implications of my argument are therefore limited: what it establishes is that if you accept the PP, then at least in cases where multiple attempts

are made on the same person, a PD is justified when compared to someone that makes an identical number of attempts on independent agents. WHB is therefore too simplistic to replace the distinction between murder and attempted murder.

I would suspect most people would agree with me that A3 should receive a somewhat greater punishment than A1, simply because it would be unfair to assume that A1 would have necessarily made a second attempt on B1's life had his first attempt failed. A3's punishment, however, should probably be quite substantially less severe than A4's because I have shown that A3 is substantially less blameworthy than A4.

## Conclusion

The reformist lays a powerful charge against the PD when we look at specific instances where the only difference is the consequences. I assumed the truth of the PP on which this argument is based, but I have shown that the repeatability of attempts can bring in different luck factors, and a PD can take such factors into account in some cases. The WHB as it stands would treat all such cases equally, and therefore does take into account luck factors that it intends to avoid. Feinberg's proposal of WHB ends up relying on a narrow application of the PP, which would need to be reformed to take examples like these into consideration.

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## References

[1] Christopher, R. 'Does Attempted Murder Deserve Greater Punishment than Murder-Moral Luck and the Duty to Prevent Harm.' (2004). Notre Dame JL Ethics & Pub. Pol'y, 18, 419.

[2] Feinberg, J. 'Problems at the Roots of Law.' (2003). New York: Oxford, 203, 150

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