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## **Abandoned Criminal Attempts: An Economic Analysis**

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# ABANDONED CRIMINAL ATTEMPTS: AN ECONOMIC ANALYSIS

*Murat C. Mungan\**

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## ABSTRACT

*An attempt is “abandoned” if the criminal, despite having a chance to continue with his criminal plan, forgoes the opportunity to do so. A regime that makes abandonment a defense to criminal attempts provides an incentive to the offender to withdraw from his criminal conduct prior to completing the previously intended offense. However, the same regime may induce offenders to initiate criminal plans more often by reducing the expected costs associated with such plans. Among these two effects, I call the former the marginal deterrence effect and the latter the ex-ante deterrence effect of the abandonment defense. This Article formalizes a trade-off between marginal and ex-ante deterrence by using standard economic analysis. The analysis suggests, contrary to the principles encapsulated by existing legal regimes, that all abandoned attempts, voluntary and involuntary alike, ought to potentially be punished less severely than completed attempts. Furthermore, an abandonment need not be treated as either a full excuse or no defense at all; optimal punishment schemes require abandonments to be treated as mitigating factors in sentencing. The Article then identifies two important factors that ought to be taken into consideration while determining the magnitude of mitigation: the predictability of the events that led to the abandonment and the information regarding the offender’s dangerousness that is revealed through the abandonment. Finally, existing laws on abandonment are briefly reviewed. This review reveals that there is significant variation among states, and that there are cases where courts (i) excuse abandoning defendants even when the law does not provide an abandonment defense and (ii) punish abandoning defendants even where, under a strict reading of the law, the defendant ought to be excused. I conclude by suggesting that deviations from strict readings of the law can be minimized by moving more closely towards the optimal punishment schemes identified in this Article.*

## INTRODUCTION

Attempters 1, 2, and 3 set out to execute very similar crimes: each has the goal of shooting his respective victim with a sniper rifle. Each attempter, at different times and locations, spots his respective victim at home and has a clear shot at shooting the victim through one of the house windows.

Attempter 1 pulls the trigger without hesitation, but unbeknownst to him, the window is bullet-proof. Unsuccessful at his attempt at murdering his victim, Attempter 1 withdraws from the crime scene. This action, which I call Attempt 1, constitutes a *completed attempt* because Attempter 1 has

taken all necessary steps to accomplish his crime, but he has failed due to external factors.

Attempter 2, before pulling the trigger, notices a number of surveillance cameras around the victim's house and decides to abandon his criminal plan. Attempt 2 constitutes an *abandoned attempt*, where the abandonment is presumably motivated by the desire to avoid a *high likelihood of detection*.

Attempter 3, while looking at his victim through his rifle's scope to get an accurate aim, suddenly feels a sense of sympathy, compassion, and mercy towards his victim. He prays for forgiveness, abandons his plan, and walks away from the scene. This action, which I call Attempt 3, constitutes an *abandoned attempt*, where the abandonment is motivated by a *true change of heart*.

The three scenarios described above all constitute attempted murder. Despite this, intuition might dictate that the would-be murderers in each scenario ought to be treated differently. Is there a sound basis, beyond simple intuition, supporting this normative view? In this Article I demonstrate that the objective of optimal crime prevention through deterrence and incapacitation suggests that all three attempts ought to be punished differently.<sup>1</sup> In particular, I argue that abandoned attempts (i.e., Attempts 2 and 3) ought to be punished less severely than completed attempts, and Attempt 3 ought to be punished less severely than Attempt 2 based on the distinct nature of the events that led to abandonment in these two scenarios and what it tells about the attempter's likelihood of recidivating.

Contrary to what my analysis suggests, many jurisdictions either do not distinguish between any of the three types of attempts<sup>2</sup> or treat Attempts 1 and 2 similarly but distinguish them from Attempt 3.<sup>3</sup> Another issue is that

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1. This Article provides a consequentialist analysis that uses the tools of law and economics. It does not provide an analysis of retributive justice considerations. See also *infra* note 35 and accompanying text for a more detailed description of the particular consequentialist methodology used in this Article.

2. See, e.g., SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 557 (Vicki Been et al. eds., 8th ed. 2007) (“[T]he law traditionally denied any defense of abandonment, and many courts continue to adhere to that view.” (citing *State v. Robins*, 646 N.W.2d 287, 295 (Wis. 2002); *People v. Herman*, 119 Cal. Rptr. 2d 199, 215 (Cal. Ct. App. 2002))). See also *infra* notes 21–33 and accompanying text.

3. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 411 (5th ed. 2009) (“To the extent that a defense of abandonment is recognized today, however, it applies only if the defendant *voluntarily and completely* renounces her criminal purpose.”); see also WAYNE R. LAFAVE, CRIMINAL LAW 607 (4th ed. 2003) (“The cases are in agreement that what is usually referred to as involuntary abandonment is no defense.”); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 81(a) (1984) (“[Abandonment type defenses] require that the renunciation have been made at a time and under conditions that suggest a voluntary and complete change of heart rather than, for example, a change in the actor’s assessment of the likely success of the criminal plan.”).

most jurisdictions either fully excuse an abandoned attempt or do not provide a defense at all.<sup>4</sup> Perhaps due to these features of the law, decision-makers occasionally bend or creatively interpret the law to produce outcomes that comport more with what are presumably their intuitive notions of justice.<sup>5</sup> This type of behavior represents a symptom of the sub-optimality of the current state of the law governing attempts, which I argue can be remedied by the use of penalty mitigations for abandonments.

The law and economics (L&E) literature<sup>6</sup> has not fully and formally studied the various types of attempts, either; virtually all previous studies

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4. See, e.g., KADISH ET AL., *supra* note 2, at 557 (“A number of states have [recognized abandonment as a complete defense], either by statute or judicial decision.”); Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 2 (1989) (“Renunciation is a defense that allows a person who has committed a crime to abandon or renounce his or her criminal enterprise and thereby extinguish any previously incurred criminal liability.”); Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 142, 146 (2014) (“[T]he Model Penal Code gives expression to this idea in its affirmative defense of abandonment. . . . Affirmative defenses, note, are all-or-nothing.”); see also Francisco Muñoz Conde, “Rethinking” the Universal Structure of Criminal Law, 39 TULSA L. REV. 941, 945 (2004) (referring to “the exemption from liability recognized in all the modern codes for the voluntary abandonment of the criminal plan before the harm occurs”).

5. See, e.g., MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 71 (1988) (observing that courts may engage in this type of behavior: “The courts use several different techniques to give effect to the institutional principle that an announced rule that substantially fails to satisfy the standards of social congruence and systemic consistency should not be consistently applied and extended. Perhaps the most common of these techniques is to draw distinctions, in the form of exceptions, that seem plausible in form but are in substance either inconsistent with the announced rule, given the social propositions that support the rule, or impossible to administer in such a way that cases are treated in a consistent fashion.” (footnote omitted)); see *infra* Part V.A (illustrating through examples how courts have creatively interpreted attempt laws in abandonment cases).

6. See Omri Ben-Shahar, *Criminal Attempts*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 546–49 (Peter Newman ed., 1998) (commenting on the marginal deterrence effect of sanctioning attempts less severely and summarizing points made in Shavell, *Punishment of Attempts* and Shavell, *Optimal Use of Nonmonetary Sanctions*); Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299 (1996) (analyzing how victim precautions affect the optimal punishment of attempts without considering the abandonment defense); David D. Friedman, *Impossibility, Subjective Probability, and Punishment for Attempts*, 20 J. LEGAL STUD. 179 (1991) (distinguishing between possible attempts and impossible attempts, but not abandoned attempts and completed attempts); Samuel Kramer, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. CRIM. L. & CRIMINOLOGY 398, 401 (1990) (commenting on the relationship between marginal deterrence and the illegal gains to the criminal to conclude “that sanctions responding to the criminal’s utility achieve more effectively the desired ends of marginal deterrence”); Murat C. Mungan, *Welfare Enhancing Regulation Exemptions*, 31 INT’L REV. L. & ECON. 249, 255 (2011) (comparing and contrasting regulation violations and attempts without distinguishing between various types of attempts); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1217–18 (1985) (noting that punishing attempts less severely can cause marginal deterrence without distinguishing between various types of attempts); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions As a Deterrent*, 85 COLUM. L. REV. 1232 (1985) [hereinafter Shavell, *Optimal Use of Nonmonetary Sanctions*] (pointing out that different types of attempts can be punished differently); Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435 (1990) [hereinafter Shavell, *Punishment of Attempts*] (constructing a formal model of attempts and optimal deterrence that does not distinguish between various types of attempts, and making comments and conjectures about the possibility of using different sanctions for different types of attempts in the discussion section of the article); Manuel A. Utset, *Inchoate Crimes Revisited: A Behavioral Economics*

of attempts mainly focus on attempts generally<sup>7</sup> and distinguish between, for instance, completed attempts and abandoned attempts only while considering implications of their main analyses.<sup>8</sup> Neither has the non-L&E scholarship generated a comprehensive analysis identifying specific trade-offs between the costs and benefits of having an abandonment defense.<sup>9</sup> The lack of a systematic and sophisticated study of different types of attempts causes an apparent under-appreciation of the trade-off between what I call the *marginal deterrence* and *ex-ante deterrence* effects of punishment schemes for attempts.<sup>10</sup>

From a consequentialist perspective, the key difference between a completed attempt and an abandoned attempt is in the risk created by each. A completed attempt creates a risk of social harm beyond that which is created by an abandoned attempt: someone who abandons his attempt forgoes the opportunity to complete the harmful conduct that criminal laws prohibit. Therefore, mitigating the punishment for abandoned attempts could reduce social harm if, by punishing abandoned attempts less severely, punishment schemes can induce offenders to withdraw from their

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*Perspective*, 47 U. RICH. L. REV. 1205 (2013) (providing behavioral justifications for the existence of inchoate offenses); *see also infra* note 34 (discussing the findings of other, non-economic analyses of the law of attempts.)

7. *See* sources cited *supra* note 6. As noted in Shavell, *Punishment of Attempts*, *supra* note 6, Beccaria took a similar approach in 1767. *See* CESARE BONESANA DI BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 138 (W.C. Little & Co. 1872) (1764) (“[A]s there may be an interval of time between the attempt and the execution, it is proper to reserve the greater punishment for the actual commission, that even after the attempt there may be a motive for desisting.”).

8. *See* Ben-Shahar, *supra* note 6; Kramer, *supra* note 6; Shavell, *Punishment of Attempts*, *supra* note 6. Commenting on the possibility of recognizing abandonment as a factor affecting sanctions, these articles do not specifically model how penalty mitigations for abandoned attempts can affect the trade-off between marginal and ex-ante deterrence, as is done *infra* Part III.D; as a result, the articles do not comment on the importance of the predictability of the events causing the abandonment, which is an issue covered *infra* Part IV.A.

9. Despite identifying various important functions of penalty reductions for abandonments, including marginal deterrence and separating between dangerous and non-dangerous offenders, the non-L&E articles do not formalize the trade-off between marginal and ex-ante deterrence and, therefore, are unable to point out the importance of predictability of the events causing the abandonment as a factor in the determination of the appropriate penalty for abandoned attempts. *See, e.g.*, Michael H. Crew, *Should Voluntary Abandonment Be a Defense to Attempted Crimes?*, 26 AM. CRIM. L. REV. 441 (1988); Richard G. Gervase Jr., *Grading Criminal Attempts—A Proposed Solution for Statutory Reform in Sentencing*, 20 RUTGERS L.J. 479 (1989); Paul R. Hoerber, *The Abandonment Defense To Criminal Attempt and Other Problems of Temporal Individuation*, 74 CALIF. L. REV. 377, 383 (1986); Evan Tsen Lee, *Cancelling Crime*, 30 CONN. L. REV. 117 (1997); Moriarty, *supra* note 4; Gideon Yaffe, *Attempt, Risk-Creation and Change of Mind: Reflections on Herzog*, 9 OHIO ST. J. CRIM. L. 779 (2012).

10. The more general theme of ex-ante versus ex-post effects, or static versus dynamic efficiencies, has, of course, been analyzed in various contexts in the L&E literature. Many economic analyses of patent and antitrust laws, for instance, focus on the necessity of sacrificing static efficiencies to generate dynamic efficiencies. Trade-offs between ex-ante and ex-post effects have also been identified in analyses of criminal law. *See, e.g.*, Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CALIF. L. REV. 1181, 1211–17 (1994) (explaining how the desirability of recognizing a defense of provocation in homicide cases depends on its ex-ante and ex-post incentive effects).

criminal conduct. This type of punishment scheme, which deters the completion of the crime but not its initiation, is said to achieve *marginal deterrence*.<sup>11</sup>

Unsurprisingly, however, the strategy of punishing abandoned attempts less severely creates a problem. Consider a punishment scheme fully excusing (by which I mean the functional equivalent of not punishing the offender) would-be offenders who abandon their crimes. If this strategy were in place, it would be costless for a potential offender to initiate a criminal plan<sup>12</sup> and abandon it if, after scoping out the scene and observing an unexpected number of police officers, he determines that he is likely to be detected and convicted. This would make the initiation of criminal plans a much better bet. If completing the crime turns out to have a positive expected return, the criminal completes it; if it has a negative expected return, he abandons it and gets off for free. Therefore, the average return from initiating a criminal plan would be positive, and many potential offenders would be induced to commit crimes. This illustrates why fully excusing offenders for abandoning criminal attempts has a negative effect on *ex-ante deterrence*, which refers to the discouraging of criminal acts at the initiation stage.<sup>13</sup>

In this Article, I first focus on the trade-off between the marginal deterrence and ex-ante deterrence effects of providing penalty reductions for abandoning of attempts. I begin by developing a benchmark model of deterrence and rational decision-making, which illustrates that reducing the penalty for abandoned attempts can reduce crime by generating a marginal deterrence effect that more than offsets the reduction of the ex-ante deterrence effect. This suggests that our criminal justice system ought to treat completed and abandoned crimes differently, and that the regime should take abandonment of an attempt into account, at a minimum, as a potentially mitigating factor. This reasoning explains why Attempt 1 should be treated differently than Attempt 2 and Attempt 3.

I then consider what factors ought to be taken into consideration in determining the appropriate penalty reduction. One important factor is the *predictability* of the event that causes the offender to abandon his crime. In this Article, I use the word *unpredictable* to refer to situations where the offender's assessment of the probability (i.e., subjective probability) of an event taking place is significantly lower than the actual probability (i.e.,

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11. See *infra* Part II.A (defining and explaining marginal deterrence in further detail).

12. Costs here refer to the additional expected cost of punishment and therefore exclude the costs of preparation.

13. See *infra* Parts III.A, III.B (defining and explaining ex-ante deterrence in further detail).



objective probability) of the event taking place.<sup>14</sup> The punishment for a criminal who abandons due to unpredictable events should not have an important effect on his decision to initiate a criminal plan because, by definition, the criminal cannot properly account for them. Therefore, the particular choice of punishment should not produce significant ex-ante deterrence. Hence, the previously identified trade-off is tipped in favor of promoting marginal deterrence, and attempts that are abandoned due to unpredictable developments ought to be punished less severely. This reasoning implies that we should punish Attempt 2 more severely than Attempt 3, if we believe that a true “change of heart” is less predictable than an attempter finding out, for example, that there is an unusually strong police presence at the scene.

As the existing literature points out,<sup>15</sup> another important factor in the determination of the appropriate penalty reduction is the information that the abandonment reveals concerning the likelihood with which the attempter is likely to recidivate. Explaining this reasoning requires a brief description of one of the common rationales for punishing attempts in general, which relies on the supposition that attempting to commit a crime reveals that the attempter is dangerous, meaning that he is likely to recidivate.<sup>16</sup> Based on this logic, the claim is that attempters ought to be incapacitated to prevent future crimes.<sup>17</sup> If this is true,<sup>18</sup> then the expected incapacitative benefit from punishing an attempter is directly related to the strength of the information revealed regarding his dangerousness via his attempt. *Ceteris paribus*, a completed attempt intuitively signals, on average, a greater likelihood of dangerousness compared to an incomplete

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14. Similarly, I use the word *predictable* to refer to situations where the subjective and objective probabilities are close to each other. Alternatively, one could focus on the expected degree of offender optimism regarding the likelihood with which events necessitating abandonment may arise. In this regard, the two terms, as defined in this article, are interchangeable.

15. See, e.g., Lee, *supra* note 9.

16. This is the main rationale extended and endorsed in the Model Penal Code. MODEL PENAL CODE AND COMMENTARIES, PART 1 § 5.01 cmt. 2 at 303 (AM. LAW INST. 1985) (“The judgment is thus that if the defendant manifests a purpose to engage in the type of conduct or to cause the type of result that is forbidden by the criminal law, he has sufficiently exhibited his dangerousness to justify the imposition of criminal sanctions, so long as he otherwise acts with the kind of culpability that is sufficient for the completed offense.”). See also Hoerber, *supra* note 9, at 383 (classifying the theory “that attempt liability is justified because [] attempters are dangerous persons” as one of the “major theories of attempt liability”).

17. Hoerber, *supra* note 9, at 383–85 (explaining the Model Penal Code’s rationale for punishing attempts).

18. There is significant disagreement on whether this claim is true. Compare *id.* (arguing that this claim is false, and concluding that “the dangerous-person rationale cannot justify the prohibition of attempts”), with Lee, *supra* note 9, at 152 (“Attempters who renounce are almost certainly less dangerous than attempters who go through with their target offenses, but are probably more dangerous than members of the public at large. Thus, the relatively moderate dangerousness of abandoning attempters provides a warrant for some reduced degree of incapacitation.”).

attempt.<sup>19</sup> Similarly, a person who abandons his attempt because his moral valuation of a criminal act has changed is less likely to recidivate compared to a person who abandons his attempt only for strategic reasons.<sup>20</sup> These observations supply further reasons as to why Attempts 1, 2, and 3 ought to be treated differently.

The law in many jurisdictions approximate, to some degree, what I argue is the optimal punishment scheme for attempts, but they often do so indirectly and incompletely. Although “[t]he traditional common law view is that abandonment cannot be a defense to attempt,”<sup>21</sup> currently there are at least two ways in which abandonment can play a role in the determination of an attempter’s liability.<sup>22</sup> First, a person’s abandonment may signal that the person had previously not possessed or fully formed the requisite intent to commit the relevant crime.<sup>23</sup> In this case, the *mens rea* element of the attempt would be lacking, and the alleged attempter would escape liability.<sup>24</sup> Second, even in cases where the elements of attempt are present, in some jurisdictions the defendant may have an abandonment defense<sup>25</sup> or a renunciation defense.<sup>26</sup> However, this defense is made available only if the defendant’s abandonment was “voluntary” and under limited circumstances.<sup>27</sup> If the defense is made available, on the other hand, the

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19. Lee, *supra* note 9, at 152 (arguing a similar point); *see also infra* Part IV.B (discussing the strength of information revealed through attempts in further detail).

20. *See infra* Part IV.B (discussing the strength of information revealed through different abandonments in further detail).

21. Hoerber, *supra* note 9, at 377; *see also* Lee, *supra* note 9, at 119 (“[C]ommon law of crimes did not recognize a renunciation defense . . .”).

22. LAFAVE, *supra* note 3, at 605–06; *see also* DRESSLER, *supra* note 3, at 411 n.180 (“Even when abandonment is not recognized as a defense, however, a court may still find a defendant’s abandonment relevant in an attempt prosecution.”).

23. *People v. Kimball*, 311 N.W.2d 343, 347 (Mich. Ct. App. 1981) (“[V]oluntary abandonment . . . may be relevant to the issue of whether defendant possessed the requisite intent in the first place.”); LAFAVE, *supra* note 3, at 605–06; *see also* DRESSLER, *supra* note 3, at 411 n.180 (“For example, in *Commonwealth v. McCloskey*, 341 A.2d 500 (Pa. Super. Ct. 1975), *M*, a prison inmate, scaled the fence leading to the prison recreation yard, but he then returned because he did not want to shame his family by escaping. . . . [H]is conviction [for attempted prison escape] was overturned on the questionable ground that *M*’s actions demonstrated that he was still only contemplating an escape, but had not yet begun attempting the act.”).

24. LAFAVE, *supra* note 3, at 605–06.

25. *See, e.g.*, LAFAVE, *supra* note 3, at 605–06; Hoerber, *supra* note 9, at 382 (“[T]oday approximately one-half of American jurisdictions recognize the abandonment defense.”); Lee, *supra* note 9, at 120 (“Since the promulgation of the MPC, twenty-six American jurisdictions have adopted an abandonment defense for attempt . . .”); *see also* DRESSLER, *supra* note 3, at 411.

26. In some jurisdictions the defense is called the “Renunciation Defense,” *see, e.g.*, TEX. PENAL CODE ANN. § 15.04 (West 2011), or the “Defense of Renunciation,” *see, e.g.*, KY. REV. STAT. ANN. § 506.020 (LexisNexis 2014), because renunciation of criminal intent is necessary for the defense.

27. *See supra* note 3.

defendant is generally fully excused<sup>28</sup> rather than being given mitigation in punishment.<sup>29</sup>

Although the common legal approaches towards abandonment of attempts can be summarized as above, as Professor Wayne LaFave has stated:<sup>30</sup> “[I]t is impossible to generalize about the current status of such a defense; one survey concluded that the issue remains an open question in most jurisdictions,<sup>[31]</sup> and in some states the cases in point cannot be reconciled.<sup>[32]</sup>” Furthermore, “[e]ven when the rule has been adopted by the legislature, judges and lawyers sometimes seem to refuse to accept its existence and argue as if they do not understand it.”<sup>33</sup> Given the lack of consensus among some prominent legal scholars on the issue,<sup>34</sup> it is perhaps unsurprising that there is confusion in the law on abandonments. This Article represents an attempt to formalize important factors that affect the normative desirability of potential laws on abandoned attempts with the

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28. See *supra* note 4.

29. But see TEX. PENAL CODE ANN. § 15.04 (permitting mitigation in penalty where a defendant is convicted of a criminal attempt but can still successfully demonstrate during the penalty phase that he “renounced his criminal objective by abandoning his criminal conduct . . . before the criminal offense was committed and made substantial effort to prevent the commission of the object offense . . . [I]n the event of a finding of renunciation under this subsection, the punishment shall be one grade lower than that provided for the offense committed.”).

30. LAFAVE, *supra* note 3, at 607.

31. Citing Daniel L. Rotenberg, *Withdrawal as a Defense to Relational Crimes*, 1962 WIS. L. REV. 596, 596–97 (1962).

32. Citing and comparing *People v. Staples*, 85 Cal. Rptr. 589, 594 (Cal Ct. App. 1970) (“[I]t would seem that the character of the abandonment . . . is not controlling. . . . Once that attempt is found there can be no exculpatory abandonment.”), with *People v. Von Hecht*, 283 P.2d 764, 771 (Cal. Ct. App. 1955) (“Abandonment is a defense if the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution and where there is no outside cause prompting such abandonment.” (emphasis omitted)).

33. Moriarty, *supra* note 4, at 11. Moriarty reviews *Chaney v. State*, 417 So. 2d 625 (Ala. Crim. App. 1982), as an example illustrating his proposition.

34. Compare, e.g., Lee, *supra* note 9, at 118 (“I will ultimately conclude that there remains sufficient justification to punish even those who have completely and voluntarily renounced their criminal purpose in a timely fashion. . . . I argue that a renunciation should occasion some mitigation of punishment.”), and Yaffe, *supra* note 9, at 780 (arguing that a person who attempts murder and subsequently abandons his attempt “deserves mitigation in his sentence in light of his change of mind, but does not deserve an affirmative defense”), with Crew, *supra* note 9, at 441 (“argu[ing] that voluntary abandonment is a valid defense to liability for an attempted crime, and that only those attempters who have tried to the best of their ability to complete the intended crime, and have failed because of external circumstances, should be punished”), Hoerber, *supra* note 9, at 402 (“[A]ttempt liability should not be imposed on those who, having abandoned their efforts, did not try to commit crimes.”), and Moriarty, *supra* note 4, at 2 (“I believe the defense deserves an extension beyond the boundaries presently assigned to it and argue for its expanded application.”). See also *supra* note 6 (listing previous L&E articles analyzing attempts). Because the main focus of these articles is not abandonment of attempts, there is not significant tension between them in terms of what they suggest is the normatively desirable punishment for abandoned attempts. But see Ben-Shahar & Harel, *supra* note 6, at 334 (pointing out that the “Posner-Shavell . . . theory is not without its difficulties” and questioning the relevance of the marginal deterrence effect of punishing attempts less severely than completed crimes).

hope of providing a coherent framework to discuss how the existing confusion in the law can be alleviated.

This framework is constructed by using the L&E methodology and does not focus on retributive justice considerations.<sup>35</sup> In particular, I focus on the deterrent and incapacitative effects of punishment<sup>36</sup> and demonstrate that penalty mitigations are likely to generate reductions in ex-ante deterrence and incapacitative benefits but that they are likely to result in savings in enforcement costs in addition to increasing marginal deterrence. I consider how the trade-off between these benefits and costs is affected by the nature of the abandonment to identify relevant factors in the determination of the optimal penalty mitigation for abandonments.

This Article proceeds as follows: Part I provides a simple taxonomy of criminal conduct and criminal attempts and thereby clarifies the precise subject of the Article. Part II formalizes how abandonment defenses can cause marginal deterrence. Part III introduces ex-ante deterrence and identifies a trade-off between marginal deterrence and ex-ante deterrence caused by allowing mitigations in punishment for abandonment of attempts. In Part IV, I consider the incapacitative effect of imprisonment and identify two important factors affecting the normative desirability of penalty mitigations for abandonment of attempts. Part V compares the normative implications of my analysis with existing laws on abandonment and offers a few extensions and conjectures that emerge from my analysis. Part VI concludes.

## I. A SIMPLE TAXONOMY OF ATTEMPTS

Distinguishing abandoned attempts from other criminal conduct is necessary for clarifying the scope of the arguments presented in this Article. To start, it should be noted that the Article focuses on conduct committed by individuals, not crimes committed by organized groups,

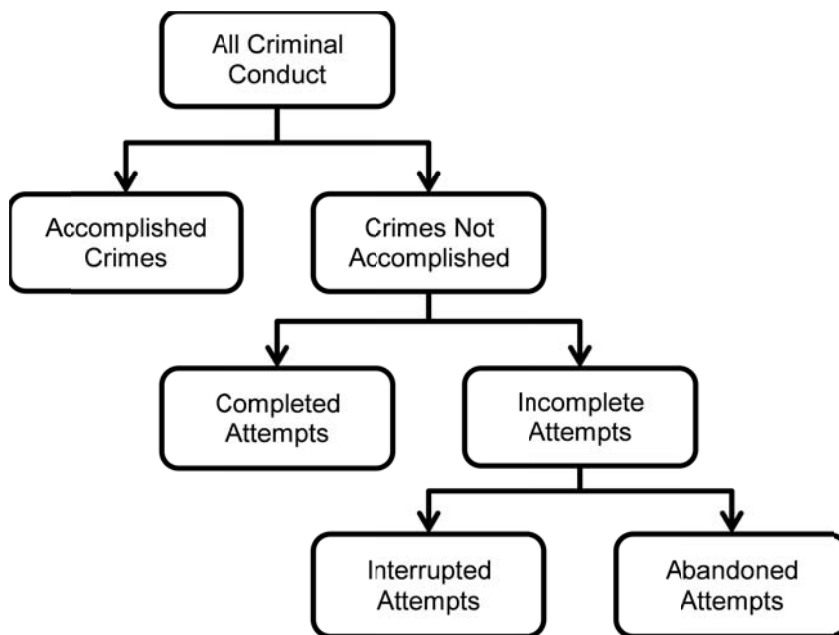
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35. This only implies that the scope of this article excludes retributivist considerations and not that the normative implications described *infra* Part V.A are necessarily inconsistent with those that would emerge from a retributivist analysis.

36. “The three basic measures of crime control most frequently discussed in the criminological literature are deterrence, incapacitation, and rehabilitation.” Isaac Ehrlich, *On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence*, 71 AM. ECON. REV. 307, 311 (1981). Like an overwhelming majority of economic analyses of criminal law, I do not comment on potential rehabilitative effects, mainly because, as noted in one of the most popular criminal law casebooks, “[i]ncarceration rarely is imposed today for rehabilitative (reform) purposes.” JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 37 (5th ed. 2009). *See also* Murat C. Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation*, 72 MD. L. REV. 156, 175–83 (2012) (describing the frequency with which deterrence, incapacitation, and rehabilitation are considered in L&E analyses and reasons for why “[a]mong the three potential consequentialist justifications for punishment, rehabilitation receives the least attention”).

gangs, or other collections of individuals.<sup>37</sup> Therefore, I proceed by providing a taxonomy of criminal attempts<sup>38</sup> as opposed to other inchoate crimes, such as solicitation and conspiracy.<sup>39</sup> This taxonomy can be represented by Figure A, below, which is useful for walking the reader through the proposed categories of criminal conduct.

**Figure A. A Taxonomy of Attempts and other Criminal Conduct**



As a starting point, one can distinguish between accomplished crimes and attempted crimes. Attempted crimes can be categorized further into two types: complete attempts and incomplete attempts.<sup>40</sup> A complete

37. For analyses focusing on other inchoate crimes, see R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code's Wrong Turn: Renunciation as a Defense to Criminal Conspiracy*, 64 FLA. L. REV. 353 (2012); Utset, *supra* note 6.

38. Shavell, *Punishment of Attempts*, *supra* note 6 (provides a similar taxonomy).

39. See Utset, *supra* note 6; Moriarty, *supra* note 4 (listing inchoate crimes and other inchoate-like crimes).

40. Gervase, *supra* note 9 (suggesting a similar categorization); Shavell, *Punishment of Attempts*, *supra* note 6. Shavell also symbolically formalizes the distinction between complete and incomplete offenses as follows:

[T]here are *acts*, designated by  $A_1, A_2, \dots$ ; *states of nature*, that is, possible circumstances, designated by  $S_1, S_2, \dots$ ; and *outcomes*, which in the context will either be  $N$ , meaning no harm, or  $H$ , meaning harm. Given an act  $A_j$ , the state of nature  $S_i$  determines the outcome; that is,  $f(A_j, S_i) = N$  or  $H$ , where the function  $f$  describes whether harm occurs given the act and the state of nature. An *incomplete attempt* is an act  $A_j$  such that  $f(A_j, S_i) = N$  for all states of nature  $S_i$ ; that is, harm does not occur under any circumstances because something necessary to the occurrence of harm was not done. A *complete attempt* is an act  $A_j$  such that

attempt refers to a situation where the criminal has taken all necessary steps to accomplish his crime, but due to circumstances uncontrollable by him, his actions have not produced the result that he had intended. A good example is found in *State v. Martin*,<sup>41</sup> where, after robbing a family, “[o]ne of the perpetrators instructed the other to kill [one of the victims], but when the other perpetrator pulled the trigger in compliance, the gun jammed. The perpetrators then fled from the scene.”<sup>42</sup> The court held that these facts were sufficient to support the defendant’s conviction for attempted second degree murder.<sup>43</sup>

An incomplete attempt, to the contrary, is one where the criminal has taken substantial steps, but not all steps, that are necessary to complete his crime. If the person has not taken substantial steps to complete his crime, his acts do not constitute an attempt but “mere preparation.”<sup>44</sup> Incomplete attempts can be further broken down into two categories: interrupted attempts and abandoned attempts.<sup>45</sup> Interrupted attempts refer to situations where the criminal is prevented from taking further steps to complete his crime and therefore never has a chance to complete it. For instance, a situation where “an individual is prevented from firing his gun by someone who grabs it away”<sup>46</sup> may constitute an interrupted attempt.

Abandoned attempts, on the other hand, are situations where the criminal, despite having a chance to continue with his criminal plan, forgoes the opportunity to do so. A case exemplifying abandoned attempts is *People v. Johnson*.<sup>47</sup> This case involved a defendant who, following a fight with a friend at a bar, went to his house to retrieve and load a gun and subsequently “crawled under a pickup truck across the street to wait for the friend.”<sup>48</sup> After the truck’s owner approached, the defendant gave the driver some beer, took the keys to the truck, and made the driver sit in the vehicle while he remained underneath.<sup>49</sup> However, after some time passed, the

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$f(A_j, S_j) = H$  for some state(s) of nature  $S_j$ ; that is, the act  $A_j$  will result in harm under some circumstances (perhaps many).

Shavell, *Punishment of Attempts*, *supra* note 6, at 446 n.18.

41. 92 So. 3d 1027, 1029 (La. Ct. App. 2012).

42. *Id.* at 1030.

43. *Id.* at 1031.

44. See DRESSLER, *supra* note 3, at 380 (“The action must constitute a substantial step, beyond mere preparation, toward commission of the offense.”).

45. As a practical matter it may be difficult, in some cases, to distinguish between interrupted and abandoned attempts. See, e.g., LAFAYE, *supra* note 3, at 605 (discussing such difficulties in *People v. Staples*, 85 Cal. Rptr. 589 (Cal. Ct. App. 1970)); Shavell, *Optimal Use of Nonmonetary Sanctions*, *supra* note 6, at 1251 n.76 (discussing potential issues related to error costs when it is difficult to distinguish between abandoned and interrupted attempts).

46. Shavell, *Punishment of Attempts*, *supra* note 6, at 446.

47. 750 P.2d 72 (Colo. App. 1987).

48. *Id.* at 72.

49. *Id.*

defendant began to sober up and reconsidered his plan to shoot his friend in retaliation for beating him up.<sup>50</sup> By the time police arrived on the scene, the defendant had removed the shells from the firearm and placed them in his pocket.<sup>51</sup> In this fact pattern, because the defendant's attempt was "broken off by [him], not by the intercession of another,"<sup>52</sup> his conduct constitutes an abandoned attempt.<sup>53</sup>

This Article focuses mainly on abandoned attempts and questions whether these attempts ought to be punished less severely than completed attempts. Although Part V.D contains comments on the implications of my analysis concerning the proper punishment of interrupted attempts, a formal and complete analysis of interrupted attempts is beyond the scope of this Article.

## II. A POSITIVE ANALYSIS: THE MARGINAL DETERRENCE EFFECT

### A. *Abandonments and Marginal Deterrence*

The objective of marginal deterrence was accurately explained more than two hundred years ago by Bentham as "induc[ing] a man to choose always the least mischievous of two offenses; therefore, where two offenses come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less."<sup>54</sup> Later, in an influential 1970 article, George Stigler coined the phrase marginal deterrence in reference to this objective: "If the offender will be executed for a minor assault and for a murder, there is no marginal deterrence to murder. If the thief has his hand cut off for taking five dollars, he had just as well take \$5,000. Marginal costs are necessary to *marginal deterrence*."<sup>55</sup>

As the excerpt from Stigler's article demonstrates, the term "marginal deterrence" was initially meant to capture the diverting of criminal behavior towards the less harmful crime in cases where a criminal may

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50. *Id.*

51. *Id.* at 73.

52. Shavell, *Punishment of Attempts*, *supra* note 6, at 446.

53. In *People v. Johnson*, the court had to determine whether "there was sufficient evidence to warrant an instruction on the affirmative defense of abandonment or renunciation," and it determined that there was sufficient evidence. 750 P.2d at 73.

54. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 142 (Batoche Books Kitchener 2000) (1781). As noted in Steven Shavell, *A Note on Marginal Deterrence*, 12 INT'L REV. L. & ECON. 345, 345 (1992), the concept of marginal deterrence was also described in the eighteenth century works of Beccaria and Montesquieu.

55. George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527-28 (1970) (emphasis added).

choose to commit one among many crimes. Since 1970, many L&E scholars have used the phrase to refer to this meaning.<sup>56</sup>

A similar type of deterrent effect can be found in the context of abandoned attempts versus other types of criminal conduct. If, despite having taken substantial steps to complete a crime, the availability of a reduction in punishment for abandoning an attempt induces an offender to abandon his criminal conduct, then that punishment scheme achieves a form of marginal deterrence.<sup>57</sup> The label “marginal deterrence” is appropriate because this punishment scheme does not deter the individual from taking substantial steps to commit the crime. Hence, the punishment scheme does not achieve ex-ante deterrence<sup>58</sup> but only a form of marginal deterrence. Richard Posner has also noted the possibility of achieving this type of deterrence through less severe punishments for attempts and has also characterized it as a form of marginal deterrence. Posner notes that one of the rationales for punishing attempts less severely than results is “to give offenders an incentive to change their minds at the last moment (a form of marginal deterrence).”<sup>59</sup>

In discussing marginal deterrence effects in the proceeding parts of this Article, I use the term “Defense” to refer to any defense or mitigation in penalty that the defendant is entitled to upon a showing of abandonment.<sup>60</sup>

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56. See, e.g., David Friedman & William Sjostrom, *Hanged for a Sheep—The Economics of Marginal Deterrence*, 22 J. LEGAL STUD. 345 (1993) (defining marginal deterrence similarly); Shavell, *supra* note 54, at 345 (“[A] person may be contemplating which of several harmful acts to commit . . . . In such contexts, the threat of sanctions plays a role in addition to the usual one of deterring individuals from committing harmful acts: it influences which harmful acts undeterred individuals choose to commit. Notably, undeterred individuals will have a reason to commit less rather than more harmful acts if expected sanctions rise with harm. This tendency is sometimes said to reflect marginal deterrence because an individual will be deterred from committing a more harmful act owing to the difference, or margin, between the expected sanction for it and for a less harmful act.” (emphasis omitted)).

57. See *infra* note 59 and accompanying text.

58. See *supra* text accompanying note 13 and *infra* Parts III.A, III.B for definitions and explanations of ex-ante deterrence.

59. Posner, *supra* note 6, at 1217. Professor Shavell also notes a potential marginal deterrence effect but notes that Posner’s point does not provide a justification for punishing attempts in general less severely than accomplished crimes because “[t]he argument does not recognize that different sanctions may be imposed for different types of attempt.” Shavell, *Punishment of Attempts*, *supra* note 6, at 455.

60. One may question whether the usage of the word “defense” is proper to refer to mitigating factors. This appears to be a simple semantic point. Nevertheless, it can be addressed easily by defining abandoned attempts and completed attempts as separate offenses, and by making abandonment a complete defense against a completed attempt charge. Similar categorizations and defenses exist in the law. Lack of malice aforethought, for instance, provides a complete defense against a murder charge.



B. *The (Un)importance of Criminals “Changing Their Minds”*

In an article analyzing the punishment of attempts,<sup>61</sup> Omri Ben-Shahar and Alon Harel question the relevance and importance of the marginal deterrence rationale proposed by Posner.<sup>62</sup> Specifically, they state:

[Posner’s] marginal deterrence application justifies the lenient treatment of attempts as providing incentives for rational criminals to “change their minds” and abandon a plan that they have already begun to pursue. *One may wonder why rational individuals would even begin the pursuit of a crime if they expect to change their minds in the process.* If the incremental sanction imposed on completed acts is sufficient to generate marginal deterrence, why does it not generate full deterrence and prevent the initiation of pre-crime activities? After all, a criminal who commits an attempt intends it to succeed, and takes into account the sanction for completed acts. If that does not deter him, why would the same sanction deter him when he has already initiated the act and has only to decide whether to finalize it? Unless the criminal learns new information that leads him to reevaluate the desirability of completing the crime, there is no reason to expect marginal deterrence to operate upon him.<sup>63</sup>

Professors Ben-Shahar and Harel are certainly correct in their conclusion, but the conclusion is a conditional one: one that relies on criminals not obtaining new information.<sup>64</sup> There could, however, be many instances in which criminals obtain new information during the course of criminal undertakings.<sup>65</sup>

Consider, for instance, a potential offender who is planning to rob a gas station. *Ex-ante*, he has some estimate of the likelihood of being caught

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61. Ben-Shahar & Harel, *supra* note 6.

62. Posner, *supra* note 6, at 1217–18.

63. Ben-Shahar & Harel, *supra* note 6, at 334 (emphasis added).

64. In Shavell, *Punishment of Attempts*, *supra* note 6, at 456, Professor Shavell anticipates the point made by Ben-Shahar and Harel, and he, too, responds to it by referring to the mixed and fluctuating nature of criminal motives. He states:

[A] similar objection could be made with regard to abandonment—that a person who sets out on a course of conduct would be unlikely to abandon it. Yet this objection is not emphasized in the abandonment context. The reason, I conjecture, is that many people do believe that the motives of those who engage in potentially harmful conduct are complex and subject to change.

65. See Ben-Shahar, *supra* note 6, at 548 (noting that criminals may discover “pessimistic information in the course of the crime”); Kramer, *supra* note 6, at 401 (noting that criminals can recalculate their expected utility from completing crime in response to changing circumstances); Shavell, *Punishment of Attempts*, *supra* note 6, at 456; and Utset, *supra* note 6, at 1207 (noting that criminal preferences are subject to change).

during the robbery.<sup>66</sup> He may know, for instance, that there is, on average, a single security guard at the particular gas station. However, he is also aware that this is only the *average* number of security guards; sometimes there are two security guards, and sometimes there are no security guards present at the gas station. Therefore, it is reasonable to assume that the potential criminal can re-evaluate (implicitly or explicitly) the likelihood of being caught upon arrival at the gas station<sup>67</sup> since he can observe how many security guards are present, how many cameras are installed, whether there are police officers patrolling the neighborhood, and so on. Moreover, external factors need not be the only source of new information. A criminal may re-evaluate his benefits from crime,<sup>68</sup> correct his optimism<sup>69</sup> upon confronting danger, and rid himself of his false expectations regarding his preferences.<sup>70</sup>

Given that criminals may acquire more information (from external as well as internal factors) after taking several steps to complete a crime, there are reasons to expect marginal deterrence to operate on them. In particular, the Defense can give people an incentive to abandon criminal activity upon discovering new information. In the next Section, I formalize this idea with a simple decision tree.

### C. Formalizing the Marginal Deterrence Effect

To illustrate how the Defense may cause marginal deterrence, consider a modified version of Alyona Ivanovna's murder by Raskolnikov, a character from Dostoevsky's novel *Crime and Punishment*.<sup>71</sup> In this

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66. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (formalizing this assumption); A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 403–54 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (describing how this assumption is used in various contexts in the standard economic theory on law enforcement).

67. See Ben-Shahar, *supra* note 6, at 548; Kramer, *supra* note 6, at 401 (noting similar points).

68. See Robert D. Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will*, 11 INT'L REV. L. & ECON. 149, 149–51 (1991) (building an economic model in which people may commit crime due to lapses); Mungan, *supra* note 36 (proposing a model that incorporates fluctuating criminal tendencies); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1977–79 (2001) (discussing how people may have different emotional states that might induce them to act differently at different times).

69. See Mungan, *supra* note 36, at 202 n.168 (reviewing previous literature on optimism and overconfidence).

70. See Utset, *supra* note 6, at 1207 (“There is a large empirical literature finding that people routinely mispredict the extent to which their preferences may change over time. This is due to a projection bias: When trying to predict their future tastes and preferences, people will give undue weight to their current tastes and preferences.”). On projection bias generally, see George Loewenstein et al., *Projection Bias in Predicting Future Utility*, 118 Q. J. ECON. 1209 (2003).

71. FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* 67–78 (Constance Garnett trans., Bantam Books 1971) (1866).

hypothetical Raskolnikov arrives at Alyona's apartment with an axe concealed under his coat.<sup>72</sup> His intention is to kill Alyona with the axe to steal some valuable items from her. He knocks on Alyona's door and forces his way into her apartment.<sup>73</sup> Once in the apartment, Raskolnikov takes out the axe and prepares to strike.<sup>74</sup> But in this version, unlike in *Crime and Punishment*, he sees Alyona's sister, Lizaveta, walk into the room right before he is about to swing it towards Alyona. Raskolnikov is unsure about whether Lizaveta or Alyona has yet seen his axe. Raskolnikov appears to have two choices: (i) put the axe back in his coat, hope that the two women have not seen it, and leave Alyona's apartment; and (ii) kill both women and proceed with the initial plan.

While thinking about how to proceed, Raskolnikov realizes that what would otherwise be an easy crime is now complicated by the arrival of Lizaveta. Ex-ante, Raskolnikov hoped for a situation where he would catch Alyona alone in her apartment and kill her very quickly, before she could utter a single word, which would make his escape very easy and, therefore, his detection and subsequent conviction very unlikely. Lizaveta's presence jeopardizes Raskolnikov's plan, as she is very likely to scream and alert others.

What does Raskolnikov do: does he abandon his crime, or does he continue with it? Assuming he is rationally weighing his options,<sup>75</sup> his decision depends, in part, on whether abandoned attempts are punished as severely as completed attempts. The following game tree can be used to formalize how the presence or absence of the Defense affects Raskolnikov's decision-making process:

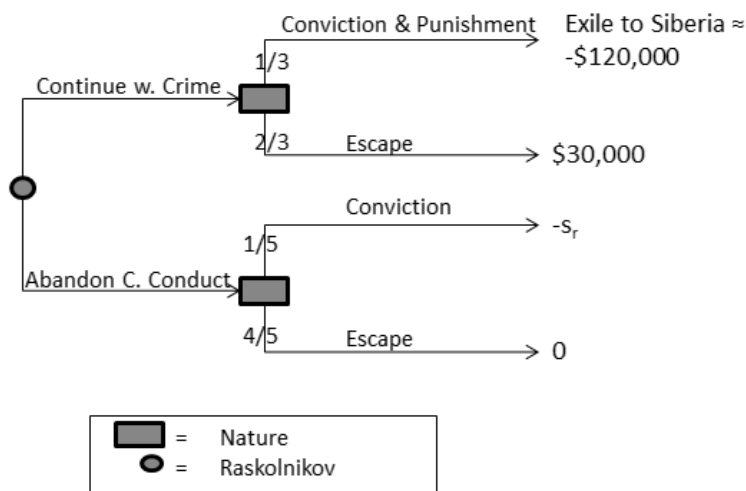
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72. *Id.* at 67–68.

73. *Id.*

74. *Id.* at 68.

75. In *Crime and Punishment*, there are many statements suggesting that Raskolnikov is not fully aware of himself. See, e.g., *id.* at 68–69 (“He pulled the axe quite out, swung it with both arms, scarcely conscious of himself, and almost without effort, almost mechanically, brought the blunt side down on [Alyona's] head.”).

**Figure B. Raskolnikov's Decision Tree**

If Raskolnikov continues, he expects Lizaveta's arrival to cause the probability of his capture to be  $1/3$ . Should Raskolnikov be captured, he expects to be exiled to Siberia,<sup>76</sup> which he equates to a loss of \$120,000. If, however, he is not caught—which happens with a probability of  $2/3$ —he expects to steal about \$30,000 worth of valuable items from Alyona. According to these numbers, his expected return from continuing with the robbery is:  $1/3 \times (-\$120,000) + 2/3 \times (\$30,000) = -\$20,000$ .

On the other hand, if Raskolnikov abandons his crime, he estimates that he will be caught with a probability of  $1/5$ , in which case his fate will depend on whether or not the Defense is available and whether it is applicable to his case. In particular, if the Defense is not available, assume briefly that Raskolnikov will be found guilty for attempted murder and that this is punished as severely as the murdering of the two sisters. In this case, Raskolnikov's expected return from abandoning is:  $1/5 \times (-\$120,000) + 4/5 \times (\$0) = -\$24,000$ . If the Defense is available, and it operates as a complete defense, Raskolnikov's expected return from abandoning is \$0.<sup>77</sup> Comparing these two numbers to Raskolnikov's expected return from continuing with the robbery implies that Raskolnikov will be deterred from continuing with his plan only when the Defense is available. This type of deterrence effect, which is not produced when Raskolnikov is punished

76. This is what ends up happening to Raskolnikov in *Crime and Punishment*. DOSTOEVSKY, *supra* note 71.

77. This assumption is mainly simplifying, and the effects of relaxing it are discussed in the next paragraph.

even when he abandons his conduct, is the marginal deterrence effect of the Defense.

Of course, this is a single and simple example, which abstracts from some relevant issues. One may ask, for instance, what would have happened if the punishment for abandoned attempts was intermediate, that is, between \$0 and \$120,000. It is easy to verify that marginal deterrence would be achieved, holding everything else constant, if the punishment for Raskolnikov's abandoned attempt was the equivalent of less than \$100,000. Hence, a complete defense is sufficient but not necessary, in this example, to generate marginal deterrence. On the other hand, other considerations, such as ex-ante deterrence, may make partial sentence reductions more appealing than complete defenses. In order to discuss this and other issues, a more elaborate analysis is necessary, which requires addressing points raised by scholars in previous analyses.

As pointed out by professors Ben-Shahar and Harel,<sup>78</sup> it is unclear whether and why sanctions sufficient to deter Raskolnikov from continuing with his plan are insufficient to deter Raskolnikov from going to Alyona's apartment with the intent to murder her in the first place. After all, his expected return is at most \$0 in the game tree represented by Figure B. So why, then, would Raskolnikov want to rob Alyona's apartment in the first place? The reason for this may be that absent new information, Raskolnikov believes that it is highly likely for Alyona to be alone at home. Therefore, ex-ante, his pay-off from initiating his criminal plan might be positive, despite the non-positive return in the state of the world where Alyona is not alone. As such, his ex-ante expected pay-off from initiating the criminal plan can be positive. In this case, he would be undeterred from initiating the plan but deterred ex-post from continuing when Lizaveta is present. Because this claim appears to be intuitive, its proof is relegated to Part III, where a larger decision tree is used to analyze the effect of the Defense.

This insight immediately leads to the next important question. The Defense reduces the cost to Raskolnikov in the state of the world where Alyona is not alone from -\$20,000 to \$0. Might not this reduction in cost cause Raskolnikov to initiate a criminal plan that he otherwise would not have? In other words, might not the Defense be causing a reduction in ex-ante deterrence for purposes of increasing marginal deterrence? If that is the case, would it not be wiser to not have the Defense, since marginal deterrence—that is, inducing Raskolnikov to abandon his crime—would never be necessary if Raskolnikov never initiated a criminal plan?

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78. See *supra* notes 63–64 and accompanying text.

Answering these and similar questions requires incorporating “changes in circumstances” into the economic analysis of attempts. Once this is done, one can focus on the trade-off between marginal and ex-ante deterrence and demonstrate that the marginal deterrence effect can off-set the ex-ante deterrence effect. Furthermore, once the benchmark model of deterrence and rational decision-making is structured, one can consider the effects of other considerations including behavioral deviations from rationality and the incapacitative effect of imprisonment.

### III. THE TRADE-OFF BETWEEN MARGINAL DETERRENCE AND EX-ANTE DETERRENCE

#### A. Incorporating “Changes in Circumstances” into the Economic Analysis of Attempts

Existing formal economics models of attempts mainly focus on whether attempts in general ought to be punished less severely than results.<sup>79</sup> These models do not incorporate the possibility of offenders acquiring new information between the time the potential offender triggers potential liability for attempts and the time when he is in a position to take the last step necessary to complete his crime.<sup>80</sup> When the incorporation of such information is recognized, one can talk about potential changes in circumstances.

While contemplating performing a criminal act, a rational potential offender considers how things are likely to develop. The rational potential offender initiates his criminal plan where there is a positive ex-ante expected return associated with the criminal act. However, between the time he initiates his plan and the time the final step necessary to complete the crime must be taken, circumstances may change. Circumstances may appear to be “out of the ordinary,” and the potential offender may use this new information to re-calculate his expected returns from completing the offense. In other words, the expected return associated with the crime may

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79. See *supra* notes 6–8 and accompanying text.

80. See, for example, the modeling in Shavell, *Punishment of Attempts*, *supra* note 6, at 438, where the temporal dimension of the criminal act is not considered, and therefore, there is no room for the criminal to incorporate new information:

An individual may commit a potentially harmful act from which he will obtain a benefit. If he commits such an act, harm will occur with some probability  $q$ , and harm will not occur with the complementary probability  $1 - q$ . In the latter case, we will say that the individual committed only an attempt.

As professor Shavell later notes, the temporal dimension of criminal acts has been noted in the eighteenth century by Beccaria. See BECCARIA, *supra* note 7, at 138 (“as there may be an interval of time between the attempt and the execution”). That offenders may incorporate new information within this “interval of time” has later been noted by modern scholars. See *supra* notes 64–65.

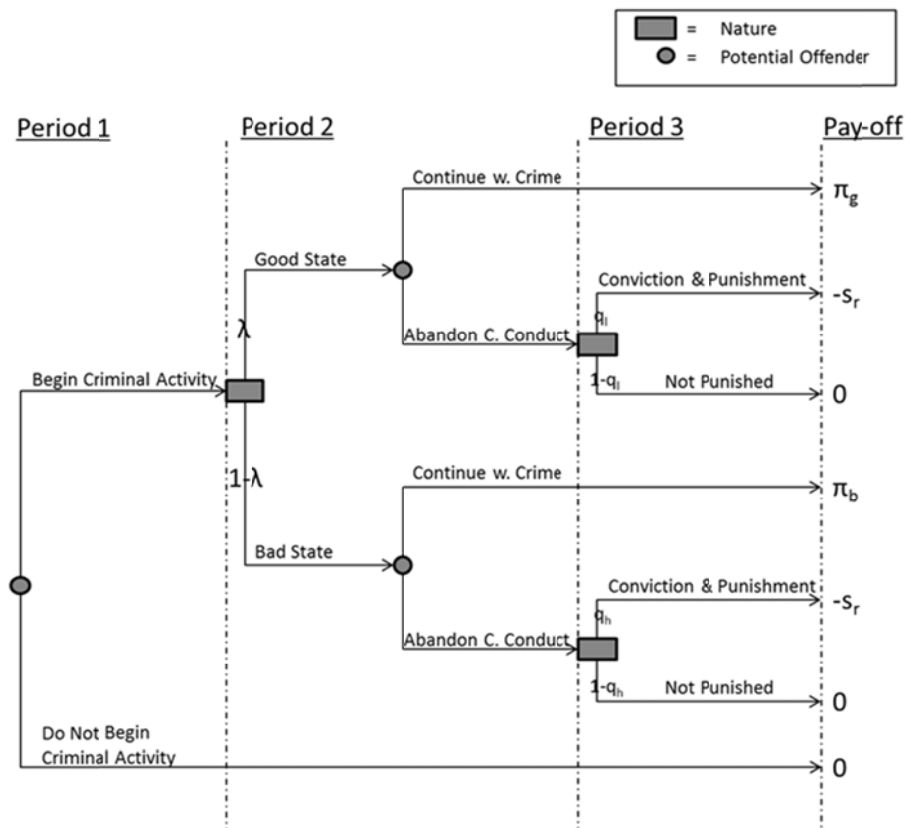
deviate significantly from what the criminal had initially anticipated. If the expected return is higher than what the criminal had initially anticipated, he will continue with the crime. If, however, the expected return deviates significantly and negatively from the return the criminal had initially calculated, the criminal must re-evaluate his decision. If abandoned attempts are punished less severely, then, as explained in the previous Part, the potential criminal may be induced to abandon his criminal plan.

To incorporate this idea, existing economic models of criminal decision-making<sup>81</sup> must be modified to allow for multiple states of the world, each generating a different expected return associated with continuing with crime. The simplest way to incorporate this change is by assuming that the criminal act involves three periods. In Period 1 the potential criminal decides whether or not to initiate a criminal plan, that is, whether or not to begin his criminal activity. If he goes ahead with the criminal act, in Period 2, new information is revealed to the criminal; he finds out whether he is in advantageous or detrimental circumstances. Given this new information, the criminal decides whether to abandon the criminal act or to continue with it. In Period 3 he is either punished or evades detection and thereby avoids punishment. If he continues with the crime, he risks being caught for the completed offense or for a non-abandoned criminal attempt. But he may also evade detection and benefit from his crime. If, on the other hand, he abandons his crime, then he forgoes the possibility of acquiring criminal benefits and risks being punished for an abandoned criminal attempt. This model is conveniently summarized by the following decision tree:

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81. See Polinsky & Shavell, *supra* note 66 (describing public law enforcement models commonly used to analyze criminal decision-making *a la* Becker, *supra* note 66).

Figure C. Potential Offenders' Decision Tree



In Figure C,  $\pi_g$  and  $\pi_b$  represent the expected pay-offs associated with continuing with the crime. The variation between  $\pi_g$  and  $\pi_b$  can be caused by many factors, including differences in the probability of detection or conviction, differences in criminal benefits to be earned from completion of the crime, or differences in the cost of completing the crime. The precise source of variation may be crucial for purposes of identifying optimal punishment schemes, especially when some “bad states” are unpredictable by the criminal. But for the current purpose of building a benchmark model identifying deterrence effects, it is sufficient to note the mere existence of such variations. In Part IV, imperfect expectations are considered and sources of potential variations are discussed in greater detail.

### B. Abandonment and Ex-Ante Deterrence

I have previously noted that imposing reduced penalties for abandoned criminal attempts may cause a reduction in ex-ante deterrence. Figure C can be used to clearly demonstrate this effect. In particular, if marginal



deterrence is to be achieved, it must be true that the potential offender is induced to abandon his criminal act in Period 2 when he reaches the “bad state” due to the existence of such a reduction. If this is the case, then the potential offender’s expected pay-off in the “bad state” must be increased from  $\pi_b$  to  $-q_h s_r$  by virtue of the penalty reduction.<sup>82</sup> This naturally raises the ex-ante expected pay-off to the criminal by the difference between these two pay-offs (i.e.,  $-q_h s_r - \pi_b$ ), discounted by the probability (i.e.,  $1-\lambda$ ) with which the criminal will end up in the “bad state”:  $(1-\lambda)(-q_h s_r - \pi_b)$ .

This implies that there could be circumstances in which, but for the reduction in penalty for the abandoned attempt, the potential criminal could have been deterred from crime ex-ante. To see this, note that absent the marginal deterrence effect of reduced penalties for abandoned attempts, the criminal’s pay-off is given by  $(1-\lambda)\pi_b + \lambda\pi_g$ . If this number is negative but close to zero, say  $-\$10$ , it could be the case that the additional reduction in expected penalties due to mitigations in penalties for abandoned attempts (i.e.,  $(1-\lambda)(-q_h s_r - \pi_b)$ ) is sufficient to induce the potential offender to commit crime. In fact, as long as  $(1-\lambda)(-q_h s_r - \pi_b) > \$10$ , the Defense will induce the criminal to initiate a plan that he would otherwise not. This naturally raises the following question: assuming rational decision-making, can the Defense reduce crime?

### *C. A Preliminary Result: Penalty Reductions for Abandonment Can Reduce Crime*

A very simple example will affirmatively answer the aforementioned question. Consider the decision tree illustrated in Figure C, and suppose that

$$\pi_g = \$3000; \pi_b = -\$300; \lambda = 40\%; q_h = 5\% \quad (1).$$

Solving the decision tree represented in Figure C by backward induction can reveal how the availability of a Defense for abandoning of attempts affects the potential criminal’s decisions.<sup>83</sup> Given the values in

82. Note that the marginal deterrence effect cannot be observed in the good state because the criminal is getting a positive pay-off; otherwise, he would not contemplate crime in the first place. This implies that marginal deterrence cannot exist unless the offender is rewarded for abandoning his crime through subsidies.

83. Backward induction is the most commonly used method for determining the equilibria of sequential games. See, e.g., Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 6 (1996) (“In analyzing this case, as well as subsequent cases, we are going to apply ‘backward induction.’ This approach is the standard method used by economists for analyzing strategic interactions in which parties make decisions over several time periods.”). See also ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 57–61 (1992) (explaining how to use backward induction).

line (1), it is clear that the potential criminal will choose to continue with the crime whenever he is in the “good state,” regardless of whether or not the Defense is available. This follows because continuing results in a positive expected pay-off, whereas abandoning results in a maximum pay-off of \$0. On the other hand, whether or not the criminal abandons the crime in the “bad state” depends on the value of  $s_r$ , which reflects the potential penalty reduction for abandoned crimes. In particular, if  $-q_h s_r$  (the expected return from abandoning the crime) is greater than  $\pi_b$  (the expected return from continuing with the crime) the criminal will abandon the crime; otherwise, he will not. Plugging in the numbers from line (1) reveals that this condition is met when  $s_r < \$6,000$ .

First consider the case where the Defense is not available, so that  $s_r > \$6,000$ . In this case, the potential criminal’s expected pay-off from initiating the crime in the first place is

$$\lambda\pi_g + (1-\lambda)\pi_b \quad (2).$$

Plugging in the values from line (1) reveals that this corresponds to  $(0.4 \times \$3000) + (0.6 \times (-\$300)) = \$1020$ . Since this number exceeds the value attached to the outside option of not committing crime, the potential criminal decides to initiate the criminal plan. This observation reveals that when the Defense is not available the criminal initiates his plan and executes it in both states of the world (i.e., the good as well as the bad state).

Next, consider the case where the Defense is available, such that  $s_r < \$6,000$ . The potential criminal’s expected benefit from initiating the criminal plan is given by

$$\lambda\pi_g + (1-\lambda)(-q_h s_r) \quad (3).$$

This is because the potential criminal knows that if things go bad, he will abandon his plan, in which case he will only face the risk of receiving the smaller sanction for abandoned attempts, namely  $s_r$ , which happens with a probability of  $q_h$ . In the scenario where he ends up in the good state, he will complete the crime, which results in an expected payoff of  $\pi_g$ . This implies that the potential criminal’s expected return from initiating his plan must be greater than the corresponding expected return when there is no Defense, namely \$1020.

This brief analysis reveals that when the Defense is available, the criminal initiates his plan but does not fully accomplish it 60% of the time, because 60% is the probability with which the criminal enters the “bad state” and abandons the crime. Hence, allowing the Defense for strategic abandoning of crimes lowers the probability of the crime being pursued to

completion by 60%. This is the equivalent to a 60% reduction in the crime rate,<sup>84</sup> assuming that there is a continuum of offenders who all have the same characteristics and face criminal opportunities of the type described in line (1).

Although this example abstracts from many relevant issues, it highlights an important function of the Defense: the marginal deterrence effect of the Defense lowers the rate of completed crimes committed by potential offenders whom it would be difficult or impossible to deter ex-ante through harsh penalties. Accordingly, the deterrent effect of the Defense is positively related to: (i) the number of crimes whose initiation cannot be deterred ex-ante through harsh penalties, but whose completion can be deterred ex-post; and (ii) the probability with which the potential criminal enters the “bad state.”

#### *D. The Trade-Off Between Marginal Deterrence and Ex-Ante Deterrence*

The preceding example and its brief analysis reveal important characteristics of the potential gains from allowing a Defense. The example does not, however, tell us anything regarding the costs of allowing the Defense for abandoned attempts. This is because the preceding example considers a situation in which the potential criminal is one whose decision to initiate the criminal plan is independent of whether or not the Defense is available. If the Defense was applied only in these circumstances, then it would unambiguously reduce crime rates. However, there may be variation among criminals, which is not captured by the previous example. In particular, as discussed briefly in Part III.B, some criminals may have expected returns from committing crime that are low enough for them to be deterred by harsh penalties. The existence of potential offenders of this type might generate costs associated with the Defense in the form of reduced ex-ante deterrence.

To make this point more discrete and to illustrate the trade-off between marginal and ex-ante deterrence, consider two groups of individuals. The first group of potential offenders (Type C) includes those who were considered in Part III.C. Type C people cannot be deterred from initiating the criminal plan through the use of harsh penalties<sup>85</sup> but can be induced to

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84. This result focuses on the instantaneous effect on deterrence and abstracts from incapacitation effects. If offenders are not imprisoned for abandoned attempts, a proportion of them may later try to commit crime again. See *infra* Part IV.B (discussing incapacitation and potential recidivism); in particular, see *infra* note 106 (noting that the proportion of re-attempters depends, among other things, on the proportion of attempters encountering criminal opportunities in the future).

85. Harsh penalties refer to the maximal penalty available for a particular offense. One may question why, theoretically, a maximal penalty may exist for a particular offense. There are at least two reasons for this. The first reason is related to marginal deterrence, used in its primary meaning, which

abandon their criminal plans in “bad states” if there is a significant reduction in the penalty for abandoned attempts. The second type of potential offenders (Type D) was those considered in Part III.B. Type D individuals can be deterred from even initiating a criminal plan, but only if there are harsh penalties for abandoned attempts.

Given the characteristics of Type C and Type D individuals, an important trade-off emerges between (i) reducing the execution of crimes committed by Type C individuals by allowing the Defense and (ii) reducing the initiation of criminal plans by Type D individuals by not allowing a Defense. This trade-off implies that the optimality of allowing the Defense hinges on<sup>86</sup> the ratio of Type C to Type D individuals as well as the frequency with which individuals enter “bad states” in which they abandon their attempts.

In reality there are, of course, not two types of potential offenders but a much larger number of types. When more types are present it matters not only whether the Defense is available, but also the specific reduction in the penalty for abandoned attempts. In particular, the greater reduction in the penalty will cause greater marginal deterrence effects but at the cost of lower ex-ante deterrence. To see this, consider four groups of individuals: (i) Type 1: those who require a reduction of  $X$  in the penalty to abandon their crimes in “bad states”; (ii) Type 2: those who require a reduction of  $X+1$  in the penalty to abandon their crimes in “bad states”; (iii) Type 3: those who are deterred from initiating a criminal plan only if the reduction for abandoned attempts is less than  $X$ ; and (iv) Type 4: initiating a criminal plan only if the reduction for abandoned attempts is less than  $X+1$ .

The following table delineates the effect of various penalty reductions on these individuals’ criminal behavior:

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is, as defined *supra* Part II.A, the diverting of criminal behavior towards the less harmful crime in cases where a criminal may choose to commit one among many crimes. “Considerations of marginal deterrence . . . imply that the schedule of sanctions rises with the magnitude of harm. Overall, this acts as a limitation on the size of sanctions.” Shavell, *Punishment of Attempts*, *supra* note 6, at 449. Professor Shavell notes a second constraint on the size of sanctions: “[S]ociety may desire that there be some proportionality maintained between the gravity of bad acts and the severity of punishment for them. If so, the size of sanctions for doing harm is limited by the proportionally fair magnitude.” *Id.*

86. Theoretically, the initiation of the plan may cause social harms in addition to the execution of the criminal plan. If that is the case, the ratio between these harms and the harms from the completion of the crime will also affect the optimality of making an abandonment defense available; the greater the ratio, the more important is ex-ante deterrence, and therefore the smaller is the optimal mitigation in punishment.

**Table A. The Effect of the Defense When There are More Than Two Types of Potential Offenders**

Penalty Reduction (R)	Type 1	Type 2	Type 3	Type 4
$R < X$	Not marginally deterred	Not marginally deterred	Deterred ex-ante	Deterred ex-ante
$X < R < X+1$	Marginally deterred	Not marginally deterred	Not deterred ex-ante	Deterred ex-ante
$R < X+1$	Marginally deterred	Marginally deterred	Not deterred ex-ante	Not deterred ex-ante

This example with four types of individuals demonstrates the incremental effect of reducing the penalty for abandoned attempts. Given this observation, in theory, one must account for not only the optimality of having a Defense but also the optimal reduction in the penalty for abandoned attempts. As the example establishes, increasing the reduction in penalty increases marginal deterrence but at the cost of a reduction in ex-ante deterrence. Therefore, assuming these costs and benefits behave according to standard economic assumptions, the optimal reduction in penalty will be present where the incremental benefit from marginal deterrence equals the incremental cost from ex-ante deterrence.<sup>87</sup> These incremental benefits and costs, in turn, depend on the relative size of each group (i.e., Types 1–4) and the frequency with which various types enter “bad states.”

In plain English, this means that whether and to what extent a Defense should be available for abandoned attempts depends on the number of attempts we expect to be abandoned as a result of the availability of the defense and our belief concerning the number of individuals who would be induced to commit crimes because they get an easy way out of being punished when the Defense is available. Further sophisticated and lengthy analysis is required to gather information on these numbers, and the

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87. If incremental benefits always exceed incremental costs, then abandonment ought to operate as a complete defense. Conversely, if incremental costs always exceed the incremental benefit, then it is optimal to not have any reduction in the penalty for abandoned attempts. One can call these “corner solutions.”

answers to these questions will presumably depend on the type of crime. The objective here is not to supply specific numbers but to provide a list of factors that affect the social value of providing sentence reductions for abandoned crimes. With this objective in mind, I consider in the next Section the potential effects of those considerations from which the benchmark model presented in this Part abstracts.

#### IV. FACTORS AFFECTING THE NORMATIVE DESIRABILITY OF PENALTY REDUCTIONS FOR ABANDONMENTS

##### A. *Unpredictability of Events Leading to Abandonment*

An overwhelming majority of economic analyses of criminal behavior assume that individuals have constant criminal tendencies.<sup>88</sup> In other words, the standard “model assumes that people consistently make the same choices over illegal and legal options. They do not, for instance, park legally today and park illegally tomorrow, unless the expected fine for illegal parking changes over time.”<sup>89</sup> An alternative and more realistic assumption is that potential offenders possess “fluctuating criminal tendencies.”<sup>90</sup> That is, a potential offender may decide to engage in a criminal act today but forgo the opportunity to engage in a virtually identical act (i.e., an act associated with the same expected return) at some point in the future. At least two reasons<sup>91</sup> have been suggested for this type of fluctuation: “First, people may have different benefits from the same illegal activity at different points in time.”<sup>92</sup> And, second, the degree of self-control people possess may vary throughout time and circumstances.<sup>93</sup>

Regardless of their specific sources, if unpredictable ex-ante, these fluctuations in criminal tendencies are likely to generate asymmetric effects

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88. See Mungan, *supra* note 36, at 184–87 (explaining how most economic analyses of criminal law assume constant criminal tendencies).

89. *Id.* at 166.

90. *Id.* at 194–205 (defining fluctuating criminal tendencies and proposing methods to incorporate offenders with such tendencies into standard crime and deterrence models).

91. *Id.* at 194. A third and related source of fluctuation in criminal tendencies may relate to the criminals’ biased perception of expected costs and/or benefits. In particular, a criminal possessing optimism bias will over-estimate the expected net benefit associated with crime. *Id.* at 202. Furthermore, people may suffer from projection-bias, which refers to “[p]eople exaggerat[ing] the degree to which their future tastes will resemble their current tastes.” Loewenstein et al., *supra* note 70, at 1209. A combination of optimism bias and projection bias may be effective in explaining why people experience changes of hearts before taking the last steps towards committing a crime. An optimistic person may discount his likelihood of panicking, having moral concerns, or similar feelings. When the time comes to commit the crime, he may indeed experience these feelings and decide to abandon his crime.

92. Mungan, *supra* note 36, at 194.

93. *Id.*

on marginal deterrence versus ex-ante deterrence. The Defense will induce the criminal to abandon his attempt when he, during the course of his criminal conduct, possesses a lower than previously anticipated criminal tendency, and this will result in additional benefits due to marginal deterrence.<sup>94</sup> But a similar ex-ante deterrence effect should not be observed because while initiating his criminal plans, the potential offender does not expect to experience fluctuations in his criminal tendencies in the future. Other scholars have noted this before, suggesting that abandonment defenses requiring a complete and voluntary renunciation<sup>95</sup> are unlikely to “embolden those considering some criminal endeavor because they will be more willing to take the first steps toward the crime when they know they can withdraw with impunity.”<sup>96</sup>

This brief analysis implicitly assumes that a person who experiences a negative shock to his criminal tendency requires an incentive to abandon his criminal conduct. This is not true in situations where the person’s criminal benefit fluctuates to negative values, meaning that the person is willing to forgo all criminal benefits in order to avoid committing the criminal act. In these situations, even if the punishments for abandoned attempts and results are equal, the person would be inclined to abandon his conduct.<sup>97</sup> This suggests that the Defense does not have a marginal deterrence effect because the person is “marginally deterred” even without the Defense. Even in these circumstances, there is a second benefit to reducing the punishment for abandoned attempts. The cost of punishment<sup>98</sup> dictates that it is economically wasteful to devote resources to punishing a person when punishment, as in this circumstance, has no ex-ante deterrence effect.<sup>99</sup>

The preceding comments reveal that providing the Defense in cases where the crime is abandoned due to unpredictable fluctuations in criminal

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94. This follows because the number of instances where the offender enters a “bad state” increases, and these are exactly the instances in which marginal deterrence is likely to be effective. See *supra* Part III.D.

95. See LAFAVE, *supra* note 3, at 609.

96. *Id.*

97. This is also true for some individuals when, as in Figure B, the probability of conviction is lower for abandoned attempts than for completed attempts. The difference in the probability of conviction may be sufficient to induce some individuals to abandon their crimes. These individuals, too, do not require penalty reductions to abandon their crimes.

98. Punishment costs and their effect on optimal law enforcement has been studied extensively in the literature. See, e.g., Louis Kaplow, *A Note on the Optimal Use of Nonmonetary Sanctions*, 42 J. PUB. ECON. 245 (1990); A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984); Shavell, *Optimal Use of Nonmonetary Sanctions*, *supra* note 6; Steven Shavell, *The Optimal Use of Nonmonetary Sanctions as a Deterrent*, 77 AM. ECON. REV. 584 (1987).

99. Similar benefits are realized from the mitigated punishment of individuals as described *supra* notes 97–98 and accompanying text.

tendencies leads to benefits from marginal deterrence as well as savings in punishment costs. This implies that the Defense is likely to have greater marginal benefits, *ceteris paribus*, when “changes in circumstances” are caused by unpredictable fluctuations. Therefore, it is optimal to provide greater mitigations in punishment for abandonments caused by this type of fluctuations. The law’s distinct treatment of voluntary versus involuntary abandonments<sup>100</sup> can be interpreted as an effort to achieve such separation. But, as I argue in Part V, a greater focus on factors that should go into determining the proper sentence reduction for abandonments rather than creating rigid categories of attempts to define which attempters are fully excused would give rise to an increase in social welfare.

### B. Revealed Information on Offender’s Dangerousness

The preceding parts, like the majority of economic analyses of criminal law, focus on deterrence as the main goal of criminal law.<sup>101</sup> However, an often neglected function of imprisonment is incapacitating dangerous offenders.<sup>102</sup> One may argue that once incapacitative benefits from imprisonment are accounted for it may be optimal for there to not be an abandonment defense because by initiating the crime the offender has revealed his dangerousness,<sup>103</sup> and by letting him go free the criminal justice system fails to take advantage of an opportunity to prevent recidivism.<sup>104</sup>

This argument against the Defense has a few important weaknesses.<sup>105</sup> First, abandonment may signal, albeit in a noisy way, that the criminal has initiated a criminal plan due to mistaken beliefs or irrational behavior, in which case his initiation of the crime signals less about the likelihood

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100. See *infra* Part V.A for a review of existing laws on abandonment.

101. See Mungan, *supra* note 36, at 175–81 (reviewing existing literature and concluding that “economic theories of crime and law enforcement focus predominantly on deterrence and pay very little attention to rehabilitation and incapacitation” (citation omitted)).

102. *Id.* at 177–79 (reviewing existing literature and concluding that “[n]ormative L&E analyses of law enforcement that incorporate incapacitation as a justification for punishment are rare”).

103. See *supra* note 16 and accompanying text.

104. See *supra* note 17 and accompanying text.

105. Hoerber, *supra* note 9, at 384–85 argues that the “dangerous-person” rationale cannot justify the prohibition of attempts. In this Part, I consider not whether this rationale can supply a justification for attempt liability, but how, assuming attempt liability is desirable for purposes of achieving deterrence (as is argued in the previous law and economics literature, see, e.g., Shavell, *Punishment of Attempts*, *supra* note 6), social welfare can be increased by making use of noisy signals regarding attempters’ dangerousness. A similar approach is taken in Lee, *supra* note 9, at 152: “Attempters who renounce are almost certainly less dangerous than attempters who go through with their target offenses, but are probably more dangerous than members of the public at large. Thus, the relatively moderate dangerousness of abandoning attempters provides a warrant for some reduced degree of incapacitation.”



which he will recidivate.<sup>106</sup> In this case, the criminal may not possess the necessary benefit or the necessary talent<sup>107</sup> to make the crime profitable ex-ante.<sup>108</sup> He may have initiated the crime despite this due to temporary miscalculations, optimism, or lack of self-control.<sup>109</sup> At the least, it seems intuitively true that the probability that an abandoning person will recidivate is smaller than the probability with which a non-abandoning person will recidivate (if not imprisoned). Therefore, expected incapacitative benefits associated with eliminating recidivism are not as large as the argument against the Defense would suggest.

Second, even if the person initially possesses the necessary desire and talent to make his criminal plan profitable ex-ante, the act of abandoning and receiving a penalty reduction for it may alter his preferences and reduce his benefits from criminal conduct.<sup>110</sup> A person who sets out to murder a person but later repents his initial intentions and thoughts, for instance, has presumably experienced a shift in his preferences towards the act of murder. Therefore, the person would be less likely to recidivate, and incapacitative benefits from imprisoning him would be lower than one would otherwise think.

Describing the third weakness in the argument against the Defense requires noting that fully excusing an attempter who withdraws is not the only alternative to severely punishing him. He can be punished less severely than the person who completes his attempt. As discussed in the previous part, less severe penalties for abandonment of crimes produce a marginal deterrence effect.<sup>111</sup> A similar effect is unlikely to be gained by reducing the punishment of completed attempts.<sup>112</sup> Accordingly, even if a

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106. A related weakness in the argument is that it relies on the attempter encountering similar criminal opportunities in the future. Consider a person who encounters an extremely profitable criminal opportunity today—so that he will not be deterred even if the expected ex-ante penalty for this crime is maximal—and that he is almost certain to never encounter profitable criminal opportunities in the future. In this case, inducing the criminal to abandon his crime today by fully excusing him for his abandoned attempt is the optimal solution. This person is not “dangerous,” not because he lacks the intent to commit crime, but because he lacks future criminal opportunities. Therefore, it is best to prevent criminal harm through marginal deterrence today, as well as save the cost of imprisoning this person. In reality, of course, it is impossible to identify the likelihood with which various attempters will encounter profitable criminal opportunities in the future. But as this discussion demonstrates, attempts are not perfect signals of future dangerousness, even if criminals’ preferences remain constant over time, as long as some attempters’ face some probability of not encountering a profitable criminal opportunity in the future.

107. Shavell, *Punishment of Attempts*, *supra* note 6, at 438–44 (providing a deterrence based rationale for why less talented individuals ought to be punished less severely).

108. *See supra* Part III (identifying conditions under which crime is profitable ex-ante for the potential offender).

109. *See supra* notes 68–70, 91 and accompanying text.

110. *See Mungan, supra* note 36, at 209–13 (discussing shifts in preferences and proposing ways to incorporate these shifts into the standard L&E analysis of crime).

111. *See supra* Parts II, III.

112. *See Shavell, Punishment of Attempts, supra* note 6, at 455 (making a similar point).

person who abandons his criminal plan and a person who completes his attempt were equally dangerous, the incremental net-benefit from increasing the imprisonment of the latter would still be greater than the incremental net-benefit from increasing the imprisonment of the former for the same amount of time. This is because the incapacitative benefits and ex-ante deterrence effects of punishment would be the same for the two types of individuals, but there would be an additional cost—in the form of loss of marginal deterrence, as demonstrated in Parts II and III—from severely punishing individuals who abandon their crimes.

The first and second arguments outlined above rely on the nature of the information relating to the offender's dangerousness and produced by the act of abandoning.<sup>113</sup> In particular, the operating assumption in these arguments is that an abandoned attempt provides "weaker" information compared to a completed attempt concerning the dangerousness of the attempter. Information is "weaker" in the sense that we are not as certain about the dangerousness of the offender as we are when the offender has completed his attempt. It follows, intuitively, that the optimal reductions in the penalty for abandonment ought to hinge on the nature of the information revealed by the abandonment, and that it ought to be inversely related to the strength of the information revealed by the act of initiating and later abandoning the crime.

This criterion can be applied to Attempt 2 and Attempt 3 described in the Introduction. Attempter 2's strategic abandonment supplies strong information regarding his dangerousness because he demonstrates that his abandonment is not due to some reduction in his criminal tendency. On the other hand, Attempter 3's emotions towards his victim and his repentance signal that he has initiated a criminal plan while acting impulsively and/or irrationally, and that his attempt has shown him that he does not possess the mind-set necessary to murder another person. Hence, it appears reasonable to assume that Attempter 3 is less likely than Attempter 2 to recidivate.

## V. POLICY IMPLICATIONS, REMARKS AND EXTENSIONS

The preceding Parts of this Article demonstrate that the optimal sentence reduction for abandonment of an attempt depends on, among other things, the trade-off between marginal deterrence benefits and ex-ante deterrence costs. If the abandonment is caused by unpredictable changes in the criminal's tendencies to commit crime, then, *ceteris paribus*, the

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113. The third argument, on the other hand, suggests that even assuming *arguendo* that all attempters reveal the same type of information, it is optimal to punish abandoned attempts less severely than completed attempts. Offenses for which the punishment is maximal are discussed further *infra* Part V.B.

incremental net-benefit from sentence reductions is higher, and therefore, such abandonments ought to be punished less severely. Furthermore, because incapacitative benefits from imprisonment are inversely related to the expected dangerousness of the offender, the mitigation in penalty for abandonment ought to be greater when the abandoned attempt provides weak information regarding his dangerousness.

This Part first compares the normative implications of the analysis presented in the preceding Parts to existing laws on abandonment. Then, it identifies policy implications and a number of issues that can benefit from a careful analysis in future research and considers and responds to potential criticisms.

#### *A. Normative Implications Compared to Laws on Abandonment*

A brief review of existing law is necessary to compare and contrast them with the normative implications of my analysis. As briefly discussed in the introduction, there is no general consensus among jurisdictions on the law of abandoned attempts.<sup>114</sup> Although abandonment was not a defense to attempts in common law, today it can affect the defendant's liability in one of two ways.<sup>115</sup> First, the abandoning defendant may escape liability under the theory that he did not possess the requisite intent for the attempt because "where the accused has changed his mind, it would be only just to interpret his previous intention where possible as only half-formed or provisional, and hold it to be insufficient *mens rea*."<sup>116</sup> Second, some jurisdictions recognize abandonment as a defense<sup>117</sup> where the abandonment occurs "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."<sup>118</sup> An abandonment that meets these criteria is generally a complete defense<sup>119</sup> rather than a mitigating factor for purposes of punishment.<sup>120</sup>

Contrary to existing laws, my analysis suggests that, as a general matter, all abandoned attempts, without regard to whether they would be classified as voluntary or involuntary, ought to potentially be punished less severely than completed attempts. Furthermore, abandonment need not be subject to a dichotomous scheme such that it provides a full excuse or else no defense at all. Optimal punishment schemes require abandonments to be

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114. See *supra* notes 21–34 and accompanying text.

115. See *supra* notes 22–26 and accompanying text.

116. See LAFAVE, *supra* note 3, at 606 (quoting GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 620–621 (2d ed. 1961)).

117. See *supra* note 26.

118. MODEL PENAL CODE § 5.01(4) (AM. LAW INST. 1981).

119. See *supra* note 28.

120. See *supra* note 29.

treated as mitigating factors in punishment and require that the magnitude in mitigation be determined by considering factors discussed above.

These differences should not leave the impression that the normative implications of my analysis and existing laws are completely divergent; they are not. In fact, they have many similarities. In particular, the complete renunciation of criminal purpose requirement in many jurisdictions allowing a defense can be interpreted as a proxy for identifying the defendant's dangerousness. Similarly, the necessity of *voluntary* renunciation is often interpreted as a requirement that there be no "outside cause"<sup>121</sup> or "extraneous factor"<sup>122</sup> motivating the abandonment. This requirement can be thought of as providing a proxy for the predictability factor that I have identified, since intuitively, outside factors are more predictable than internal changes, including changes of heart.

This brief comparison suggests that the law has equipped itself with instruments intended to serve purposes similar to those identified by my economic analysis but that it has chosen instruments that are too blunt. In particular, most laws create categories of abandonments that are too rigid by requiring that they either provide a full excuse or no defense at all.

This claim is supported by the existence of cases where a strict reading of the law suggests one verdict, but the court produces the opposite one.<sup>123</sup> Consider for instance *Commonwealth v. McCloskey*<sup>124</sup> and *People v. McNeal*,<sup>125</sup> which represent deviations from the strict reading of the law in the two possible directions.

In *Commonwealth v. McCloskey*, a prison inmate "scaled a fence within the prison walls that led to the recreation yard and then to the prison wall" before turning back and aborting his escape attempt.<sup>126</sup> The inmate stated that his abandonment was motivated by a desire to "not . . . shame [his family] any more."<sup>127</sup> Although "abandonment [was] not recognized as a defense,"<sup>128</sup> the inmate's conviction for attempted prison escape was "overturned on the questionable ground that [his] actions demonstrated that he was still only contemplating an escape, but had not yet begun attempting

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121. See LAFAVE, *supra* note 3, at 609 (citing *People v. Von Hecht*, 283 P.2d 764 (Cal. Ct. App. 1955)).

122. See *id.*

123. See EISENBERG, *supra* note 5, at 71 (discussing how and why courts may inconsistently apply rules).

124. 341 A.2d 500 (Pa. Super. Ct. 1975). See also DRESSLER, *supra* note 3, at 411 n.180 (interpreting the grounds for the overturning of the defendant's conviction as "questionable").

125. 393 N.W.2d 907 (Mich. Ct. App. 1986).

126. 341 A.2d at 502.

127. *Id.* at 501.

128. DRESSLER, *supra* note 3, at 411 n.180.

the act.”<sup>129</sup> Hence, the court used a rather favorable interpretation of the law of attempts for the appellant to overturn his conviction.

The Court of Appeals of Michigan interpreted the law in the opposite direction in *People v. McNeal* where the defendant, although initially intent on raping the victim, desisted after talking with her for over an hour.<sup>130</sup> Subsequently the “[d]efendant was convicted by a jury of attempted second-degree criminal sexual conduct.”<sup>131</sup> The Court of Appeals noted that voluntary abandonment was a recognized defense in Michigan based on precedent established in *People v. Kimball*.<sup>132</sup> But despite this, the court upheld the defendant’s conviction<sup>133</sup> based on the supposition that “the victim’s use of her wits in keeping defendant talking and in convincing him to let her go . . . may constitute ‘unanticipated difficulties’ or ‘unexpected resistance,’”<sup>134</sup> which would make the abandonment involuntary under *Kimball*.<sup>135</sup>

It is impossible to know what exactly led to these creative interpretations, but it is plausible that according to intuitive notions of justice the defendants in *McCloskey* and *McNeal* ought to be punished, but less severely than the full punishment for a completed attempt.<sup>136</sup> In cases where this is not an option, the decision maker has to choose between full punishment or a full excuse and may be inclined to choose that one which is closest to what he finds is the just punishment for the defendant, even if the verdict cannot be easily supported by a strict reading of the law.<sup>137</sup> It is

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129. *Id.*

130. 393 N.W.2d at 909–10.

131. *Id.* at 909.

132. *Id.* at 912. Although the defense was not made available by statute, *People v. Kimball*, 311 N.W.2d 343, 349 (Mich. Ct. App. 1981), held that “voluntary abandonment is an affirmative defense to a prosecution for criminal attempt.”

133. *McNeal*, 393 N.W.2d at 914.

134. *Id.* at 913.

135. *Id.*

136. In *McNeal*:

[t]he evidence indicated that defendant put the victim on the couch, laid himself down next to her, kissed her neck and lips, and touched her thighs and stomach. Because defendant never touched the victim’s intimate parts, he could not have been convicted of the completed crime of second-degree criminal sexual conduct . . . .

*Id.* Many people, after confronting this type of fact pattern, feel that the defendant should be punished for his acts but presumably less than a person who completes the criminal sexual conduct.

137. See EISENBERG, *supra* note 5, at 71. There are other ways judges can indirectly alter the defendant’s punishment to approximate their notions of justice more closely. For instance, voluntary abandonment may signal that the offender is remorseful, and manifestations of remorse can be used as mitigating factors in a number of states. See Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 745 (2012) (discussing how states allow remorse to be used as a mitigating factor). See also Mungan, *supra* note 36, at 190 (reviewing previous studies regarding how judges exercise discretion while sentencing remorseful and apologetic offenders and concluding that “manifestations of remorse, such as apologies, can affect the way judges

very plausible that in *McCloskey* the judge felt that the attempted escapee deserved a minor, rather than full, punishment. Similarly, in *McNeal* the judge could have felt that it would be unjust to let the defendant's conduct go unpunished. But because the legal mechanism in each state did not allow intermediate punishments, the judges may have been inclined to creatively interpret the law to produce results that are closer to their internal notions of justice.

In sum, the rigid categories created by the law of abandonments may be pushing decision makers to bend or creatively interpret the laws to get closer to the decision they find intuitively just. The existence of this problem may be interpreted as a sign that the law of abandonments has not yet evolved to its optimal form. Implementing the proposed punishment schemes in this Article appears to be a step in the right direction, especially since these punishment schemes further the goals of optimal deterrence and incapacitation.

#### *B. Dynamic Versus Static Effects when Group Interactions Are Present*

The models presented in this Article focus on attempts committed by individuals. Without substantial modification they cannot be used for purposes of analyzing illegal conduct committed by multiple entities or individuals. Nevertheless, even when analyzing such criminal activity, including conspiracies and the formation and operation of cartels, it should be asked whether abandonment-type defenses ought to exist, and if so, how they ought to be structured. In answering these questions one must address a trade-off that is very similar to that identified in this Article, namely that between dynamic and static efficiency.

The use of leniency programs in the enforcement of antitrust laws provides a clear example of this trade-off in action. Under these programs a cartel member can avoid criminal liability by reporting the activities of the cartel to the U.S. Department of Justice (DOJ).<sup>138</sup> Self-reporting naturally raises the likelihood of successful detection and prosecution of illegal cartel activity<sup>139</sup> and thereby leads to static benefits. These benefits are in the form of elimination of cartel-induced, supra-competitive prices. But, like abandonment defenses, leniency programs can reduce ex-ante deterrence

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exercise discretion in sentencing criminals. In fact, a number of previous studies discuss how judges are tempted to impose shorter sentences when they are convinced that an offender is remorseful." (footnotes omitted)).

138. See, e.g., Scott D. Hammond, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, Address at the National Institute on White Collar Crime 1–4 (Feb. 25, 2010).

139. See Massimo Motta & Michele Polo, *Leniency Programs and Cartel Prosecution*, 21 INT'L J. INDUS. ORG. 347 (2003).

by reducing the expected cost of forming a cartel in the first place.<sup>140</sup> Hence, a trade-off emerges between ex-ante deterrence and static benefits.

Although this trade-off is similar to that which has been identified in Parts II and III of this Article, a closer look reveals subtle differences. First, static benefits in the context of leniency programs are not completely analogous to the marginal deterrence benefits observed when considering individual attempts. Because these leniency programs lead to the dismantling of group ventures rather than the ceasing of activity of an individual, incentivizing each member of a conspiracy or cartel to cooperate with the DOJ results in the elimination of harm caused by multiple parties. Second, although abandonment defenses clearly reduce ex-ante costs to initiating crimes, the effect of leniency programs on cartel formation activity is ambiguous. A potential cartel participant knows that it is not the only entity that can act as a “whistle-blower.” Therefore, leniency programs create distrust among cartel members and thereby can increase the likelihood with which cartels are dismantled after they are formed. This can in turn reduce the expected benefits associated with forming cartels, and increase ex-ante deterrence.

Accordingly, leniency programs are likely to produce static benefits that offset any costs that might exist due to reduction in ex-ante deterrence. This conjecture is consistent with current leniency programs in the United States, which provide “full immunity”<sup>141</sup> to corporations that cooperate with the government instead of mitigations in penalty; if the marginal net benefit from reducing the penalty for whistle-blowers is always positive, then it is optimal to provide the maximal reduction, which is equivalent to providing full immunity.<sup>142</sup>

The identification of this trade-off in regards to leniency programs has important implications as to how abandonment defenses for conspiracies can potentially be reformed. Existing research on leniency programs demonstrates not only that leniency programs can be used to dismantle cartels but also that limiting full immunity to only the first cartel-member

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140. See *id.* at 347. (“[Leniency programs] decrease the expected cost of misbehavi[or].”); See also Joseph E. Harrington Jr., *Optimal Corporate Leniency Programs*, 56 J. INDUS. ECON. 215, 217 (2008) (noting that leniency programs may increase the benefit from continuing to collude: “In that colluding firms recognize that they may use the leniency program in the future (when the probability of detection is high), a more lenient program reduces the size of penalties in the event that a firm receives leniency. This . . . means that more leniency raises the expected payoff from continuing to collude.”).

141. See Hammond, *supra* note 138, at 1.

142. See Motta and Polo, *supra* note 139, at 375 (coming to a similar conclusion: “when the [Antitrust Authority (AA)] has limited resources, leniency programs may be optimal in a second best perspective. Fine reductions, inducing firms to reveal information once an investigation is opened, increase the probability of ex-post desistance and save resources of the AA, thereby raising welfare. The optimal scheme requires maximum fine reduction, that is, the firms that collaborate with the Authority should not pay any fine.”)

to cooperate is likely to create a “race to the enforcer’s door.”<sup>143</sup> This effect reduces the expected benefits from colluding<sup>144</sup> and is therefore likely to increase ex-ante deterrence. Similarly, limiting abandonment defenses for conspiracies to the first party to take affirmative steps to report the conspiracy to law enforcers may generate greater ex-ante deterrence. However, further and meticulous research focusing on similarities and differences between cartel activity and other conspiracies is necessary to draw more accurate conclusions. In particular, it must be determined whether the dynamic-static trade-off in the criminal conspiracies context is sufficiently similar to that which exists in the cartel formation context to warrant transplanting strategies used in leniency programs to criminal conspiracy laws.

*C. On the Use of Escalating Penalty Schemes to Mitigate the Loss in Incapacitative Benefits*

Whether or not punishing an individual who abandons his criminal effort provides significant incapacitative benefits is uncertain. This uncertainty may be resolved, at least partially, through the use of escalating punishment schemes.<sup>145</sup> The main virtue of using escalating punishment schemes in conjunction with an abandonment defense is to cause marginal deterrence while preserving benefits similar to those that would be generated by the incapacitation function of imprisonment.<sup>146</sup> To exemplify how escalating penalty schemes result in these benefits, consider a penalty scheme that provides a penalty reduction for abandoned crimes but increases the penalty for any subsequent crime. This scheme generates marginal deterrence because whenever a criminal enters the “bad state,” he will be inclined to abandon his crime. The scheme also reduces recidivism

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143. See Hammond, *supra* note 138, at 3.

144. See Harrington, *supra* note 140, at 217 (showing that “[t]he Race to the Courthouse Effect results in a more lenient policy, lowering the expected payoff from colluding—making collusion more difficult”).

145. A punishment scheme is escalating if the punishment for the second offense is greater than the punishment for a subsequent offense. There is a large L&E literature on escalating penalties, and despite this, there is no consensus on the conditions under which escalating penalties are optimal. See, e.g., Winand Emons, *A Note on the Optimal Punishment for Repeat Offenders*, 23 INT’L REV. L. & ECON. 253, 253 (2003) (“[t]he optimal sanction scheme is decreasing rather than increasing in the number of offenses” under conditions identified by the author); Murat C. Mungan, *Repeat Offenders: If They Learn, We Punish Them More Severely*, 30 INT’L REV. L. & ECON. 173 (2010) (escalating penalty schemes can be optimal if offenders learn how to evade the detection mechanisms employed by law enforcers upon being convicted or committing crime); Polinsky & Shavell, *supra* note 66, at 438 (“only if deterrence is inadequate is it possibly desirable to condition sanctions on offense history”).

146. Escalating penalty schemes could also be used to reduce imprisonment costs. See, e.g., Murat C. Mungan, *A Behavioral Justification for Escalating Punishment Schemes*, 37 INT’L REV. L. & ECON. 189 (2014).



by increasing the penalty for future crimes that may be committed by potentially dangerous offenders and thereby generating specific deterrence.<sup>147</sup> Hence, the main trade-off affecting the optimality of the Defense is between its ex-ante and marginal deterrence effects outlined and discussed in Part III.

One might object to this reasoning by arguing that the criminal might be undeterrable and by delaying his punishment, we may be providing him with an opportunity to commit crime in the future. There is an important flaw in this argument. If the person were completely undeterrable, then he would not be affected by marginal deterrence, either, and therefore would not abandon his criminal activity due to the prospect of receiving a lower punishment. Thus, this type of individual will not be able to invoke the Defense, and the Defense will not cause recidivism as claimed. Therefore, the applicability of this argument appears to be limited to a very special class of offenses, namely those for which the penalty is already maximal. If the penalty for the completed attempt is maximal, the subsequent commission of the crime cannot be punished more severely, and therefore recidivism cannot be reduced further. For these types of offenses, if the penalty for the offense was set efficiently to begin with, it may indeed be best to not allow the Defense.<sup>148</sup>

Perhaps a more important objection to the escalating punishment scheme may question why the penalty for the initial crime was not set at the level that is sufficient to deter the dangerous offender, especially if we believe we can deter him from recidivating by punishing him more severely for his second offense. The L&E literature on the optimal punishment of repeat offenders offers several answers to this question, although none appear to be completely comprehensive.<sup>149</sup> One of the most intuitive explanations is provided by Professor Miceli:

An enforcer wishes to deter a particular undesirable act but is unsure about what level of punishment it will take because offenders vary in their gains from committing the act. One approach would be to set a high initial punishment, but this policy would be costly to implement if some offenders are, for whatever

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147. See the references cited *supra* note 145 (describing how recidivism can be reduced by increasing the penalty for repeat offenders).

148. This conjecture is formed through a somewhat subtle economic reasoning. That the punishment for the attempt is maximal signals that the incremental benefit from increasing expected costs to the potential offender off-sets, rather than being equal to, the incremental cost of increasing these expected costs. In economics jargon, it is likely that we are observing a corner solution to begin with. This signals that the potential gains from marginal deterrence are unlikely to bump the incremental costs from increasing the expected penalty above the incremental benefit from increasing the same.

149. See *supra* note 145.

reason, not deterred. Thus, a cheaper strategy may be to set a low initial punishment, and then to raise it for those who commit the act, thereby revealing their higher valuation. Under this escalating scheme, some early crime is tolerated in order to save on punishment costs.<sup>150</sup>

Whether or not the existing L&E literature provides convincing arguments for the use of escalating punishments can be debated. But as a practical matter, repeat-offender laws exist,<sup>151</sup> and there is very often room to implement escalating penalty schemes that increase the penalty for future crimes for people who have abandoned their attempts.

#### *D. On Criminals' Ignorance of Laws*

Most economic analyses of criminal law assume that laws affect potential offenders' incentives by adjusting the costs and benefits of committing crime. Another less explicit and perhaps antecedent assumption is that potential offenders are well informed of the details of criminal laws. Some scholars have recently questioned the validity of this assumption and have argued that in many circumstances criminals are unaware or imperfectly informed about the applicable criminal laws.<sup>152</sup> Because the model presented in Parts II and III also makes these assumptions, one may wonder whether the normative implications that are based on this model are reliable.

There is a very simple, yet powerful, defense against such criticisms. The particular law governing abandonment of attempts should not have any incentive effect on criminals that are truly uninformed of these laws. Therefore, the ex-ante as well as the marginal deterrence effect of laws on abandonment on these individuals is negligible. The incentive effects on these individuals can justifiably be ignored when discussing effects on social welfare.<sup>153</sup> If it is further assumed that there is a proportion of offenders, even if this proportion is small, whose incentives are affected by the particular law governing abandonment of attempts, then the laws can justifiably be structured to provide proper incentives only to these

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150. Thomas J. Miceli, *Escalating Interest in Escalating Penalties 2* (Univ. of Conn. Dep't of Econ. Working Paper Series, Working Paper No. 2012-08).

151. See, for example, those that are discussed in Mungan, *supra* note 36, at 187–88.

152. See, e.g., Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEG. STUD. 173 (2004); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. J. 949 (2003).

153. This has no effect on whether imprisonment costs and incapacitative benefits from punishing offenders ought to be considered.

individuals. Hence, the normative implications derived by the models presented in this Article are still valid when one assumes that there are individuals who are uninformed of the laws, and another, perhaps smaller, group of individuals whose incentives are affected by the particular law on abandoned attempts.

### *E. On Interrupted Attempts*

This Article is mainly concerned with the properties of optimal punishment schemes for abandoned attempts. Although it does not consider optimal punishments for interrupted attempts, one can form conjectures regarding this issue by relying on the insights provided in the preceding Parts.

When attempts are interrupted one cannot ascertain whether the attempter would have completed it or whether he would have abandoned it. This uncertainty, intuitively, makes interrupted attempts conceptually a hybrid between completed and abandoned attempts.<sup>154</sup> The facts surrounding the interruption might inform the fact finder about how close that particular interrupted attempt is to one category versus the other. However, in many cases this type of information will not be available. In these cases, priors regarding the likelihood with which an attempt would have been completed but for the interruption become important. To the extent that this prior is high, the interrupted attempt ought to be punished with a sanction close to the corresponding sanction for completed attempts.

## VI. CONCLUSION

In this Article, I have used standard L&E tools to identify costs and benefits associated with defenses that provide penalty mitigations for abandoning of attempts. Penalty mitigations provide incentives to offenders who initiate criminal plans to abandon their unlawful efforts, while reducing the expected cost to initiating criminal plans in the first place. Moreover, abandonment defenses may reduce incapacitative benefits

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154. If courts made no errors in categorizing attempts as interrupted versus abandoned, then interrupted attempts would be hybrids only in terms of their information revealing features. Shavell, *Optimal Use of Nonmonetary Sanctions*, *supra* note 6, makes a similar point at 1251: “[P]unishing interrupted attempts less severely than acts that result in harm may be advantageous. Since interrupted attempts may later be abandoned or fail, there is less evidence of the dangerousness of interrupted attempts and less reason for sanctioning them than acts that actually do result in harm.” However, they would be similar to completed attempts in terms of their inability to generate marginal deterrence. If, however, courts make errors in categorizing attempts, then a penalty reduction for interrupted attempts would produce a small marginal deterrence effect because the offender would be punished less severely when he abandons his crime but is subsequently punished for an interrupted attempt due to the court’s erroneous categorization of the attempt.

associated with punishment. The trade-off between these costs and benefits is affected by the characteristics of offenders. The predictability of the events that led to the abandonment and the information regarding the offender's dangerousness that is revealed through the abandonment provide insights regarding the characteristics of the offender and should therefore be taken into account in determining the appropriate magnitude of mitigation. The analysis suggests that abandoned attempts ought to be punished less severely than completed attempts, and the mitigation ought to be large when the abandonment is due to unpredictable events that reveal that the offender has a low likelihood of recidivating.