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What is Punishment Imposed For?

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WHAT IS PUNISHMENT IMPOSED FOR?

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The institution of punishment invites a number of philosophical queries. Sometimes the question is: How do we know that inflicting discomfort and disadvantage is indeed punishment? This is a critical question, for example, in cases of deportation or disbarment proceedings.[1] Classifying the sanction as punishment triggers application of the Sixth Amendment and its procedural guarantees. In other situations the question might be: Why do we punish? What is the purpose of making people suffer? In this context, we encounter the familiar debates about the conflicting appeal of retribution, general deterrence, special deterrence, and rehabilitation.

In this article I wish to pose a different sort of question: What is punishment imposed for? When those convicted of crime are punished properly, I assume that they are being punished *for* something. Yet it is not clear what this "something" is. In tort cases, we ordinarily say that compensation is paid *for* the injury suffered by the plaintiff. Note that this connection between the injury and compensation holds regardless of the purpose one advocates for tort liability. Even those who subscribe to the programs for promoting efficient behavior would not say that compensation is paid *for* the efficient consequences of imposing liability. Compensation can be paid only for something that has already happened.

When x (compensation, punishment) is imposed for y, then y must be a state of affairs that has already occurred. Even if one believes, as I do, that punishment is an expression of solidarity for victims,[2] the expression of solidarity could not satisfy the requirements of the variable y. The grammar here is interesting. It would be correct to say that compensation is required "for the sake" of deterrence or that punishment is imposed "for the sake" of solidarity, but not correct to say that either form of liability is imposed simply for deterrence or solidarity. In this context the preposition "for" demands not a goal but an untoward state of affairs.

The reason that compensation and punishment are imposed for something that has happened is that both institutions function, at least in part, as remedies. They are responses to something that has happened. Damages remedy the injury, or at least they are supposed to. The scope of tort injuries sets the ambit of the damages. Now what does punishment remedy? Unfortunately, the answer is not readily at hand.

Perhaps we could reason backwards in the following way: if a certain factor conventionally increases punishment, then that factor should be

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1. See George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978), pp. 410-14.
2. See George P. Fletcher, "Symposium: Blackmail: The Paradigmatic Crime," *University of Pennsylvania Law Review* 141 (1993): 1617-1638.

included in that for which the offender is punished.[3] This inference obtains in the case of torts. The scope of the injuries determines the damage award, and damages are paid for the injury. Whatever determines the degree of punishment, then, should be that for which punishment is imposed. Unfortunately, the connection is less plausible in the case of criminal punishment than in tort law. There are many factors that aggravate punishment, with seeming legitimacy. Note the role of prior convictions, lack of remorse, and other factors that indicate that an offender is dangerous. The need for social protection may dictate a higher punishment in this situation even though the offender is not being punished for symptoms of likely recidivism. The question what the offender is punished for, therefore, remains a puzzle.

Let us consider some possible answers.

1. Injury

One might be tempted to draw an analogy from tort law and argue that as compensation is paid for injury, punishment is also inflicted for the injury that occurs to the victim of violent crime or property damage. This might be the thought underlying the claim that retributive punishment itself is a form of compensation.

Before resolving this suggestion, we should clarify a few terms. Compensation offers the party who deserves something in place of damage suffered or labor expended. It differs from restitution, which typically restores the status quo ante by returning to the injured party something that has been taken from her. There can be restitution, it seems, of money or things taken, but not of labor expended or of damage suffered. The fact of compensation recognizes that the clock can not be turned back, that a surrogate for the loss is the only response possible. Restitution enjoys the illusion of erasing the loss, leaving as the only damage the period of time during which the aggrieved party properly claimed restitution.

Restitution comes closer than does compensation to Aristotle's ideal of corrective justice. Aristotle reasoned that wrongful acts created an imbalance in the equilibrium established under criteria of distributive justice.[4] The injurer causes a loss and as a result, a shift of resources occurs from the victim to the injurer.[5] Corrective justice requires that the injurer give half of the imbalance as a payment to the victim. This payment restores the status quo ante: the just distributive equilibrium is reinstated by eliminating loss to the victim and the corresponding gain to the injurer. What is "corrected" according to the view is neither the

3. I am indebted to Russell Christopher for this suggestion.
4. The Nicomachean Ethics of Aristotle (on distributive justice)(David Ross trans., 1925), § 1131a.
5. Ibid., p. 1131b (on rectificatory or corrective justice).

wrong nor the loss, but the imbalance that has occurred in the distributive scheme.

One could imagine a legal system in which punishment came close to the concept of compensation. This seems to have been the approach of ancient talmudic law, which conceived of all possible sanctions as points on a single scale of justice between the injurer and the injured. Suppose that A assaults B. Under the shared approached of modern legal systems, the following legal consequences ensue. B may repel the attack in self-defense. B may sue A in tort for the injuries suffered in the initial assault; and this is true regardless of whether he successfully repels the attack. In addition, A might be prosecuted for the crime of assault. All three of these responses are possible, and the use of one has no bearing on the others. But talmudic law espoused the principle that invoking the more severe sanction preempted the less severe.[6] If the victim sought punishment of the offender, he could not demand damages thereafter. This is a version of double jeopardy that makes sense in a system that ranks all sanctions on a single linear scale of severity. For good or for ill, we have come to see self-defense, punishment, and tort suits as parallel and non-exclusive responses to those who threaten and do harm to others. Our concept of punishment presupposes this structure of parallel remedies and responses.

It is hard to imagine a criminal injury to a person (as opposed to abstract entities such as "the administration of justice") that would not also be compensable in tort. If punishment were compensation, one would wonder why the victim should be compensated twice, once in tort and then again by putting the offender in jail or imposing some other sanction on him. Of course, in some situations the offender is judgment-proof in tort. But the principle of punishing crime is designed for rich and poor alike. True, the defendant's having made restitution may bear upon sentencing. Voluntary amends by the offender presumably provide evidence of good character to counterbalance, in part, the evidence provided by the crime itself. The rationale for a lighter sentence is not that the restitution takes the place of the justified punishment.

Of course, in tort the victim sues; in a criminal case, the state takes the lead. But the difference between punishment and compensation, or between crime and tort, lies not only in the identity of the suing party. The structure of liability also differs. The underlying principle of tort law is the separation of the criteria of liability from the criteria of damages. Once liability is established, the plaintiff recovers the full amount of her injuries, regardless of how tenuous the liability link might have been. This principle is expressed in the "eggshell skull" rule: even if the extent

6. On the principle *kimle bdraba mina*, see George P. Fletcher, "Punishment and Self Defense," *Law and Philosophy* 8 (1989): 201-215, 203.

of the injury is unforeseeable and therefore beyond the injurer's fault, the victim recovers in full.[7]

The principle of reducing liability on the basis of contributory negligence as well as the principle of compensation according to "market shares" represent seeming exceptions to this principle. In these cases, the criteria of liability have a bearing on the degree of damages. In fact, both institutions are reconcilable with the general principle that the injuring party must pay for all the damage that he or she causes. Contributory negligence should be understood as a division of damages based on relative degrees of causation. The same with the principle of "market share" liability, which simply apportions causal responsibility over the class of injuries as a whole.[8]

Criminal law places a different emphasis on the occurrence of harm. So far as fault matters (and not strict liability), the degree of the defendant's fault (blameworthiness, or culpability) bears on the degree of liability. The difference between common law murder and manslaughter lies not in the damage done, but in whether the killer acts with malice. Tort damages do not depend on whether liability is based on negligent or intentional wrongdoing. Yet in tort cases, juries decide the issue of damages as well as of liability; this enables the jury informally to consider the degree of fault in setting the level of damages. In criminal law, the way in which the harm is done — negligently or intentionally, by act or omission — determines the level of liability as a matter of principle. Criminal juries are permitted to consider issues in assessing liability that tort juries raise covertly in setting the level of damages.

In view of all these differences between the two types of sanction, the interpretation of punishment as compensation enjoys particular tenacity. The root of "retribution," namely "retribuere," conveys the idea of "paying back." And there is indeed an analogy between the ideas of compensation and paying back, or returning to the offender that which he has done. Foucault's interpretation of punishment as reenacting the crime on the body of the offender, captures the same idea.[9] *Vergeltung* in German conveys the same point of applying to the offender that which he has imposed on the victim.

It is tempting to mischaracterize retribution as requiring that the same offense be committed on the offender. If the offender rapes, he should be raped in return. Admittedly, the unfortunate metaphors of the *lex talionis* support this reductio ad absurdum. It is not clear that *Exodus* chapter 22 really meant "eye for an eye, a tooth for a tooth." The rabbis of the Talmud understood the text to require a life for a life — under certain conditions of culpable killing. But they readily interpreted

7. Vosburg v. Putney, 50 N.W. 403 (Wis. 1891); *Restatement (Second) of Torts* 461 (1965).

8. Sindell v. Abbott Laboratories, 26 Cal.3d 588, 6-7 P.2d 924, 163 Cal.Rptr. 132 (1980), *cert. den.* 449 U.S. 912 (1980).

9. See generally Michel Foucault, *Discipline and Punish* (New York: Pantheon, 1979).

the rest of the bodily references to require compensation for injuries suffered by those physical harms short of death.

Kant developed a version of retribution that clearly had nothing to do with returning the crime in kind. The central message in Kant's teaching is that punishment should bring home the meaning of the crime to the criminal offender. Thus he proposes castration as the proper punishment for rape, and exile for other sex offenders who display what he took to be an inability to live in civilized society.[10] The only sensible punishment for theft, he taught, was imprisonment as the functional equivalent of commitment to the "poor house." The thief should be treated as someone who displays contempt for the value of property and thus as someone who, himself, has no property.[11] This is not a matter of reenacting the crime on the body of the offender, but of forcing the offender to confront the meaning of his acts.

Thus we may conclude: In tort, compensation is paid and received for the injury, in criminal cases, the punishment is imposed not for the harm done, but, it seems, for some other aspect of the actor's conduct. What could that other aspect be?

2. *Wrongdoing*

If one inmate turns to another and asks another, "What are you in for?" the response would normally include a reference to what the inmate did — some action that he or she performed. The answers would typically be the names of crimes themselves: drunk driving, selling crack, or "bumping someone off." The appropriate description of the action would include a reference to the norm implicitly violated. These conventional understandings of why men and women are imprisoned provides some guidance to what, as a conceptual matter, punishment is imposed *for*. It is imposed for the act of wrongdoing, the unjustified violation of a statutory norm.

H.L.A. Hart hints at the same point when he lists the following elements defining the concept of punishment:

> [1] Punishment must involve pain or other consequences normally considered unpleasant.
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> [2] It must be for an offense against legal rules.
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> [3] It must be of an actual or supposed offender for his *offense*.
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> [4] It must be intentionally administered by human beings other than the offender.
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> [5] It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.[12]

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10. Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans., 1991), p. 169.
11. Ibid., p. 142.
12. H.L.A. Hart, "Prolegomenon to the Principles of Punishment," in H. L. A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968), pp. 4-5.

The point underscored in this list is that punishment is imposed for the offense committed by an actual or supposed offender. The offense is a violation of a prohibition against a specific action or a prescription requiring a particular action. I refer to this violation of the norm as wrongdoing. It might be worth adding a word on behalf of this usage if for no other reason than that in this symposium Michael Moore asserts the contrary: "wrongdoing" supposedly refers only to causing harm.[13] It follows for his purposes that attempts and other non-harmful inchoate offenses, such as possession offenses, are not wrongful; they are not instances of wrongdoing.

Consider the prohibited possession of a weapon. The mere act of possession causes no harm — though it may generate a risk of accidental discharge or of purposeful misuse. It is not clear why Moore balks at labelling the knowing violation of the statutory prohibition as an instance of wrongful behavior. Surely he would have to say that the knowing possession of the weapon violates the law: it is unlawful. Referring to an action as wrongful provides another description of the same state of affairs. The term "wrong" underscores the positive evaluative content of the law as Right *(Recht, droit, derecho, diritto)*:[14] a state of affairs incompatible with the Right is wrong. It is that simple. Moore's effort to link wrongdoing to causing harm defies common sense.

Yet the question remains whether wrongdoing is aggravated by the occurrence of harm. Virtually everybody insists that this is true. Legislatures routinely punish drunk driving that causes death more severely than simple drunk driving.[15] The usual pattern of liability imposes a greater sanction on attempts that succeed as opposed to attempts that fail.[16] Yet there is a great temptation in the academic world to support a skeptical position about the relevance of harm to the degree of wrongdoing.[17]

The skeptical view goes something like this. Individual actors can be culpable only for matters within their control — their absolute control. The only thing we have absolute control over is the movement of our bodies. We have no control over what happens to a bullet after it is fired, over what happens to poison placed in someone's drink, over whether

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13. Michael S. Moore, "The Independent Moral Significance of Wrongdoing," *Journal of Contemporary Legal Issues* 5 (1994): 237-281, 240.

14. On the two concepts of law, see George P. Fletcher, "Two Modes of Legal Thought," *Yale Law Journal* 90 (1981): 970-1003, 980-84.

15. James B. Jacobs, *Drunk Driving: An American Dilemma* (Chicago: University of Chicago Press, 1989), pp. 83-85.

16. The notable exception is the Model Penal Code § 5.05(1), which recognizes as its default rule that "attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted or solicited or is an object of the conspiracy." According to the commentaries to the Code, only a few states have adopted this principle. See 2 American Law Institute, Model Penal Code and Commentaries 486 (1985). Even the reformist Model Penal Code concedes, however, an exception for the most serious offenses. See *Model Penal Code* § 5.05(1)(sentence 2).

17. See, e.g., Stephen Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Result of Conduct in the Criminal Law," *University of Pennsylvania Law Review* 122 (1974): 1497-1607.

someone hired to kill actually carries out the plan, or over whether a woman consents or does not consent to a seduction with gentle force. Crimes should be defined, therefore, independently of these consequences. It follows that attempted homicide and attempted rape—crimes defined solely on the basis of what the actor intends at the time of acting—should be punished no less than the completed offenses.

It is clear, however, that this academic effort runs afoul of the public's sensibilities of wrongdoing and its degrees. The average person regards an actual killing as worse than a miss, an overcoming of the partner's will as worse than a case in which the woman happens to consent. Some theorists claim that this common view reflects a penchant for neurotic guilt, that if the average person were well informed, he or she would come around to the sophisticated view advocated by the academics.

There is no basis for thinking that this common view is neurotic, that it reflects some displacement of guilt. Yet the popularity of the common view has little impact on the theoretical conviction that control over one's bodily movements determine the outer limit of culpability and liability. This ongoing dispute presents, in the end, a conflict between two cultures in criminal law, one tied to common sense, the other reflecting what Bruce Ackerman once dubbed "scientific policy making."[18] I put little stock in the latter, but I am aware how difficult it is to address and convince those who do. If punishment is tied to shared cultural judgments of wrongdoing, then harming is clearly a greater wrong than trying or preparing to harm. It follows that the result, when it occurs, is part of the action for which an offender is punished.

The ordinary language of crime as well as religious sin supports the view that the result is part of the action. Prohibitions are always directed against killing, maiming, destroying, and other harmful actions. The Ten Commandments are directed to results such as dishonoring one's parents and desecrating the sabbath. The interesting exception is the Tenth Commandment: thou shalt not covet that which belongs to thy neighbor. Still the imperative is against actually coveting, not against trying or attempting to covet. No one would formulate a moral imperative simply against trying to commit these harms. In the culture of crime and punishment, as we know it, the harmful result inheres in the action prohibited.

Inchoate offenses are always derivative. They are designed to catch the offender in the preparatory stages where he may merely frighten the potential victim or take an excessive risk of harming someone (drunk driving). Because they are derivative and less intrusive in the rights of potential victims, they understandably receive a lower punishment. Admittedly, this sensible conclusion has yet to generate a compelling philosophical foundation. Moore believes that he has furnished one in

18. Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977), pp. 10-22.

this symposium, but Russell Christopher's Appendix to this article demonstrates that though Moore's intuitions are in the right place, his logic is wanting. The search for a convincing account of our intuitions in this area remains unsatisfied.

3. The Relevance of Culpability

To speak of culpability is presumably to speak of culpability *for* something, for an act, a state of affairs, a violation of the law. In this respect, the structure of culpability parallels the concept of punishment. As the latter is not simply imposed without an object of punishment, culpability does not exist in the abstract. One is culpable *for* something untoward that has happened — for causing harm, for violating the law, for wrongful behavior. Similarly the excuses that negate culpability — mistakes of fact and law, duress and personal necessity, insanity — are excuses *for* having brought about the same untoward state of affairs.

Yet one often hears theorists of the criminal law say that offenders deserve punishment only if they are culpable — culpable in the abstract, without specifying what it is the actor is culpable for. This is notable among those who reduce culpability to an event of consciousness, such as intending or choosing to do something. This way of speaking suggests that the punishment is imposed for culpability itself. Those who take this line of thought characteristically have difficulty recognizing negligence as a genuine form of culpability. This is the position that Michael Moore finds himself in.[19] In a less sophisticated way, Jerome Hall took this line a generation ago.[20]

Some trends in criminal law support this way of thinking. The venerable requirements of *mens rea* and *actus reus* are treated as independent, parallel pillars of liability. This seems to imply that *mens rea* or "culpability" can be analyzed separately from the realization of an *actus reus* in the external world. This disposition is reflected in the current practice of penalizing impossible attempts. The actor thinks that sugar is cyanide and puts it in the intended victim's coffee. If there is a conviction in this case, what would the punishment be imposed for? The criminal act, it is said, is the taking of steps toward the execution of criminal intent. Yet it would not make sense to punish the act as it appears to others, namely as putting sugar in coffee. From the perspective of possible victims, the act itself is innocent and harmless. The only thing untoward in the situation is the intent to kill. The intent renders the act criminal, and then this act doubles as that for which the actor is deemed culpable. The circularity disquiets.

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19. See Michael Moore, "Choice, Character, and Excuse," *Social Philosophy and Policy* 7 (1990): 29, 58 ("perhaps negligence by itself does not merit any moral blame").

20. Jerome Hall, "Negligent Behavior Should be Excluded from Penal Liability," *Columbia Law Review* 63 (1963): 632.

Maybe we would never have arrived at this state of criminal law if we took the rights of victims seriously in thinking about retributive punishment. Punishing harmless impossible attempts that frighten no one would hardly make sense if we take the victim's perspective. The particular act is not dangerous. If anything it is the actor who may be dangerous. But this shift from a dangerous act to a dangerous actor is morally monumental. Impossible attempts come into relief as the expression of a wicked intent. The would-be poisoner shows himself to be dangerous and therefore punitive intervention is supposedly justified. Yet this a curious form of retributive thinking. It is in fact early intervention and preventive confinement masquerading as punishment.

The significant feature of culpability, as it bears on punishment, is that it comes in degrees. The person who kills under provocation or while suffering from diminished capacity acts with partial culpability. In sentencing, the presumptively reduced culpability of those who are contrite or who have made amends has the impact of reducing punishment. This, as I pointed out earlier, is the feature that renders criminal liability different from tort liability.

The intersection of two factors, then, determines the level of punishment that justly fits the crime. One is the scale of the wrongdoing; the other is the degree of culpability. They come together in this formula devised by Robert Nozick: P = r.H. The level of punishment equals the degree of responsibility (varying from 0 to 1) times the scale of wrongdoing. Causing rather than just risking harm increases the scale of the wrongdoing. Bringing about the harm negligently rather than intentionally reduces the "r" factor.

Punishment is imposed, therefore, for wrongdoing as reduced by the extent to which culpability is diminished. This way of understanding punishment is lost on those who think of culpability as an independent factor or even as the central factor in structuring criminal liability. Yet it may be lost on others as well. For as I argued at the outset, thinking of punishment as imposed *for* something attributes to punishment the capacity to rectify some untoward state of affairs. We live, however, in an era of skepticism about whether it is really possible to bring out harmony in the moral order or metaphysically to vindicate right over wrong. In these anti-mystical times we need to bring punishment back to the people who are directly affected by whether it is imposed or not.

4. The Duty to Punish as a Double Negative

It may be easier to justify punishment not as a positive remedy for wrongdoing but rather as the absence of an evil. The evil is abandoning victims in their suffering and isolation. Recently, I argued that blackmail should be understood as a paradigmatic crime, wrong because, like other crimes of violence, it establishes a relationship of dominance and subor-

dination between the criminal and the victim.[21] I continue the argument here. The claim is that punishment is imposed in order to avoid the evil of not punishing.

Blackmail, theft, embezzlement, all leave a wake of dominance and subordination. Rape victims have good reason to fear that the rapist will return, particularly if the rape occurred at home or he otherwise knows her address. Burglars and robbers pose the same threat. Becoming a victim of violence beyond the law means that what we all fear becomes a personal reality; exposure and vulnerability take hold and they continue until the offender is apprehended. It would be difficult to maintain that all crimes are characterized by this feature of dominance. The most we can say is that this relationship of power lies at the core of the criminal law. It is characteristic of the system as a whole.[22]

The way to counteract the power of the criminal over the victim is for the state to intervene with power over the person of the criminal. It is not enough to make the offender pay damages or a fine, for all this means is that she purchases her ongoing status beyond the prohibitions that apply to others. The state must dominate the criminal's freedom, less the criminal continue his domination of the victim. The deprivation of liberty and the stigmatization of the offense and the offender — these means counteract the criminal's dominance by reducing his capacity to exercise power and symbolically lowering his status.

Punishment expresses solidarity with the victim and seeks to restore the relationship of equality that antedated the crime. This may not be so obvious in a culture that has become accustomed to thinking of punishment as a utilitarian instrument of crime control. The way to appreciate the psychological significance of the state's standing by the victim is to think about the cases in which the state refuses to prosecute and thereby abandons the victim in solitary suffering. During the terror in Argentina that led to approximately 9000 *desparecidos* prior to 1983, many victims' families realized, to their horror, that they could not turn to the police. The police were often the ones engaged in the roundup of suspected terrorists. The failure of the state to come to the aid of victims, as expressed in a refusal to invoke the institutions of prosecution and punishment, generates moral complicity in the aftermath of the crime. The failure to punish implies continuity of the criminal's dominance over the victim. Not only the criminal can trigger a relationship of dominance and subservience. The state can effect the same relationship by failing to invoke the customary institutions of arrest, prosecution and punishment.

The problem is whether this argument is offered as a rationale for retributive punishment or as identification of the nexus between punish-

21. See note 2, supra.

22. Homicide seems to be a special case. We could treat the decedent's loved ones as secondary victims, but they do not suffer from the same fear of recurrence that characterizes other forms of violent crime.

ment and the criminal act. Does it make sense to focus on the relational aftermath of the crime as that for which punishment is imposed? Significantly, the plaintiff's injury, also an aftermath of the liability-creating incident, provides the requisite nexus for compensation. And we noted at the outset that we sought an account of punishment that would be as clear as the proposition that tort compensation is awarded for injuries sustained. Attempting to draw the parallel in the context of punishment, however, encounters grammatical problems. One cannot quite say that the punishment is imposed *for* the dominance the criminal acquires over his victim. The sanction may be imposed to counteract or neutralize this dominance, as compensation is awarded to rectify injuries sustained. But this might not be enough.

The factors of desert as well as remedy seem to control the grammar of "compensating for" and "punishing for." The victim deserves compensation for the full extent of her injuries, provided liability is established. The criminal may deserve punishment on the basis of what he has done, but not, it seems, for the advantage that he acquires in the crime. Also, focussing on the relational aftermath of the crime rather than on the crime itself might not generate the fine gradations we have noted in the formula P = r.H. The scale of wrongdoing and the degree of culpability are features of the act, not of the relationship of dominance the act establishes. We are drawn to the aftermath of crime in order to understand why we impose punishment, but to grasp what punishment is imposed for we must stick to the crime itself — in all its subtlety and fine grained distinctions. That we no longer grasp punishment as a remedy for the crime is a contradiction that we cannot so easily escape.

APPENDIX: CONTROL AND DESERT: A COMMENT ON MOORE'S VIEW OF ATTEMPTS

Russell L. Christopher*

Should a consummated criminal offense be punished more than an attempt to commit the same offense, by the same actor, that fails? The issue of the relevance of harmful results to an actor's moral desert has engaged the attention of many moral philosophers and criminal law theorists. The convening of this Symposium which, at least in part, addresses this fundamental question testifies to its continuing vitality and its capacity to evoke sharp disagreement.

Proponents of the irrelevance of harmful results have focused on the element of accident, chance, luck or fortuity determining whether a criminal attempt succeeds or fails. Whether a bullet strikes and kills its

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intended target or misses due to a sudden gust of wind, a sudden movement of the victim, or a bird deflecting the bullet's path is outside the control of an actor. Events or causal factors outside the control of the actor should not be an indicia of an actor's moral desert. Only for that which the actor can control is she responsible; only that for which she is responsible can contribute to her moral desert. In essence, moral luck[1] is rejected as a relevant determinant of an actor's desert.

In his contribution to this Symposium, Professor Michael Moore stakes out his claim for the "independent moral significance of wrongdoing."[2] Although Moore finds culpability to be a necessary and sufficient condition for the imposition of punishment, he maintains that wrongdoing (harmful results), when coupled with culpability, is a relevant determinant of moral desert and increases the amount of punishment that may be imposed. In confronting the view that harmful results are irrelevant, what Moore terms the "standard educated view,"[3] Moore rejects its premise that the harmful results of intended actions are outside an actor's control. Since harmful results are within an actor's control, an actor may be held responsible for them. Harmful results increase an actor's moral desert, which in turn justifies the imposition of increased punishment.

Moore's method of argumentation is to assume that the premise of the standard educated view is true and to demonstrate that it generates a reductio ad absurdum. Moore concludes that in order to avoid the absurd consequences following from that premise, the consequences of intended actions must be considered within an actor's control.

The importance of Moore's ingenious argument cannot be overstated. If he is right, the standard educated view's most powerful argument (that the results of intended actions are outside the control of an actor), is rendered absurd. The focus of this Comment is to assess the validity of Moore's reductio ad absurdum of the standard educated view. The Com-

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1. For a discussion of the problem of moral luck see Thomas Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979).

2. Michael S. Moore, "The Independent Moral Significance of Wrongdoing," *Journal of Contemporary Legal Issues* 5 (1994): 237-281.

3. Ibid. p. 238. Moore cites the following adherents to the standard educated view: Model Penal Code § 5.05(1) (Proposed Official Draft, 1962); Andrew Ashworth, "Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law," *Rutgers Law Journal* 19 (1988): 725; Lawrence Becker, "Criminal Attempt and the Theory of the Law of Crimes," *Philosophy and Public Affairs* 3 (1974): 262; Joel Feinburg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), p. 33; James Gobert, "The Fortuity of Consequence," *Criminal Law Forum* 4 (1993): 1; Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), pp. 423-436; H.L.A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), pp. 129, 131; Sanford Kadish, "Tracking the Irrational in the Criminal Law," unpublished Faculty Research Lecture, University of California, Berkeley, 1993; Richard Parker, "Blame, Punishment, and the Role of Result," *American Philosophical Quarterly* 21 (1984): 269-276; Steven Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law," *University of Pennsylvania Law Review* 122 (1974): 1497-1607; Michael Zimmerman, "Luck and Moral Responsibility," *Ethics* 97 (1987): 374.

ment will conclude that Moore's argument generates its own reductio ad absurdum and is thus untenable.

Moore first shows that we cannot control the causal factors enabling us to act. Suppose Smith forms a firm intention to shoot and kill Jones. Yet Smith may lack the opportunity: Jones is never alone, Jones has moved out of the area, Smith keeps having his gun stolen. Additionally, Smith may lack the capacity: as Smith is about to pull the trigger he sees a ghost which unnerves him, Smith is so happy at the prospect of finally killing Jones that he gets overexcited and cannot coordinate his fingers. Just as actors cannot control the factors which will dictate whether a bullet that is fired with the intent to kill will succeed (wind speeds, movements of the victim, a bird flying in the way, a quantum shift etc.), so also Smith cannot control a myriad of factors intervening between the formation of the intent to kill and pulling the trigger. Since Smith cannot control these factors preventing him from acting, his acts cannot be relevant in ascertaining moral desert. Thus punishment cannot be imposed for acts.

Moore then demonstrates that we cannot control whether we form a firm intention to murder. Suppose Smith is very angry at Jones for taking his job. Given sufficient time, Smith would have formed the firm intention to kill Jones. But due to factors outside Smith's control he never gets the opportunity: Jones dies, Jones gets fired, Smith is injured and cannot take the job etc. Additionally, Smith might lack the capacity to form the intention because of factors outside his control: each time Smith is about to form the intent to kill Jones dust sends Smith into sneezing fits, he faints, his arm goes numb etc. Since we cannot control the factors which determine whether we form a firm intention to kill, having a culpable firm intention to kill is irrelevant in assessing moral desert. Thus we cannot impose punishment for culpability.

Since results, acts, and firm intentions are outside our control, Moore suggests the only basis left for moral responsibility is character. Yet Moore argues that due to genetic factors and environmental influences during our youth, which we have no control over, our character is also largely outside our control. Moore confronts the possible objection that "who we are *is* our character, so that fortuities in determining who we are are irrelevant."[4] Yet Moore deftly responds that if character can be a basis for moral desert, despite our inability to control the factors molding our character, then our inability to control the factors determining whether we firmly intend, act or produce harmful results fails to bar them as objects of punishment. Thus producing harmful results is a proper basis for determining moral desert.

Moore concludes that the narrow sense of control advocated by those who reject harmful results as a basis for punishment leads to the reductio ad absurdum that none of the possible bases for moral desert is suffi-

4. Moore, supra note 2, p. 279.

ciently within our control. Thus no one is responsible for any criminal violation and no one is deserving of punishment. The only alternative to this absurdity, Moore argues, is to accept that we are in control of our intentions, acts and the harmful results which we produce. Thus one cannot claim that our lack of control over harmful results disqualifies harmful results as a basis for moral desert and punishment.

Despite the ingenuity of Moore's argument, it is seriously flawed. Moore's contention that a reductio ad absurdum ensues from barring harmful results due to their being outside an actor's control proves too much. In Moore's preferred, broad "sense of control we also control whether or not we execute our general choices with volitions, and in this sense of control we control our bodily movements when we will them with our volitions. Further, in this sense of control, we control the gun in our hand, and we control the bullet, its impact on the victim, and his death . . . ."[5] But if we control the bullet, as Moore claims, and the bullet nonetheless misses, then we controlled the bullet missing the target. If the bullet misses, then we didn't intend to kill after all. An attempt that fails is not subject to attempt liability because the actor, controlling the bullet, must not have intended to hit the victim.

In attempting to derive a reductio ad absurdum of the narrow sense of control, Moore's argument lends itself to its own reductio ad absurdum. Moore's argument, purporting to show that harmful results are relevant, eviscerates attempt liability. The ensuing anomaly is that an actor with a firm intention to kill who merely commits a prepatory overt act or substantial step is subject to attempt liability. Since the actor has not yet had a chance to fail, his failure has not yet negated his intent. An actor who shoots and misses, however, escapes liability altogether because he did not have the requisite culpable intent. If he did have the requisite culpable intent, since he controls the bullet, he necessarily would not have missed. Since the actor did miss and the actor controls the path of the bullet, it necessarily must be the case that he intended to miss and that he did not intend to produce the harmful result. Moore might reply that we only control the results of our actions when we succeed. Yet Moore cannot simultaneously argue that when an actor intends to kill and succeeds that he was in control and also claim that when an actor attempts and misses, he was not in control. If we control the results of our intended actions, as Moore claims, we control the result both when we succeed and when we fail.

Moore might respond by accepting the reductio but denying the absurdity. Perhaps when we shoot and miss we are conflicted about whether we truly wish to kill the victim. Professor Alan Dershowitz raises this possibility in an article written while he was a law student.[6]

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5. Ibid., p. 271-74.
6. Alan Dershowitz, Note, "Why Do Criminal Attempts Fail? A New Defense," *Yale Law Journal* 70 (1960): 160-169.

Although this claim might be true in a small number of cases, it clearly does not obtain in every instance of a failed attempt. Yet Moore is not merely making the empirical claim that occasionally we can explain a failed attempt by maintaining that the actor never really intended to complete the offense. By virtue of Moore's preferred, broad sense of control, the results of all actors' intended actions are necessarily within their control. Thus if an actor fails, it must necessarily have been due to the actor not really intending to cause the harm. Another difficulty for Moore in denying the absurdity is that it contradicts one of Moore's assertions. Moore himself believes that trying to kill is morally relevant: "it seems to matter whether one actually tried to execute one's intention to kill or not."[7]

The absurd implications of Moore's own reductio argument perhaps go further. Under Moore's broad sense of control, virtually everything is within an actor's control. Thus an actor who commits the requisite overt act or substantial step necessary for attempt liability but who fails to take the last step, for whatever reason, must not have really intended to produce the harmful result. Since it is within an actor's control to take the last step, to pull the trigger and to kill the victim, the actor's failure to do so may only be explained by the fact that he did not truly intend to do so. Thus under Moore's broad sense of control, all attempt liability is eliminated. Furthermore, liability for other inchoate offenses e.g., conspiracy is eliminated: the actor's failure to complete the offense can only be explained by the fact that she did not truly intend to commit the consummated offense.

Again Moore might respond by accepting the reductio but denying the absurdity. Perhaps for Moore placing the relevance of harmful results for an actor's moral desert on firm footing is worth the cost of eliminating attempt and other inchoate offense liability. Yet this move might be difficult for Moore. He is already committed to the view that culpability is a necessary and sufficient condition for the imposition of punishment. Yet if attempt and other inchoate offense liability is eliminated, only offenses involving harmful results could be punished. There never would be an instance of an actor with culpability alone receiving punishment. Moore's assertion that culpability is a necessary and sufficient condition for punishment would be superfluous, if not contradictory.

In light of the absurd consequences flowing from Moore's reductio ad absurdum of the standard educated view, as well as the difficulties for Moore in denying that they are absurd, Moore's argument that we control the results of our intended actions must be rejected. The ensuing conundrum for theorists is that the narrow sense of control arguably bars punishing for harmful results whereas, the broad sense of control arguably dispenses altogether with attempt and other inchoate offense liability.

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7. Moore, supra note 2, p. 274.