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DOES ATTEMPTED MURDER DESERVE GREATER PUNISHMENT THAN MURDER? MORAL LUCK AND THE DUTY TO PREVENT HARM

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INTRODUCTION

Does the commission of a consummated offense deserve more severe punishment than an attempt to commit the same offense that fails? Almost every jurisdiction world-wide punishes the attempt that succeeds more severely than the attempt that fails.[1] For example, murder is punished more severely than attempted murder.[2] But perhaps a majority of criminal law theorists disagree with this punishment differential for consummated and inchoate offenses (the "PD").[3] In what has been termed "the standard educated view,"[4] successful attempts deserve no more punishment than unsuccessful attempts—murder deserves

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1. *E.g.*, GEORGE FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 82 (1988) ("[T]he practice persists in every legal system of the Western world."); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 129 (rev.ed. 1988) (noting "the almost universal practice of legal systems of fixing a more severe punishment for the completed crime than for the mere attempt"); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 119 (1995) (observing that "most legal practice throughout the world treats failed and successful attempts quite differently").

2. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 375 (3d ed. 2001) ("Almost always, the penalty for an attempt to commit a capital crime or an offense for which the penalty is life imprisonment is set at a specific term of years of imprisonment.").

3. *See* Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. OF CONTEMP. LEGAL ISSUES 237, 238 (1994).

4. *Id.* at 238. Among the adherents to the "standard educated view" which Moore cites are as follows: JOEL FEINBERG, DOING AND DESERVING 33 (1970); HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 423–36 (1979); HART, *supra* note 1, at 129–31; Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Lawrence Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262 (1974); Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

no more punishment than attempted murder. These critics of the PD (the "Critics") argue that whether a result issues from the performance of an act is outside the control of the actor and is merely a matter of luck.[5] An actor should not be responsible for that which is outside the control of the actor and which is a matter of luck.[6] Thus, whether a prohibited result occurs cannot be a part of, or increase, an actor's deserved punishment. As a result, Critics contend, insofar as the PD is based on an actor's deserved punishment, and not on consequentialist concerns,[7] the PD is

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5. Though a defender of the PD, Michael Moore concisely illustrates the Critics' position:

> It cannot matter to an offender's just deserts whether the wind, a bird, or a quantum shift moved the bullet that an offender sent on its way, intending to kill another, for these causal influences are wholly beyond the control of the offender. What he can control is whether he intends to kill and whether he executes that intention in a voluntary action of moving his finger on the trigger; all the rest is chance. The offender deserves to be punished only for factors he can control, not for chance events he can't control.

Moore, *supra* note 3, at 239.

6. *See, e.g.*, HART, *supra* note 1, at 129–31; Feinberg, *supra* note 1, at 118–19.

7. There may be a persuasive consequentialist or utilitarian basis for punishing an attempt less than the completed offense. Jeremy Bentham's utilitarian theory of punishment requires that there be increasingly severe punishment at each successive stage of a criminal's course of conduct. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 168 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1781) ("The punishment should be adjusted in such a manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.") (emphasis omitted). For example, according to Bentham, the punishment for "a man's giving you ten blows" must be greater than the punishment for merely five blows. *Id.* Otherwise, after already giving five blows, an assailant "will be sure to give you five more, since he may have the pleasure of giving you these five for nothing." *Id.* Applying Bentham's requirement to the punishment of, for example, murder and attempted murder, the punishment of murder must be greater to provide a disincentive to commit murder after a criminal is already liable for attempted murder. If they are punished the same, an actor who has attempted to kill, but has failed, would have no disincentive not to try again. This may be "[t]he best utilitarian argument for lesser punishment of attempts." DRESSLER, *supra* note 2, at 383. While both Defenders and Critics of the PD may well concede this consequentialist argument, the debate in the literature focuses more on whether there is a nonconsequentialist basis for the PD. *See* Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 CAL. L. REV. 791, 792 (2000) (noting that although there may be a consequentialist justification for the PD, "the real challenge" is to furnish a nonconsequentialist justification). That is, apart from the good or bad consequences of the PD, does the unsuccessful attempter *deserve* less punishment?

"arbitrary,"[8] "illogical,"[9] and "irrational."[10] Defenders of the PD (the "Defenders") reply that we are responsible for the results of our actions and results do matter to our desert even if they are outside our control and are subject to the caprice of luck.[11]

The clash between these opposing views is part of the larger issue termed the problem of "moral luck:"[12] whether, and to what extent, matters outside the control of an actor and subject to chance and luck may nonetheless be relevant in assessing an actor's moral and legal desert.[13] The debate has produced an enormous literature with each camp unable to convince the other.[14] The intractableness of the debate stems from the different advantages each side enjoys. On the side of Defenders is the nearly universal intuition, embodied in nearly every legal jurisdiction, that results do, in fact, matter. On the side of the Critics is the seemingly unimpeachable argument from principle that results are outside our control and a matter of luck for which we are not responsible and do not deserve to be punished. While Critics concede they cannot account for our intuitions and admit

8. Feinberg, *supra* note 1, at 118 (maintaining that greater punishment for completed offenses than attempts is "more arbitrary than rational").

9. HART, *supra* note 1, at 130.

10. Sanford Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695 (1994) (referring to the harm doctrine—that completed offenses deserve more punishment than attempts—as "an irrational doctrine").

11. *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW 472–83 (1978); Michael Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 LAW & PHIL. 1 (1986); Katz, *supra* note 7; Moore, *supra* note 3; Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 CAL. L. REV. 813, 813 (2000). For discussion of the various arguments marshaled to support the PD, see Feinberg, *supra* note 1, at 122–31; Kadish, *supra* note 10, at 684–95; Moore, *supra* note 3, at 240–52.

12. The term moral luck was perhaps first coined by Thomas Nagel and Bernard Williams. *See* Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS 24, 26 (1979) [hereinafter Nagel, *Moral Luck*]; BERNARD WILLIAMS, *Moral Luck*, *in* MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 20 (1981). Nagel himself later credited Williams with originating the term. THOMAS NAGEL, OTHER MINDS 167 (1995). For an excellent collection of articles addressing the various aspects of moral luck, see MORAL LUCK (Daniel Statman ed., 1993).

13. Nagel, *Moral Luck*, *supra* note 12, at 26 ("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, it can be called moral luck.").

14. *See, e.g.*, Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 B.Y.U. L. REV. 553, 556 (1986) ("[L]ittle progress has been made toward a solution of this issue in the last two hundred years."); *id.* at 556–57 ("In the final analysis, it is questionable whether a compelling and rational argument on this issue is possible.").

they are unlikely to change the positions of practical-minded legislators,[15] some Defenders concede that they can marshal no rational, principled argument supporting their position.[16] Thus, intuition and existing legal practice favor the Defenders, but principled argument perhaps favors the Critics.

At the heart of the debate is our conflicted sense that both sides are right.[17] That which is outside our control and is a mat-

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15. *See, e.g.*, Kadish, *supra* note 10, at 702 ("There are limits, therefore, particularly in a democratic community like ours, to how far the law can or should be bent by reformers to express a moral outlook different from that of the deeply held intuitive perceptions of the great mass of humanity, irrational though they may seem to some.").

16. George Fletcher, an advocate of punishing completed offenses more than attempts, concedes that the PD is one of a number of doctrines in the criminal law which lack a persuasive rationale:

> Admittedly, there might be stronger arguments for a position that seems so deeply entrenched in the world's legal culture. Generating a convincing rationale . . . reminds one of other practices of the criminal law that are widely shared and intuitively accepted—for example, punishing completed crimes more severely than attempts . . . —but for which theoreticians have yet to generate a compelling justification.

George P. Fletcher, *The Nature of Justification*, *in* ACTION AND VALUE IN CRIMINAL LAW 175, 179 (Steven Shute et al. eds., 1993). For similar concessions by defenders of the PD as to the paucity of principled argument to sustain the PD, see FLETCHER, *supra* note 1, at 82–83 ("[O]ur combined philosophical work has yet to generate a satisfactory account of why the realization of harm aggravates the penalty. . . . We cannot adequately explain why harm matters . . . ."); David Lewis, *The Punishment That Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53, 53 (1989) ("It is hard to find any rationale for our leniency toward the unsuccessful [attempter in comparison to the successful attempter].").

17. The economic philosopher Adam Smith aptly captures our ambivalence as to the relevance of results to our desert. He concludes paradoxically that we believe, in the abstract, that results are irrelevant, but nonetheless we somehow find results relevant in our assessment of particular cases:

> To the intention or affection of the heart . . . to the propriety or impropriety, to the beneficence or hurtfulness of the design, all praise or blame . . . which can justly be bestowed upon any action, must ultimately belong.
>
> When this maxim is thus proposed, in abstract and general terms, there is nobody who does not agree to it. Its self-evident justice is acknowledged by all the world, and there is not a dissenting voice among all mankind. Everybody allows, that how different soever the accidental, the unintended and unforeseen consequences of different actions, yet, if the intentions or affections from which they arose were, on the one hand, equally proper and equally beneficent, or on the other hand, equally improper and equally malevolent, the merit or demerit of the actions is still the same . . . .
>
> But how well soever we may seem to be persuaded of the truth of this equitable maxim . . . when we come to particular cases, the actual consequences which happen to proceed from any action, have a very

ter of luck should not increase deserved punishment, but nonetheless consummated offenses deserve greater punishment than inchoate offenses. How can both sides, however, be right? Seemingly the only difference between, for example, murder and attempted murder, is the prohibited result that obtains in the former but not in the latter. And the relevance of that prohibited result for deserved punishment, as Critics maintain and some Defenders concede, has proven elusive. So, seemingly both sides cannot be right.

But both sides could be right, ironically, if they share a false premise. According to Ramsey's Maxim, named after the seminal mathematician F.P. Ramsey, whenever there is a long-running, intractable dispute the two sides in opposition may well be in agreement about a premise which is false.[18] Identification of that shared false premise could hold the key to resolving the problem of moral luck. This Article argues that the false premise which both Defenders and Critics share is that the *only* candidate on which to rest the justification for greater deserved punishment of murder, as compared to attempted murder, is the prohibited result.[19] For both Defenders and Critics, then, the comparative punishment of murder and attempted murder is a function of the significance (or lack thereof) of whether a prohibited result issues from an actor's conduct.

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great effect upon our sentiments concerning its merit or demerit, and almost always either enhance or diminish our sense of both.

ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 109–10 (Knud Haakonssen ed., 2002) (1759).

18. Roy Stone supplies the following concise account:

> This maxim claims that where there is a prolonged and persistent dispute . . . , it is often the case that the disputants . . . are really in agreement about an assumption, hypothesis, premise, fundamental to their argument, which is false. They share a common but false premise.

Roy Stone, *Affinities and Antinomies in Jurisprudence*, 22 CAMBRIDGE L.J. 266, 266 (1964). Ramsey's Maxim is based on the following observation by Ramsey:

> [I]t is a heuristic maxim that the truth lies not in one of the two disputed views but in some third possibility which has not yet been thought of, which we can only discover by something assumed as obvious by both the disputants. Both the disputed theories make an important assumption which, to my mind, has only to be questioned to be doubted.

FRANK PLUMPTON RAMSEY, FOUNDATIONS OF MATHEMATICS AND OTHER LOGICAL ESSAYS 115–16 (1931).

19. One notable exception is Leo Katz's utilization of some attempters' efforts to prevent the attempt from becoming a completed offense in his defense of the PD. *See* Katz, *supra* note 7, at 795–806. For further discussion of Katz's argument, see *infra* note 20 and accompanying text.

Both sides could be right, however, if there is something else—besides the presence or absence of a prohibited result—that (i) distinguishes murder from attempted murder, (ii) is not a matter of luck, and (iii) is morally relevant to an actor's deserved punishment. That something else would provide the Defenders with a principled argument to support our nearly universal intuitions and existing practices, yet avoid the Critics' objection that what is outside of our control and is a matter of luck should not be a basis for deserved punishment.

This Article demonstrates, without relying on the presence or absence of a result, that in some cases successful attempts deserve more punishment than unsuccessful attempts. Part I presents a morally intuitive basis for a successful attempter to deserve greater punishment than an unsuccessful attempter by comparing an attempter that endeavors to prevent the completed offense from arising versus an attempter who does not. Part II explains how this moral intuition is bolstered by the legal doctrine of the duty to prevent harm conceived either as a generalized duty to render aid or as the duty to act to prevent harm after placing a person or interest in peril. The successful attempter who violates this duty commits something which the unsuccessful attempter who fulfills the duty does not—a culpable omission. Since violation or fulfillment of this duty is not a matter of "outcome luck," it provides an independent basis—apart from results—for the successful attempter to deserve greater punishment than the unsuccessful attempter. Although this justification of the PD may only apply in a narrow range of cases, Part III shows that for cases outside that range Critics of the PD are forced into what perhaps constitutes a reductio ad absurdum: that an attempt deserves *greater* punishment than the consummated offense.

I. Efforts to Prevent Harm as an Independent Basis—Apart from Outcome Luck—for Attempts Deserving Less Punishment than Completed Offenses

Leo Katz has promisingly identified an independent basis—not relying on results—for successful attempters to deserve greater punishment than unsuccessful attempters. In a series of ingenious, but complicated, hypotheticals, Katz seeks to show that attempters who feel remorse and take steps to prevent the completion of the attempt are intuitively less blameworthy and deserve less punishment than attempters who fail to take such

steps.[20] But Paul Robinson has criticized Katz's argument for, among other reasons, (i) the use of hypotheticals,[21] (ii) the unrealistic and "bizarre" nature of the hypotheticals,[22] and (iii) the reliance on moral intuition and "emotional feelings" in assessing the comparative blameworthiness of the various actors in the hypotheticals.[23] Rather than assess the validity of Robinson's critique, let us simply assume its validity *arguendo.* Building on Katz's insight—that an attempter's efforts to prevent the consummation of the offense renders her less blameworthy for reasons not dependent on results—this Article will endeavor to demonstrate that a completed offense deserves greater punishment than an attempt while avoiding Robinson's criticisms.

To avoid Robinson's criticism of the use of implausible hypotheticals, consider the following actual case. In *State v.*

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20. Katz, *supra* note 7, at 799–806. Given the intricate nature of Katz's series of hypotheticals, a concise summary fails to do them justice. At the risk of oversimplification, I will simply furnish Katz's own summary of his argument:

> Consider three cases:
>
> > Case 1. Assassin A1 poisons five people and they die. . . .
> >
> > Case 2. Assassin A2 poisons five people [the poison affecting a different vital organ of each of the five]. Then he saves them by killing a sixth [whose organs are transplanted into the five]. . . .
> >
> > Case 3. Assassin A3 poisons five people. The poison proves insufficient to kill. . . .
>
> The usual approach to the problem of moral luck is to compare A1 with A3 . . . and to convince you that even though luck is all that separates the two, that is all right because you put up with luck in so many other domains of life.
>
> My approach is different. It never asks you to directly compare A1 with A3, and it does not draw on your uncertain intuitions about luck. Instead it asks you to compare A1 with A2 . . . and A2 with A3 . . . . Without having to appeal to your feelings about luck, I then tried to convince you that A1 is worse than A2 and that A2 is worse than A3, whence it followed that A1 is worse than A3.

Id. at 806. From the Critics' point of view, in which attempted murders are equally blameworthy as completed murders, A2 might seem worse than A1 because A2 commits 6 crimes and A1 only five crimes. But, according to Katz, this ignores our moral intuition that A2 is less blameworthy for taking steps to prevent five people from dying. On this basis, A1 deserves greater punishment than A2 even from the viewpoint of the Critics. And since A2 commits six crimes as opposed to A3's five crimes, A2 deserves more punishment than A3. Since the blameworthiness of A1 > A2, and A2 > A3, then, by the principle of transitivity, A1 > A3. That is, A1 who commits five murders deserves greater punishment than A3 who commits five attempts. And this justifies, according to Katz, the PD.

21. Robinson, *supra* note 11, at 819–23.

22. *Id.* at 823.

23. *Id.* at 823–25.

Smith,[24] the defendant, Smith, stabbed his uncle twice in the chest. Seeing his uncle collapse from the wounds, Smith became "remorseful and wept."[25] He threw down his knife, hauled his uncle into a car and sped to a hospital to obtain medical attention for his uncle.[26] Due no doubt to the defendant's quick action, the uncle survived and recovered from the stab wounds.[27] Upon prosecution for attempted murder, the defendant asserted an abandonment or renunciation defense—that he abandoned his attempt to kill his uncle.[28] Though the defendant's actions presumably saved his uncle's life, the court ruled that the defendant was not eligible for an abandonment defense.[29] Since substantial harm had already occurred, his actions constituted a complete attempt which cannot be abandoned.[30]

Though liable for attempted murder, Smith is clearly less morally blameworthy for seeking to save his uncle's life rather than letting him die. To illustrate this, let us compare Smith's conduct with a hypothetical Smith 2. Suppose all the same facts obtain except that after stabbing his Uncle, Smith 2 decides not to seek medical care for his Uncle. Smith 2 decides to walk away allowing (and intending) his uncle to die. Smith's life-saving efforts show him to be less blameworthy than Smith 2. It was not a matter of "outcome luck" that Smith undertook to save his uncle and Smith 2 chose not to endeavor to save his uncle.[31]

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24. 409 N.E.2d 1199 (Ind. Ct. App. 1980).
25. *Id.* at 1199–1200.
26. *Id.* at 1200.
27. *Id.*
28. *Id.*
29. *Id.* at 1202.
30. *Id.* at 1201–02. For an interesting argument that the abandonment or renunciation defense should also be available as a defense to complete attempts (even where harm has already occurred), see Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 50–54 (1989).
31. Although not a matter of outcome luck, that Smith undertook to save his uncle and Smith 2 did not might nonetheless be a function of other types of luck. Thomas Nagel categorizes four types of luck:

> 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. The other two have to do with the causes and effects of action: luck in how one is determined by antecedent circumstances, and luck in the way one's actions and projects turn out.

Nagel, *Moral Luck*, *supra* note 12, at 28. Applying these categories of luck to a hypothetical assassin, Katz shows how the various types of luck may prevent an assassin from successfully completing his attempt:

> Luck might have caused him to be brought up to hate violence. (Philosophers call this "character luck.") Luck might have kept him out of

Smith voluntarily and intentionally decided to try to save his uncle. Smith 2 voluntarily and intentionally chose to leave his uncle to die. Disregarding the absence of a prohibited result issuing from Smith's conduct and the presence of the prohibited result issuing from Smith 2's conduct, Smith is still less morally blameworthy than Smith 2. And since the difference in moral blameworthiness between Smith and Smith 2 is not a product of outcome luck, their differences in blameworthiness supply a fair basis for Smith 2 deserving greater punishment than Smith. Thus, the successful attempter (Smith 2) deserves greater punishment—for reasons apart from outcome luck—than the unsuccessful attempter (Smith).

Let us compare Smith and Smith 2's punishment under a system with a PD and one without. Under a system with a PD, Smith would be punished less than Smith 2. This is because Smith is liable only for attempted murder and Smith 2 is liable for murder. But the outcome for each does track the lesser and greater moral blameworthiness of Smith and Smith 2, respectively. Even though the system with a PD reaches this outcome only because of its focus on the absence or presence of a prohibited result, the outcome is consistent with the differences in their moral blameworthiness apart from results.

Under a system without a PD, Smith and Smith 2 would be punished the same. Smith's attempted murder and Smith 2's murder would be punished equally. That Smith saved his uncle's

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temptation's way. (Philosophers call this "opportunity luck.") Luck might have caused him to have a sneezing fit just as he was deciding whether to try to kill. (Philosophers call this "circumstantial luck.") And finally, luck might have caused his bullet to miss its mark—the case of outcome luck.

Katz, *supra* note 7, at 798. It is this last type of luck, outcome luck, which is most relevant for the purposes of this Article. Since Critics of the PD have dismissed these other forms of luck as unproblematic and argued that only outcome luck is problematic, and this Article is criticizing the Critics' position, these other types of luck will also be disregarded. *See, e.g.*, Kadish, *supra* note 10, at 690 (dismissing character luck, opportunity luck, and circumstantial luck as unproblematic for determining deserved punishment; only outcome luck is problematic). For the Critic, the former three types of luck are unproblematic because they obtain prior to the choice to commit a crime; only outcome luck, obtaining after the choice to commit a crime, is problematic as a component of deserved punishment. *Id.* ("Fortuity prior to choice, therefore, may be accommodated to our notions of just desert; fortuity thereafter cannot.") (citation omitted). For a discussion and partial defense of the Critics' distinguishing between the relevance of these various types of luck, see Katz, *supra* note 7, at 798–99. For an elegant attempt to defend the PD based on not distinguishing between the relevance of the various types of luck, see Moore, *supra* note 3. For a critique of Moore's argument, see Russell Christopher, *Control and Desert: A Comment on Moore's View of Attempts*, 5 J. CONTEMP. LEGAL ISSUES 111 (1994).

life and Smith 2 left his uncle to die would be considered irrelevant. Such a system would treat Smith no differently than if Smith, like Smith 2, had allowed the uncle to die rather than saving his life. But despite attaching no significance to results, a system without a PD does not track the differences in Smith and Smith 2's moral blameworthiness. The outcome under a system without a PD is inconsistent with the comparative moral blameworthiness (even apart from outcome luck) of Smith and Smith 2.

Under the PD, Smith and Smith 2, with their differing moral blameworthiness apart from outcome luck, are properly punished differently. Without the PD, Smith and Smith 2, despite their differing blameworthiness apart from outcome luck, are improperly punished the same. Only under a system with the PD does Smith, with his lesser moral blameworthiness, receive lesser punishment and Smith 2, with his greater moral blameworthiness, receive greater punishment.

The comparison of Smith and Smith 2's deserved punishment demonstrates that the presence or absence of a prohibited result issuing from an actor's conduct is not the sole basis for determining whether murder and attempted murder deserve the same or different punishment. Thus, in at least one case, the shared premise of both Defenders and Critics is false. The comparison of Smith and Smith 2 also demonstrates that the different punishment of murder and attempted murder is not merely a matter of outcome luck. Since the basis for the Critics' objection to the PD—the role of results which are based on luck—is not the exclusive basis for the PD here, even Critics would agree that Smith should be punished less for attempted murder than Smith 2 for murder. As a result, both Defenders and Critics should agree that Smith deserves less punishment than if he had allowed and intended his uncle to die.

Of course, a Critic might object that this approach to the problem of moral luck does not completely eliminate the role of luck. Suppose, contrary to fact, that the uncle died despite Smith's best efforts. Smith would have been punished for murder based on that which is a matter of luck and which is outside Smith's control. In such a counterfactual, Defenders and Critics would again part company. There are a number of replies to such an objection. First, it overlooks the significance of the fact that the actual case presents at least one instance in which Critics and Defenders would agree that the unsuccessful attempter

deserves less punishment than the successful attempter. The PD is justified in at least this one case.[32]

Second, even though the Critics' objection is true—that the role of luck has not been completely eliminated—the actual Smith case still demonstrates that only a system employing a PD has the capacity to properly punish Smith less, based on his lesser blameworthiness for reasons apart from outcome luck. A system of punishment without the PD, as advocated by the Critics, would fail to punish Smith in accordance with his lesser blameworthiness. Without the PD, Smith would be punished no less than if he had walked away intending his uncle to die.

Third, and most importantly, a system without the PD is unjust for the same reason that Critics have objected to a system with the PD—offenders are not punished according to their comparative moral blameworthiness. Critics have claimed that the PD is unfair by punishing offenders of equal desert unequally. But with respect to the comparison of Smith and Smith 2, it is the system without a PD that would be unfair in punishing offenders of unequal desert equally. In short, though the Critics' objection is valid, it only goes to the scope of the resolution, not to the validity of the resolution with respect to the actual *Smith* case.

II. Omission Liability as an Independent Basis—Apart from Outcome Luck—for Attempts Deserving Less Punishment than Completed Offenses

Although Robinson might agree that the argument thus far does not rely on implausible hypotheticals, he might nonetheless contend that Smith 2 being more blameworthy (even apart from outcome luck) than Smith is nothing more than a moral intuition.[33] While the intuition seems eminently plausible and one which would be difficult (for either the Critics or Robinson) to deny, it thus far is nothing more than a moral intuition. Perhaps by showing that our intuition is incorporated into an existing legal practice or doctrine might avoid Robinson's criticism. The most obvious possibility, on which Katz perhaps (at least par-

32. There are cases, other than *Smith*, in which this occurs. *E.g.*, State v. Mahoney, 870 P.2d 65, 67–68 (Mont. 1994) (concerning a defendant who, after stabbing victim twelve times and seeing the victim bleeding profusely, stopped the attack, called the police, and requested an ambulance). But admittedly the number of these cases is no doubt small.

33. *See* Robinson, *supra* note 11, at 823–25 and text accompanying *supra* note 23.

tially) relies,[34] is the abandonment or renunciation defense. That is, our intuition that Smith deserves less punishment than Smith 2 might be elevated beyond a mere intuition if Smith deserved less punishment because he was entitled to the abandonment defense. Unfortunately, because Smith caused harm prior to his abandonment Smith is not eligible for the abandonment defense.[35] As a result, we must look elsewhere to find a legal doctrine supporting our moral intuition.

Perhaps a more promising legal doctrine to bolster our moral intuition is the duty to act to prevent harm. There are two possible sources for such a duty. First, the generalized duty to act to prevent harm. Most U.S. jurisdictions, however, do not have such a generalized duty—no Good Samaritan laws.[36] But a handful of states[37] and many European countries do impose such a duty.[38] Second, the duty to render aid and act to prevent harm after placing a person or interest in peril. Even though few states have Good Samaritan laws, many states impose a duty to render aid and act to prevent harm on one who places another person or interest at risk or peril.[39]

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34. *See* Katz, *supra* note 7, at 800. *See also* Robinson, *supra* note 11, at 818 n.13 (discussing an alternative, unpublished argument of Katz dependent on the abandonment or renunciation defense).

35. *See supra* notes 30–31 and accompanying text.

36. DRESSLER, *supra* note 2, at 98 ("Subject to a few limited exceptions, a person has no criminal law duty to act to prevent harm to another, even if the person imperiled may lose her life in the absence of assistance.") (citing People v. Oliver, 258 Cal. Rptr. 138, 142 (Ct. App. 1989); GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 46 (1998) (noting that "most American states" lack a general duty to render aid); PAUL ROBINSON, CRIMINAL LAW 197 (1997) (observing that "few states have adopted such a general duty to aid") (citation omitted); John Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382, 382 (1976) (observing that the Anglo-American legal tradition generally does not impose a duty to render aid).

37. *E.g.*, R.I. GEN. LAWS § 11-56-1 (1998); VT. STAT. ANN. Tit. 12, § 519(a) (1973); WIS. STAT. ANN. § 940.34 (West 1995).

38. FLETCHER, *supra* note 36, at 46 (noting that "[m]ost European countries" have a generalized duty to render aid); ROBINSON, *supra* note 36, at 197 (explaining that "such a duty is not uncommon in Europe") (citation omitted); Kleinig, *supra* note 36, at 382 ("In the Russian Criminal Code of 1845 and, since then, in almost every continental European country, the failure to be a Good Samaritan has been declared a criminal offense."); Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT'L. & COMP. L. 451, 452 (2000) ("[M]ost civil law countries . . . recognize a general duty to rescue in their criminal codes.") (citing eighteen European countries with a generalized duty to rescue, the violation of which is subject to criminal penalties).

39. *See, e.g.*, Jones v. State, 43 N.E.2d 1017, 1018 (Ind. 1942) (upholding defendant's conviction for intentionally failing to render aid to a girl who, distraught after being raped by defendant, jumped or fell into a creek and

Any attempt, perhaps by definition, creates a risk of harm or peril to a person or interest.[40] At the point where an actor's conduct passes the threshold from preparation to where attempt liability attaches, the actor is posing a risk to, or placing in peril, a person or interest. At this point, the attempter's duty to prevent the risk or peril from coming to fruition would arise. The vast majority of successful attempters (like Smith 2) violate such a duty. Those unsuccessful attempters, like Smith, who do fulfill such a duty are less culpable and deserve less punishment.

Under either source of the duty, the successful attempter may be differentiated from the unsuccessful attempter not merely on the ground of the presence or absence of a prohibited result but also on the ground that the unsuccessful attempter may have fulfilled her duty to prevent harm and the successful attempter will typically have violated that duty. Whether or not actual harm is prevented or not is, of course, a result and as such outside of the control of the actor and a matter of outcome luck. But what is not a product of outcome luck, is the actor's decision to try to fulfill the duty to prevent harm or the actor's decision to violate the duty. Regardless of whether actual harm is prevented or not, the duty may be fulfilled by a good-faith effort to prevent the harm.[41] Similarly, regardless of whether actual harm is pre-

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drowned); DRESSLER, *supra* note 2, at 103 ("A person who . . . places a person or her property in jeopardy of harm, has a common law duty to aid the injured or endangered party."); ROBINSON, *supra* note 36, at 195 ("[A]n actor may have a duty to rescue if the actor has created the peril . . . ."); PAUL ROBINSON, 1 CRIMINAL LAW DEFENSES § 86(c)(2)(F) (2003–2004 Pocket Part update) ("A person who may otherwise have no duty to act, may have a duty imposed upon him if he is the cause of the conditions resulting in the victim's peril."); Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971, 975–76 (2000) (noting that criminal omission liability attaches where "a person creates a risk of harm to another person or property and then fails to act to prevent the harm from occurring") (citation omitted); Melody J. Stuart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 396 (1998) ("If a person intentionally or unintentionally causes another to be in a position of peril, she has a common law duty to assist the injured or endangered party.") (citation omitted).

40. *See, e.g.*, DRESSLER, *supra* note 2, at 378 ("When a person lies in wait in order to kill another, or pulls the trigger of a gun [even if no consummated harm occurs], she endangers another person's bodily security, jeopardizes the interests of loved ones in the intended victim's well-being, and impairs society's interest in a safe community in which to live.").

41. *See, e.g., id.* at 101 (noting that the duty to act to prevent harm only arises "*assuming that she was physically capable of performing the act*"); ROBINSON, *supra* note 36, at 200 ("An actor's failure to perform an act that he or she is incapable of performing is no more a suitable basis for [omission] liability than an involuntary act is."); J.C. Smith, *Liability for Omissions in Criminal Law*, 14 LEG.

vented or not, the duty may be violated by not making a good-faith effort to prevent the harm. The actor who fulfills the duty is less blameworthy and deserves less punishment than one who violates the duty. Violating the duty and committing the omission, since it increases the actor's culpability and wrongdoing, is a fair basis for greater deserved punishment.

Apart from causing a prohibited result, the duty to act to prevent harm after placing a person or interest in peril provides an additional basis—and one which is not based on outcome luck—for the PD. For example, consider Smith who is liable for attempted murder and Smith 2 who is liable for murder. Smith committed only an attempt. But Smith 2 committed not only the attempt[42] but an omission as well—the intentional failure to act to prevent further harm to the uncle after placing him at peril. Smith 2's greater punishment need not rest only on the fact that a prohibited result issued from Smith 2's conduct. Smith 2's greater deserved punishment may be justified by his committing something that Smith did not—a culpable omission. And unlike results, whether Smith 2 commits this culpable omission is not a product of outcome luck. Thus, the unsuccessful attempter (Smith) deserves less punishment for his attempt than Smith 2 who has committed not only an attempt but also a culpable omission. The successful attempter deserves (apart from committing the prohibited result) greater punishment for his committing something that the unsuccessful attempter did not—a culpable omission, which is not a function of outcome luck.

III. A REDUCTIO AD ABSURDUM? ATTEMPTS DESERVING GREATER PUNISHMENT THAN CONSUMMATED OFFENSES

The Critic might object that this approach to justifying the PD—taking into account whether an attempter fulfills or violates the duty to prevent harm—only works in a limited class of cases. The approach is viable only where the unsuccessful attempter fulfills the duty and the successful attempter violates the duty. But what about the cases where the successful attempter fulfills the duty but the victim dies anyway? And what about the cases

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STUD. 88, 94–95 (1984) (suggesting that the duty is not necessarily to prevent the harm but merely to take "reasonable steps to prevent the peril from resulting"). That is, one is under a duty to *act* for the purpose of preventing harm, but one is not under a duty to actually prevent harm.

42. Although Smith 2 commits murder, a lesser-included offense committed by Smith 2 is attempted murder. *See* DRESSLER, *supra* note 2, at 375 ("[W]ith crimes of intent, the successful commission of the target crime logically involves an attempt to commit it.") (citing People v. Vanderbilt, 249 P. 867, 868 (Cal. 1926)).

where the unsuccessful attempter violates the duty but the victim survives? In both of these latter categories of cases, the Defender and the Critic will presumably once again diverge. Presumably, the Defender will still advocate punishing the successful attempter who fulfills the duty more than the unsuccessful attempter who violates the duty. Interestingly, the Critics' stance on these cases may be less clear. If we take the Critics at their word (that results are irrelevant and only that which is not a function of outcome luck is eligible to be relevant as a component of deserved punishment), then the Critic's position will be shown to be, if not a reductio ad absurdum, considerably less plausible. In these two categories of cases, the Critics may be shown to be committed to maintaining that attempts deserve more severe punishment than consummated offenses. In any event, these two categories of cases will be an interesting device to test how truly committed the Critics are to their position that results are irrelevant.

Though in these two categories of cases the approach suggested here will not resolve the problem of moral luck, the PD is the only way to properly punish actors like Smith and Smith 2. Of course, the Critics might concede this but rejoin that the PD does not properly punish actors in categories outside Smith and Smith 2. The resulting dilemma for the Critics is that with or without the PD, offenders will not be punished according to their comparative moral blameworthiness. With the PD, successful attempters are punished more than unsuccessful attempters despite, according to the Critics, their equal desert. But without the PD, an unsuccessful attempter who fulfills the duty to prevent harm and a successful attempter who violates the duty are punished the same despite their different blameworthiness. In other words, the dilemma for the Critics is whether we should unequally punish offenders with equal desert or equally punish offenders with unequal desert. The absence of a PD is unjust for the same reason that Critics maintain that the presence of a PD is unjust—offenders will not be punished in proportion to their comparative desert.

But the Critics have a rejoinder which resolves their dilemma—punish attempts equally regardless of whether a prohibited result occurs or not, but punish attempts differently based on whether a duty to act to prevent harm is fulfilled or violated. In this way, the Critics would endorse a PD but still equally punish offenders which have, in their view, equal desert. Under the Critics' version of the PD, offenders such as Smith 2 would be properly punished more than those like Smith. But also under the Critics' PD, unsuccessful attempters who violate

their duty would be punished more than successful attempters who fulfill their duty. For example, some attempted murders would be punished more than some murders.

Though this resolves the Critics' dilemma above, the Critics' approach may now be susceptible to the charge of even greater implausibility. Despite the nearly universal intuition that attempts should be punished less severely than consummated offenses, the Critics have contended that attempts should be punished the same as consummated offenses. If that contention is considered counter-intuitive, then the comparison of unsuccessful attempters who violate their duty to prevent harm with successful attempters who fulfill their duty demonstrates the Critics' position to be even more counter-intuitive. If punishing unsuccessful attempts the same as successful attempts is counter-intuitive, then a fortiori punishing some unsuccessful attempts more severely than successful attempts is comparatively more implausible.

Of course, a devout Critic may well be unswayed and continue to maintain that outcome luck is irrelevant to deserved punishment even if it entails some unsuccessful attempters deserving greater punishment than successful attempters. But the prospect of punishing, for example, some attempted murders more severely than murder may cause the less committed Critic to lose faith in the position that outcome luck is irrelevant to deserved punishment. And that prospect may also make it more difficult for the Critics to attract converts and appeal to the undecided. Whether the Critics are really willing to maintain that, in some cases, attempted murder deserves more severe punishment than murder supplies an interesting basis to test the firmness of their position. Either way, the Critics' position that outcome luck is irrelevant to deserved punishment entails not merely that, for example attempted murder deserves the same punishment as murder, but also that, in some cases, attempted murder deserves greater punishment than murder.

CONCLUSION

Leo Katz's insight—the relevance to deserved punishment of whether or not an actor acts to prevent harm—provides the foundation for a justification of the greater deserved punishment of successful attempters than unsuccessful attempters that does not rely on outcome luck. Comparison of an unsuccessful attempter who endeavors to prevent the harm of the completed offense from coming to fruition versus a successful attempter who does not, generates the moral intuition that the former

deserves less punishment than the latter apart from outcome luck. This moral intuition is bolstered by, and incorporated in, the legal doctrine that after placing a person or interest in peril, an actor has a duty to take steps to prevent the fruition of harm. The fulfillment of this duty avoids, and its violation incurs, omission liability. As a result, an unsuccessful attempter who fulfills this duty deserves less punishment—for reasons independent of outcome luck—than the successful attempter who violates this duty. Although for some cases fulfillment or violation of this duty justifies completed offenses deserving more punishment than attempts, in other cases it does not—where the successful attempter fulfills the duty and the unsuccessful attempter does not. There, the Critic of the PD might be forced into the implausible position of maintaining that the unsuccessful attempter violating the duty deserves more severe punishment than the successful attempter who fulfills the duty. Whether the Critic is really willing to hold that, for example, an attempted murder deserves more severe punishment than murder supplies an interesting test of the firmness of the Critics' position that outcome luck is irrelevant to the determination of the degree of deserved punishment.