

Attempts and Renunciations

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In a small but intriguing group of cases, individuals get perilously close to committing crimes only to pull back at the last moment. A man bent on killing his hated rival has the rival in the sights of his rifle, but does not pull the trigger. A man determined to rob a bank reconnoiters the bank, packs his gun and mask, and drives to the bank parking lot, prepared to carry out the deed, yet turns his car around and drives away. A woman desperate to purchase illegal drugs to which she is addicted approaches someone whom she believes to be a dealer, hails him, but having gotten his attention, turns and walks away. These kinds of cases raise a number of difficult issues within criminal law, but the one on which I focus most of my attention concerns whether and why individuals charged with attempts should be permitted to avoid attempt liability by arguing that they renounced or abandoned them.

In order to isolate and clarify the issues, it will be assumed that the agents in question have not been interrupted by the authorities or concerned citizens before they could fully initiate their attempts. Agents who have been interrupted will face formidable problems making renunciation defenses because it will appear that the only thing that stopped them from going forward were forces external to them. Of course, some of these agents might have pulled back from their attempts had they not been interrupted and for reasons that convince us that they should be exempt from attempt liability. Such agents will simply be unlucky—they are entitled to the defense but will not, in most cases, be able to demonstrate this to the satisfaction of the court. However, it is possible to imagine other agents who, unbeknownst to them, are observed (by the police, private citizens, or on videotape) on the verge of initiating their attempts before they turn away from them. Suppose that such agents are, sometime later, arrested. The first question we face is whether they should be charged with attempted crimes.

The answer to this question depends on an account of the conduct requirement for criminal attempts. How far along in the completion of an attempt agents have to get before they are appropriately liable to the charge that they have attempted a crime? Criminal law and legal theorists offer a variety of answers to this question, ranging from an agent having taken a “substantial step” toward the completion of the crime to the agent having committed an act that, on its face, constitutes an attempt or is such that harmful consequences have been unleashed that the agent can no longer control.¹ In the first section, my aim is limited to defending a view

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of attempt liability that leaves room for individuals to renounce (or abandon) attempts and walk away from them. For renunciation to be possible, we must not have a conduct requirement that tells us to wait until agents have set harmful consequences in motion that they can no longer control, or believe they have done so, to charge them with attempts. There must be a “buffer zone” of sorts around criminal harms, such that if individuals get very close to attempting them, they can be called to account for making attempts.² How close they must get is a question that I do not address in any detail. The success of my argument in the first section depends solely on explaining the desirability of pushing the point of attempt liability back far enough from actually harmful acts so that it will be possible for agents to claim that they have abandoned them and should not be punished.

In the second section, I take up the renunciation defense and offer what I believe is a novel approach to it. Having been charged with attempts, under what, if any, conditions should individuals be permitted to successfully assert that they should not be punished because they pulled back before completing their attempts? The courts and legal scholars have also given various answers to this question.³ To a considerable extent, these answers depend on competing views about which motives for renunciation, or the circumstances in which it occurs, should be deemed acceptable by the criminal law. There is widespread agreement that interruption of an attempt by the authorities, or abandonment of an attempt due to the fear of imminent arrest by the authorities, should not constitute valid cases of renunciation. There is also considerable agreement that agents who leave off their criminal attempts due to the realization that what they are about to do is wrong ought to be entitled to renunciation defenses. Yet there is a variety of cases in-between these two extremes that have not been adequately explored in the existing literature. Moreover, there are different accounts of why renunciation should be a defense and these competing accounts have varying implications for the range of cases in which agents abandon their efforts to complete their crimes.

The account I develop situates the renunciation defense within a retributive approach to legal punishment. Successful assertion of the defense requires individuals charged with attempts to convince a court that they did not go forward with them due to relatively independent acts of reason and will, and so do not deserve to be punished. It will not be easy to make this defense, but a few agents

¹ For a general discussion of the candidates for the conduct requirement, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 423–30 (4th ed. 2006) and Andrew Ashworth, *Attempts*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 125–46 (John Deigh et al. eds., 2011).

² The notion that those charged with crimes are “called to account” for their conduct is developed by Antony Duff, Lindsay Farmer, Sandra Marshall, & Victor Tadros (eds.), THE TRIAL ON TRIAL II: JUDGMENT AND CALLING TO ACCOUNT (Antony Duff et al. eds., 2006).

³ For discussion, see DRESSLER, *supra* note 1, at 439; R. A. DUFF, CRIMINAL ATTEMPTS 66–75, 395–97 (1996); GIDEON YAFFE, ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 287–309 (2013); Evan Tsen Lee, *Cancelling Crime*, 30 CONN. L. REV. 117 (1997–98); Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1 (1989); Paul R. Hoyer, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CALIF. L. REV. 377 (1986).

will be eligible for it, including, on my account, agents whose acts of reason and will are not necessarily morally motivated.

In the third section, I briefly address the question of whether renunciation ought to be treated as a full or partial defense. I defend the former view, though I concede that individuals who manage to ward off conviction for attempts might nevertheless be punished for creating unreasonable risks for having taken substantial steps towards completing their attempts.⁴ However, offenses of risk creation should generally be punished to a lesser degree than attempts. And in some cases, those who abandon their attempts might not have unreasonably raised risks of harm and so should not be punished at all.

Importantly, in discussing the range of cases in which individuals leave off attempted crimes, we must distinguish the theoretical analysis of such cases from what state officials can plausibly establish about them or criminal defendants can hope to prove about their own motives or actions. For purposes of analysis, my discussion assumes an omniscient point of view, according to which we know things about agents who come close to attempts that it is unlikely can ever be established with certainty, or even high probability, about some of them. The criminal law cannot be made a sharp enough tool to distinguish among the variety of agents who abandon their attempts so as to treat each of them as they ought to be treated.

I. LEAVING ROOM FOR RENUNCIATION

In thinking about the conduct requirement for attempts, consider the following two cases:

SNIPER: SNIPER hates his business rival whom he believes has behaved underhandedly in out-competing him, pushing SNIPER'S business to the verge of bankruptcy. Hence, SNIPER decides to kill his rival. He buys a rifle, learns how to use it, sneaks out of his house early one morning, drives over to the vicinity of his rival's house, and lies in the weeds a short distance from his rival's house, waiting for him to step onto the porch so that he can shoot him. But when his rival appears on the porch, SNIPER gathers up his rifle and walks away from the scene.

BANK ROBBER: BANK ROBBER is determined to rob a local bank that he has been reconnoitering for the last two weeks. On the day that he has decided to rob the bank, BANK ROBBER drives to the bank and parks across the street from it. In his car he has a gun, a mask, and a

⁴ Such a position is defended by Larry Alexander and Kimberly Kessler Ferzan (with Stephen Morse), LARRY ALEXANDER ET AL., CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 217–18 (2009).

bag for the money he hopes to steal. He gets out of his car, crosses the street, and starts up the steps toward the main entrance of the bank. However, BANK ROBBER suddenly turns on his heel, goes back to his car, and drives off.

Again, suppose that neither SNIPER nor BANK ROBBER, while their actions are observed or caught on videotape, is interrupted prior to leaving the scene of what appeared to be their impending crimes. In spite of this, their actions are reported to the police who subsequently arrest them. Should they be charged with criminal attempts—homicide in SNIPER’s case, armed robbery in BANK ROBBER’s?

According to the Model Penal Code [MPC], the answer in both cases is pretty clearly “yes.” Both individuals have taken what the Code terms a “substantial step” toward the completion of their criminal intentions.⁵ Indeed, SNIPER and BANK ROBBER have taken several such steps. Others argue that neither should be charged with, let alone convicted of, attempts. Specifically, Lawrence Alexander and Kimberly Ferzan have recently defended an account of the conduct requirement according to which neither SNIPER nor BANK ROBBER has yet unleashed what he believes to be an “uncontrollable” sequence of events productive of criminal harm.⁶ SNIPER has not squeezed the trigger firing off a round, and BANK ROBBER has not entered the bank and handed a teller a note demanding money, coupled with the threat of violence in the event of a failure to comply.

Other accounts of the conduct requirement typically place it somewhere in-between the two poles represented by the Model Penal Code and the Alexander/Ferzan accounts.⁷ Importantly, several of these accounts establish a conceptual space in which agents might renounce their attempts before actually inflicting harms upon their fellow citizens. They leave this space because they justify charging individuals with attempts before they reach the last act that unleashes uncontrollable harmful consequences. Alexander and Ferzan’s version of the conduct requirement precludes renunciation. Once an uncontrollable sequence of events is set in motion, agents can, at best, feel remorse for what they have done and might be given some sentence mitigation for doing so.

Why do Alexander and Ferzan insist that an attempt must be fully under way before individuals incur attempt liability? Part of their answer is that people can

⁵ See MODEL PENAL CODE § 5.01(1)(c) (1985).

⁶ ALEXANDER ET AL., *supra* note 4, at 216. For their more recent discussion of the issues raised by such cases, see also Larry Alexander & Kimberly K. Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM. L. 637 (2012).

⁷ See DRESSLER, *supra* note 1, at 424–30. For an illuminating account of how agents might move from initial thoughts or plans about crimes, to “first acts” toward implementing their intentions, to subsequent and ultimately “last acts,” see David O. Brink, *First Acts, Last Acts, and Abandonment*, 19 LEGAL THEORY 114 (2013).

and do change their criminal intentions, even up to the last possible moment.⁸ Most intentions, including most criminal intentions, they argue, are conditional. Agents plan to do certain things if a host of conditions (some of which they might not even be conscious of) are satisfied.⁹ Few of our intentions involve resolving to do things *tout court*. Further, Alexander and Ferzan argue that the criminal law should punish people for what they have done, not for what it predicts that they will do.¹⁰ Until an agent relinquishes control over a chain of events, she is not culpable and should not be punished. Quoting Antony Duff, they suggest that if the state is to treat agents as responsible beings, and thus as capable of being guided by reasons, “it should be slow to coerce them on the ground that they are likely to commit a wrong if not thus coerced, since that is to treat them as if they will not be guided by the reasons that should dissuade them from such wrongdoing.”¹¹ Importantly, in Duff’s view, this way of treating citizens is a “categorical requirement,” and thus, not one to be weighed against the interest in preventing other persons from harm.¹² Moreover, Alexander and Ferzan concede that agents such as BANK ROBBER and SNIPER could be charged with something—offenses of risk creation—just not attempts.¹³

Although there is much to admire in Alexander and Ferzan’s account, I believe that, in the end, it is not plausible and that the arguments they give in support of it are unconvincing. It is implausible because, as the SNIPER and BANK ROBBER examples illustrate, the individuals in question seem to have done more than make some preparations for carrying out their criminal intentions, even substantial ones. Each was on the verge of carrying out his intentions and might be reasonably deemed to have initiated an attempt, though both pulled back from going further before committing the “last act.”¹⁴ Granted, they both might have changed their minds before unleashing causal chains that they could no longer control, but it does not follow that the government acts unfairly by arresting

⁸ ALEXANDER ET AL., *supra* note 4, at 208.

⁹ *Id.*, at 203–06. *See also* ALEXANDER AND FERZAN, *supra* note 6, at 647–52.

¹⁰ ALEXANDER ET AL., *supra* note 4, at 199.

¹¹ *Id.* at 209 n.11.

¹² DUFF, *supra* note 3, at 388.

¹³ ALEXANDER ET AL., *supra* note 4. Alexander and Ferzan, have more recently argued that instead of punishing those who come close to the “last act” for attempts, we might impose “preventive restrictions of liberty” (or PRLs) upon them. ALEXANDER AND FERZAN, *supra* note 6, at 660–67. PRLs might consist of defensive actions by those citizens subject to imminent attack, preventive detention by the authorities of individuals deemed dangerous, or other, less-intrusive liberty-restricting measures. Yet it is not clear how PRLs can be made to satisfy proportionality constraints or distinguished from legal punishment. If individuals refuse to renounce their criminal intentions, would Alexander and Ferzan permit the authorities to detain them indefinitely? Also, the line between such detention and legal punishment seems awfully thin. Those preventively detained will be deprived of their liberty, like individuals imprisoned for their crimes, and likely will be stigmatized by it, unless preventive detention is made quite different from imprisonment.

¹⁴ On the implausibility of the “last act” requirement, see DRESSLER, *supra* note 1, at 425, and DUFF, *supra* note 3, at 39–42.

them, charging them with attempts, and, in effect, requiring them to demonstrate that they have done so. Bringing in Duff's point that the law should be "slow" to coerce does not rescue their account, though I think it is an important point. How slow to coerce should the criminal law be? Perhaps the Model Penal Code's version of the conduct requirement is too "quick" to coerce, although showing this is not as obvious as some might believe it to be. After all, the MPC account does not make individuals liable for mere criminal intentions or even some preparations toward acting on those intentions. It requires a "substantial step," whatever that means. Lots of individuals' lives will be unaffected by such a conduct requirement—those who do not form criminal intentions or take substantial steps toward acting on them—and they will therefore enjoy considerable liberty to act as responsible agents. Even if more scope for responsible agency is better than less scope, other things being equal, why should an agent not be charged with attempt once the agent get as uncomfortably close to unjustifiably harming others as SNIPER and BANK ROBBER? Admittedly, in charging them with attempts, the state seeks to punish them for what it seemed they were about to do. But this is not a prediction based on such dubious grounds as their criminal records or their psychological or sociological characteristics, or even the criminal intentions they have formed and fully plan (though without having taken any steps) to execute.¹⁵ Nor would it be punishing them for their "mere criminal intentions," but for criminal intentions on which they had begun to act.

A further crucial point is this: It is possible to move the conduct requirement back from the point at which agents unleash what they believe are harmful consequences that they can no longer control and still treat them as responsible agents if we grant them the opportunity to mount renunciation defenses. If we were to exempt individuals from attempt liability who, for instance, could convince us that, at or somewhat before the last moment, they realized that their intentions were horribly wrong and abandoned them, then we would effectively preserve most of the scope for responsible conduct that Alexander and Ferzan want us to preserve. Attempt law would thereby grant agents who have come perilously close to the "last act" a chance to act responsibly, and to convince us that they did so. Of course, some individuals who did or would have acted responsibly at the last moment will not be able to convince a court of this. There is a moral cost, in the form of punishment of the undeserving, to moving the conduct requirement for attempts back from the last act. But there seems nothing objectionable about having our legal practices communicate to individuals that if they come perilously close to acting on criminal intentions, even though they would have pulled back from them for the right kinds of reasons, they might not be able to avoid punishment. "Do not come so close to harming others and expect to avoid

¹⁵ On the pitfalls of basing predictions of dangerousness based on actuarial characteristics, see R. A. Duff, *Dangerousness and Citizenship*, in *FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH* 141–63 (Andrew Ashworth et al. eds., 1998).

punishment,” would seem to be the takeaway message from such practices. Those unwilling to heed it cannot justifiably complain too much about what befalls them, especially if they have been given fair warning of such practices.

Also, there is a moral cost to the kind of “last act” conduct requirement that Alexander and Ferzan support. All of the agents who pull back before the last act will avoid attempt liability, though they might be charged with and convicted of endangerment offenses. Yet some who pull back will do so because they encounter unforeseen obstacles or threats, whereas others will do so for different kinds of reasons, some of which might reflect better on them. Indeed, it is not clear that Alexander and Ferzan’s account could support attempt charges against agents whose actions were interrupted by the authorities, at least so long as the authorities got to them before the “last act.” This, in turn, means that none of the agents who leave off their attempts or have them interrupted before they get to the last act, no matter how close they get, will be required by the courts to explain their actions. That seems unfortunate. Some of them would have likely gone forward had they not “gotten lucky” and encountered threats or obstacles to their doing so. They therefore seem indistinguishable, at least when it comes to deserved punishment, from their counterparts who encountered no such obstacles and so did go forward.

How far back from the “last act” we should move the conduct requirement for attempts is a vexed question that I will not attempt to answer. The position I defend is only that it seems reasonable to create a “buffer zone” around criminal harms, such that individuals reasonably can be charged with attempting such harms before they get to the “last act.” We might say that those who enter the buffer zone are *prima facie* deserving of punishment for attempts. But they should be given the opportunity to persuade us that they should not be punished, all things considered, because they renounced their crimes. Under what conditions individuals should be taken to have successfully asserted a renunciation defense will be explored in the next section.¹⁶

II. COMPLEXITIES SURROUNDING THE RENUNCIATION DEFENSE

Assuming that it makes sense to favor a conduct requirement for attempts that permits state authorities to arrest and charge individuals with attempts even if they have not committed the “last act” that sets an uncontrollable chain of harm-producing events in motion, under what conditions should individuals so charged be able to successfully assert renunciation defenses? In this section, I treat renunciation as a full defense. In the next section, I discuss the arguments of those who maintain that renunciation should be, at most, a partial defense.

¹⁶ The buffer zone might be expanded or contracted, depending on the seriousness of the harm that would eventuate if individuals went through with their criminal intentions. Criminal attempts obviously vary in their seriousness, mostly as a function of the nature and extent of the unjustified harms, if any, they risk. On this, see DRESSLER, *supra* note 1, at 424.

Return to the SNIPER and BANK ROBBER cases described at the outset of the previous section. Again, suppose that there are undetected observers of SNIPER or BANK ROBBER who, after watching them leave off their attempts, report their actions to the authorities. Having received those reports, the authorities proceed to arrest and charge SNIPER and BANK ROBBER with attempted homicide and bank robbery, respectively. What we think about the legitimacy of a renunciation defense for either agent will likely depend on the reasons for which they abandoned (or appear to have abandoned) their criminal projects. In laying out the different kinds of motivations that might move individuals to leave off their attempts, I will concentrate on SNIPER. With slight modifications, the following scenarios could be made to fit BANK ROBBER and other kinds of cases.

Scenario A: SNIPER abandons his intention to kill his rival because SNIPER has a moral epiphany to the effect that what he is about to do is plainly wrong. SNIPER packs up and leaves, throws his rifle in a nearby river, and resolves to deal with his hatred of his rival through other methods, none of which involve illegality. [Moral Conversion]

Scenario B: SNIPER abandons his intention to kill his rival because he thinks of his spouse and children and of the fact that, if he kills his rival and is caught, his arrest and conviction will not only destroy his family, but leave them bereft of his emotional and financial support. SNIPER packs up and leaves, throws his rifle in a nearby river, and resolves to deal with his hatred of his rival through other methods, none of which involve illegality. [Agent-Relative Reasons]

Scenario C: SNIPER abandons his intention to kill his rival because he realizes that, if he is convicted of homicide, he will likely spend the rest of his life in some squalid prison fending off predation by his fellow inmates. SNIPER is prudent enough to not want to have to endure all of this misery so decides to deal with his rival through other legal and less risky means. [Prudence]

Scenario D: SNIPER does not fully abandon his intention to kill his rival but, at the last moment, his moral qualms against doing so convince him to leave off doing so at this time. He picks up his rifle, drives off in his car, but does not throw the rifle in the river. [Moral Self-Control]

Scenario E: SNIPER does not fully abandon his intention to kill his rival but, at the last moment, the thought of the ways in which his own family might suffer if he is convicted of homicide convinces him to leave off doing so at this time. As in the previous scenario, however, SNIPER does not get rid of the rifle. [Agent-Relative Self-Control]

Scenario F: SNIPER does not fully abandon his intention to kill his rival, but, at the last moment, the thought of the ways in which he would suffer if convicted of homicide convinces him to leave off doing so at this time. SNIPER keeps the rifle, however. [Prudential Self-Control]

Scenario G: SNIPER is on the verge of pulling the trigger, but a sudden attack of cowardice or squeamishness prevents him from doing so. He leaves the scene mentally berating himself for his weakness and does not abandon his intention to kill his rival. [Internal Obstacle]

Scenario H: SNIPER pulls the trigger but the rifle misfires. When he pulls it again, the rifle does not fire at all. Disgusted, SNIPER leaves the scene and drives off in his car, internally vowing to try again to kill his rival at some later juncture. [Disability]

Scenario I: SNIPER is prepared to pull the trigger but just as he has his rival in his sights, rival's neighbor comes out on his porch, or a police car goes past rival's house, and SNIPER decides to postpone his attempt to kill his rival. [Postponement]

Again, set to one side the epistemic difficulties in distinguishing among these scenarios in a court of law. The theoretically interesting questions concern which of the defendants should be eligible for the renunciation defense, assuming that any of them should be, and why they should or should not be eligible for it.

Start with the strictures on the defense laid out by the Model Penal Code. According to the MPC, the defense is limited to defendants whose abandonment of their criminal intentions is “complete and voluntary.”¹⁷ In laying out the preceding scenarios, I have intentionally omitted agents whose attempts are interrupted by the authorities because I wanted to focus, instead, on scenarios in which agents appear to leave off their attempts all on their own. Nonetheless, such Interruption scenarios, as we might term them, are an important starting point for an analysis of the renunciation defense. The drafters of the MPC make clear that individuals who are interrupted by the authorities once they have taken a substantial step toward acting on their criminal intentions are not entitled to the defense. Their “abandonment” is not voluntary, the thought apparently being that, but for the force brought to bear by the authorities, the attempts would have gone forward. Abandonment is held to be little more voluntary when individuals leave off carrying through with their intentions because they see a police car in the immediate vicinity. Such imminently coercive incentives to desist are thought to undermine the voluntariness of abandonment, though it could be argued that the

¹⁷ MODEL PENAL CODE § 5.01(4) (1985).

drafters of the MPC stretch the concept of non-voluntariness beyond its defensible boundaries. Normally, if I am speeding and I see a police car up ahead of me, whereupon I slow down, my response to the prospect of a ticket would not be accurately characterized as “non-voluntary.” One wonders if what the drafters had in mind here might be better captured by the notion that, in some cases, but for the somewhat fortuitous appearance of the police or other agents on the scene, those with criminal intentions would have gone through with them and so are deserving of punishment. I develop this alternative account below.

The preceding cases can be contrasted with ones in which individuals postpone acting on their criminal intentions—either to await better opportunities to execute them without the risk of detection and apprehension, or with a view to taking advantage of more lucrative or easier victims. Such agents are disqualified from the renunciation defense by the MPC’s insistence that the abandonment of criminal purposes must be “complete.” The same would presumably be true of individuals who failed to achieve their aims because they met unexpected difficulties (whether of an external or internal kind) in acting, but who do not renounce their aims, hoping to act on them at some later juncture. Hence, the MPC would also seem to rule out the defense for the scenarios I have termed Postponement, Disability, and Internal Obstacle.

But what does the MPC imply about the scenarios in which SNIPER abandons his attempt through the exercise of some kind of self-control? It would seem that such abandonment is not “complete.” The Self-Controlled SNIPERs do not leave the scene vowing to kill their rivals, but they do not fully renounce their intentions to do so either. They have only (just) managed to keep themselves from acting on them. Nevertheless, they did stop themselves, rather than having to rely on others to do so. We might say that their criminal intentions are “suspended” or “inactive,” but the MPC seems to require more than this. Is it that such agents are still dangerous, and, as such, ought to be subject to attempt liability?¹⁸ Further, what does the MPC account imply about the SNIPER who pulls back due to Prudence or Agent-Relative reasons for action? Here, I think, the answers are quite unclear. Also, there is debate in the literature about whether the MPC requires something like what I have termed Moral Conversion for the renunciation defense to be successful.¹⁹ The courts have leaned toward requiring it.²⁰ But is moral conversion necessary to the renunciation defense, and why might anyone think that it is?

There appear to be two distinct arguments in support of requiring full moral conversion as a necessary condition of the renunciation defense. One says that full moral renouncers are no longer dangerous; the other says that they are less

¹⁸ This is one justification cited by the Model Penal Code. See Moriarity, *supra* note 3, at 20. As Moriarity notes, at 15, the Code’s drafters also believed that provision of the defense might induce individuals to desist from continuing with their attempts.

¹⁹ See Moriarity, *supra* note 3, at 26–27; DUFF, *supra* note 3, at 395–97.

²⁰ DRESSLER, *supra* note 1, at 439–40.

dangerous than individuals who renounce for other kinds of reasons or from other kinds of motivations. Neither of these arguments is convincing. There is nothing about full moral conversion that guarantees its permanence. Criminal intentions that have been “completely” abandoned or repudiated, for the best kinds of reasons, can be rekindled at some later point. In fact, it is easy to imagine circumstances in which the SNIPER in the Moral Conversion scenario forgets or discounts his moral epiphany and his subsequent resolve to deal with his rival through legal means. Suppose that after a relatively peaceful period of co-existence, SNIPER’s rival again engages in underhanded business practices that drive SNIPER into bankruptcy. SNIPER’s rage at his rival returns, and he resolves, this time, to carry through his intention to kill him. There seems nothing fantastic or even unusual about such a sequence of events. Yet this suggests that the MPC requirement of “completeness” is somewhat misguided.

Further, it is doubtful whether full moral conversion better insulates individuals from rekindling their repudiated criminal intentions. Consider SNIPER scenarios B and C. In B, SNIPER abandons his plan to kill his rival because he realizes that he does not want to cause his family the ignominy and suffering that would attend his being apprehended and convicted of murder. Why would those agent-relative reasons (and hardly disrespectful ones) for conduct be less sustaining, over time than the fully moral ones that characterize SNIPER in scenario A? Even the more nakedly self-interested reasons of SNIPER in scenario C might be just as good at keeping SNIPER on the legal straight and narrow, over time, as more respectable moral reasons. Prudent SNIPER was not, after all, responding to the kinds of short-term, self-interested reasons to which SNIPER in scenario I was responding. No police car drove by, nor did SNIPER spot a neighbor who had inconveniently ventured outside his house and might serve as a witness to SNIPER’s activities. Instead, Prudent SNIPER realized the horrific risks to his own future welfare that he was taking and abandoned his attempt. It is not obvious that an appreciation of those risks cannot sustain SNIPER from making future attempts on his rival’s life as effectively as full-fledged moral reasons will.

In response, it might be argued that it is a mistake to view the criminal law as consisting solely of a set of prohibitions backed by prudential incentives in the form of threatened criminal sanctions for compliance failures. Numerous theorists argue that the criminal law, or at least substantial portions of it, consists of prohibitions backed by powerful moral reasons, and that one of the aims of legal punishment is to express authoritative public support for those powerful moral reasons by censuring criminal conduct.²¹ Viewed in this light, agents who undergo moral conversions and fully repudiate their criminal intentions exhibit a grasp of

²¹ See A.P. SIMESTER & ANDREAS VON HIRSCH, *CRIMES, HARMS, AND WRONGS; ON THE PRINCIPLES OF CRIMINALISATION* 10–14 (2011); R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 80–81 (2001); ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 17–21 (2005).

these powerful moral reasons in ways that agents who abandon attempts because they (only?) care deeply about their loved ones or themselves do not. Moral conversion, it might be claimed, resonates with the purposes of the criminal law in ways that love of family or self does not.

There is no use denying that those who abandon their criminal intentions for moral reasons understand something more profound about the criminal law than those who abandon them for other reasons. The problem is that it seems inappropriate to require such understanding as a condition of avoiding attempt liability. We do not normally care whether people refrain from homicide, assault, or theft for moral reasons, or simply because they wish to avoid unpleasant encounters with the authorities.²² So why should we care whether they abandon attempts for such reasons so long as it is clear that they have abandoned them, unless, of course, we tacitly believe that other reasons are wholly or less reliable guarantors of future compliance with the law?

To the preceding, it will be objected that if the motivation agents have for abandonment does not matter, then those who leave off attempts because the police arrive on the scene or because they encounter unforeseen obstacles, should also be entitled to renunciation defenses. In responding to this objection, we are brought back to the question of why renunciation ought to be a defense at all. It seems that there is a crucial difference between Prudent SNIPER, or the SNIPER whose love of his family leads him to desist, and the SNIPER who pulls back from his attempt because of his fear of imminent detection and arrest. But for the appearance of the neighbor on the porch or the police driving past, it seems reasonable to infer that Postponement SNIPER would have gone through with shooting at his rival and ought to be convicted of an attempt, just as the SNIPER who pulls the trigger and shoots deserves to be. The same is true for Disabled SNIPER, whose rifle jams, or Internal Obstacle SNIPER, whose squeamishness or cowardice blocks him from going forward. And it is obviously true for Interruption SNIPER, who is apprehended by the police before he can squeeze off a shot. Granted, Prudent SNIPER is to some extent prompted to pull off his attempt by the anticipated actions of state authorities, as is the SNIPER who pulls back for agent-relative reasons. But I would argue that what distinguishes the latter two cases from the former ones is that Prudent and Agent-Relative Reasons SNIPER call these unhappy future possibilities to mind all on their own and thus decide to abandon their attempts. Their pulling back from their attempts appears to be traceable to relatively independent exercises of reason and will on their part, things over which they have substantial control. They do not need the occurrence of proximate events over which they lack control—events that easily might not have occurred—to prevent or discourage them from going forward with their crimes. In other

²² Cf. DUFF, *supra* note 3, at 389. Retributivists typically insist that only beings responsive to moral considerations should be subject to legal punishment. Nonetheless, they do not hold that individuals who refrain from offending for purely self-interested reasons ought to be immune from punishment, at least so long as they are also responsive to moral considerations.

words, it is not “moral luck” that keeps the SNIPERs in the Moral Conversion, Agent-Relative Reasons, and Prudence scenarios from going forward, but rather it is actions over which they have control and thus are to their credit.²³

Still, we can imagine scenarios in which such agents likewise appear to be prompted to pull back from their attempts by fortuitous proximate events. Suppose that right before he leaves home to go shoot his rival, SNIPER’s spouse and children warmly embrace him, not knowing what he is about to do. Suppose also that it is the remembrance of that warm embrace that subsequently jars him into realizing everything that he is about to risk and thus to lower his rifle and walk away from the scene of his near-attempt. We might wonder why he should get credit for his renunciation any more than the SNIPER who acts in response to the sight of the police car. What if the embrace simply had not occurred? Or consider the Moral Conversion SNIPER whose moral epiphany occurs because, just as he is about to pull the trigger and shoot his rival, his rival’s spouse and children appear on the porch and the sight of them suddenly brings SNIPER to his senses. The appearance of the spouse and children also seems lucky and thus not to the credit of the SNIPER, even if his reaction to it is something over which he does have control. Why is it not reasonable to infer that, but for their appearance, SNIPER would have gone through with his crime and thus is not entitled to a renunciation defense?

The preceding cases do, I admit, pose formidable problems for my account. I would not deny that there might be circumstances in which Moral Conversion and Agent-Relative Reasons SNIPERS ought to be unable to convince a court that they abandoned their criminal intentions through relatively independent exercises of reason and will on their part. If the circumstances of their abandonments are as described in the previous paragraph, then they too were lucky and there seems little reason to conclude that they would not have gone through with their crimes in the absence of largely fortuitous events. In this respect, my account of the renunciation defense is more restrictive than versions that would grant it to all agents who undergo moral conversions, regardless of what precipitated them. Nonetheless, much depends on how near the prompting event is to SNIPER’s act of leaving off the attempt. I doubt that we would think it relevant if SNIPER’s family gave him a warm embrace a day earlier, or several days earlier. It would still be up to him, in such cases, to recall that event and permit it to enter into and play a significant role in his deliberations about whether to shoot at his rival. Similarly, if SNIPER had seen his rival with his family at some time in the past, that alone would not derail his plans unless he actively called it to mind and reflected on its moral significance. In cases such as these, SNIPER acts “relatively independently” of events over which he lacks control. He does not just get lucky;

²³ For the classic discussions of moral luck, see B.A.O. Williams, *Moral Luck*, 50 PROC. OF THE ARISTOTELIAN SOC’Y 115 (1976); T. Nagel, *Moral Luck*, 50 PROC. OF THE ARISTOTELIAN SOC’Y 137 (1976).

he independently employs his reason and will to make his actions conform to the criminal law.²⁴

As against my account of the renunciation defense, an alternative and intuitively plausible account says that the test of whether renunciation ought to exempt is whether agents are still dangerous or, perhaps better, persist in harboring their criminal intentions. On this alternative account, Moral Conversion, Agent-Centered Reasons, and Prudent SNIPERs are entitled to the renunciation defense because they have abandoned their criminal intentions and so can no longer be reasonably deemed dangerous. In this respect they are quite unlike the Interrupted, Disabled, Postponement, or Internal Obstacle SNIPERs, none of whom has abandoned his criminal intentions. Those whose criminal intentions persist and thus whose abandonment of them is not “complete,” are, it might be argued, appropriately liable to legal punishment once they have come perilously close to acting on them.

The difference between this account of the renunciation defense and my own is clearly illustrated by considering the three Self-Control scenarios. In them, SNIPER does not fully renounce his intention to kill his rival, though he does stop himself from carrying out his attempt by a relatively independent act of reason and will. On my account of the renunciation defense, the SNIPER in each of these scenarios ought to succeed in asserting it, at least assuming that the relevant acts of self-control were not precipitated by fortuitous proximate events. Each of these SNIPERs shows himself capable of resisting his intention to kill his rival, though the intention to do so remains alive, at least in the sense of it’s not being fully or decisively repudiated. Each of them has wrestled internally with the reasons for and against shooting at rival and come down on the side of not continuing his efforts. Moreover, if each of them did it once, each of them can do it again and, we might say, should therefore be given the benefit of the doubt. Granted, such agents might bear watching or monitoring, if that is feasible. Yet conceding that is different than saying that they ought to be held criminally liable for attempted homicide. By contrast, on the account of the renunciation defense according to which it should be denied to those whose criminal intentions persist, none of the Self-Controlled SNIPERs should be able to ward off criminal liability. None of them has fully or decisively repudiated the intention to kill his rival.

How should we decide between these competing accounts? Against the “persistent intentions” account, it might be argued that we do not generally think it

²⁴ A more radical objection would be that responsiveness to moral, agent-relative, or prudential reasons are equally contingent or fortuitous, and therefore as no more to an individual’s credit or under his control than the appearance of police on the scene, jammed rifles, or squeamishness. Yet it seems doubtful that the development or maintenance of moral, agent-relative, or prudential-reasons responsiveness is entirely beyond the control of individuals. Even if it is, it does not follow that their exercises of it, in specific choice situations, is likewise beyond their control. It is one thing to be endowed with capabilities of various kinds; it is another to utilize them on the appropriate occasions.

appropriate to punish individuals solely because they harbor criminal intentions.²⁵ To do so would be to adopt a too-inclusive account of criminal liability. Also, we do not normally care if individuals struggle to control their criminal impulses; it is enough if they manage to do so.

However, the persistent intentions account does not support punishing individuals solely for harboring criminal intentions. Instead, it says that once individuals have entered the buffer zone, they should have to convince us that they no longer harbor such intentions or else face punishment. Such individuals are unlike individuals who form criminal intentions, but whose self-control stops them before they go very far toward acting on them. By entering the buffer zone and not fully renouncing their criminal intentions, such individuals, it might be argued, show themselves deserving of punishment.

Yet it is not clear why individuals who enter the buffer zone, but who pull back on their own, before harming anyone, deserve to be punished. They have done what we hope and want them to do, albeit they have done so too late to avoid arrest and charges. The alternative, and I believe a more plausible view, is that the individuals who deserve punishment for attempts are those who enter the buffer zone and would have gone forward except for the occurrence of fortuitous proximate events over which they had little control. Such individuals are a bit like ticking bombs. If they had found themselves in different circumstances, they would have “gone off.” Self-controlled SNIPERs are different—they have shown that they can defuse themselves, so to speak.

Further, we should ask why the persistence of criminal intentions matters, even if agents have shown themselves capable of declining to act on them on one or more occasions. The most logical answer to this question would seem to be that agents whose criminal intentions persist are more dangerous than those whose do not. Yet if that is why a persistent criminal intent makes one eligible for attempt liability, then it is not clear why anyone who has ever adopted a criminal intention in the first place, especially one as odious as SNIPER’s, should be eligible for a renunciation defense. It is not exactly normal or admirable to intend to murder someone and to take steps in the direction of acting on that intention. Once one has done so, one would seem to bear watching for quite some time, even if one can show that one has undergone a genuine change of heart and fully abandoned one’s homicidal project. Moreover, as we have seen, fully abandoned intentions can be rekindled. Nothing about an intention’s repudiation guarantees the permanence of that repudiation. Unless having a persistent criminal intent can be severed from continued dangerousness, we might have to reject a renunciation defense for SNIPER regardless of his motivations for pulling back from his plan to kill his rival.

²⁵ But see DOUGLAS HUSAK, *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS* 47–52 (2010) for where Husak explores the justifiability of punishing individuals for “thoughts” that take the form of “firm” criminal intentions.

Granted, it will be exceedingly difficult, in most cases, for individuals charged with attempts to convince a court that they would not have gone forward due to relatively independent acts of reason and will on their part. Prosecutors will argue that fortuitous external or internal events are what really led such individuals to desist; defendants will struggle to muster convincing evidence to the contrary. But a few defendants might be able to demonstrate that no police, or other agents, appeared on the scene to stop or discourage them from going forward. Such defendants might also be able to demonstrate that their subsequent actions confirm that they no longer harbor the criminal intentions in question, or at least that they are inactive in the sense that defendants are not looking for opportunities to act on them. The question we now face is whether once individuals have gotten so close to acting on their criminal intentions, they should be granted full or only partial exemptions from punishment for attempts.

III. FULL DEFENSE OR MITIGATION?

A further question to be addressed is whether renunciation should serve as a full defense or simply as a ground for the mitigation of punishment. Gideon Yaffe recently rejected the former view while endorsing the latter.²⁶ His reasons for insisting that renunciation can serve only this more limited role are briefly elaborated. He claims that one who abandons an attempt “has committed a crime—the crime of attempt—and this fact is not erased by his abandonment, nor are most of the reasons for punishing attempts negated by it.”²⁷ There appear to be two distinct arguments here. One says that abandonment does not erase or negate what the attempter has done so far. Perhaps the idea is this: Whatever an agent’s motivation, once she has satisfied the conduct requirement for attempt liability, her pulling back from acting on her intention does not cancel or annul her culpability.²⁸ In a similar vein, Antony Duff recently argued that agents who come perilously close to acting on their criminal intentions, even if they pull back from doing so at the last moment, have “done wrong” and therefore deserve some punishment.²⁹ We might punish those who renounce less severely than we punish those who do not—much as we punish the remorseful less than the remorseless—but punish them we must.

Yaffe’s other argument says that whatever our reasons for punishing those who attempt crimes, they hold for those who take steps toward attempting them, but back off before they actually harm anyone. Yet this argument—that our reasons for punishing attempts are equally reasons for punishing near-attempts—is

²⁶ YAFFE, *supra* note 3, at 291–92.

²⁷ *Id.*

²⁸ See Lee, *supra* note 3, at 141.

²⁹ ANTONY DUFF, *Risks, Culpability, and Criminal Liability*, in *SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS* 141 (G. R. Sullivan et al. eds., 2012). Duff had earlier supported a full renunciation defense. See DUFF, *supra* note 3, at 395–97.

convincing if we punish attempts simply in order to deter them. Perhaps we should punish individuals who come very close to harming others, even if they pull back at the last instance, in order to discourage all of them from starting down this path.³⁰ However, if desert considerations play the primary role in a sentencing scheme, then it will be important to try and distinguish among those who abandon their attempts. Those who abandon due to relatively independent acts of reason and will do not, I have argued, deserve to be punished. They have not yet harmed anyone, though they came close to doing so. Those who abandon their criminal intentions because they feared imminent detection and arrest, were suddenly overcome by cowardice or squeamishness, found it more difficult than they expected to complete their crimes, or postponed their crimes because it suddenly seemed that there would be better opportunities to commit them later, are different. They deserve to be punished because they have crossed into the buffer zone and it is reasonable to conclude that but for the occurrence of proximate events beyond their control, they would have gone through with their attempts.

This brings us back to the first argument. At first glance, it seems to conflate moral blameworthiness with liability to legal punishment. In arguing that we should not punish those individuals who abandon due to relatively independent acts of reason and will, I can concede that such agents have behaved in ways that are morally blameworthy. Nothing about their pulling back at the last moment changes that, though the fact that they do so on their own makes them undeserving of punishment. It does not follow that they ought to be immune from moral criticism, even condemnation. Furthermore, it is perfectly reasonable for the authorities, if they are subsequently made aware of how far such individuals appear to have gone toward making attempts, to arrest and charge them, and thereby call them to account for their actions. It will then fall to the individuals so charged to convince the court that, having gone as far as they did, they did not proceed with their attempts for the right kinds of reasons. It will not be easy for them to make this defense successfully, nor should it be.

Furthermore, it might be appropriate for some of these agents to be charged with and convicted of crimes of reckless endangerment or other offenses of risk creation. Although some of the SNIPERS should not, on my account, be convicted of attempted homicide, all of them put someone at risk, especially by aiming a loaded rifle in the direction of their rivals, and so might be punished for having done so. Similarly, those who light fuses on explosives, only to then change their

³⁰ YAFFE, *supra* note 3, at 296–302, argues that moral conversion removes a reason we have to punish those who move toward attempts but abandon them, namely, the need to maintain a sufficient deterrent to the completion of their attempts. Assuming that the typical punishment for attempts provides such a deterrent, moral converts do not need the prospect of it to induce them to desist from their attempts. But those whose abandonment is based on crass concerns about being punished might need the added incentives provided by the typical sanctions to induce them to desist. However, Yaffe's argument puts greater reliance on the marginal deterrence capacities of longer sentences than seems warranted.

minds and extinguish them, or who poison food, only to abandon their attempts by disposing of the tainted food before it is consumed by the person they intended to kill, might be reasonably charged with and punished for creating unreasonable risks of harm, even if they can manage to convince a court that they renounced their attempts all on their own. Conceding this brings my position closer to that of Yaffe and Duff, without conceding that renunciation is grounds only for the mitigated punishment of attempts.

Importantly, there might be cases of renunciation in which no punishment at all is in order, because the agents with nefarious purposes never put anyone in danger. Suppose, for instance, that instead of intending to shoot his rival, SNIPER intended to beat him to a pulp with his fists. To mark this change in modus operandi, let us rechristen him MAULER. Suppose MAULER drove to his rival's house, waited in the bushes outside of it for his rival to appear, but when his rival stepped out onto his porch, MAULER renounced his intention and walked away without confronting his rival. It is not clear that MAULER can be plausibly claimed to have recklessly endangered his rival, just by "going armed" with his fists. And if he renounces his crime based on a relatively independent exercise of reason and will, then MAULER should not be convicted of attempted aggravated assault—even if his actions were somehow observed by others, reported to the authorities, and MAULER is (properly) arrested and charged and thus made to account for them.

A final point: The claim that those who come close to initiating their attempts might be reasonably punished in some cases for offenses of risk creation, even if not for attempts, will be most persuasive if we set the conduct requirement for attempts fairly close to the last act.³¹ If we set it further back—say to the Model Penal Code's requirement of a "substantial step"—then the risks created by attempters' conduct might be insubstantial in many cases. After all, a single substantial step might not significantly raise the level of risk to others.

CONCLUSION

In a small group of cases, individuals will be observed initiating criminal attempts only to pull back from them before unleashing harmful consequences over which they lack control. Though they might be reasonably charged with attempts by the authorities, we can preserve opportunities for individuals to act responsibly by permitting them to argue that they pulled back because they renounced their crimes. I have urged an account of the renunciation defense according to which individuals should have to convince the court that they pulled back due to relatively independent exercises of reason and will on their part and so do not deserve to be punished. However, renunciation does not have to be morally

³¹ As Duff, at least, appears to do, though he rejects the "last act" approach of Alexander and Ferzan. See DUFF, *supra* note 3, at 140.

predicated. It is enough if reflects the independent agency of individuals rather than the occurrence of proximate events over which they lack substantial control. Further, I have distinguished my account of the renunciation defense from one according to which the individuals who leave off their attempts must convince the court that they are no longer dangerous. Finally, I have argued that renunciation ought to be a full defense to attempt charges, though its success as such might not preclude individuals from being convicted on charges of having acted in ways that endangered others.