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LAWRENCE C. BECKER

Criminal Attempt and the Theory of the Law of Crimes

The fundamental problem addressed in this paper is that of getting an adequate rational justification for the distinction the law draws between criminal and noncriminal wrongs. But because theorizing about the law is not only vacuous but likely to be positively misguided apart from a consideration of concrete issues in the law, I want to frame the discussion of theory with an example of its application.

I have chosen, as the example, a proposal for reforming the law of criminal attempt—specifically the proposal that, at least in many cases, successful crimes and (the corresponding) attempted crimes should be punished equally. I have chosen this example both because it has intrinsic interest and because the current status of attempt law, as well as discussion of it, directly reflects what I will argue is a mistaken theory of the law of crimes, and thus is a convenient way of introducing my own view. Due to the fact that the law of attempts has several complex elements, much of what follows will be about those elements. But this should not be allowed to mask the fact that the philosophical crux of the paper is in its discussion of the fundamental aims of criminal law.

There are two additional remarks to be made as preliminaries.

I am indebted to Joseph Raz, Thomas T. Lawson, Theodore Long, Lewis H. La Rue, and the members of the Hollins College Seminar in Philosophy for help with an early draft of this paper. Jesse Zeldin and Roscoe Hill gave me useful bibliographical material at the same stage. A shortened version was read to the Virginia Philosophical Association in October 1973. Valuable criticism from that group, from Charles A. Fried, and from the editors of *Philosophy & Public Affairs*, have gone into the current version of the paper.

First, I will speak throughout of *punishment* for crimes, because that is the traditional way of speaking. But my argument is independent of the question of whether we should “punish” criminals, in the usual sense, at all. Everything argued for here is perfectly compatible with less retributivistic ways of speaking. Further, the proposal for *equal* penalization of attempts and successes is independent of the question of whether one should equalize the penalties by raising those for attempt or by lowering those for success.

Second, and more importantly, it must be noted that there is general agreement that no adequate single principle can be found which will provide a rational basis for the full variety of wrongs currently involved in the criminal/noncriminal distinction. The law has grown in too random a fashion for that, and we shall, I suppose, never be able to find a plausible theory of the law of crimes which justifies both treating pilfering petty cash as criminal and certain sorts of highly harmful breaches of contract as noncriminal. An historical explanation is one thing; no doubt we can get that. But a single justifying principle is quite another matter. This is the difficulty which has led some writers to do little more than state the problem and then give up,¹ and has caused others simply to ignore the problem for more promising pursuits.²

But while it may not be possible—or even important—to get an adequate single distinguishing principle, it is possible, I think, and quite important to get clear on what is *fundamentally* at stake here: that is, why it is that we mark off the major sorts of criminal wrongs from others and make them part of public, rather than private, law. This is an important task because there is general consensus in the legal profession on this more limited version of the problem, and I am convinced that the consensus has latched onto a mistaken theory—a theory which is reflected in the treatment of attempted crimes, and which has contributed to the quite unnecessary overestimate of just how far from rational consistency the criminal law as a whole is.

1. See P. J. Fitzgerald, *Criminal Law and Punishment* (Oxford, 1962), p. 7.

2. Glanville Williams, for example, in his enormous textbook on English criminal law, *Criminal Law: The General Part*, 2nd ed. (London, 1961), does not devote so much as a sentence to an attempt to define his subject in a general way.

I

The common law was late in recognizing attempts as criminal. Early English law started from the principle that an attempt to do harm was no offense.³ Of course, if a man wounded another in an attempt to kill him (or to steal from him, etc.), he could be punished for the wounding. But that was not punishment for an attempt at the more serious crime, and, apparently, if no physical damage was done by an attempt, no prosecution was possible, nor thought to be proper.⁴ It was not until the sixteenth century, in the Court of the Star Chamber, that the criminal law was consistently extended to attempts, and then it was apparently only extended to attempted felonies.⁵

The modern doctrine of criminal attempt had to wait until 1801 for its formulation. The case was *Rex v. Higgins*, a prosecution for the

3. Pollock and Maitland, *History of English Law* (2nd ed. 1898: in the 1952 reprint by Cambridge University Press) II, p. 475 remark that the principle in English law at the end of the middle ages was "where there is no harm done, no crime is committed; an attempt to commit a crime is no crime." At page 509, they remark that this is true "as a general rule" of ancient (English) law.

The situation was somewhat different on the Continent. Attempts were apparently punished there all through the middle ages, though scholars have had little success in uncovering any theoretical discussion of the practice from that time. By the sixteenth century, attempt was included in recognized Continental criminal codes. See Jerome Hall, "Criminal Attempt: A Study of Foundations of Criminal Liability," *Yale Law Journal* 49 (1940): 789-791.

4. See Henrici de Bracton, *De Legibus et Consuetudinibus Angliae* (Twiss, ed. 1878) vol. II, p. 337, where Bracton quotes as "well known" [*illud*] a phrase refusing penalties for attempts: "for what harm did the attempt cause, since the injury took no effect?" There was, however, an early English law against unlawful assembly, rout, and riot which held that any assembly of three or more persons for an illegal purpose, involving action toward that purpose, was punishable as a rout. As with the many acts held to constitute treason (e.g., writing letters denouncing the King, or making a bet that he would not live long), it is a fairly small conceptual step from such laws to the notion of criminal attempt. There are three early cases, in addition, which are sometimes cited as deviations from the usual practice. In one, reported in 27 Ass. pl. 38 (1353), Shardlowe, J. said, "One who is taken in the act of robbery or burglary even though he does not carry it out, will be hanged according to the law." The other two cases concern attempted murder, and in both cases, the culprits were hanged, the judges citing the maxim *voluntas reputabitur pro facto* [the will is to be taken for the deed]. This particular excursion into Latin maxims quickly proved embarrassing and was not pursued in subsequent decisions. See, for a review of these matters, Jerome Hall, *op. cit.*

5. See Hall, *op. cit.*, pp. 796-797.

misdemeanor of solicitation. Higgins had asked a man's servant to steal a quantity of rope from the servant's master. The servant did nothing, but the plot was discovered and Higgins was brought to trial. His counsel argued that although an attempted *felony* was a crime, an attempt at a misdemeanor was not, and Higgins' act had clearly been no more than an abortive attempt at the misdemeanor of solicitation. He was, however, convicted and the Court said in part: "every attempt to commit a crime, whether felony or misdemeanor, is itself a misdemeanor and indictable."⁶ This piece of judicial legislation was a success, and has been followed faithfully since.

The situation at present is that, in England, criminal attempts remain punishable as common-law misdemeanors, with life imprisonment as a theoretical maximum. In practice, however, courts normally award lighter sentences for attempts than they do for complete offenses, and in some cases, statutes require this.⁷ In the U.S., "the usual punishment grading system for attempt involves making [attempt] punishable by a reduced factor of the punishment for the completed crime. In California [for example] attempt carries a maximum term of not more than one-half of the highest maximum term authorized for the completed crime."⁸ In a small number of states—e.g., Illinois and Mississippi—most attempts are punished equally with successes. But even here, attempts at first degree felonies are punished less severely than the completed crimes. We can say, then, that the current practice generally treats attempted crimes more leniently than completed ones.⁹

6. *R. v. Higgins* [1801] 2 East 5 at 11; 102 E.R. 269 at 272.

7. Fitzgerald, *Criminal Law and Punishment*, p. 98.

8. Sanford H. Kadish and Monrad G. Paulsen, *Criminal Law and Its Processes*, 2nd ed. (Boston, 1969), p. 368.

9. The Model Penal Code, however, recommends the following sort of law: "Except as otherwise provided in this Section, attempt . . . [is a crime] of the same grade and degree as the most serious offense which is attempted. . . . An attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree" (American Law Institute, *Model Penal Code* (1962), §5.05(1)). Earlier cultures in the West have also tended toward the more stringent approach. The Romans punished attempts, and though for "ordinary" crimes an attempt got a lighter penalty than a success, for "atrocious" crimes attempts were apparently punished just as severely as completed crimes, at least

The standard arguments in support of current practice make the following points:¹⁰

(1) The Reform Argument. They acknowledge that, in terms of the reformative aims of penal sanctions, there is probably no point in distinguishing between attempts and successes. One who tries and fails is not likely (merely from that fact) to be in less need of reform than one who tries and succeeds. Thus we have some reason for punishing attempts and successes *equally*.

(2) The Deterrence Argument. On the other hand, they hold that lesser penalties for attempts do not reduce the *deterrent* effect of the law, for at the stage when a person is contemplating a crime, the penalty which has deterrent force for him (if any) is the one for what he *intends* to do. On the assumption that the criminal does not intend

as long as the result of the attempt was not insignificant. See Hall, "Criminal Attempt," p. 790. And Plato has this to say about attempted murder:

If anyone has a purpose and intention to slay another who is not his enemy, and whom the law does not permit him to slay, and he wounds him, but is unable to kill him, he who had the intent and has wounded him is not to be pitied—he deserves no consideration, but should be regarded as a murderer and be tried for murder. Still having respect to the fortune which in a manner has favored him, and to the providence which in pity to him and to the wounded man saved the one from a fatal blow, and the other from an accursed fate and calamity—as a thank-offering to this deity, and in order not to oppose his will—in such a case the law will remit the punishment of death, and only compel the offender to emigrate to a neighboring city for the rest of his life, where he shall remain in the enjoyment of all of his possessions. But if he have injured the wounded man, he shall make such compensation for the injury as the court deciding the case assess . . . (Plato, *Laws*, Book IX: 877; trans. Jowett, Modern Library Editions, vol. 2, p. 621).

In all these instances, however, from the earliest to the latest, there has been hesitation, if not flat refusal, to treat attempt and success alike for all crimes, and ever to impose the death penalty for an attempt.

Pollock and Maitland, *History of English Law* II, p. 497 n. 2, say, however, "It is further to be remembered that among some barbarous folks, which are not utterly lawless, successful theft is regarded with tolerance, if not admiration, and gives rise to a mere claim for the restoration of the goods, while 'manifest theft' is unsuccessful theft and exposes the thief to a beating."

10. Examples of such arguments may be found in P. J. Fitzgerald, *Criminal Law and Punishment*, p. 98; Waite, John Barker, *The Prevention of Repeated Crime* (Ann Arbor, 1943), pp. 8-9; Hall, "Criminal Attempt," p. 817 n. 130; and American Law Institute, *Model Penal Code, Tent. Draft No. 10* (1960), comment to §5.05.

merely to attempt, but rather to succeed, it follows that the severity of the penalty for attempt has little or no force as a deterrent. In accordance with the principle of minimizing pain, then, we have some reason for giving *lesser* penalties for attempts than for successes.

(3) The Unequal Harm Argument. The conflict between (1) and (2) is resolved, or so the arguments go, by noting that since attempts do less actual harm than successes, the principles of proportionality and similar treatment for similar cases combine on the side of (2) to require the lesser penalties. We are committed, for good reason, to making the severity of punishments roughly proportionate to the gravity of the wrongs done. (Consider, for example, the injunctions against “cruel and unusual punishments”—ordinarily interpreted to mean excessive or disproportionate punishments.) We are also committed, of course, as a part of a general commitment to rational decision-making, to treating similar wrongs similarly. If attempts do less harm than successes, the latter principle requires us to class them, on that basis at least, with crimes of similar gravity—i.e., not with successes. And if the penalty is to be proportional to the gravity of the offense, the lesser wrongs should get lesser penalties.

I shall not deal with all the issues raised by such arguments. Specifically, I shall not attack the deterrence argument (2), even though I think it is contestable. I shall, rather, challenge the theory of criminal wrongs implicit in the unequal harm argument (3). If that argument falls, as it may when the theory of criminal wrongs is revised, and it is replaced with an *equal* harm argument (3)', the principles of proportionality and similar treatment for similar cases will combine on the side of the reform argument (1)—which I assume is uncontestable—to support equal punishment for attempts and successes.

II

A leading characteristic of the criminal law is that it is *public law*—a region in which society itself takes the initiative for prosecution and itself exacts the penalty. The major sorts of wrongs we classify as criminal are as old as law itself (murder, mayhem, theft . . .), but primitive law typically treated such matters, along with what we now call torts and breaches of contract, as private law problems.¹¹ It was

11. B. Nicholas, *An Introduction to Roman Law* (Oxford, 1962), p. 208.

not that people were then unaware of the distinction between murder and accidental death through negligence (or at least it would be odd to suppose so). They merely treated the two wrongs—legally—in the same way: by using the legal process to establish who the wrongdoer was, and to see to it that he made amends to the injured party. Thus indemnities were often acceptable penalties for killings of both sorts, and when they were not, they were replaced with Solomon-like provisions which emphasized the private law nature of the system: e.g., if X falls from a tree and kills Y, Y's kinsman, if he insists on vengeance, is entitled to climb a tree and fall on X.¹²

It is characteristic of private law that the initiative for prosecution rests with the injured party (or his representatives), and that the issue at stake is the satisfaction of his grievance. At some point (it is not clear just when) certain wrongs began to get special treatment. Prosecution in these cases no longer depended on the initiative of the injured party; and the penalties assessed the wrongdoer were less and less designed to "satisfy" the victim. The thief was imprisoned rather than forced to make restitution.

The historical explanation for this shift (which, of course, was a gradual process) is no doubt complex. Political utility was quite likely a large part of the cause, both in terms of the administration of the thickets of laws drawn up to protect and strengthen monarchs, and in terms of handling public outrage and public safety in the case of particularly vicious wrongdoers. Further, it is reasonable to suppose that as governments grew in strength, and sought popular support in terms of the stability and protection they could afford to citizens, the development of a public law response to particularly "visible" and unsettling wrongs would follow. In addition, there were doubtless some moral demands which found expression in the growth of public law—particularly the principles of equity and desert in cases where no injured party remained to initiate an action (as in the murder of a destitute and "relationless" person), and probably convictions about Divine Law as well in cases where the government put itself forward as a servant of such.

12. Pollock and Maitland, *op. cit.* II, p. 471, quote *Leges Henrici* at 90. §7 as saying that "if by mischance you fall from a tree upon me and kill me, then, if my kinsman must needs have vengeance, he may climb a tree and fall upon you."

But an historical explanation is one thing, and a rational justification is another. It is the public law character of the whole criminal law as it now exists—from whatever historical causes—which must be justified, and it is clear that the hodgepodge of reasons one can assemble from the causes listed above will not even begin to produce a justification. Why should the law take over the prosecution of fraud but not intentional breach of contract? Why should the prosecution of motor vehicle homicide be a matter for public initiative (and the penalty be imprisonment, even when the wrongdoer is uninsured) when deaths caused by the negligence of one's employer are not? Why, in general, is the amount of damage done to the victim, or the amount of suffering he endures, or his capacity to initiate and carry through a prosecution not even a relevant factor in deciding which wrongs will be publicly prosecuted? (After all, one can die just as horrible a death by someone's noncriminal negligence as by intentional criminal conduct. And one can be just as incapable, financially or otherwise, of carrying through a lawsuit for breach of contract as one may be in carrying through a criminal prosecution.) And why are the penalties of the criminal law not directed toward recompense of the victim, at least where possible?

When jurists have reached for an answer to such questions—or rather, to the general question of what is fundamentally at stake in distinguishing criminal from noncriminal wrongs—they have typically said two things: first, that the relevant distinguishing characteristic of the major sorts of wrongs defined as criminal is that they are social or public harms; and second, that no single distinguishing principle can be found for the full range of criminal wrongs.

The former point has become virtually an uncontested definition in the law.¹³ Its rational appeal is obvious. If some harms are harms to

13. "A crime may be described as an act, default or conduct prejudicial to the community, the commission of which by law renders the person responsible liable to punishment . . ." (P. G. Osborn, *A Concise Law Dictionary*, 5th ed. [London, 1964], p. 97). "The distinction between a *crime* and a *tort* or civil injury is that the former is a breach and violation of the public right and of duties due to the whole community considered as such, and in its social and aggregate capacity; whereas the latter is an infringement or privation of the civil rights of individuals merely." Or again, "A crime, as opposed to a civil injury, is the violation of a right, considered in reference to the evil tendency of such violation, as regards the community at large" (*Black's Law Dictionary*,

the community as a whole, then it is only fitting that the community itself, through its legal officers, take the initiative for prosecution. And it is likewise fitting that the sanctions imposed for these harms should be designed to get the necessary community benefits (e.g., reform and deterrence). Indeed, it is hard to see what other theory could account for both public initiative and public-regarding sanctions for anything like the list of wrongs we now define as criminal.

One can, of course, argue for public initiative as a way of spreading the cost of (personally) important prosecutions, but then one cannot draw the public/private law distinction between crimes on the one hand and torts and contract on the other. Moreover, one has no ground, on that account, for public-regarding sanctions. Any argument adequate to establish the justifiability of such sanctions—even if it is expressed in terms of the state's duty to enforce morality or Divine Law—will, it seems, be some version of a social harm argument. Similarly for straight social utility arguments. They either concern rectifying or preventing *disutility* consequent to the wrongs done, in which case they are social harm arguments; or else they concern simple expediency for the political/legal process, in which case both the list of crimes we have and the public-regarding sanctions we have appear bizarre.

So if there is a rational justification for the public law response to what we call crimes, it appears that it must be some version of the standard legal thesis that crimes are social harms. I say "some version" of the thesis because just anything which harms the community cannot plausibly be a candidate for the crime category. In general, the law restricts the social harms involved to those produced by intentional, malicious conduct which is aimed at doing (or tends to do)

4th ed. revised [St. Paul, 1968], p. 443). See also pp. 1-14 of the standard hornbook on the substantive criminal law, LaFare and Scott, *Handbook on Criminal Law* (St. Paul, 1972).

Such definitions are also commonplace in the cases: "All such acts or attempts as tend to the prejudice of the community are indictable" (*R. v. Higgins* [1801] 2 East 5). "The common law is sufficiently broad to punish as a misdemeanor . . . any act which directly injures or tends to injure the public to such an extent as to require the state to interfere . . ." (*Commonwealth v. Mochan* 177 Pa. Super. 454, 110 A. 2d 788). There has been much judicial discussion of the proper scope of such pronouncements, but that this approach to what makes an act criminal is the correct one does not seem to be in dispute.

physical or financial damage to persons or property, and “wanton” or “willful” negligence which shows a “reckless or indifferent disregard” of the health and safety of others.¹⁴ The explication of the social harm argument must account for why these sorts of social harm—and not those produced by “lesser” negligence, for example—justify a public law response. As noted previously, it is not likely that the whole list of things the law currently defines as criminal can be justified on some such ground. The law has grown too randomly to make such an expectation reasonable.¹⁵ This need not destroy the importance of the point, however, that the main body of criminal wrongs can be understood in terms of a social harm principle.

What makes all this interesting in the case of criminal attempt is that jurists in favor of lesser penalties for attempts appear to forget their own theory of criminal wrongs when they make the unequal harm argument [(3) above]. When they argue for the lesser penalty on the basis of penalties proportional to the harm done, they are clearly referring to the harm done to the individual victims, since they treat the point about lesser harm resulting from attempts as an obvious one—as a truism requiring no argument. The issue of whether less *social* (i.e., *criminal*) harm is done by attempts than by completed crimes is of course not nearly so clear. It is not clear partly because the *sort* of social harm at stake in the distinction between criminal and tortious wrongs is rarely made explicit. I intend to make it explicit below, but the first correction to be made to arguments about criminal attempt is simply this: that they must show that attempts produce less specifically *criminal* harm than do completed crimes.

But is this true of attempts? I think not, even though an affirmative answer has some plausibility. The plausibility rests on a mistaken notion of the sort of social harm the criminal law is specifically aimed at. Consider the following (erroneous) line of argument: A mere attempt on the life of Robert Kennedy during his campaign (even if, like the

14. See the definition of criminal negligence in *Bell v. Commonwealth*, 170 Va. 597; 195 S.E. 675 at 681.

15. In fact, as Fitzgerald actually argues, to “explain” the *whole* list we are forced to say simply that “whether or not any conduct constitutes a crime . . . depends solely on whether or not such conduct has been proscribed as criminal by the law. The hallmark of criminality is that it is a breach of the criminal law” (Fitzgerald, *Criminal Law and Punishment*, p. 7).

attempt on George Wallace, its effect had been to cripple him and stop his candidacy) would have been much less socially damaging than what actually happened. Indeed, the differences in the public responses to both actual events are, in part, an example of the ways in which we may say that a killing does more social damage than a crippling. In the former case there was a great deal more public turmoil (desire for revenge, dislocation of the political structure, violation of expectations, frustration of desires) which had to be dealt with than in the latter. The reasons for this are no doubt to be found in people's reactions to the amount of harm suffered by the victims (and in their attitudes toward the victims). Furthermore, of course, in the former case, the victim was lost to society forever, while in the latter case, he can still contribute, even if at a reduced level. In short, since an attempt does less social (criminal) harm than a completed crime, it can reasonably be punished less severely.

This sort of argument will not do, however. After all, if we are to determine the severity of the penalty on the basis of the sorts of social harm this argument refers to, then we must distinguish *among* attempts as well as between attempts and successes, for some attempts do much more of the sort of social damage referred to than do others. And we would be forced to distinguish various attempts on a basis which violates one of the most firmly justified controlling principles of law. After all, an attempt on the life of a gangster will presumably do less social damage than the same sort of attempt on the life of a beloved public figure. To distinguish them on that basis would put us in the untenable position of having to decide, perhaps as a matter of statute, how much to punish an offender on the basis of how "popular" and socially useful his victim happened to be. Clearly this would violate, at a minimum, one of our most deeply felt and thoroughly justified moral and legal principles: that of equal protection under the law. For if anyone who is contemplating murdering me knows that his penalty will be next to nothing compared to that of someone who kills, or tries to kill, Martin Luther King (because, in terms of the sorts of social value at issue here, I am next to nothing compared to Martin Luther King), then the law hardly protects me at all, let alone equally. The initial plausibility of this interpretation of criminal harm, then, falls away sharply when its consequences are made plain.

There is, however, a sort of social harm which is at the root of criminality and which argues strongly for treating not only all “attempts” alike (regardless of the status of their victims and the amount of harm done to them) but also argues for treating at least some attempts with the same severity as completions. This is the social harm done, the social volatility, if you like, consequent to the *process* of doing the major sorts of conduct we punish criminally.¹⁶

To explain: when a person is killed by accident, we respond very differently than we do to a premeditated murder or to voluntary or involuntary manslaughter. More exactly, our normal responses to accidents, regardless of intensity, regardless of the amount of damage done to victims or to society at large, are not socially volatile. That is, they do not have the potential for destructive disturbance of fundamental social structures to be found in our responses to intentional, malicious harms, or even to extreme negligence. What calls forth a socially volatile response to the latter sorts of acts is their relation to what might be called socially unstable character traits. To wit:

Let us define perfect social stability as that state of affairs in which everyone always acts in ways which are “socially justifiable” (i.e., in ways which are at least consistent with the maintenance of social coherence, social institutions and the systems of mutual expectations necessary for the productivity of the members of society). Perfect social stability is no doubt only approachable as a limit, and indeed may not even be a desirable achievement. But it is clear that it is not even approachable unless each of us can have assurance that his person and activities will not be unjustifiably interfered with by others. For insofar as I do not possess such assurance, my own criteria for decision-making will (only rationally) include the prospect of abandoning my own socially stable behavior in self-defense. This is what I describe

16. While unconventional, the approach developed here is anticipated by some remarks of Pollock and Maitland, *History of English Law* II, p. 503, with regard to the law of treason. In discussing treason law prior to its crystallization into an elaborate statute in 1352 (25 Edw. III, stat. 5, cap. 2), and specifically those parts of it which penalize conspiracies, “compassing” the king’s death, and the like, they say: “. . . in marked contrast to the general drift of our old criminal law, the crime was in this case found, not in a harmful result, but in the *endeavour to produce it . . .*” (emphasis added).

as a volatile response, and its community-wide occurrence is social volatility.

Assurance about the justifiable behavior of others depends upon beliefs or assumptions about, and consequent trust in, their dispositions to behave in justifiable ways—that is, on belief in their not having socially unstable character traits. There are, of course, many kinds of such traits. The disposition to break one's promise whenever it is convenient is one, and a harmful one. Promise-breaking can do social as well as personal damage, and its spread community-wide would certainly create a socially volatile situation. But individual instances of promise-breaking are not, at least in our society, typically productive of social volatility. X may break his promise to Y, and Y may kill him for it (surely a personally volatile response), but it is typically the killing, and not the breaking of the promise, which produces the *community-wide* volatility. The most malicious, deceitful dealing imaginable may turn a family out in the cold, but the typical public response is an affirmation of socially *stable* behavior (through, for example, public support for the family and scorn for the wrongdoer), and not a chain reaction breakdown of such behavior in self-defense.¹⁷

Some unstable traits, thus, get a socially volatile response while others do not. And social volatility is to be regarded as a disvalue in itself, the creation of which, by acts produced by an individual's socially unstable character traits, is a social harm. It is this sort of social harm, I want to argue, which justifies the public law response we make by defining the acts involved as criminal. And it is the absence of such harm, together with the other arguments which support *mens rea* and *actus reus* requirements, which justifiably excludes some wrongs from the category of a crime. Similarly, it is the (supposed) absence of such harm which alone could justify leaving intentional, but yet personally and socially harmful, breaches of contract to private law.

17. The law sometimes recognizes this in a big way in its handling of rescue cases. See, for example, the incredible case of *Yania v. Bigan* 347 Pa. 316; 155 A. 2nd 343 (1959) in which Bigan "enticed, taunted and inveigled" Yania to jump into a trench ten feet deep in water, and then stood by doing nothing while Yania drowned. Bigan was not even held *civilly* liable, let alone criminally liable.

The interpretation of criminal harm as the harm consequent to the social volatility of conduct thus makes a good deal of sense out of the current list of things defined as criminal, the list of things defined as noncriminal, and the insistence of jurists that social harm is the issue at stake in justifying the two lists as they (mostly) stand.¹⁸ It also, of course, gives some rationale (however inadequate) for the general absence of reparation-to-the-victim in criminal sanctions. Reparation for the amount of harm done to the victims is not a part of the logic of opting for a *public* law response at all. Thus the criminal penalties for murder and for negligent manslaughter may justifiably be *different*, even though the harm to the victims is the *same*. And the penalties for attempts and completed crimes need *not* be different, merely on the ground of a difference in the amount of harm to the victims.

Two things are important to keep in mind, however, about this line of argument. First, the sorts of socially unstable character traits which produce a socially volatile response probably vary considerably from culture to culture. Which traits produce such a response in any given time and place is an empirical issue, and one to be taken seriously by any proposal for law reform. Second, the amount of social volatility (and consequent harm) produced by various types of crimes is also an empirical issue, though I want to argue that there is no reason *in general* for thinking it to be less for attempts than for successes.

With these two cautions in mind, we may proceed. The argument against the *general* conclusion that attempts should be punished less severely than successes may be put briefly as follows. Once we acknowledge that it is social harm which is specifically criminal, then we must recognize that the sort of social harm involved is precisely the harm consequent to the social volatility of the conduct at issue. It is this sort of social harm for which we punish a person's *successful*

18. There are notable exceptions. There are, for example, regions of both strict and vicarious liability in the criminal law. The concept of criminality developed here will not apply to them. But I think these cases may be safely ignored for present purposes. They do not represent the major thrust of the criminal law, and there is nearly continuous, vigorous debate over the justifiability of such laws (as one would expect, were the theory proposed here the correct explication of the distinction).

criminal conduct. And it is the same sort of social harm for which we punish criminal attempts. Now it seems plausible to suppose that, at least for many sorts of crimes, no less of such harm is done by attempts than by successes, for the breakdown of the assurance of social stability (i.e., of one agent's contribution toward it) is complete once the attempt has been made, and made known. A rash of public shootings, successful or not, are socially volatile. I see no reason to suppose that attempts are, in general, any less "public," and thus less productive of social harm, than successes. Some attempts, such as the one on George Wallace's life, are more public than nearly all successful murders, while some murders are never discovered by anyone and thus cannot do any of the sort of social harm at issue here. These vagaries, and others like them, must be ignored for present purposes. Just as it is unjustifiable to make the severity of the penalty depend on the prominence or social usefulness of the victim, so it would be unjustifiable to make the penalty depend on the amount of subsequent publicity produced at the discretion of news agencies; or, indeed, to make it depend on the degree of success a criminal has in keeping things quiet. Once we have decided on a public law response to certain wrongs, and decided roughly how much social harm (conditions of public information being equal) each type of wrongdoing causes, principles of equal treatment and advance notice require the sort of variables mentioned above to be disregarded. When this is done, there is no difficulty in seeing that the killer who fails because his bullet accidentally hits his victim's belt buckle is no less a social menace in the requisite sense than one who succeeds because his victim happens to be wearing suspenders.

The usual rationale for treating attempts, in general, less severely than successes thus breaks down: attempts are seen as presumptively equal in social harm to successes; the principles of proportionality and similar treatment for similar cases thus require that, unless the presumption is rebutted, attempts be treated equally with successes, and combined with the admittedly equal needs of the attempters and the successful for reform [the reform argument (1) above], the deterrence argument [(2) above] is overwhelmed.

III

As a convenient way of advancing additional arguments for it, I want now to consider a set of objections to the theory of criminal wrongs just presented.

A. *Confusion of General Justifying Principle with Regulative Principles.* It might be urged that the construction of an elaborate theory of social volatility to supplant a perfectly straightforward theory of social harm suggested by the Kennedy-Wallace example is based on a simple confusion. It might be maintained that the general justification for treating X as a public law matter is indeed its potential for social harm of the "usual" sort (e.g., the "costs" to society, etc.), but what controls the *grading* of the particular *sort* of offense is the amount of harm done to the victim, just as what controls the amount of punishment meted out to a particular offender is (or ought to be) its utility for reform and deterrence. Thus there is no problem with differential punishments depending on how "popular" one's victim happens to be. The *general* principle controls only the public-law/private-law decision; other principles regulate the grading of offenses and sentencing.

There is much that could be said in response to such an objection, but it will suffice to produce the sort of counterexample which can be generalized. On the theory advanced by this objection, premeditated murder and motor vehicle homicide must be graded at the same level. We typically think (for good reasons, I believe) not only that both offenses are properly public law matters (as this theory also would have it), but that they are *not* offenses of equal "criminal" gravity. But if offenses are to be graded on the basis of the amount of harm done to the victim(s), then the two forms of homicide cannot, on that basis, be distinguished. This counterexample has a structure which can be filled in many ways. Generally speaking, it shows that the objection ignores what we typically take (quite justifiably, I believe) to be a crucial element in the grading of crimes—*mens rea*. It cannot be repaired by importing intent into the grading process, for that simply raises the question of why intent is a crucial factor—and that question leads directly to the sort of social harm argument I propose. How can intent be the factor which controls our decision to classify a given act as criminal?

Only, it seems, if intentional wrongdoing is socially damaging in a way that other sorts are not. What could such a way be, if not through social volatility?

B. *Having It Both Ways*. It might also be urged, however, that the “usual” sort of social harm was faulted for violating a cherished principle of justice (equal protection) while a similar failing of the new interpretation of social harm was passed over smoothly. If the new interpretation can be shored up by introducing a principle which “holds” publicity equal for instances of a given crime (in order to meet the requirements of justice), then surely the “usual” interpretation can be shored up in a similar way. So what reason is there for opting for one interpretation over the other?

The reply here may also be brief. The equal protection problem is a *difficulty* for the usual interpretation of the social harm argument, but alone it is not decisive. What is decisive is that in addition to this difficulty, the usual interpretation—just as is so, ultimately, for objection A above—cannot give an account of why *mens rea* is a crucial element in the grading of crimes. To do so it would have to invoke a theory of social volatility, and once that is done (and the harm consequent to the status of the victim is held constant for reasons of equal protection), one doesn’t have the “usual” interpretation at all, but in effect at least, the one I propose. To see this clearly, one need only ask how one could account, on the usual theory, for treating injuries produced negligently differently than the same injuries intentionally and maliciously produced.¹⁹

C. *Oversimplification*. The theory of criminal wrong presented here may also be attacked as oversimplified. Even granting that the rationale for the public law response to certain wrongs may have to be elab-

19. It might be noted that in tort law, as well as criminal law, intentional wrongs are distinguished in important ways from negligent ones. For one thing, victims of intentional torts are able to collect punitive or exemplary damages. In addition they need not always be able to show actual injury from the wrong, whereas such a showing is a necessary part of an action for negligence. And in some cases, time limitations on the initiation of an action are more generous to victims of intentional torts than to victims of negligence. See Charles O. Gregory and Harry Kalven, Jr., *Cases and Materials on Torts*, 2nd ed. (Boston, 1969) p. 23. Whether the rationale for this difference is in any way related to the concept of social volatility is unclear.

orated along those lines, it surely is obvious that the criminal law—even for intentional and malicious injuries—has a much more complex social function than that. We take the administration of justice out of the hands of injured parties to prevent blood feuds and the vicious self-perpetuating cycles of revenge they spawn. This we find socially necessary, just as we find it necessary to go further and make prosecutions a matter of public initiative. But we must recognize the tendency these necessary steps have to impart a sense of frustration and alienation to the injured parties and to the sympathetic public at large. A vicious crime is committed, and immediately upon the capture of the culprit the engines of justice start to grind in virtual isolation from those most profoundly concerned. The outraged public is an impotent spectator; the victim is at best a mere source of evidence. Yet precisely in terms of the sort of social volatility described above, this sense of frustration and alienation can be the source of significant social instability. So we punish to reform and to deter, certainly. But we also must punish to satisfy the desire for retaliation felt by victims of crime and to satisfy the public outrage generated by those crimes. Thus, the logic of reparation and retaliation must remain very much a part of the criminal law. The severity of penalties must reflect that logic. Does this not mean, then, that equal penalties for attempts and successes would be viewed as excessive—and perhaps further aggravate the sense that the criminal law is something alien and unresponsive to the needs of those most directly concerned?²⁰

The answer to the question must be, I think, no. The places where the logic of retaliation becomes a factor in the grading of crimes are (i) where the penalties dictated by the grading are less than what is needed for retributive satisfaction; and (ii) where the penalties dictated by the grading are felt to be excessive. In either of those cases, one can imagine social instability arising. But clearly neither of those cases obtain for attempts if the analysis I propose is correct. In terms of reform, a penalty equal to that for success is indicated, and the proposed analysis of criminal harm supports equalization in general. Unless the penalty for *success* is too low for retributive satisfaction,

20. For a similar argument in favor of lesser penalties for attempts, see Wechsler and Michael, "A Rationale of the Law of Homicide II," *Columbia Law Review* 37 (1937): 1290-1298.

there is no way the proposal for equalization could result in damage under (i) above. Further, the proposed analysis of criminal harm argues against the view that the equalization of penalties is excessive by providing grounds for a presumptive claim of the equal social harm of attempts and successes. It is true that if one considers only the physical harm done to the victims, the equalization proposal may seem excessive. But we need not suppose that people are so unsophisticated as to believe that that is the only harm crimes do. And once it is shown that in terms of specifically *criminal* harm attempts and successes do equal damage, what ground is there for supposing that there would be any social outcry from retributivists for giving the two crimes equal criminal penalties? We may, I think, lay this objection aside with the others.

D. *The Need for Evidence.* It may be objected, however, that throughout the whole discussion of social harm, social volatility and the like, a number of crucial issues have been settled a priori which really stand in need of empirical evidence. This, it may be urged, is especially true of the claim that attempts are no less socially volatile than successful crimes. How can one know such a thing a priori? And until one knows it, mustn't the whole proposal for reform of attempt law stand in abeyance?

This is an objection to be taken seriously, and indeed it does weaken the proposal regarding criminal attempt. It does not, of course, strike at the analysis of what is at stake in justifying the criminal/non-criminal distinction, but that does not allow one to bypass it in a discussion of the applicability of the analysis to this region of the criminal law.

Two things need to be said. First, the amount of social harm done by attempts as opposed to successes *is* an empirical issue, and it is plausible to suppose that attempts at certain sorts of minor crimes might well be a significantly lesser source of the requisite sort of social harm than successes. I do not deny this, and would not dispute a decision to grade such attempts a notch (or several notches) below the corresponding successes. I have merely argued that there is no reason to suppose that, *in general*, attempts do less criminal harm than successes, and that we may thus establish a rebuttable presumption in favor of equal penalties.

Even so, it may be asked whether this is not based on an indefensibly a priori judgment. This leads to the second point which must be made. I do not think the difficulty raised here must be regarded as decisive, when one notices that some issues which are nominally empirical really present no discoverable *need* for empirical investigation. A good case in point is the contention that attempters stand no less in need of reform than successful criminals (at least if their failure is due to ineptness or intervening circumstances). For it is reform of dispositions, behavior patterns, motivation and the like which is at stake, and what reason is there for supposing that there is a significant difference in such factors between attempters and the successful? Likewise (though I admit, less conclusively) there seems to be little discoverable need for empirical confirmation of the point that an attempted armed robbery on a downtown street is just as disconcerting to passersby as a successful one, and that an increase in the number of such attempts would cause just as much apprehensiveness in people as would a corresponding increase in successes. One may imagine a bizarre society in which practically no attempts at *any* crime ever succeeded or did any harm to anyone, and so people were more bemused by such happenings than alarmed by them. But that is certainly not our situation. And so I think this objection, too, can be laid aside.

IV

The analysis of social harm, its adequacy as a principle for making the criminal/noncriminal distinction, and its applicability *in principle* to the reform of criminal attempt law have probably been discussed sufficiently for present purposes. No actual application of such an analysis to the law, however, can end with such an abstract discussion. So in this section and the next, I want to take up a number of objections which might be raised, not about the applicability of the analysis "in the abstract," but about its relation to a whole set of concrete problems in the law—especially, but not exclusively, in the area of criminal attempts.

A. The Difficulty of Distinguishing Attempt from Mere Preparation.

It is notoriously difficult to draw a hard and fast line between acts

merely *preparatory* to the commission of a crime and an actual attempt. It may be urged that to exact the same penalties for attempt as for completion thus puts too much strain on decisions which are often shaky anyway, and the result might be both a significant amount of injustice (the very severe penalization of people who could reasonably have been held to be merely *preparing* to commit a crime, and thus innocent of any criminal offense), and—to borrow a phrase from Justice Frankfurter—the consequent sensationalization of the judicial process with respect to trials for attempt. This is a serious enough argument to require an extended examination.

Mere preparation, of course, is not an offense in either the common law or the penal codes which have sprung from it. This is so, apparently, for two reasons, both similar to the reasons for not punishing mere intent: first, the difficulty, in most merely preparatory stages, of proving that the actions involved were really directed toward fulfilling a criminal intent (after all, one may buy poison for any number of reasons); and second, the fact that one may always abandon his criminal purpose during the preparatory stage, thus correcting his own behavior and rendering punishment unjustifiable, while once he has *attempted* the crime, it seems by definition too late to claim renunciation of the intent as an excuse—no more than one can claim renunciation as an excuse upon *completion* of the crime.

The problem is, however, in deciding at what point, in the series of steps leading towards the completion of the crime, an actual attempt has been made. Some cases are clear: firing a gun at a man's head with intent to murder is surely an attempt at murder. Going to a gunshop to choose a weapon for murder is clearly still at the stage of preparation. But consider:

(a) A man met a fourteen-year-old boy in a park, took him to a cafe and bought him ice cream. They then walked back to the park, where the man sat with the boy on a bench, put his arm around him, made indecent gestures to him, and engaged in indecent conversation with him. He suggested to the boy that they sleep out together in the park, and although he did not actually suggest participating in indecent conduct, asked the boy to meet him in the park the next night and promised him money, a walk and a movie if he did so. The next night the boy met him and was told it was too late for the movie but

that they should take a walk together. At this point the man was arrested and charged with attempting to procure the boy to commit an act of gross indecency. He argued that his conduct did not constitute an attempt, but at most merely preparation.²¹

(b) A man was talking with his employer about getting a raise, and in the course of the conversation, began to pull a revolver from his pocket. Before he could raise his arm, however, the employer grabbed him. During the struggle, in which he was eventually disarmed without having fired, he said several times to the employer, "You've got to die." He was charged with attempting to discharge a loaded revolver with intent to do grievous bodily harm. It was objected on his behalf that his acts did not constitute evidence of attempt.²²

(c) A jeweler who had insured his stock against theft concealed some of it in a recess under his safe, then tied himself up and called for help. When the police came, he told them he had locked up, gone upstairs and been knocked down and tied up by someone. The safe was found open and empty. The police were not satisfied with the story, and after searching the store, found the hidden merchandise. Told of this, the jeweler confessed to having hoped to get insurance money for the "stolen" goods. He was charged with attempting to obtain money under false pretenses. He argued that at most his conduct was preparatory.²³

(d) A man constructed and arranged combustibles in a building with intent to commit arson in order to "injure the insurers" of the building and its contents. The combustibles were ready to be lighted, but on his way back to the building to do it—when he was some quarter of a mile away—he changed his mind and drove away. He was arrested for attempting to burn the building and injure the insurers. He argued that his acts were merely preparatory.²⁴

21. *R. v. Miskell* (1953) 37 Cr. App. R. 214. He was convicted and his appeal dismissed.

22. *R. v. Linneker* [1906] 2 K.B. 99. He was convicted, and the conviction was affirmed on appeal.

23. *R. v. Robinson* (1915) 11 Cr. App. R. 124. He was convicted, but on appeal it was held that his acts were not enough to constitute an attempt and his conviction was quashed.

24. *Commonwealth of Mass. v. Peaslee* 177 Mass. 267; 59 N.E. 55 (1901). He was convicted, and on appeal the court suggested, but declined to decide, that

(e) A group of armed men cruised the streets of an area of New York City, looking for a particular payroll clerk whom they intended to rob of about \$1200. Their futile efforts to find the clerk led to their surveillance and arrest by the police. They were charged with attempted robbery. They argued that their acts did not constitute attempt.²⁵

These cases illustrate adequately, I think, the difficulty courts have had in drawing the line between preparation and attempt. From time to time there have been attempts to enunciate a general principle for making the distinction, and there has been some progress in the sense that a number of obvious candidates for a distinguishing principle have been found inadequate. At least it may be said that the definitions of attempt now offered are a good deal more sophisticated than, for example, the untenably narrow principle that the accused must have done all that was necessary to actually commit the crime to be guilty of an attempt.²⁶ Even Salmond failed to provide an adequate formulation:

An act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be in itself sufficient evidence of the criminal intent with which it is done. A criminal attempt is an act which shows criminal intent on the face of it. The case must be one in which *res ipsa loquitur*. An act, on the other hand, which is in its own nature and on the face of it innocent is not a criminal attempt.²⁷

Clearly, though, it is not so much what we see (i.e., the act) as what we know (about the intent) which determines whether we regard something as an attempt, and information on that can come from sources other than the act—for example, from a confession. The act

the evidence was sufficient for a conviction for attempt. Instead it reversed the conviction on an unrelated procedural ground.

25. *People v. Rizzo* 246 N.Y. 334; 158 N.E. 888 (1927). They were convicted, but on appeal the conviction was reversed on the ground that their acts constituted mere preparation.

26. Enunciated by Parke, B. in *R. v. Eagleton* 6 Cox C.C. 559. This was thrown out in *R. v. White* [1910] 2 K.B. 124 where it was held that the giving of the first dose of poison in series intended to cause death was attempted murder.

27. In *R. v. Barker* [1924] N.Z.L.R. 865.

of turning the wheel which opens the sluice gates of a dam is ambiguous. Did the actor think he was *opening* the gates (thus intending to let the water out)? Or did he think he was making sure the gates were *closed*? We cannot determine criminal intent merely from this act. Yet if the actor later confessed an intent to open the gates to flood the town, it would surely be odd to have to say that because *res ipsa loquitur non*, he was not guilty of attempt.

As a result of the failures of general formulas, statutory definitions of attempt have had to rely on vague formulations—for example, to the effect that the criminal intent must be clear and the act toward accomplishing the crime must be a “substantial step” toward the commission of the crime which is “strongly corroborative of the actor’s criminal purpose.”²⁸ One then relies on examples—drawn, naturally enough, from the cases—to illustrate the meaning of “substantial step” and “strongly corroborative.”²⁹ But it must be admitted that such “definitions” of attempt are no more than guidelines; they are by no means an exhaustive statement of the necessary and sufficient conditions for attempts.

In the face of this difficulty, then, the argument may be pressed that increasing the penalties for attempts to the level of the penalties for completed crimes—especially in the case of first degree felonies, for which the most severe penalties are exacted—demands a level of certainty in distinguishing preparation from attempt which simply cannot be achieved.

The reply to this argument must be made in several stages. First, it should be noted that preparation/attempt is not the only distinction in the criminal law which it is difficult to draw with precision. And if we were to step down the penalties for crimes on the basis of the “degree of difficulty” involved in determining whether they have been committed, a number of unfortunate things would result. For one thing, all crimes involving proof of intent would *per se* be subject to a similar argument concerning “strain on a difficult distinction,”

28. See American Law Institute, *Model Penal Code, Tent. Draft No. 10* (1960) §5.01(1).

29. For example, from the Model Penal Code, *op. cit.*, §5.01(2): examples of “substantial steps”: “(a) lying in wait, searching for or following the contemplated victim of the crime; (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission. . . .”

for it is clear that if preparation vs. attempt is a difficult distinction for the law to draw, conceptually, the existence/nonexistence of *mens rea* is an even more difficult one, if not to draw, then at least to apply. Yet that distinction is utterly fundamental to nearly all major criminal proceedings.

Further, and closer to the subject at hand, the distinction between attempt and completion itself—upon which the present law depends for deciding the level of penalties to be assigned—is sometimes the subject of dispute. Suppose X hits Y on the head with an ax, intending to murder him. Thinking Y dead (which he is not), X then throws him off a cliff, or down an ant-bear hole, or into a river, in order to hide his body. The second act is what actually kills Y. Now, X claims that his *intent* to kill Y was extant only during the *first* act (hitting Y on the head), and since that did not succeed, he can only be charged with attempted murder. After all, the act that actually killed Y was not *intended* to kill him at all, hence not itself an attempt at—or rather success at—murder.³⁰

Difficulties in distinction-making are pervasive in the law, and while we should not needlessly add to the list of difficulties, the reform of the law of attempt suggested here is not such a needless addition. If it is agreed for any class of crimes, in accord with the argument in II above, that attempts and successes are equivalent criminal wrongs, then the extension of equal treatment to both is hardly “needless.” On the contrary, it—and it alone—satisfies one of the most fundamental principles of justice: that of equal treatment for relevantly similar cases. And while it may “add” to a problem of proof, it also “subtracts” from one: it eliminates the importance of making the sort of discrimination between attempt and success striven for in the cases just mentioned.

Borderline cases of attempt would, under the reform suggested, be dealt with much as borderline cases of intent are presently dealt with. If there is reasonable doubt that the act constitutes an attempt (com-

30. There are at least four such cases on the books. In one, *Thabo Meli et al. v. R.* [1954] 1 W.L.R. 228; 1 All E.R. 373, the accused was convicted of murder. In the other three (*R. v. Khandu* [1890] T.L.R. 15 Bom. 194; *R. v. Shorty* [1950] S.R. 280; *R. v. Chiswibo* [1961] 2 S.A. 714) the accused were convicted only of attempt.

pare: an intended, malicious injury), then it is treated as mere preparation (compare: mere accident) and not punished criminally. If this has the effect of acquitting some reprehensible people who would otherwise—under the lighter penalty for attempt—have been punished at least a little bit, then so be it. This is perfectly consistent with the fundamental principles of the standards of proof required in criminal cases.³¹

In fact, it would be distressing to think that standards of proof can justifiably be lowered in the case of attempt as long as the penalties are kept significantly lower than those for successful crimes. And this is really what, underneath it all, the argument being discussed here is saying: that we need not be worried about making the wrong decisions on borderline preparation/attempt cases as long as the penalties for attempts are kept low. Such feelings may be justified in some cases of distinction-making in the criminal law (the reverse—the *increased* concern about getting things right—is surely warranted in the case of capital crimes). But where the issue is one of conviction as opposed to acquittal, as it is in the preparation/attempt cases, we cannot allow

31. It has been suggested by at least one eminent legal writer that we might do well to make certain unambiguous preparations (which clearly fall short of attempts) criminal in themselves. See Glanville Williams, "Police Control of Intending Criminals," *Criminal Law Review* 66 (1965); and by the same author, in *Criminal Law: The General Part*, pp. 632-633. And it may be noted that Soviet law does just that. See Article 15 of *Fundamentals of Criminal Legislation for the USSR* (official text in translation) (Moscow, 1960). This is a much more radical change than that suggested here for the law of attempt, however, and I am very sceptical, to say the least, about its justifiability. It would, no doubt, allow us to deal more adequately with some frustrating cases (e.g., *People v. Rizzo*, cited above). But the danger is, of course, that it would reach too far back toward mere intent. Everyone will doubtless agree that mere imaginative rehearsals (as distinct from intent) ought not to be made criminal. And punishment for mere intent is held by most to be similarly incompatible with the principles of a free society. But it may also be that if we are to treat our fellows as free, moral agents, we need to allow them more latitude in the process of deciding right from wrong than that. It may be that we need to respect the possibility of renunciation of criminal purpose enough not to reach back further than an actual attempt. Merely making renunciation of intent an affirmative defense (as Soviet law does: see Article 16 of the *Fundamentals*) does not answer this objection. It is the widest possible *opportunity* for renunciation which is at stake, and it is clear that persons who could not have gone through with even an attempt might well be caught before they had "had a chance" to change their minds.

ourselves the comfort of thinking that the problem can be minimized by keeping the penalties for attempt one notch lower than those for success. If there is reasonable doubt as to whether an act is criminal *at all* (i.e., in this case, should count as preparation or attempt), the benefit should fall to the accused, just as it does when there is reasonable doubt that he actually intended to harm his victim. And if there is no reasonable doubt as to whether the act is an attempt or not, the decision will be obvious. In either case, the severity of the penalty for attempt is not at issue. The reasons which justify the reasonable doubt rule for criminal cases are well enough known not to require repetition here.

In short, then, we may confidently dismiss the objection resting on the difficulty of distinguishing attempt from preparation. There are, however, some further objections to consider.

B. *The Half-hearted Attempt.* It may be argued that, just as some attempts at suicide are really not attempts at all, but calls for help, so some attempts at crimes are properly regarded as "something else": for example, as the working out of a desire, for whatever reason, to be *caught*. Some criminals are caught in attempts so often that it is hard for those intimately connected with them to interpret their behavior in any other way. It would be wrong, this argument goes, to punish such "attempts" equally with successful crimes, since the actor was not really trying to commit the crime so much as to get attention.

The reply to this, of course, is that if a distinction in penalties is to be made for those who *attempt* crimes for such motives, then it should also be made for those whose attempts (for those motives) just happen to succeed. If there are half-hearted attempts, there are half-hearted successes as well. They should be treated alike. Whether, then, the category of "half-hearted crimes" should receive lesser penalties than "whole-hearted" ones is a separate issue, and does not affect the outcome of the proposal for reforming attempt law put forward here.

C. *The Encouragement of Second Thoughts.* Another objection which might be raised against the proposal, however, is that having lesser penalties for attempt encourages "second thoughts" during the commission of some crimes. Equalizing the penalties for attempts

and completions eliminates one motive a person may have for stopping in the middle of an attempt, should he suddenly change his mind about the wisdom of what he is doing. Thus the lesser penalty may be a better deterrent in this case than the greater one.

A fairly straightforward response to this is that if we want to encourage second thoughts (i.e., abandonment of criminal purpose before the crime has been completed), we can do this directly, without regard to the relative severity of penalties for attempts and completed crimes, by making renunciation of intent an affirmative defense and/or an admissible ground for mitigation. This is surely a much more rational way of dealing with the problem than by simply excusing from the heavier penalty all whose attempts fail to come off—for whatever reason. As it stands now, the person who gives up in the middle of the attempt merely out of fatigue, or because he is interrupted by the arrival of the police, is given the same penalty as one who has given up because he has come to see the wrongfulness of his behavior. Certainly in terms of the reformative aims of criminal sanctions, as well as in terms of the amount of specifically criminal harm (social volatility) produced, the genuine repentance must be distinguished from attempts which fail for other reasons.³²

32. Making renunciation of intent an affirmative defense has its difficulties, of course. Authorities are clear that "involuntary" abandonment of attempt (as when a police patrol spots the activity and moves in, forcing the attempters to run) cannot reasonably be a defense. But although voluntary abandonment is also often said to fail as a defense, there are cases in which it has been accepted. See, for example, *People v. von Hecht* 133 Cal. App. 2d 25; 282 P.2d 764 (1953); and *Weaver v. State (of Georgia)* 116 Ga. 550; 42 S.E. 745 (1902). For a review of the authorities, see *Model Penal Code, Tent. Draft No. 10* (1960), §5.01.

The Model Penal Code, *op. cit.*, §5.01(4) recommends that renunciation of intent be an affirmative defense if it is "complete and voluntary." On the meaning of "complete and voluntary," it says: "renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim." In 1967, New York adopted a similar version of this doctrine: New York Penal Law §34.45.

Not all cases are easy to evaluate on such grounds, however. Consider *Le Baron v. State (of Wisconsin)* 32 Wisc. 294; 145 N.E.2d 79 in which the defend-

Still, in all fairness, one must recognize the possibility that penalizing attempts and completions equally might in some cases weaken the motive for giving up before completion. This would not, of course, be so for anyone who is prepared to renounce his criminal purpose as a matter of moral principle. But one who is merely in personal turmoil about the rightness of advisability of his conduct, or one who has come to believe it is simply highly unlikely that he will be able to succeed anyway, may well reflect that he might as well go ahead. After all, convincing a jury that he gave up due to a renunciation of intent is an uncertain business at best. Yet if he cannot convince them of that, thus getting a lesser penalty, it really does not matter whether he finishes the crime or not. He will get the same penalty in either case if he is caught. As Huck Finn puts it: “. . . what’s the use of learning to do right when it’s troublesome to do right and it ain’t no trouble to do wrong, and the wages is just the same?”³³

Even acknowledging this problem, however, the gains to be gotten for the reformatory aims of penal sanctions by equalizing the penalties for attempt and success seem to me to outweigh the possible disadvantages noted. Once again, then, an objection to the proposed reform seems to be met adequately.

D. *Impossible Attempts*. The proposal may, nevertheless, be attacked on yet another ground. In cases in which the crime attempted was *impossible* of accomplishment, one may argue that it is unfair to treat the offender even on a par with other attempters, let alone those who are successful. Consider: a man who, as it turns out in the course of the event, is impotent, seizes a woman and tries to rape her. It was physically impossible for him to have achieved his purpose. Can he be guilty of attempted rape?³⁴ Or consider a man who “places an il-

ant forced a woman into a shack and up against the wall and made further moves in preparation to rape her. The woman was finally able to convince him that she was pregnant and that he would hurt her baby if he proceeded. He gave up the attempt, warning her that if she screamed or went to the police after he left, he would kill her. It is uncertain whether this would fall within the meaning of “complete and voluntary” renunciation as defined above.

33. Mark Twain, *Huckleberry Finn* in *The Complete Works of Mark Twain* (Garden City, 1964), chap. 16, p. 810.

34. *Preddy v. Commonwealth (of Virginia)* 184 Va. 765; 36 S.E.2d 349 (1946). He was found guilty of attempt.

legal bet” on a horse which, as it turns out, has been scratched from the race an hour before. Is he guilty of an attempt to place an illegal bet?³⁵ Or consider a man who attempts to buy what he thinks are stolen goods. They are not. Can he be convicted of an attempt to receive stolen property?³⁶

As can be seen, there has been some conflict among the cases as to the legitimacy of the defense of impossibility. More often than not, the courts have rejected the defense, as have academic writers.³⁷ But whatever the resolution of the conflict turns out to be, we may safely argue that whatever is to be done with “impossible attempts” should be done on the issue of whether they are to be regarded as attempts at all. If they are, then one can see no reason for treating them differently than other attempts. If they are not, then the question does not arise.

E. *Generosity*. Finally, it may be wise to comment on the sort of objection suggested by Plato’s remarks (above, note 9). The suggestion is that when the attempt does not come off, it is only gracious of us to exercise the virtue of generosity, to reduce the penalty as a way of marking the proper human response (i.e., joy, relief . . .) to fortuitous and happy turns of fate which prevented the completion of the crime. Such an objection is not in the least frivolous (though I have not given it the development it deserves). Benevolence and related virtues are of the first importance in the moral life, and there is every reason to believe, at least in terms of moral theory, that considerations of what conduct would be virtuous with respect to criminal attempts ought to carry as much weight as considerations of what duties we have toward society and what values are involved in various sorts of policies on criminal attempt.³⁸ Unfortunately for this objection, however, while spontaneous generosity “for no good reason” is

35. *O’Sullivan v. Peters* (1951) SR (South Australia) 54. He was convicted.

36. *People (of New York) v. Jaffe* 184 N.Y.497; 78 N.E. 169 (1906). It was held, on appeal, that since the crime he intended to commit could not possibly have been consummated even if he had succeeded in buying the goods, he could not be found guilty of an attempt.

37. For a good overview of the problem, see Kadish and Paulsen, *Criminal Law and Its Processes*, pp. 393-410.

38. I have argued for this thesis at length in *On Justifying Moral Judgments* (London and New York, 1973).

something without which life would hardly be bearable, its ossification into a policy (such as punishing all attempts less severely than successes) eliminates its spontaneity, and hence, a necessary feature of what makes it virtuous to begin with. So again, the proposal for treating attempts on a par with successes must stand.

v

Some concern, however, may understandably be directed toward the question of the ramifications of this reform. In particular, the analysis of the nature of criminality given above has two rather startling consequences which deserve mention, not to say further study.

A. Criminal Negligence. If criminal harms come not from the consequences of the victim's injuries, but rather from the consequences of the ways in which those harms come about, then an argument analogous to the one for treating criminal attempt and success equally suggests itself for cases of what might be called "uneventful" and "eventful" criminal negligence. Take the case of reckless driving. Suppose two men are driving in equally reckless ways—at night, perhaps, in cars whose brakes and steering could not pass inspection standards, and through a residential section at high speed. One is unlucky enough to hit and kill a pedestrian who unwittingly steps into the street. The other had passed by the same spot, "uneventfully," in the same criminally reckless manner, several moments earlier. The criminality of the acts is, it seems, equal, and the acts therefore ought to be punished equally. Yet we charge the one with only reckless driving, a relatively minor offense, and the other with negligent manslaughter. The difference in the two offenses is one of mere chance, just as is the difference between the assassin whose bullet hits the belt buckle and the one whose bullet finds its target. To be consistent with the analysis of criminal attempt given here, then, it seems we should equalize the penalties for both "uneventful" and "eventful" negligence.

Resistance to any such proposal would doubtless be strong—and based on a complex of factors, not the least of which is the difficulty of determining degrees of negligence *prospectively*. Just as occasionally we may use the very fact that an injury resulted from some sort of unusual conduct as evidence that the conduct was negligent, so

too it may happen that we cannot determine *whether* an act was negligent, or *how* negligent it was, in the absence of some physical damage done. This proof problem, it may be argued, militates against extending the attempt argument analogously to uneventful negligence. But it is clear that the issue needs careful analysis.

As to whether such a startling consequence casts a question mark over the adequacy of the whole analysis of criminal wrongs proposed here, I can only remark that it is not at all unusual for the law to have to depart from even the clearest and most thoroughly grounded rules, principles or conceptualizations for reasons of equity or even practicality. If that is so in this case, it need not destroy the value of the analysis for other parts of the criminal law.

B. *Motive vs. Intent.* Another consequence suggested by the account of criminality given here is the reform of the criminal law's traditional refusal to differentiate offenses on the ground of motive, as opposed to intent. If, again, criminal harms come from the consequence of the way in which the victim's injuries (or the social harms) are accomplished, then it seems irrational to exclude a consideration of motive in grading offenses. We respond very differently (and in ways which alter the social harms done) to violations of the law done as a matter of civil disobedience than we do to the same violations done for purely personal and antisocial motives. Yet the law as it stands does not allow a consideration of motive to enter the judicial process in determining the seriousness of the crime (except as a matter of discretionary prosecution or as a matter of judicial discretion in sentencing).³⁹ It might be argued, then, that the reform of attempt law proposed here should be extended to include a reform of the law with regard to motive. Like the extension with regard to criminal negligence, however, I suspect that a rather extensive inquiry would be needed to assess such a suggestion.

39. See, for example, *Chandler v. DPP* [1962] 3 W.L.R. 694 in which protesters at a Royal Air Force base were not permitted to defend their illegal acts in terms of their motives of civil disobedience. For an argument in favor of exercising prosecutorial and sentencing discretion with respect to some forms of civil disobedience, see Ronald Dworkin, "On Not Prosecuting Civil Disobedience," reprinted in Murphy, *Civil Disobedience and Violence* (Belmont, Calif., 1971), pp. 112-130.

C. *Transferred Intent*. Finally, in addition to these somewhat problematic extrapolations, the theory of criminality given here has at least one rather straightforward extension: it renders the transferred malice (or intent) rule easily intelligible. The rule is, oversimply, that when X is trying to murder Y, but misses and accidentally kills Z, his malice or intent toward Y “transfers” to Z and he may be charged with murder.

On the basis of the usual theory of crimes, the rule is a bit problematical, for it looks as though the criminal is punished either for the unintended result (the accidental harm done a bystander) or the mere intent toward the intended victim. One alternative is uncomfortable in terms of standard accounts of the rationale for the *mens rea* requirement; the other is uncomfortable in terms of the principle of not punishing mere intent. Clearly, understanding criminal wrong as the social instability created by the process of doing certain things provides a ready and easily intelligible rationale for the transferred malice rule.⁴⁰

Perhaps enough has been said, then, to establish the main points: that reform of the theory of the law of crimes, and the consequent reform of the law of criminal attempt, are clearly indicated as part of the continuing process of rationalizing the criminal law. The analogous extensions of these reforms will, of course, have to be subjected to further study. But the lines of inquiry look promising, and it appears that they will confirm rather than disconfirm the results reached here.

40. For a clear statement of the difficulties in the traditional justification for transferred malice, see Glanville Williams, *Criminal Law: The General Part*, §49. And on the U.S. version, see LaFare and Scott, *Handbook on Criminal Law*, pp. 252-255.