

Renouncing the attempt versus perpetration distinction

Izabela Skoczeń (Jagiellonian University) and Markus Kneer (University of Zurich)

John lights a long fuse in order to burn his enemy's house. After a short while, John has second thoughts. Consequently, he tries to stamp out the fuse. There are two possible outcomes. The first outcome is lucky: John stamps out the fuse easily and the enemy survives. However, it could also be that a strong wind prevents John from stamping out the fuse. As a result, John's enemy dies anyway.

In both cases, the lucky and the unlucky one, John has the same quality of the will: he initially intends a criminal outcome, yet later, on second thoughts, desists from his criminal intent and does everything he can to prevent the criminal outcome. While his actions are intentional, the outcome is accidental as it is not fully under John's control – it is subject to causal luck.

If one believes that it is one's quality of the will rather than an accidental outcome of an action which should determine, for instance moral and legal, responsibility, then irrespective of the outcome of John's action, he should be held equally responsible in both cases. Moreover, if quality of the will is to be decisive for responsibility, then John is surely more culpable than someone who never even undertook lighting a fuse in order to kill an enemy. However, John is less culpable than someone who would not entertain second thoughts and would not even try to stamp out the lit fuse. This stance could be labeled internalism about responsibility and culpability, as it goes along Kantian lines of reasoning.

By contrast, if one thinks that external factors, such as for instance the outcome of one's action, should determine one's responsibility or culpability, then John in the lucky case is less culpable or responsible than John in the unlucky case, as only in the latter the enemy dies. However, given that the outcome of John's action is not under his control, but is subject to outcome and causal luck, an externalist, consequentialist approach to culpability and responsibility is unfair.

If one looks at the general rules governing criminal intention (*mens rea*) ascriptions in legal systems around the globe, these rules are largely Kantian (internalist), rather than consequentialist (or externalists). After all intention is a necessary prerequisite of culpability. However,

surprisingly, both common and civil law systems treat the lucky and unlucky cases differently. If John is lucky and stamps out the fuse, John commits merely an attempt (one can 'attempt' only if one fails to achieve the goal). Consequently, he can use the so-called renunciation defense in court. This defense consists of a mitigation of punishment due to the fact that John completely and voluntarily desisted from his criminal enterprise. By contrast, if John is unlucky and the fuse cannot be stamped out due to the harsh wind, then John is taken to be a perpetrator, he cannot resort to the renunciation defense, even though he did everything he could to stamp out the fuse and, as a result, receives the full punishment. Yet are these rules the expression of reflective, all things considered views on legal responsibility? Or rather, are they the result of a bias arising out of the fact that in real life we never see the relevant counterfactual? In other words, juries and judges see either the lucky or the unlucky John separately, they never compare the two cases.

In order to test the bias hypothesis, we performed a series of experiments (total N=800). We employed a between subject and a within subjects' experimental design. In the between subjects' design, participants are presented with either a lucky or an unlucky renunciation case. Next, participants are asked questions about moral and legal responsibility (blame, wrongness of action and punishment), probability of the outcome occurring (subjective and objective) and mental states. We also performed the same experiment in a within subjects' design.

We found that (i) outcome influences moral and legal responsibility ascriptions; (ii) the influence of outcome is mitigated in the within subjects design as compared to the between subjects design (effect size of the difference in between subjects $d = .87$; versus effect in within subjects $d = .35$); (iii) probability mediates the relation between outcome and mental state ascriptions.

Based on our results, we point toward the conclusion that the folk concept of fair and just responsibility requires that agents are held responsible only for outcomes that are under their control. Since legal rules on the renunciation defense in common and civil law systems run counter to this claim, they should be reformulated.

References:

Alexander, L., Ferzan, K. K., & Morse, S. J. (2009). *Crime and Culpability: A Theory of Criminal Law*. Cambridge University Press.

Alicke, M. D. (2000). Culpable control and the psychology of blame. *Psychological Bulletin*, 126(4), 556–574

Kneer, M., & Machery, E. (2019). No luck for moral luck. *Cognition*, 182, 331–348.

Knobe, J. (2004). Intention, intentional action and moral considerations. *Analysis*, 64(2), 181–187.

Knobe, Joshua, & Shapiro, S. (forthcoming). What Cognitive Science Can Teach Us about Proximate Causation.