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BOOK REVIEW

Trying to Make Sense of Criminal Attempts

A review of Bebhinn Donnelly-Lazarov, *A Philosophy of Criminal Attempts: The Subjective Approach* (Cambridge University Press, 2015) 254 pp, Hbk $79/£72, ISBN 978-1-107-02983-5.

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1. INTRODUCTION

Prof Bebhinn Donnelly-Lazarov's *A Philosophy of Criminal Attempts: The Subjective Approach* is a novel, insightful and ambitious theory of attempts. While Prof Donnelly-Lazarov covers many different issues, her three principal aims are to explain what exactly an attempt is, to situate attempts in action theory and to resolve some significant conceptual problems with criminal attempts. I will first present Prof Donnelly-Lazarov's treatment of these very difficult issues and then offer a constructive critique.

2. ATTEMPTS GENERALLY

For Prof Donnelly-Lazarov, an attempt is a 'setting out to do' (35), a being 'on the way to bringing about the object set' (35), an act 'in advance of an end' (39).

This end or object is the reason for which the attempt is made. '[T]he reasons for which we act … give our attempts their substantive form' (58). Because 'the reason is constitutive of the action as an attempt' (122), the second half of the

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book's title ('The Subjective Approach') follows. What makes a given act an attempt is the agent's particular reason for acting in this manner. '[T]o determine what an agent attempts is to adopt his perspective' (3). '[A]n agent has exclusive access to her attempt; the attempt *is* what it is to her' (68). So if a person believes that she is playing snakes and ladders but is really playing what the rest of us would call chess, then—given the goal that she has set for herself—she is trying (and unknowingly failing) to play snakes and ladders' (67–69).

It is our attempts that make us human. 'Everyday "attempting" is meaningful for it points to our fallibility as human beings' (83). Prof Donnelly-Lazarov's point here represents a slight innovation on the more traditional theme that it is our actions (or practical reason) that make us human. But this may be a distinction without a difference because every action involves an attempt. This point may seem to be counter-intuitive insofar as we tend to refer only to *un*successful, not *successful*, actions as attempts. But Prof Donnelly-Lazarov's response to this objection is compelling (82). If an agent fails on a particular occasion to accomplish what she set out to do—whether from insufficient effort, excessive difficulty, external interference or just bad luck—then her setting out do is clearly an attempt. And it is difficult to see why this setting out to do would no longer qualify as an attempt if the agent had succeeded instead. Success cannot retroactively change the nature of what preceded it. The fact that the agent succeeds in performing the action that she set out to perform does not magically erase the fact that she set out to perform this action in the first place and therefore that what preceded this success was indeed an attempt.

3. THE PROBLEM OF OUTCOME LUCK

Just as the success or failure of an attempt cannot retroactively convert the attempt into a non-attempt, so too it cannot retroactively determine or change the attempt's moral status—that is, its level of blameworthiness. This is the 'equivalence theory'. In Chapter 7, Prof Donnelly-Lazarov argues for the equivalence theory (what she sometimes calls 'equivalism') but with a partial acceptance of its opponent, the 'non-equivalence theory'.

On the one hand, Prof Donnelly-Lazarov endorses the standard equivalence theory: all else being equal, failed attempters and successful attempters are equally blameworthy because their intentional actions, the loci of responsibility, are identical. *Ex hypothesi*, they equally set out to do the same thing under the same (or sufficiently similar) circumstances. They differ only with respect to what they do not have control over: the external consequences of their actions. The consequences of their actions are entirely a matter of *luck*—'outcome luck'—and therefore do not affect their relative levels of blameworthiness. Just as the failed attempter does not deserve to be rewarded for failing, the successful attempter does not deserve to be blamed more severely for succeeding. The circumstances that prevented the former from succeeding were just as out of her control—and therefore just as irrelevant to her degree of blameworthiness—as the absence of circumstances that prevented the latter from failing.

On the other hand, the non-equivalence theory gets this much right: the criminal justice system is often justified in acknowledging our intuition that failed attempters and successful attempters should be treated differently—that is, given different sentences—even when all else (but the outcomes) is equal. But Prof Donnelly-Lazarov's justification for this point is not retributivism, which says that criminals should be punished in proportion to their degree of blameworthiness. Rather, her justification is *rehabilitation* (171–75): even if two different criminals are equally blameworthy for committing the very same act under the very same circumstances, one might be harder to rehabilitate than the other because of a difference in personalities. Despite their equal blameworthiness, then, the criminal who is harder to reform should receive more severe punishment than the criminal who is easier to reform.

One circumstance that will generally affect an offender's susceptibility to rehabilitation and should therefore influence her sentence is the degree of harm that she caused through her criminal act. Once again, the degree of harm does not retroactively make the offender more or less blameworthy; the offender's degree of blameworthiness is fixed at the time of her act, prior to any harm that it may cause. Instead, the degree of harm determines whether or not the offender is a *murderer* (for example), at least on this occasion. And the attribution of this label does and should affect her sentencing because it will likely change her self-conception, especially if this is the first time she has murdered (170–71). Her crossing this moral and legal threshold will very likely change how she views herself, her values, and her future behaviour. Because of this likely self-transformation, a person who has killed is more likely in need of greater rehabilitation than a person who attempted to kill but failed. To be sure, the latter might indeed try again or keep trying until she succeeds. But she might just as likely step back from the abyss and feel great relief that her attempt never came to fruition, that her target is still alive and that she does not have (this) blood on her hands.

4. THE IMPOSSIBILITY DEFENCE

From the outcome-luck debate arises yet another debate, the debate about the impossibility defence. Suppose the failed attempter argues that, given the factor(s) that prevented her attempt from succeeding, her attempt could not possibly have succeeded. It was doomed all along. Therefore her act was not dangerous, in which case she should not be blamed or punished for it. Is this very clever defence successful? Our intuitions—and both the equivalence theory and non-equivalence theory—suggest not. But this position is more difficult to defend than it would first appear. On what grounds may—and should—we punish an attempt that not merely did not cause the intended harm but could not possibly have caused the intended harm?

In Chapters 4 and 6, Prof Donnelly-Lazarov rejects the impossibility defence and, more generally, the notion that culpability should depend in part on whether a given attempt was possible (could have been successful) or impossible

(could not have been successful). Her conclusion rests on two arguments. First, people who make attempts that turn out to be impossible are often, if not usually, dangerous (146–52). If, for example, Joe is not carrying a wallet, then it is impossible for Pickpocketer to steal Joe's wallet from Joe's person. But if Pickpocketer mistakenly believes that Joe's pocket does contain a wallet and tries to take it, Pickpocketer has proved herself to be dangerous. She exhibited a desire to take Joe's wallet, an intent to act on this desire, and a belief that her act would fulfil her intent. It is Pickpocketer's demonstrated willingness to commit this crime, not the objective context or circumstances of which she was ignorant (that is, the absence of a wallet), that matters for the purposes of determining Pickpocketer's blameworthiness and culpability. The very fact that she tried to steal at least this once warrants the inference that she will try to steal again.

Second, consider the 'voodoo' objection (88–90, 146–52). Suppose Sabrina believes that making a doll resembling her worst enemy—'Enemy'—and then pricking it with a pin will cause Enemy to die. Should Sabrina's paranormal efforts qualify as attempted murder? Our intuition is that this is going too far. And the most likely reason we have this intuition is because Sabrina's attempt was impossible; voodoo just does not work.

Prof Donnelly-Lazarov, however, argues that this reason is weak (90–94, 143–46). There are plenty of impossible attempts for which we feel agents *are* culpable and *should* be punished. We just came across one above: the failed pickpocketer. And here is another: suppose Sabrina had shot her rifle at Enemy with the intent of killing him and the bullet missed Enemy by three inches. Given the exact circumstances, Sabrina's attempt to kill Enemy was just as impossible as her attempt to kill Enemy using voodoo. Yet all reasonable people—and certainly the criminal justice system—would regard the shooting as attempted murder. So it cannot be impossibility itself that renders a given attempt non-culpable. It must be something else.

According to Prof Donnelly-Lazarov, this something else is, once again, dangerousness ('harmfulness') (146–49). Trying to kill one's enemy using voodoo is not dangerous because this technique will never lead to success; the causal laws simply do not support it. But trying to kill one's enemy using a rifle is dangerous because this technique will often lead to success; the causal laws overwhelmingly support *it* (148–52). Similarly, if we had evidence that Sabrina was only starting with voodoo and was going to try more 'promising' means of bringing about Enemy's premature demise, then we might in fact regard her as dangerous and therefore her voodoo as attempted murder after all. Our judgment about Sabrina and whether to consider her voodoo attempted murder hinges not on possibility or impossibility per se but rather on the likelihood that Sabrina will sooner or later resort to more effective techniques, techniques that are more likely than voodoo to accomplish her nefarious purpose.

Importantly, Prof Donnelly-Lazarov's position here implies that an agent has not necessarily committed attempted murder even if she has satisfied both elements: intending to kill (mens rea) and acting on this intent (actus reus). One other condition must be satisfied as well: either (a) that her act be of a kind that can cause

another human being to die or (b) that the agent has exhibited an inclination to perform this kind of lethal act. So in order to be convicted of attempted murder, satisfaction of actus reus and mens rea alone is not sufficient. There must also be evidence of either (a) or (b). Normally, (a) and (b) are implicitly satisfied by the circumstances. But the voodoo situation helps to show that their general invisibility in attempt prosecutions does not entail their insignificance.

5. PHYSICAL MOVEMENT AND INTENT

The voodoo example helps to illustrate yet another fundamental point about the criminal law's approach to attempted murder: a person should not be blamed and punished simply for wanting another human being to die. One reason is that the (just) state needs to *prove* both this desire and the intent to perform an act that will likely lead to the realisation of this desire. And it is generally thought that the only kind of evidence that qualifies for this proof is physical movement: the external, publicly observable and therefore provable embodiment of the inner, unobservable state of mind.

While Prof Donnelly-Lazarov does not seem to reject this motivation for the actus reus requirement in criminal law, she still does argue that the actus reus requirement is pregnant with three misleading implications: that physical movement is necessary for action, that action can exist independently of intent and that intent can exist independently of action.

First, Prof Donnelly-Lazarov argues that physical movement is simply not necessary for action (49–50, 58–59, 117–20). One may act without moving at all. For example, mental actions such as planning a trip and solving maths problems in one's head may not require any physical movement. Likewise, an omission—pure inaction—may qualify as a criminal act when it violates a legally prescribed duty (for example, the duty to pay one's taxes or feed one's children). While mental actions will be more relevant in action theory than in criminal law, omissions are quite relevant in both domains.

Second, Prof Donnelly-Lazarov argues that actus reus cannot be separated from mens rea (4, 38, 107–19). On the contrary, every action is intentional. Without this intention, it would not be an action in the first place; it would be a mere physical movement and nothing more. For example, we do not consider bodily motions such as twitches, spasms and convulsions to be actions because they are involuntary and therefore unintended. Prof Donnelly-Lazarov draws an interesting conclusion from this point: the distinction between actus reus and mens rea in criminal law is entirely artificial. Because actus reus is the 'act part' (as opposed to the mens rea or 'mind part') of a criminal act, and because all actions are intimately connected to an intention, it follows that actus reus is intimately connected to intention as well. Therefore the notion of actus reus as a mere physical movement that exists independently of the intention behind it simply does not make sense (112–17).

Indeed, Prof Donnelly-Lazarov goes even one step further and argues that the term 'basic actions'—an expression philosophers have used to denote bodily motions directly performed by the agent—is a misnomer; that they are not really actions at all because they contain no reference to the intention behind them (40–45). For example, opening a door by twisting the doorknob is an action. But this same bodily motion without reference to its intention—merely extending my arm and twisting my hand—is not an action.

Third, and perhaps most controversially, Prof Donnelly-Lazarov argues that intention cannot be separated from action.

> [I]ntention has no pure form; it has no reality separable somehow from human action. The category of pure intention … that has wreaked havoc in theories of intention is a natural, useful and maybe unavoidable human construct, but it is not a feature of human nature and no underlying phenomenon, in the mind or anywhere else, is identified by it. (11)

Of course, one might object that an agent can intend to perform an action in the future, in which case the intention exists in its pure form both prior to and independently of the action that will, or may, follow. But Prof Donnelly-Lazarov suggests that this mental state does not really qualify as an intention unless the agent is 'on the way' to carrying it out (11, 18–22, 26, 30–31). If she is not on the way to carrying it out, it is merely a hope or wish or plan but not an intention.

For Prof Donnelly-Lazarov, then, an intention is ultimately the agent herself—the 'I'—exercising its various capacities (47, 117, 119, 122): 'knowledge, understanding, beliefs, hopes, fears, reasons for acting, physical movements' (38). '[I]ntentional act is no doubt made possible by our distinctively human capacities and perhaps it should not surprise that it is unlike the abilities that give it life' (11). Because an intention is ultimately the self in all self-motivation, it is also the locus of responsibility (126–30). I am responsible for my actions just because they are *my* actions. They originate with *me*—that is, with my intent.

6. RECKLESS ATTEMPTS, ATTEMPTED RAPE AND ATTEMPTED THEFT

In the final two chapters of her book, Prof Donnelly-Lazarov addresses a difficult issue in criminal law: how to make sense of reckless attempt, attempted rape and attempted theft. Prof Donnelly-Lazarov's solution is to suggest that we take these crimes out of the attempt category and put them into a new category: 'non-attempt inchoate offences' (78, 176–81).

The notion of reckless attempt is problematic because it seems to be oxymoronic (5, 184–85, 206). On the one hand, an attempt is inherently goal-directed. To attempt a given action *A* is to engage one's various capacities (knowledge, understanding etc.) with the intent of accomplishing *A*. On the other hand, recklessness is inherently *un*intentional. To act recklessly is to act in such a way that one aims toward one goal *and* consciously or knowingly disregards the substantial and

unjustifiable risk that a criminal harm will result in the process. The harm, then, is not the intended goal; it is the unintended risk. And one cannot intend to realise an unintended risk without contradiction.

Still, we do not want to conclude from the conceptual incoherence of reckless attempts that recklessness which happens not to cause any harm should go unpunished. We still want to criminalise, for example, reckless endangerment of a child even if the risk to the child is never realised. The reason that we want to continue recognising this crime is to deter it and thereby to minimise the kinds of harms that it tends to cause (192–93). So Prof Donnelly-Lazarov proposes that, while not attempts, harmless crimes for which recklessness is the mens rea should still be recognised as inchoate—that is, incomplete or non-harm-causing (188–92).

In Chapter 9, Prof Donnelly-Lazarov proposes a similar solution to the problem of defining both attempted rape and attempted theft (5, 210–18). (For the sake of space, I will concentrate only on the former.) Rape requires at least one circumstance to be satisfied: sexual penetration *without the victim's consent* (204–209). This circumstance raises a difficult question: does attempted rape require one not merely to attempt sexual penetration but also to attempt the other person's non-consent? For Prof Donnelly, the problem with answering this question in the affirmative is that it is unclear how a person can attempt another person's non-consent for the same reason that it is unclear how a person can attempt the sun to rise (196). Both are circumstances outside the person's control.

Of course, one can certainly attempt *to make* the other person withhold or withdraw consent. But the problem with this suggestion, and therefore an argument that further supports Prof Donnelly-Lazarov's position, is that it requires too much for attempted rape. If attempted rape required not only attempting to penetrate but also attempting to make the victim withdraw or withhold consent, then a highly implausible implication would follow: there would be *no* attempted rape when the defendant attempts penetration and merely *believes* that the victim is not consenting or is *indifferent* to whether the victim is consenting.

So how do we reconcile this circumstance element—non-consent—with attempt? Prof Donnelly-Lazarov proposes that we re-label attempted rape as 'inchoate rape' (210–18). Inchoate rape contains two standard elements, attempted penetration and lack of a reasonable belief in the victim's consent, plus a threshold disjunctive element: the defendant 'penetrated [victim's orifice] or recognised his action as being in the process of penetrating [victim's orifice] or recognised his action as being about to penetrate [victim's orifice]' (216). The advantage of this proposal over current definitions of attempted rape is that it does not require juries and judges to figure out whether the defendant intended the victim's non-consent, knew that the victim was not consenting, or merely was indifferent (reckless) to whether the victim was consenting. Prof Donnelly-Lazarov leans toward the last, recklessness with regard to the victim's non-consent, as the appropriate mens rea for attempted rape (197). But, again, she regards the notion of a reckless attempt to be incoherent. So in an effort to reconcile these two points, Prof Donnelly-Lazarov recommends that we re-conceptualise attempted rape as a non-attempt inchoate offence.

7. CRITIQUE

While Prof Donnelly-Lazarov's book is extremely rich and well-argued, I did find two problems with it. First, it does not offer a rigorous discussion of one of the most fraught issues in the area of criminal attempts: what test we should use to determine when an act has crossed the threshold from 'mere preparation' to criminal attempt. The book would have been that much stronger had it clearly explicated, and decided between, the four tests that jurisdictions have developed: dangerous proximity, substantial step, equivocality and a hybrid of (or compromise between) dangerous proximity and substantial step.

The second problem is that it is not clear to me that Prof Donnelly-Lazarov's overall theory of attempts always leads to the right answer. Consider the following hypothetical:

> Nils wants to kill Amy and make it look like she died from natural causes to avoid getting caught. So he figures that he will start with a 'shot in the dark': hoping, without any evidence, that Amy is one of the 1 per cent of the population that is allergic to peanuts (as he himself is), he buys a box of 20 chocolates, half of which contain peanuts, and gives the box to Amy in the hopes that she will eat a chocolate with peanuts and die from anaphylactic shock. Amy does eat several chocolates with peanuts and suffers no harm because, as it turns out, Amy is *not* allergic to peanuts.

Has Nils committed attempted murder? I believe that Prof Donnelly-Lazarov's positions on intent, impossibility and outcome luck together lead to the wrong answer.

First, based on Prof Donnelly-Lazarov's general conception of attempts, Nils clearly has set out to kill Amy, which would, by itself, seem to make his act of giving Amy the chocolates an attempt to kill her and therefore attempted murder. Second, Prof Donnelly-Lazarov's endorsement of the equivalence theory suggests that Nils' attempt to kill Amy is just as blameworthy as it would have been if Amy *had* been allergic to peanuts and therefore *had* died from eating the chocolates. Third, Prof Donnelly-Lazarov's position is that it is not possibility or impossibility that matters but rather harmfulness or dangerousness. And one might very well argue that Nils is clearly dangerous simply because he tried a method of killing that, unlike voodoo, could work under the right circumstances (that is, under the circumstance that Amy *had been* allergic to peanuts). So it is really no different than if he had shot at Amy and missed by several feet.

In response, I suggest that Nils has *not* committed attempted murder and therefore that something is amiss in Prof Donnelly-Lazarov's theory of attempts. Nils did something that is perfectly legal and usually laudable: he gave Amy a box of chocolates. Yes, he hoped that she would die from eating them. But hope is neither intent nor belief. It certainly is not belief; I can hope for miracles that I believe are very unlikely to happen. And hope is not necessarily intent, even when it is acted on, because intent requires either (a) belief in the likelihood of success or at least (b) the non-existence of a belief that success is very unlikely. Consider playing a national lottery. It would be a stretch to say of a rational player who recognises the negligible chances of winning that she intends to win. It would be much

more accurate to say only that she intends to *play* and *hopes* against all odds to win. Likewise, then, with Nils. He intended to give Amy chocolates and hoped that they would cause her to die, but he did not intend to kill her because he did not believe that they would (or maybe even believed that they would not).

Even if I conceded that Nils *intended* to kill Amy, however, it is still not clear that he is guilty of attempted murder. In order for Nils to be guilty of attempted murder, it would have to be the case that he would have been guilty of *murder* if his attempt had been successful.[1] And this is simply not the case. Even if Amy *had been* allergic to peanuts and *did* die from eating some of the chocolates that Nils gave her, there are three reasons why he would not be guilty of murder. First, it would be very hard to prove his intent. Second, even if the prosecutor could prove Nils' intent, it is still not clear that Nils caused Amy's death. She is arguably the superseding cause because she took the chocolates, knew or should have known the risk of eating them, and still ate them all on her own. Third, Nils would simply have gotten lucky, and—by Prof Donnelly-Lazarov's own arguments—luckiness is irrelevant to blameworthiness. As an analogy, suppose I ask my enemy to meet me under a tree in the hopes that a branch will snap, fall and kill her. If my hope is miraculously realised, I am hardly guilty of murder; I just got extremely lucky. Likewise, then, with Nils (again, if Amy had died).

8. CONCLUSION

Throughout *A Philosophy of Criminal Attempts: The Subjective Approach*, Prof Donnelly-Lazarov challenges some giants in action theory and criminal theory. They include Elizabeth Anscombe, Andrew Ashworth, Michael Bratman, Donald Davidson, RA Duff, HLA Hart, Alfred Mele, Brian O'Shaughnessy, John Searle and Gideon Yaffe. (She also challenges my approach to outcome luck in Chapter 7: 166–68.) I am convinced that this book elevates Prof Donnelly-Lazarov to the same level. It is required reading for any scholar who wishes to learn about attempts in action theory and criminal law.

1 Prof Donnelly-Lazarov critiques this 'test', which was first promoted by RA Duff (211–13). It is not clear to me, however, that her critique is successful, at least in this context.