

# FEINBERG ON LUCK AND FAILED ATTEMPTS

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To take on the subject of “attempts,” you have to command a vast philosophical and legal terrain—one that includes action, motivation, punishment, desert, justice, to name some parts of it. Few are in a position to move as confidently in this space as Joel Feinberg is. So when he offers “A Modest Proposal,” we had better pay the sharpest attention. The logic of the Swiftian essay is to gather together what are universally taken to be impeccable, or in any case unchallenged, assumptions, and from their conjunction to serve up some unpalatable but “given the assumptions” apparently reasonable conclusion. The assumptions Joel Feinberg draws on are the principle of proportionality in punishment, blameworthiness as the measure of just punishment, and the strict separation of the justifications of tort and criminal law. The part he expects we will find hard to swallow is the conclusion that it is clearly unreasonable not to impose the same degree of punishment for failed attempts as for completed crimes. What gets consumed as a side dish is the causal condition of completed crimes. While I don’t think of Feinberg as a Swiftian satirist (and I do think Feinberg takes his proposal quite seriously), this elegant paper has a Swiftian effect—compelling serious rethinking of arguments and principles that have seemed too obvious to worry about.

Most of what I have to say is about things leading up to the modest proposal itself. I am still not sure what I would or should conclude about it, and I suppose I am not yet convinced that there are no good reasons to punish failed attempts less harshly than successful ones. There are features of both the reformist and the retentionist positions that are hard to resist.

The argument Feinberg presents for what he calls “the reform position” is disarmingly simple; what is difficult, as he sees it, is explaining why sensible people think otherwise. Here is the bare bones argument:

1. Punishment is a legal sanction whose severity ought to be a function of the moral gravity of the criminal action. (“Principle of proportionality”).
2. The moral gravity of a criminal action is (or is a function of) the degree of moral blameworthiness of its perpetrator in acting.
3. For a given criminal action, the perpetrators of attempted and successful actions are (or can be) equally morally blameworthy.

Therefore,

4. Perpetrators of attempted and successful criminal actions (of the same kind) ought to be punished equally. (“No gap”).

The framing premise is a view of the purpose of the criminal law: to

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penalize those behaviors likely to cause serious harm to others. It is from the point of view of the criminal law so understood that attempts and successful actions are equally blameworthy, because equally dangerous.

Feinberg argues that our current practice's failure to assign equal moral gravity to attempts and successful actions gives moral weight to a difference—the actual occurrence of the harmful outcome—that is explained by luck. And since luck marks a difference in action or outcome that is from the moral point of view arbitrary, its absorption into legal doctrine is to be avoided, as, in Feinberg's simile, corrosive rust is in a machine.

Corrosive rust not only interferes with the workings of a machine, if untreated, it destroys it. Therefore, avoid rust? But whether rust is to be avoided depends on what a machine is used for and in what conditions. The fact that rust can't be avoided on a long sea voyage doesn't direct us to stay on land. Rather, as sailors, we need to know how to protect and mend vulnerable parts. So even if we agree that arbitrariness is not good for legal proceedings and that its unchecked presence would destroy the rule of law, if it is also not avoidable—if for some reason it's just part of the fabric of things—what we need to know is what can be done to confine it or repair its effects. But not to let the metaphor take over, my point is this: to say that luck brings arbitrariness into the law is not yet to offer an argument; but it is only a consideration of some yet to be determined weight.

What I propose to do is go on for awhile about attempts. I want, first, to think about the costs of eliminating them from our moral or legal vocabulary (whether by treating all actions as attempts, or all as completed, from the relevant point of view), and second, to consider whether the causal condition does, as Feinberg claims, bring with it corrosive arbitrariness.

It seems to me that there might be good reasons to treat attempts separately. To begin with, not all attempts are like the shooting case (two shooters, two victims; one success, one failure due to the unexpected intervention of a mosquito); nor is it clear that the shooting case provides the best representative of what the attempt category captures, morally speaking. The shooting case is constructed to hold constant everything that has to do with the agent, so that the only morally relevant difference is the difference in outcome that is the result of an unpredictable and agent-independent causal intervention: the mosquito. A microscopical moral camera trained on the pair of shooters would not reveal anything that distinguished them or their actions. (I take it that the moral camera would not register the mosquito.)

This kind of evaluation of action is dear to any Kantian's heart: the moral value of an action is in the package of agent's motive and intention, effort and decision. Where these factors are the same, the moral value of the action must be the same. Just as we lose no moral credit (worth) when we fail to bring about good results that we sincerely and effectively try for, so we are not to be let off the moral hook when our bad intentions and plans fail.

But the picture of action as something the agent sends out into the causal network of the world—a casting of her own causal efficacy into a net of intersecting independent causal pathways—melds attempts and actions, and so obscures some things that are arguably important and available only if we keep attempts as a separate category. For example, we think that many failed

attempts fail for a reason: a partial withholding of will, an ambivalence of motive—a lack of whole-hearted dedication to the goal. Using the shooting example as a paradigm of attempt means to rule this out by controlling for the cause of failure too. Sometimes we are sure that the causal explanation for the failure is an external intervention; but sometimes we are not. And when we are not—not sure, I mean—then I think there is reason to maintain some room for the complex effects of human motivation that may mark a failed attempt. This is not just an acknowledgment of the opacity of other minds or other intentions. It's a vote of confidence, as it were, for the redemptive possibilities of our nature. In an earlier time one might have talked about leaving room for the effects of grace. (One wants to avoid, of course, the matching error of making too much of agency—where every mis-step must be the effect of faulty action.)

A first caution, then, is about the paradigm shooting example. If it shows there can be failed attempts that are equal in all respects to successful criminal actions but for the caused effect, it is insufficiently representative of attempts to provide passage for the conclusion that failed attempts warrant, from the moral point of view, equal treatment. "Other things" are not often enough equal.

One response could be that we need even more classes of action: successful attempts, externally caused failed attempts, attempts that aren't quite full attempts, and so on. But I don't think that's quite the point. It is attempts themselves that are more complicated.

Consider A, B, C, and D, setting out to climb Mt. Whitney. A, B, and C drop out at different times; D makes it to the top. A's canteen springs a leak, a rock falls on B's foot, and C has an allergic reaction to the mosquito that lands on her nose. Who of these has attempted to climb Mt. Whitney? (A friend of theirs, E, got an emergency call from his grandmother right as he was going out the door and so "was unable to make the attempt." How far along would E have had to go to have successfully attempted and then failed to climb the mountain?) Now to be sure, climbing a mountain takes some time, unlike the shooting, which is over in an instant (or the shooter's part in it is). But that temporal fact about the shooting can't be what makes it an attempt. We do not want to say that you cannot attempt lengthy and complex things—as when the conspirators attempt to overthrow the government. (And when does a conspiracy to overthrow the government become an attempt? Is there some first action that starts it?)

Suppose F also goes up the mountain, gets farther up than A through C, but has to stop because he is badly out of shape, wore sandals rather than walking shoes, and brought no water or food. We might say that F, unlike A through D, didn't make a real attempt at all.

Many kinds of issues can be involved here: actions and plans, problems of description, simple and complex actions, attempts and efforts. I don't mean to suggest they all have to be sorted out before we talk about punishing failed criminal attempts. But I do think they should give us pause. Before concluding that we can without loss punish failed attempts as we do successful crimes, we need to understand more about failed attempts that fall short of the paradigm shooting case.

Consider the crime of attempted rape. It is distinguished from the crime of rape by the failure or absence of penetration. The moral seriousness of

attempted rape is hardly to be doubted. Indeed, I am not sure I would want to say that it is morally less grave than successful rape. But it is different. And some of the difference, the moral difference, comes from the fact of the failure of penetration. The failed attempt belongs, we might say, to a different narrative—one we do not want to lose the ability to represent, in law as well as in our private lives. As before, we might want to know whether the source of the lack of success is like the mosquito, or the effect of some saving ambivalence. We may not be able to tell. We may want to preserve the distinctness of the attempt because of our uncertainty, but we also might want to preserve it to mark our conviction that we care deeply about the difference between rape and attempted rape as well as about the range of possible causes of failure.

Now it could be that what marks the rape case is that, unlike the shooting case, where the doing is complete before the killing happens, there just is no rape without penetration—something the rapist has to do. In a way, *more* is required in the shooting case for it to be an attempt (attempted murder, not attempted shooting). Is attempted rape more like a shooting case where the assailant's finger slips from the trigger? and is that case equally, and for the same reasons as the paradigm shooting case, an attempted murder? Actions differ in their distance from caused harm, but, it seems unlikely that what determines criminal liability is this kind of distance from the outcome. One might think the greater the distance, the more room for the intervention of luck or causal factors outside the control or knowledge of the agent. We should not confuse physical distance and moral space, however. Lying is even more curious, since it happens fully, independently of its outcome, whether or not what is intended happens. Is it because of this that there is something odd in the idea of an attempted lie? An attempted lie is not impossible, of course, as when someone involuntarily signals that he or she is lying.

Now recall the fulcrum of Feinberg's argument: we should not treat failed attempts differently than successful criminal actions because what causes the attempts to fail is something morally arbitrary. The reformist presumption is rebutted if we find a reason other than harm caused (that is a tort concern) and something not merely expedient (that is a system cost) for keeping completed crimes and failed attempts separate. The point so far is that *if* not all attempts are like the shooting case, then what distinguishes failed attempts from successful actions may be more complicated in a morally relevant way, and not all attempts do seem to be like the shooting case. Of course, nothing I have said provides an argument for a retentionist position either.

It is important not to elide questions. There is the question whether attempts are morally on a par with successful actions. There is the independent question of whether moral blameworthiness is the necessary and sufficient condition for punishment of criminal action. Feinberg argues against those who would distinguish attempts from successful actions on grounds of blameworthiness for harm caused. I have suggested that our moral interest in attempts is not exhausted by questions of blameworthiness for harm caused, and that some of the other features of attempts that interest us may mark them for different treatment in the criminal law. It is even possible that what interests us about attempts has no bearing on moral blameworthiness. It does not follow, however, that acknowledging such interests would either introduce arbitrary

factors into the law of sentencing, or draw elements that belong to the separate sphere of torts and compensation into the criminal law. (There is of course lots to be said about this separation.)

But what about luck?—the element that is to show the arbitrariness of distinguishing between failed attempts and successful actions? That the success of our actions is contingent on factors outside our control is too general a fact to explain anything. We casually take the boundaries of our bodies to mark some region of ours/not-ours, what is in our control and what is not. But that's not right. I have much greater control over the contributions to the success of my actions of some of the things outside my body than I do over some within. The computer that I am writing on is much more reliable than I am, and in its sphere of activity, more responsive to my will. Even factoring in bad luck—untimely hard disk crashes and the like—I am surer of getting it to do its job between 3 and 4 on any given afternoon than I am sure of my getting myself to do mine. Earthquakes and power failures may interrupt and cause my work not to be completed, but it is far more likely that I will leave the work unfinished because I cannot resist fatigue, or suddenly find it imperative to go out to buy coffee, etc., etc. Well, so what? We might say, though we do not, that it's a matter of luck (or fate, or contingency) that I get anything done at all. And we do not say this (or believe it) because we assume something like a baseline sphere of effective agency—of control over ourselves and even over some of our things—that makes the explanation of normal action a matter of course, even though it is always the case that what we will is not causally sufficient to effect our ends. Thus if I fire the gun and hit my target, absent a special story, the action and its intended effect are imputable to me. But if I fire and there is a mosquito story, *not* hitting the target is, in a sense, not imputable to me. That is, if I fire to hit—whether there is a mosquito or not—the action *and its intended effect* are imputable.

It is this, I believe, that explains our reformist intuitions in the paradigm shooting case. It is also why we resist certain counterfactuals:  $A_1$  cannot say that his killing of  $B_1$  was a matter of luck even though it was equally likely that the mosquito land on his nose. Imagine two shooters, two victims and two mosquitoes-who-land-on-noses, causing both  $A_1$  and  $A_2$  to twitch. The outcomes are the same as before. If we do not think the new mosquito improves  $A_1$ 's moral situation—whether his shot hits  $B_1$  because or in spite of the twitch—*luck* is not a factor in the moral situation of either  $A_1$  or  $A_2$ .

Whether or not the world cooperates in our efforts is out of our control, but it is *not* a matter of luck, if luck marks the introduction of something arbitrary from the moral point of view. It is an ordinary component of rational agency that we act on the assumption that things are as they seem. That we are not, say, in an environment where ordinary causal connections are disrupted (or one where people react hysterically to requests for the time of day—thus a certain level of excuse is available for untoward actions when we travel, but there is also a requirement of increased sensitivity and precaution). Because it is reasonable to trust that normal actions will not misfire, we are not lucky when they succeed, even though, as we know, there may be a littered field of “almost mishaps” in our wake.

I have a friend who always leaves just enough time to make an

appointment. Not surprisingly, he is frequently late—an accident on the freeway, a phone call as he leaves the house. Bad luck, he says. But he is surely wrong, and he is just as surely at fault for being late. Another friend, who thinks promptness one of the cardinal virtues, gives herself lots of time, and yet is occasionally late—an accident on the freeway, a phone call as she leaves the house. Bad luck, she says. And she is right, and not at fault for being late (though of course it is she, and not my more casual friend, who feels guilty).

The moral I want to take from these sketchy remarks is this: if luck refers to the interference in our actions of independent causal sources, then luck is morally irrelevant, because ubiquitous. I think we do better if we take the domain of luck, good or bad, to be the unpredictable departures from the normal or expectable range of independent (of our will), causally “live” effects.

Once we take into account the complexity of the relation between intentional action and the various lines of intersecting causal contingency, there is at least a *prima facie* reason to look at the notion of “attempt” as marking off a more complex condition of action whose moral relevance is not yet clear. In this light, the tendency to treat all punishable action as having the moral character of an attempt seems premature. Distinguishing failed attempts from successful actions *may* not involve anything morally arbitrary. Further, although there is certainly something to be said for regarding those actions we in some direct sense “launch” as being completed, from a moral point of view, before their effects occur or fail to occur, that is a moral fact about a special kind of action, not about actions and attempts *per se*.

But of course there are other complications. We might say: From the perspective of the agent acting, when one shoots to kill, one is not making an attempt, one just is acting, and one may succeed or not. From the perspective of a failed action, however, we do want to separate out attempts, in part to indicate that the absent outcome was *not* the agent’s object in acting. But it is also true that when we look back, we look back on what was done *and* on what happened. It is hard to resist wanting to accommodate both views. To try to do this within the framework of Feinberg’s reformist challenge, we might have to find movement in another quarter.

Suppose we looked at the relevant kind of moral blameworthiness this way: you are morally blameworthy (in the relevant way) when you engage in prohibited dangerous behavior with the object of causing some harm to another or others. This is the domain of Feinberg’s Wrongful Homicidal Behavior. But now I want to look at it as a moral threshold. Having crossed the threshold with your dangerous behavior, we may not only hold you responsible for the outcome if your action is successful, we are justified in punishing you for what your action brought about. That is, you are blameworthy for the outcome because your behavior—regardless of outcome—put you at or over the threshold.

This is not a new line of argument. It has a source in Kant; variants of it are used by Judith Thomson, David Lewis, and Michael Davis. I think it is worth taking seriously.

Let me say a few things about the strong Kantian version of the argument. Focused on the effect of contingency on the success or failure of our efforts, we tend to ignore the effects of contingency in the production of

further consequences—the way the effects of our actions inevitably outstrip our intentions. One of the protections the moral life affords us is that when we act permissibly or as morality dictates, our responsibility ends roughly with the arrival of the intended outcome (I am assuming negligence and what ought to be foreseen is covered in the permissibility standard). Thus, however bizarre the causal warp, however many bad effects there were from my starting my car yesterday morning, so long as what I did was permissible and the circumstances were reasonably thought to be normal, they are not imputable to me. When we act outside the boundaries of the permissible, this is not the case. Then, when there are unexpected and unexpected consequences, because we have made ourselves, as Kant would say, authors of our own law, we are responsible for outcomes, whether we intend what happens or not. Kant's particular concern is our belief that we are justified in promoting a good end by immoral means. However good our intentions, we may fail at what we would do because of some unexpected interference with our plans. What we intended may not come to pass; something bad or worse can happen instead. But having stepped outside the protection of the moral, having asserted our authority as efficacious agents, the untoward outcome is imputable to our action.

The application to our concern here is this: once the "wrongful action" takes place, the consequences are imputable. This is not a story about action and contingency but about morality. Thus it is correct to say of both  $A_1$  and  $A_2$  that having fired the gun with the intent to kill, what follows from the impermissible action is imputable. Thus  $A_1$  and  $A_2$  have done different things. They are indeed equally morally blameworthy, but that fact determines not the degree of punishment that is appropriate, but their equal eligibility for penal sanction. And, we might want to argue, it is reasonable, and certainly not arbitrary, to punish someone for what he is morally responsible for doing.

I do not offer this as a sound argument for the retentionist conclusion. I have done no more than point to a line of argument that seems to allow the difference in what happens to make a difference in degree of punishment, without sneaking a tort-appropriate concern into criminal law.

Having said this much, I have said very little, and touched on only a small part of Feinberg's concerns. I have tried to give some reasons for thinking the category "attempt" worth preserving; I have suggested that luck may be a red-herring; and I have gestured at a different line of argument about imputability that the reformist needs to consider. I have said nothing about Feinberg's immensely interesting discussion of guilt. I haven't asked a question that really puzzles me: why would it be so terrible to have tort-like concerns in the criminal law—say, at a second tier of concern? There is much more to be done with the concept of moral blameworthiness. There are possible ambiguities in the principle of proportionality. Is disobedience of the law the best way of understanding what makes a criminal act wrong or blameworthy?

But this range of difficult and perplexing questions is the natural legacy of Feinberg's (not so) modest proposal. It does what the best philosophy always does—appearing simple and obvious, it makes you re-evaluate the things you are sure you know. No failed attempt, this.

