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

Russell L. Christopher\*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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5. *Ibid.*, p. 271-74.

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

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

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

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

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

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

