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Risking Wrongdoing and Changing Your Mind

ABSTRACT: Sometimes you risk contributing to a wrongdoing occurring in ways that are themselves wrong. Some would however say that you have not (yet) done anything wrong, just so long as you retain control over whether or not the wrongdoing occurs. There may be good pragmatic reasons for legal codes to be written in that way, but morally there are no good principled reasons for – and strong ones against – endorsing that view.

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Schlagworte: Gefahr fehlerhaften Verhaltens – Veränderung des Bewusstseins – Preisgabe – Verzicht auf kriminelle Absichten

1.

Taking a risk of doing something that might turn out to be wrong may not itself always be wrong. But it certainly *can be* wrong. In the US law of negligence, for example, risk-taking is deemed ‘unreasonable’ – and hence wrong – if the probability-weighted costs that you risk imposing on others exceeds the benefits that you can probabilistically expect to obtain from so acting.¹ For purposes the present discussion, focus on risking wrongdoing that *is* itself wrong, whether by that standard or any other you prefer.

There are two ways of risking a wrongdoing. Risk involves uncertainty², which can enter into the action equation at either of two points. Let X represent your act, and Y represent what occurs in consequence of your act.

- (1) You might be certain that Y is wrong but be uncertain whether X will lead to Y.
- (2) Alternatively, you might be certain that X will lead to Y but be uncertain as to whether Y is wrong.³

1 This is the ‘Learned Hand rule’, enunciated in *US v Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).

2 Whether it is subjective or objective does not matter for present purposes.

3 The latter uncertainty may be epistemic or it may be objective, i. e., Y may be wrong only in certain circumstances which remain undecided at the time of your acting. See more generally Frank Jackson and Michael Smith, Absolutist moral theories and uncertainty, *Journal of Philosophy* 103 (2006), 267–83. The uncertainty may also concern which moral theory is correct, in which case the absence of a theory-independent standard for assessing the risks arguably stands in the way of deciding what to do in an ordinary decision theoretic way; see Ted Lockhart, *Moral Uncertainty and Consequences*, 2000. Since this article is concerned with problems arising under scenario (1) alone, these issues need not be confronted here.

Risking a wrongdoing in either way can be wrong, depending on how the moral calculus (as described above, or altered as you prefer) turns out. Or so it would seem.

Some, however, say that there is a subset of (1) in which what might seem to be risking a wrongdoing is never wrongful risk at all. That, they would say, is when the uncertainty attaches purely to future states (most typically, actions) that are entirely *under your own control*.⁴ On this analysis, you only be held to blame for ‘completed attempts’, ones in which there is nothing left for you to do (although whether the attempt proves successful may still depend upon the actions of other agents or brute luck).⁵

Suppose, for Case 1A, that you buy a gun in order to shoot the president. Have you thereby wrongly increased the risk that the president will be shot? Viewed from the outside, the strong temptation is to say ‘of course’. After all, you could not have shot the president without the gun, and now you have the gun there is some real risk that you will use it against the president.⁶ But on the analysis here in view, the answer would be ‘no’, on the grounds that you can always change your mind before pulling the trigger.

That response accords with one classic approach within the criminal law. The criminal law typically punishes attempted breaches, even if they do not succeed. But, as Hart remarks, ‘exceptions ... have been mooted since Beccaria.’ Principal among them are ‘crimes whose consummation occupies a considerable space of time so that the criminal may have time between the attempt and its consummation to think again. He may have what is called a *locus poententiae*, and he might desist ...’⁷ In many jurisdictions around the world, and indeed in the International Criminal Court itself, ‘abandonment’ (or ‘renunciation of criminal purpose’) is a complete defence against charges of attempting to commit (or to contribute substantially to) a crime.⁸ From that doctrine it would follow

4 More precisely, you still have complete control over one state/action that is a necessary condition for the wrongdoing to occur.

5 In the terminology of David Brink, First acts, last acts and abandonment, *Legal Theory* 19 (2013), 114–23 at 116.

6 In the geographical metaphor on which Brink models his decision-tree analysis of attempting a wrongdoing, he has ‘gone further down the road toward killing the president’. See Brink (note 5), 120, building on James Fitzjames Stephens, *A Digest of Criminal Law*, 1883, § 49.

7 H. L. A. Hart, Intention and punishment, in: Hart, *Punishment & Responsibility*, 1968, 113–35 at 130; Cesare Bonesana, Marquis Beccaria, *An Essay on Crimes and Punishments*, trans Edward D. Ingraham, 1764, ch. xxxviii.

8 Under Article 25, 3, f of the *Rome Statue of the International Criminal Court*, 1998, a person is punishable for a ‘criminal attempts’ if she ‘attempts to commit a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions’. But the Statute goes on to say, ‘However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose’ prior to the crime’s occurring. See similarly American Law Institute, *Model Penal Code*, 1962, §§ 5.01(4), 5.03(6) on ‘Renunciation of Criminal Purpose’ in general and in the context of criminal conspiracies, respectively. About half of the states of the US have adopted that provision of the Model Penal Code, and a great many foreign jurisdictions do likewise; see Paul R. Hoeber, The abandonment defense to criminal attempt and other problems of temporal individuation, *California Law Review* 74 (1986), 377–427 at 382 and 379–82 more generally.

that someone who sets in train a wrongdoing, but then stops it before the wrong has actually occurred, has quite literally done nothing wrong.⁹

Suppose, for Case 1B, that you bought the gun and gave it to someone else, not under your control, who is just as disposed to kill the president as you are at the time you give him the gun. Then you would indeed have wrongly increased the risk of the president being shot – and that is so, on the analysis here in view, precisely because you have no control over the would-be shooter.¹⁰

This conclusion, too, comports well with received legal doctrines. Under the law of torts, for example, a ‘negligent actor [is] liable when [a] third person commits an intentional tort or crime, provided that “the actor at the time of his negligent conduct realized or should have realized the likelihood that [...] an opportunity for such tort or crime] might be created [thereby] and that a third person might avail himself of the opportunity to commit such a tort or crime”’.¹¹ From that doctrine it would follow that someone who does something that he could and should have known might well contribute to a future wrongdoing of another, over whom he has no further control, has indeed done something wrong.

2.

What might justify us in thinking that the difference between such cases is morally significant? Various answers are possible, but as we shall see none are particularly persuasive.

A first thought might be this. Suppose someone performs an action that is sufficient (in itself, or in the circumstances prevailing at the time of the action¹²) to bring about a wrongful outcome. That person may be thought to have done something morally worse than another person who performs an action that is necessary, but not sufficient, to bring about the wrongful outcome.¹³

That is itself a contentious claim, perhaps. But even if true, it provides no grounds for the purported distinction between Cases 1A and 1B. For a start, it says only that people who provide merely necessary conditions do something *less bad* than those who

9 That, as distinct from ‘has done something less wrong’. The latter is arguably what Beccaria had in mind, and is the rule in virtually all the rest of the jurisdictions that do not adopt the ‘complete defence’ approach.

10 Indeed, it would be wrongfully increased even if you still have some control over him, just so long as there is some chance (large enough to make the risk wrongful, by whatever standard we use to decide that issue) that the person to whom you gave the gun will shoot the president, even if you change your mind and try to stop him.

11 H. L. A. Hart and Tony Honore, *Causation in the Law*, 2nd edn, 1985, 279, quoting the American Law Institute’s *Restatement of the Law, Torts*, § 448 (see similarly § 447).

12 I. e., it is the last necessary condition required to complete a set of conditions that are jointly sufficient to produce the outcome.

13 It would be wrong to say the former is ‘the (unique) cause’ of the outcome, for reasons given in Hart and Honore (note 11), 219–25; but it may nonetheless be the case that he has ‘done something morally worse’. See Brink (note 5).

provide sufficient conditions. The claim under discussion, in contrast, holds that the in Case 1A gun-purchaser who retains control of the gun himself has not (yet) done anything bad *at all*.

But assume for the sake of argument that some credible argument could be given for supposing that no moral blame whatsoever attaches to people who provide merely necessary conditions that are not (either in themselves or in the circumstances in which the action occurs) sufficient to cause the wrongdoing. That would still not differentiate Case 1A from 1B. In both cases, the gun-purchaser has (so far) done only something that was necessary, but not sufficient, for the president's being killed. Yet on the account here in view, he is supposed to be morally to blame for that in Case 1B but not in Case 1A.

3.

Another thought might be that, free will being what it is, probabilities do not properly attach to people's future intentional actions. Risks are essentially probabilities, so no risk can properly be said to be associated with people's future intentional actions.

But that argument fails to vindicate any distinction between Cases 1A and 1B. Giving the gun to someone else is supposed to wrongfully increase the risk (i. e., probability) of the president's being shot, whereas keeping the gun yourself does not. On the present analysis, that is supposed to be because we cannot properly attach probabilities to people's future intentional states at all. Yet in Cases 1A and 1B, probabilities are being attached to future intentional actions sometimes (when they are those of others) but not others (when they are your own). How can that disparity be justified?

Certainly it is true that what appear as 'choice' nodes from the first-personal perspective appear as 'chance' nodes from a third-personal perspective. We *decide* our own future actions, whereas we merely *predict* those of others. Note well, however, that the judgments here in view are both third-personal judgments. In both Cases 1A and 1B, we are asking about the whether you've done anything wrong *tout court* – not merely whether you have done something wrong from your perspective. In judging the rightness or wrongness of your actions, we are doing so from the outside, not the inside.

4.

Yet another response might be couched in terms of 'anti-paternalism'. Part and parcel of opposition to paternalism is the view that people should be given a chance to right themselves, which the gun-purchaser still has in Case 1A but not in Case 1B. For the anti-paternalist, that might make those two cases importantly different.

That response fails in two ways, however. First, judging the gun-purchaser to have wrongfully increased the risk of the president being shot (which is what is under discussion here) is not exactly the same as judging that anyone else should have stepped in to

prevent the purchase (which is all that the anti-paternalist objects to, strictly speaking). The two judgments may be related, but they are far from identical.

More importantly, the anti-paternalist response envisioned above errs in focusing exclusively upon the risk to the gun-purchaser and her moral standing, neglecting altogether the risk to the president. He is the one who stands to get shot, after all. Hence this is simply not the sort of case to which anti-paternalist arguments properly apply. It is not here the case that the only interests at stake are those of the agent himself (the gun-purchaser). The interests of someone else (the president) are also vitally at stake.

5.

A fourth approach might focus on the notion of a 'final accounting'. On that analysis, the question of moral responsibility is: 'What are you responsible for at the end of the day?' And to the question of 'when does the end of the day come?' its response would be: 'When you've done all you can do.'¹⁴

That approach would indeed differentiate between our two target cases. In Case 1B, the bottom line for purposes of moral accounting would be drawn at the point at which the gun-purchaser hands the gun to another person beyond his control. In Case 1A, it would be drawn only after the last opportunity for assassinating the president has passed.

That is a perfectly plausible analysis of *when* to undertake a final reckoning of moral accounts. But it leaves open the much more crucial question of *for what* one ought to be held morally accountable. One candidate would be 'for the outcome that actually occurred'. A second would be 'for what you did, and what you could and should have then expected to occur as a result of what you did at the time you did it'. Taking the 'end of the day' as the proper accounting period might seem to imply that it is 'what actually occurred at the end of the day' for which we are properly accountable. But that, I shall argue, is clearly mistaken.

5a.

How things actually turn out clearly matters. But we ought not restrict moral attention entirely to how things actually turn out.¹⁵ The reason is simply that things can turn out either much better or much worse than an agent had any reason to expect at the time he undertook his action. Insofar as morality is supposed to be action-guiding, it must provide a mechanism for judging what an agent should do at the time of acting. And to

¹⁴ This is the 'completed attempt' thought, mentioned at the outset.

¹⁵ This is contrary to those who assert that there can be such a thing as 'moral luck', e.g., Bernard Williams, *Moral Luck*, 1981, and Thomas Nagel, *Mortal Questions*, 1979, 24–38. For an summary of the arguments on both sides, see Dana K. Nelkin, *Moral luck*, *Stanford Encyclopedia of Philosophy*.

incentivize him to act on that moral advice, it must hold him to account on that same basis when retrospectively assessing moral responsibility for what he has done.

Thus, someone who drives home drunk has run an unreasonable risk of killing someone, even if somehow he manages to get home without crashing. Legally, of course, he may not be held liable for deaths that did not actually occur.¹⁶ But morally he is surely to blame for taking an unreasonable risk of wrongful deaths occurring, and that it itself is wrong. It is precisely that sort of wrong that is under discussion here.

sb.

Notice, furthermore, that morally assessing an act on the basis of what the actor could and should have known at the time of acting might sometimes have implications opposite to those advocates of this approach want to associate with Cases 1A and 1B. They want to say that the gun-purchaser who retains the gun is not (yet) guilty of risking a wrongdoing, because he could still change his mind and not shoot. But on the present basis, someone who ceded control of the gun to someone else (as in Case 1B) might be judged morally superior to someone who keeps control of it himself (as in Case 1A).

Suppose you buy a gun and then give it to someone else who is beyond your control, knowing that she is equally disposed as you to try kill the president – but knowing, too, that she is a far worse shot than you and hence is far less likely to succeed than you would have been had you retained the gun.¹⁷ On that scenario, the ‘you might change your mind’ argument for retaining the gun is outweighed by the ‘she’s a worse shot’ argument for relinquishing it. Based on what you could and should have known at the time, ceding rather than retaining control of the potential death weapon would have been the better thing to do. That is the better way to minimize the probability of the president’s being killed.

Or, again, suppose that you know that the person to whom you give the gun, and who is at the moment just as disposed to use it kill the president as you are, is actually more likely than you to change her mind before going through with the crime. Then once again, ceding rather than retaining control of the potential death weapon would have been the better thing to do, the better way to minimize the probability of the president’s being killed.

¹⁶ In tort law – although he can be liable under the separate criminal offence of drunken driving.

¹⁷ Why would you do that? Maybe because you know that when face-to-face with the president you will not be able to resist pulling the trigger, but in the quiet of your study you realize that killing the president would be wrong.

5c.

Of course, if there were *no chance* that you would go through with the assassination, even after buying a gun in order to do so, then it would indeed be true in Case 1A that your gun purchase has not actually increased (*at all*, much less wrongfully so) the risk of the president's being killed.

That is right, and undeniably so. Notice, however, two things wrong with that as a way of justifying the mooted moral superiority of Case 1A over 1B. One is that we can virtually never be certain that there is literally zero probability of anything's occurring. The other is that, of course, the same response applies in Case 1B as well. If there were *no chance* that the person to whom you gave the gun will go through with the assassination, then it would once again be the case that your gun purchase has not actually increased (*at all*, much less wrongfully) the risk of the president's being killed. So undeniably correct though this response may be in one way, it still provides no leverage for distinguishing Cases 1A and 1B in the way wished by advocates of the argument under discussion.

6.

In conclusion we might agree, from a legal perspective, that there may be good reasons for treating 'renunciation of criminal purpose' as a complete defence against charges of having committed a criminal attempt. That may be particularly so with the case of criminal conspiracies, where that defence is typically available only to those who both abandon their own criminal intentions and also go to the authorities and cooperate fully in their efforts to foil the criminal conspiracy.¹⁸ We want to maximize the incentives for conspirators to do that, and treating their 'renunciation of criminal purpose' (including subsequent cooperation with the authorities) as wholly exonerating their earlier contribution to the crime does just that.

Yet we may still want to censure the abandoned attempt morally, even if we have good reason not to impose sanctions on it legally.¹⁹ From the moral point of view, there seems to be no principled reason whatsoever for supposing that 'changing your mind before a wrongful act was completed' should *completely* expunge the wrongness of 'having intentionally taken steps toward committing that wrong' in the first place. It is undeniably good that you changed your mind. You deserve moral credit for that. But it would have been undeniably better, yet again, had you not formed the evil intention and taken those initial steps toward acting upon on it in the first place.

Neither should the chance that 'you might still change your mind' require us (as in the proposal here under discussion) to suspend moral judgment until the matter has passed entirely out of your hands. It's good that you can still change your mind, and we hope that you will. But the fact remains that, whatever you do or do not do in the

18 American Law Institute (note 8), § 5.03(6).

19 Gideon Yaffe, *Attempts*, 2010, ch. 12.

future, you already have done something wrong in buying a gun with which to kill the president.

One way of cashing out that intuition is in terms of the moral character being manifested. Someone who courts wrongdoing, only later to renounce it, is of worse moral character than someone who does not court wrongdoing at all. That is certainly one perfectly natural way to cash out those intuitions.²⁰

But an equally good way to cash them out, consequentialistically, is in terms of risks of the wrongdoing occurring. When you buy the gun in order to kill the president, you create a risk that the president will be killed with the gun that you bought.²¹ That risk persists, in Case 1A, until such time as you renounce your intention use that gun to kill the president. Creating a risk of something bad happening that persists for a time is bad. It is not as bad as the bad outcome actually eventuating. But it is worse than never having run that risk at all. We buy insurance against time-delimited risks (e.g., those associated with airplane flights) all the time. We should stand equally ready to condemn morally the imposition of time-delimited risks, as well.

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20 Yaffe's analysis of attempts in terms of a 'guiding commitment' seems to rely on a dispositional analysis of just this sort; see Brink (note 5), p. 116 discussing Yaffe (note 19), esp. ch. 3.

21 'What an act risks is a product only of what makes it likely *in the absence of further action* [including the agent's changing his mind], and not a product of what it makes likely, taking future action into consideration'; Gideon Yaffe, Attempt, risk-creation and change of mind, *Ohio State Journal of Criminal Law* 9 (2012), 779–87 at 785. See similarly Yaffe, Trying to defend *Attempts, Legal Theory*, 19 (2013), 178–215 at 188. (It should be noted that Yaffe (note 19), ch. 11, offers grounds for vindicating charges of a criminal attempt in cases of abandonment, different from the risk-creation analysis offered here).