

Harm Matters: Punishing Failed Attempts

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I. INTRODUCTION

For some time now, there has been a lively debate among legal scholars and punishment theorists about the sentences appropriate to certain kinds of failed criminal attempts. The cases in question are contrived in ways to isolate the relevant issues. Often, they involve crimes in which individuals form intentions to kill someone and undertake to do so. They aim rifles at their intended victims and pull the triggers. Some of them hit their intended targets; others shoot but the intended victim moves or a wayward breeze blows and the bullet whizzes on by. We are supposed to imagine, in the latter cases, that no further attempts are made before the police intervene and arrest the failed attempters.

Many scholars, often termed “subjectivists,” insist that the agents in the two scenarios ought to be assigned the same sentences by the courts, although some completed homicides and others only attempted them.¹ The successful and failed killers are alleged to be equally culpable—both had intentions to kill their victims and acted on them. Only luck, a factor beyond the control of the respective agents, determined the different outcomes. To simplify things, we are to imagine that the agents are the same in every other respect that might be thought relevant to sentencing. Thus, things like an offender’s past criminal history—a significant sentencing factor in many legal jurisdictions—are to be held constant in the analysis of the two kinds of scenarios.

Other scholars, often termed “objectivists,” argue that the harms actually done by the “successful” agents ought to be regarded as legitimate, independent factors in sentencing, such that the harm-causing agents should receive longer sentences than the agents who, luckily, did not cause harm.² Objectivists often appeal to the

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¹ The subjectivists include: Richard Parker, *see generally* Richard Parker, *Blame, Punishment, and the Role of Result*, 21 AM. PHIL. Q. 269 (1984); Andrew Ashworth, *see generally* Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Sanford Kadish, *see generally* Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Joel Feinberg, *see generally* Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against it*, 37 ARIZ. L. REV. 117 (1995); and Larry Alexander and Kim Ferzan, *see generally* LARRY ALEXANDER & KIMBERLY FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* (2009).

² The objectivists include: George P. Fletcher, *see generally* GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (2000); R. A. Duff, *see generally* R.A. DUFF, *CRIMINAL ATTEMPTS*

social fact of different emotional and behavioral reactions to the two kinds of agents. Successful murder attempts produce considerable social anguish, grief, and resentment. Failed attempts produce significantly less intense reactions of these kinds. Also, failed attempters might come to view themselves as fortunate and feel great relief at not having actually caused the harm they intended. Successful attempters will or should feel differently about what they have done. These varied reactions to the ultimate outcomes are given weight by objectivists, who argue that they help to make sense of ubiquitous sentencing practices according to which failed attempters are thought to be deserving of less punishment than otherwise similar but successful ones.

Like many of the subjectivists, I remain unpersuaded by appeals to our different emotional reactions to the two kinds of cases. For what is there to convince us that these reactions are not, at bottom, simply irrational? As some scholars have suggested, perhaps these reactions are driven by outcome bias, according to which we naturally, but illogically, attribute more culpability to agents who succeed in producing the harms at which they aim than do agents who fail to produce harm.³ At the very least, we might like to hear more about why such admittedly widespread emotional or behavioral reactions *justify* assigning different sentences to successful and unsuccessful attempters. In particular, how does assigning them different sentences serve appropriate penal aims?

My aim in what follows is to develop and defend an objectivist account that is different from those in the extant literature. It is an account focused on the special significance of harm, and in particular, on its crucial role within what I believe is a plausible theory of sentencing. In Part II, I briefly sketch this theory. It is a version of negative retributivism according to which penal sentences aim to reduce crime within upper and lower proportionality limits that are keyed to victim harm. Importantly, I concede that these proportionality limits must be constructed in ways that reflect the culpability of offenders. Intentional or deliberately inflicted harms are the most culpable and penal harms should take this into account; recklessly or negligently inflicted harms are less culpable and penal harms should be discounted accordingly. Unlike many subjectivists, however, I contend that it is the harms typically wrought by criminal offenses, rather than offender culpability, which play the lead role in determining sentence ranges for core criminal offenses.

In Part III, I examine the implications of the resulting account of sentencing for the debate about whether successful and failed attempters ought to be punished

(1996); Michael S. Moore, *see generally* MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997); Peter Westen, *see generally* Peter Westen, *Why Criminal Harms Matter: Plato's Abiding Insight in the Laws*, 1 *CRIM. L. & PHILOSOPHY* 307 (2007); and Gideon Yaffe, *see generally* GIDEON YAFFE, *ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* (2010).

³ Edward Royzman & Rahul Kumar, *Is Consequential Luck Morally Inconsequential?*, 17 *RATIO* 329, 329–44 (2004); Darren Domsky, *There Is No Door: Finally Solving the Problem of Moral Luck*, 101 *J. PHILOSOPHY* 445 (2004).

differently. My contention is that when harm does not eventuate from criminal attempts, the retributive component of a mixed sentencing theory, in the form of a principle requiring that proportional penal harms ought to be visited upon offenders, does not get activated. Failed attempters have not inflicted harm; to then inflict penal harms on them proportional to the harms caused by successful attempters would be anomalous. Instead, we punish failed attempts primarily to deter them or to incapacitate those who have undertaken them.

In Part IV, I consider various objections to my account. One common strategy of subjectivists is to focus on the equal culpability of successful and failed attempters.⁴ I argue that this misconceives the role of culpability in a theory of sentencing. The harms done to victims or society are what ought to matter in determining criminal sanctions; culpability is a qualifying factor in sentencing—nothing more. I also argue against recent efforts by Larry Alexander and Kim Ferzan to denigrate the role of harm in our thinking about how to punish failed attempters.⁵ In the course of doing so, I discuss “impossible attempts” and their implications for the debate between objectivists and subjectivists.

II. HARM MATTERS

I begin with the proposition that it is harm to our vital interests, in various forms, that the criminal law seeks to prevent and, when it is wrought through culpable action, punish. In many cases, these harms are individual in character—loss of life, physical or psychological injury, or loss of or damage to property. In other cases, the harms to be prevented by the criminal law are more indirect, as when the criminal law prohibits actions that contribute to aggregate harms, such as environmental degradation, or when it punishes actions that are contrary to mutually beneficial schemes of cooperation. Of course, the criminal law prohibits and punishes not only actions that actually inflict harm, but ones that unreasonably risk it. What the criminal law does not do is punish people merely for their malevolent intentions or earnestly hoped-for deadly or damaging outcomes. Individuals can spend their days beseeching the gods for suffering to be inflicted upon their enemies, or plotting elaborate schemes to exact revenge upon them, but such mental activities are not properly within the ambit of the criminal law unless they are manifested in one or more overt actions designed to unleash destructive forces in the world. On this point, about the punishment of failed attempts, subjectivists and objectivists are presumably in agreement. We should not punish people for bad intentions or bad characters, only for actions that cause or unreasonably risk harm.

It will be useful in thinking about sentencing to begin with Andrew von Hirsch’s well-known account of legal punishment, according to which it has two

⁴ See, e.g., ALEXANDER & FERZAN, *supra* note 1, at 171.

⁵ See ALEXANDER & FERZAN, *supra* note 1, at 171–96.

essential components: censure and hard treatment.⁶ It censures by communicating societal condemnation of prohibited acts. This communicative message goes not only to offenders, who are deemed capable of grasping its stark assessment of their moral failings, but also to victims, who thereby see society standing for their interests, and the public, which is reminded of signally important limits on the actions in which they are permitted to engage.⁷ Von Hirsch interprets the censure element as retributive in character, insisting that it must be tailored to reflect the ill-deserts of offenders. He construes hard treatment as primarily concerned with preventing future crimes. On his account, legal punishment “speaks” to us both as moral creatures (through its censuring aspect) and as fallible moral creatures who might need the threat of some penal harm or setback to serve as a prudential or incapacitation backup.⁸

There is much to admire in von Hirsch’s elegant blending of retributive and crime reduction aims to legal punishment, and I believe that a plausible theory of sentencing must blend them. However, I interpret and blend them differently. Crime reductionists have long sought to make sense of legal punishment’s censuring aspect, interpreting it as a way of reinforcing vital moral norms against certain kinds of misconduct.⁹ By condemning criminal acts, legal punishment reminds each of us of the importance of these norms. To the extent that this message is internalized, individuals refrain from harmful conduct all on their own, thus reducing the need for socially costly and individually damaging criminal sanctions.

More importantly for my purposes, retributivists offer various accounts of why the hard treatment of offenders is justified.¹⁰ What these accounts share is the notion that censure is expressed through the imposition of hard treatment, which must be kept proportionate with the severity of crimes. The severity of crimes is determined by the harms they cause (or perhaps risk) and the culpability with which agents act.¹¹ Retributivists do not view hard treatment as a prudential supplement to censure; instead, they construe hard treatment as a vehicle for justice. Also, on what I believe are the most convincing retributive accounts, hard treatment serves a kind of rough equalizing purpose. Through their criminal

⁶ ANDREW VON HIRSCH, CENSURE AND SANCTIONS 9–14 (1993).

⁷ *Id.* at 10–11.

⁸ *Id.* at 13.

⁹ See Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 961 (1966); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 72 (2005).

¹⁰ See, e.g., Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968); MOORE, *supra* note 2, at ch. 7; Jean Hampton, *A New Theory of Retribution*, in LIABILITY AND RESPONSIBILITY 377 (R.G. Frey & Christopher W. Morris eds., 1991); R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY xii–xv (2001).

¹¹ As will become apparent, I believe that retributive accounts of hard treatment make more sense in relation to so-called *male in se* than in relation to so-called *mala prohibita*.

actions, offenders disrupt a normative status quo, inflicting unjustified injuries or losses on those who are their victims. In response, legal punishment imposes proportional penal losses and disabilities on offenders. Granted, it can do so, in some cases, simply by requiring offenders to act in ways to make their victims whole again. Yet many of the harms wrought by criminal offenses—loss of life, permanent disability, degradation, loss of privacy, a diminished sense of security—cannot be restored through financial or other compensation. The only “equalizing” recourse is to impose proportionate penal harms on offenders.

It will be useful, at this point, to introduce the distinction between ordinal and cardinal proportionality in order to clarify the retributive account of hard treatment.¹² The former concerns the relative severity of penal harms: murderers, because they inflict the gravest of harms on their victims, must be punished more harshly than bank robbers or shoplifters. Contriving a sanction scale so that it is ordinally proportionate, and thus reflective of the relative severity of the various criminal offenses, is challenging, but most penal theorists believe it is a challenge that can be met.¹³ Cardinal proportionality presents greater difficulties. It concerns the absolute severity of the penal sanction scale—or what von Hirsch refers to as its “anchoring points”—and it is less clear whether there are widely-shared intuitions about how harsh or mild sanction scales should be overall.¹⁴ Indeed, it is apparent that different societies anchor their sentencing scales in various ways, with the United States scale at the harsh end of things, and Scandinavian countries at the milder end.¹⁵ Cardinal proportionality might place only very broad constraints on sentencing. We might all agree that punishing shoplifters like murderers is not only ordinally unjust, but cardinally, or absolutely unjust. Yet not all cases will be as easy as this one. Hence, the most plausible interpretation of cardinal proportionality is one that permits some variability in the overall “punishment bite” of sentencing scales.

Once it becomes apparent that retributive approaches do not have a monopoly on explaining how legal punishment censures, and that crime reduction approaches do not have a monopoly on explaining hard treatment, we are back to the drawing board, so to speak, in attempting to determine whether one of these approaches is preferable to the other, or whether we ought to combine them in some way. For a variety of well-known reasons, I believe that the most defensible approach is to combine them in ways that yield a version of what is known as negative (or

¹² For discussion of ordinal and cardinal proportionality, see VON HIRSCH, *supra* note 6, at 18–19.

¹³ For empirical evidence that there is widespread agreement among persons regarding the ordinal ranking of crime seriousness, see Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV 1829 (2007).

¹⁴ See Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 79–83 (1992).

¹⁵ See John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess, Part I: The Nature and Roots of Scandinavian Exceptionalism*, 48 BRIT. J. CRIMINOLOGY 119, 130 (2008).

limiting) retributivism.¹⁶ Negative retributivism embraces a crime reduction role for legal punishment, though one that is constrained by retributive considerations. As in familiar versions of the theory, there must be upper proportionality constraints on the severity of criminal sanctions that otherwise aim at reducing crime. Presumptively, we should not inflict more than proportional penal harms on offenders even if crime reduction considerations would counsel us to do so.¹⁷ Rather than casting this proportionality constraint as a mere stipulation limiting the pursuit of crime reduction aims, I contend that it is grounded in a commitment to keeping penal harms from exceeding the harms done to victims or society by criminal offenses. In accordance with the rough equalizing aim of retributive penal logic, sanctions must be kept responsive to the gravity of the wrongdoing engaged in by offenders or else offender interests will be unjustly set back by criminal sanctions and thereby devalued. Punishing burglars like rapists or murderers, for instance, inflicts penal losses and disabilities on burglars that are ordinarily disproportionate given the harms typically caused by their respective crimes. Also, depending on the severity of the sanctions imposed, they might turn out to be cardinally disproportionate, exceeding any plausible version of what burglars deserve given the harms typically wrought by their criminal actions.

Further, we should opt for a version of negative retributivism that employs a retributive constraint at the lower end of the sentence ranges for crime types. This means that even if crime reduction considerations would not, for some reason, require the infliction of proportional penal losses or disabilities on offenders of certain kinds, we must be prepared to impose them if considerations of proportionate penal harm require it. Again, though a retributive account of hard treatment must be interpreted in ways that acknowledge the indeterminacy of cardinal proportionality, moderate to severe criminal offenses that harm victims substantially must be punished with sanctions that impose significant penal losses and disabilities on the person convicted of having committed them. Just as legal punishment for offenses can be too harsh, by taking much more from offenders than they took from their victims, so it can be too mild by taking too little from offenders. A large fine or a brief prison sentence for a crime as serious as intentional homicide, for instance, would slight the grave harm to the victim. Indeed, I doubt that we can make sense of victim or survivor anguish and frustration with the criminal justice system in cases in which it fails to punish

¹⁶ For the classic discussion of negative retributivism, see J. L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in *PHILOSOPHY OF LAW* 677 (Joel Feinberg & Hyman Gross eds., 1991). For a more recent discussion, see Richard L. Lippke, *Some Surprising Implications of Negative Retributivism*, 31 *J. APPLIED PHILOSOPHY* 49 (2014). For a discussion of “limiting retributivism,” see RICHARD S. FRASE, *JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM* 11–12 (2013).

¹⁷ This presumption might be rebutted in cases in which we have good reason to believe that an agent is wholly unresponsive to moral considerations or so fanatical in the pursuit of violence against the innocent that forms of preventive detention are in order.

serious wrongdoers proportionally with the gravity of their crimes without accepting the plausibility of a retributive element in sentencing. One of the crucial things persons who are criminally harmed in significant ways by others want, or what their loved ones want, is justice, understood as proportionate punishment of those who committed severe wrongs; this is consistent, of course, with their also wanting punishment to deter or incapacitate.¹⁸

Crime reductionists argue that we punish serious crimes more harshly in order to deter them or incapacitate those who commit them. Perhaps, except that it is well-known that harsher sanctions are not strongly correlated with marginal deterrence.¹⁹ It seems doubtful that lengthy prison sentences are all that useful in deterring many would-be offenders, including would-be murderers. Indeed, von Hirsch, who defends hard treatment primarily on preventive grounds, urges no more than five-year prison sentences for most deliberate homicides, precisely because of the dubious marginal deterrence effects of longer sentences.²⁰ If we are to punish deliberate murderers more stoutly than von Hirsch proposes, as I believe that we should, something other than a deterrence rationale likely will be needed.

In response, crime reductionists might champion incapacitation as the ground for longer sentences. But many deliberate murderers, for instance, are probably not a danger to others, since they kill people close to them over personal conflicts that are unlikely to recur.²¹ Add to this the aging out effect, and lengthy sentences for serious crimes seems like a questionable crime reduction strategy if the costs and burdens of legal punishment are to be weighed against its benefits.²² Without a retributive sentencing element of the sort my version of negative retributivism incorporates, it will prove difficult to justify inflicting substantial penal losses and disabilities on offenders who have caused grave harm to their victims. Longer sentences are needed in order to inflict proportionate penal losses on serious offenders and thereby afford justice to victims, not simply to reduce crime.

Nonetheless, crime reduction considerations might figure in such a negative retributivist scheme in at least three different ways. First, ordinal proportionality is consistent with having sentence ranges for offense types, thus leaving sentencing judges with some discretion in assigning sentences for offense tokens.²³ Judges

¹⁸ See Uli Orth, *Punishment Goals of Crime Victims*, 27 *LAW & HUM. BEHAV.* 173 (2003).

¹⁹ See Anthony N. Doob & Cheryl M. Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 *CRIME & JUST.* 143, 143–44 (2003); ANDREW VON HIRSCH ET AL., *CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH* 1–2 (1999).

²⁰ VON HIRSCH, *supra* note 6, at 43.

²¹ See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 16 (1997) (noting that a substantial portion of homicides “grow out of arguments and other social encounters between acquaintances”).

²² See Daniel S. Nagin, *Deterrence and Incapacitation*, in *THE HANDBOOK OF CRIME & PUNISHMENT* 345, 364 (Michael Tonry ed., 1998).

²³ For one elaboration of this, see FRASE, *supra* note 16, at ch. 1.

should be permitted to assign sentences in the relevant ranges based on empirically-verified crime reduction considerations, such as the need to incapacitate certain offenders. Second, given that cardinal proportionality is, at best, loosely constraining, there might be some role for crime reduction considerations to play in moving a sentencing scheme's anchoring points upwards or downwards. For instance, if offending in a given society has significantly increased, and the existing sentencing scheme seems unable to tamp it down, we might be justified in bumping sentences up overall to see if doing so would induce more compliance with the law. Of course, by the same token, if the existing scheme seems too costly and damaging to offenders, and we are convinced that reducing sentences overall would be unlikely to produce a significant uptick in offending, then we might move the anchoring points down and thereby opt for a milder scheme (so long as doing so could not reasonably be seen as denigrating victim interests). Third, and most controversially, I am increasingly persuaded that most *mala prohibita* are punished not to inflict proportional penal harms on offenders—there might, after all, be no victims of such offenses—but to deter their commission. This means that sanctions for such offenses must be designed so that they are sufficient to deter, yet not so costly or harmful as to outweigh their benefits. With *male in se*, there are victims, or would-be victims, and so considerations of proportional penal harm are relevant to determining the sentences for such offenses. The question we now turn to is whether there should be distinctive sentence ranges for “successful” and “unsuccessful” attempts to commit prohibited harmful acts.

III. PUNISHING FAILED ATTEMPTS

Again, in addition to the harm wrought by agents whose actions fall under the purview of the criminal law, retributive proportionality analysis standardly requires the level of offender culpability to be taken into account. When harm is caused by an agent in the complete absence of culpability, as with accidental harms, then legal punishment, with its censure and hard treatment, is inappropriate. But one can easily imagine that at some earlier point in human history, the impulse to return harm for harm might have led our ancestors to strike back vengefully at accidental harmers. Reduced or absent culpability, as a crucial qualifying factor in the infliction of legal punishment, might be a relative latecomer to the punitive stage.²⁴ Moreover, harmers who inflict injuries or death non-culpably often are plagued by feelings of guilt afterwards, even if such feelings are entirely irrational

²⁴ For a brief account of the emergence of culpability as a sentencing factor and its largely unsystematic character until the 19th century, see Ronald Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575 (1988).

given the circumstances of the harm.²⁵ This suggests how much harm and the avoidance of harm matter to us.

Failed attempters who do no harm are at the other end of the spectrum from accidental harmers. Their actions are highly culpable but produce no harm. Initially, given my account of the role of retributive proportionality in a theory of sentencing, the puzzle might seem to be why we punish them at all. Why not adopt the maxim “no harm, no foul?” Yet it is not only actually causing harm that we seek to discourage and punish, but risking it (and in the cases under consideration, risking grave harm at a high degree of probability). Negative retributivism, which incorporates a crime reduction role for legal punishment, can accommodate this point more easily than can positive retributivism. It might be claimed that agents who risk or attempt harm are, nonetheless, highly culpable and so deserving of punishment. Perhaps, though as we shall see, such an account depends on a controversial construal of the notion of “culpability.”

This brings us to the crux of my argument concerning the punishment of failed attempts. If retributive hard treatment is premised, as I believe it is, on the notion that we must key penal harms to victim harms, it would appear that such a proportionate harm principle is not activated when there are no victim harms. The victims in such cases suffer “close calls,” but might suffer little real harm. Granted, they might be traumatized by their close calls, but this will, at most, justify only the infliction of relatively mild penal harms on those who sought to harm them. Simply put, in cases of failed attempts, there is nothing, or perhaps very little, for retributive hard treatment to equalize. My sense is that we punish acts that attempt or risk harm in order to prevent them. Yet, as we have seen, crime reduction can be achieved in such cases without sanctions that punish failed attempters as harshly as we punish successful ones.²⁶ Yes, we want to discourage and perhaps incapacitate those who attempt murder yet who fail to produce any harm, but we probably do not need to assign them prison sentences comparable to those of successful murderers to accomplish these penal aims.

Conversely, when victims are harmed, the retributive proportionate harm principle is fully activated. Hence, even if on crime reduction grounds it might not make any sense to punish successful and failed attempters differently—as theorists on both sides of the objectivist/subjectivist divide have sometimes argued—the presence of the proportionate harm principle requires us to inflict substantial penal harms on offenders who have taken everything from their victims.²⁷

One way in which to drive home the intuition on which my account is based is to consider what it would be like to punish failed attempts equivalently with successful ones. Suppose that we believed that highly culpable murderers

²⁵ MOORE, *supra* note 2, at 192. See also Bernard Williams & T. Nagel, *Moral Luck*, 50 PROC. OF THE ARISTOTELIAN SOC'Y 115 (1976).

²⁶ See VON HIRSCH, *supra* note 6, at 43.

²⁷ See Ashworth, *supra* note 1, at 737–38; DUFF, *supra* note 2, at 122.

warranted the death penalty. Subjectivists then would be committed, it seems, to assigning it to failed attempters. This would mean that after many years of the inevitable appeals of the sentence, the failed attempter would be escorted to the execution chamber. Among the observers might be his intended but very-much-alive victim. Surely there is something wrong with this picture. It would not help much to imagine that attempted murderers should be subjected to sentences of life without parole, like their successful murdering counterparts, or even to very long prison sentences. We would still have the specter of the attempter languishing for the rest of her life in prison, or for most of it, while her intended victim enjoyed a long, normal life. On a version of negative retributivism that incorporates a principle of imposing proportionate penal harms for culpably inflicted victim harms, punishing failed attempts as we punish successful ones seems paradoxical. What makes sense is accepting a compromise: we should punish failed attempters less than successful ones, although enough, presumably, to censure their wrongdoing and strongly discourage it.

The counter-intuitive nature of subjectivism can be shown in another way. Again, subjectivists hold that failed homicide attempts ought to be punished equivalently with successful ones when all other relevant sentencing features are held constant. This means, it would seem, that subjectivists are also committed to punishing failed homicide attempts more than aggravated assaults, at least on the assumption that homicide is a more serious crime than aggravated assault. Some aggravated assaults leave victims profoundly and permanently disabled. Assume that in some such cases, the perpetrators were not intending to kill their victims, only injure them badly. Subjectivists would have to support less punishment for such vicious maulers than for those who attempt but entirely fail to kill persons. Yet it seems odd to punish more harshly someone who inflicts little or no harm on an intended victim, as some failed attempts do, than someone who intentionally inflicts debilitating, lifelong injuries on a victim. Yet it is not apparent how subjectivists, who downplay the role of harm in sentencing, can avoid this implication.

It might be objected that, in cases of failed attempts, as in cases of successful ones, we ought to employ legal punishment to retributively stand for or validate the interests of victims.²⁸ Those who were the intended objects of failed attempters' murderous intentions might complain bitterly if the state imposed legal sanctions on attempters that amounted to little more than proverbial slaps on their wrists. "Look what almost happened to me," they might protest. Does this not show that the proportionate harm principle ought to be activated by failed attempts? I do not believe that it does. First, such an essentially communicative version of retributivism struggles to explain hard treatment. On retributive accounts, legal punishment does communicate, but it does so through the imposition of

²⁸ This objection depends on something like Jean Hampton's account of retributive punishment. Hampton, *supra* note 10, at 402.

proportionate penal harm on offenders. The difficulty is explaining why legal punishment should inflict penal harms when victims suffer no harm. Second, my position is not that failed attempters should not be punished at all, only that they should not be punished equivalently with actual murderers. Sanctions aimed at deterrence or incapacitation will still censure offenders and validate the interests of their victims. But dead victims require the imposition of considerably more censuring hard treatment on offending agents, for such victims have not “almost” lost everything. They have, in fact, lost everything.

Importantly, the absence of harm, and with it the non-activation of the retributive proportionate harm principle, better explains why we punish failed attempters differently from successful ones than do the appeals by many objectivists to our emotional reactions to the two kinds of attempts. One problem with such appeals is that it is easy to imagine cases in which the public’s emotional reactions to failed attempts might work to support punishments equivalent to or greater than those for successful ones. Much might depend on the popularity of the targeted victim or the unpopularity of the unsuccessful attempter. Racial, ethnic, gender, or class prejudices might influence the emotional reactions of the public, or the largest or most powerful segments of it, producing harsher sentences for some failed attempters than others. Also, objectivist appeals to the relief that failed attempters ought to experience when their intended targets emerge unscathed likewise seems a shaky ground for such discounts when failed attempters do not, in fact, react as they should. Some failed attempters will not feel relief; they will be chagrined that their attempts miscarried and vow to renew them should they ever get the chance. It is hard to see how failed attempters of that kind would be entitled to any sentencing discount based on their emotional reactions to their failures.

Peter Westen has recently defended a different objectivist account, which he attributes to Plato.²⁹ According to Westen’s account, failed attempters do not deserve reduced sentences but might be granted them as a matter of virtue or supererogation.³⁰ Because failed attempters do not actually harm their intended victims, we feel somewhat more kindly toward them than we do toward successful ones. Subjectivists are apt to regard such charitable impulses as misguided. I worry that such virtuous reactions might manifest only in some cases of failed attempts, not all of them.³¹ Again, whether or not the public feels more kindly toward failed attempters than successful ones will likely depend on the identity of their intended targets or of the attempter.

On my account, lesser sentences for failed attempters do not depend on the public’s or offenders’ emotional reactions to their crimes. Instead, they depend on the absence of victim harm and thus the non-activation of the retributive

²⁹ Westen, *supra* note 2, at 314–18.

³⁰ Westen, *supra* note 2, at 317.

³¹ Westen, *supra* note 2, at 318.

proportionate harm principle according to which penal harms must be proportionate with victim harms. Specifically, those who try to kill others but entirely fail to do so should be charged with attempted homicide and punished less than their successful homicidal counterparts.

IV. FURTHER OBJECTION AND REPLIES

Numerous objections to the account I have defended can be anticipated. One of them begins by reminding us that retributive accounts of sentencing are supposed to proportion legal punishment to the ill-deserts of offenders. The more deserving of legal punishment offenders are, the more they should be punished. Yet successful and failed attempters are equally deserving: both have malevolent (and illegal) purposes and both act intentionally to set into motion causal chains that they have reason to believe will eventuate in harm.³² Thus, it will be argued, even a negative retributivist account, such as my own, should, presumptively at least, insist on the equal punishment of the equally culpable.

I contend that the account of retributivism implicit in this criticism is too focused on culpability as a sentencing factor in ways that sleight the importance of harm. Again, on retributive approaches to sentencing, legal sanctions should be keyed to victim harm; culpability is then brought in as a qualifier, one that can, in some cases, make legal punishment inappropriate though agents have caused grave harm. Generally speaking, culpability has to do with the extent to which a harm-causing agent exercises control over producing the harm.³³ Deliberate harmers exercise more control than do reckless or negligent harmers. Deliberate harmers attempt to see to it that the necessary and sufficient conditions of harm production are satisfied. Reckless or negligent harmers simply raise the risks that others will suffer setbacks to their interests, with the former doing so to a greater extent or with greater indifference than the latter. Notice this also: if culpability in this narrow sense determined sentences, then all deliberate harmers would have to be punished similarly, regardless of the harms they inflicted, for all of them exercised the same amount of control over whatever harms they produced. The same would be true for all reckless harmers. This suggests that it must be harm of different kinds and degrees that is the key to determining sentences on a retributive account. Once sentence ranges are set with regard to the kinds and degrees of harm, with deliberate causation of harm taken as the starting point, those who harm recklessly or perhaps negligently then receive discounts in light of their reduced control over the harmful consequences of their acts.

In response, it might be claimed that there is a straightforward sense in which those who attempt murder are more culpable than those who attempt assault or

³² See, e.g., Ashworth, *supra* note 1, at 736–37; Kadish, *supra* note 1, at 686–95; ALEXANDER & FERZAN, *supra* note 1, at 172–78.

³³ See HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 87–88 (1979).

theft and should be punished accordingly. I concede that sometimes the word “culpability” is used in this way. When it is, it contains implicit reference to the harms that the agents in question were setting out to produce. I would also concede that, prospectively, successful and failed murder attempters are “equally culpable” or blameworthy. They both set about deliberately attempting to produce grave harm. The problem is that, on a retributive approach, legal punishment is not determined prospectively but retrospectively. To determine what punishment an offender is due, we should not focus only on what he set out to do but what he actually did. Failed attempters did not produce the harms they set out to produce. Therefore, we do not need to impose proportionate penal harms on them in order to do justice to the harms done to their victims’ lives and interests—victims who, after all, have emerged largely if not entirely unscathed.

It might be objected that the theory of sentencing on which my analysis depends seems awkward in cases in which significant harm is wrought by offenders who are less than fully culpable. Specifically, if we punish those who recklessly harm less than those who purposefully do so, how does this serve to impose penal losses on offenders that are proportionate with the losses suffered by their victims? It would seem that having culpability as an element in retributive sentencing is somewhat at cross purposes with giving victim harm its full and proper due. Further, we do not punish those who harm others if they do so accidentally; neither do we usually punish those who inflict harm negligently. Instead, we generally prefer to let the victims of negligently-inflicted harms attempt to recover compensation through tort suits. Culpability up to a certain level—usually the level of recklessness—is a necessary condition of appropriate liability to legal punishment. Does this not suggest that culpability plays a more central role in sentencing than my emphasis on harm allows?

There is no use denying that, on my account, crimes that recklessly inflict harm should be punished less than crimes that purposefully inflict it. Of course, those who recklessly harm will still be punished and the severity of their punishment should reflect the gravity of the harms their actions produced. Such punishment therefore will be proportionate, even if it will not be roughly equalizing in the ways that retributive hard treatment is supposed to be. Victims (or their loved ones) might feel somewhat cheated or disappointed by this, but it is vital to point out that those who inflicted the harms imposed unjustified risks of harm but did not purposefully set out to harm. With purposeful harming, no reduced culpability discount should be applied and thus stronger condemnation in the form of more punishment is in order. Also, individuals who have been harmed through the recklessness of others can still pursue civil remedies in the attempt to force harm-causing agents to compensate them.

Granted, in the absence of culpability, or sufficient culpability, no punishment of harm-causers is appropriate, and this is true even if victims have been caused grave harm. Yet this does not show that culpability is more central to determining appropriate legal punishment than my position acknowledges. True, a harm-causing agent’s conduct must be culpable up to a certain level to qualify for legal

punishment. But again, it is the harm done or risked by agents that is the starting point for determining their legal punishment. Culpability alone is nearly useless in determining the extent to which crimes are to be punished. This is hardly surprising given that questions about the extent to which harm was caused purposefully, recklessly, or negligently are pertinent to a wide range of criminal offenses that threaten harm in different ways and to different degrees and so must be punished differently.

Larry Alexander and Kimberly Ferzan have recently challenged objectivists, concocting several ingenious analogies that they believe show the irrelevance of harm to the punishment of attempts.³⁴ In the most successful of their analogies, the leaders of a Satanic cult set up a sort of Russian Roulette which involves inviting cult initiates to each take a turn shooting a rifle through a small aperture at some innocent victim who is strapped to a chair. The catch is that all of the initiates, save one, will be shooting blanks. Only one of them will do the actual killing. Alexander and Ferzan stipulate that the initiates are not acting in concert; each acts independently in shooting the rifle, though each knows that there is a chance that it contains a live round that might kill the person strapped to the chair. At the conclusion of the initiation ritual, the victim is dead. Suppose that the initiates are arrested, charged, and punished for what they did. Alexander and Ferzan argue that the only sensible thing to do would be to charge and punish them all alike. They all equally imposed a grave risk of death and, moreover, did so believing that they might be unleashing a causal chain that could produce the victim's death. The fact that only one of them actually caused the harm is, they argue, irrelevant for the purposes of determining their respective punishments.

Though intriguing, I do not think that Alexander and Ferzan's analogy is convincing. The analogy involves a case of unreasonably risking grave harm, as opposed to intentionally attempting to inflict it. Alexander and Ferzan would presumably argue that this does not matter, since it is not the level of culpability of the agents on which we are meant to focus, but the (alleged) irrelevance of the harm in determining the punishment that each should be assigned. I would agree that if the authorities are unable to determine which of the shooters had the live round, then they should all be charged and punished similarly. With what they should be charged is a bit less clear. The answer might depend on what the participants knew or reasonably believed about the outcome of the ritual. In particular, did each of them know or reasonably believe that, at the end of the

³⁴ ALEXANDER & FERZAN, *supra* note 1, at 172–78. Alexander and Ferzan's second analogy, involving two children who, after being admonished not to risk slight harms, do so with the result that only one of them produces the harm, seems to me less instructive. Our intuitions about what it shows are apt to be clouded by the differences between the parent/child relationship and the state/citizen one. Also, the triviality of the harm makes it harder to determine whether the two children ought to be punished differently. Finally, it is unclear from the analogy whether they act separately or in concert in defying the parent's commands. This will make a difference to how we evaluate their liability to parental punishment.

ritual, one of them will have fired a live round thereby gravely endangering the person in the chair? Or did they know or reasonably believe only that each of them was firing a rifle that might contain a live round but that death or grave injury to the person in the chair was not inevitable, as it were? In the former case, charges of reckless homicide might be appropriate; in the latter case, charges of reckless endangerment might seem more defensible. Alexander and Ferzan stipulate that the shooters are not acting “in concert,” but it is unclear what they do or do not know about the likely outcome of the ritual. In any event, their reasoning seems persuasive if the authorities cannot determine who, in fact, fired the live round.

However, what if the authorities could discern which of the initiates fired the live round? Suppose that just as the shooter who happened to have the live round was pulling the trigger and killing the victim, the police arrive on the scene. Having witnessed the killing, the police arrest the shooter and turn the case over to the prosecutor, who charges the shooter with homicide. Suppose also that as the police investigation continues, they discover that a number of other individuals took shots at the victim believing that they were shooting live rounds, although none of them were actually doing so. The police then arrest the other initiates as well and turn their cases over to the prosecutor. The question is with what should the prosecutor charge them. Homicide? That might make sense if they were acting in concert and they each believed that, at the conclusion of the initiation ritual, it was nearly certain that the victim would be dead. Yet if each of them believed only that there was a chance she was shooting a live round and it was unclear to each of them whether anyone actually had one, then charging them with reckless endangerment might seem more appropriate. In effect, the non-lethal shooters would be like drunk drivers who luckily avoid hitting and killing anyone. Further, once apprised of the nature of the ritual, the prosecutor might revise the charges against the live shooter who actually killed the victim down to something like reckless homicide. The question is whether the prosecutor would be acting irrationally in so distinguishing between the live shooter and the other initiates. Alexander and Ferzan would have us believe so (and, no doubt, the live shooter’s attorney would agree with them). After all, each of the participants did the same thing with the same belief that she was risking killing the victim.

I am not persuaded that the prosecutor would act unreasonably in charging the live shooter differently from the other initiates. If pressed, the prosecutor might argue that the live shooter did something different—she actually killed the victim. The other initiates merely risked grave harm. Granted, the other initiates were lucky, but there is nothing obviously unfair about punishing more stoutly someone who knowingly risks legally prohibited harm and then, unluckily, causes it. To be clear, my argument is not one to the effect that since most legal jurisdictions punish harm-causers more than harm-riskers, therefore the former are on notice, so to speak, that they will receive harsher punishment. Such an argument would beg the question against subjectivists like Alexander and Ferzan; they are claiming that such legal practices, though ubiquitous, are unjustified. Instead, my argument is that harm to victims changes things; in response to it, legal punishment must be

tailored to inflict proportionate penal harms on offenders. Moreover, harm-riskers can and should be put on notice that this is true; if the harms they risk eventuate, then they can hardly complain of unfairness, especially if they are punished proportionally with the gravity of the harms they inflict. True, the live shooter in the Satanic ritual case just got unlucky compared with her initiate counterparts. But her unluckiness produced a victim and this activates the proportionate harm principle, just as the drunk driver who kills someone gets unlucky and has to pay a stiffer punitive price.³⁵

If this seems unconvincing, then consider a modified version of the analogy in which each of the shooters is told by the cult leaders that they might be shooting a live round when, in fact, none of them actually is. After all, being prepared to shoot what he believes to be a live round might suffice to convince the cult leaders of an initiate's worthiness for membership. If the ritual was discovered by the authorities, would Alexander and Ferzan have the authorities charge the initiates with reckless endangerment, or worse, reckless homicide? All who pulled the trigger engaged in an act which they believed could result in the death of the targeted person. In other words, all of them had a culpable state of mind and acted to initiate what he or she believed to be an uncontrollable casual chain. If harm does not matter, as Alexander and Ferzan contend, then I do not see how they can avoid drawing the conclusion that all of the impossible shooters are "guilty" of reckless homicide. After all, each of them acted intentionally in a way that persons who recklessly endanger others and wind up killing them act. Yet such a conclusion surely strains credibility.

The preceding case is an instance of what are known as "impossible attempts." In impossible attempts, offending agents have malevolent intentions, combined with mistaken beliefs about the efficacy of the means they employ to effectuate them. The mistaken beliefs can range from the bizarre—persons who believe that voodoo can be employed to torture those whom they despise and wish to harm—to the more mundane—persons who intend to kill their spouses purchase baking powder from undercover police officers, believing it to be cyanide, which is then used in "poisoning" attempts. Theorists who elevate culpability over harm would seem to have a difficult time explaining why we should not punish agents who impossibly attempt homicide exactly like those who fully achieve it. Indeed, many subjectivists argue that the two kinds of agents should be punished the same.³⁶ Yet this seems an unattractive position to defend, given that impossible attempters not only do no harm but could not do so, given their mistaken beliefs. It does not follow that we should do nothing with or to impossible attempters. How we should react to them might depend on the origins of their mistaken

³⁵ The rite's organizers should be charged with deliberate homicide, at least on the supposition that they set up the rite knowing that it would produce the killing of the victim. They did more than recklessly cause a death; they intentionally caused it.

³⁶ ALEXANDER & FERZAN, *supra* note 1, at 194–95; Ashworth, *supra* note 1, at 758–59.

beliefs. Those who, for instance, incompetently assemble bombs that they then try to detonate might be punished like other attempters who fail due to factors beyond their control. After all, it is not to the credit of incompetent bombers that they failed to blow up their intended targets, any more than it is to snipers who miss their targets because the wind blows their bullets off target. Others who attempt homicide, such as deluded agents who believe that nerf guns are deadly weapons, might best be dealt with through civil commitment proceedings.

It might be thought that subjectivists can evade the problem posed by impossible attempts by adopting some form of rationality constraint on the beliefs that render agents liable to full legal punishment. Again, subjectivists typically argue that it is what homicidal agents believe and intend that renders them culpable, not whether their beliefs are true or otherwise grounded in reality.³⁷ It is this feature of their view that opens them up to the objection that deluded or utterly mistaken homicidal agents must be punished equivalently to otherwise lucid homicidal agents. But perhaps subjectivists can avoid such a position by insisting that, in order to be liable to full legal punishment, homicidal agents' beliefs must be "minimally rational." Such a constraint might enable them to avoid holding that voodoo and nerf gun "killers" ought to be punished like real killers.

Setting to one side the difficulties with specifying the relevant constraint more precisely, the problem is that it will not enable subjectivists to argue against the full legal punishment of other impossible attempters. The agent who believes that she is shooting real bullets at her hated rival, instead of blanks, might well have beliefs that are "minimally rational," as might the agent who believes that he is purchasing cyanide from reputable dealers, rather than undercover police officers. Blanks might look just like real bullets such that only those more knowledgeable about weapons and ammunition can tell the difference. Likewise, the prospective cyanide killer might have little reason to doubt the veracity of the agents who sell him the baking soda. Again, my position is not that these impossible attempters should not be punished, only that it is far from clear that they ought to be punished the same as actual murderers.

V. CONCLUDING REMARKS

Many penal theorists will remain skeptical about the retributive element in my account of sentencing, regarding it as little more than what Jean Hampton once termed a "bite back" response.³⁸ It might be useful to note that one can embrace it without endorsing *lex talionis*, capital punishment, or many of the other harsh and

³⁷ See Ashworth, *supra* note 1, at 757; ALEXANDER & FERZAN, *supra* note 1, at 194–95.

³⁸ Jean Hampton, *Forgiveness, Resentment, and Hatred*, in FORGIVENESS AND MERCY 35, 54 (Jeffrie G. Murphy & Jean Hampton eds., 1988).

lengthy forms of punishment employed in countries like the United States.³⁹ I believe that it is also fair to say that some existing sentencing schemes exceed retributive upper limits by failing to take into account the myriad and sometimes subtle ways in which legal punishment diminishes offenders' lives. Nevertheless, for those prepared to do entirely without a proportionate penal harm principle in a theory of sentencing, then little that I have said in the preceding pages will convince them that failed attempters ought to be punished less than their successful counterparts. Yet foregoing proportionality constraints in an account of sentencing, or including them but leaving them unexplained, seem to be unattractive options. In fact, most subjectivists appear to assume some version or other in their analyses of the punishment of failed and successful attempts. This is shown by their repeated assertions that successful and failed attempters deserve the same punishment.

³⁹ For more on this, see Richard L. Lippke, *Anchoring the Sentencing Scale: A Modest Proposal*, 16 THEORETICAL CRIMINOLOGY 463 (2012).