Singapore Journal of Legal Studies
[2002] 604 - 616

PUNISHMENT AS RESPONSE TO HARM: WHY THE ATTEMPT WARRANTS LESSER PUNISHMENT THAN THE COMPLETED CRIME

DAVINIA FILZA ABDUL AZIZ *

In this article, the author sets out the case for punishing a person who unsuccessfully attempts the commission of a criminal act to a lesser extent than one who actually completes the same act. A common objection to such a position is that one who attempts should not escape equal punishment on a mere quirk of fate, for it is this, in essence, that separates the attempter from the perpetrator of the completed crime. This objection is misconceived. The rationale behind laying down a lesser punishment for attempts lies not in surrendering what is really a normative judgment to the vagaries of luck, but in the fundamental reality that harmful consequences—which only manifest upon completion of a crime—form a basic part of the societal response and reaction mechanism that is our criminal justice system.

I. INTRODUCTION

…Th'attempt and not the deed
Confounds us…Had he not resembled
My father as he slept, I had done't.

Macbeth, Act II Scene 2[1]

Those who argue in favour of equivalent punishment for complete attempts and completed crimes echo a familiar refrain. Sanford Kadish, for example, asks the typical questions: "Would the father who stabbed his son deserve less punishment if a skilful doctor had been available to save the son's life? Would the Russian Roulette player deserve less punishment if the bullet happened to be in another chamber when he fired?"[2]

But for their "outcome luck", both the father and the Russian Roulette player would be convicted murderers, subject to the full brunt of homicide

---

* LLB Hons (NUS), Justices' Law Clerk, Supreme Court of Singapore. The views reflected in this article are entirely the author's own. She wishes to express her sincerest thanks to Dr Victor Ramraj of the Faculty of Law, National University of Singapore, for his invaluable help and encouragement. All errors, of course, remain her own.

1 S Wells & G Taylor (eds), *William Shakespeare: The Complete Works* (Oxford: Clarendon Press, 1988) at 982.

2 S Kadish, "The Criminal Law and the Luck of the Draw" (1994) 84 J Crim L & Criminology 679 at 680.

law, which, in Singapore, visits the ultimate penalty of death upon the perpetrator of the complete crime of murder.[3] Contrast this with the prescribed punishment for *attempted* murder: imprisonment for ten years or for life depending upon the circumstances of the attempt.[4] Our initial intuitive concurrence with this state of affairs usually turns to incredulity when we consider that mere fortuity, rather than, for example, a lower level of *mens rea*, is all that separates the attempter from the convicted murderer. Why should the attempter receive a lesser punishment on a quirk of fate?

A. *What price attempts under the Singapore Penal Code?*

In the day-to-day administration of justice, lesser punishments are routinely handed out to perpetrators who attempt crimes and fail to succeed. The Singapore legislature has promulgated this practice into law in the form of section 511 of the Penal Code.[5] This provision applies in default "where no express provision" has been made for punishment of attempted crimes. On a cursory examination of the other Penal Code provisions, it would seem that this practice of non-equivalent punishment is sustained even where express provision has indeed been made. As mentioned earlier, section 307, which governs attempt to murder, provides that the offence is punishable with ten years' imprisonment and fine, and with life imprisonment if hurt is caused to any person in the course of the attempt. The offence of murder, by contrast, is punishable by death.[6]

Upon closer scrutiny, however, we find that the PC in fact crystallises—without resolving—the perennial debate between those who would advocate equivalent punishment for attempts and completed crimes, and those who would advocate a lesser degree of punishment for the attempter. Among the Penal Code provisions which mandate *equal* punishment is section 152, which provides that an attempt to obstruct a public servant in the discharge of his duty in the specified circumstances is punishable, as is an *actual* obstruction, with six years' imprisonment, or a fine, or both.[7]

---

3 Section 302, Penal Code, Cap 224, 1985 Rev Ed.

4 Section 307, *supra*, n 3.

5 Section 511 provides:

> Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence: Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for in the offence.

In *Chua Kian Kok* v *PP* [1999] 2 SLR 542 (HC, Singapore), Yong CJ was of the opinion that this section sets out the general law of criminal attempt as applicable locally. See para 25 of the judgment.

6 *Supra*, n 3.

7 Section 152, *supra*, n 3.

Ostensibly, it is possible to justify this discrepancy as follows. In the main, the Penal Code provisions that lay down equivalent punishment for attempts and completed crimes relate to offences against the State, offences relating to the armed forces, offences against public tranquility and public servants, the giving of false evidence and offences against public justice. Those which, like section 511, provide for non-equivalent punishment relate primarily to offences against the person.

However, this effort to rationalise the apparent inconsistency contained in our Penal Code disintegrates when one points out that section 354A(1), which regulates punishment for outraging of modesty where the offender causes or attempts to cause hurt to his victim, falls into the first category (equivalency of punishment) when it should, on the above analysis, fall into the second (non-equivalency of punishment). How are we to justify this mess of anomalies?

One might conceivably write them off as the inevitable offshoot of legislative policy, but this is simply not acceptable. It is not acceptable because the decision as to whether to punish an attempter to the same extent as an offender who has actually completed that crime cannot be treated merely as a decision to be left to the legislature—as would be the case if the inconsistencies in our Penal Code were blindly accepted as following from some legislative/executive vision for our system of criminal justice. Nor can they be written off as mere working principles of punishment. Each of these Penal Code provisions is, in fact, a *normative judgment as to culpability* that goes to the very core of our criminal justice system. This article subjects that normative judgment to scrutiny, and ultimately argues in favour of the position that advocates punishing complete attempts *less* severely than completed crimes.

B. *Preliminary remarks*

In this section, I briefly outline the argument that follows and, by way of clarification, set out the parameters of that argument as well as the manner in which certain terms and concepts will be used.

Returning to Kadish's seemingly unanswerable questions regarding the knife-wielding father and the Russian Roulette player, I argue that both questions must be answered with an emphatic "Yes". My position is that those who do everything within their power to commit an offence, but fail, are *not* as culpable as those who succeed. Therefore, they ought not to be punished to the same extent. The same measure of punishment for both a complete attempt and a completed crime is not justified because:

(a) the notion of "culpability" *must* include *actual* harm done; and,
(b) the "outcome luck" objection—a favourite argument of those who argue the opposite position to mine—is irrelevant.

I now turn to some explanatory observations to clarify certain concepts used in the following pages. First, with regard to terminology, the terms "objectivism" and "non-equivalence theory" are used interchangeably to indicate the position taken in this article (that is, the position in favour of punishing attempts less than the completed crime). The terms "subjectivism" and "equivalence theory" are used to refer to the opposing view. "Culpability" and "criminal liability" are also used interchangeably.[8] "Blame" is used to denote a factor that, *together* with actual harm done, equates to "culpability".[9] Finally, the word "attempter" is used to refer to a moral agent who commits a complete attempt.

Second, the parameters of my argument are confined to moral agents who commit *intentional complete attempts*. Therefore I will not, for example, discuss at length here the problems of distinguishing "mere preparation" from "attempts", and whether "impossible attempts" ought to be punished. A "complete attempt" is one in which the attempter does everything in his power to secure the commission of a crime, but fails due to some extraneous factor beyond his control. By the phrase "does everything in his power", I mean the totality of conduct required by what is commonly referred to as the "last act doctrine". This idea is better conveyed by way of the following example, taken from Illustration (d) to s 307 of the Penal Code:[10]

> *A*, intending to murder *Z* by poison, purchases poison and mixes the same with food which remains in *A*'s keeping; *A* has not yet committed the offence defined in this section. *A* places the food on *Z*'s table or delivers it to *Z*'s servants to place it on *Z*'s table. *A* has committed the offence defined in this section.

II. The Notion of "Culpability" Must Include Actual Harm Done

A. *The case for the objectivists*

1. *The subjectivist position: redux*

According to the subjectivist view, an attempter is culpable simply because he harbours the same "evil intent" as who completes the crime. Revisiting Illustration (d) for a moment, this is why the subjectivist position limits itself to A *after* he has placed the poisoned food on Z's table or delivered it to Z's servants. At this point, A's "evil intent" is completely manifest. All that remains is for his intended victim, Z, to imbibe the poison. If it just so

---

[8] It should be noted that while these terms are used as such for the sake of simplicity here, considerable debate exists over whether only those who are "culpable" should be held "criminally liable". This is beyond the scope of the present article.

[9] This point is addressed at length in Part IIA2, below.

[10] *Supra*, n 3.

happens that Z decides not to eat, A will be just as culpable as if Z had indeed ingested the poisoned food and subsequently died. Nothing but the result, or actual harm done to the victim, separates a successful murderer from an unsuccessful one in terms of "blame".

Therefore, the Russian Roulette player and the murderous father are just as culpable as they would have been had their victims died—simply because they pulled the trigger and wielded the knife respectively. To reduce the subjectivist argument to a simple equation for clarity, "blame" equals "culpability".[11]

2. *The objectivist formula for "culpability"*

My position is that the concept of actual harm done *should* enter into the picture. Instead of merely leaving the equation at "blame" equals "culpability", I adopt Clarkson and Keating's formulation that "blame" plus "harm" equals "culpability".[12] "Harm" here means actual harm done to the victim; ideas of "risk of harm" and "social volatility" are deliberately discounted and dealt with below.[13] In other words, the sort of "harm" connoted is that which would have occurred had the Russian Roulette player's bullet been in the chamber when he fired. The key question, though, remains: why should "harm" in the sense of actual consequences arising from the moral agent's conduct be at all relevant in determining culpability? Why, indeed, should the lack of a dead body make a difference in the case of attempted murder as opposed to murder? For that matter, why should the lack of a broken arm make an attempted assault any different from a successful assault?

3. *The merits of the objectivist case: why consequences matter*

The answer to these questions is simply this: consequences are relevant to culpability because they factor in to the seriousness of the wrong. This argument derives from a fundamental premise: namely, Justice Oliver Wendell Holmes' oft-quoted aphorism that "one man's rights end where another's nose begins". As Ripstein appositely observes, "if we think about crimes in this way, there is no way to eliminate the effects of chance, because *what happens* is so crucial to the extent of the *freedom of others*."[14] It is only when the moral agent's intended consequences become reality that he impinges on the right of another person. Therefore, we should define a moral agent's actions not merely in terms of subjective *conduct*, but in terms of its objective *consequences* as well. Returning to our previous

---

[11] RA Duff, *Criminal Attempts* (Oxford: Clarendon Press, 1994) at 205.

[12] *Ibid.*

[13] See Part IIB, below, for more on this topic.

[14] A Ripstein, *Equality, Responsibility and the Law* (Cambridge: Cambridge University Press, 1999) at 225. [Emphasis added.]

questions, the dead body of the broken arm makes all the difference because there has been a tangible invasion of another person's rights. Even if the attempter had harboured the most evil of intentions but missed when he struck the blow, the fact remains that there would have been no such rights violation. The attempter would only be culpable to the extent of the blameworthiness of his conduct: that is, he would be criminally liable for attempted murder, but noting more. It is the moral agent's action "as it actually impinged on the world"[15] that is paramount.

This is necessarily a better account of culpability than the subjectivist view because it gives life to the Holmesian societal construct, thereby accurately depicting the basic social processes inherent in our criminal justice system. The criminal justice system is the mechanism through which we channel our innate human responses to what we see as wrongful acts. This mechanism is a conduit or the processes of placing culpability and exacting punishment. Our innate human responses, in turn, are responses to *objective consequences*, not subjective conduct. Contrast our instinctive, *different* responses to a moral agent who has committed a complete attempt, as opposed to one who has successfully completed a crime: "X killed Y" carries with it overtones of shock, dismay and sorrow, whereas "X tried to kill Y but fortunately didn't succeed" carries with it relief that no actual death occurred. The distinction between the two reactions embodies this important difference: "X killed Y" sounds the stark note of finality, but with the attempted killing of Y, X has been granted, as it were, a *locus poenitentiae*.[16]

How do these responses translate to the question of punishment? These responses are crystallised accordingly in our criminal law by convicting X of attempted murder rather than murder, and mitigating his sentence to mirror the fact that no death occurred. This is why a "general discount for failure" is justified.[17] It derives not from the vagaries of luck, but from a conception of the criminal justice system as society's process of response and reaction to a tangible invasion of another individual's rights.

B. *Objections: "risk of harm" and "social volatility" as harm?*

Two possible objections may be raised at this juncture. One, put forward by Richard Parker and appearing in New Zealand draft legislation, is that "harm" is better understood as "risk of harm". Another, put forward by Lawrence C Becker, is that "harm" is the "social volatility" brought about by the complete attempt. Complete attempts, so the argument runs, produce the same "social volatility" as completed crimes, and it is this "social

---

15 *Supra*, n 11 at 206.
16 *Ibid* at 346.
17 *Ibid* at 352.

volatility" that constitutes the harm we are concerned with. These objections will be dealt with separately.

1. *The "risk of harm" objection*

Parker suggests that it is the risk of harm created by a moral agent's conduct that should be used as a substitute for actual harm as the touchstone of culpability, and therefore punishment.[18] In his conception of crime, we would not punish someone for manifesting detrimental results, but for wrongful conduct. He argues that harm is not irrelevant to the subjectivist position, but that it is to be used as *evidence* of the individual's conduct being harmful. In Parker's own words, "conduct is blameworthy and may create liability for punishment because and to the extent that it is harmful."[19] This basic idea also appears in New Zealand's 1989 Crimes Bill, in which it was proposed that much of existing homicide law be replaced by the offence of "endangering".[20] In other words, the emphasis would henceforth be on crimes of *conduct* rather than crimes of *result*.

Parker further argues that "the harm actually produced by conduct is not always irrelevant to an evaluation of the culpability attributable to that conduct…The relevance of a harmful result is in the form of evidence that

---

[18] R Parker, "Blame, Punishment and the Role of Result" in *Philosophy of Law*, edited by J Feinberg & J Coleman (Belmont: Wadsworth/Thompson Learning, 2000) 592 at 594.

[19] *Ibid* at 595.

[20] The relevant portions of the Crimes Bill provide:

Endangering

130. Endangering with intent to cause serious bodily harm –

(1) Every person is liable to imprisonment for 14 years who –

(a) Does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to cause serious bodily harm to any other person; or

(b) With reckless disregard for the safety of others, does any act, or omits without lawful excuse to perform or observe any legal duty, knowing that the act or omission is likely to cause serious bodily harm to any other person.

(2) This section applies whether or not the act or omission results in death or bodily harm to any other person.

…

132. Endangering with intent to injure, etc.

(1) Every person is liable to imprisonment for five years who –

(a) Does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to injure any other person; or

(b) With reckless disregard for the safety of others, or heedlessly, does any act, or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury to any other person or to endanger the safety or health of any other person.

(2) Every person is liable to imprisonment for two years who negligently does nay act, or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury.

Cited in JJ Gobert, "The Fortuity of Consequence" (1993) 4 Crim L Forum 1 at 30-1. The Bill lapsed at the end of New Zealand's 1993 Parliamentary session and was never promulgated into law.

the conduct in question was indeed harmful."[21] Although Parker does not completely discount harmful result from his computation of culpability, there is still a fundamental problem with his position in that whether or not harmful result does manifest is entirely a matter of chance. Result is irrelevant to his analytical framework *insofar* as the determination of criminal liability and, consequently, punishment, is concerned. It is not a tenable response to the proposition put forward earlier: that every instance of harmful result should be treated as an essential factor in processing society's response and reaction to criminal conduct, thereby justifying, on the basis of actual consequences, greater punishment for the perpetrator of the completed crime.

2. *The "social volatility" objection*

The second objection relies on the "social volatility" that is apparently caused by a complete attempt. According to Becker, the argument runs thus: there is a sort of social harm which is at the root of criminality—the "social volatility" consequent to the *process of doing* the major sorts of conduct we punish criminally.[22] Becker contrasts our different responses when someone is killed by accident as opposed to when someone is killed in a premeditated murder. It is the premeditated murder that produces the socially volatile response, because it has the "potential for disruptive disturbance of fundamental social structures".[23] He puts forward the example of a rash of public shootings. Successful or not, he argues, they produce "social volatility", thereby causing "social harm" just as much as a completed crime does. This is why, Becker contends, attempts must be punished to the same extent as the completed crime.

Becker's choice of example is telling. It shows us why his objection, too, must be set aside. His argument works if the complete attempt is committed in public. However, it is only half a solution to the overarching problem. What is to be done where the complete attempt is carried out wholly in *private*, in circumstances where the would-be perpetrator and his intended victim are the only witnesses to the former's conduct? What "social volatility" is caused then, and how do we then justify punishing the complete attempt to the same extent as the completed crime? Furthermore, Becker's argument makes a return to the response-based analysis set out above to justify the *objectivist* position[24]—an analysis of the *very same responses* to the occurrence of actual harm which, according to the

---

21 *Supra*, n 18 at 595.

22 LC Becker, "Criminal Attempt and the Law of Crimes" (1974) 3 Philosophy & Public Affairs 262 at 273.

23 *Ibid.*

24 *Supra*, n 15 and accompanying text.

subjectivists, we are supposed to discount in our assessment of the law of attempts.[25]

III. The Irrelevance of the "Outcome Luck" Objection

The essence of the "outcome luck" objection is neatly captured in Kadish's conundra set out at the beginning of this article. If it withstands analysis, then it is indeed a grave challenge to the objectivist position. Outcome luck is really a specific application of the more general philosophical problem of moral luck, which Margaret Urban Walker sums up thus:

> The 'problem' of moral luck resides in a sense that persuasive general beliefs about the conditions for moral responsibility are at odds with our actual common practices of moral assessment in cases involving an element of luck. Common belief is said to endorse the principle—a 'control condition'—that factors due to luck are "no proper object of moral assessment and no proper determinant of it, either" or, more simply, that people cannot be morally assessed for what is due to factors beyond their control.[26]

As to the ways in which luck may enter into our moral assessments, Thomas Nagel, who together with Bernard Williams reintroduced the problem of moral luck into modern philosophy, identified four:

> One is the phenomenon of *constitutive luck*—the kind of person you are, where this is not just a question of what you deliberately do, but of your inclinations, capacities and temperament. Another category is *luck in one's circumstances*—the kind of problems and situations one faces [opportunity luck]. The other two have to do with the causes and effects of action: luck in how one is determined by *antecedent circumstances* [circumstantial luck] and luck in *the way one's actions and projects turn out* [outcome luck].[27]

At first blush, the subjectivist argument, which is anchored in an essentially Kantian scheme of morality,[28] does seem like a strong argument in favour of equal punishment for both the complete attempt and the completed crime. A fires a gun at B intending to kill B, and B dies. C fires a gun at D intending to kill D. Most fortuitously —for D, that is—a bird flies between

---

[25] *Supra*, n 11 at 338-42.

[26] MU Walker, "Moral Luck and the Virtues of Impure Agency" (1991) 22 Metaphilosophy 14 at 15.

[27] Quoted in A Kenny, "Aristotle on Moral Luck" in *Human Agency: Language, Duty and Value*, edited by J Dancy, JME Moravcsik & CCW Taylor (Stanford: Stanford University Press, 1988) 105 at 108.

[28] J Andre, "Nagel, Williams and Moral Luck" (1983) 43 Analysis 202 at 204-5.

them, taking the bullet for D. D lives. It seems absurd to allow something as trivial as a bird's flight path to alter C's culpability.[29]

A. *Why "outcome luck" is irrelevant*

Yet when we subject the "outcome luck" assertion to closer examination, it, too, falls apart. There are two reasons why. First, there is no principled justification for treating outcome luck any differently from Nagel's other three classifications of moral luck set out above. However, this is precisely what we do when we seek to equalize punishment for complete attempts and completed crimes. Second, outcome luck does not justify a *general* differentiation between complete attempts and completed crimes. We do not always see luck as *the* factor to which the failure of a complete attempt is attributable, nor do we regard luck in the same light with respect to praise and culpability.

1. *Outcome luck and other types of moral luck*

With regard to the first contention, we unhesitatingly and habitually accept many other kinds of moral luck apart from outcome luck in making judgments as to culpability.[30] Adapting Katz and Moore's observations to our own example, consider the following in relation to C:

- What if, growing up, C had been taught and conditioned to abhor violence? This is constitutive luck.
- What if luck had kept him out of D's way so that he would have had no cause to hate D and want to kill him? This is opportunity luck.
- What if C had had a fainting spell just as he was about to pull the trigger? This is circumstantial luck.

Why should we choose outcome luck as the differential between A and C? Why not constitutive luck, opportunity luck or circumstantial luck? With respect to constitutive luck, for example, could we not say that it matters not that some people were brought up to abhor violence and some others were not, and they should all therefore be punished the same regardless? Hence, the question is why the subjectivist chooses to treat outcome luck differently from any of these other kinds of moral luck. There seem to be no principled reason for this subjectivist selectivity.

A separate but related issue is the prevalence of moral luck in many other areas of the criminal law. Ripstein highlights the use of random police

---

[29] See for example S Sverdlik, "Crime and Moral Luck" in *Moral Luck*, edited by D Statman (Albany: SUNY Press, 1993) 181 and Gobert, *supra*, n 20.

[30] L Katz, "Why The Successful Assassin Is More Wicked Than The Unsuccessful One" (2000) 88 Calif LR 791.

patrols as just one example of another situation where two individuals, otherwise alike in their intentions and conduct, are treated differently as a result of factors beyond their control.[31] Because one is caught by the random police patrol and the other is not, one is subjected to punishment and the other is not. No one, though, is going to argue that the random nature of the police patrol—a matter of moral luck from whatever perspective one views it—is going to make any difference as to culpability. We accept that it is a matter of moral luck that random patrols apprehend some, and not others who are every bit as culpable.

2. *Outcome luck does not justify general differentiation between complete attempts and completed crimes*

We do not always naturally see the failure of a complete attempt as a matter of moral luck. Whether or not we do in fact depends on what *kind* of attempt it is. In the polarized examples that subjectivists habitually construct to show the purported merits of their position—one *specie* is the example relating to the unlucky bird above— the "fortuitous intervening event" usually consists of something quite mundane, so that it seems patently unjust and unreasonable to allow the attempter to escape scot-free.

However, these scenarios do not always parallel the complexities of real life. If the attempt is competent, careful and committed with the most resolute of intentions, we would *not* see failure as a matter of luck. We would expect nothing less.[32] Furthermore, the truth is that we treat luck differently in matters of culpability than in matters of praise. To illustrate the point: A clumsily lobs a fork at a grizzly bear and somehow stops it dead in its tracks, thereby preventing it from mauling B to death. We would have substantially less difficulty with attributing significant credit for saving B's life to A, even though luck had everything to do with it—just as when an attempt is prevented from ripening into a completed crime.

---

[31] *Supra*, n 14 at 226.

[32] *Supra*, n 11 at 329-30. On the separate but related point of impossibility due to the ineptitude of the would-be criminal, Yong CJ has noted:

> An example of this [type of impossibility] would be a man trying to break into a safe with a jemmy that was too small for the task. Generally speaking, this sort of attempt is liable [sic]…At first blush, this does not seem to be a problem…The problem becomes apparent, however, when we take this line of reasoning to its logical conclusion. What if the accused merely stands outside the house and tries to use his telepathic powers to open the safe and 'teleport' the contents of the safe out to him?... [T]here is nothing really to distinguish our aspiring telepath from the safe-breaker with the inadequate jemmy. They are both equally morally culpable, as they both intend to steal the property of another and have done their best to achieve it.

See *Chua Kian Kok* v *PP*, *supra*, n 5 at paras 37-47. This judicial pronouncement comports with the subjectivist position, according to which "the mere fact that it was impossible for a defendant to commit some crime which she intended to commit should not bar her conviction for attempting to commit that crime." See Duff, *supra*, n 11 at 154ff.

Moral luck is pervasive. Simply put, it is a fact of life that must be accepted when making judgments as to culpability.[33] It is arbitrary to single it out with respect to attempts. It is also dangerous to rest on it the weight of one's objection to a lesser punishment for attempts. Seen in this light, the irrelevance and irrationality of the "outcome luck" objection becomes evident.

B. *Objections: can the selective subjectivist fixation on outcome luck be justified?*

Kadish hazards this explanation as to why subjectivists choose to take issue with outcome luck, and not with other types of luck: "The settled moral understanding is that what you deserve is a function of what you choose…Fortuity prior to *choice*, therefore, may be accommodated to our notions of just desert; fortuity thereafter cannot."[34] Choice is seen as the crucial dynamic which legitimises treating outcome luck differently from other kinds of luck. Thus if I make the conscious choice to pick up a gun and shoot my mortal enemy, I cannot then turn around and say that the fortuitous consequence of my bullet having missed should have any part to play in determining my culpability.

This is no explanation at all. It merely replaces one arbitrary differentiating factor (outcome luck) with another (choice). How clearly, if at all, can we distinguish "choice" from other aspects of ourselves as moral agents? For that matter, how can we be sure that our "choices" are not free of influence from not only outcome luck, but constitutive luck, opportunity luck and circumstantial luck? Perhaps my decision to pick up the gun rather than settle scores with my mortal enemy through reasoned argument was influenced by my upbringing in an unusually violent environment. As Duff observes, "we must [then]…ask…why choice should be the sole determinant of the entries in the cosmic ledger."[35]

---

[33] See generally Walker, *supra*, n 26. Brynmor Browne takes the argument a step further, arguing that "the 'condition of control' which gives rise to the problem of moral luck is incoherent as an account of human agency and that this requirement is really the requirement that an agent be a complete instigator of his actions." See B Browne, "A Solution to the Problem of Moral Luck" (1992) 42 Philosophical Quarterly 345 at 348.

[34] *Supra*, n 2 at 690. [Emphasis added.]

[35] *Supra*, n 11 at 344.

IV. Conclusion

The tyrannous and bloody act is done –
The most arch deed of piteous massacre
That ever this land was guilty of.
Dighton and Forrest…are gone, with conscience and remorse.
Richard III, Act IV Scene 3[36]

In the final analysis, the two main contentions often put forward by subjectivists in favour of punishing the complete attempt to the same extent as the complete crime simply cannot stand. By contrast, to make a case in favour of punishing the complete attempt *less* than the completed crime is to take a position that accords more with the realities of the world we live in by placing emphasis on actual harm done. It is this harm which produces responses in us directed to the seriousness of the wrong. As Walker astutely notes, "such responses are common phenomena of our moral lives together when we do not simply imagine ourselves as the ideal moral judiciary, or as officers of the moral police armed with sharp instruments of blame."[37] Issues of "outcome luck" are, as we have seen, but false distractions.

It remains only to be observed that "if we are then told that we should (rationally) aspire to a more god-like detached judgment, which prescinds from the actual outcome of actions, we may wonder about the possibility of such a judgment: but we must also ask why that is a stance towards which we ought to aspire, as human beings living in a material and social world."[38] After all, "the best morality…is one that makes the best of the unfair world we live in…not one that pursues fairness and equality in an imaginary metaphysical world of pure morality and pure goodwill."[39]

---

[36] *Supra*, n 1 at 210.
[37] *Supra*, n 26 at 19.
[38] *Supra*, n 11 at 347.
[39] *Supra*, n 27 at 119.