Attempt, Preparation, and Harm: The Case of the Jealous Ex-Husband

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The editors of this journal pose an interesting hypothetical for our consideration, to wit:

> An ex-husband, divorced for about a year, travels to Chicago where his ex-wife lives. He first obtains a loaded gun from the home of his deceased father, and then drives to his ex-wife's house. From the bushes next to the house, he sees her in the kitchen and the man he suspects is the ex-wife's lover giving the husband's female toddler a bath. The ex-husband turns away from the window, but is arrested the next day after the gun is discovered on him by a police officer. Assume that a neighbor of the ex-wife saw the ex-husband in the bushes and reported it to the ex-wife, who now adamantly wants charges pressed against the ex-husband.

Although the editors asked us to consider whether the local prosecutor should bring charges of attempted murder, reckless endangerment, or attempted reckless endangerment, due to limitations of space, I have elected to focus on the question of attempted murder exclusively.[1] To do so, I intend to take a liberty that I do not permit my students, and build some assumptions into the hypothetical to sharpen its focus. Thus, I assume that when the ex-husband went to the home of his ex-wife, he had the specific intent to kill both her and her lover, and hence had the mens rea for attempted murder. Further, I assume that when he was in the bushes watching his ex-wife and lover, the ex-husband did not aim the gun at them or otherwise remove it from its place of concealment.

Now, if the question associated with this hypothetical was whether the prosecutor could properly charge the jealous ex-husband with attempted murder, the answer would clearly be "yes." But the question asked was whether the prosecutor *should* file such charges. The fact that the answer to this question is almost assuredly "no" suggests that there is something amiss with the current state

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[1] I believe the argument I provide to apply to reckless endangerment as well, but that application will be left to the reader. I do not address attempted reckless endangerment. Because it is impossible to attempt to be reckless, I believe that there should be no such offense.

of the law governing attempted crime; and what is amiss is the definition of the actus reus of attempt.

At present, most states employ the Model Penal Code's definition of the actus reus of attempt as doing "anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[2] Because, by assumption, the ex-husband had the mens rea of attempted murder, and because going to a potential victim's home with a loaded firearm and lurking in the bushes outside a window through which one can shoot is clearly a substantial step toward the crime of attempted murder, the ex-husband may be charged with and convicted of attempted murder. This definition of attempt is often criticized for eliminating the locus poenitentiae—the opportunity to abandon an intention to commit a crime before its perpetration—on the grounds that punishing one who repents of his or her evil intent before acting on it is unjust. This is a situation that our hypothetical illustrates well.

My objection, however, is more deep-seated and philosophical. It is that the current definition of attempt is inconsistent with the theoretical requirements of a liberal legal system. Specifically, I claim that the current definition of attempt improperly undermines the civil libertarian role played by the actus reus requirement in protecting innocent citizens against erroneous or abusive prosecution.

Anglo-American criminal law is the criminal law of a liberal society. A liberal society is one that regards individual liberty and autonomy as a pre-eminent political value. The normative end of a liberal society is not the promotion of the common good *simpliciter*, but the promotion of the common good to the extent that can be done consistently with the preservation of individual autonomy. Hence, a fundamental tenet of liberalism is that the duty to preserve the autonomy of the individual members of society (usually as embodied in a set of individual rights) must be respected even if significant gains in the aggregate welfare of society could be achieved by violating it.[3] Thus, a liberal society places a higher normative value on liberty than on improvements in material welfare or physical security, and when such values come into conflict, tips the balance toward the preservation of liberty. Perhaps the most well-known reference for this conception of the liberal society is John Rawls' theory of justice in which liberty is given priority of place in a lexical ordering to indicate that it is different in kind from other political values and may not be sacrificed for gains in these other values.[4]

What is the role of criminal law in such a society? In the abstract, criminal law is the mechanism by which a state punishes those of its citizens who fail to comply with the rules of behavior that it prescribes. A liberal society's

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[2] MODEL PENAL CODE §5.01(1) (1985).

[3] *See, e.g.*, RONALD DWORKIN, *Taking Rights Seriously*, *in* TAKING RIGHTS SERIOUSLY 184 (1978).

[4] *See* JOHN RAWLS, A THEORY OF JUSTICE § 39, at 244 (1971).

commitment to individual autonomy places limits on both the substantive content of such rules and the mechanisms by which they may be enforced. Substantively, liberalism requires that the rules of criminal law be limited to those that actually enhance individual autonomy—that protect individuals' ability to live their lives in accordance with their personal values. Thus, the rules of criminal law must be limited to those that protect individuals against assault and predation by their fellow citizens. Procedurally, liberalism requires that the means by which such rules are enforced be limited to those that do not themselves pose too great a risk to liberty.

Criminal law may be necessary to provide for the security of citizens' persons and property, but it does so by depriving those who violate the law of their liberty. The normative priority of liberty over security requires that criminal responsibility be assigned so that increases in security against criminals are not purchased with decreases in the liberty of law-abiding citizens. Accordingly, a liberal society regards the protection of citizens against state enforcement error and abuse as relatively more important than protection against criminal activity.

Although this argument is based on a philosophical commitment to the priority of liberty, it is reinforced with the practical observation that the state generally constitutes a greater danger to citizens than individual criminals. Even in a relatively lawless society, citizens can act to protect themselves against theft and injury. Installing burglar alarms, purchasing a gun, forming a neighborhood watch group, and hiring private security services are all steps citizens can take to protect themselves against the criminal activity of their fellows. However, there is little citizens can do to protect themselves against abuse by state officials. Self-help against official action is itself illegal. The only redress available against the state is an appeal to the state itself. This makes the danger of a state that has slipped its bonds significantly greater than that posed by even the most malicious of criminals.

The purpose of the criminal law in a liberal society, then, is to secure citizens' persons and property to the extent that this can be done without endangering the liberty and autonomy of those who are innocent of wrongdoing. This means that criminal punishment is not justified in all cases in which an individual has acted in a dangerous or morally blameworthy way, but only in those cases in which the effort to impose criminal punishment does not create an unacceptable risk that prosecutors will erroneously or abusively target those who have not engaged in wrongdoing. But all criminal punishment caries some risk of prosecutorial error or abuse. When do we cross the line between acceptable and unacceptable risk? Both the mens rea and actus reus requirements for criminal conviction are designed to help us answer this question.

The civil libertarian function of the mens rea requirement is well understood. Individuals often cause harm to others. The requirement that the prosecution prove that a defendant acted with a "guilty mind" greatly restrains the state's ability to take action against those who do, and, in H.L.A. Hart's words, "maximize[s] the individual's power . . . to predict the likelihood that the sanctions of the criminal

law will be applied to him."[5] Arnold Enker lucidly explains the protective aspect of the mens rea requirement as follows:

> It is the function of the criminal law to promote the security and well-being of members of society by securing for them a high measure of protection from harmful acts. But since society achieves such protection by inflicting harm on those who would commit such acts, it must take care not to offset this gain in security by unduly increasing the risks that persons will be subjected to official harm unpredictably. Acts can occur accidentally, but the state of mind that accompanies one's act is entirely within the individual's control. Thus, by recognizing mens rea as an indispensable element of crimes, we substantially increase the individual's power to control his freedom from punishment.[6]

The way in which the actus reus requirement serves the same civil libertarian end is less widely appreciated. This is because most crimes are completed crimes, rather than inchoate crimes like attempt. In completed crimes, the harm that constitutes the actus reus has occurred and so the presence of the actus reus is rarely in doubt. Thus, in most cases, it is the mens rea requirement that does most of the protective work. Nevertheless, the requirement that the prosecution establish the actus reus also restrains the state's ability to impose sanctions on its citizens. Professor Enker, again:

> [I]t would be shortsighted to think that only the mens rea element serves this function. Mens rea is within one's control but, as already seen, it is not subject to direct proof. More importantly, perhaps, it is not subject to direct refutation either. It is the subject of inference and speculation. The act requirement with its relative fixedness, its greater visibility and difficulty of fabrication, serves to provide additional security and predictability by limiting the scope of the criminal law to those who have engaged in conduct that is itself objectively forbidden and objectively verifiable. Security from officially imposed harm comes not only from the knowledge that one's thoughts are pure but that one's acts are similarly pure. So long as a citizen does not engage in forbidden conduct, he has little need to worry about possible erroneous official conclusions about his guilty mind.[7]

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[5] H.L.A. Hart, *Legal Responsibility and Excuses*, *in* DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 81, 99 (Sidney Hook ed., 1965).

[6] Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 688 (1969).

[7] *Id.* at 688.

Thus, like the mens rea requirement, the actus reus requirement sets "an objective limit to those situations and persons that can become the objects of official assertions of control."[8]

The problem with the Model Penal Code definition of attempt that most states have adopted is that it eviscerates the protective function of the actus reus. Ordinarily, the prosecution's discretion about whether to bring charges against a citizen is limited not only by the need to prove that the defendant acted with a guilty mind, but also by the need to produce specific evidence that the defendant violated an objectively defined standard of conduct that constitutes the actus reus of an offense. In contrast, under the Model Penal Code's definition of attempt, the prosecution is not required to prove that the defendant's conduct met any particular set of criteria. Under it, *any* action taken by the defendant can serve as the actus reus of an attempt as long as, *given the defendant's beliefs about the state of the world*, it would constitute a substantial step toward the completion of a crime. Thus, under the Model Penal Code definition, a conviction can be based solely upon evidence of what was in the defendant's mind. The evidence that is usually required to establish what the defendant has actually done is replaced by evidence of what the defendant believed he or she was doing.

This definition allows attempt convictions to be based on highly suspect forms of evidence. The elimination of the objective aspect of the actus reus results in the creation of "newly defined crimes in which we replace the statutorily defined fixed reference points for judging the defendant's mens rea with an open-ended sufficiency-of-the-evidence test which may include the less reliable forms of evidence such as questionable admissions, the testimony of informers and accomplices, and proof of prior convictions."[9] The danger of the Model Penal Code definition "is that under it cases appear as indictable attempts in situations where proof of the intention of the accused is the only circumstance that could make us begin to think of what has been done as a criminal attempt."[10]

Many of us would jump at the chance to purchase an item we want at a bargain price, even if from a non-retail source. Under current law, every time we make such a purchase, we render ourselves liable to conviction for the attempt to receive stolen property, if a prosecutor can convince a jury that we thought the property was stolen. This may not be a trivial concern to those of us with criminal records or other associations or characteristics that both reduce our credibility with a jury and make us likely targets of prosecutorial suspicion or antipathy. More relevantly to the present concern, the difference between an enraged ex-husband lurking in the bushes awaiting his chance to murder his ex-wife and her lover and a forlorn ex-husband lurking in the bushes in the hope of stealing a glance at the object of his affection is purely what is in the mind of each. Under current law, the

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[8] *Id.* at 688.

[9] *Id.* at 682.

[10] Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1024 (1967).

latter's freedom rests entirely on his ability to persuade a jury as to what he was thinking.

The current law of attempt allows prosecutors to use it as a bludgeon against all those who dare not risk their liberty on a test of their credibility before a jury. Although most prosecutors are entirely honest, the incentives within the criminal justice system reward those who obtain convictions and "get the bad guys off the streets." One of the best ways to do this is to get participants in criminal enterprises to become informers or turn state's evidence. How many prosecutors would resist the urge to pressure a known gang member to cooperate with him or her by accusing the gang member of attempted murder when he walks into the territory of a rival gang carrying a weapon? This would certainly meet the Model Penal Code definition of attempt if the accused had the intention the prosecutor ascribes to him. How reasonable would it be for the gangster to take his case to a jury in which it is his word against the police as to what he was thinking? How much confidence can we have that ill-motivated prosecutors will not use the attempt statute to target disfavored minorities? That this has been the case in the past is evidenced by cases such as *McQuirter v. State*,[11] in which an African-American was convicted of attempted assault with intent to rape for walking down the street behind a white woman on the basis of highly suspect evidence of what he was thinking. In the current climate of the war on terrorism, is it unreasonable to wonder whether prosecutors will use the threat of conviction for the attempt to provide material support to a terrorist organization against Muslims who donate to certain Islamic charities if the prosecutor thinks the Muslim has information useful to his investigation?

This analysis suggests that the actus reus of attempt should contain an objective condition for liability—one that defines the prohibited act in terms of something other than what the defendant *believed* he or she was doing. I have argued elsewhere that the required objective condition is that defendant act in a manner "sufficient to cause public alarm if observed by an average citizen."[12] Why is this the appropriate standard?

One of the mechanisms that ensures that the criminal law remains true to its purpose of securing the persons or property of the citizenry without becoming a vehicle for excessive social control or oppression is the general requirement that every criminal prohibition be directed against an identifiable *public* harm. The requirement that every criminal statute address an identifiable harm prevents the state from using the criminal law to indiscriminately deprive citizens of their liberty, and the requirement that the harm be a public harm—a harm to a collective, societal interest as opposed to a purely private interest that can be adequately vindicated via civil liability—helps ensure that the criminal sanction is regarded as a last resort rather than a favored method of social control. Thus, for

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[11] 36 Ala. App. 707, 63 So. 2d 388 (Ala. Ct. App. 1953).

[12] John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L. J. 1, 75 (2002).

the crime of attempt to fit comfortably within the ambit of Anglo-American criminal law, it must be directed against an identifiable public harm.

Professor Thomas Weigend has presented a convincing case that the public harm addressed by the crime of attempt is the spread of public alarm. By examining several of the archaic, inchoate offenses that were the precursors of attempt, such as the prohibitions on being a vagabond, going armed, and lying in wait, Weigend found that:

> All of these diverse forerunners of today's criminal attempt have one common feature: they penalize behavior which does not bring about actual harm, but which tends to cause public alarm. What made these actions appear reprehensible was not the actual danger so much as the fact that they are apt to disturb the peace in the community and threaten the feeling of safety of all those who watch or hear about the offender's conduct.[13]

Weigend concludes, and I agree, that the interest in avoiding disturbances of the public peace has survived as a rationale for criminal punishment and constitutes the public harm caused by criminal attempts.

> We have seen that an attempt usually does not do damage to any tangible object. But that does not mean that an attempt is harmless. . . . Every such act has the potential to violate an intangible good—the public peace. The harm caused is the apprehension and fear of the victim as well as the alarm of the community about the fact that someone has set out to do serious damage to a fellow citizen and to break the accepted rules of social life.[14]

Attempts are, by definition, failures, and thus do not produce the harm of the completed crime. However, the attempts themselves have their own harmful effects on citizens' ability to lead peaceful and secure lives. Attempts to kill, injure, or steal or destroy property are extremely likely to provoke violent responses when the perpetrator is known, placing both the antagonists and innocent members of the community at risk. And when the perpetrators are not known or not apprehended, attempts produce unease that causes citizens to either restrict their activities to avoid harm or expend resources on protective measures. Attempted muggings keep people off the streets and attempted burglaries boost home security system sales as much as successful muggings and burglaries. The need to protect the public against this type of harm is what justifies the criminalization of attempts.

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[13] Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 263–64 (1977).

[14] *Id.* at 264 (footnotes omitted).

Attempt, then, is properly defined as an unsuccessful effort to commit a crime that is sufficient to cause public alarm. The mens rea of attempt is the specific intention to commit a specific crime. The actus reus of attempt is conduct that would cause public alarm if observed by an average citizen.

All that remains, then, is to apply this definition of attempt to our hypothetical. By hypothesis, the ex-husband has the mens rea of attempted murder. And by going to his ex-wife's house and lurking in the bushes, he has taken a substantial step toward the commission of the crime of murder. However, he has neither drawn nor pointed his gun at his ex-wife or her lover nor made any other move suggestive of an attack upon them. To all outward appearances, he is more like the forlorn ex-husband than the enraged one. An average citizen observing his behavior would have no reason to suspect that violence was in the offing, and hence, no cause for alarm. Consequently, the ex-husband's conduct does not constitute the actus reus of attempted murder, and he should not be indicted for that crime.

One refinement is necessary. As currently articulated, there is a reasonable argument that the proposed definition of attempt leads to a contrary conclusion. Consider that it is reasonable to contend that the mere appearance of a stranger in the bushes looking into someone's house is, in itself, sufficient to cause public alarm if observed by the average citizen. Hence, the ex-husband's conduct meets the proposed test after all, and he can properly be indicted and punished for attempted murder.

The problem with this line of argument is that the type of alarm engendered by mere lurking is distinctly different from the type of alarm engendered by a failed attempt at murder. The former constitutes the type of public harm usually addressed by trespassing or anti-stalking offenses. Charging the ex-husband with attempted murder because his conduct arouses the public alarm associated with lurking raises a problem similar to the one my proposed definition of attempt is designed to resolve—the ability of the prosecution to threaten the accused with a level of punishment vastly out of proportion to the public harm his or her conduct threatens.

This situation indicates that the definition of attempt advanced in this article has not been sufficiently specified. The proposed objective condition for liability that this article prescribes—that the defendant's conduct be sufficient to cause public alarm if observed by an average citizen—needs to be refined to include a correlation between the type of public alarm produced by the defendant's conduct and the type of harm to be expected from the completed crime that he or she is charged with attempting. Thus, the proposed definition of attempt should be amended to an unsuccessful effort to commit a crime that is sufficient to cause the type of public alarm *associated with the crime being attempted*. Although I am fairly certain that the nature of this refinement requires more explication, providing such is beyond the limits of this article's format and so must await another day.

It must be admitted that under the proposed definition of attempt, some truly dangerous people will not be subject to criminal punishment. In our hypothetical,

the ex-husband did intend to kill his wife, and it is possible that he may act on that intention with more resolve in the future. A definition of attempt that prevents his incarceration poses a real risk of future harm. However, the only way to avoid that risk is to define criminal attempt in a way that permits the punishment of those whose actions are indistinguishable from the actions of entirely innocent individuals. Given the fallibility, and sometimes the venality, of the prosecutorial agents of the state, doing so creates its own risk that those who have done no wrong will be deprived of their liberty.

The inherent liberal bias built into Anglo-American criminal law requires that such a conflict between preserving the liberty of the innocent and providing increased security against the depredations of the guilty must be weighted in favor of the former. The slight reduction in personal security associated with the more restrictive definition of attempt proposed in this article is the price we pay to maintain our liberal society. In my opinion, it is a bargain.