

# Should failed attempted crimes be punished less severely than successful attempted crimes?

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## Abstract

If Dum fires a pistol at his victim and misses, while Dee shoots on target and kills, should Dum be punished as severely as Dee? This essay supports current legal practices that punish unsuccessful criminal attempts less severely than successful criminal attempts. Joel Feinberg and other legal scholars have argued for legal reform that punishes equivalent criminal attempts equally, regardless of their ultimate success. This essay argues that the case for reform does not succeed. Legal reform would punish criminal agents according to factors beyond their control and is therefore subject to the same criticisms of unfairness it attributes to current practices. Moreover, legal reform undermines democratic values and is therefore not practically desirable.

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## Introduction

Failed criminal attempts should be punished less severely than successful crimes. Such legal practice is widespread, and regarded by most ordinary citizens as acceptable. Nonetheless, philosophers have argued for legal reform on the basis that the distinction between attempted and successful crimes is arbitrary and

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unfair. This essay argues that the case for legal reform is unconvincing for two reasons. First, legal reform would punish criminal agents according to factors beyond their control and is therefore subject to the same complaints of unfairness it attributes to current practices. Second, legal reform undermines democratic values and is therefore not practically desirable. For these reasons, the argument for legal reform is not strong and our current practices should be maintained.

## **I. The Argument for Reform**

A criminal attempt takes place when a person intends to commit a crime and takes steps toward committing it, but ultimately fails. Current legal practice punishes criminal attempts less severely than corresponding completed crimes. This differential punishment is criticised by reformers who argue that failed attempts to perform criminal actions should be punished as severely as successfully completed crimes. Their argument typically begins by considering two identical criminal attempts that differ only due to factors beyond the criminal's control. Consider, for example, Lewis's case of Dee and Dum:

Dee wants to kill his enemy, and so does Dum. Dee and Dum try equally hard to kill, both acting without justification. Dee's gun fires exactly as he intends, and his victim is successfully murdered. Dum fires his gun but misses, and his victim escapes unscathed. Dee spends the rest of his life in prison, while Dum receives a shorter prison sentence.<sup>1</sup>

In such cases, reformers argue, it is difficult to defend our leniency toward the unsuccessful criminal. Dee and Dum inflict equal risk of harm on their victims and their intentions are equally immoral. Yet, due to luck, Dum gets

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<sup>1</sup> Lewis, 'The Punishment that Leaves Something to Chance' 1.

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away with a lesser punishment. To show why this is unfair, reformers appeal to two intuitively appealing principles of fairness.

1. **Control principle:** An agent, D, is morally blameworthy to the extent that what D is blamed for depends on factors within his control.
2. **Proportionality principle:** An agent, D, should be punished with a severity proportional to D's blameworthiness.

Feinberg appeals to the control principle by arguing that Dee and Dum are equally blameworthy since the only difference between them is due to factors beyond their control. Dum is unfairly rewarded for luck which, being beyond his control, does not diminish his blameworthiness. The proportionality principle stipulates that Dee and Dum should be punished equally since they are equally blameworthy. Punishing them differently on the basis of sheer luck is arbitrary. By failing to adhere to these principles, differential punishment is both arbitrary and unfair.

Feinberg argues that equal punishment for failed criminal attempts and successes should replace differential punishment and proposes an appealing principle for reform: 'if the law is arbitrary in some respect, then provided we can improve it in that respect, at a reasonable cost in other values, we should improve it.'<sup>2</sup> It follows that we should pursue legal reform and implement equal punishment if the two following conditions are met:

- (i) Equal punishment corrects for the unfairness and arbitrariness of differential punishment. That is, equal punishment adheres to the control and proportionality principles.
- (ii) Replacing differential punishment with equal punishment does not come at an unreasonable cost to other values.

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<sup>2</sup> Feinberg, 'Criminal Attempts: Equal Punishments for Failed Attempts' 80.

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In what follows I argue that conditions (i) and (ii) do not hold. For the purposes of this essay, in line with the reformers, I consider the purpose of punishment to be the removal of blameworthy individuals from society, and the deterrence of blameworthy behaviour. First I show that equal punishment penalises agents according to factors beyond their control, and therefore does not satisfy condition (i). Second, enforcing equal punishment comes at an unreasonable cost to democratic values and violates condition (ii).

## **II. Punishment and Luck**

Reformers argue that equal punishment adheres to the control and proportionality principles. This is because, unlike differential punishment, equal punishment does not penalise criminals according to consequential luck, which is luck in how a criminal attempt turns out. Criminals are punished only for what is within their control, their intention. In this way, equal punishment corrects for the unfairness and arbitrariness of differential punishment.

However, criminal intentions are often beyond an agent's control. Nagel's notion of constitutive luck captures the idea that agents are not in control of their personalities, inclinations, capacities or temperament. Put simply, who we are is a matter of luck.<sup>3</sup> To illustrate this point, consider a modification of Lewis's thought experiment with a new character, Fee. Fee and Dee are identical except that Dee's psychological composition is such that he has a greater predisposition to violence than Fee. We might imagine this psychological difference as being due to upbringing, inherited personality, or mental illness. According to the control principle, Dee cannot be held blameworthy for his psychological composition because this is beyond his control. According to the proportionality principle, Dee should be punished no more than Fee. Yet equal punishment, as favoured by reformers, would punish Dee and not Fee. Therefore equal punishment does not adhere to the control or proportionality principles.

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<sup>3</sup> Nagel, 'Moral Luck' 3.

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Indeed, a variety of scenarios show that intention is due to factors beyond an agent's control. Dee may not have formulated his murderous intention if, due to luck, he never met his victim; or if he had been lucky enough to receive psychological treatment for his anger issues. Arguments for legal reform claim differential punishment exposes criminal agents to an unfair degree of consequential luck. But if intention is also due to luck, and equal punishment penalises criminals on the basis of intention, then this poses a significant challenge to the reformers' argument. Why draw the line at intention, when even that is beyond an agent's control? If criminal agents cannot be held blameworthy for their intentions or the consequences of those intentions, then legal reform is open to the same criticisms of unfairness and arbitrariness as current practices.

The reformers might respond that this argument is mistaken, and that Dee can plausibly be held more blameworthy than Fee. Even if psychological composition is subject to the influence of luck, this does not render moral agents powerless over their intentions. With self-reflection and a great deal of effort, a naturally violent person like Dee can alter his predispositions. Although it might be difficult for each agent, depending on their psychological tendencies, all rational moral agents are capable of cultivating good intentions. Equal punishment would thus adhere to the control principle. Criminal agents are assessed for what is within their control: the effort invested toward cultivating the right intention. Because Dee has failed to cultivate the right intention, he is more blameworthy than Fee. The proportionality principle thus implies that it is permissible to punish Dee to a greater extent than Fee.

However, there are three problems with this response. First, upholding the control principle in this case severely limits the extent to which agents may be held morally blameworthy for their crimes. If an agent is morally blameworthy to the extent that she fails to cultivate the right intention, rather than because she suffers from an evil intention, the scope of criminal punishment is severely limited. What Dee would be punished for in this case would be 'failure to

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cultivate the intention not to harm' rather than his natural inclination to violence and his subsequent attempted murder. While this might be appealing insofar as this adheres to the control principle, this constitutes a legal change that is far more radical than many reformers currently defend. Secondly this is unfeasible. We will never have a legal system that can accurately judge the efforts that agents invest into manipulating their predispositions.

Thirdly, this response continues to violate the control principle. What would happen if Dee really did manage to cultivate the 'right' intention not to attempt murder? Because Dee has a greater tendency toward violence than Fee, Dee uses greater effort than Fee to develop the intention not to harm. The control principle therefore implies that Dee is more morally praiseworthy than Fee. Yet this is counter-intuitive: Dee and Fee have exactly the same intention, and neither commits a crime. Moreover, this is unfair on Fee. Because Fee is naturally non-violent, she does not have the opportunity to demonstrate her ability to bend her will toward the good. Therefore, the control principle is violated because the moral praise of Fee is restricted by factors beyond her control. For these reasons, the reformers are forced to concede that condition (i) does not hold: equal punishment does not adhere to the control principle or the proportionality principle.

Nonetheless, reformers could plausibly maintain that legal reform is defensible despite the failure of condition (i). Legal reform should be pursued because it is preferable to current practices. Equal punishment is less arbitrary and less unfair than differential punishment. Where differential punishment exposes criminals to consequential luck, equal punishment corrects for this luck. The extent to which agents are punished for factors beyond their control is thereby reduced and reform satisfies the control and proportionality principles to a greater extent than current practices. However, the argument for reform is not complete until it can be shown that condition (ii) is also satisfied.

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### **III. Costly Reforms**

Condition (ii) is not satisfied because replacing differential punishment with equal punishment comes at an unreasonable cost to other values. I focus only on the cost to democratic values. Legal reform disregards the preferences of ordinary citizens. Almost every criminal justice system in the developed world distinguishes between criminal attempts and successes. Moreover, evidence suggests that the majority of the adult population support current practices. A psychological study found that adults are more likely to favour punishing a care-less actor when harmful consequences occur than when no such consequences occur.<sup>4</sup> If the preferences of ordinary citizens are disregarded, and legal reform is implemented on the basis of complex philosophical argument, we implicitly authorise a legal system in which only an intellectual elite matters.<sup>5</sup> Furthermore, if the general population does not support the criminal laws in place, then there is little hope that they will be obeyed by inhabitants or upheld by jurymen.

Feinberg responds that widespread support for differential punishment does not imply that differential punishment is fair or non-arbitrary: 'That the bulk of the people believe that a particular proposition is true... is not a good reason, even in a democracy, for believing that proposition to be true.'<sup>6</sup> Even if Feinberg were undoubtedly right that, in cases such as Lewis's *Dee and Dum* case, equal punishment is more rationally and morally defensible than differential punishment, this is not sufficient to pursue legal reform. As he himself states, legal reform may be pursued so long as it is practically desirable. That is, it comes 'at a reasonable cost in other values.'<sup>7</sup> It is not at all clear that dismissing the views of the majority and undermining popular belief in our legal system is one such reasonable cost. As the argument for reform currently stands, a stronger

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<sup>4</sup> Cushman, 'Crime and punishment: Distinguishing the roles of causal and intentional analyses in moral judgment' 370.

<sup>5</sup> Feinberg, 'Criminal Attempts: Equal Punishments for Failed Attempts' 84.

<sup>6</sup> Feinberg, 'Criminal Attempts: Equal Punishments for Failed Attempts' 85.

<sup>7</sup> Feinberg, 'Criminal Attempts: Equal Punishments for Failed Attempts' 80.

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case is required to show that legal reform is valuable enough to outweigh the costs that result from undermining democratic values. If the views of ordinary citizens were to change, legal reform would have greater appeal, but as views currently stand, legal reform does not satisfy condition (ii).

### **Conclusion**

The argument for legal reform does not succeed. Legal reform fails to uphold the control and proportionality principles by punishing agents according to factors beyond their control. Moreover, legal reform entails unacceptable costs as it fails to respect the consensus of ordinary citizens. For these reasons, our current practices should not be changed. Attempted crimes should be punished less severely than corresponding completed crimes.

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## **References**

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