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## The Criminal Law and the Luck of the Draw

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# SUPREME COURT REVIEW

## FOREWORD: THE CRIMINAL LAW AND THE LUCK OF THE DRAW\*

SANFORD H. KADISH\*\*

I propose to consider what to make of a doctrine of the criminal law that seems to me not rationally supportable notwithstanding its near universal acceptance in Western law, the support of many jurists and philosophers, and its resonance with the intuitions of lawyers and lay people alike. This is the doctrine—the harm doctrine, I'll call it—that reduces punishment for intentional wrongdoers (and often precludes punishment for negligent and reckless wrongdoers) if by chance the harm they intended or risked does not occur. I will also consider a corollary of the harm doctrine which offers a full defense if it so happens that, unbeknownst to the defendants, the harm they intended could not possibly have been done.

Whether the harm doctrine can be justified is, as George Fletcher has said, a “deep, unresolved issue in the theory of criminal liability.”<sup>1</sup> Indeed, a German scholar, Björn Burkhardt, recently concluded his comparative review of the law on this subject with the sobering words that “little progress has been made toward a solution of this issue in the last two hundred years.”<sup>2</sup> He continued:

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\* This Introduction is substantially the Second Faculty Research Lecture delivered on March 4, 1993, to a general university audience under the auspices of the Academic Senate (Berkeley Division) of the University of California. Beyond some stylistic changes I have not tried to alter its character as a lecture. I have, however, used the occasion of its publication to revise and slightly extend some of the argument. I am indebted to the following for their suggestions and criticisms: Meir Dan-Cohen, Michael Davis, Mort Kadish, Eric Rakowski, Stephen Schulhofer and Jeremy Waldron.

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<sup>1</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 473-74 (1978).

<sup>2</sup> Björn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 B.Y.U. L. REV. 553, 556. He should have said two thousand plus years—Plato tried to explain the lesser punishment for a failed attempt to kill as an expression of gratitude to the gods. PLATO, *THE LAWS OF PLATO* 272-73 (Thomas L. Pangle trans., 1980).

"The arguments of the past still dominate contemporary discussion. . . . [H]ardly anything of substance has been added."<sup>3</sup> And he concluded: "In the final analysis, it is questionable whether a compelling and rational argument on this issue is possible."<sup>4</sup> That may well be so. The debate over the issue remains unresolved notwithstanding the earnest attention of generations of scholars. But though the ground is well trod,<sup>5</sup> the subject continues to have a fascination for those of us who worry about the criminal law (perhaps just because it has defied successful resolution), and I am not immune to its attraction.

I should explain at the start what I mean by saying that the harm doctrine is not rationally supportable. I mean that it is a doctrine that does not serve the crime preventive purposes of the criminal law, and is not redeemed by any defensible normative principle. Suppose, for example, the law provided that any crime committed during the night of a half-moon may not be punished with more than one-half the punishment appropriate on all other occasions. This distinction is patently irrelevant to any crime preventive purpose of the criminal law. Yet it might still be rationally supportable if it could be justified by moral principle. But no such principle can relate guilt or desert to the phases of the moon. Here, then, we would have an extreme instance of a rationally indefensible doctrine. One qualification: sometimes the law must defer to people's irrationalities to maintain the acceptance needed to govern. This might possibly be the case even with my half-moon doctrine of pun-

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<sup>3</sup> Burkhardt, *supra* note 2, at 556.

<sup>4</sup> *Id.* at 556-57.

<sup>5</sup> Here is just a sample of the recent literature: H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 127-33 (1968); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974); Lawrence C. Becker, *Criminal Attempts and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262 (1974); FLETCHER, *supra* note 1, at 472; HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 423-36 (1979); Charles R. Carr, *Punishing Attempts*, PAC. PHIL. Q. 61 (1981); Michael D. Bayles, *Punishment for Attempts*, 8 SOC. THEORY & PRAC. 19 (1982); Richard Parker, *Blame, Punishment, and the Role of Result*, 21 AM. PHIL. Q. 1 (1984); Michael Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 LAW & PHIL. 1 (1986), reprinted in MICHAEL DAVIS, TO MAKE THE PUNISHMENT FIT THE CRIME 101 (1992); Burkhardt, *supra* note 2, at 553; Yoram Schachar, *The Fortuitous Gap in Law and Morality*, 6 CRIM. JUST. ETHICS 12 (1987); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 738 (1988); David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53 (1989); Mordecai Kremnitzer, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime? A Comment on Prof. Dr. Bjorn Burkhardt's Paper*, 4 B.Y.U.J. PUB. L. 81 (1990); R.A. Duff, *Auctions, Lotteries, and the Punishment of Attempts*, 9 LAW & PHIL. 1 (1990).

ishment. The doctrine, however, would still be rationally indefensible, even though its adoption by the law would not be.

Of course our criminal law has for centuries included many irrational doctrines—whole Augean stables full. Some of them were that way from the start. Others got that way when changed conditions made them anomalous, like the murder rule requiring the victim to have died within a year and a day of the injury.<sup>6</sup> But these differ from the harm doctrine in that they are widely recognized as insupportable, and their long persistence in the law is simply evidence that the law is slow to change. The harm doctrine is special (although, as we will see, not singular) in that large segments of the legal and lay community regard it as sound.

I will begin by setting out the law that most clearly exhibits the harm doctrine at work. This is the law governing the punishment of failed efforts to do some prohibited harm (the law of attempts) and of actions that create the risk of the harm without producing it (the law of culpable risk creation). These rules are well known and I will only sketch them briefly.

First, the law of attempts. Consider the case of a man who stabbed his son in anger, pleaded guilty and was convicted of a crime equivalent for our purposes to attempted murder.<sup>7</sup> After serving several months of a two year sentence he was paroled. However, three months later his son, who had been hospitalized since the attack, took a turn for the worse and died, whereupon the prosecutor, quite within the law, charged the father with murder, a crime punishable with life imprisonment or death.

What did the father do in jail or on parole that merited the greater punishment? Not a thing. If a good constitution or a good surgeon had saved the son, the father could not have been further punished. The occurrence of the resulting death alone raises the crime and the punishment. In most jurisdictions this same principle operates for all crimes, not just homicidal crimes.<sup>8</sup> In California, for example, an attempt to commit a crime is punishable with half the punishment for the completed crime.<sup>9</sup> Thus, the reward for failing,

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<sup>6</sup> SIR EDWARD COKE, 3D INSTITUTE 47 (1644).

<sup>7</sup> See Linnet Myers, *Son's Death Means Ex-Con's Now Charged in Murder*, CHI. TRIB., May 20, 1987 § 2 at 6. Actually, the man was convicted of aggravated battery, but for simplicity's sake let us assume the crime was attempted murder.

<sup>8</sup> Though a few states, influenced by the 1962 Model Penal Code, have made the punishment the same for attempted and successful non-homicidal crimes. MODEL PENAL CODE § 5.05 cmt., at 486 (1985).

<sup>9</sup> CAL. PENAL CODE § 664 (West 1988).

no matter how hard you try to succeed or how close you come, is a lesser punishment.

Now consider crimes of culpable risk creation—crimes in which a person is punished, not for attempting a harm, but for culpably risking it. The punishment of these crimes is also made to depend on chance. Take the case of Mr. Malone.<sup>10</sup> He and his friend decided to play a game of Russian Roulette in which each took turns spinning the chamber of a revolver, with one round in it, and firing at the other.<sup>11</sup> When Malone's turn came to pull the trigger the gun fired and killed his friend.<sup>12</sup> Malone was convicted of second degree murder, based on the egregious risk to life he needlessly created.<sup>13</sup>

That sounds fair enough. But suppose instead, that the bullet only inflicted a flesh wound, or that the bullet was not in the firing chamber when Malone pulled the trigger. Could Malone then have been convicted of any crime? Perhaps he could have been convicted of some ad hoc statutory offense concerning firearms, but such an offense would carry nothing like the penalty for murder. And if there had been no special statute of this kind, he could not be convicted of any crime at all, since traditionally just recklessly endangering another was itself not criminal—except in specific contexts, like driving a car. Some jurisdictions have in recent years made it criminal to recklessly endanger another person in all situations, but even these statutes treat the offense as a minor one.<sup>14</sup>

Finally, I need to mention one more doctrine that exhibits the law's preoccupation with a resulting harm. It is the doctrine of impossibility, which takes the harm doctrine one step further. The harm doctrine calls for a lesser punishment when no harm was done; the impossibility doctrine calls for no punishment at all when the harm could not possibly have been done. Though now a minority view, it still has its defenders, both on and off the bench.<sup>15</sup>

The gist of this doctrine is that a serious effort to commit a crime, even one which includes what the actor thought was the last thing he needed to do to commit it, is not punishable if the crime could not have succeeded. For example, assume a person uses lies

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<sup>10</sup> Commonwealth v. Malone, 47 A.2d 445 (Pa. 1946).

<sup>11</sup> *Id.* at 446.

<sup>12</sup> *Id.* at 447.

<sup>13</sup> *Id.*

<sup>14</sup> See MODEL PENAL CODE § 211.2 cmt., at 196 (1980).

<sup>15</sup> See, e.g., Anderson v. Ryan, 1985 App. Cas. 560 (H.L.); United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973). For scholarly support see Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057 (1992); J. Temkin, *Impossible Attempts—Another View*, 39 MOD. L. REV. 55 (1976).

and deceit to dupe another into giving up his property, but all to no avail because the owner sees the lies for what they are. Can the would-be deceiver be convicted of attempting to obtain the property of another by false pretenses? Not under the impossibility doctrine—since the owner saw through the lies, the defendant could not possibly have succeeded.<sup>16</sup> In another example a hunter, meaning to shoot a deer before the hunting season, shoots at a straw dummy the game warden erected, with reflectors for eyes to give it verisimilitude. Is this an attempt to take a deer out of season? No, said the court: “If the [s]tate’s evidence showed an attempt to take the dummy, it fell far short of proving an attempt to take a deer.”<sup>17</sup> A final example: Professor Moriarty shoots at what he takes to be Sherlock Holmes, but which in reality is the shadow of Holmes’ paper cutout profile that Holmes has set revolving on a phonograph in front of a lamp. Too clever by half, Mr. Holmes. Moriarty escapes again, this time thanks to the impossibility doctrine, since his action—shooting at a shadow—couldn’t possibly kill Holmes.

Today, these impossibility cases would go the other way in most jurisdictions—though the attachment of courts to the doctrine is sometimes remarkable.<sup>18</sup> But with the exception of the impossibility doctrine, all of the doctrines I have described are essentially still the

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<sup>16</sup> See *Commonwealth v. Johnson*, 167 A.2d 344, 347 (Pa. 1933) (Maxey, J., dissenting). See also B. H. Glenn, *Attempts to Commit Offenses of Larceny by Trick, Confidence Game, False Pretenses, and the Like*, 6 A.L.R.3d 241 (1966).

<sup>17</sup> *State v. Guffey*, 262 S.W.2d 152 (Mo. Ct. App. 1955).

<sup>18</sup> In 1981, Parliament enacted the Criminal Attempts Act of 1981, Section I(2) of which provided that one may be guilty of attempting to commit an offense “even though the facts are such that the commission of the offense is impossible.” The Appellate Committee of the House of Lords nonetheless found a way to sustain the defense of impossibility, holding, in *Anderton v. Ryan*, 1985 A.C. 560, that one who believed she was buying stolen property can’t be convicted of attempting to do so if the property was not in fact stolen. It took a blistering attack by Professor Glanville Williams, in his article *The Lords and Impossible Attempts*, 1986 CAMB. L.J. 33, to persuade the House of their error, which they rectified a year later in *Regina v. Shivpuri*, 1987 A.C. 1. Professor Williams opened his attack with words that in an earlier day might have won him a contempt citation, were it not that he should have had a defense of adequate provocation:

Stephen once said that the drafting of a statute should aim at a degree of precision which a person reading in bad faith cannot misunderstand; and it is all the better if he cannot pretend to misunderstand it. The decision . . . in *Anderton v. Ryan* shows how difficult, if not impossible, it is to achieve these objectives.

As this opening may indicate, the tale I have to tell is unflattering of the higher judiciary. It is an account of how the judges invented a rule based upon conceptual misunderstanding; of their determination to use the English language so strangely that they spoke what by normal criteria would be termed untruths; of their invincible ignorance of the mess they had made of the law; and of their immobility on the subject, carried to the extent of subverting an Act of Parliament designed to put them straight.

*Id.* at 33.

law in most places.<sup>19</sup>

Having illustrated the workings of the harm doctrine, the two major tasks I have set for myself lie ahead. First I must make good, if I can, my claim that the doctrine, in all its applications, is not rationally defensible. Second, I need to consider what to make of the durability of this doctrine.

## I. THE RATIONAL INDEFENSIBILITY OF THE HARM DOCTRINE

To make my case that the harm doctrine cannot be rationally defended, I must establish two things: (a) that the doctrine cannot be justified in terms of the crime preventive purposes of criminal punishment; and (b) that neither can it be justified in terms of any convincing principle of justice.

### A. THE ARGUMENT FROM THE PURPOSES OF PUNISHMENT

Does the harm doctrine further the law's interest in crime prevention? There are two main ways in which criminal punishment is thought to reduce crime. One is by preventing further criminal acts by the offender. The other is by discouraging criminal acts by others. How far the law succeeds in particular times and places in attaining this goal is an empirical question I need not pursue here, for the question is whether, on the law's premise that punishment does work in this way, the distinction in punishment required by the harm doctrine is defensible.<sup>20</sup> Let's first consider the goal of preventing further crime by the offender being punished.

Convicting offenders serves to identify those who have shown themselves to threaten further breaches of the law, and punishing them constitutes a response to the threat they constitute. The response may take the form of efforts to alter their criminal proclivities (reformation), or to teach them a lesson (special deterrence), or to physically keep them from doing harm for a while (incapacitation). The question is whether the actual occurrence of harm is relevant in assessing the dangerousness of the offenders and their suitability as subjects for reformation, special deterrence or incapacitation in the interest of public protection.

Consider in this light the attempt cases I presented a moment ago. Take the father who stabbed his son. He is now out on parole

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<sup>19</sup> H.L.A. Hart refers to "the almost universal practice of legal systems of fixing a more severe punishment for the completed crime than for the mere attempt." HART, *supra* note 5, at 129.

<sup>20</sup> The most comprehensive and incisive examination of these issues appears in Schulhofer, *supra* note 5, at 1497.

from his attempted murder conviction. Has he suddenly become more dangerous because the son finally succumbed? Or consider the Russian Roulette player, Mr. Malone. Would he have been less dangerous if the bullet had not fired because it was in another chamber? Of course not. And the same is surely true of the impossibility cases I just described. Whether the property owner did or did not have the wit to see through the defendant's lies, whether the object the hunters shot at turns out to be a dummy or a live deer, whether the revolving shadow was really that of Holmes or only a cutout—in none of these cases does it make a whit of difference so far as identifying the actor as *prima facie* requiring protective measures or as indicating the length of time the actor should be held. It may be conceded that a different response may be called for if the impossibility would be obvious to any sane person—trying to open a safe with incantations, for example—or where the evidence of criminal intent is doubtful. But neither is true in any of my cases.

One might argue that we need the harm to happen in order to be sure of the dangerousness of the actors. Without it, the argument might go, we would have to speculate on whether they would actually go forward and do the harm, and thereby deprive actors of the freedom to make a final choice. This argument has no force, however, in cases where the defendants have done the last act they thought necessary to cause the harm—consider, for example, one who shoots to kill another but misses, or cases like those of Professor Moriarty and the hunters. Furthermore, even if the defendant has more to do, the law of attempts requires substantial acts—traditionally defined as acts that come proximately close to success—precisely to meet this concern. Finally, the argument is misdirected, for its logic leads not to punishing attempts less, but to not punishing them at all: freedom to make a final choice whether to take the last step or to desist is at stake whether the punishment is two years or four.

Is culpable risk creation any different?<sup>21</sup> Do we need the harm to assure us of the culpability and dangerousness of the actor when the act is unintentional? Surely not in all cases. We do not need the gun to fire and kill someone to be certain of the danger of Russian Roulette. We don't need someone to be killed to know that wild, drunken driving through congested city streets is dangerous.

Therefore, reducing punishment in all cases, just because luckily no harm occurs, makes no sense in terms of the purpose of pun-

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<sup>21</sup> This question is well canvassed in MODEL PENAL CODE § 211.2 cmt., at 201 (1985) and Schulhofer, *supra* note 5, at 1588-89.



ishment to identify dangerous behavior and to prevent its perpetrators from repeating it. My point is not that a rational criminal law would increase the punishment for attempts; it may as well be that the law should reduce the punishment for completed offenses. Rather, my point is simply that punishing attempts and completed crimes differently makes no sense insofar as the goal of the criminal law is to identify and deal with dangerous offenders who threaten the public.

Now let's look at the second way criminal punishment may reduce crime, through general deterrence. This works not by protecting the public from the offender, but by providing others who might be tempted to commit a like crime with a warning of what may happen to them if they do. The question here is the same as before: whether it makes any sense to punish attempted and completed crimes differently, insofar as the goal of the law is to deter others from committing the crime.

It seems evident that in crimes of culpable risk creation, like that of my Russian Roulette player or my reckless driver, the lesser punishment for attempts reduces the deterrent efficacy of the law. Since the actors are not planning on doing the harm, the threat of punishment if they do is discounted for them by its improbability. The only way to maintain its full deterrent force is to threaten punishment whether or not the harm occurs. But in crimes of intention like attempts—for example, Professor Moriarty trying to kill Holmes, or the father trying to kill his son—some argue that we do not lose deterrence, because people who try to commit a crime expect to succeed, and if the punishment for success does not deter them, an equal punishment for failure certainly will not.<sup>22</sup> By punishing them less for attempt when they fail, therefore, we economize on the use of punishment without loss of deterrence.

There is something to this, but not enough, I think, to justify the law's prevailing punishment patterns. Isn't it plausible to suppose that at least in some cases the threat of equally severe punishment for an attempt may increase the law's deterrent effect? I have in mind cases where potential offenders know there is a greater chance of being caught and punished if they fail than if they succeed. Sting operations, for example, are of this kind, because they are generally directed at consensual behavior such as narcotic sales

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<sup>22</sup> In other words, "a person who will not be deterred from attempting to commit a crime by the prospect of being punished if he succeeds, will [not] be deterred from doing so by the prospect of being punished either as severely or less severely if he fails." JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 585 (1940).

or bribery that usually goes undetected and unpunished when it succeeds. Treason is another example. As the well-known couplet puts it:

Treason doth never prosper: what's the reason? For if it prosper, none dare call it treason.<sup>23</sup>

Moreover, even to the extent the harm doctrine may economize on punishment without loss of deterrence,<sup>24</sup> there are the other objectives of punishment—reformation, special deterrence and incapacitation—that are indeed disserved by rewarding chance failure with less punishment, as I've indicated.

There is indeed an appeal in the argument that reducing punishment for attempt is justified insofar as it economizes on the use of punishment. It is an appeal, however, primarily because our punishments tend to be indefensibly high—any way to reduce them seems a move in the right direction. If statutory punishments were more nearly optimal, however, a reduction based simply on failure would have much less to be said for it, for the reasons I've tried to suggest.

Finally, some argue that the harm doctrine would serve crime preventive purposes by offering the prospect of lesser punishment as an inducement for the defendant to desist.<sup>25</sup> This is an argument more appealing on first sight than on second thought. It doesn't apply to those who culpably create risks since, having already created the risk, it's too late for desisting. Neither does it carry weight with those who believe they have already taken the last step needed to do the harm. And even with those who know they still have more to do, the argument is really weaker than it seems. First, by the time the defendant has done the substantial acts toward carrying out the crime that the law of attempt requires, there is very little chance of a change of heart. Second, even if the defendant might have a moment of doubt at the last instant, reducing the punishment from say, six to three years imprisonment, hardly does much to reinforce it.

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<sup>23</sup> SIR JOHN HARRINGTON, *EPIGRAMS* 181 (Bartlett's 15th ed. 1980).

<sup>24</sup> Professor Schulhofer has suggested reason to doubt that the lesser punishment for attempt economizes on the use of punishment. Commenting on the move of the Model Penal Code to retain the punishment distinction for the most serious crimes, he observes:

Although the Code's goal of limiting the use of the most severe sanctions appears attractive, it proves difficult to show with any degree of generality that the Code's approach in fact has this effect; leniency for unsuccessful attempts may instead work to perpetuate unnecessarily severe and vindictively harsh sentences in the case of completed crimes.

Stephen Schulhofer, *Attempt*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 91, 97 (1983). He develops his argument more fully in Schulhofer, *supra* note 5, at 1562-85.

<sup>25</sup> This was Beccaria's reason for favoring lesser punishment for attempt. CESARE BECCARIA, *ESSAY ON CRIMES AND PUNISHMENTS* 40 (Henry Paolucci trans., 1963).

Third, if providing a motive to desist were really the objective, one would expect the law to offer a defense of total exculpation where the defendant voluntarily desists. But only a minority of jurisdictions allow voluntary abandonment as a complete defense. And even in those that do, the practice of reducing punishment for failed attempts persists.

#### B. THE ARGUMENT FROM THE PRINCIPLE OF DESERT

My argument to this point has been that attributing legal significance to the chance happening of harm either undercuts or is irrelevant to the crime prevention purposes of criminal punishment. Even so, as I said at the outset, a practice may be justified by some relevant principle of justice. Now I take the principle that limits punishment to what the offender deserves to be such a principle, and one which those subscribing to the harm doctrine would want to rely on. The question, then, is whether wrongdoers deserve less punishment (or none at all) because the harm they intended or culpably risked happens not to occur, or could not have occurred, for reasons unknown to them.

Isn't desert the same whether or not the harm occurs? It is commonly accepted that punishment is deserved if persons are at fault, and that fault depends on their choice to do the wrongful action, not on what is beyond their control. Reconsider my attempt cases. Would the father who stabbed his son deserve less punishment if a skillful doctor had been available to save the son's life? Would the Russian Roulette player deserve less punishment if the bullet happened to be in another chamber when he fired? Or consider my impossibility cases. Do the hunters who shot the dummy believing it was a deer, or Professor Moriarty, who shot the shadow thinking it was Sherlock Holmes, deserve no punishment because they were mistaken?

While in principle it's difficult to find good reasons for making desert turn on chance, here's the rub: most of us do in fact make judgments precisely of this kind.<sup>26</sup> Doesn't it seem natural for a parent to want to punish her child more for spilling his milk than for almost spilling it, more for running the family car into a wall than for almost doing so? That's the way our unexamined intuitions run. The sight of the harm arouses a degree of anger and resentment

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<sup>26</sup> Professor Yoram Shachar doubts that harm-oriented thinking is as widespread as many people believe. Shachar, *supra* note 5, at 12. He presents an interesting review of the literature bearing on the empirical question.

that far exceeds that aroused by apprehension of the harm. What Adam Smith observed of his time is still largely true of ours:

Our resentment against the person who only attempted to do a mischief, is seldom so strong as to bear us out in inflicting the same punishment upon him, which we should have thought due if he had actually done it. In the one case, the joy of our deliverance alleviates our sense of the atrocity of his conduct; in the other, the grief of our misfortune increases it.<sup>27</sup>

Since he believed that the real demerit is the same in both cases, the person's intentions and actions being equally culpable, Smith concluded that in this respect there is "an irregularity in the sentiments of all men, and a consequent relaxation of discipline in the laws of . . . all nations, of the most civilized, as well as of the most barbarous."<sup>28</sup>

What should we make of this paradox? Is there something to be said after all for the popular sentiment that fortuitous results do have a bearing on blameworthiness, something that is missed by treating it simply as an irregularity? Can attributing punishment significance to the occurrence of harm be justified in terms of the desert principle?<sup>29</sup>

Obviously, the foundation of my argument against making punishment turn on the chance happening of harm rests on the incompatibility of luck and desert. But perhaps this assumption is mistaken. A distinguished philosopher, Thomas Nagel, has advanced the paradoxical notion of "moral luck."<sup>30</sup> His point is that

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<sup>27</sup> ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 100 (D.D. Raphael and A.L. Macfie eds., 1976).

<sup>28</sup> *Id.*

<sup>29</sup> The Supreme Court had to take a stand on this issue when called upon to determine the constitutionality of permitting a jury to hear victim impact evidence in a capital case. In *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the impact evidence consisted of a grandmother's testimony regarding the great suffering of her young grandchild as a result of his mother's murder. *Id.* at 2599. Chief Justice Rehnquist, speaking for a majority of the Court, sustained the use of this evidence. He did not contest the dissent's reasoning that the amount of suffering of the victim's family did not reflect on the defendant's blameworthiness. Rather he appealed to the longstanding precedents in the law for imposing differing punishments on equally blameworthy defendants because their acts caused differing amounts of harm. *Id.* at 2605. The venerability of the harm doctrine, therefore, appears to have been the basis for the Court's rejection of the constitutional claim. On the other hand, the Chief Justice seemed to waffle on the blameworthiness point, for a few pages later he declared, "[w]e are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Id.* at 2608.

For a general treatment of the relevance of victim impact evidence to culpability, see Andrew Ashworth, *Victim Impact Statements and Sentencing*, 1993 CRIM. L. REV. 498.

<sup>30</sup> THOMAS NAGEL, *MORTAL QUESTIONS* 24-38 (1979). See also BERNARD WILLIAMS, *MORAL LUCK* 20-39 (1981).

we do commonly make and defend judgments of moral desert despite the presence of substantial elements of chance. So if the harm principle is irrational because it makes moral desert turn on chance, then so are many of our considered moral judgments.

Nagel instances four situations in which moral desert turns on chance. Two of the four are based on a determinist premise; namely, that you may be lucky or unlucky in the antecedent factors that determine the kind of person you turn out to be and in how you choose to exercise your will. True enough if one accepts determinism. But, first, that explanation of human action is highly contestable, and second, the criminal law, with its concepts of personal responsibility and desert, plainly rejects it.

A third instance Nagel gives of moral luck is that you may be lucky or not in whether circumstances present you with an occasion to make a moral choice that will reveal your moral shortcomings; for example, luck in whether you are ever presented with the need to choose to betray a friend or break a promise. But I don't believe that this threatens our sense of justice in blaming in the same way that luck in the fortuitous outcome of an action (the harm doctrine) threatens it. The settled moral understanding is that what you deserve is a function of what you choose. It may be that you would not have had occasion to make a choice that revealed your badness if you had better luck. Nonetheless, you did make a choice—nobody made you—and it is that choice for which you are blamed. It is a different matter, however, to say that chance occurrences that follow after you have made your choice determine what you deserve, for that is to rest desert upon factors other than what you chose to do. Fortuity prior to choice, therefore, may be accommodated to our notions of just desert; fortuity thereafter cannot.<sup>31</sup> As I see it, that leaves the harm doctrine, Nagel's fourth instance of moral luck, as the one deep challenge to the desert principle, the singular paradox which Adam Smith early identified.

I turn now to arguments designed to justify the harm doctrine in terms of the principle of desert. They all strike me the way one philosopher found metaphysics—"the finding of bad reasons for

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<sup>31</sup> As David Lewis puts it in *The Punishment that Leaves Something to Chance*, *supra* note 5, at 56:

[I]t may be misleading to speak of the moral luck of the attempter, since it may tend to conflate this case with something quite different. The most intelligible cases of moral luck are those in which the lucky and the unlucky alike are disposed to become wicked if tempted, and only the unlucky are tempted. But then, however alike they may have been originally, the lucky and the unlucky do end up different in how they are and in how they act. Not so for the luck of hitting or missing. It makes no difference to how the lucky and the unlucky are, and no difference to how they act.

what we believe upon instinct.”<sup>32</sup> One argument proceeds as follows: our prevailing punishment practice with respect to results is no different than a penal lottery in which the amount of punishment for a crime depends on some such chance event as the drawing of long and short straws.<sup>33</sup> To appreciate this, the argument goes, we need to cease thinking of the lesser punishment for failing to complete the crime as attributable to lesser guilt, and think of it merely as the chance event that determines the losers and winners of the lottery. Thought of as a penal lottery, then, there is no unfairness, for in leaving punishment to chance all attempters are treated alike. They all, in effect, draw straws. If they draw the short straw (that is, they succeed) they get the greater punishment. If they draw the long straw (that is, they fail) they get lesser punishment. There is no unfairness in treating the winners better than the losers so long as the lottery is unrigged.

But even unrigged, the basic injustice of a lottery in allocating punishment remains: to allow one of two offenders equally deserving of punishment to receive less punishment if she wins a lottery detaches punishment from desert. It would be the same if we allowed every equally guilty offender a throw of the dice—a throw of six or less and we halve the punishment. The two offenders end up being punished differently even though they are identical in every non-arbitrary sense. That is what is crucial, not the fact that they both had an equal chance of getting a lesser punishment when they threw the dice.<sup>34</sup>

One might object that while punishing a person more than he deserves is unjust, punishing him less because he lucked out is not.<sup>35</sup> Of course, the offender who lucked out can't complain. But the one who got what would otherwise be his just punishment may well complain, as any child knows who sees his sibling spanked once while he is spanked twice for the same offense. You wouldn't convince the child he wasn't unfairly treated by explaining to him that you left it to chance and he lost. He'd feel wronged, and rightly so.<sup>36</sup> The parent's punishment action was arbitrary, in the sense that punishment of the children was left to chance, and thus for-

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<sup>32</sup> F.H. BRADLEY, *APPEARANCE AND REALITY* xiv (2d ed. 1897), *quoted in* David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1624 (1992).

<sup>33</sup> See Lewis, *supra* note 5.

<sup>34</sup> See Schulhofer, *supra* note 5, at 1569-72. *But cf.* MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME* 179 (1992) (ch. 8, "Sentencing: Must Justice Be Even-Handed?").

<sup>35</sup> DAVIS, *supra* note 34, at 204.

<sup>36</sup> If you said to the child that there is a place for mercy in the administration of punishment, he might persuasively ask why it was shown to his sister but not to him.

feited any claim that the child should respect it as fair punishment.<sup>37</sup>

A different defense of the harm doctrine rests on the judgment that given two people who try to do a harm or to risk it, the one who succeeds becomes a worse person than the one who fails, and thus deserves more punishment. So it has been argued that “in *doing* something evil one *becomes* something evil,” and the one who fails to kill does not become what success in killing would have made him—an attempted murderer is not a murderer.<sup>38</sup>

I do understand how most people would have heavier hearts if their blow had killed another than if it luckily only wounded. But I rather think they'd be kidding themselves to think themselves better persons because their victim happened to have a good constitution or a good doctor. Even if I'm wrong, though, I don't see how the difference warrants a difference in punishment. The principle of proportional punishment requires that the amount of punishment should bear some relation to the degree of blameworthiness of the defendants' actions, not to what they think of themselves or to what they have become in some existential sense.

Finally, I will mention two recent efforts to bring our intuitions about the harm doctrine into harmony with our reason. The first draws upon the recently popular retributive justification of punishment that views punishing the offender as restoring the imbalance of benefits and burdens created by the crime.<sup>39</sup> There is, of course, one readily understandable imbalance produced by most crimes: the criminal profits from a loss he imposes on the victim—he steals or damages the victim's property, he causes the victim to suffer an economic loss, or he injures him physically. If punishment can justifiably be seen as somehow restoring the victim's loss, then less punishment for an attempt, where the victim has suffered no (or, arguably less) loss, could make sense.<sup>40</sup> It is hard to see, however, how inflicting pain on the criminal restores anything—certainly it doesn't restore the victim to his property or compensate him for his

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<sup>37</sup> DAVIS, *supra* note 34, at 204, argues to the contrary that while the chance addition of punishment to what is just is an injustice, the chance deduction is not. He argues that “the attitude of rational persons toward good fortune is not symmetrical with their attitude toward misfortune,” and attributes to the one of the two equally guilty offenders who was not lucky enough to get less than he deserved the feeling of envy. *Id.* Envy may be the right word for the feeling of the loser of a gaming contest toward a winner. When the state spins the wheel to determine the punishment of identically situated offenders, however, it seems to me different. The loser may well feel envy toward the other's good luck, but envy does not explain his sense of being unfairly dealt with by the state.

<sup>38</sup> PETER WINCH, *ETHICS AND ACTION* 149-50 (1971).

<sup>39</sup> See Kent Greenawalt, *Punishment*, in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1336, 1339 (1983).

<sup>40</sup> See Carr, *supra* note 5, at 65-66.

economic loss or for his medical expenses and pain and suffering. And even if it somehow did, in the unpalatable sense that the victim received a restorative amount of pleasure from the offender's suffering,<sup>41</sup> it is not the morality of retributive punishment that would have been demonstrated, but the desirability of satisfying the vengeful feelings of the victim, which is not the same thing.

However, the image of righting the imbalance is more often construed by those who use it in a different way—not as compensating the victim for physical injury or economic loss, but rather as depriving the offender of an unfair advantage; namely, the advantage of releasing himself from restraints the rest of us accept to allow the social enterprise to go forward.<sup>42</sup> Punishment of the wrongdoer, then, deprives him of the parasitic advantage he has taken, somewhat analogously to the way a penalty in a competitive game is designed to negate any advantage gained by unsporting conduct.<sup>43</sup> Using this as a justification for retributive punishment, Michael Davis has fashioned an ingenious argument to justify a lesser punishment for attempt.<sup>44</sup> He draws an analogy to an imagined auction of licenses that permit the holder to act free of social restraints. Such an auction would reveal that a license to fail is worth less than a license to succeed, because people would naturally bid less for it. One who succeeds in committing a crime has unfairly imposed on the rest of us to the extent of the value of the license to succeed, while one who fails has imposed on us to the lesser extent of the

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<sup>41</sup> Of course, crime victims often have strong vengeful feelings toward the criminal, so that hurting the offender would give victims something they value. But, is it morally permissible for the State to make one person suffer just so that another can enjoy the experience? Few people today would contest that traffic in the pleasures of another's pain is traffic in morally illicit goods. Some utilitarians, prepared to find value in any human satisfaction, regardless of its nature, might think otherwise. See, e.g., JAMES F. STEPHEN, 2 HISTORY OF THE CRIMINAL LAW OF ENGLAND 81-82 (1883 ed.). But even utilitarians may be observed to squirm and dodge at the prospect of such a conclusion. Consider, for example, the arch-utilitarian, Jeremy Bentham. He conceded some value to one person's enjoyment of another's suffering, but his qualification was telling. While allowing as a collateral end of punishment the pleasure of the victim in the offender's pain, he thought it beneficial only when some other purpose required it and never just for this purpose, "because . . . no such pleasure is ever produced by punishment as can be equivalent to the pain." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158-59 (J.H. Burns and H.L.A. Hart eds., 1970). That's as clear as a squirm and a dodge as one is likely to find in Jeremy Bentham.

<sup>42</sup> See, e.g., HERBERT MORRIS, ON GUILT AND INNOCENCE 33-34 (1976); J.G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 228 (1973).

<sup>43</sup> For a critique of this view see David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537 (1991). Michael Davis replies in *Criminal Desert and Unfair Advantage: What's the Connection?*, 12 LAW & PHIL. 133 (1993).

<sup>44</sup> DAVIS, *supra* note 34, at 101.



value of a license to try and fail. Less is needed in the latter case, therefore, to rectify the unfairness.

There are many intriguing questions that may be pursued in connection with the working of this hypothetical auction,<sup>45</sup> but my basic disquiet with Davis' argument arises from the premise on which it rests. For the psychoanalyst, it is plausible to conceive of people as spurred on by their deepest urges to ravage and plunder their neighbors, but held in check by social and legal constraints. On this view, presumably, the law-abiding have this grievance against the law-defying: "We played by the rules and held ourselves back from larceny, assault, rape and so forth. But you disregarded the implicitly agreed-on rules and did what the rest might have wanted to do. For taking this unfair advantage of the rest of us it is only right that you should be penalized."

As I said, this is the explanation some psychoanalysts give for the prevalence of the retributive urge.<sup>46</sup> However, the contention that in punishing the criminal we are only cancelling the advantage the offender took of the rest of us in not restraining his anti-social impulses, as the rest of us do most of the time, seems an unlikely moral justification. No doubt there are some crimes for which this analysis is apt—for example, those in which the offender and others are indeed competing to win some goal, such as business people bidding for a contract. The one who cheats by finding out what the others have bid in order to be sure he submits the winning bid does derive precisely the kind of unfair advantage that Davis has in mind. The same can be said of income tax evasion. But, it seems unrealistic and demeaning to the rest of us to treat all crimes in this manner. What the law-abiding feel when they read of a child abduction, a rape, a murder, a vicious assault, is not that the offender has gotten an unfair advantage over them for which he should be penalized (and penalized proportionately to the price a license to commit these crimes would fetch at an auction). It is the evil of the offender and the harm he has imposed on the victim which moves them, not their own loss.<sup>47</sup> So the theory of punishment as restoration of the unfair advantage the offender has taken of the rest of us ultimately fails, as does the notion of auctioned licenses which rests on it.

The second recent effort to justify the harm doctrine comes

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<sup>45</sup> See Duff, *supra* note 5, at 10-17.

<sup>46</sup> See FRANZ ALEXANDER & HUGO STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 231 (1956).

<sup>47</sup> See R.A. DUFF, *TRIALS & PUNISHMENTS* 211-17 (1986), which develops a telling criticism of the unfair benefit theory along these lines.

from R.A. Duff.<sup>48</sup> He suggests that in punishing an attempt less than a completed crime the law serves to communicate to the offender that, although subjectively he is as culpable as one who does the harm, in fact all should be grateful that the harm he intended did not come to pass. The lesser punishment communicates the law's judgment that a worse state of affairs would have existed if the offender had achieved his objective—in other words, things are not as bad as they might have been. Perhaps the force of this argument turns on Duff's theory of justified punishment as communication directed towards the offender's repentance,<sup>49</sup> but I find it hard to accept that we need the lesser punishment to keep us (and the offender) aware, for example, that things would be worse if the attempted rapist had succeeded in raping his victim.

## II. WHAT TO MAKE OF RATIONALLY INDEFENSIBLE DOCTRINES

This, then, is my case against the harm doctrine. If I'm right, what should we make of it? What might it signify that an irrational doctrine like this perdures in the law and continues to have such a strong intuitive appeal outside the law, and what, if anything, should be done about about it? I have no big answers, only some speculations.

### A. THE NON-SINGULARITY OF THESE DOCTRINES

The first important thing to notice is that the harm doctrine is not a singular anomaly in the criminal law. There are other rationally indefensible standard criminal law doctrines that have widespread intuitive appeal. In speculating on the whys and wherefores of the harm doctrine it may be instructive to take them into account as well. Let me instance two doctrines that seem to me to be of this character.

The first goes under different names and has a variety of applications. I will refer to it as the lesser-wrong doctrine, for it rests on the premise that if I do something I should not—something wrong or unlawful—I become guilty of any harm my action produced, even though I wouldn't have been responsible for it had I been doing something legal. One finds the principle widely manifested in the law. For example, in the law of homicide, it is known as the misdemeanor-manslaughter or felony-murder rule. A hunter, first looking around to be sure no one will be endangered, shoots at game. The bullet unpredictably ricochets off a rock, killing a person who

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<sup>48</sup> Duff, *supra* note 5, at 30-37.

<sup>49</sup> DUFF, *supra* note 47, at 233 *et seq.*

was hiding behind a bush. So far no crime has been committed, only an accident. But suppose the hunting season had not yet started or the animal was of a protected species. Now the hunter would be guilty not only of hunting out of season and killing an endangered species but of culpable homicide as well. Under the traditional common law rules, if the hunting offenses were misdemeanors the hunter would be guilty of manslaughter; if they were felonies the hunter would be guilty of murder.<sup>50</sup> While the severity of these doctrines has been moderated in modern times, they are still part of the law. The lesser-wrong principle affects thinking in non-homicide cases as well. For example: A man deserts his pregnant wife. Under this doctrine he is guilty of the crime of deserting a pregnant wife even if he had no reason to know she was pregnant. Why? Because deserting one's wife is itself a wrong thing to do.<sup>51</sup> A man absconds with a girl under sixteen without parental approval. Under this doctrine he is guilty of the crime of doing so even if he reasonably thought she was over sixteen. Why? Because running off with a young woman is itself a wrongful action.<sup>52</sup>

I needn't labor what's wrong with these doctrines. The pursuit of crime-preventive purposes scarcely justifies them. To speak of the homicide doctrines, for example, if we want to deter life-threatening actions, then those are the types of acts that we should punish—not non-threatening acts just because they're done in the course of some lesser crime and happen to kill by some fluke. The doctrines only serve to raise the punishment for the lesser crimes during which death chances to result. As one critic put it, "[s]urely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged."<sup>53</sup> Nor does the desert principle support these doctrines. What the offender deserves is punishment for the lesser crimes, not for the deaths, which are, by stipulation, wholly accidental. Of course, the same reasoning also applies to the non-homicidal instances of the lesser wrong principle, as in the cases of the husband deserting his wife and the man taking out a young woman without permission. If anything, these are even more objectionable since they result not just in arbitrarily raising the punishment, but in making a legally innocent action a crime.

Here then we have another instance of an irregularity in our

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<sup>50</sup> Cf. COKE, *supra* note 6, at 56.

<sup>51</sup> See *White v. State*, 185 N.E. 64 (Ohio Ct. App. 1933).

<sup>52</sup> See *Regina v. Prince*, 2 Crown Cas. Res. 154 (1875).

<sup>53</sup> THOMAS B. MACAULAY, AN INDIAN PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS Note M, at 64-65 (1837).

sentiments producing a rationally indefensible doctrine—not, like the harm doctrine, the diminution of resentment when no harm is done, but its augmentation when it is, so great that one who is not culpable of the harm is made accountable nonetheless, because that person has done something else that is wrong. To be sure, the lesser-wrong doctrine does not have so widespread an intuitive appeal as the harm doctrine, and is not so deeply rooted in the law. But it is to be found more than occasionally, particularly in Anglo-American law, and it does respond to a not uncommon intuition that someone who has done wrong can't complain if he gets blamed for harms that happen as a consequence, even if he didn't intend them or couldn't reasonably expect them.<sup>54</sup>

Now for the final and most pervasive instance of what strikes me as a rationally indefensible practice, one which lies at the heart of our criminal law and has prevailed over most of the history of Western society—the doctrine of retributive punishment. In claiming that so fundamental a feature of our criminal law is not defensible I fear I risk whatever credibility I might have earned so far in my argument. After all, retributive punishment is not only deeply ingrained in our culture, it has the endorsement of leading moral philosophers of the past and present, from Immanuel Kant<sup>55</sup> to Michael Moore.<sup>56</sup> I could be pressed to concede that the term “rationally indefensible,” while apt for the harm and the lesser-wrong doctrines, may be more than a whit hyperbolic for retributive punishment. (I would hardly suggest that the likes of Michael Moore, not to mention Immanuel Kant, are guilty of systematic irrationalities.) However, I will presume to continue to use the term “rationally indefensible,” hyperbolic though it is, to allow me to develop what I see as the continuities between the retributivist principle and the other questionable doctrines I've been discussing.

The form of retributivism I intend to address is that which

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<sup>54</sup> There is a related doctrine in the law of causation, applicable in both civil and criminal proceedings, that bears mentioning at this point. It states that a wrongdoer takes his victim as he finds him. Hence, if a defendant strikes a victim a relatively minor, but unlawful blow, which unpredictably kills him, because, perhaps, the victim has a so-called “eggshell” skull, the defendant becomes liable for his death. The sentiment seems to be that the death would not have happened if the defendant had not wrongfully assaulted the victim in the first place. His culpability for the blow, therefore, which unaccountably led to the victim's death, renders him culpable for the death as well. See H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 172-73 (2d ed. 1985).

<sup>55</sup> IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 99-102 (John Ladd trans., 1965).

<sup>56</sup> Michael S. Moore, *Justifying Retribution*, 27 *ISRAEL L. REV.* 15 (1993); Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER AND EMOTIONS* 179 (Ferdinand Schoeman ed., 1987).

makes the doing of the wrongful action the moral basis for punishment—wrongdoing retributivism. There is another form which looks upon the occurrence of the harmful result as its moral basis—talionic retributivism. The harm doctrine itself is obviously an application of this latter form of retributivism, and most of what I have thus far said was directed to discrediting it. Now I am concerned with wrongdoing retributivism.

First, I must distinguish two kinds of wrongdoing retributivism, one strong and one weak. The strong form, sometimes called positive retributivism, makes wrongdoing alone sufficient to create a duty to punish the wrongdoer. The weak form, negative retributivism, asserts not that justice requires that all wrongdoers be punished, but that they and only they may be punished, and only in an amount proportional to what they deserve.<sup>57</sup> I do not include negative retributivism in my charge of irrationality. Indeed, I implicitly invoked it in arguing that the amount of punishment should depend on the culpability of the actor and not on chance outcomes.

Some would argue that the two principles are not distinguishable, that if positive retributivism is not rationally defensible, then neither is its negative counterpart.<sup>58</sup> But it does not follow that it is right to punish the guilty because it is wrong to punish the innocent. Punishing the innocent violates the norm of fairness. To punish them in order to serve the law's crime preventive purposes, as it might in some circumstances, is a form of scapegoating. But nothing in that position extends to requiring that the guilty be punished.<sup>59</sup>

My reason for believing positive retributivism to be rationally insupportable is not the rigorous consequentialist's position that denies that moral judgments may sometimes be warranted apart from whether they produce valued or disvalued states of affairs. It is rather that I find positive retributivism to be a principle unworthy of our allegiance. This form of retributivism declares that a wrongdoer's responsibility for committing a wrong alone justifies (and in some versions, morally compels) punishing the wrongdoer. The claim is not that our feeling of hatred and resentment toward the criminal, which is to say, vengeance, requires it—I would find that

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<sup>57</sup> See John L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in *PHILOSOPHY OF LAW* 677, 678 (Joel Feinberg & Hyman Gross eds., 4th ed. 1992); John L. Mackie, *Morality and the Retributive Emotions*, 1 *CRIM. JUST. ETHICS* 3, 4 (1982); HART, *supra* note 5, at 8 *et seq.*

<sup>58</sup> See the discussion of this issue in RICHARD A. WASSERSTROM, *PHILOSOPHY AND SOCIAL ISSUES*, FIVE STUDIES 135 *et seq.* (1980).

<sup>59</sup> HART, *supra* note 5, at 8-13.

understandable in human terms, if not admirable—but that punishing criminals is itself one of life's goods simply because criminals have done wrong.

I have no problem with the claim that responsible wrongdoers deserve to be blamed and therefore may be punished when doing so serves to protect the public against crime. But what makes punishing them a good thing to do in and of itself? After all, punishment consists of intentionally afflicting a person with suffering and deprivation or similar evils. Why is it good to create more suffering in the world simply because the criminal has done so? How does the unlikely proposition that it is right to hurt a person apart from any good coming of it connect with other moral ideas in our culture that are worth preserving? Is it not a strange candidate for a good worthy of our devotion? Doesn't it resemble too closely for comfort the despised practice of taking pleasure in another's pain?<sup>60</sup> I freely confess that, like most people, I have a feeling in my bones that it is right to punish wrongdoers even where no good comes of it. Yet I can find no persuasive justification for my feelings; that they are widely shared tells me that it is human, not that it is right.

There are a variety of learned arguments that have been advanced on behalf of the retribution principle.<sup>61</sup> Without responding to them I can hardly claim to have shown anything more than that retribution is *prima facie* morally suspect and in need of an adequate justification.<sup>62</sup> But that is as much as I could hope to do in an essay primarily concerned with the harm doctrine.

#### B. LIVING WITH THESE DOCTRINES

It is obvious enough that these irrational doctrines are not indigenous to the law. The doctrines of criminal liability and punishment represent a system of assessing legal blame which the law models upon the principles that govern assessing moral blame in our everyday social life. If I am right that some of the law's doctrines are not rationally defensible, that is because, as Adam Smith observed, it is our moral judgments that are irregular. For it is clear that these intuitions—that chance results do matter in assessing blame, that in doing wrong you take on all the consequences, foreseeable or not, and that it is right that wrongdoers should be made to suffer—are ingrained in our moral sensibilities, and that the law I

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<sup>60</sup> See *supra* note 41.

<sup>61</sup> See *supra* notes 55-59.

<sup>62</sup> For trenchant criticisms of the arguments in support of retributivism, see John L. Mackie's articles, *supra* note 57.

have been describing only reflects them. The track of the irrational in the criminal law leads back to our moral culture itself.

But what *if* some of our intuitive moral beliefs turn out to be irregular, or irrational, by the tests I have employed? Does this condemn them as unworthy reactions we should seek to correct? This leads inevitably to the controversial questions of the nature and status of our moral beliefs. On the one hand, it seems to me there must be a place for critical morality—for correcting moral mistakes, for weeding out mere prejudices, for maturing our moral vision. On the other hand, by what standards are we to judge which of our intuitive moral beliefs are prejudices and mistakes and which are worthy of keeping? If what we think is rational clashes with what we feel is right, must the lesson be always to try to change our feelings? If inconsistencies appear in the patterns of our beliefs, as they surely do, how quick should we be to assume that something has to go, and how do we know which should be rejected? I have no very good answers to these questions. Moral philosophers, I find, have too many.

It may seem that I am now affecting a disingenuous humility, for have I not spoken of the three doctrines I have been discussing as irrational and irregular, thereby signaling what I thought of them? True. But while believing this, may I not at the same time doubt my ability to demonstrate the basis of my own moral commitments? Why, after all, must a worthwhile morality always be shaped by the pursuit of purposes, and why must it be transparent to reason? May I not be troubled that too rigorous a critical stance toward our moral intuitions might threaten what is most particular about our moral beliefs, namely their remarkable power to make us want to do what is right, even when doing so disserves our interests? Might it not, moreover, transform the nature of our moral experience in radical and undesirable ways? If people ceased to feel, for example, that wrongdoers should be punished, how would that affect the pattern of our beliefs with regard to right and wrong, to what is deserved and what is not, to praise and blame? Perhaps disastrously, if it is the case, as John Stuart Mill argued, that the desire to punish the wrongdoer is an essential ingredient in the sentiment of justice.<sup>63</sup> And how long could the commitment that the innocent *should not* be punished remain vigorous once it was no longer believed that the guilty *should* be punished? In ending guilt, would we

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<sup>63</sup> JOHN STUART MILL, *UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT* 62 (1950).

also see the beginning of the end of innocence?<sup>64</sup> May I not, without disingenuousness, worry about these questions while still holding the view that the beliefs I have been discussing are irregularities and irrationalities?

The issue, then, is how these dubieties bear on the prospect of law reform. The lesser-wrong doctrine presents the least trouble. It is peculiar to the Anglo-American legal tradition, the English abandoned much of it decades ago, and the successful resistance in the United States owes much simply to its usefulness to prosecutors in easing their burden of proof. The other two doctrines are more troublesome. The failure of harm calls for lesser punishment in virtually all jurisdictions. Even the most important recodification effort of the twentieth century, the Model Penal Code, proposed to depart from the doctrine only for some crimes, excluding the most serious. And even this reform failed to win much support from legislatures.

Retributive punishment, which has been the dominant theory of punishment for centuries, has occasionally been challenged by competing rationales—by Benthamite theories of deterrence, by the social defense theories of the Italian positivists, and, most recently, in the United States by the rise of the rehabilitative ideal in the first part of this century.<sup>65</sup> But, even when it has been rejected *de jure* (as it was, for example, during the period of the indeterminate sentence in California in the 1940s and 1950s, when the ostensible purpose of punishment was rehabilitation of the individual offender), it permeated our punishment practices *de facto*. Its tendency to make a *de jure* comeback is illustrated by the enactment of California's determinate sentencing law in 1976 which, opening with the sentence, "[t]he Legislature finds and declares that the purpose of imprisonment for crime is punishment,"<sup>66</sup> ended the experiment with rehabilitation as the avowed shaping goal of the penal system.

It is plain, then, that popular belief in the significance of harm and in retribution run deep and powerfully in our culture. In view of the worries and uncertainties I just alluded to—ultimate doubts about the standards of validity by which to judge our moral beliefs, and the real possibility of disturbing the patterns of our interconnected moral beliefs in unforeseeable and dangerous ways—one would be well-advised to tread warily in forcing radical changes in legal doctrine that too blatantly defy these popular beliefs.

In conclusion, let me point to one final consideration that con-

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<sup>64</sup> See Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L. J. 273 (1968).

<sup>65</sup> See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

<sup>66</sup> CAL. PENAL CODE § 1170 (West 1990).



veys the same counsel. Not only are our laws instruments for achieving our purposes; they are also a medium for expressing our cultural and moral sensibilities just like our art, religion, language, literature, myths, and ceremonies. Justice Holmes no doubt had something like this in mind when he observed that “[t]he law is the witness and external deposit of our moral life.”<sup>67</sup> There are limits, therefore, particularly in a democratic community like ours, to how far the law can or should be bent by reformers to express a moral outlook different from that of the deeply held intuitive perceptions of the great mass of humanity, irrational though they may seem to some.

I conclude with Isaiah Berlin’s rendition of a sentence from Immanuel Kant that captures the spirit of much of what I’ve been trying to say in these concluding paragraphs: “Out of the crooked timber of humanity no straight thing was ever made.”<sup>68</sup>

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<sup>67</sup> Oliver W. Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 170 (1920).

<sup>68</sup> ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 48 (1990).