

The Research of Unrealized Offense' Judgment Standard

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Abstract

In recent years, new changes have taken place in the theoretical study of unrealized offense, which is independent from the attempted crime. Therefore, the distinction between unrealized offense and attempted crime becomes the focus of research, and the core of the distinction lies in the judgment of danger. The existing theories focus on the judgment of danger and put forward the objective danger theory, the specific danger theory and the modified objective danger theory, but all have their shortcomings. So for dangerous judgment should be insisted on, on the basis of the objective doctrine of attempt, absorbed the positives, take the general person standard and then scientific causality standard, and then to "why it can't happen" after the intervention of comprehensive judgment way to achieve the high accurate judgment, so as to realize the dual purpose of criminal law protection benefit and safeguard human rights.

Keywords

Unrealized Offense; Attempted Crime; Danger; Objective Doctrine of Attempt; Doctrine of Objective Dangerousness; Doctrine of Specific Dangerousness.

1. Introduction

The distinction between unrealized offense and attempted crime is always the barometer of the trend of criminal law theory and the main battlefield of the subjectivism and objectivism of criminal law. [1] Although the attempted offense can be given a lighter or mitigated punishment than the accomplished offense, it is still punishable, while the unrealized offense is not punishable all the time. In this context, it is particularly important to judge the unrealized offense. The author thinks that the research on the unrealized offense' Judgment standard should be carried out from the following three aspects. First, the development of the theory of unrealized offense is sorted out to find out the essence. Second, carry on the critical research to each theory, find each theory can adopt place. Thirdly, construct the operable path of unrealized offense' Judgment standard and test the case.

2. Unrealized Offense the Origin of The Problem

Concept is an important tool to solve legal problems, and the understanding of a problem should start from concept. For a long time, the general theory and judicial practice of our country regard the unrealized offense as a special form of attempted crime, and adopt a punishment attitude, so it is labeled as the subjective doctrine of attempt. [2] With the influence of criminal law objectivism movement and the rise of criminal law modesty, the influence of objective attempted theory on the unrealized offense is more and more profound.

2.1. The Unrealized Offense of The Subjective Doctrine of Attempt

The theory of subjective attempt holds that "the key point of punishing attempted behavior is not the factual danger of attempted behavior to the object of behavior protected by constitutive elements, but the perpetrator's hostility to the law in his subjective state of mind through his behavior, so as to form intentional wrongdoing." [3] Based on the subjective attempt theory, once the actor has the intention of committing a crime and shows it through his behavior, it will

constitute a crime and be punished. As for whether it poses a danger to legal interests is not important, under this background, the attempted crime will be punished, even if unrealized offense, and only superstition crime will not be punished.

2.2. The Unrealized Offense of The Objective Doctrine of Attempt

Objective attempt theory holds that the essence of illegal lies in the infringement of legal interests, more precisely in the infringement of legal interests in the way of violating legal norms, and there is no need to use criminal law sanctions before the danger of infringement of legal interests is formed. [4] Under the theory of objective attempt, the basis of punishment for attempted crime lies in the existence of objective risk of infringement of legal interests. If there is no such risk, it should not be punished. Therefore, unrealized offense will not be treated as a sub-item of attempted crime, but fundamentally exclude the unrealized offense of punishment. Under the framework of objective attempt theory, the core difference between attempted crime and unrealized offense is whether there is objective danger of infringing legal interests, so whether there is danger and the judgment standard of danger have become the center of academic research. At present, based on the theory of objective attempt, there are three kinds of judgment about danger: objective doctrine of attempt, specific doctrine of attempt and modified objective doctrine of attempt.

Although theories can guide conviction and sentencing in the concept of criminal law, they lack clear standards and feasible judgment paths in judicial practice, and it is difficult to grasp the differences between individual cases. Especially when the two theories come to completely opposite conclusions about the same case, how should the judge ensure the same case and judgment and sufficient reasoning, there is great difficulty.

3. The Doctrine Structure That Unrealized Offense Judgment

The character of unrealized offense lies in the fact that it is impossible for the doer's behavior to cause the risk of infringement on legal interests, so it is not punishable and differs from attempted crime. Unrealized offense judgement standard of surrounding the behavior whether there is objective risk, mainly concentrated in the judgment of the benchmark for risk judgment, judgment of data and determine the time points, according to the differences in these three factors, under the framework of objective attempt produced objective danger theory, specific danger theory and modified objective danger theory.

3.1. The Judgment Standard Under Objective Danger Theory

The objective risk theory takes scientific causality standard as the criterion of judgment; Take all the facts later ascertained as the information for judgment; To make a judgment as a point in time during a trial. According to the analysis of the facts of the case by using the scientific causality standard, if the ordinary people with scientific knowledge perceive the risk of the result to be relatively unable, they will be regarded as the attempted crime; if they cannot perceive the danger, they will be regarded as absolutely unable, and they will be regarded as unrealized offense and be exempted from punishment. The objective danger theory completely follows the standard of objectivity and tries to exclude all subjective factors. For example, in the case of shooting a corpse as if it were a living person, if it is judged according to the objective danger theory, it can be regarded as unrealized offense without considering other factors.

For objective danger to the causal relationship between science as benchmark that should rethink of judgment, if this as a benchmark in practice will inevitably draw all actual law failed to damage the abortive behavior is unrealized offense, this obviously makes many crime to escape punishment, not only caused damage to the social order and make the protection of the law interest is not complete. It is beyond the possibility of public prediction. In this regard, some scholars believe that danger is not an absolute objective existence, but a relative danger that is

specially recognized by the actor and possibly perceived by ordinary people, [5] so as to oppose the judgment standard of objective danger theory.

3.2. The Judgment Standard Under Specific Danger Theory

The specific danger theory is put forward in view of the defects of the objective danger theory. The specific risk theory takes the opinion of ordinary people or the majority as the benchmark for judgment. The facts recognized by ordinary people at the time of the act and the facts specially recognized by the actor are used as the data for judgment. Act as a point in time for judgment. The distinctive features of the doctrine of the ordinary people to have social common sense or most human judgment benchmarks, only know when to judge that the incident, if the average person can feel the results of risk, is certainly exist attempted crime, [6] avoid the objective danger said after the event and have all the facts as data and easy to draw a attempted behavior are not punished behavior mistake. So that legal interests can be better protected.

But there are some scholars pointed out that the objective attempt and objectivism of criminal law requirements as far as possible dangerous objective, just to behavior when the average person can recognize the fact that for dangerous judgment data cannot achieve objective request. After all, for some of the larger community dispute case, how to define the most people there is a problem.

3.3. The Judgment Standard Under Modified objective Danger Theory

The modified objective risk theory is a new theory proposed by revising the inadequacy of the objective risk theory, which requires to lead to the cause of the analysis, scientific exploration of what will happen under the circumstances of the results and the possibility of how much, although in the objective did not cause the results, but the general personnel will have a sense of crisis after the high probability, if there should be identified as attempted crime, on the contrary, is unrealized offense.

In addition, on the basis of the judgment, the judge advocates to judge from the perspective of people, and requires the judge to start from the average person, but at the same time adhere to the principle of scientific causality.

4. Reconstructing Unrealized Offense's Judgment Standard

Admittedly, it is difficult to judge the "danger", but it is also an unavoidable problem in research. Neither the objective danger theory nor the specific danger theory nor the modified objective danger theory can accurately and effectively judge all the situations in practice, so the judgment of unrealized offense should be a comprehensive judgment process based on the objective attempt theory.

4.1. Unrealized Offense Judgment Path

First of all, it needs to be clear that the judgment of unrealized offense belongs to the judgment of individual cases. In the previous research process, there are many scholars who classify unrealized offense, including means unrealized offense, object unrealized offense, superstition unrealized offense, etc, which has no great significance in practical operation. In practice, there are many reasons for the occurrence of unrealized offense. In a large number of cases, unrealized offense is caused by comprehensiveness or superposition of reasons. If the perpetrator shot at the empty bed at night, if the victim happened to be sleeping on the sofa in the living room that night, it should be considered as attempted crime; but if the victim's been working away from home for a long time, it should be considered as unrealized offense.

The key to determine whether it is unrealized offense whether its behavior is dangerous. There are three steps to determine whether the behavior is dangerous. The first step is to judge the risk of the behavior according to the standard of ordinary people. The time point used in the

judgment is the perspective of the event, judging whether the behavior is dangerous according to the situation of the case. The second step is to adopt scientific standard of causality is dangerous to judge on behavior, the judgment of time is the ex post perspective, through investigation to understand all the case facts and objective laws of accurate judgment whether the behavior do dangerous, if the average standard with the science causality standard determined by the conclusion is consistent, It can make the final judgment whether there is danger or not, and determine whether it can not be committed. If the two judgment conclusions are opposite, it needs to start the third step for judgment, and reach the final conclusion. Third judgment is based on why it can't happen make judgment, according to the scientific standard of causation judgment in the first place, will not be able to reason is divided into absolute and the relative not, absolutely can't there is no damage to the possibility of interests, therefore belongs to unrealized offense, resistance is relatively not because of accidental factors results further judgment should be used. When the possibility of this condition is very small, it is considered that the possibility of infringing on legal interests is very small and cannot be committed. The judgment standard adopted at this time is the judgment standard of ordinary people. When the possibility of this condition is not very small, it should be regarded as the possibility of infringing on legal interests and belongs to the attempted offense.

If A wanted to kill Lee and went to a drug store to buy arsenic, the drugstore owner thought A might have killed Lee and changed arsenic into white sugar. A few days later, B came to Visit Li at her home and poured arsenic into Li's drinking glass in an attempt to kill Li, but failed. "Arsenic case" is a classic case that cannot be discussed. In this case, it is considered dangerous according to the standard of ordinary people. And scientific causality standard decided that its behavior is not dangerous, so need to be the next step, in this case, cause the purpose of the crime, the pharmacist gave B sugar not arsenic, so the possibility of the pharmacist will exist to B arsenic, causality in accordance with the scientific judgment, obviously there are, so it belongs to relative not, So is it very unlikely that the drugstore owner gave B arsenic instead of sugar? Obviously not, because what B bought was arsenic, and it is not likely that B bought arsenic to sugar, so it should be considered as an attempted criminal.

4.2. Unrealized Offense The Benchmark of Judgment

First of all, it is clear that danger is purely objective, but the judgment of danger is subjective. Because danger is perceived by people, two aspects must be considered in the judgment of danger. Neither the standard of ordinary people alone nor the standard of scientific causality can effectively solve the whole situation when making hazard judgments. The standard for ordinary people is subjective, which may punish some cases that are absolutely impossible to cause damage to legal interests, which may damage the modesty of criminal law. It may also ignore some specialized special crimes and cannot fully protect the interests. However, the standard of scientific causality only makes judgment from the perspective of hindsight, and the judgment of danger is from the perspective of absolute "rationality", ignoring the judgment of subjective malignancy and danger of the doer, which may make the doer escape punishment. Therefore, it is necessary to make a hierarchical judgment on both and make up for this defect. When making a hazard judgment, we should first make a judgment according to the standard of ordinary people. This is because most people can make accurate judgments based on "experience" when judging according to ordinary people's standards, and most of the behaviors that are not dangerous according to ordinary people's standards are not punishable. Such as adding large amounts of glucose to the water with the intention of causing the drinker to develop diabetes and eventually kill. In this case, most people can judge that the act is not dangerous and therefore should not be unrealized offense. In addition, the act of killing or injuring people by means of ignorance and superstition can be accurately judged according to the general understanding of danger, and it is unrealized offense.

But relying on ordinary people's standards alone is not necessarily an accurate judgment of the danger of all actions. Such as smeared hiv-tainted blood on school park benches in the summer with the intention of spreading AIDS. According to the standard of ordinary people to judge, most people think that the behavior is dangerous, should belong to attempted crime, but according to the judgment of scientific causality, the behavior is impossible to spread AIDS, and belongs to the absolutely not, so this situation should be classified as unrealized offense. In addition, for biological invasion and other cases that require professional knowledge to conduct scientific causal relationship and make hazard judgment, ordinary people cannot make accurate judgment on danger due to lack of professional knowledge. Therefore, they also need to conduct scientific causal relationship judgment to correct the result of hazard judgment and fully protect interests.

4.3. The Time Point of Unrealized Offense Judgment

The judgment of scientific causality must be made after the fact, because the judgment of scientific causality is based on the understanding of all the facts of the case, including the situation found out after the fact, objective and physical facts. Average person standard judgment is based on the average person's fear of behavior occurs and daily life experience to judge, does not need to know about all the things after happened, the key is that according to the average person perceived range to determine whether there is a danger, whether the infringement known to the legal interests of ordinary people, and can be based on the judgment that the verdict in accordance with the national forecast possibilities.

"If it is determined by the behavior of the time point, it can only be judged by the fact that the facts recognized by the average person; if all the facts existed objectively, it must be considered afterwards or afterwards, and afterwards." [7] The fact that the two judgments is not consistent with the difference in the fact that it is determined by the fact that the time point of the judgment is different, and the scientific causal standard is based on the judgment. All facts are judged, and it is possible to protect the behavior of the law without the protection of the legal protection. The average persons standard is to perceive the subjective viciousness of the actor and the perceived perception and fear of the average person, according to the appropriate social concept. Grasp the risk of behavior, let the criminal law meet the possibility of national prediction.

4.4. Rejudgment when Judgment is Inconsistent

When in accordance with the standards of ordinary people and judgment of the causal relationship between scientific standard consistent, nature can draw the behavior whether there is a danger, but not all cases of judgment is consistent, both when there is a causal relationship between average person standard and scientific standard of judgment result inconsistent, should be how to deal with, is the key to reconstruct unrealized offense judgement standard.

As in the "blood case", in accordance with the standards of ordinary people think this kind of behavior is dangerous, in accordance with the standards of scientific causal relationship to judge this kind of behavior is that there is no danger, the judge result is not consistent, can't denial by one party results at this time the other party as a result, because both belong to the same level of judgment, there is no status relationship, At this point, another criterion should be introduced to further measure the risk.

The introduction of the standard requires further analysis of the reasons for the inconsistency between the general person standard and the scientific causality standard, that is, the analysis of the "why it can't happen" in unrealized offense. In the "Blood case", the general standard that this kind of behavior is dangerous is based on a more emotional understanding, more is a fear of AIDS without a clear understanding of the behavior. Scientific causality is the spread of AIDS

to do scientific research, such behavior is absolutely not to be realized, should be included in the scope of absolutely not. Here we can divide impossibility into two forms according to the reason of impossibility, that is, absolute impossibility and relative impossibility. Absolute impossibility means that the reason why a crime cannot be realized is that it is restricted by objective rules, so that the behavior will not result even if it is indulged. Relative impossibility means that the behavior of the actor is restricted by external accidental factors, thus blocking the path of the behavior resulting in the result of impossibility. Here, the judgment of absolute and relative impossibility is the judgment of scientific causality, that is, pure objective judgment. As mentioned above, the behavior of smearing blood containing HIV in a bench is definitely not propagated by HIV, so this behavior belongs to unrealized offense.

In this case, so the relative impossibility must be an attempted crime, the answer is negative. The modesty of criminal law requires that when the possibility of harm to legal interests is very small, criminal law does not regulate this kind of behavior; On the other hand, considering the penalty cost, it is not worth the loss to punish this kind of behavior. Even if this kind of behavior belongs to the relative impossibility, also need to the possibility of the result of the occurrence of judgment, if the danger possibility is very small at this time, still belongs to unrealized offense. On the contrary, if the possibility of the occurrence of danger is not very small, it belongs to the category of attempted offense. At this time, to judge whether the possibility of the occurrence of danger is very small, the standard of ordinary people is adopted.

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