



Wrongful convictions and the punishment of attempts[☆]



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ARTICLE INFO

Article history:

Received 14 August 2014
Received in revised form 11 January 2015
Accepted 14 January 2015
Available online 23 January 2015

JEL classification:

K00
K14
K42

Keywords:

Type-I errors
Attempts
Wrongful convictions
Judicial errors
Crime and deterrence
Optimal sanctions

ABSTRACT

This article presents economic models of law enforcement where the punishment of attempts leads to an increased risk of wrongful convictions. Consideration of these risks weakens the case for punishing attempts. Specifically, attempts ought to be punished less frequently than suggested in previous literature, and even when the punishment of attempts is desirable, they typically ought to be punished less severely than accomplished crimes. Purely deterrence related rationales as well as rationales based on costs associated with wrongful convictions support this conclusion. The presence of wrongful conviction costs also implies that a degree of under-deterrence is optimal and that incomplete attempts ought to typically be punished less severely than complete attempts.

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1. Introduction

Accomplished crimes are very commonly punished more severely than attempted crimes.¹ However, only a few law and economics models exist that study attempts,² and these have been criticized for failing to provide satisfying justification for this intuitive practice.³ These models, like most economic analyses of law

enforcement, focus on type-II errors, i.e. false acquittals,⁴ but ignore type-I errors, i.e. wrongful convictions. In this article I incorporate wrongful convictions arising from the punishment of attempts into the standard crime and deterrence model, and show that, in line with existing practices and the intuition of many,⁵ attempts ought to be typically punished less severely than accomplished crimes. Moreover, when compared to the findings of previous work, the set of circumstances under which attempts ought to be punished at all is narrowed.

That the punishment of attempts may lead to increased risks of wrongful conviction has been noted in the literature. [Guttel and Teichman \(2012\)](#) summarizes how and why these risks are created.⁶ “[P]unishing attempts. . . generates a considerable risk of wrongful convictions when compared to the punishment of complete crimes. Criminal attempts always involve situations in which at least one of the objective elements of the crime is absent. This,

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¹ See, e.g., [Ben-Shahar and Harel \(1996, pp. 318–319\)](#) (footnotes omitted): “Attempts are punished less severely than completed crimes and preparation ordinarily is not subject to criminal liability at all. Most U.S. jurisdictions stipulate that the perpetrator of an attempted crime will be punished less severely than the perpetrator of a completed crime. The rule is pervasive, despite a wide range of critiques directed against it.”

² See [Section 2](#), for a review of existing law and economics work analyzing attempts.

³ See, e.g., [Ferrante \(2007, p. 7\)](#): “evaluating the practice of differential punishment with the theoretical tools that the economic approach offers leads to the conclusion that there are no reasons for adopting schemes of differential sanctions”. It should be noted that [Ferrante \(2007\)](#) quickly – in a footnote – dismisses the primary rationale for differential punishment offered in [Shavell \(1990\)](#), which is based on talent variation and unobservability. *Id.* p. 14, n 25. My analysis provides two separate rationales for punishing attempts less frequently, one which relies, a-la [Shavell \(1990\)](#), on talent variation, and one which does not.

⁴ False acquittals are generally implicitly incorporated by assuming an interior probability of conviction. Hence, not every person who commits a wrongful act is convicted. Examples are numerous, see generally [Polinsky and Shavell \(2007\)](#), pp. 412–419.

⁵ See, e.g., [Ferrante \(2007, p. 3\)](#) citing [Fletcher \(1988\)](#): “intuitive though the practice may appear, its justification has proven elusive.”

⁶ To support their summary the authors refer to previous studies, including [Enker \(1969\)](#), [Hall \(1940\)](#), and [Ashworth \(2007\)](#).

in turn, leaves fact finders to conjecture about the missing elements and increases the likelihood of erroneous determinations.”⁷ As pointed out by the authors, the Model Penal Code also draws attention to this aspect of punishing attempts by stating that it “would allow prosecutions for acts that are externally equivocal and thus create a risk that innocent persons would be convicted.”⁸

Although the requisite tools for studying wrongful convictions have been provided for in some of the previous work in the field,⁹ to the best of my knowledge, type-I errors have not yet been incorporated in economic models of law enforcement analyzing attempts. This is surprising, given that Prof. Shavell supplied the economic model for studying the optimal punishment of attempts about twenty-five years ago. The analysis in *Shavell (1990)* starts out by noting that the sanction for accomplished crimes may have to be below (or equal to) a certain maximal penalty.¹⁰ When the maximal penalty for the accomplished crime does not provide adequate deterrence, it becomes desirable to increase the probability of punishment to increase deterrence.¹¹ By punishing attempts, one increases the number of instances where the criminal is punished, and thereby increases deterrence.¹²

Intuitively, this justification for punishing attempts is weakened if one assumes social costs associated with wrongful convictions arising from the punishment of attempts. But, a lesson from previous studies on judicial errors is that type-I errors may lead to purely deterrence related costs as well, which may undermine the desirability of punishing attempts. In particular, as demonstrated in *Png (1986)*, type-I errors may incentivize criminal activity by reducing the value of not committing crime.¹³ Therefore, the presence of social costs associated with wrongful convictions, as well as deterrence related considerations may potentially weaken previously provided justifications for punishing attempts.

In Section 3.1, I start investigating whether this weakening effect is in fact obtained when one incorporates type-I errors associated with the punishment of attempts into the model presented in *Shavell (1990)*. I show that, contrary to *Shavell (1990)*, the punishing of attempts is not necessarily justified whenever punishing accomplished crimes does not provide adequate deterrence. This result is driven by the incentives provided to potential offenders who believe that they are likely to successfully accomplish their crimes if they set out to commit them. These individuals, whom I will call *talented individuals*, believe that they are unlikely to be caught and convicted for an attempt once they initiate a criminal plan; instead they are only likely to be caught for accomplished crimes. Thus, an increase in the punishment of attempts increases

the expected cost associated with wrongful convictions more than it reduces the expected benefit from initiating a criminal plan. Therefore, increasing the punishment of attempts lowers deterrence for these individuals, making the punishment of attempts less desirable.

This deterrence-based rationale for punishing attempts less frequently depends crucially on there being variation in individuals' talent levels, these talent levels being unobservable by courts, and the particular distribution of individuals' talents.¹⁴ When talented individuals are rare, purely deterrence based rationales for punishing attempts less frequently becomes weaker. But, when there exist social costs associated with the punishment of the innocent separate from deterrence-costs,¹⁵ an independent rationale emerges as to why attempts ought to be punished less frequently.

To separate out the effect of wrongful conviction costs and the deterrence reducing aspect of punishing attempts, I present a second model in Section 3.2, where there are no talented individuals.¹⁶ This model suggests that attempts ought to be punished less often than is suggested by previous work, namely in a subset of cases where the maximal punishment for accomplished crimes does not provide adequate deterrence. The reason is that the punishment of attempts generates greater wrongful conviction costs than the punishment of results, because they lead to more frequent type-I errors. Another implication of the model is that the punishment of attempts may never be optimal if society places a sufficiently large value on wrongful convictions. And, perhaps unsurprisingly, the model implies that under-deterrence as opposed to first-best deterrence may be optimal when type-I errors are present.

Overall, the two models studied imply that there are purely deterrence related rationales as well as rationales that rely on the social costs of wrongful convictions as to why the punishment of attempts is less desirable than previous studies suggest. Purely deterrence related rationales are stronger when the pool of potential offenders contains talented individuals, and non-deterrence related rationales are stronger when the value of not punishing innocent individuals is large relative to the value of deterring crime.

The remainder of the paper is structured as follows. Section 2 reviews previous literature. Section 3 presents two law enforcement models that incorporate type-I errors associated with the punishment of attempts, and derives the results summarized above. Section 4 extends the analysis to cases where the punishment of accomplished crimes generates type-I errors in addition to the errors generated by the punishment of attempts. The analysis shows that results are not affected much when wrongful conviction costs are present, but they are distorted somewhat when there is significant variation in individuals' talents and wrongful conviction costs do not exist. The same section discusses the importance of these distortions, considers implications when type-I errors do not have substantial effects on deterrence (as is argued in the recent

⁷ *Guttel and Teichman (2012, pp. 612–613)* (footnotes omitted). The authors also note that wrongful convictions may arise due to uncertainty regarding (i) whether the defendant intended to bring about a harmful result, (ii) the specific act that the defendant intended to complete, and (iii) whether the defendant would have had the resolve to complete his crime if he had the opportunity to complete it. *Id.* at 613.

⁸ Model Penal Code §5.01(5)(f) (Official Draft and Revised Comments, 1985).

⁹ See, e.g., *Png (1986)* and *Chu et al. (2000)*.

¹⁰ The maximal penalty may emerge due to marginal deterrence considerations or because of constitutional requirements that necessitate proportionality in punishment (see *Shavell (1990, p. 449)* for a lengthier discussion).

¹¹ See *Shavell (1990, pp. 436–437)*.

¹² *Id.* *Shavell (1990)* also notes that increasing the frequency with which accomplished crimes are punished is in many cases an inferior method of increasing the probability of punishment because “additional enforcement resources would be required to raise the probability of apprehension of those who do harm, whereas no resource increase is needed to apprehend at least a portion of those who commit attempts”. *Id.* at p. 437.

¹³ Note, however, that this view has recently been challenged in the literature and there is an ongoing academic debate on the likely effects of type-I errors on deterrence. See, e.g., *Lando (2006)*, *Garoupa and Rizzolli (2012)* and *Lando and Mungan (2014)*. In Section 4, I explain how the results presented in Section 3.2 continue to hold when there are costs associated with punishing the innocent, even if type-I errors have no effect on deterrence.

¹⁴ In fact, as I demonstrate in Section 4.2.1, a counter-argument exists for punishing attempts when there are type-I errors associated with the punishment of results, in addition to similar errors associated with the punishment of attempts. This counter-argument also requires the presence of some individuals who are untalented but have an incentive to initiate criminal plans. In Section 4.2.2, I argue that this argument is weak, because the benefits associated with reducing the under-deterrence of such individuals are likely to be small in comparison to costs that are not considered in the model but are likely to exist in reality.

¹⁵ Costs associated with the punishment of the innocent have previously been incorporated in the law enforcement literature, see, e.g. *Chu et al. (2000)*. Furthermore, recent articles provide explanations as to how such costs may emerge, see, e.g., *Galbiati and Garoupa (2007)*, *Mungan (2011)*, *Kaplow (2011)*, *Rizzolli and Saraceno (2013)*, *Rizzolli and Stanca (2012)*, *Nicita and Rizzolli (2014)*.

¹⁶ Talented individuals are as defined in the previous paragraphs, i.e. for these individuals an increase in the punishment of attempts increases the expected cost associated with wrongful convictions more than it reduces the expected benefit from initiating a criminal plan.

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