

CONTRIBUTOR BIO



DEEKSHA KOHLI is a senior Political Science major, concentrating in pre-law. She is involved in Mock Trial and the Undergraduate Law Association. Upon graduation she plans to attend law school. She chose to write this paper in order to highlight what she finds to be a problem with the current criminal justice system currently in place.

INTENT BASED CRIMINAL RESPONSIBILITY: HOW SHOULD WE PUNISH ATTEMPTS?

Deeksha Kohli

Introduction

It seems that society has come to a basic consensus about the types of acts that should be considered crimes and should be punished, although there is still dispute in some regards. Everyone agrees that murder, theft, assault and the like should be considered crimes. There is not a consensus about how we should punish someone who attempted one of these crimes but failed. In our current system, we apply a lesser punishment to attempts than we do to successful crimes. For example, the sentence for attempted murder is less than the sentence for successful murder. Some political theorists think that this is the correct system that should be in place while others believe that an attempt should receive the same punishment as a success. There has been a long-standing debate in the world of political theory surrounding this issue. The argument has almost turned into a situational analysis. While attempts at crimes such as murder seemingly fit the view that there should be equal punishment, attempts at a crime like money laundering arguably seem silly to punish equally. Gideon Yaffe is one of the many theorists who have tried to

answer this daunting question using what he calls the “Guiding Commitment View” of attempt.

The first section of this paper will introduce Yaffee’s argument and the guiding commitment view of attempt in order to show that we should punish attempts in the first place. It will then offer a critique of Yaffee’s argument presented by Michael E. Bratman. The second section will discuss a piece by Thomas Nagel in order to explain the concept of moral luck and how it applies to the punishment of attempts. Then the question of to what degree attempts should be punished will be discussed by offering the arguments of two other theorists, David Lewis and Joel Feinberg, in favor of punishing attempts the same as successful crimes. In addition, this section will also include an opinion against this view by Thomas Bittner. Finally, the third section of this paper will consist of a collective analysis of all the theorist’s opinions, coming to the conclusion that Yaffee’s Guiding Commitment View of attempt appears to be the solution to the arguments set forth by the critics of equal punishment and also encompasses the reasoning for which the proponents of equal punishment are advocating for equal punishment.

Yaffee’s Guiding Commitment View: Section 1.0

Yaffee begins by setting forth “the problem of impossibility.”¹ He does this by presenting the fact pattern for *States v. Crow*. In this fact pattern, Crow was messaging an undercover officer who was posing as a thirteen-year old. Crow then tried to solicit sexually explicit photos from whom he believed to be a thirteen-year old girl. He was charged with sexual exploitation of a minor, however, the law requires proof that the person being exploited was indeed a minor. Seeing as it was an adult police officer undercover, the person being exploited was in fact not a minor even though Crow thought it was. The question then arises whether Crow is actually guilty of exploiting a minor. Yaffee states that he has a solution to the impossibility problem, but first there must be a working definition for what exactly an attempt is.

He starts by laying out the two most common schools of thought: the subjectivists and the objectivists. The subjectivists focus on the *mens rea*, or the state of mind of the agent, when looking at what qualifies as an attempt. However, they run into the problem of punishing thought crimes, which are seen as

¹ Yaffee, Gideon. “Attempts.” *Attempts: In the Philosophy of Action and the Criminal Law* (2010).

being monstrous. In response, the subjectivists say that “they involve resolute intention of a sort that is manifested in action, and not merely idle thoughts.”² Objectivists, on the other hand, still believe it would be monstrous to punish thought crimes so they look to the *actus rea*. The *actus rea* involves the conduct and action taken on behalf of the agent rather than the intent and mindset that *mens rea* looks at. The objectivists are faced with the problem of having to explain why failed attempts should be punished, despite the actions being harmless because the agent did not cause harm if they did not succeed. For example, they would have to show that the action “risks harm, is ‘proximate’ to harm, or would result in harm if not prevented.”³ Yaffee, on the other hand, finds a problem that both the objectivists and the subjectivists do not address. He states that neither party tries to explain what distinguishes an attempt from other forms of action and offers that there may be a middle ground here that needs to be found, which would address this issue.

He then introduces us to “the Transfer Principle” in order to explain why attempts should be criminalized. He states that the reasons for which we criminalize the completion of a crime transfer to why we would want to punish the attempt of the crime. Yaffee argues that “if a form of conduct is legitimately criminalized, then so are attempts to engage in that form of conduct”.⁴ But, he also qualifies this principle by saying that the criminality of an attempt to commit a specific crime can only come from the criminality of that same crime. For example, the criminality of attempted battery cannot come from the reasons that we criminalize theft. Under the Transfer Principle, an attempt can only be criminalized if a description of the act that is attempted matches the description of an act that is criminalized.

In order to proceed with this principle, we also must look at what constitutes an intention. Here, Yaffee cites Michael Bratman’s definition of intention. Bratman states that “intention’s function is to make the world as intended and to make that happen in a way that allows agents to efficiently achieve long-term goals.”⁵ Along this regard, one would not act rationally in a way that conflicts with their intention. They would also not have an intention while also believing with certainty that they will not accomplish

2 *Op. Cit.*, fn. 1

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

what they are intending to accomplish. Yaffee states that looking at intention is important because its sources are from the agent's will and not from confounding circumstances.

Yaffee then turns his focus to types of commitment, which will muster his "Guiding Commitment View." He states that there are three kinds of commitment: commitment to promotion, commitment to non-reconsideration and commitment to non-complaint. Commitment to promotion means the agent will act in a way that will make the odds more likely that their intended outcome will arise and they will respond to obstacles that come in their way in a manner that will dampen their effect. A commitment to non-reconsideration means the agent will not reconsider their actions on the basis of a component of their original intent. This is best illustrated with an example: if you intend to go running at 9 AM, you will not wake up at 9 AM and decide not to go running because it is 9 AM. Instead, you may feel that you are too tired or realize that it is raining and then decide not to go on that basis. However, if you have a commitment to non-reconsideration, then you cannot reconsider your intended action based on a component of that intent. Finally, there is a commitment to non-complaint. This means if the world turns out to be the way you intended it to be, you cannot complain that what you intended to happen actually happened. Simply put, "a very particular kind of complaint is silenced, namely, the complaint that might be expressed by saying, 'that's not what I intended.'"⁶ It is important to keep in mind that these types of commitment can exist without the others, meaning you can have one form of commitment without having the others, but they are also not mutually exclusive.

Yaffee uses the above three kinds of commitment in order to create his definition of an attempt, but first he shows that the other senses on an attempt are insufficient. First is the wide sense of attempt, which states, "anything that would be true of your act were you to do as you intended contributes to what you are trying to do."⁷ Yaffee calls this the wide sense of attempt because it criminalizes too much and constitutes a large amount of over-inclusion. The narrow sense of attempt is when "only that which you are committed by your intention to promoting contributes to what you are trying to do."⁸ Yaffee claims that this view does not criminalize many actions that should be and constitutes a large

6 *Op. Cit.*, fn. 1

7 *Ibid.*

8 *Ibid.*

amount under inclusion. Although, he does contend that the narrow sense of attempt is closer to what the definition of attempt really should be. Yaffee then presents his own definition of attempt, which is “to try to act, in the sense of relevance to the criminal law, is to have an intention that commits one (in one of the three sense of intention-based commitment) to each of the conditions involved in completion, and for one’s behavior to be guided by the intention.”⁹ He calls this definition “The Guiding Commitment” view of attempt.

Yaffee finally loops back to the problem of impossibility and shows how the Guiding Commitment view of attempt would criminalize Crow’s actions in *States v. Crow*. He first lays out two types of impossibility: legal impossibility and factual impossibility. Legal impossibility means that if you succeeded in doing what you intended to do, it would not have even been a crime in the first place, meaning an attempt at this action would not be a crime either. Yaffee gives the example of attempted adultery in a state where adultery itself is legal. Factual impossibility on the other hand means that if you succeeded in doing what you intended to do, it would be a crime, but you made some kind of factual mistake in the process. His example is buying goods you believed to be stolen, and intending to buy stolen goods, that are not actually stolen. He states that in general, it is believed that legal impossibility would not be a crime but factual impossibility would be. Yaffee, however, states that there are numerous problems with this because the wrong question is being asked, “would he have committed a crime had he done as intended?” In the case of the factual impossibility, the answer would be no. Yaffee claims that the right question to ask is: “Was he committed by his intention to all of the components of the crime of receipt of stolen property?”¹⁰ This question embodies the Guiding Commitment view of attempt and the answer to the question would be yes. Therefore, Yaffee concludes that his Guiding Commitment view of attempt is the solution to the impossibility problem.

A Critique of Yaffee’s Guiding Commitment View: Section 1.1

Michael E. Bratman begins his critique of Yaffee’s argument by starting with the transfer principle. As Yaffee acknowledges, we do not want to criminalize mere thoughts as attempts even if the thoughts are about how to conduct criminal activity. In other words, both Bratman and Yaffee agree that punishing pure

⁹ *Ibid.*

¹⁰ *Ibid.*

thought crimes would be monstrous and unjust. However, Bratman brings up that the wording of the transfer principle seemingly does support the criminalization of pure thought crimes because it “does not include an explicit limitation to attempts that involve action on the part of the agent that is in fact, [...] in the public space.”¹¹ Bratman claims that in order for there to be intent, there must be an act in the public space. For example, you cannot intend to kill someone without making an action in the public space. Yaffee, on the other hand, does not agree with this logic. Yaffee believes that “intention based guidance can still occur even if there is unanticipated, relevant paralysis.”¹² Though if the attempted action were to be completed, it would be an act in the public space, even if the attempt does not necessarily have to be.

Bratman furthers his argument by setting forth a hypothetical. He argues that there are cases of attempt, which involve trying to think something through. This involves goal-directed thinking and planning that are entirely mental. His example involves an intention to defraud. He asks the reader to suppose that the early steps of his plan to defraud you is complexly thinking through how exactly he is going to attempt to defraud you. He claims that although the last act would go beyond mere thoughts, the early thinking seems to constitute an attempt according to the guiding commitment view because the thinking is guided by intention and commitment. This would be considered a “non-last-act attempt,” but Yaffee includes non-last-act attempts in the guiding commitment view. This presents the problem that “given that there are attempts that do not involve acts in the public space, and given that the transfer principle supports the criminalization of attempts tout court, not only attempts that involve acts in the public space, we seem to be in danger of endorsing ‘thought crimes.’”¹³

In response to this concern, Yaffee has created what he calls the means requirement, which states: “A defendant has committed a criminal attempt only if he has performed an act in the class of means.”¹⁴ The wording of the means requirement, specifically the use of the term “act” proposes a solution to criminalizing thought crimes. The word “act” constitutes an act in the public space as Bratman has been suggesting all along. Now, Bratman argues that the

11 Bratman, Michael E. “Yaffee on Criminal Attempts.” *Legal Theory* 19.2 (2013): 101-13. ProQuest. 24 May 2016.

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

transfer principle and the means requirement are incompatible with each other. He claims, “if C is legitimately criminalized, the mere attempt to C is not legitimately criminalized if it does not involve an act in the public space that is in the class of means, though it is indeed possible for an attempt not to involve such an act.”¹⁵ This violates the transfer principle because it places limitations on the criminalization of attempts to those that satisfy the means requirement.

Yaffee responds with what he calls the guidance based evidentialist approach. This approach involves not looking at the means requirement as an independent normative constraint and not looking at the performance of a public act as a necessary element of an attempt. This approach involves seeing the performance of a public act in the class of means as a necessary piece of evidence to show the attempt. This involves three ideas that will make up the guidance based evidentialist approach. The first idea is that the performance of an act in the class of means is evidence that the agent is attempting criminal conduct and the attempt fits the definition set forth in the guiding commitment view. The second idea is that the performance of an act in the class of means is a necessary piece of evidence to show an attempt. This is not to say that it is evidence of intention, rather, it is necessary evidence to prove that the intention to engage in criminal conduct is guiding the agent in a way essential to constitute an attempt. The third idea is that the evidence cannot simply be correlated to the guidance of intent, “the action is itself a part of that in which the crime of attempt consists.”¹⁶

In order to counteract Yaffee’s guidance based evidentialist approach, Bratman brings up the example of “Hacker,” who intends to hack and steal data from someone’s computer. Hacker does all the initial planning in her head, trying to figure out the code. Bratman argues that this would constitute an attempt according to Yaffee’s theory. This is where I think Bratman’s argument begins to fall apart. I do not think Yaffee would agree that this constitutes an attempt. In these initial stages, it appears that Hacker is simply trying to learn how to hack a computer, granted it is with the intent to steal data from another’s computer. I would still argue that this does not constitute a criminal attempt regardless of the planning being guiding by commitment, especially when we consider the means requirement. It is not clear at all that learning how to hack a computer, regardless of the intent, would constitute an attempt. This is arguably an attempt, but not a criminal one. Bratman furthers this hypothetical and adds

15 *Ibid.*

16 *Op. Cit.*, fn. 12

that Hacker has been publishing detailed journals online, which illustrates how she is trying to figure out the codes so she can hack and steal data. While these blog posts are correlated to the act that is criminalized, it is not itself a part of what is being criminalized. Therefore, according to the means requirement and the guidance based evidentialist approach, it does not qualify to prove an attempt. This is where Bratman begins contradicting himself. At the beginning of his piece, Bratman states that his only concern with Yaffee's point of view is that it would justify thought crimes. Here, Bratman is now arguing that the means requirement, the solution to the aforementioned problem, is problematic because it does not punish thought crimes.

Based off the previous logic, Bratman offers a counter principle to the transfer principle, which he calls the qualified transfer. It reads, “‘if a particular form of conduct is legitimately criminalized then the attempt to engage in that form of conduct’ that involves an act in the class of means to that criminalized conduct ‘is also legitimately criminalized’”¹⁷. It seems that what Bratman has done here is not negate the legitimacy of the transfer principle, the guiding commitment view, or the means requirement. The wording of the qualified transfer is simply combining the wording of all of Yaffee's theories into one sentence. The logic and reasoning that Yaffee presented in his works still stands and by creating the qualified transfer principle, Bratman has arguably agreed to Yaffee's approach. Therefore, if we adopt Bratman and Yaffee's logic, it would be appropriate to criminalize attempts to commit crimes according to the limitations stated above. Now the question arises, which is addressed in the following section, as to how we should punish attempts.

The Issue of Moral Luck: Section 2.0

Through the arguments laid out in Section 1, we can see that it would be morally just to criminalize attempts. However, neither Bratman nor Yaffee addressed the issue of how we should punish criminal attempts. In other words, should failed attempts carry the same punishment as successful attempts or should failed attempts receive a lesser punishment? While this may seem like a relatively simple question on the surface, it becomes more intricate when addressing the issue of moral luck.

In order to understand why the concept of moral luck may pose a problem in deciding whether to impose equal punishment or not, it is necessary to

¹⁷ *Ibid.*

understand what moral luck is. Thomas Nagel, in his article “Moral Luck,” addresses this concept and its implications including intent-based criminal responsibility. Nagel defines moral luck to be “where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment.”¹⁸ Moral luck, just like regular luck, can be good or bad. Nagel gives the example of if you are driving and have to hit the brakes and swerve. An example of good moral luck would be if there were no one on the sidewalk, but bad moral luck would be if there were and you hit them with your car. In both situations, you did the same action, however it was out of your control whether or not someone was there. You would blame yourself for the injury of the person you hit, but if there were no one there, you would feel relief and like you just made a mistake. Nagel argues that in fact, “ultimately nothing or almost nothing about what a person does seems to be under his control.”¹⁹ After establishing that we cannot rid of the condition of control, Nagel establishes “four ways in which the natural objects of moral assessment are disturbingly subject to luck.”²⁰ The first is called constitutive luck, which is based on “the kind of person you are ... your inclinations, capacities and temperament.”²¹ The second is one’s circumstances, which are “the kind of problems and situations one faces.”²² The third is the antecedent to one’s actions, and the fourth is the outcome of the action.

Nagel goes into further detail about luck in the way things turn out. He brings up a truck driver who accidentally runs over a child. Nagel states that if the driver has absolutely no part or fault, then all that would happen is the driver might feel “agent-regret.” However, if the driver even had the smallest amount of fault or negligence, then he would have to blame himself for the death of the child instead of just feeling bad. Therefore, the first instance is not yet reaching the scale of moral luck but the second instance does. He states that this displays moral luck because the negligence would be the same even if the child had not run in front of the car, and the driver has no control over that.

Nagel then addresses the issue at hand in this paper, looking at the intent of the agent rather than the outcome of their actions. He cites how attempted

18 Nagel, Thomas “Moral Luck” *New York: Cambridge University Press* (1991).

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

murder is a lesser sentence than actual murder in court, yet the intent to kill is the same in both scenarios. However, he cites Joel Feinberg to state that looking to intent or “restricting the domain of moral responsibility to the inner world will not immunize it to luck” because factors beyond the agent’s control could still affect the decision making process.²³ For example, a coughing fit can interfere with decisions as well as interfere with the path of a bullet from a gun. Ultimately, Nagel rejects intent based criminal liability as a solution to moral luck because it also cannot account for factors out of one’s control.

Lewis’s Penal Lottery: Section 2.1

David Lewis, in his paper “The Punishment That Leaves Something to Chance,” tries to make sense of why we punish attempts the way that we currently do. He states we are more prone to punishing successful attempts more severely than failed attempts, as we have established in the previous sections. Lewis sets forth a famous hypothetical known as the “Dee and Dum Scenario.” In this scenario, there are two people, Dee and Dum. They are both plotting to kill their enemy and are exactly the same in their intent to do so. They both try equally as hard to kill their enemy, they both act out of malice with no justification, and they both shoot a gun at their respective enemies. The only difference between the two is that Dee hits his target and Dum misses, meaning Dum is only guilty of attempted murder and gets a shorter prison sentence than Dee. The question then arises as to why it should be so. They were both equally wicked in their desires and they both pursued them. Additionally, their actions were equally dangerous. Lewis states that, “Dee’s act was worse than Dum’s, just because of Dee’s success; but it is not the act that suffers punishment, it is the agent.”²⁴ He argues that both Dee and Dum engaged in conduct that, as a society, we would want to prevent by deterrence. In order to prevent successful attempts, we must prevent attempts altogether. Lewis states that one of the functions of punishment is to get criminals off the streets before they do more harm, so punishing the attempt would satisfy that function.

Lewis then outlines some of the common rationales for punishing failed attempts less severely than successful attempts. The first is the argument of the gods, which states that if the gods see bloodshed, they will be angered and

²³ *Ibid.*

²⁴ Lewis, David. “The Punishment That Leaves Something to Chance.” *Philosophy & Public Affairs* 18.1 (1989): 53-67.

the only way to appease them will be to shed guilty blood. If there is a failed attempt, then there is not bloodshed and consequently no appeasement to be done. However, Lewis argues that this rationale does nothing to defend our current practice as just. He then moves on to the conservative argument, which states that it is a good idea to have the least amount of reform possible in order to avoid unexpected problems. He again argues that this also does nothing to show that our current system is just. Lewis then moves on to the deterrence of a second attempt rationale, which states that it will make failed attempters more inclined to attempt the crime again, because they will bear no extra punishment if they succeed. This is the nothing left to lose argument; it will give the criminal every reason to make at least one attempt successful. However, Lewis argues that we can just make the punishment for two attempts more severe than one, regardless of success. Therefore, this rationale also does not show why we should not punish attempts equal to success. Additionally, Lewis brings up moral luck, explained in the previous section. He argues that while people use moral luck as a rationale for more severe punishment of successes, it seems to actually name the problem with not having equal punishment. For example, why does Dee deserve less punishment because he missed his mark due to luck? Finally, Lewis addresses the rationale that involves wholehearted and halfhearted attempts. Wholehearted attempts are seen as worse because they involve more planning, more effort, more persistence and sometimes repeated tries. He says that due to the higher likelihood of success and the greater risk the victim is in, “*ceteris paribus*, a wholehearted attempt, is more dangerous.”²⁵ Therefore, from the standpoint of every function of punishment, it makes sense to punish wholehearted attempts more severely. His problem here lies in that success is often used as evidence to show wholeheartedness. However, Lewis argues that wholehearted attempts can fail and halfhearted attempts can succeed, so it is not a good indicator.

Lewis then proceeds to argue that our current system is a disguised penal lottery as a new rationale for why we punish the way we do. Although, he does qualify this by stating he does not say that it works nor does he think that there is a justification for punishing attempts more severely when they succeed. He defines a penal lottery as a punishment system in which the criminal is subject to risk of punitive harm. He argues that our system is a

25 *Op. Cit.*, fn. 25

mixture of a pure and impure penal lottery, meaning, “part of the punishment is certain harm, part is the penal lottery.”²⁶ He specifies that an overt penal lottery is one in which there is explicit statement or announcement of the risk. Lewis leaves the justness of such a system up to the reader. He argues that he will prove that our current system is an overt penal lottery, so if you believe that a penal lottery is just, then you will believe our current system is just and vice versa.

Lewis starts by presenting “cases” showing differences between the two, each case building on the one that comes before it, in order to show that they do not matter. In all of the cases the death penalty is in place for those found guilty, in other words, those who lose the lottery. Through analysis of the cases, Lewis concludes that our current system is like his sixth case, which involves a lottery by reenactment of the crime. In the previous cases, Lewis enforced a value of giving the defendant a risk of punishment that equals the risk of harm the defendant places his victim in. With lottery by reenactment, if the defendant is sentenced to face the lottery, actors recreate the situation and the levels of risk of the original crime. If the victim dies in the reenactment, then the defendant loses the lottery and is sentenced to death as well and vice versa. In case six, “enactment replaces reenactment.”²⁷ They use the original crime in the manner that the reenactment was used in the previous cases. Meaning if the victim died in the actual crime, then the defendant has lost the lottery and dies too. But if the victim lived in the actual act, then the defendant wins and gets a shorter prison sentence.

Lewis still leaves the justness of such a system up to the reader. Although his analysis of our current system as a penal lottery in the sense of the sixth case, the justness of such a system is not clear. This rationale still fails to answer all the questions and problems that Lewis raised with the rationales he mentioned earlier in his piece. He fails to show, like with the gods rationale and the conservative rationale, how the penal lottery defends our current system as just. It does not explain why we should punish Dee and Dum differently, in fact to me it shows why they should be punished the same. In that sense, I am one of the readers who finds the penal lottery to be unjust, thereby finding our current system of punishment unjust.

²⁶ *Ibid.*

²⁷ *Ibid.*

Feinberg's Wrongful Homicidal Behavior: Section 2.2

Joel Feinberg also wrote a piece addressing this historical legal problem of how to punish failed attempts at committing criminal acts. He starts, much like Lewis, with a “Dee and Dum” scenario, however he calls his characters A1 and A2. The fact pattern is the same as Dee and Dum in that both attempted murder, but A1 succeeded and A2 did not. Feinberg argues that punishing A1 and A2 differently does not commit to the principle of proportionality. The principle of proportionality “requires that the severity of the punishment be proportional to the moral blameworthiness of the offense.”²⁸ In this example, the moral blameworthiness can be argued to be identical, but the punishments are not. Feinberg claims that the characters are not being punished to what they deserve morally but simply according to their luck.

Feinberg argues that when the discrepancy between punishments is as large as a term of imprisonment and the death penalty, it is important that there is as little arbitrariness as possible. If we were to rely on luck, or give weight to factors that are out of the agent’s control, then this introduces arbitrariness as “the absence of rule, as in the bare will of an authority who can exert his power free of accountability, in a manner without rhyme or reason, which in turn makes predictability and security from abuse difficult, and fairness an inapplicable notion,”²⁹ into the court proceedings. Based on the arbitrariness of basing sentencing on moral luck, Feinberg argues that completed crimes and unsuccessful attempts should be treated essentially the same, other things being equal.

Feinberg argues that we should eliminate the causal requirement in the definition of all so-called completed crimes. For example, the crime of murder would not require a death to come from the act in order for the action to be criminally liable. He acknowledges that this would necessitate a change in terminology in order to avoid confusion and saying foolish things like “Jones murdered Smith although Smith is still alive.” He offers a more comprehensive “Wrongful Homicidal Behavior,” but recognizes that completely reinventing the terminology would also cause confusion. Therefore, he offers that we can try to downplay the moral significance of the distinction between murder and attempted murder, so we can still use traditional terms. We could still use the

28 Feinberg, Joel. “Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments against It.” *Arizona Law Review* 37.1 (1995): 117.

29 *Ibid.*

terms “murder” and “attempted murder” without letting anything substantively different come between them. He also includes that there can still be degrees of criminality based on motive or premeditation. Therefore, some defendants would receive more severe punishments but only when their actions are more morally blameworthy, not when the defendant was just luckier. Feinberg emphasizes that what the so-called “reformists” are looking for is equality, which can come from reducing the severity of one’s sentence, increasing the severity of the attempt sentence or even meeting somewhere in the middle. The end result should be that the punishment for an attempt and for a success should be the same.

Feinberg then addresses the arguments in favor of keeping the current system. The first argument he looks at is the rationale that because criminal law aims to prevent harm to the public, there can be no crime without harm. Therefore, they are arguing not only that an unsuccessful attempt should have a lesser punishment, but actually that the criminalization of attempts would be pointless. On the other hand, Feinberg argues that their logic does not conclude that attempts to perform an act that is harmful should not be criminalized. The second argument Feinberg addresses is the argument which states that, “if you are responsible for more harm, then you pay for more, or alternatively, the more harm you cause, the more harm you must pay for.”³⁰ Feinberg argues that this rationale comes from confusion between the function of the law of torts and criminal law. The law of torts is intended to be compensatory, where you add up the amount of harm caused and compensation is required. Therefore, in the law of torts, if there is no harm, then there is nothing to compensate. Criminal law is intended to punish parties for criminal acts, whether or not harm occurred due to the actions. The rationale behind criminal law is that it should reduce the amount of harm by deterring all conduct that would be considered as dangerous. Using this rationale, the above argument is not consistent with criminal law.

Feinberg argues that in looking at the reformist approach, one would not have to look at responsibility for someone’s death ever again, rather, whether or not they are guilty of breaking the law. Feinberg’s argument about the arbitrariness that stems from moral luck builds off of Lewis’s claim that moral luck is a statement of the problem with the current system rather than a deterrent to

30 *Ibid.*

change it. It seems that according to Feinberg's logic, the current system rewards people for their "good" moral luck by lessening the punishment for attempts.

A Critique of Equal Punishment and "Dee and Dum": Section 2.3

Thomas Bittner, in a critique of the reformist view, focuses on the inadequacy of the Dee and Dum scenario presented by Lewis. He starts by claiming that Dee and Dum are not an accurate representation of the average differences between attempts to commit crimes and the actual successes. First, he states that many attempts differ from the crime in the actual actions taken. While Dee and Dum performed the same action but received different results, this model would not follow for theft, incest, and money laundering. Bittner states that, "in all these cases, the completed crime involves by definition a different act than the attempted crime."³¹ For example, burglary requires that the agent enters the house, but attempted burglary does not require entrance for a number of reasons. Second, in some cases, the legal requirements for the completed crime are different from the requirements for the attempt. For example, money laundering requires some amount of stolen money while the attempt does not. Finally, Bittner claims that Dee and Dum do not accurately show the differences between attempts and successes because often attempts do not fail due to pure luck, rather there is a reason a victim escapes harm.

The purpose of the Dee and Dum scenario is to isolate the element of harm. However, Bittner feels this is a mistake because comparisons should be made based on all factors that are stable, not by isolating a single element. One should compare the average failed attempt to commit a given crime to an average successful attempt to commit that crime. He states that by simply isolating the harm element, the full picture is not considered. One cannot find that in general, attempters are less skillful, less committed and less persistent than those who succeed in harming their victims. Therefore, they deserve a lesser degree of moral condemnation because they are not failing by luck alone.

Bittner argues that generalizable rules should be created that can apply consistently in every case. While he acknowledges that this is impossible because there will always be unpredictable cases, a legal system cannot operate on a case by case basis. A principle must be created that would be the most generalizable as possible. He argues that if one tries hard enough, they

31 Bittner, Thomas. "Punishment for Criminal Attempts: A Legal Perspective on the Problem of Moral Luck." *Canadian Journal of Philosophy* 38.1 (2008): 51-83.

would be able to find some kind of extraneous circumstance in which the principle would not seem to fit, but that is no reason to suddenly re-evaluate the entire system.

It seems that what Bittner is advocating for here, a generalizable principle, is discussed by Yaffee and Bratman in Section 1 through the qualified transfer principle. Therefore, it appears that the logic that Bittner used to advocate for keeping the status quo may in fact be used to show the opposite. In addition, the qualified transfer principle does not rely on the Dee and Dum principle that Bittner is opposed to.

Conclusion: Section 3.0

Given Feinberg's discussion of the purpose of criminal law as opposed to the law of torts, it is clear where the logic of punishing attempts differently than successes came from. However, if taking the reformist argument and coupling that with the definition of attempt that is set forth by Yaffee, it appears that there are compelling arguments to indicate that there should be equal punishment. Many of those who are opposed to punishing attempts equally indicate that their opposition is due to the potential of punishing thought crimes or punishing actions of lesser moral culpability equally. Although, given the definition of attempt set forth by the guiding commitment view of attempts, both of those concerns virtually disappear.

Obviously, no system is perfect but our current method of giving lesser punishments to unsuccessful attempts to commit crimes does not fulfill the purpose of criminal law. However, there are still concerns and risks in adopting Yaffee's guiding commitment view of attempts, and criminalize those attempts with equal punishment to completed crimes. But the current system does not address proportionality, as suggested by Feinberg. By eliminating the harm element to these crimes, it would create a greater deterrence and protect our society in a better manner. It seems as though we are rewarding people for their moral luck. Specifically, in the Dee and Dum scenario, Dum could have been considered to have good moral luck because he missed his target and received a lesser sentence. Dum is still a danger to society and put a person at extremely high risk of harm. To say that Dum's action is not as morally culpable as Dee's actions would be naïve. Let's even take the example of burglary that Bittner set forth to show the unrealistic nature of the Dee and Dum. If a burglar attempted to rob a house but did not know that they had a security system so he could not

get in, does that make him any less morally culpable? Just because something prevented him from committing the crime, the intention was still there and the deterrence is necessary. As stated above, punishing thought crimes is not the purpose of the reformist argument. The purpose is to grant equal punishment to equally morally condemning actions.