ATTEMPT, RECKLESS HOMICIDE, AND THE DESIGN OF CRIMINAL LAW

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Most American criminal codes create an offense for recklessly killing another person, and nearly all contain a general provision covering any attempt to commit an offense. This article explores the relation between reckless homicide and attempt, which proves more complex than it appears and also turns out to provide a useful starting point for examination of several broader issues in attempt law and criminal law generally.

The idea of "attempted reckless homicide" ("ARH") is largely disfavored by legal scholars and almost, but not quite, universally rejected in American law. Part I of the article questions that hostility. The theoretical arguments against ARH prove unpersuasive, or else too persuasive, in that taking them seriously would call into doubt not only ARH but also the general notion of having attempt liability at all. Moreover, the legal case against ARH under existing criminal statutes is by no means airtight. Indeed, the widely followed Model Penal Code formulation of attempt, read according to its own commentary's interpretive guidance, actually allows ARH in a limited set of situations, though the Code elsewhere tries to deny the possibility of ARH.

Although the law has not embraced ARH per se, it does penalize the same (or very nearly the same) conduct ARH would address, by creating a distinct offense of reckless endangerment, or a variety of more particular offenses covering

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specific forms of dangerous conduct, or (commonly) both. Yet as Part II of the article discusses, the endangerment-offense "solution" to the ARH puzzle creates its own practical problems and raises a distinct set of questions about how to formulate criminal law rules. The idea of writing a single attempt provision expansively covering any conduct that risks, but does not create, a criminal harm seems rooted in a sense that criminal law works best by establishing relatively few general rules of broad application. By contrast, the project of identifying particular types of risky conduct and criminalizing each with a specific offense indicates a sense that criminal rules should be narrow and precise, rather than broad and flexible.

The article explores these two visions of how to write criminal law—which I call the thin-code and thick-code models, respectively—and describes how the choice between thick and thin is not merely formal, but may have significant practical consequences. Although each model has its independent merits, indiscriminately mixing the two is likely to make for a poor and problematic criminal code. Sadly, though, such thoughtless blends of thin and thick are all too common in our criminal law; if anything, they seem to be increasing.

INTRODUCTION

Most American criminal codes provide for an offense of reckless homicide, also commonly known as involuntary manslaughter.[1] The offense is committed when one "recklessly"

1. Twenty-nine states explicitly define an offense that prohibits recklessly causing the death of another person. *See* ALA. CODE § 13A-6-3(a) (LexisNexis 2005); ALASKA STAT. § 11.41.120(a)(1) (2006); ARIZ. REV. STAT. ANN. § 13-1103(A)(1) (2001 & Supp. 2006); ARK. CODE ANN. § 5-10-104(a)(3) (2006); COLO. REV. STAT. § 18-3-104(1)(a) (2006); CONN. GEN. STAT. ANN. § 53a-55(a)(1) (West 2001); DEL. CODE ANN. tit. 11, § 632(1) (2001); HAW. REV. STAT. § 707-702(a)(1) (1993 & Supp. 2005); 720 ILL. COMP. STAT. ANN. 5/9-3 (West 2002); IND. CODE ANN. § 35-42-1-5 (LexisNexis 2004); KAN. STAT. ANN. § 21-3404(a) (1995 & Supp. 2005); KY. REV. STAT. ANN. § 507.040(1) (LexisNexis 1999) (defining offense as "wantonly" killing another. "Wantonly," as defined *supra* § 501.020(3), is equivalent to standard definition of recklessness); ME. REV. STAT. ANN. tit. 17-A, § 203 (2006); MO. ANN. STAT. § 565.024 (West 2000); N.H. REV. STAT. ANN. § 630:2(I)(b) (1996 & Supp. 2006); N.J. STAT. ANN. § 2C:11-4(b)(1) (West 2005); N.Y. PENAL LAW § 125.15(1) (McKinney 2004 & Supp. 2007); N.D. CENT. CODE § 12.1-16-02 (1997); OHIO REV. CODE ANN. § 2903.041 (West 2006); OR. REV. STAT. § 163.125(a) (2005); 18 PA. CONS. STAT. ANN. § 2504 (West 1998 & Supp. 2006); S.C. CODE ANN. § 16-3-60 (2003) (requiring "criminal negligence," but defining that term as a "reckless disregard of the safety of others"); S.D. CODIFIED LAWS § 22-16-20 (2006); TENN. CODE ANN. § 39-13-215 (2006); TEX.

causes another person's death—in other words, to use the most common formulation, when one causes a death while "consciously disregard[ing] a substantial and unjustifiable risk that

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PENAL CODE § 19.04 (Vernon 2003); UTAH CODE ANN. § 76-5-205 (2003); WASH. REV. CODE ANN. § 9A.32.060 (West 2000); WIS. STAT. ANN. § 940.06 (2005); WYO. STAT. ANN. § 6-2-105(a)(ii) (2006).

Another seven states, and the District of Columbia, criminalize "manslaughter" (or, in two cases, "involuntary manslaughter") without defining the term. *See* D.C. CODE ANN. § 22-2105 (2001 & Supp. 2006); MD. CODE ANN., CRIM. LAW § 2-207(a) (LexisNexis 2002); MASS. ANN. LAWS ch. 265, § 13 (LexisNexis 2002 & Supp. 2006); MICH. COMP. LAWS ANN. § 750.321 (West 2004); N.C. GEN. STAT. § 14-18 (2005 & Supp. 2006) (distinguishing voluntary and involuntary manslaughter); R.I. GEN. LAWS § 11-23-3 (2002 & Supp. 2006) (manslaughter); VT. STAT. ANN. tit. 13, § 2304 (1998 & Supp. 2006); W. VA. CODE ANN. § 61-2-5 (LexisNexis 2005). The standard understanding of manslaughter would include reckless homicide as involuntary manslaughter. *See, e.g.,* WAYNE R. LAFAVE, CRIMINAL LAW § 15.4, at 794–96 (4th ed. 2003) (discussing common-law view of involuntary manslaughter as requiring some form of gross "negligence," often better characterized as "recklessness" under modern terminology, and noting that the "modern view" is to require recklessness).

Nine states, and the federal criminal code, do not have an offense for reckless homicide specifically, but either have an offense for negligent homicide (which presumably would also include reckless homicides) or define "manslaughter" or "involuntary manslaughter" in a way that seems to suggest a standard of negligence rather than recklessness. *See* 18 U.S.C. § 1112 (2000); CAL. PENAL CODE § 192(b) (West 1999 & Supp. 2007); FLA. STAT. ANN. ch. 782.07(1) (2000); GA. CODE ANN. § 16-5-3(a),(b) (2004); IDAHO CODE ANN. § 18-4006(2) (2004); IOWA CODE ANN. § 707.5 (West 2003); LA. REV. STAT. ANN. § 14:32 (1997 & Supp. 2007); MONT. CODE ANN. § 45-5-104 (2005) (negligent homicide; § 45-2-101(42) defines "negligence" to include standard conceptions of both recklessness and negligence); OKLA. STAT. tit. 21, §716 (2002); VA. CODE ANN. § 18.2-36 (2004) (referring only to "involuntary manslaughter," but aggravating punishment for that offense in § 18.2-36.1(B) if conduct shows "reckless disregard for human life," indicating base offense requires something less). In Minnesota, one version of "manslaughter" refers to both "negligence" and consciousness of a risk, suggesting something closer to recklessness, except that the consciousness need not involve a risk of death specifically. *See* MINN. STAT. ANN. § 609.205(1) (West 2003) (causing death by "culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another").

Finally, four states have homicide provisions whose closest approximations to reckless homicide do not clearly fit into any of the above three categories. *See* MISS. CODE ANN. § 97-3-35 (2006) (defining manslaughter to cover killings "without malice, in the heat of passion, but in a cruel or unusual manner, or by use of a dangerous weapon"); NEB. REV. STAT. § 28-305 (1995 & Supp. 2005) (defining manslaughter to require an "unlawful act"), *id.* § 28-306 (defining offense of "motor vehicle homicide," satisfied by any death resulting from a violation of driving laws); NEV. REV. STAT. ANN. § 200.070 (LexisNexis 2006) (defining involuntary manslaughter to cover deaths resulting from commission of a "lawful act which probably might produce such a consequence in an unlawful manner"); N.M. STAT. ANN. § 30-2-3 (2004) (defining manslaughter as "the unlawful killing of a human being without malice," and defining involuntary manslaughter to include manslaughter resulting from the "commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection").

[the death] will result from [one's] conduct."[2] Nearly all codes also have a general provision prohibiting any "attempt" to commit an offense.[3] This article examines how, if at all, those two provisions relate to each other. Is there such an offense as "attempted reckless homicide" (which, to save space, I will call "ARH"), or should there be one? If not, why not? As it turns out, ARH proves to be a fairly tricky puzzle whose solution(s) can offer interesting insights into the nature and proper design of attempt law, and of criminal law as a whole.

Past treatments of the possibility of ARH have generally been, to put it charitably, unenthusiastic about the concept, ranging from a qualified and seemingly reluctant acknowledgment of its possibility to a clear and emphatic rejection of the very idea as absurd. In nearly all jurisdictions to consider the question, courts have held that no such offense exists.[4] The offense has been explicitly recognized, however, in one state: Colorado.[5] Commentators' views have been somewhat more

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2. MODEL PENAL CODE § 2.02(2)(c) (1985); *see also id.* cmt. 3 at 238–39 nn.18–19 (citing numerous state statutes and cases adopting this formulation of recklessness).

3. For a discussion of (and citations to) these provisions, see *infra* Part I.D.

4. *See, e.g.*, State v. Holbron, 904 P.2d 912, 920, 930 (Haw. 1995) ("Our research efforts have failed to discover a single jurisdiction that has recognized the possibility of attempted involuntary manslaughter. On the other hand, the cases holding that attempted involuntary manslaughter is a statutory impossibility are legion. . . . We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter.") (internal quotation marks omitted). *See also* State v. Almeda, 455 A.2d 1326 (Conn. 1983); State v. Jones, 21 P.3d 569, 571 (Kan. 2001); Bailey v. State, 688 P.2d 320 (Nev. 1984); State v. Kimbrough, 924 S.W.2d 888, 891 (Tenn. 1996) (rejecting ARH and citing cases in agreement from Alabama, Nebraska, Oregon, and Utah); State v. George, 527 N.W.2d 638, 642 (Neb. Ct. App. 1995); People v. Johnson, 59 Cal. Rptr. 2d 798, 801 (Cal. Ct. App. 1996). *Cf.* State v. Grant, 418 A.2d 154 (Me. 1980) (rejecting possibility of attempted fourth or fifth degree homicide, offenses requiring reckless or negligent mistake as to justification, and concluding defendant cannot intend to act recklessly or negligently); State v. Vigil, 842 P.2d 843, 848 (Utah 1992) (rejecting offense of attempted depraved-indifference homicide); State v. Hemmer, 531 N.W.2d 559, 564 (Neb. Ct. App. 1995) (refusing to recognize offense of "attempted reckless assault on a peace officer"; collecting cases from Alabama, Hawaii, Illinois, Indiana, Minnesota, New York, Oregon, Washington, and Wisconsin holding that *mens rea* of recklessness will not support attempt liability).

5. *See* People v. Thomas, 729 P.2d 972 (Colo. 1986) (recognizing offense of attempted reckless manslaughter and reinstating defendant's conviction for that offense); *see also* People v. Castro, 657 P.2d 932, 937–38 (Colo. 1983) (recognizing offense of attempted extreme-indifference murder); *cf.* People v. Meyer, 952 P.2d 774 (Colo. Ct. App. 1997) (refusing to recognize offense of attempted felony murder); People v. Eggert, 923 P.2d 230 (Colo. Ct. App. 1995) (refusing to recognize

mixed, though still often skeptical. Some have affirmatively argued that the offense should exist,[6] although their discussions have tended to focus either on the general scope of attempt liability or on a handful of specific hypothetical cases, and have generally failed to contemplate the ARH offense's

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offense of attempted criminally negligent homicide).

There is authority in Florida and Louisiana suggesting that in those states, attempt may not require intent as to any resulting harm an offense requires. That authority, however, often uses the term "intent" in a way that seems to implicate the common-law distinction, now obsolete under a proper reading of most modern codes, between "specific intent" and "general intent." *See* State v. Brady, 745 So. 2d 954, 957 (Fla. 1999) (citing Gentry v. State, 437 So. 2d 1097 (Fla. 1983), for claim that "attempted second-degree murder does not require proof of the specific intent to kill"); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) (recognizing offense of attempted third-degree murder); Gentry v. State, 437 So. 2d 1097 (Fla. 1983) (affirming conviction for attempt to commit "second-degree murder"—i.e., murder "perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual," *see* FLA. STAT. ANN. ch. 782.04(2) (2000)—based on conclusion that attempt requires only "general intent" if completed offense also requires only "general intent"); State v. Barnett, 521 So. 2d 663, 665 (La. Ct. App. 1988) (holding that offense of attempted cruelty to juveniles does not require specific intent as to causing "pain and suffering," but requires only "general criminal intent to mistreat or neglect"). In any case, it is clear that in Florida, at least, the offense of attempted involuntary manslaughter does not exist. *See* Taylor v. State, 444 So. 2d 931, 934 (Fla. 1983) (stating that only attempted voluntary manslaughter, and not attempted involuntary manslaughter, is recognized in Florida).

Interestingly, some foreign jurisdictions—including, at various times, Scotland, South Africa, West Germany, and some Canadian provinces—have recognized ARH or its equivalent. *See* Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 756 & n.120 (1988).

6. Indeed, some commentators take the even stronger position that there should be no distinction, ever, between attempt liability and liability for the completed offense. *See, e.g.*, Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363. To the extent these scholars believe acts reflecting recklessness as to causing death are sufficiently culpable to merit criminal liability (as they generally do appear to believe), they would not only support ARH but see no distinction between ARH and reckless homicide itself. *See, e.g.*, Kadish, *supra*, at 682 (giving example of Russian Roulette, essentially an ARH or depraved-indifference scenario, as case where extent of liability should not "depend on chance," i.e., on whether fired chamber happened to be loaded or not); Morse, *supra*, at 393–95 (dealing specifically with reckless creation of risks).

That position differs from this article's claims both because it is more general, applying to all attempt crimes rather than just ARH, and because my claims regarding the potential desirability of recognizing ARH do not also demand that ARH receive the same degree of liability as a completed reckless homicide. Obviously, however, a number of the arguments and principles those theorists advance would resonate with some of my claims in support of ARH.

contours or limits in any detail.[7] Others have been more equivocal[8] or have supported the offense on a narrower basis, as by noting that the offense would exist in a few specific situations, but explicitly limiting its reach to those situations.[9] Still others conclude, like the courts, that no such offense does or should exist.[10]

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7. *See, e.g.*, Donald Stuart, *Mens Rea, Negligence and Attempts*, 1968 CRIM. L. REV. 647, 662 ("If a pharmacist is grossly negligent in making up a prescription and the patient dies as a result of taking the dosage on the bottle[,] the pharmacist is clearly guilty of manslaughter. Surely the policy considerations which dictate such a conviction apply equally if, through chance, the negligent error is discovered before any damage is done. There seems to be every reason for a verdict of attempted manslaughter."); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 619 (2d ed. 1961).

Kimberly Kessler Ferzan, writing alone and with Larry Alexander, has supported recklessness as a proper minimum basis for inchoate liability. *See* Kimberly D. Kessler, Comment, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2226–34 (1994); *see also* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1176 (1997) ("[R]ecklessness should be required as the lowest mens rea for all elements of inchoate crimes regardless of the mens rea required in the completed crime. . . . For completed attempts, the mens rea with respect to each element should be exactly the same as the mens rea required for the completed crime."); *cf.* Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 649 n.173 (2001) (supporting attempt liability for case involving reckless firing of numerous gunshots in police station). Ferzan and Alexander also fall into the category of scholars, mentioned *supra* note 6, who oppose any distinction between attempts and completed crimes. *See* Alexander & Kessler, *supra*, at 1176–77 n.78; Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1 (1994); Kessler, Comment, *supra*. For further discussion of commentary addressing the application of attempt to crimes of recklessness, see *infra* Part I.A.

8. *See, e.g.*, WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.2(c)(2), at 502 (2d ed. 1986) (noting that "[i]t may well be that the purposes of the criminal law would be properly served by" imposing liability for reckless or negligent conduct despite absence of resulting harm, but stating "it might be questioned whether" liability should be imposed via "a redefinition of attempt law" rather than a distinct endangerment offense); Ashworth, *supra* note 5, at 756–57 (noting moral similarity of reckless acts regardless of whether or not result of death ensues, but also noting that "the practical consequence [of liability for 'reckless attempts'] would be to extend the scope of the criminal law considerably, which would in turn increase the powers of the police and the individual's liability to both lawful and unlawful police intervention"; also pointing out the alternative of defining endangerment offenses, but noting possible flaws of that approach as well); *cf.* Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1033 (1998) (advocating attempt liability based on showing of proposed new culpability level of "acceptance," which would be more expansive than knowledge requirement but "would not open the floodgates to attempt liability as recklessness does, for example, by potentially turning every endangering action into attempted manslaughter").

9. *See, e.g.*, R.A. DUFF, CRIMINAL ATTEMPTS 373 (Clarendon 1996). I discuss Duff's approach in more detail *infra* notes 70–74 and accompanying text.

10. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 419–20 (4th

This article explores the bases for the frequent legal and academic opposition to ARH. The aim here is to use the ARH issue as a narrow window through which to view the criminal law landscape more broadly. ARH is a useful focal point because it represents a particular anomaly within attempt law, which frequently *does* allow for liability where a person is reckless as to at least some offense elements, but not where the recklessness relates to a *result* required by the offense.[11] Homicide is the classic crime (and one of the few) to require a result,[12] and hence offers the most obvious avenue to explore the anomaly.[13]

The case against ARH is not as obviously correct or airtight as it may seem.[14] The conceptual arguments against ARH are mainly unpersuasive, or else *too* persuasive, in that their indictment, if taken seriously, points to difficulties that inhere in having *any* general rule for attempt liability. Further, despite the near-universal rejection of ARH in the courts, even the legal status of ARH under current statutes is more complicated than it may first appear. For example, although the Model Penal Code's commentary specifically states its in-

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ed. 2006) (arguing against attempted crimes of recklessness based on their failure to demonstrate the same likelihood of future dangerousness as attempted crimes of intent); Arnold N. Enker, *Mens Rea and Criminal Attempts,* 1977 AM. B. FOUND. RES. J. 845, 855–56; J.C. Smith, *Two Problems in Criminal Attempts,* 70 HARV. L. REV. 422, 429–34 (1957).

11. *See, e.g.*, MODEL PENAL CODE § 5.01 cmt. 2 at 301 (1985) (noting that attempt formulation would allow for recklessness as to circumstances, but not result). The Code recognizes three types of elements: conduct, circumstances, and results. *See id.* § 1.13(9). Only circumstance and result elements are generally relevant to recklessness; in fact, many codes do not even define recklessness as to conduct, on the ground that "while a person may recklessly take risks concerning present external facts [circumstances] or possible consequences [results] of his behavior, it does not make sense to speak of recklessness concerning the behavior itself." *Id.* § 2.02 cmt. 3 at 239.

12. *See* PAUL H. ROBINSON, CRIMINAL LAW § 3.1 at 150 (1997) ("A minority of offenses contain a result element. Homicide offenses, personal injury offenses, and property destruction offenses are examples of this minority of offenses; they require a resulting physical harm.").

13. The two other major categories of offense demanding a result are those involving personal injury rather than death (known variously as assault or battery) and those involving damage to property (sometimes known as "mischief" offenses). Most or all of this article's claims about ARH would also apply (though perhaps less forcefully) to attempts involving those crimes—at least, to the extent recklessness would suffice for the *completed* crimes, which is sometimes but not always the case for such offenses. For the sake of convenience and of focusing the discussion, I concentrate the analysis on ARH.

14. *See infra* Part I.

tention to reject ARH, its general explanation of the Code's attempt formulation defines a scheme that would actually allow ARH liability in a narrow set of cases.

Interestingly, although both codes and commentators blanch at the idea of an offense called "attempted reckless homicide," nobody seems to have a problem with criminalizing the same category of conduct that would comprise ARH—or an even broader category of conduct—by way of a separate offense: namely, the offense of reckless endangerment ("RE").[15] The Model Penal Code, for example, ultimately dodges the issue of whether its attempt provision covers crimes involving recklessness as to results by declaring the issue effectively moot because its RE offense covers the same ground anyway.[16]

Surprisingly, the literature contains barely any explanation or analysis of the nature and boundaries of the RE offense. The commentary that does exist offers no reason to think that RE lacks any of the flaws ARH would have. Indeed, the actual experience with RE in the states suggests that it shares any difficulties that would attend ARH, and may introduce new difficulties of its own.[17] Further, the states themselves seem frustrated with RE in that they frequently supplement the RE offense with other, more specific offenses covering particular forms of dangerous conduct.[18] These two reactions to RE—the apparent lack of outrage in the literature, and the apparent lack of satisfaction in the legislatures—might both be driven by the relatively low punishment ranges often available for the reckless-endangerment offense.[19] One might expect that very feature of RE, however, to attract some attention. Scholars might wonder why such a severe gap in punishment should exist between two situations (reckless homicide and RE) for which an actor's conduct and culpability are the same, and only the result varies. We might also ask why legislatures enact various specific endangerment offenses with heightened pun-

15. *See, e.g.*, MODEL PENAL CODE § 211.2 (1980); *see id.* cmt. 1 at 197 nn.14–15 (citing similar provisions adopted in state criminal codes).

16. *See* MODEL PENAL CODE § 5.01 cmt. 2 at 304 (1985) ("The approach of the Model Code is not to treat such behavior [i.e., conduct recklessly risking death] as an attempt. Instead the Code creates a separate crime, a misdemeanor, for recklessly placing another person in danger of death or serious bodily injury.").

17. *See infra* Part II.A.

18. *See infra* Part II.B.

19. *See infra* note 160 (comparing punishment grades available for RE with those that would exist for ARH, were it recognized).

ishment grades, rather than simply enhancing the penalties for the existing general RE offense.

Fundamentally, the ARH "problem" seems rooted in an underlying, and often unstated, vision of how to write criminal law. That vision strives to formulate legal rules that are few in number, but broad in reach and flexible in application. For example, instead of defining numerous offenses covering specific types of "inchoate" offenses—offenses where a criminalized harm is risked but does not occur—this model might endorse a single general provision prohibiting all "attempts" to commit an offense. The resulting criminal code would be spare and its provisions pliant, though it might also remain unable to do all the legal heavy lifting itself, as application of its expansive and potentially ambiguous terms in specific cases would demand analysis and interpretation by others (judges, juries, etc.). This model seeks to create what I will call a *thin* criminal code.

In striving for elegant brevity, a thin code might resort to language so broad as to be vague or unhelpful, or might try to make a single provision do too much. As indicated by the Model Penal Code's apparently unwitting adoption of a formulation that allows for ARH, it is a formidable task to craft a single attempt provision that properly maps onto the culpability and conduct requirements of all the various offenses with which it is combined. As with clothing, the effort to make one size fit all may lead to something that does not fit anyone especially well. And there may be some question as to whether the cloak of attempt was even meant to fit all offenses, or whether there were some (such as reckless homicide) it was not supposed to cover.

One might, then, prefer a code that prioritizes precision over concision, adopting many particular rules each of which pinpoints narrow forms of harmful conduct and takes pains to address only that conduct. Such a code may lack the elegance or flexibility of a thin code, whose provisions would likely be more adaptable to changing circumstances and creative new criminal methods,[20] but would have the virtue of offering clear notice as to which acts are prohibited.[21] Its specificity might

20. *Cf.* Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part,* 4 BUFF. CRIM. L. REV. 301, 312 (2000) ("The more specific we make offenses, the greater the likelihood of both 'gaps' and 'redundancy' in our criminal codes . . . .").

21. *Cf.* Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legis-*

also make for less ambiguous, hence more easily implemented, provisions.[22] This *thick* approach would yield a code that would be bulkier and less flexible, yet also more powerful (at least in terms of exercise of legislative power, as opposed to delegating to others interpretive power over broader, more open-ended terms).

The perceived problems with ARH seem to inhere in adopting the thin model, and its perceived solution—adopting one or more endangerment offenses—seems to use thick-code tactics to deal with a thin-code shortcoming. Yet if the thick model works better for ARH, we might ask why it would not work better across the board: why not simply abandon altogether the notoriously difficult project of trying to define a single attempt provision?[23]

This choice between pursuing a thin code or a thick one may seem purely formal, but has significant practical and political implications. The design of criminal law rules directly affects the balance of power between the various institutional players in the criminal justice system: the legislature, the police, prosecutors, judges, and juries. The criminal law literature, however, is itself shockingly thin when it comes to principled analysis or guidance regarding the proper method, thin or thick, for translating abstract intuitions about what to punish into particular rules or offenses, either generally or for specific issues.[24]

Whatever the relative merits of being consistently thin or thick, or of a principled and intentional blending of thin and

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lation, 1 BUFF. CRIM. L. REV. 599, 623 (1998).

22. *See* Green, *supra* note 20 ("The more specific we are in identifying and classifying criminal offenses, the more information such classifications give us. . . . Narrower offense definitions may also ease the task of the jury.").

23. *See* DUFF, *supra* note 9, at ix ("Some believe that theorists pay altogether too much attention to the law of criminal attempts: '[t]he literature on attempt', remarks Gordon, 'is so extensive as to be excessive.'") (quoting G.H. GORDON, THE CRIMINAL LAW OF SCOTLAND 163 (2d ed. 1978)).

24. The literature that does discuss methodological questions about how to craft, or draft, criminal law rules or doctrine includes John Gardner, *On the General Part of the Criminal Law*, *in* PHILOSOPHY AND THE CRIMINAL LAW 205 (Antony Duff ed., 1998); Green, *supra* note 20; Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297 (1998); Alan C. Michaels, *"Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism*, 100 COLUM. L. REV. 54 (2000); Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQ. L. 283 (2002). *See also infra* Part II.C (discussing work of George Fletcher and Paul Robinson, among others).

thick, any of these approaches is preferable to a code that mixes thin and thick aspects indiscriminately, as most contemporary codes unfortunately do. Adding specific provisions that expand on, or overlap with, more general provisions creates at least three problems. First, multiple overlapping offenses tend to create not only redundancies, but inconsistencies, making the rules internally incoherent—presumably an inherently bad state of affairs, but also instrumentally bad to the extent such internal contradictions bring the law into disrepute among the governed community.[25] A second problem, related to the first, is that where prosecution is possible under both a general attempt provision and a more specific inchoate offense provision, it will be unclear whether to allow liability for either or both offenses. Third, the presence of both types of provisions will create the possibility of applying the general attempt provision to the specific inchoate offenses themselves, raising the specter of "attempted reckless endangerment" or the like. Though some have endorsed at least the theoretical possibility of that particular offense,[26] the general question of whether and when one may attempt a crime that is itself inchoate will produce difficult questions of statutory interpretation and greatly increase the risk that criminal liability might attach to conduct increasingly remote from any actual harm of concern to the criminal law.

To summarize, this article seeks to offer three contributions. The first, developed in Part I, relates specifically to the law of attempts: there seems to be no good reason to reject the application of attempt law to crimes involving recklessness as to a result, such as reckless homicide. Second, in Parts II.A and II.B, the article highlights endangerment offenses, and specifically the RE offense, as a neglected subject ripe for (and in need of) further exploration and clarification. Third, and

25. For a discussion of the significance of the criminal justice system's reputation to its deterrent efficacy, see PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 21–23, 128, 138–39, 183–85 (2005).

26. *See* PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 161–64 (1998); Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay,* 81 J. CRIM. L. & CRIMINOLOGY 447, 484 n.119 (1990) ("[I]nsofar as reckless endangerment requires creation of risk, it might itself be considered a result crime. In theory then, a person might potentially be liable for attempted reckless endangerment. However, such attempt liability would probably require a belief that one is creating, or has purpose to create, the risk.").

most important, Parts II.C and II.D describe how the various efforts to respond to the ARH situation implicate a more general, and largely unexplored, set of questions about how best to translate criminal theory into criminal law.

I. THE PROBLEMS WITH ATTEMPTED RECKLESS HOMICIDE'S "PROBLEMS"

This Part surveys the objections ARH has faced and assesses their merits. As a preliminary matter, it may be useful to offer some examples of the conduct an ARH offense would address, which may help illuminate its possible uses and problems.

A person plants a bomb in a building, or sets it on fire, while reckless as to whether the building is occupied (or to be more precise, while reckless as to whether the explosion or fire will kill someone). If the building is occupied, and someone dies as a result of the person's action, the bomber or arsonist is guilty of reckless homicide. Indeed, in many jurisdictions, he would be guilty of murder, if (as seems likely) the recklessness is found to reflect "extreme indifference to the value of human life."[27] But even if the jurisdiction does not recognize "depraved indifference" (or it is not provable in a specific case), where a person recklessly creates a substantial risk of death—by setting off a bomb, committing arson, firing a gun into a crowded room or as a drive-by shooter, driving recklessly (or, in many places, drunk)—and death ensues, the person will be liable for reckless homicide.

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27. MODEL PENAL CODE § 210.2(1)(b) (1980); *see also id.* cmt. 4 at 26 & nn.57–61 (citing state statutes defining some version of murder based on recklessness).

In this case, the bomber would also be liable for murder under a different theory, if the jurisdiction has adopted (as nearly all have) some version of the *felony-murder* rule imposing murder liability for deaths resulting from a felony, either regardless of culpability or demanding only a reduced showing of culpability. *See* Guyora Binder, *The Origins of American Felony Murder Rules,* 57 STAN. L. REV. 59 (2004) (discussing history of felony murder rules); David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine,* 8 HARV. J.L. & PUB. POL'Y 359, 360 nn.4–5 (1985) (stating that four states—Hawaii, Kentucky, New Hampshire, and Ohio—have repealed the felony murder rule by statute, and one, Michigan, has judicially abrogated the common law rule); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at a Constitutional Crossroads,* 70 CORNELL L. REV. 446, 446 n.6 (1985) (stating that "[o]nly three states no longer use the felony-murder rule": Hawaii, Kentucky, and Michigan); Helyna M. Hauser, *Recent Decisions,* 60 MD. L. REV. 909, 912–13 nn.25 & 33 (2001) (collecting statutes).

Yet if the building is unoccupied, or if the bomb does not detonate—or if the building is occupied and the bomb does detonate, but no occupant is killed (even though one or more may be seriously injured, or saved only by heroic measures)—the bomber is probably guilty of no offense reflecting his lack of concern for human life.[28] He may be guilty of arson or property damage, but those focus on other harms.[29] The fact that nobody died marks the difference between homicide liability and no liability for risking another's death, even though someone may have come infinitesimally close to death, and even though the lack of a death is completely fortuitous so far as the bomber's conduct is concerned.[30]

This dichotomy between the death and no-death scenarios would not exist, of course, if the bomber had a higher level of culpability as to death. If he intended to kill someone with the bomb, he would clearly be guilty of attempted murder even if the bomb did not go off, the building was in fact unoccupied, or for any other reason, nobody was killed. Indeed, under the Model Penal Code formulation, followed by six states,[31] not only intent to kill but "knowledge" (meaning belief) that one will cause a death would suffice to ground attempted-murder liability.[32] In other words, if the bomber is "practically cer-

28. The bomber may be liable for reckless endangerment, an ARH substitute which I discuss *infra* Part II.A.

29. In some places, higher degrees of arson are defined to explicitly incorporate risks to human life or actual resulting injury—perhaps because there is no ARH or similar offense to capture that aspect of the offender's wrongful behavior. *See, e.g.*, N.Y. PENAL LAW § 150.15–.20 (McKinney 2004 & Supp. 2007). But this is not a good thing. *See infra* Part II.C.

30. In fact, the Model Penal Code commentary recognizes and criticizes this anomaly in the context of defending its reckless-endangerment offense. *See* MODEL PENAL CODE § 211.2 cmt. 2 at 200 (1980) ("Varying the degree of liability according to the harm actually caused may amount to grading by fortuity. The person who pursues a course of action despite conscious recognition of a substantial and unjustifiable risk to another is both dangerous and blameworthy. Whether death of another actually results from his conduct, however, may depend on factors entirely unrelated to either of these concerns. . . . [Various other] factors may control the outcome, but none bear any dependable relation to the dangerousness of the actor's conduct or his blameworthiness in disregarding a risk to human life.").

31. *See infra* note 103.

32. *See* MODEL PENAL CODE § 5.01(1)(b) (1985) (allowing liability for completed attempts where offender has either purpose or "belief that [her conduct] will cause [the prohibited] result"); *id.* cmt. 2 at 305 ("If, for example, the actor's purpose were to demolish a building and, knowing that persons were in the building and that they would be killed by the explosion, he nevertheless detonated a bomb that turned out to be defective, he could be prosecuted for attempted murder

tain"[33] that the building is occupied, he may be liable for attempted murder; yet if he "consciously disregards a substantial and unjustifiable risk" of death—that is, if he is reckless—there will be no liability for attempted homicide.[34] Having such a strict dichotomy here is odd, for the line between certainty and awareness of a substantial probability is a slippery one,[35] much more so than, say, the line between recklessness and negligence, which marks a significant moral distinction between the presence and absence of actual subjective awareness of a risk.[36] Even so, although actual culpability in this context exists along a continuum, the criminal law's rules are binary: attempted murder liability for certainty, no attempt liability (even for a lesser homicide offense) for anything short of that.

Of course, ARH presents the strongest case for attempt liability grounded in recklessness, for although recklessness is a lower form of culpability than that usually required, in the ARH case it is culpability as to the gravest harm the criminal law contemplates: the taking of human life. One can easily develop both moral and practical grounds for taking such culpable disregard seriously and bringing it within the criminal law's reach even where the risk of death does not come to fruition.[37] Indeed, preventing the creation of serious and blameworthy risks of human death not only seems suitable for crimi-

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even though it was no part of his purpose that the inhabitants of the building would be killed.").

33. MODEL PENAL CODE § 2.02(2)(b)(ii) (1985).

34. *See supra* notes 4–5 (detailing near-universal rejection of ARH in American jurisdictions, with exception of Colorado); *cf. infra* Part I.D (discussing legal status of ARH under proper reading of existing attempt statutes).

35. *Cf.* Ferzan, *supra* note 7, at 621 n.82 ("The only difference between knowledge and recklessness is the degree of certainty the agent has."); Michaels, *supra* note 8, at 969–70 (setting out hypothetical suggesting moral arbitrariness of distinguishing knowledge from recklessness).

36. *Cf.* DUFF, *supra* note 9, at 147–51 (noting relevance to culpability of personal choice based on subjective beliefs, which is not present for negligent acts).

37. *See, e.g.*, Morse, *supra* note 6, at 394 ("Whether [a] risked outcome occurs should not matter . . . because this fortuity cannot guide the agent's conduct and has no relevance to desert. . . . In the case of homicide, for example, this analysis suggests that criminal liability for homicidal behavior should be based on pure death-endangerment."); *cf.* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 422–23 (1991) ("It is certainly arguable that the reach of the inchoate offenses should increase with the seriousness of the harm—meaning, for example, that the law should stretch further against crimes of violence than against mere property offenses. Surveys of English law suggest that there is no such scheme, and that inchoate offenses (and, more particularly, substantive offenses in the inchoate mode) have simply been increased on an *ad hoc* basis.").

nal law, but should probably merit law enforcement priority relative to other situations.[38] As Stephen Morse has pointed out, simply focusing attention on such risks may help set law-enforcement priorities about what forms of dangerous behavior merit more or less concern:

> Treating risk creation as criminal without regard to results would have the virtue of forcing the law to determine the degree to which certain commonly risky activities, such as driving while intoxicated, are in fact sufficiently death-endangering per se to warrant the heavy penalties associated with homicide liability.[39]

Devoting resources to deterring and punishing culpably created risks of death seems at least as worthwhile as devoting them to some existing crimes, such as intentional attempts to bring about a lesser harm (say, purposeful attempts to shoplift), or even completed offenses whose gravamen is considerably less serious than the death of a person (say, recklessly misrepresenting a fact on a government form).[40]

ARH, then, might close an existing gap, or at least remove an existing anomaly: it would enable liability for conduct that risks, but does not cause, death where (a) reckless-homicide liability would lie if the death did result, and (b) attempted-murder liability would lie if the person performed the same conduct but had higher culpability as to causing death. Rejecting ARH seems anomalous for at least two reasons: (a) the law would be giving *total* significance (as between total homicide liability and no liability) to the fortuity of whether a given re-

38. *See* Morse, *supra* note 6, at 394 ("In terms of desert and danger, the sufficiently careless driver who luckily does not kill is indistinguishable from the similarly careless driver who unluckily does. I assume, further, that we wish maximally to deter the kind of gravely death-endangering conduct that is a predicate for vehicular homicide liability, especially if the risk would justify a conviction for murder. This proposal would surely lead to much more careful operation of motor vehicles, and thus to less carnage from automobile accidents—which cause many more deaths than nonvehicular criminal homicides.").

39. *Id.* at 395.

40. For this reason, I find unpersuasive the pragmatic arguments made by Dressler and Enker, *see supra* note 10. Perhaps one who attempts murder is more dangerous than (and thus deserves more punishment than, or law enforcement priority relative to) one who commits ARH—and the grading of ARH relative to attempted murder would and should reflect that—but the person committing ARH still seems more dangerous than various people who intentionally attempt crimes of less gravity.

sult occurs, which the criminal law does not typically do; and (b) the law would be drawing a sharp distinction between knowledge and recklessness, which might seem to demand further explanation given the lack of a sharp distinction between those two mental states in the abstract.[41]

ARH might also apply in at least three other, more particular situations than the basic scenario described above. First, ARH may come in handy as a practical matter based on diffi-

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41. Rejecting ARH may also create a third anomaly as well. Although not entirely clear, the doctrinal formulations of some jurisdictions suggest the possibility of liability for a *conspiracy* to commit reckless homicide. (To give an example, a handful of gang members who agree to go on a drive-by shooting spree might constitute such a conspiracy.) Under the widely followed Model Penal Code formulation, conspiracy differs from attempt in that it does not explicitly require purpose, or intent, as to any result required by the target offense. Instead, the formulation requires "the purpose of promoting or facilitating" the target offense, and an agreement to "engage in conduct that constitutes such crime." MODEL PENAL CODE § 5.03(1) (1985). Even though, during the drive-by itself, the gang members may only be reckless as to whether any particular act will kill any particular person, the agreement to engage in the drive-by is done for the sake of promoting or facilitating the offense—the danger and threat of causing death are exactly the point.

Eight states have conspiracy provisions even more amenable to such a broad reading of the scope of conspiracy relative to attempt, as they do not explicitly require any culpability at all for conspiracy. *See* FLA STAT. ANN. ch. 777.04(3) (West 2005); GA. CODE ANN. § 16-4-8 (2004); KAN. STAT. ANN. § 21-3302(a) (1995 & Supp. 2005); MINN. STAT. ANN. § 609.175(2) (West 2003); N.D. CENT. CODE § 12.1-06-04(1) (1997); OKLA. STAT. tit. 21, § 421(A) (2002); S.D. CODIFIED LAWS § 22-3-8 (2006); VA. CODE ANN. § 18.2-22(a) (2004).

Allowing one form of inchoate liability as to an offense while denying the possibility of other forms seems unusual, if not inconsistent, particularly since conspiracy has the potential to reach even more preliminary conduct toward an offense than attempt does. Any "overt act" toward an offense will generally suffice to ground conspiracy liability, *see, e.g.*, MODEL PENAL CODE § 5.03(5) (1985), whereas attempt liability requires something further along the spectrum from "mere preparation" to completion—a "substantial step," or "dangerous proximity," or some other such rule. *See infra* Part I.B.

The Model Penal Code commentary, however, rejects any suggestion that the language of the Code's conspiracy provision might allow liability based on recklessness as to a result. *See* MODEL PENAL CODE § 5.03 cmt. 2(c)(i) at 408 (1985) ("[W]hen recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, as for example when homicide through negligence is made criminal, there could not be a conspiracy to commit that crime.").

Also, Colorado—the one state to recognize ARH—has rejected the possibility of conspiracy to commit reckless homicide, as Colorado's conspiracy statute requires intent to commit the crime. *See* Palmer v. People, 964 P.2d 524, 525 (Colo. 1998) ("Our earlier cases recognizing the crimes of attempted reckless manslaughter . . . are inapposite. Attempt does not require the specific intent to achieve a criminal result. . . ."); *see also* COLO. REV. STAT. § 18-2-201 (2006) (defining conspiracy offense).

culties of proof with respect to an offender's culpability. In some situations where an offender engages in clearly dangerous behavior, it may nonetheless be difficult to prove that the person was acting with an intent to cause (or knowing he would cause) any particular harm, such as death. In that case, recklessness might be easier to prove and ARH liability thus might enable an otherwise impossible conviction for a person whose conduct evinces a manifest disregard for the lives of others.

Second, ARH might also apply in situations involving intoxicated offenders.[42] Many schemes effectively impute recklessness to a voluntarily intoxicated actor,[43] whose condition might create such impairment as to make her unaware of her own conduct or its context or likely results, preventing the formation of the "conscious awareness" otherwise needed for recklessness, and possibly eliminating the level of conscious volition required for higher levels of culpability as well. That being the case, an intoxicated person engaging in clearly violent but only questionably "willed" behavior might not be subject to attempted-murder liability, but the imputation rule could support ARH liability, if such an offense were recognized. This would enable criminal liability for such an actor while recognizing a difference between truly willed, intentional acts and those brought on by intoxication.[44]

Third, ARH might apply in situations involving omissions as well as actions. Little attention has been paid to the question of attempt liability based on an omission, though many attempt provisions are written to make such liability available where one has the requisite culpability and satisfies any other

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42. This potential application might not strike everyone as an argument in ARH's favor, for one might take issue with the application of liability to intoxicated offenders in these cases. Such opposition, however, would reflect a more general disapproval of the imputation rule for intoxication, rather than a reason to reject ARH liability itself. *Cf. infra* Part I.C (making similar point about opposition to "attempted felony murder"). I take no position here as to the desirability of the imputation rule as a general matter. If the rule is legitimate, however, ARH facilitates its application to a range of relatively dangerous, violent behavior—precisely the kind of situations, I would think, where the case for applying such a rule is strongest.

43. *See* MODEL PENAL CODE § 2.08(2) (1985) (intoxication causing failure to recognize risk immaterial if sober person would have recognized risk); *id.* cmt. 2 at 360–61 n.29 (citing jurisdictions adopting some variant of this position).

44. *Cf.* State v. Weaver, 643 N.E.2d 342 (Ind. 1994) (LSD-influenced teenager, while suffering from hallucinations, violently attacks girlfriend, causing serious injury; court concludes—questionably, given facts—that defendant had sufficient intent to support attempted murder liability).

requirements of omission liability: typically, being subject to a legal duty to act.[45] Where a person neglects to perform a legal duty and thereby recklessly risks but does not in fact cause another person's death, ARH liability, if possible, would be appropriate.[46]

It seems at least possible that ARH liability might make some sense, even if only for a limited set of situations. Why, then, does it meet with such consistent hostility? The balance of this Part explores the arguments against ARH. The case against ARH proceeds on two levels: conceptual/normative and legal/descriptive. Parts I.A–I.C explore, and find unpersuasive, three general theoretical objections to ARH: first, that ARH is inconsistent with the notion of an "attempt," which must involve some intent to bring about the relevant conduct; second, that implementing ARH would present conceptual and practical problems based on the difficulty of figuring out what conduct would suffice to ground ARH liability; and third, that recognizing ARH would demand recognition of other, unwanted crimes, specifically attempted felony murder.

The legal objection maintains that ARH is not possible simply because current statutory formulations do not allow for it. Part I.D examines this claim and finds that, although only one state has recognized ARH, a number of other states also have attempt provisions that are either ambiguous regarding ARH or seem affirmatively to support its recognition.

A. Culpability-Related Objections: The Intention Intuition

Two general sets of critiques have been lodged against the notion of allowing attempt liability for offenses requiring only recklessness. The first, discussed in this section, asserts that recklessness is a level of culpability simply incompatible with the idea of an attempt. The basic claim is that it makes no intuitive sense (or perhaps that it makes no sense at all) to speak of "attempting" to cause a result when one is merely reckless as to that result's occurrence.[47] Although it makes sense to speak

45. *See, e.g.*, MODEL PENAL CODE § 5.01(1)(c) (1985) (attempt committed if one "purposely does or omits to do anything that . . . is an act or omission constituting a substantial step" toward the crime).

46. *Cf.* Billingslea v. State, 734 S.W.2d 422 (Tex. Crim. App. 1987) (adult man's severe neglect of 94 year-old mother, with whom he lived, led to serious injuries and ultimately death).

47. *See* Smith, *supra* note 10, at 434 ("The conception of attempt seems neces-

of attempted murder, where one person purposefully tries to kill another and fails, the concept of an "attempt" does not seem to fit where one has no actual desire to accomplish the result "attempted," but merely recognizes that result as a possible peripheral consequence of one's actions. I describe this view as reflecting an *intention intuition* with respect to the meaning of criminal attempt.

Indeed, once upon a time, criminal punishment for attempted offenses was generally limited to such intuitively appropriate situations: a person wants to commit a crime, and tries to, but fails, or is caught in the act. Only the apparent fortuity[48] of the non-occurrence of the offense's prohibited harm separates the assassin from the would-be assassin who shoots, but misses. One may argue (and many do[49]) that the would-be assassin deserves less punishment than the successful one, but few would claim that his behavior should fall altogether outside the reach of the criminal law.

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sarily to involve the notion of an intended consequence. . . . When a man attempts to do something he is 'endeavoring' or 'trying' to do it. All these ways of describing an attempt seem to require a desired, or at least an intended, consequence. Recklessness . . . [is] incompatible with desire or intention. Where, therefore, in a crime which by definition may be committed recklessly . . . but not intentionally [and] the recklessness . . . relates not to a pure circumstance but to a consequence, it is impossible to conceive of an attempt. Thus there can be no attempt to commit involuntary manslaughter."); *see also* Law Commission, *Report No. 102, Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement,* 102 GREAT BRITAIN LAW COMM'N REP. 1, 12 (1980) ("[I]mplicit in attempt is the 'decision to bring about, in so far as it lies within the accused's power, the commission of the offence.'") (quoting *Regina v. Mohan,* Q.B. 1, 11 (1976)); *cf.* DRESSLER, *supra* note 10, at 419 (noting that attempt's requirement of intent makes etymological sense, as "[t]he word attempt means 'to try,'" but pointing out that "[t]his basis for the common law intent requirement, however, cannot take us very far"); DUFF, *supra* note 9, at 30–31 (like Dressler, noting but questioning superficial appeal of relying on ordinary meaning of "attempt" as involving intent).

48. Whether the absence of resulting harm is truly a mere "fortuity," or whether it should have some moral and legal significance, is a matter of considerable dispute. For support of the position that resulting harm should not matter, see sources cited *supra* note 6; *see also, e.g.,* Ashworth, *supra* note 5, at 738–44, 770 (favoring "intent-based" view of attempt over "harm-based" conception, as a "rational system for judging human behaviour should pay attention to choice, not chance"). For support of the position that results do matter, see, for example, DUFF, *supra* note 9, at 334–47, 351–54; GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 6.6.5, at 482–83 (1978); Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One,* 88 CALIF. L. REV. 791 (2000); Michael S. Moore, *The Independent Moral Significance of Wrongdoing,* 5 J. CONTEMP. LEGAL ISSUES 237 (1994).

49. *See, e.g.,* FLETCHER, *supra* note 48; Katz, *supra* note 48; Moore, *supra* note 48.

For some time, however, observers have thought that this basis for attempt, if legitimate, is subject to no limiting principle explaining why attempt should cover only crimes involving intent.[50] To the extent one adopts such a *subjectivist* understanding of the purpose of attempt—believing that punishment for attempt is justified by the subjective culpability of the actor, rather than his acts or any objective risk they create[51]—one should be prepared to punish, on that ground, any level of culpability recognized as sufficient to warrant criminal sanction. (Of course, lower culpability would merit less punishment, but there would be no obvious reason to categorically refuse to allow any punishment at all.) Accordingly, some have sought to relax attempt's culpability rules, asserting that attempt should apply to offenses other than those that require intent to commit the intended crime.[52]

Actually, the main contemporary debate in this area among criminal law theorists is about whether culpability should be enough to support *full* liability even without harm, rather than just reduced liability. Many theorists maintain that the happenstance of whether an offender's culpable actions cause a resulting harm should not bear on that offender's criminal liability.[53] For some reason, though, even these theo-

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50. *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 66 (1881) ("It may be true that in the region of attempts, as elsewhere, the law began with cases of actual intent, as those cases are the most obvious ones. But it cannot stop with them, unless it attaches more importance to the etymological meaning of the word *attempt* than to the general principles of punishment. Accordingly there is at least color of authority for the proposition that an act is punishable as an attempt, if, supposing it to have produced its natural and probable effect, it would have amounted to a substantive crime.").

51. *See* FLETCHER, *supra* note 48, at 166–67 ("[T]he general thrust of Western legal theory has favored the rise of subjective criminality . . . in the law of attempts. . . . Since the late nineteenth century, the principle of subjective criminality has been almost unceasingly ascendant.").

52. *See* sources cited *supra* notes 6–7. *But cf.* R.A. Duff, *Criminalizing Endangerment, in* DEFINING CRIMES 43, 58 (R.A. Duff & Stuart P. Green eds., 2005) ("[W]hilst a failed attack is structured by the harm it is intended to do, a luckily harmless act of endangerment is further removed from the harm that it might have caused, but did not cause; the former is still intrinsically or essentially harmful, whilst the latter is only potentially harmful.").

53. *See* Ferzan, *supra* note 7, at 601 n.14 (citing various theorists, including herself, who take this position); Ashworth, *supra* note 5. For one classic articulation of this position, see Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law,* 122 U. PA. L. REV. 1497 (1974). *But cf.* David Enoch & Andrei Marmor, *The Case Against Moral Luck,* 26 LAW & PHIL. 405, 412–17 (2007) (noting that even if cases with and without resulting harm are equivalent in terms of moral blame, other considerations

rists tend to ignore the application of their position to situations involving recklessness.[54] In the recklessness situation as in others, culpability without harm may (or may not) support reduction in punishment, but merits at least *some* punishment.

It is, in fact, particularly odd to make liability depend entirely on resulting harm in the context of reckless behavior, because recklessness covers a wide variety of culpable disregard, namely, disregard of any risk that is "substantial" but less than "practically certain" (i.e., less than the culpable mental state of "knowing").[55] As to a risk of death, perhaps even a fairly low probability (say, 10%) would be "substantial," but a very high probability (say, 80–90%) would still be needed to show "practical certainty." Accordingly, without ARH, a person who recklessly creates a 20% chance of death and does kill someone will be punished, but one who creates a 75% chance of death but does not kill someone will receive no punishment. In other words, one form of conduct may be objectively more dangerous, and morally worse, than another in terms of the *ex ante* risk that the actor actually created and disregarded, but the criminal law will distinguish the two based solely on the *ex post* result, which the actor could not control.

The general idea of allowing attempt liability to reach beyond intent has much appeal, for expansion of the culpability requirement can help eliminate certain inconsistencies be-

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may justify differential legal responses based on presence or absence of harm).

The Model Penal Code itself expresses skepticism about the significance of resulting harm, questioning the basis for altering liability based on whether harm occurs, but ultimately acceding to the widespread (however conceptually dubious) legal practice of having results matter to liability. *See, e.g.*, MODEL PENAL CODE § 211.2 cmt. 2 at 200–02 (1980) ("Despite the familiarity of this emphasis on results in the law of homicide and personal injury, its logic is not unassailable. . . . Perhaps more persuasive [in explaining that emphasis] are arguments drawn from practice rather than from theory. . . . This uniformity of practice [in punishing completed homicide more than attempt] probably reflects much more than the momentum of prior law. It may also evidence a widely spread and deeply rooted conviction by the public at large that homicide is simply different from risk creation not resulting in death. While a rationalist may find the reasons for this attitude less than compelling, its existence can hardly be doubted.").

54. *See* Ferzan, *supra* note 7, at 601 ("While many theorists advance th[e] argument [that results are irrelevant] in the context of attempts and completed crimes, few focus on the result that his argument would have for reckless actors. That is, such a theory commits one to holding that the reckless driver who does not kill someone should be held as responsible as the reckless driver whose conduct results in death.").

55. MODEL PENAL CODE § 2.02(2)(b) (1985); *see also id.* cmt. 1 at 233 n.4 (citing jurisdictions adopting culpability definitions based on the Code).

tween completed and attempted crimes. For example, when attempt is limited to the old requirement of "specific intent" rather than tracking the culpability requirements of the target offense, a person whose liability would be mitigated from murder to manslaughter for killing someone in a fit of rage might be unable to receive the same mitigation where he tries, but fails, to kill the person. In such a case, a "failed manslaughter" gives rise to liability for attempted murder—which may be a more serious offense than a *completed* manslaughter, meaning that the offender receives less punishment when he manages to kill his victim (thus obtaining the mitigation) than when he does not.[56] The culpability requirement for attempt, in short, *enhances* liability here by making the mitigation impossible. Perhaps the more obvious problems with the specific-intent view work in the other direction, to foreclose any liability for an attempt even where liability clearly would be allowed for the crime if completed, as where the foiled statutory rapist is acquitted of attempt because he did not "intend" his victim to be underage.[57]

Yet although the modern view has sought to reject the earlier view of attempt as a "specific intent" crime, most current formulations show some lingering attachment to the intention intuition. As a result, they have a difficult time figuring out and expressing exactly when and how to relax the culpability rules and let something less than intent suffice for liability.[58] For example, the Model Penal Code's attempt provision retains,

56. Such is the situation in Illinois. *See, e.g.*, People v. Lopez, 655 N.E.2d 864, 867 (Ill. 1995) ("[T]he intent required for attempted second degree murder [Illinois's version of voluntary manslaughter], if it existed, would be the intent to kill without lawful justification, plus the intent to have a mitigating circumstance present. However, one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force."); People v. Reagan, 457 N.E.2d 1260 (Ill. 1983).

Cases that would otherwise be treated as attempted second-degree murder (the equivalent of attempted voluntary manslaughter) are thus treated as attempted first-degree murder, an offense which is graded more seriously than a *completed* second-degree murder. *See* 720 ILL. COMP. STAT. ANN. 5/8-4(c)(1) (West 2002) (attempted first-degree murder; Class X felony subject to further aggravation); *id.* 5/9-2 (second-degree murder; Class 1 felony).

57. *See* MODEL PENAL CODE § 5.01 cmt. 2 at 301–02 (1985) (discussing this example and explaining how the Code's formulation, which does not demand purpose as to circumstances, avoids this result).

58. Part I.D *infra* considers in depth the various formulations of attempt that American criminal codes (including the Model Penal Code) actually adopt, and the relation of those formulations to the ARH question.

for incomplete attempts,[59] a requirement of intent (or "purpose," in the Code's language) as to any required result, even where the completed crime requires something less than intent.[60] Such a formulation excludes even attempts where the actor *knows* the prohibited result will occur—although it is not his "purpose" or "intent" to cause that result—and where such knowledge would be sufficient to ground liability for the completed offense if the result actually occurred, or even, under a separate part of the Code's provision, if the attempt had been completed but was still unsuccessful.[61] An example highlights the problem:

> Assume an actor places a bomb in a military services draft board knowing it will kill the persons therein. He does not want to kill such persons, his object is only to destroy the building, but he knows that when he pushes the detonator the people are practically certain to be killed. If he is caught by police after the explosion causes deaths, he is liable for murder [because the murder offense requires only knowledge as to causing death]. If he is caught just before he presses the detonator, he is not liable for attempted murder. . . . He may be liable for other offences but escapes liability for attempted murder because it is not his *conscious object* to cause death.[62]

Even for crimes requiring only recklessness, rather than knowledge, attempt liability may sometimes be appropriate. For example, the person stopped just before dumping toxic

59. By "incomplete" attempt, I mean one for which the offender has not yet performed all of the conduct that would, if successful, constitute the target offense. *Cf.* MODEL PENAL CODE § 5.01(1)(b) (1985) (defining specific rule for attempts where actor has performed all conduct necessary to cause prohibited result, i.e., completed attempts). A classic completed attempt is the shoot-and-miss scenario, where no further act is need beyond firing the shot; the attempt fails only because of the inaccuracy of the shot. An incomplete attempt would be one where the shot has not yet been fired, but the actor has done enough to be liable for an attempt—say, buying the gun, loading it, pursuing the victim, aiming and preparing to fire.

60. *See* MODEL PENAL CODE § 5.01 cmt. 2 at 301–05 (1985) (explaining that the Code retains a requirement of purpose as to all elements for attempt, with two exceptions: as to circumstance elements, the culpability requirement of the target offense governs; and where the attempt is complete, i.e., all conduct has been performed, "belief" as to result will suffice).

61. *See* MODEL PENAL CODE § 5.01(1)(b) (1985) (allowing "belief" to suffice for completed attempts).

62. PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 159 (1998).

waste in a river, upstream from the town swimming hole, should be guilty of attempted reckless endangerment.[63] We might similarly envision cases where ARH liability might be appropriate; I have discussed a few earlier.[64]

The Model Penal Code's attempt provision therefore draws two significant lines, at least as to offenses involving some required result. First, it draws a line between incomplete attempts, for which the Code demands purpose as to any required result, and complete attempts, for which "knowledge" as to a result suffices. Second, within the world of complete attempts, it draws a line between "knowledge" as to a result, which may ground liability, and recklessness, which may not. Holding aside the validity of drawing the first of these lines, which at least facially has the virtue of specifying a fairly clear subset of attempts for which the culpability requirement is relaxed, the second line appears arbitrary. Especially in the homicide context (to single out the most prominent category of offenses having any result element), there is not always a lot of moral difference between knowledge and recklessness. True, a person who acts with recklessness only has a sense that the result might happen, rather than "knowing" that it will happen; but that is often because he doesn't especially care whether the result happens, and thus can't be bothered to find out or figure out how likely it is to occur. The person recognizes a significant risk to human life, but is interested in performing a certain act, or achieving some other result, regardless of that risk.

Significantly, the law of homicide, if not the law of attempt, recognizes the way in which recklessness shades toward having the moral gravity of knowledge or even intent. Most jurisdictions define a form of murder based on recklessness indicating an "extreme indifference to the value of human life,"[65] or some equivalent formulation.[66] In defining the completed crime, then, the law recognizes the moral equivalence of at least some reckless killings with knowing or intentional killings.[67] The law of attempt, however, undermines rather than

63. *See id.* at 161.

64. *See supra* note 27 and accompanying text.

65. MODEL PENAL CODE § 210.2(1)(b) (1980).

66. *See id.* cmt. 4 at 22 n.38 (citing twenty-three states recognizing some form of "depraved heart" murder prior to drafting of Code); *id.* at 26–27 (citing nineteen codes and six proposed codes, some from states appearing on earlier list, that adopt some version of reckless murder, and sixteen codes that do not).

67. *Cf.* R.A. Duff, *Criminalizing Endangerment: A Response to Marcelo Fer-*

tracks this recognition, for the same culpability rules that prevent ARH also prevent imposition of liability for attempted murder of the depraved-indifference sort. This aspect of the operation of attempt law refutes the potential claim of opponents of reckless-attempt liability that limiting attempt liability to cases involving intent or knowledge would simply lead to a proper focus on the most serious crimes while weeding out other offenses thought to be less serious. Here the attempt provision works to exclude attempt liability for (one version of) the most serious crime.

Like the Code, some criminal-law scholars, including R.A. Duff and Paul Robinson, have tried to describe versions of attempt that expand its scope while adhering to some version of the intention intuition. Robinson has proposed a formulation of attempt that requires intent as to one's own future course of conduct, but does not require intent as to the *result* of that conduct:

> The actor's future conduct intention is central to the definition of what constitutes a criminal attempt; the actor must have as his *purpose* to engage in the conduct that constitutes the offense. There is no apparent reason, however, why the culpability requirements of the substantive offense, which serve the liability function, must be elevated to [intent].68

Under this view, the person who is caught while carrying toxic waste to the river can be held liable for attempted endangerment; although his purpose was only to get rid of the waste, and not to cause the harm of endangering others, he did intend to carry out all the conduct necessary to bring about that harm.69

Duff's theory, in somewhat similar fashion, describes the culpability requirement for attempt as "an intention such that

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rante's Comment, 65 LA. L. REV. 983, 986 (2005) ("I argue that the two types of action—attacks and endangerments—are morally different, but that is not the same as arguing that they are differently located on a single scale of moral wrongfulness: 'different' does not entail 'better' or 'worse[.]'").

68. ROBINSON, *supra* note 61, at 161; *cf.* Alexander & Kessler, *supra* note 7, at 1170 ("To us, the most coherent justification both for inchoate criminal liability and for having a criminal purpose . . . as a requirement for such liability . . . rests on the assumption that *forming an intention to engage in future criminal conduct is itself a culpable act*[.]").

69. ROBINSON, *supra* note 61, at 161.

the agent would necessarily commit a complete offence in carrying it out."[70] Here again, the idea is that one has a planned course of conduct that, if successful, would constitute a crime—including, perhaps, a crime demanding only recklessness as to a result. Duff gives the example of attempted property damage, an offense that in Britain requires only recklessness as to damaging another's property:

> A gardener tries to cut down what she realizes might well be her neighbour's tree. She is guilty of attempted criminal damage if it actually is her neighbour's tree: she acts with an intention [to cut down this tree] such that, given that it is her neighbour's property and her recklessness as to that fact, she would necessarily commit a complete offence of criminal damage in carrying it out.[71]

As with Robinson, one may be liable based on one's intent to go forward with conduct that actually amounts to the crime, even if one is only reckless as to causing the resulting harm the crime addresses.

Both Robinson and Duff, then, suggest that ARH liability would at least sometimes be possible, but both have a difficult time drawing clear theoretical or practical lines around when it should apply, and when not. Duff offers examples of how his formulation would treat some different ARH scenarios:

> A hunter fires at what he thinks is probably a deer but realizes may be a person. If it is a person, he is guilty of manslaughter [i.e., reckless homicide] if he kills her, and my test convicts him of attempted manslaughter if he fails to kill her[.] . . . [But] compare the hunter with someone who, without intending to kill, commits some recklessly dangerous action which would make him guilty of manslaughter if he caused death: for example, someone who dynamites a building, realizing that this might well kill people living nearby, but taking no adequate steps to warn or protect them. The risk of human death which he knowingly creates might be greater than that which this hunter knowingly creates: but my test acquits him of attempted manslaughter[.][72]

70. DUFF, *supra* note 9, at 371.
71. *Id.* (brackets in original).
72. *Id.* at 373.

The underlying idea seems to be that Duff still wants to require intent as to the result of the crime, narrowly defined (causing death), but not as to the circumstances of the crime, broadly defined (causing death *of a person*). The conceptual distinction is coherent—interestingly, as Part I.D discusses, it is the same distinction the Model Penal Code makes, albeit inadvertently[73]—but Duff himself seems to recognize the difficulty of offering a principled explanation for why these disparate results should occur, except that they follow from his conception of attempt as an attack.[74]

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73. *See infra* notes 103–14 and accompanying text.

74. Duff notes that the example:

> might also strike some as counter-intuitive. . . . This distinction which my test draws between the hunter and the dynamiter will also seem implausible if we see the law of attempts as a law of endangerment, aiming to penalize culpably dangerous conduct. If instead we see the law of attempts as concerned with attacks, we can see a crucial difference between the two agents. For the hunter, although he does not intend his action as an attack upon human life, in fact attacks a human life: he tries [to kill] a living being which is in fact human. . . . By contrast, the dynamiter recklessly endangers human life, but is not attacking human life.

DUFF, *supra* note 9, at 373 (brackets in original). Duff's description may be accurate, but it does not explain why we *should* "see the law of attempts as concerned with attacks," even where doing so forces distinctions between cases that seem equivalent in all relevant ways (to me, at least). To put it differently, Duff does not explain why it is useful or proper—much less dispositive—to focus narrowly on the hunter's intent "to kill" (which makes his act an attack "in fact") rather than considering his mental attitude toward the situation more broadly (trying to kill a deer while noting that it might not be a deer).

Duff suggests the victim's perception of the offender's act as an attack, rather than as (merely) dangerous behavior, is somehow meaningful:

> The hunter's potential victim might reasonably reproach him by saying 'you tried to kill me!'. . . . The most the dynamiter's potential victims could say, however, is 'you might have killed me!'. The difference between 'you tried to kill me' and 'you might have killed me' marks the difference between attempted homicide and mere endangerment.

Id. I suspect in both cases, the would-be victim's response would be more like, "Are you trying to kill me or something?"—and even an honest answer of "or something" would not be very satisfying to that person in either case. In any event, the moral relevance of characterizing an action as an "attack" rather than endangerment (either as an objective matter or as experienced by the victim) is somehow lost on me, and Duff's hunter-dynamiter examples only strengthen my sense that he is banking on some moral intuition I do not share. Perhaps others do. *Cf.* Douglas Husak, *Attempts and the Philosophical Foundations of Criminal Liability*, 8 CRIM. L.F. 293, 298 (1997) ("I am unsure, however, of the criteria by which I would pronounce [Duff's positions] to be correct or incorrect. Perhaps they should be brought into 'reflective equilibrium' with our intuitions. My own intuitions, however, are silent or ambivalent about several of the outcomes that Duff favors in hypothetical and not-so-hypothetical cases.").

Robinson focuses on attempt as a frustrated course of conduct that *would* culminate in the offense if not frustrated. But in the ARH situation, how can we know for sure whether the person's planned course of conduct would have resulted in another's death? Sometimes it seems that when Robinson talks about intent to "engage in the conduct constituting the offence,"[75] what he means, or necessarily assumes, is an intent to engage in conduct that would in fact *cause* whatever harm the offense requires.[76] (Duff's conception of an "attack" may well be similar.) In other words, it looks like Robinson is not only imposing a culpability requirement regarding one's own future conduct; he is also imposing, or implying, an objective requirement that the planned conduct would in fact "constitute the offense." We cannot merely examine the person's mental state as to his own future course of conduct; we must also bring to bear an objective sense of the likely *effects* of that conduct—and, perhaps, of how likely those effects are—if we are to distinguish lawful intended conduct from unlawful intended conduct.

More frequently, however, Robinson disavows any such requirement of an objective likelihood, or certainty, of causing the prohibited result. In fact, Robinson generally maintains that we do not need a causation requirement to define the conduct that the criminal law prohibits. Instead, he holds that causation is relevant only to the issue of grading what is acknowledged to be criminal conduct:

> The role of the causation requirement—defining the relation between an actor's conduct and a result that gives rise to an actor's accountability for the result—similarly serves the grading function and not the rule articulation function [i.e., the task of defining prohibited conduct]. Like the requirement of a result, the causation rules determine when an ac-

75. ROBINSON, *supra* note 61, at 162; *see also id.* at 164 ("As long as the law is careful to require that it is the actor's conscious object to engage in the *conduct constituting the offence,* there seems little reason that attempts to create risks and attempts that create risks ought not be punished.").

76. He does sometimes express his own position in terms compatible with such an interpretation. *See, e.g., id.* at 158 ("It is true that the actor's purpose to complete the conduct *that would cause the death* must be clear.") (emphasis added); *id.* at 163 (supporting attempt liability where "a deliberate choice is made to *bring about the consequence* forbidden by the criminal law, and the actor has done all within his power to *cause this result* to occur") (emphases added). Yet his insistence elsewhere that conduct requirements can be specified without regard to results or causation renders unclear his degree of agreement with the reading of his attempt formulation presented in the text above.

> tor's liability is aggravated because the actor is accountable for a harmful result. Because result elements and causation requirements are not necessary to define the conduct prohibited by the criminal law, it is not surprising that liability does not necessarily depend upon them.[77]

Moreover, Robinson clearly believes that objective impossibility is no defense to attempt.[78] It is hard to reconcile that position with any claim that ARH, or any other attempt, requires some level of objective probability.

In any case, even if not altogether clear or satisfying as to the dimensions of ARH liability, both Duff and Robinson offer accounts that imply its possibility while still holding on to some version of the intention intuition for attempt. In short, we can accommodate that intuition on some level and also impose ARH liability in at least some cases.

More fundamentally, of course, one might wonder whether we need to accommodate the intuition at all. The intention intuition is based only on our casual, everyday understanding of the word "attempt," but we need not be limited by that understanding when making decisions about the substantive content of criminal law. We could choose to call the offense "inchoate crime" or "threatening (or risking) offense harm," and the need to make liability match our intuitive sense of the word "attempt" would disappear. There is no reason, in short, for criminal liability merely to track semantics rather than to provide a conceptually satisfying theory of what merits liability.[79]

B. Conduct-Related Objections

Common views of the culpability requirement for attempt, then, would seem to accommodate the possibility of ARH. But does this mean we *should* have ARH? If we did, how would we know when it had been committed? That issue introduces its own set of complications, in part because there has been a modern tendency in both theory and practice to shift the moment at which "mere preparation" becomes a criminal attempt

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77. *Id.* at 128.

78. *Id.* at 162–63 ("Ought [an] actor escape liability for attempted murder because of the factual impossibility of completion? All would agree that he ought not escape attempt liability.").

79. *See* Ashworth, *supra* note 5, at 756 ("[T]he limitations of language should not be allowed to override moral similarities.").

to an earlier link on the causal chain leading up to the completed offense. In other words, under modern formulations, the *conduct* requirement for attempt has been relaxed, as well as the culpability requirement (discussed in Part I.A). Yet if both the culpability requirement and the conduct requirement are loosened, so that attempt liability demands only the presence of the completed offense's required culpability level plus some fairly modest action tending toward the harmful result, a person might be guilty of ARH merely because he was caught driving too fast; or a drunk person might be liable as soon as she put the key in the ignition, based on her willingness to create a risk of death. Allowing attempted-homicide liability to reach so far seems both impractical and morally questionable.

This, then, is the second objection to ARH: that its recognition might open the floodgates, and suddenly all sorts of behavior will be treated as ARH, because there will be no way to cabin the conduct requirement to exclude inappropriate cases.[80] The concern, however, is a mere phantom—or rather, it has some validity, but to the extent it is valid, it describes an issue that is not unique to ARH, but could arise as to any incomplete attempt to commit an offense, regardless of that offense's culpability requirements.

As an initial matter, it is significant to note that many cases would generate no difficulty in terms of whether an offender satisfied the conduct requirement for an attempt. For completed attempts, where the person has performed *all* the conduct necessary to cause the result (firing a gun, setting off an explosive), the person's culpability and willingness to act on it are equally clear for reckless as for purposeful conduct. Shooting at someone else should satisfy any attempt conduct rule, whether the shot is fired recklessly or intentionally.

Moreover, anything short of a completed attempt will necessitate a potentially tricky judgment under the conduct rule regardless of whether the behavior is intentional or reckless. Consider, for example, a man who is not driving recklessly (or drunk), but plans to drive over to someone's apartment to murder her. We still have the same question about when his "mere preparation" becomes an attempt. Is it when he loads the gun in his own home? When he gets in his car? When he gets out

80. *See* Michaels, *supra* note 8, at 1033 (asserting that reckless-attempt liability would create a floodgates concern, "for example, by potentially turning every endangering action into attempted manslaughter").

of his car, outside the victim's apartment building, with the gun in his pocket?

The common and relatively relaxed "substantial step" test[81] offers no clear answer here, nor does it seek to.[82] But definitive answers would be equally unavailable under even a "dangerous proximity" or other test that seeks to narrow the range of attempt liability by demanding more conduct before an attempt occurs. Any general conduct requirement for attempt liability must be fundamentally indeterminate, as it seeks to provide a single rule that applies to all of the various offenses that one might attempt, whose underlying elements may vary greatly. Every formulation proposed so far shares this vagueness: an attempt demands "more than mere preparation,"[83] or a "substantial step,"[84] or acts in "dangerous proximity" to the offense,[85] or that a person must "embark on" the offense.[86]

ARH thus presents no *specific* problem as to figuring out what constitutes (or should constitute) an attempt. The real potential problem here, an intractable problem with all attempts, is an evidentiary one about the proof needed to support liability in specific cases, and if anything, the evidentiary considerations should actually cut against the floodgates concerns in the ARH context. ARH liability would demand proof beyond a reasonable doubt both that the person (1) was reckless as to, and (2) engaged in some specified amount of conduct in the direction of, committing the offense (i.e., causing another's death). Such proof would likely be hard to furnish in the vast majority of cases except those involving a completed attempt. It should not be surprising, then, that Colorado, the one state to recognize ARH, has not experienced any apparent difficulties

81. MODEL PENAL CODE § 5.01(1)(c) (1985); *see id.* cmt. 3(c) at 320 n.95; *id.* cmt. 6(a) at 331–32 n.130 (citing jurisdictions adopting substantial-step formulation).

82. *See id.* cmt. 6(a) at 329 ("Whether a particular act is a substantial step is obviously a matter of degree. To this extent, the Code retains the element of imprecision found in most of the other approaches to the preparation-attempt problem.").

83. *See* U.K. Criminal Attempts Act of 1981 § 1(1) (requiring "an act which is more than merely preparatory to the commission of the offence").

84. MODEL PENAL CODE § 5.01(1)(c) (1985).

85. *See* Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting); *see also* Commonwealth v. Peaslee, 59 N.E. 55, 56 (Mass. 1901).

86. DUFF, *supra* note 9, at 390 (describing, and endorsing, UK Court of Appeal's interpretation of UK statute's "more than merely preparatory" language to require that offender must have "embarked on" the offense, or be "in the process of committing" the offense).

in terms of prosecution of negligible or borderline conduct as ARH. Indeed, although Colorado's attempt provision requires only a substantial step toward an offense,[87] all of the reported ARH cases in Colorado involve completed attempts.[88]

Concerns about the parameters of the conduct standard for attempt are bound to arise for any form of attempted offense, at least in cases arising at the margins. It is always hard to draw a line for incomplete attempts, which might indicate a problem with the conduct requirement more broadly, or even with the notion of having a single attempt provision that applies to numerous offenses at once, rather than with the specific application of that provision to offenses requiring only recklessness as to a result.[89] None of the conduct rules developed for attempt is inherently more or less problematic in the ARH context than in any other. They are all deliberately fluffy, meant to be applied to specific situations *post hoc*. But if we trust *post hoc* decision-making in other contexts, why not trust it for ARH? Indeed, should we not expect that juries will press prosecutors even harder to supply clear proof as to the conduct requirement for crimes involving reduced culpability? On the other hand, if we object to such a scheme, perhaps that suggests the entire thin-code project of writing a single, broad attempt provision is misguided.

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87. *See* COLO. REV. STAT. § 18-2-101(1) (2006).

88. To date, sixteen Colorado appellate opinions involve cases where the defendant was convicted of attempted extreme-indifference murder or attempted reckless manslaughter. Ten of the cases involve shootings. *See* People v. Thomas, 729 P.2d 972 (Colo. 1986); People v. Castro, 657 P.2d 932, 937–38 (Colo. 1983); People v. Beatty, 80 P.3d 847 (Colo. Ct. App. 2003); People v. Anderson, 70 P.3d 485 (Colo. Ct. App. 2002); People v. Allen, 43 P.3d 689 (Colo. Ct. App. 2001); People v. Ellis, 30 P.3d 774 (Colo. Ct. App. 2001); People v. Palmer, 944 P.2d 634 (Colo. Ct. App. 1997); People v. McCoy, 944 P.2d 584 (Colo. Ct. App. 1996) (crossbow shooting); People v. Lee, 914 P.2d 441 (Colo. Ct. App. 1995); People v. Rodriguez, 888 P.2d 278 (Colo. Ct. App. 1994).

Four cases involve stabbings. *See* People v. Young, 16 P.3d 821 (Colo. 2001); People v. Tallwhiteman, 124 P.3d 827 (Colo. Ct. App. 2005); People v. Silva, 987 P.2d 909 (Colo. Ct. App. 1999); People v. Requejo, 919 P.2d 874 (Colo. Ct. App. 1996) (based on complicity).

One case, and the only one whose opinion discusses the issue of whether a "substantial step" had occurred, involves bludgeoning with a hammer. *See* People v. Ramos, 708 P.2d 1347 (Colo. 1985) (reversing judgment of acquittal and reinstating jury conviction of attempted extreme-indifference murder).

The final case involves sexual assaults by an HIV-positive offender. *See* People v. Perez, 972 P.2d 1072 (Colo. Ct. App. 1998) (reversing conviction based on lack of requisite culpability).

89. *Cf.* Alexander & Kessler, *supra* note 7, at 1173–74 (advocating abolition of liability for incomplete attempts).

C. The Pandora's Box Objection: Attempted Felony Murder

A third critique of ARH, like the conduct-based critique discussed in Part I.B, raises a floodgates concern of a different type. Here the fear is not that the ARH offense itself would be far-reaching and might apply to inappropriate cases, but that recognition of ARH would necessitate recognition of other, undesirable forms of attempt as well. The specific worry mentioned in this context is that if ARH were allowed, there would be no logical or legal obstacle to allowing a crime of "attempted felony murder" also.[90] I offer three responses to this critique of ARH.

First, it is important to recognize that the central problem with attempted felony murder is not the "attempt" part, but the "felony murder" part. That is, the visceral reaction that liability for attempted felony murder would be improper draws on, and reflects, an underlying sense that the completed offense of felony murder is itself improper—which is an almost universal opinion about the felony-murder doctrine.[91] If recognizing ARH means that we would have to recognize attempted felony murder as well, the conclusion that such an outcome would be unpalatable only serves to highlight the absurdity or undesirability of felony murder, rather than to indicate any problem with the extension of attempt liability to reckless homicide. An entirely possible, and altogether superior, way to avoid at-

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90. *See, e.g.*, SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 561 (7th ed. 2001) (noting Colorado's recognition of ARH and asking whether this demands recognition of attempted felony murder as well). For a description of felony murder, see *supra* note 27.

91. *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. 6 at 37–39 (1980) (stating that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find," asserting that the argument in its favor "reduces to the explanation that Holmes gave for finding the law 'intelligible as it stands,'" and explaining why that position offers no principled basis for retaining the doctrine); DRESSLER, *supra* note 10, at 558 (quoting cases stating that the doctrine "has been bombarded by intense criticism and constitutional attack" and that "[c]riticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine"); *see also* George P. Fletcher, *Reflections on Felony-Murder,* 12 SW. U. L. REV. 413 (1981); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law,* 51 WASH. & LEE L. REV. 1429, 1448–49 (1994) (stating that the doctrine's "primary justification" is deterrence, but that any claims "that it actually achieves its goals are rooted in blind faith or self-delusion," so the rationale offers a "poor excuse" for abandoning the usual commitment to requiring culpability). For one of the very few defenses of the doctrine, see David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine,* 8 HARV. J.L. & PUB. POL'Y 359 (1985).

tempted felony murder would be to allow ARH but abolish felony murder altogether.

A second, and related, response is that even if felony murder had to remain on the books, attempt liability could be expanded to reach crimes of recklessness without being expanded to reach crimes of strict liability. Requiring recklessness to serve as a floor for attempt liability would be a coherent and defensible approach, as it would comport with a sense (somewhat in keeping with the intention intuition) that attempt or inchoate liability should rest on a *choice* or decision to act while having culpability as to the occurrence of a criminal offense. Some have argued that recklessness should be a minimum prerequisite to *any* criminal liability, not just attempt liability.[92] But even without going that far, one can take the view that attempt liability exists to punish, even in the absence of harm, one who has culpability and manifests a willingness to act on it.

Third and finally, even if attempted felony murder were possible, it would almost certainly be rare and (like ARH itself, as discussed in Part I.B) would not reach the broad spectrum of behavior the critics assume. The critics' claim is that if attempted felony murder existed, somehow every felony would constitute attempted felony murder.[93] But why would that be the case? Attempted felony murder would demand proof beyond a reasonable doubt that the felon had performed a substantial step, or whatever amount of conduct the jurisdiction requires, toward the offense, with the offense here being *causing a death* during a felony. The felony itself, unless it involved a significant inherent risk of death, would not clearly be a substantial

92. The debate is typically cast in terms of whether criminal liability may be based on negligence; those opposing negligence liability hold that recklessness should be the minimum culpability requirement. For discussions of the issue, see, for example, MODEL PENAL CODE § 2.02 cmt. 4 at 243 (1985) ("No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability, but some critics have opposed any penal consequences for negligent behavior."); DRESSLER, *supra* note 10, at 141–42; Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632 (1963); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. ISSUES 365 (1994) (discussing arguments for and against negligence liability).

93. *See, e.g.*, KADISH & SCHULHOFER, *supra* note 90, at 561 (asking, without taking a position as to, the questions "why wouldn't every armed robbery in which the victim is not killed amount to an attempted felony-murder? . . . Would every robber and burglar be guilty of attempted felony murder, even if shots were never fired and none of the victims suffered any physical injury?").

step toward causing a death; and if it did involve such an inherent risk, attempted homicide liability would seem appropriate. As with ARH, it might be possible to prosecute completed attempts, like firing gunshots during a felony, as attempted felony murder, but why would that necessarily be so bad? Presumably the added specter of attempted-felony-murder liability for such conduct would offer an additional deterrent against committing felonies, or against firing shots during one. In other words, it would serve precisely the objective felony murder itself is designed to achieve.[94] Again, if this rationale is unsatisfying, it is because felony murder itself is unsatisfying, not because attempted felony murder would introduce any new and insoluble problems.

D. Legal Objections

Beyond the general abstract objections that have been lodged against ARH, it is worth examining the status of ARH under current law, for that status is more dubious than it might appear at first blush. Part I.A documented the tension between the historical and intuitive insistence that attempt must demand some form of intent and the conflicting sense that liability may seem appropriate in some cases where the offender lacked intent as to all elements of the offense. The Model Penal Code and many other modern codes try to strike some balance in their attempt provisions between retaining an intent requirement and accommodating some cases where intent is lacking as to some elements. Interestingly, in striking that balance, many of these provisions adopt formulations whose terms allow for ARH, even though the Model Penal Code's commentary explicitly shies away from the suggestion of possible ARH liability and state courts (with the exception of Colorado) have steadfastly avoided the possibility of ARH.

It is certainly true that many American criminal codes have attempt provisions that do not seem to allow for any pos-

94. *See* DRESSLER, *supra* note 10, at 558 ("The most common defense of the felony-murder rule is that it is intended to deter negligent and accidental killings during the commission of felonies."); HOLMES, *supra* note 50, at 59; Tomkovicz, *supra* note 91; *see also* State v. Goodseal, 553 P.2d 279, 285 (Kan. 1976) ("[The] rational function of the felony-murder rule is to furnish added deterrent to the perpetration of felonies which, by their nature or by the attendant circumstances, create a foreseeable risk of death.").

sibility of ARH. Five states,[95] and the federal criminal code, do not have a general attempt provision at all. Three of those jurisdictions instead have provisions defining specific attempt offenses, such as attempted murder (but not ARH);[96] the other three have developed the doctrine of attempt exclusively through case law (in which none has recognized ARH).[97] Another nine codes (eight states and the District of Columbia) have provisions simply prohibiting any "attempt" to commit an offense, without defining or otherwise clarifying that term.[98] Here again, the actual content of the attempt rules is supplied by case law—and here again, the jurisdictions addressing the issue have uniformly rejected ARH.[99]

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95. Iowa, Maryland, Massachusetts, North Carolina, and Rhode Island.

96. *See* IOWA CODE § 707.11 (West 2003) (defining offense of attempted murder); MASS. ANN. LAWS ch. 265, § 16 (LexisNexis 2002 & Supp. 2006) (defining offense of "attempt to commit murder by poisoning, drowning or strangling"); *id.*, at ch. 266, § 5A (defining offense of attempted arson); 18 U.S.C. § 1113 (2000) (defining offense of attempted murder or manslaughter). The U.S. Code provision has been interpreted to disallow ARH. *See* Braxton v. United States, 500 U.S. 344, 351 (1991).

97. Maryland and North Carolina have no general provision defining attempt, but do have provisions addressing the *grading* of "attempts" for sentencing purposes. *See* MD. CODE ANN., CRIM. LAW § 1-201 (LexisNexis 2002); N.C. GEN. STAT. § 14-2.5 (2005 & Supp. 2006). Maryland also has specific provisions for "attempt to commit murder in the second degree" and "attempted poisoning," which carry specified punishment ranges. *See* MD. CODE ANN., CRIM. LAW §§ 2-206, 3-213 (LexisNexis 2002). To the extent such provisions imply a catchall, undefined category of punishable criminal attempts, these states would belong with the nine jurisdictions mentioned next in the text. As noted in text, case law in both states makes clear that neither recognizes ARH. *See* Dixon v. State, 772 A.2d 283, 288 n.9 (Md. 2001) ("There is no such crime as attempted involuntary manslaughter."); State v. Coble, 527 S.E.2d 45, 48 (N.C. 2000) ("Because specific intent to kill is not an element of second-degree murder, the crime of attempted second-degree murder is a logical impossibility under North Carolina law."). Rhode Island defines no attempt offenses at all in its code, and also has no cases discussing the possibility of ARH or its equivalent.

98. *See* D.C. CODE ANN. § 22-1803 (2001 & Supp. 2006); FLA. STAT. ANN. ch. 777.04 (2000); IDAHO CODE ANN. § 18-306 (2004); MICH. COMP. LAWS ANN. § 750.91 (West 2004); S.C. CODE ANN. § 16-1-80 (2003) (referring to "the common law offense of attempt"); S.D. CODIFIED LAWS § 22-4-1 (2006); VT. STAT. ANN. tit. 13, § 9 (1998 & Supp. 2006); VA. CODE ANN. § 18.2-25, 26 (2004); W. VA. CODE ANN. § 61-11-8 (LexisNexis 2005).

99. *See* People v. Genes, 227 N.W.2d 241, 242 (Mich. Ct. App. 1975) ("While there can be no such thing as attempted involuntary manslaughter, where the theory is voluntary manslaughter there can be an attempt."); State v. Lyerla, 424 N.W.2d 908 (S.D. 1988); State v. Davis, 601 A.2d 1381, 1383 (Vt. 1991) (noting that "the crime of attempted manslaughter requires the specific intent to kill"). The District of Columbia, Idaho, South Carolina, Virginia, and West Virginia do not seem to have directly addressed the question of ARH liability. For discussion of the Florida case law, see *supra* note 5.

As for the codes that do genuinely define the concept of an attempt, their formulations generally fall into four categories with respect to culpability requirements.[100] The first, and largest, category contains the twenty states whose definitions of attempt do not distinguish between different offense elements with respect to culpability, but impose a blanket requirement of intent or purpose to commit the target offense, thereby clearly rejecting ARH.[101] The other three categories contain codes whose culpability requirements are either more complex or less clear.

The second group includes the nine states that, more or less,[102] follow the formulation of the Model Penal Code, at least

100. For the reader's convenience, the following table summarizes the four categories discussed over the next several pages of text (as noted in text above, the codes of the remaining 15 American jurisdictions have no attempt provision or fail to define the concept of attempt):

Category	*# of Codes in Category*	*Culpability Test*	*ARH allowed?*
1	20	Intent	No
2	9	Follows MPC	Yes (limited)
3	4	Tracks completed offense	Yes
4	4	[Various]	[Mixed]

101. *See* ALA. CODE § 13A-4-2 (LexisNexis 2005); ALASKA STAT. § 11.31.100 (2006); CAL. PENAL CODE § 664 (West 1999 & Supp. 2007); GA. CODE ANN. § 16-4-1 (2004); 720 ILL. COMP. STAT. ANN. 5/8-4 (West 2002); KAN. STAT. ANN. § 21-3301 (1995 & Supp. 2005); LA. REV. STAT. ANN. § 14:27 (1997 & Supp. 2007); MINN. STAT. ANN. § 609.17 (West 2003); MO. ANN. STAT. § 564.011 (West 2000); MONT. CODE ANN. § 45-4-103 (2005); NEV. REV. STAT. ANN. § 193.330 (LexisNexis 2006); N.H. REV. STAT. ANN. § 629:1 (1996 & Supp. 2006); N.M. STAT. ANN. § 30-28-1 (2004); N.Y. PENAL LAW § 110.00 (McKinney 2004 & Supp. 2007); 18 PA. CONS. STAT. § 901 (West 1998 & Supp. 2006); TEX. PENAL CODE § 15.01 (Vernon 2003); WASH. REV. CODE § 9A.28.020 (West 2000); WIS. STAT. ANN. § 939.32 (2005); WYO. STAT. ANN. § 6-1-301 (2006). Mississippi's formulation applies to "anyone who shall design and endeavor to commit an offense," which seems equivalent to a requirement of intent or purpose. MISS. CODE ANN. § 97-1-7 (2006).

102. See ARIZ. REV. STAT. ANN. § 13-1001 (2001 & Supp. 2006); ARK. CODE ANN. § 5-3-201 (2006); CONN. GEN. STAT. ANN. § 53a-49 (West 2001); DEL. CODE ANN. tit. 11, § 531 (2001); HAW. REV. STAT. § 705-500 (1993 & Supp. 2005); KY. REV. STAT. ANN. § 506.010 (LexisNexis 1999); ME. REV. STAT. ANN. tit. 17-A, § 152 (2006); NEB. REV. STAT. § 28-201 (1995 & Supp. 2005); N.J. STAT. ANN. § 2C:5-1 (West 2005).

Six of these states deviate somewhat from the MPC formulation. Arkansas, Hawaii, and Nebraska state that the offender's course of conduct must be "intended," rather than "planned," to "culminate in the offense." ARK. CODE ANN. § 5-3-201(a)(2) (2006); HAW. REV. STAT. § 705-500(1)(b) (1993 & Supp. 2005); NEB. REV. STAT. § 28-201(1)(b) (1995 & Supp. 2005). Maine similarly requires "intent to complete the commission of the crime." ME. REV. STAT. ANN. tit. 17-A, § 152(1)

with respect to its subsection specifying the rules for incomplete attempts.[103] The status of ARH under these codes is de-

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(2006). Hawaii and Nebraska also, along with Delaware, have no introductory reference to an offender having "the culpability otherwise required by an offense," which would tend to suggest such codes rely more heavily on the provision's references to intent, making it less likely they would support ARH liability. DEL. CODE ANN. tit. 11, § 531 (2001); HAW. REV. STAT. § 705-500(1) (1993 & Supp. 2005); NEB. REV. STAT. § 28-201(1) (1995 & Supp. 2005). Finally, Kentucky strengthens the "substantial step" requirement to demand not only that the conduct be "strongly corroborative" of criminal purpose, but that it must "leave[] no reasonable doubt as to the defendant's intention to commit the crime." KY. REV. STAT. ANN. § 506.010(2) (LexisNexis 1999).

103. The Code's definition of attempt is worth reproducing in its entirety:

> (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> > (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
> >
> > (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
> >
> > (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

MODEL PENAL CODE § 5.01(1) (1985).

The Code also states, vis-a-vis section (1)(c), that "[c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose." *Id.* § 5.01(2). Section (1)(c) is the subsection dealing with incomplete attempts. All general attempt provisions define the elements of this category of attempt. In other words, the twenty states in the first category (for example) all define attempt as performing some amount of conduct toward an offense (an "overt act," a "substantial step," or the like) while having the intent to commit that offense.

Section (1)(a) deals with so-called "impossible" attempts, discussed briefly in Part I.A. Only eleven states have adopted some version of (1)(a): eight of the nine states in the second general category (all but Maine), along with Oklahoma, Tennessee, and Wyoming. *See* ARIZ. REV. STAT. ANN. § 13-1001(A)(1) (2001 & Supp. 2006); ARK. CODE ANN. § 5-3-201(a)(1) (2006); CONN. GEN. STAT. ANN. § 53a-49(a)(1) (West 2001); DEL. CODE ANN. tit. 11, § 531(1) (2001); HAW. REV. STAT. § 705-500(1)(a) (1993 & Supp. 2005); KY. REV. STAT. ANN. § 506.010(1)(a) (LexisNexis 1999); NEB. REV. STAT. § 28-201(1)(a) (1995 & Supp. 2005); N.J. STAT. ANN. § 2C:5-1(a)(1) (West 2005); OKLA. STAT. tit. 21, § 44(a) (2002); TENN. CODE ANN. § 39-12-101(a)(1) (2006); WYO. STAT. ANN. § 6-1-301(a)(ii) (2006).

Section (1)(b) creates a separate subsection creating a specific rule for "completed" attempts: those for which the target offense demands a certain result, and that result could occur without the attempter having to do anything further. Only three states have adopted a version of section (1)(b) that deals exclusively with completed attempts. *See* N.J. STAT. ANN. § 2C:5-1(a)(2) (West 2005); OKLA. STAT. tit. 21, § 44(b) (2002); TENN. CODE ANN. § 39-12-101(a)(2) (2006). Three other states have variations of (1)(b) that switch it back into a (supplementary) rule for

batable, as ARH's status under the Model Penal Code itself is somewhat ambiguous. The MPC's commentary discussing "completed" attempts makes specific reference to the notion of attempt liability for reckless or negligent homicide and claims that the Code does not allow for it.[104] Yet that does not fully resolve the matter, for two reasons. First, the MPC's three subsections provide alternative, and not mutually exclusive, bases for attempt liability, and the codes following the MPC all adopt the subsection dealing with incomplete attempts instead of, or in addition to, the completed-attempt subsection.[105]

Second, and far more importantly, notwithstanding the Code's disavowal of ARH, the general scheme of its attempt provision, as explained in detail in the commentary, *does* actually admit of the possibility of ARH in a limited set of circumstances. The commentary is quite clear that the Code's attempt formulation has two exceptions to the general requirement of purpose, or intent:

> [W]ith respect to the circumstances under which a crime must be committed, the culpability otherwise required for commission of the crime is also applicable to the attempt; and with respect to offenses where causing a result is an element, a belief that the result will occur without further conduct on the actor's part will suffice.[106]

One of the frustrating aspects of the Code is that it does not define the distinction between circumstances and results. A footnote in the attempt commentary offers some examples of what each term is thought to encompass:

> The "circumstances" of the offense refer to the objective situation that the law requires to exist, in addition to the

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incomplete attempts—a rule dealing specifically with the level of culpability needed as to a result, where the target offense requires one. *See* ARK. CODE ANN. § 5-3-201(b) (2006); HAW. REV. STAT. § 705-500(2) (1993 & Supp. 1995); NEB. REV. STAT. § 28-201(2) (1995 & Supp. 2005).

104. *See* MODEL PENAL CODE § 5.01 cmt. 2 at 303–05 (1985).

105. As noted above, *see supra* note 103, only six states have adopted any version of MPC section (1)(b). In all other jurisdictions, completed attempts would be prosecuted (along with incomplete ones) under the general provision defining "attempt" to demand less than the full amount of conduct needed to commit the offense. Such provisions clearly apply to complete attempts as well, as performing all the offense conduct would ipso facto satisfy their conduct rules, which demand something less than that.

106. MODEL PENAL CODE § 5.01 explanatory note at 297 (1985).

> defendant's act or any results that the act may cause. The elements of "nighttime" in burglary, "property of another" in theft, "female not his wife" in rape, and "dwelling" in arson are illustrations. . . . Results, of course, include "death" in homicide. While these terms are not airtight categories, they have served as a helpful analytical device in the development of the Code.[107]

The explanation is not crystal clear, but is certainly consistent with the argument, advanced by Robinson and Grall, that the most sensible reading of the distinction is to understand a result narrowly as a change caused by the actor's offense conduct, whereas any other required characteristics of the offense situation are circumstance elements.[108]

Applying these attempt rules to the Code's definition of homicide reveals that ARH is not entirely foreclosed under the Code. Like many states, the Code defines homicide as "caus[ing] the death of another human being."[109] Reckless homicide (which the Code calls manslaughter) is defined simply enough, and again similarly to many states, as homicide "committed recklessly,"[110] so the offense requires recklessness as to all elements.[111] In this case, there are *two* elements: (1) "causing the death" (2) "of another human being."[112] Under the Code's own description, and clearly under Robinson and Grall's analysis, the first of these elements is a result, and the second is a circumstance.

As noted above, the Code's attempt provision would require purpose or intent as to the result element, but would allow liability based on recklessness (the culpability this offense requires) as to the circumstance element. Thus under the

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107. MODEL PENAL CODE § 5.01 cmt. 2 at 301 n.9 (1985).

108. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Liability: The Model Penal Code and Beyond,* 35 STAN. L. REV. 681, 719–25 (1983). Hardly any other work has sought to clarify the distinction between circumstances and results, and none has done so as clearly or persuasively as Robinson and Grall. *See, e.g.*, R.A. Duff, *The Circumstances of an Attempt,* 50 CAMBRIDGE L.J. 100, 104–11 (1991) (seeking to articulate a distinction between circumstances and results, or "consequences"); DUFF, *supra* note 9, at 12–14 & n.60 (noting the difficulty of this task without offering a resolution, and describing Duff's own earlier effort as "so tortuously cumbersome that the doctrine remains impracticable").

109. MODEL PENAL CODE § 210.1(1) (1985).

110. *Id.* § 210.3(1)(a).

111. *Cf. id.* § 2.02(4) (stated culpability term applies to all elements).

112. *See* ROBINSON, *supra* note 12, § 3.1 at 150 ("Most offense definitions include one or more circumstance elements as well, defining the precise nature . . . of a prohibited result—for example, causing the death of *another human being*.").

Code's carefully crafted culpability scheme, attempt liability would not lie where one acted while reckless as to causing death, but ARH (or even attempted negligent homicide) *would be possible* where one intended to cause death, but was reckless (or negligent) as to whether the thing to be killed was a human being or not. The scenario seems contrived, but some real-world cases can be described in exactly these terms.[113] Further, as Part I.A discussed, Duff's theory of attempt would explicitly recognize the distinction the MPC embraces: imposing liability (for ARH) where one tries to kill what may be a person, but denying it where one risks killing what definitely is a person.[114]

Thus, the Model Penal Code creates a framework for attempt liability that, if applied as the Code's own commentary describes, would recognize ARH in at least some cases—but apparently does so accidentally, as the Code's commentary addresses the specific issue of ARH and claims to disallow it. In addition to reinforcing this Part's claim that the law and logic of ARH is more complicated than its usual offhand dismissal would suggest, this anomaly of the Code again highlights the complexity and difficulty of writing a single attempt provision to cover all offenses and situations, and only offenses and situations, where liability is thought appropriate. Part II of this article explores in further detail how the ARH problem, and its alternative solutions, raise general issues about how to write criminal law.

The second category of state attempt provisions, those following the Model Penal Code's formulation, therefore appears to allow for ARH. A third category of attempt provision seems

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113. *See, e.g.*, Kate Schott, *Video Recording Led to Arrest in Monroe County Shooting*, LA CROSSE (WIS.) TRIB., Sep. 28, 2005, *available at* http://www.lacrossetribune.com/articles/2005/09/28/news/00lead.txt (hunter shoots at, and kills, person he says he thought was a squirrel; charged with reckless homicide). Whether the Vice President's recent hunting expedition fits into this category is for the reader to determine. *See* Anne E. Kornblut, *Cheney Shoots Fellow Hunter in Mishap on a Texas Ranch*, N.Y. TIMES, Feb. 13, 2006, at A1.

114. *See supra* notes 70–74 and accompanying text. Neither the Code nor Duff makes any such connection, however. As noted, the Code (which, of course, predated Duff's work) offers no justification of its scheme, much less a justification along Duff's particular lines; the commentary offers no recognition that ARH would arise in these or any other conditions under the Code, and even asserts that the Code rejects ARH. For his part, Duff does not draw on the Code in advancing his theory, or offer the reading of the Code provided here, which appears to track his theory. As far as I am aware, no other observer has pointed to the possibility of ARH under the Code.

even more hospitable to ARH. The group includes four states that simplify the MPC provision to state merely that a person commits an attempt if, "acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime."[115] This category includes Colorado, the one state that has recognized ARH as an offense,[116] and Utah, which once hinted at a reading that would allow ARH but has since clearly rejected that view.[117]

Serious consideration of the possibility of ARH in these states is hardly surprising, as their formulation of attempt is clearly even friendlier to the idea of ARH liability than the Model Penal Code's. This version does not explicitly require purpose as to any aspect of the offense, as the Model Penal Code does. Accordingly, it seems a strain to read such provisions as "elevating" any of the culpability requirements of the target offense to require intent. The most natural reading is that attempt liability may be imposed for any crime requiring any level of culpability, so long as (1) the offender has the culpability required for that crime, and (2) the offender satisfies the conduct requirement, i.e., takes a "substantial step" toward the offense.[118]

The fourth and final category of attempt provision, with four members, is "Other"—and appropriately enough, includes the three states whose names start with O (along with Tennes-

115. IND. CODE ANN. § 35-41-5-1(a) (LexisNexis 2004); *see also* COLO. REV. STAT. § 18-2-101(1) (2006); N.D. CENT. CODE § 12.1-06-01 (1997) ("[A]cting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime."); UTAH CODE. ANN. § 76-4-101(1) (2003).

116. *See* sources cited *supra* note 5.

117. *See* State v. Maestas, 652 P.2d 903, 904 (Utah 1982) ("The above statute makes it clear that regardless of any requirements which the common law may impose concerning 'attempt' crimes, Utah law requires only 'the kind of culpability otherwise required for the commission of the [completed] offense.'"); State v. Vigil, 842 P.2d 843, 848 (Utah 1992) (crime of attempted depraved indifferent homicide does not exist; noting but repudiating *Maestas* language, stating that "'one cannot be guilty of an attempt to commit a crime unless the necessary mens rea of the completed crime is *intentional* conduct'") (quoting State v. Howell, 649 P.2d 91, 94 n.1 (Utah 1982) (emphasis added)).

118. *See, e.g.*, People v. Thomas, 729 P.2d 972, 975 (Colo. 1986) (en banc) ("[C]ontrary to the defendant's argument, there is no logical or legal inconsistency involved in the recognition of attempted reckless manslaughter as a crime under the Colorado Criminal Code."); ROBINSON, *supra* note 12, § 11.2 at 638 (discussing Utah formulation and suggesting it does not require intent as to result).

see, evidently the nonconformist even in this group).[119] Ohio and Oregon both contain codes that could be read to define culpability rules only for an offense's requisite conduct, and not for any circumstances or results. Ohio requires that a person "purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."[120] This provision does not state a requisite level of culpability as to any result of the actor's conduct, but merely says the conduct itself must be engaged in "purposely or knowingly." The reference to the potential "success" of the conduct suggests that the actor must have some intended result in mind, but even this might allow for the possibility of ARH. For example, if the state could show that a person's planned but foiled bombing attempt would have killed someone "if successful," the bomber might be liable under this definition for attempted homicide even if he was only reckless as to causing death. Oregon's provision is even more amenable to such a reading, requiring only that a person "intentionally engages in conduct which constitutes a substantial step toward" the offense and stating no culpability as to other elements.[121] Further, Oregon dispenses with the usual requirement that the "substantial step" must strongly corroborate the actor's criminal intent.[122] Tennessee's provision, somewhat like Ohio's, suggests a requirement of intent as to a *planned course of conduct* as an alternative to a requirement of intent as to a *result* of that conduct per se—a view of attempt perhaps roughly similar to Paul Robinson's, discussed in Part I.A.[123] The Tennessee formulation imposes liability where the person, "acting with the kind of culpability otherwise required for the offense . . . [a]cts with intent to complete a course of action *or* cause a result that would constitute the offense . . . and the conduct constitutes a substantial step toward the commission of the offense."[124] Perhaps the "course of action" language is meant to apply only to offenses that require no result, but the provision is not clear about that and suggests that one could have ARH

119. *See* OHIO REV. CODE ANN. § 2923.02 (West 2006); OKLA. STAT. tit. 21, § 44 (2002); OR. REV. STAT. § 161.405 (2005); TENN. CODE ANN. § 39-12-101 (2006).
120. OHIO REV. CODE ANN. § 2923.02(A) (West 2006).
121. OR. REV. STAT. § 161.405(1) (2005).
122. *See, e.g.*, MODEL PENAL CODE § 5.01(2) (1985).
123. *See supra* notes 68–69, 75–78 and accompanying text.
124. TENN. CODE ANN. § 39-12-101(a)(3) (2006) (emphasis added).

liability based on intent to complete a course of action that involves recklessness as to killing someone.

Finally, and perhaps most unusually, Oklahoma's attempt provision only sets out rules for completed attempts, saying nothing about incomplete attempts.[125] (As to complete attempts, purpose or knowledge is required, so ARH would not be possible.) The only suggestion that liability will lie for incomplete attempts appears in the *grading* provision for attempts, which refers to one who "attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails. . . ."[126] This suggests that as to incomplete attempts, Oklahoma's code is like the nine codes noted above that use, but do not explain, the term attempt.[127] Yet its code *does* define the term "attempt to commit a crime," but in a manner that allows only completed attempts; reading the provisions together, the definition should limit the grading provision to completed attempts, notwithstanding the latter's apparent desire to reach more broadly.

To summarize, at least sixteen states—the thirteen in the second and third categories above, along with Ohio, Oregon, and Tennessee—have attempt provisions that do not clearly foreclose the possibility of ARH liability and can be read as supporting it, sometimes for only a narrow set of situations, sometimes more broadly. If these states meant to reject ARH liability, they failed to devise statutory wording that managed to do so clearly. This failure may indicate the difficulty of plainly specifying the exact content of a single, broad attempt provision that is asked to do a lot of work in defining the parameters of inchoate criminal liability. Part II considers and evaluates the alternatives to that single-attempt-provision approach.

II. THE PROBLEMS WITH "SOLUTIONS" TO ATTEMPTED RECKLESS HOMICIDE

All the criticism of ARH is especially curious given that many codes define one or more other offenses that cover much of the same conduct ARH would, if not more. As noted above, the Model Penal Code sidesteps the seeming complexities of

125. *See* OKLA. STAT. tit. 21, § 44 (2002).
126. *Id.*
127. *See supra* note 98.

ARH by pointing out that its reckless endangerment offense ("RE") covers the same ground anyway.[128] In fact, RE reaches even further than ARH in that it includes conduct risking injury as well as conduct risking death.[129]

Part II.A discusses the general RE offense as a substitute for ARH, concluding that it shares whatever problems ARH has and might add a few new problems of its own. Part II.B discusses the alternative option—or rather, supplementary option, as a number of states do both—of defining specific endangerment offenses dealing with conduct that might otherwise be ARH or RE.

Rejecting ARH in favor of adopting RE or other endangerment crimes indicates a decision, or at least a willingness, to deal with atypical varieties of criminality by writing a new offense, or multiple offenses, rather than by expanding or otherwise modifying an existing provision of general application. Yet such a choice runs counter to the usual apparent (albeit unstated and unjustified) preference of code writers for thin, elegant solutions rather than one-off provisions that make a code thick. In the end, the decision to criminalize the underlying behavior in one way rather than another, or several ways, is a matter of form rather than substance.[130] Some significant practical consequences may attend that formal choice, however, and the uncharacteristic favoring of thick methods over thin methods in the ARH situation highlights the issue of when and why a code should choose to be thick or thin, on the whole or as to particular matters.

The balance of the article considers that issue, which commentators have largely neglected to this point. Scholarship generally addresses substantive questions about which acts or actors merit punishment and which do not. The formulation of criminal law, though, involves not only those questions, but also drafting questions about how to craft rules that best capture the substantive decisions while avoiding any potential organizational, structural, or practical problems that might ensue from the rules' design. In short, it involves some selection

128. *See supra* note 16.

129. *See infra* notes 133–41 and accompanying text.

130. To be more precise, this is true only to the extent these different crimes entail the same punishment. Sections II.A and II.B discuss the relation between the offense grades that attach to endangerment offenses and those that would exist for ARH if it were recognized.

(even if made unintentionally) between a thick code, a thin code, or some mix of the two. Part II.C addresses considerations relevant to that selection, and Part II.D criticizes the common modern practice of piling thick provisions onto an originally thin legal frame.

A. The General Reckless Endangerment Offense

Following the Model Penal Code's lead,[131] twenty-four states have adopted a general RE offense.[132] This decision to adopt RE and eschew ARH—solving an apparent problem that would attend adoption of a broad general provision by adopting a more precise provision to address the conduct in question—is a step in the direction of what I earlier characterized as the thick-code rather than the thin-code model.[133] True, it is just one step: the general RE offense is itself a thinner option than other possible responses to the ARH issue, as the next section

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131. *See* MODEL PENAL CODE § 211.2 (1980).

132. ALA. CODE § 13A-6-24 (LexisNexis 2005); ALASKA STAT. § 11.41.250 (2006); ARIZ. REV. STAT. ANN. § 13-1201 (2001 & Supp. 2006); COLO. REV. STAT. 18-3-208 (2006); CONN. GEN. STAT. ANN. § 53a-63 (West 2001) (first degree); *id.* § 53a-64 (second degree); DEL. CODE ANN. tit. 11, § 604 (2001) (first degree); *id.* § 603 (2001) (second degree); GA. CODE ANN. § 16-5-60(b) (2004); HAW. REV. STAT. § 707-713 (1993 & Supp. 2005) (first degree); *id.* § 707-714 (second degree); 720 ILL. COMP. STAT. 5/12-5 (West 2002); IND. CODE ANN. § 35-42-2-2(b) (LexisNexis 2004); KY. REV. STAT. ANN. § 508.060 (LexisNexis 1999) (first degree "wanton" endangerment; "wanton," as defined in § 501.020(3), is equivalent to standard definition of "reckless"); *id.* § 508.070 (second degree); ME. REV. STAT. ANN. tit. 17-A, § 211 (2006); *id.* § 213 (aggravated version); MD. CODE ANN., CRIM. LAW § 3-204 (LexisNexis 2002); N.H. REV. STAT. ANN. § 631:3 (1996 & Supp. 2006); N.Y. PENAL LAW § 120.20 (McKinney 2004) (second degree); *id.* § 120.25 (first degree); N.D. CENT. CODE § 12.1-17-03 (1997); OR. REV. STAT. § 163.195 (2005); 18 PA. CONS. STAT. ANN. § 2705 (West 1998 & Supp. 2006); TENN. CODE ANN. § 39-13-103 (2006); TEX. PENAL CODE § 22.05(a) (Vernon 2003); UTAH CODE ANN. § 76-5-112 (2003); VT. STAT. ANN. tit. 13, § 1025 (1998 & Supp. 2006); WASH. REV. CODE § 9A.36.050 (West 2000); WYO. STAT. ANN. § 6-2-504 (2006).

Two other states have not adopted reckless endangerment only because they do not recognize "recklessness" as a distinct culpability level; they have instead adopted a negligent-endangerment offense. *See* FLA. STAT. ANN. § 784.05(1) (2000) (defining offense for "[w]hoever, through culpable negligence, exposes another person to personal injury"; code does not define "culpable negligence"); MONT. CODE ANN. § 45-5-208 (2005) (defining offense of "negligently . . . creat[ing] a substantial risk of death or serious bodily injury"; negligence is defined in § 45-2-101(42) to embrace usual concepts of recklessness and negligence together).

133. *Cf.* Green, *supra* note 20, at 336 (noting that "reckless endangerment, assault, and involuntary manslaughter [i.e., reckless homicide] all involve essentially the same conduct" and "differ only in the kind of harm caused," creating possibility of "redundancy-reducing consolidation of offenses").

discusses.[134] Moreover, the Model Penal Code drafters' purpose in creating RE was not only to resolve the ARH issue by other means, but also (in keeping with the Code's usual thin preferences) to consolidate other, more particular offenses sharing the common feature of endangerment.[135] Even so, relative to ARH, RE represents an acknowledgement that broad general-part solutions or single offense provisions, such as attempt, may not be able to cover all bases and that a code therefore will sometimes need to adopt additional specific offenses to deal with specific problems.

What does RE look like, and how does it compare to ARH? The most common version of the offense, adopted in ten states,[136] prohibits creating a "substantial risk" (or "danger") of "serious" injury to another person. Two states require only a risk of serious injury,[137] five require a substantial risk of any injury,[138] and two require only a risk of any injury.[139] Finally,

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134. *See infra* Part II.B. Douglas Husak seems to favor the general RE offense as a relatively thin solution, preferable to the much thicker option of a multitude of "simple inchoate" offenses targeting specific conduct. *See* Husak, *supra* note 21, at 621–23. What he really seems to call for, though, is a broad residual or secondary offense that, like a general attempt provision, is not self-contained but piggybacks on other provisions. He says that unlike the MPC's RE offense, "the alternative I describe would require only substantial endangerment; it need not involve [a risk of?] serious bodily injury." *Id.* at 622 n.79. But of course, if the offense would not refer specifically to a risk of serious bodily injury, some content is needed for the kinds of "endangerment" it would address. Presumably that content would be supplied by looking to the primary harms the criminal law recognizes and specifies in other offenses, and taking the endangerment offense to proscribe any sufficient risk of any of those harms.

135. *See* MODEL PENAL CODE § 211.2 cmt. 1 at 196 (1980) ("The Model Code proposes to replace the haphazard coverage of prior law with one comprehensive provision."); *id.* at 198 ("The purpose of this section is . . . to give systematic statement to the *ad hoc* provisions of prior law and to achieve uniformity of grading."). *But cf. id.* at 198–99 (comparing RE's punishment of inchoate conduct toward criminal harm to attempt provision, which operates in similar fashion).

136. Alabama, Alaska, Colorado, Maine, Maryland, New York, Oregon, Texas ("imminent danger"), Utah, and Washington. For citations to the relevant statutory provisions, see *supra* note 132. Some states' formulations refer to a risk of serious injury *or death*, but this added language is not relevant, as serious injury is typically defined to include death. New York aggravates the offense if one creates a "grave risk of death" while acting with depraved indifference. *Id.* As to Maine's RE scheme, see also *infra* note 140.

137. Hawaii and Wyoming, both of which refer to "placing in danger" of death or serious injury. For citations to the relevant statutory provisions, see *supra* note 132.

138. Arizona, Delaware, Georgia, Indiana, and Kentucky. For citations to the relevant statutory provisions, see *supra* note 132. Georgia refers to "endangering bodily safety." *Id.* Arizona and Delaware aggravate the offense for creating a substantial risk of death (Arizona refers to "imminent" death), and Kentucky ag-

five states follow the Model Penal Code's language by not demanding actual endangerment of another person, instead referring to conduct that places "or may place" another in danger of serious injury.[140]

The RE offense is even broader than an ARH offense would be, at least with respect to the level of harm that must be risked: for RE, only injury or serious injury, whereas ARH would require a risk of death. Whether RE is more or less demanding than ARH would be with respect to the magnitude of the risk, as opposed to the magnitude of harm risked, is less clear, in part because ARH would orient itself toward the actor's conduct and not necessarily toward the objective risk the conduct creates. As to that aspect of the offenses' objective requirements, there would certainly be considerable overlap, especially for most cases that would arise as a practical matter. Still, at least in the abstract, it is possible that each offense would include some cases the other would not. On one hand, behavior that creates a risk but is fairly preliminary in the chain of conduct leading toward causing a death might be RE but not ARH. On the other hand, a course of conduct that is likely to culminate in a death, and that has advanced quite far, even without yet creating an objective likelihood of death absent further action, might be ARH but not RE.

Notably, both RE and ARH rely on an underlying definition of recklessness that typically demands conscious disregard of a "substantial risk."[141] Yet this requirement arguably speaks only to the level of *subjective* risk—that is, the amount of risk the actor perceives to exist—rather than the *objective*

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gravates the offense for creating a substantial risk of serious injury while acting with depraved indifference. *Id.*

139. Connecticut and Illinois. For citations to the relevant statutory provisions, see *supra* note 132. Connecticut has a higher degree of the offense for creating a risk of serious injury while acting with depraved indifference. Illinois refers to "endangering bodily safety." *Id.*

140. New Hampshire, North Dakota, Pennsylvania, Tennessee ("places or may place another in imminent danger"), and Vermont. For citations to the relevant statutory provisions, see *supra* note 132. North Dakota's formulation refers to "substantial risk," but then adds that "there is risk if the potential for harm exists, whether or not a person's safety is actually jeopardized." *Id.* In addition, Maine's RE offense refers to conduct that "creates a substantial risk," but its aggravated form of the offense refers to conduct that "in fact creates a substantial risk," which implies that the standard offense somehow does not require risk "in fact." ME. REV. STAT. ANN. tit. 17-A, § 211 (2006); *id.* § 213 (aggravated version).

141. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(c) (1980).

level of risk that does exist in the situation.[142] Hence the variation of different RE formulations, some requiring substantial risk and some requiring only risk, has genuine significance, and an offense requiring only creation of a "risk" is not inconsistent with a definition of recklessness requiring conscious disregard of a "substantial risk." In such a case, the subjective risk the person recognizes and ignores must be substantial, but the objective risk the person actually creates need not be. This distinction is hardly obvious, however, and highlights one difficulty with RE: its frequent failure to make clear the extent to which it is meant to address subjective versus objective risk.

The problems with RE do not end there. The RE "solution" to the ARH puzzle does not eliminate the conceptual and practical difficulties with ARH, but replicates them, and may even exacerbate them. Although academic commentary has given little attention to these difficulties as they bear on RE directly, the actual experience in the states makes clear that law-enforcement authorities and the courts have struggled with the ambiguity of RE at least as much as they would with ARH.

For example, RE is subject to what we might call the count-counting problem: when a single act endangers (or might endanger) multiple people, how many counts of RE may the offender be charged with?[143] Only one, because there was only one act? One count per person actually endangered? One count for each person for whom a risk of harm was recognized and disregarded by the offender? One count for each person the actor might reasonably have expected to be there? Criminal theory has offered no clear solution to these questions.

Existing criminal law, on the other hand, offers several dif-

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142. *See* Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses,* 4 THEORETICAL INQ. L. 367 (2003). For a contrary view—asserting that objective risk does not exist or necessarily collapses into an examination of subjective risk assessment—see Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability,* 88 CAL. L. REV. 931 (2000); LARRY ALEXANDER, KIMBERLY FERZAN & STEPHEN J. MORSE, A SUBJECTIVE THEORY OF CRIMINAL LAW ch. 2 (Cambridge, forthcoming 2008) (excerpt on file with author).

143. This problem is not unique to RE; as I have noted before, the issue of when to allow liability for multiple crimes (or multiple counts of the same crime) for a single act or course of conduct is a pervasive and thorny one. *See* Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second,* 1 OHIO ST. J. CRIM. L. 599, 604–07 (2004). RE, however, provides an especially difficult, and heretofore largely unexplored, set of questions on this score.

ferent and in some cases contradictory solutions, often without offering any supporting reasoning to justify the solution chosen. Appellate case law directly dealing with the scope of RE is scant, perhaps because the offense often does not carry enough punishment to make appellate litigation worth either party's while.[144] Only a few states have tackled, much less resolved, the count-counting problem. A New York appellate court has recently said that RE "can be committed whether the conduct is directed at one person or a group of persons, but in either event, only one crime is committed because it is the actor's *conduct* and not the number of persons affected (i.e., the particular outcome) that sustains the prosecution[.]"[145] A Tennessee case hinted at a similar rule,[146] but refused to commit to it,[147] and subsequent unpublished decisions have retreated from the position, recognizing the possibility of multiple counts for multiple "acts" during a single course of conduct.[148] Other states, without squarely facing the question, have affirmed without comment convictions on multiple counts whose basis was not multiple acts, but the presence of multiple "victims."[149] A look at the offense-charging practices of law-enforcement officials reveals similar indeterminacy as to whether the number of counts depends on the conduct, such as the number of shots fired, or the situation, such as the number of people present

144. *See infra* notes 159–60 and accompanying text.

145. People v. Stockholm, 719 N.Y.S.2d 330, 331 (N.Y. App. 2001) (citing People v. Davis, 526 N.E.2d 20 (N.Y. 1988) (emphasis in original)).

146. *See* State v. Ramsey, 903 S.W.2d 709, 713 (Tenn. Crim. App. 1995) ("[T]he reckless conduct engaged in by the defendant was one continuous act, a single course of conduct, and therefore supports only one conviction for that act. . . . [A]lthough the defendant's reckless conduct victimized more than one person, it does not justify multiple convictions.").

147. *See id.* ("We need not fashion a blanket rule that provides that a defendant's continuous operation of a vehicle may *only* result in one act of reckless endangerment under the statute. Many scenarios could be created where such a rule would not be prudent.").

148. *See* English v. State, 2004 WL 57089, at *9 (Tenn. Crim. App. 2004) (remanding for finding whether defendant's "pointing the gun at the children occurred at separate times, with a sufficient interval in between to support to separate counts of reckless endangerment"); State v. Kennedy, 1997 WL 137426, at *2–*3 (Tenn. Crim. App. 1997) (stating that between veering into traffic and running red light two blocks later, defendant "had time to form the necessary criminal intent [sic] to commit the second act of reckless endangerment," so that two convictions on two counts could stand).

149. *See, e.g.*, Commonwealth v. Huggins, 836 A.2d 862, 864 (Pa. 2003) (noting without comment that driver who fell asleep had been charged with 23 counts of RE based on number of people in van at the time).

when shots are fired.[150]

The confusion in the states is hardly surprising, as it tracks a basic failure to define RE's scope clearly at the outset.[151] Most fundamentally, RE does not avoid, either in its theoretical conception or its legal implementation, the critical question of what we seek to address with inchoate offenses, and with criminal law more generally: personal culpability or objective harm. It is certainly possible to characterize RE as capturing some real or threatened harm. Indeed, such a harm can be conceived in several different ways, and it is hardly clear which

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150. For example, the *Washington Post*'s crime reports relate various cases of police charging offenders with multiple counts of reckless endangerment, apparently based on different considerations in different cases. *Compare* Jonathan Abel, *Woman Charged in House Fire,* WASH. POST, July 28, 2005, at T07 (woman charged with four counts of RE for setting fire to house with four other people in it); *Anne Arundel County,* WASH. POST, Apr. 8, 2004, at T21 (man charged with six counts of RE for pointing gun at "a group of people"); *Anne Arundel Crime Watch,* WASH. POST, June 2, 2005, at T16 (man charged with four counts of RE for firing two shots that endangered four people); *Anne Arundel Crime Watch,* WASH. POST, Dec. 11, 2003, at T08 (man charged with two counts of RE for firing gun once near two roommates); *Crime and Justice,* WASH. POST, Oct. 29, 2005, at B02 (student charged with 20 counts of RE for setting fire to Halloween decorations on classroom door at high school, where room had 20 students in it); *Crime and Justice,* WASH. POST, Dec. 14, 2000, at B02 (man charged with three counts of RE for pointing rifle at three people); *Montgomery County Crime Watch,* WASH. POST, Aug. 16, 2001, at T15 (man charged with four counts of RE for threatening four people with gun); *Boy Charged in Death of Friend,* WASH. POST, July 22, 2000, at B05 (15-year-old charged with three counts of RE for firing gun once near three people); Maureen O'Hagan, *Trial Scheduled for Man Charged in Poisoning Case; Chemist Allegedly Poured Mercury in Former Co-Worker's Car,* WASH. POST, Aug. 30, 2001, at T03 (man charged with three counts of RE for pouring mercury in car, where family owning car had three members); *with Anne Arundel Crime Watch,* WASH. POST, May 27, 2004, at T14 (man charged with two counts of RE for firing gun twice after pointing it "at several people"); *Man Charged in Firing of Gunshots at Refuge,* WASH. POST, Sep. 14, 2000, at M04 (man charged with eight counts of RE for firing multiple shots in wetlands refuge; no indication of any others present), *and with Montgomery Crime Watch,* WASH. POST, June 19, 2003, at T24 (man charged with one count of RE for throwing multiple rocks from hotel roof onto two police officers); *and with Montgomery County Crime Watch,* WASH. POST, Apr. 26, 2001, at T21 (man charged with four counts of RE for firing two shots at two women, missing and hitting two apartment windows instead).

Two additional facts are worth noting about these cases. First, in nearly all of them, the offender was charged with various counts of homicide, attempt, assault, weapons possession, and/or other crimes in addition to the count(s) of RE. Second, these cases arose in Maryland, where each count of RE carries an unusually high five-year maximum penalty. *See* MD. CODE ANN., CRIM. LAW § 3-204(b) (LexisNexis 2002).

151. The Model Penal Code's commentary devotes less than a page to explaining the meaning and boundaries of the RE offense itself, largely recapitulating the offense's language. *See* MODEL PENAL CODE § 211.2 cmt. 3 at 203 (1980).

of these possible harms, if any, the RE offense is meant to address. One possibility is that exposure to risk creates psychological harm, based on a sense that being near the path of a gunshot or out-of-control car causes mental trauma even if not physical injury. But what if the "victim" never knows she was placed in jeopardy? Indeed, should RE even demand a "victim," or is it better to conceive it, as some states do, as requiring only conduct that places "or may place" someone in danger?[152] Another view is that the risk itself is a harm.[153] In that case too, presumably there must be some person actually "suffering" the risk, and thus the harm the risk represents. Further, if risk is a harm, as more people are subjected to the risk, more people experience the harm, suggesting that a single act endangering multiple people might give rise to multiple counts of RE.

The difficulty of identifying or characterizing the harm with which the RE offense is concerned might make RE even more problematic in this regard than the ARH alternative. If the offense were overtly conceived as an attempted homicide offense, it would be easier to draw on solutions to the count-counting problem that broadly apply to homicide, or even other attempted crimes, in other contexts. If the jurisdiction's general rule is that other forms of attempted homicide, such as attempted murder, require only one actual would-be "victim," then that rule could be applied in the ARH context as well. The appropriateness of applying any such rule to the RE offense, on the other hand, is less clear, as the RE formulation does not clearly resemble the formulation of homicide offenses, or even assault offenses.

Of course, even if attempt doctrine points to answers here,

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152. *See supra* notes 132, 140 and sources cited therein.

153. *Compare* Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963 (2003) (arguing that risk is a harm), *with* Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1444 (2003) ("My Article does not resolve the criminal or tort law status of risk imposition. . . . [But it shows] that one important argument in favor of liability—the argument that risking is itself a kind of consequential harming—must be abandoned.").

On the risk-is-a-harm view, RE—and presumably attempt as a general matter—are no longer inchoate offenses, but offenses that generate their own harm. Finkelstein points out that describing risk as a harm does not itself suggest any opinion as to whether we should criminalize the creation of that harm. *See* Finkelstein, *supra* at 965–66. For present purposes, though, the risk-as-harm notion is significant precisely because RE does exist as a crime and this view provides one possible explanation or justification of the purpose and proper scope of that crime.

it might not point to *good* answers, so it is entirely possible that using ARH rather than RE would not resolve the problem in a satisfying way. In the end, it may be no simpler to make conceptual sense of ARH with respect to the count-counting problem than it is for RE. But that is the point: RE and ARH essentially cover the same ground and give rise to similar conceptual conundrums, so the view that RE "solves" the ARH puzzle is mistaken.

RE is also no clearer than ARH would be with respect to its minimum conduct requirement, that is, the point in a course of conduct when otherwise non-criminal behavior becomes sufficiently proximate to potential harm for liability to arise. A requirement of conduct that "places or may place another in danger" of a harm is not obviously more helpful or accurate or easy to implement than demanding a "substantial step" (or the like) in the direction of causing the same harm. At what point has an actor moved far enough in the direction of placing another in jeopardy that criminal liability should attach? The answer, if any *ex ante* answer is possible, seems no clearer in the RE context than in the ARH context.

RE, then, gives rise to conceptual and practical difficulties that either duplicate the difficulties of ARH or seem at least comparably problematic. Further, adopting a specific offense of RE rather than using a general attempt provision introduces the risk of incoherence in the law's conceptual approach to crime. A general attempt formulation, whatever its approach, applies across the board. Using RE instead of, or in addition to, attempt creates the possibility of inconsistency or redundancy.

One might offer, as R.A. Duff has, an account that identifies a categorical difference between endangerment offenses and attempts.[154] Such an account could justify creating distinct offenses or groups of offenses covering each of the two categories. Even if correct, such a theory would seem to suggest parallel approaches to the two categories: for example, having a single "endangerment" provision in a code's general part that, like the attempt provision, piggybacks on other defined crimes rather than defining a specific independent crime for one kind of endangerment only. It does not quite explain why attempt is the kind of inchoate crime demanding a broad

154. *See generally* Duff, *supra* note 52.

general-part provision while endangerment is the kind of inchoate crime for which a more specific offense is appropriate.[155]

Further, while such an account might justify the existence of RE, it would not justify an RE offense that substitutes for or replaces ARH. As noted earlier, Duff's own view conceives of the possibility of some form of reckless "attacks" or attempts as well as reckless endangerments.[156] His theory does not suggest that we can solve the ARH dilemma by adopting RE instead; rather, it suggests that both ARH and RE may be necessary to deal with different situations.

A final potential problem with RE relative to ARH is its breadth: whereas attempts can vary in grade based on the harm of the target offense (injury versus serious injury versus death), the standard RE formulation defines a single offense covering any risk of injury up to and including death. Some jurisdictions, though, have at least addressed this concern by enacting multiple levels of RE that distinguish between different potential harms and, sometimes, different magnitudes of risk. For example, three states (Arizona, Delaware, and New York) have an aggravated RE offense covering risk of death as opposed to risk of injury.[157] This idea of developing several different flavors of RE to deal with different, narrower categories of behavior suggests a somewhat different approach from either ARH or RE: namely, the possibility of defining many targeted offenses to deal with various different kinds of risky conduct instead of having one broader provision or offense covering any conduct risking a certain harm. The next section discusses that approach.

B. Specific Endangerment Offenses

Another way to criminalize the substance of ARH without recognizing the ARH offense is to define a series of specific endangerment offenses instead of a single RE offense. This method has been pursued in the UK and elsewhere.[158]

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155. *See id.* at 57–59 (noting various issues relating to adoption of endangerment offenses, and concluding that "[s]uch considerations do not tell us just how general or specific, in which ways, our endangerment laws should be, and do not rule out a 'reckless endangerment' offense as general as that defined by . . . the Model Penal Code . . . .").

156. *See supra* notes 70–74 and accompanying text.

157. *See supra* note 132 (citing statutory provisions).

158. *See* David Lanham, *Danger Down Under,* 1999 CRIM. L. REV. 960 ("The

Many American jurisdictions adopt both RE and more specific endangerment offenses, in part because RE alone may not seem sufficient to address some forms of dangerous conduct. Perhaps because the boundaries of RE are so nebulous, its punitive bite tends to be fairly weak. Most American jurisdictions grade RE as a high misdemeanor or very low-level felony. (Foreign jurisdictions, interestingly, are more willing to make much higher sentences available for RE.159) As a practical matter, then, enforcement of the RE offense is unlikely to be as worthwhile or effective as the relative gravity of at least some dangerous behavior might warrant. (Perhaps significantly, in most states that currently define both a reckless-homicide offense and RE, the offense grade for ARH, if it were recognized, would be higher than the current grade for RE. Generally speaking, ARH would be a mid-level felony.160) The shape-

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English approach [to endangerment] was, and is, to create a number of specific offences of endangerment, limited to endangerment by specific means or in specific circumstances . . . .").

159. *See id.* at 961, 964–65 (citing general RE offenses in Australian jurisdictions: in Victoria and Northern Territory, maximum penalty of 5 years for risk of serious injury, 10 years for risk of death; in South Australia, up to 15 years for risk of death; under Model Criminal Code, up to 10 years for risk of death, or up to 13 years if aggravating circumstances present).

160. Twenty-one states define offenses for both reckless homicide and RE. For twelve of those states—including Colorado, which does recognize ARH—the grade that would exist for ARH is two or more offense grades above the existing grade for RE. *See, e.g.*, COLO. REV. STAT. § 18-3-104(2) (2006) (reckless homicide; Class 4 felony); *id.* § 18-2-101(4) (attempt to commit Class 4 felony is Class 5 felony); *id.* § 18-3-208 (RE; Class 3 misdemeanor); *id.* § 18-1-105(1)(a)(V)(A) (presumptive sentence range for Class 5 felony is 1-3 years); *id.* § 18-1-106(1) (Class 3 misdemeanor punishable by up to six months). *See also* TEX. PENAL CODE § 19.04 (Vernon 2003) (reckless homicide; second-degree felony); *id.* § 15.01(d) (attempt to commit second-degree felony is third-degree felony); *id.* § 22.05(e) (RE; Class A misdemeanor); *id.* § 12.21 (Class A misdemeanor punishable by up to one year); *id.* § 12.34(a) (third-degree felony punishable by 2–10 years).

In New York and Illinois, the grades would be the same. *See* N.Y. PENAL LAW § 125.15 (McKinney 2004) (reckless homicide; Class C felony); *id.* § 110.05(5) (attempt to commit Class C felony is Class D felony); *id.* § 120.25 (first-degree RE, requiring creation of "grave risk of death" while acting with extreme indifference; Class D felony); *see also* 720 ILL. COMP. STAT. 5/9-3(d) (West 2002) (reckless homicide; Class 3 felony); *id.* at 5/8-4(c)(5) (attempt to commit Class 3 felony is Class A misdemeanor); *id.* at 5/12-5(b) (RE; Class A misdemeanor).

Kentucky is the only state for which the grade of RE (in this case, first-degree RE) would exceed that for ARH. *See* KY. REV. STAT. § 507.040(2) (LexisNexis 1999) (reckless homicide; Class C felony); *id.* § 506.010(4)(d) (attempt to commit Class C felony is Class A misdemeanor); *id.* § 508.060 (first-degree RE, requiring creation of "substantial danger of death or serious physical injury" while acting with extreme indifference; Class D felony); *id.* § 532.060(2)(d) (Class D felony punishable by 1–5 years); *id.* § 532.090(1) (Class A misdemeanor punishable by up to

lessness of the offense's definition might make it more difficult for prosecutors to obtain convictions, or to predict with confidence that a conviction would be forthcoming if a case went to trial; the relatively light available sanctions limit the potency of any convictions that are obtained.

The potential weaknesses, limitations, and ambiguities of the RE offense do not appear to be lost on legislatures. Perhaps because of the failings of the RE offense in terms of achieving punishment, or achieving enough punishment, many jurisdictions with general RE offenses also have numerous more specific offenses addressing particular forms of endangerment, and often grade those offenses more seriously than RE itself.

Here are a handful of examples of such offenses, by no means exhaustive.[161] Several states define offenses for shooting a firearm at a building or car,[162] or generally for handling

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1 year).

161. To consider just one state, Illinois has a general RE offense to which it adds numerous offenses covering specific types of behavior risking injury or death, often with far more serious penalties. *See, e.g.*, 720 ILL. COMP. STAT. 5/12-2.5 (West 2002) (causing "an object to fall from an overpass in the direction of a moving motor vehicle traveling upon any highway"; Class 2 felony); *id.* at 5/12-4.5 (tampering with food, drugs, or cosmetics; Class 2 felony); *id.* at 5/12-4.8 (possessing infected domestic animals; petty offense); *id.* at 5/12-4.9 (inducing or encouraging a child athlete to ingest a drug designed for quick weight gain or loss; Class A misdemeanor, Class 4 felony for repeat offense); *id.* at 5/12-5.1 (permitting residential real estate to deteriorate; Class A misdemeanor, Class 4 felony for repeat offense); *id.* at 5/12-5.5 ("gross carelessness or neglect" in operating a steamboat or other public conveyance; Class 4 felony); *id.* at 5/12-21.6 ("willfully" permitting a child to be endangered; Class A misdemeanor, Class 3 felony for repeat offense); *id.* at 120/5, 120/10 (hazing; Class A misdemeanor).

In addition to the above offenses, Illinois also has various firearm-discharge offenses of the type the text discusses for other states. *See, e.g.*, *id.* at 5/24-1.2 (grading knowingly discharging any type of firearm in the direction of a building or vehicle one "reasonably should know to be occupied" as a Class 1 felony, but aggravating the offense to a Class X felony where the offense occurs near a school, and to a Class X felony with a minimum imprisonment term of ten years where the firearm is discharged in the direction of certain categories of person, such as peace officers, emergency medical technicians, and teachers); *id.* at 5/24-1.2-5 (similar to 5/24-1.2, but only applies to "machine guns" and guns equipped with silencers; grades discharging such a firearm in the direction of an ordinary person as a Class X felony, and aggravates the offense to a Class X felony with a minimum term of 12 years where the firearm is discharged in the direction of certain persons, as noted above).

162. *See* ARIZ. REV. STAT. ANN. § 13-1211 (2001) (Class 2 felony for "knowingly discharg[ing] a firearm at a residential structure"; Class 3 felony for nonresidential structure); TEX. PENAL CODE § 22.05(b) (Vernon 2003) ("knowingly discharg[ing] a firearm at or in the direction of . . . a habitation, building, or vehicle [while] reckless as to whether the habitation, building, or vehicle is occupied").

or shooting a firearm recklessly or negligently,[163] or both.[164] Washington defines a separate offense for "drive-by shooting,"[165] while limiting its RE offense to cover only risky conduct "not amounting to a drive-by shooting."[166] (Interestingly, a few states, following the Model Penal Code, deal with reckless gun use by creating a presumption for purposes of the RE offense, rather than by defining an entirely separate additional crime.[167]) Several states also address the specific risk of HIV transmission.[168] Perhaps the most curious example is New

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163. *See* MINN. STAT. § 609.66(1) (West 2003) (recklessly handling or using a firearm, weapon, or explosive so as to endanger safety); VA. CODE ANN. § 18.2-56.1(A) (2004) ("It shall be unlawful for any person to handle recklessly any firearm so as to endanger the life, limb or property of any person."); W. VA. CODE ANN. § 61-7-12 (LexisNexis 2005) ("Any person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony . . . ."); *cf.* MONT. CODE ANN. § 45-8-333 (2005) (reckless or malicious use of explosives; misdemeanor).

164. CAL. PENAL CODE § 246 (West 1999) ("maliciously and willfully discharg[ing] a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar . . . or inhabited camper" is felony punishable by "three, five, or seven years"); *id.* § 246.3 ("willfully discharg[ing] a firearm in a grossly negligent manner which could result in injury or death to a person" punishable by up to one year). Notice that the more general offense (§ 246.3) clearly captures the conduct the more specific offense addresses—and also directly refers to some creation of an actual risk to a person, and hints at some culpability requirement as to that risk, which the specific one does not quite do—yet the punishment for the general offense is significantly lower.

165. WASH. REV. CODE § 9A.36.045 (West 2000) (originally called "reckless endangerment in the first degree").

166. *Id.* § 9A.36.050(1).

167. *See* TEX. PENAL CODE § 22.05(c) (Vernon 2003) ("Recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded."); VT. STAT. ANN. tit. 13, § 1025 (1998 & Supp. 2006) ("Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded, and whether or not the firearm actually was loaded."); WYO. STAT. ANN. § 6-2-504(b) (2006) (RE offense is committed, not just presumed, if one "knowingly points a firearm at or in the direction of another, whether or not the person believes the firearm to be loaded"); *see also* MODEL PENAL CODE § 211.2 (1980) ("Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded."). As noted above, *see supra* note 162, in addition to this presumption, Texas defines an offense for shooting at a person, building, or vehicle.

168. *See, e.g.*, GA. CODE. ANN. § 16-5-60(c) (2004) (authorizing up to ten-year sentence for person who knows s/he is "HIV infected" knowingly engaging in a sex act, sharing a needle, or donating blood without disclosing HIV status); *id.* § 16-5-60(d) (authorizing up to twenty-year sentence for person who knows s/he is "HIV infected" or "hepatitis infected" assaulting police or corrections officer "using his or her bodily fluids [or] saliva, urine, or feces" with intent to transmit HIV or

Jersey, which has no general RE offense, but treats knowingly pointing a firearm at another as aggravated assault,[169] and also has an offense entitled "reckless endangerment" that covers only such particulars as "any act . . . which results in the loss or destruction of a vessel"[170] or "manufactur[ing] or sell[ing] a golf ball containing acid or corrosive fluid substance."[171]

RE's breadth, possible ambiguity, and possibly inadequate punishment grade, then, lead legislatures to compensate by adopting more specific offenses that ban particular forms of especially (or obviously) dangerous behavior, often with aggravated punishment relative to the basic RE offense. The inclusion of these more specific offenses, however, itself generates at least four significant problems.

First, to avoid the possible vagueness or ambiguity of a broad ARH or RE offense, these offenses clearly identify the prohibited conduct, but they often do so by *only* specifying the conduct and not identifying the actual risk or harm the offense seeks to prevent. As Douglas Husak has argued, by referring only to conduct and not to the threat or harm that justifies criminalizing the conduct, such offenses, although seemingly precise, will be overinclusive, as they will invariably reach instances of the prohibited conduct that are perfectly reasonable.[172]

A second, and related, problem is that defining the crime in terms of the conduct itself, rather than in relation to the ultimate harm with which the law is concerned (here, causing injury or death) means that the offense may not explicitly de-

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hepatitis).

169. N.J. STAT. ANN. § 2C:12-1(b)(4) (West 2005). The apparent anomaly of defining inchoate conduct as aggravated assault is explained by New Jersey's general equation of attempts with completed crimes. *See, e.g., id.* § 2C:12-1(b)(1) (aggravated assault occurs if one "attempts to cause serious bodily injury to another, or causes such injury" with requisite culpability).

170. *Id.* § 2C:12-2(a).

171. *Id.* § 2C:12-2(b)(1). One cannot help but wonder which member of the New Jersey legislature made the mistake of buying an acid-filled golf ball.

172. *See* Husak, *supra* note 21, at 605 ("The issue [of overbreadth] becomes especially significant in the context of these offenses [i.e., specific rather than general inchoate offenses], as criminal liability inevitably is imposed on persons whose behavior is reasonable."). *But cf.* Duff, *supra* note 52, at 59–62 (offering considerations in favor of 'implicit' endangerment offenses that do not specify the ultimate harm or risk involved in the prohibited conduct, and thus may be committed where no risk arises).

mand any level of culpability as to that harm.[173] Effectively, culpability as to other specified facts, typically conduct and circumstances—knowing one is firing a gun, knowing one is near a building or vehicle—is used to create an irrebuttable presumption of culpability as to the law's genuine concern, the risk of resulting harm.[174]

Third, the new offenses inevitably create various grading inconsistencies and problems, both with each other and with broader offenses such as RE and attempt.[175] As a code includes more, and more refined, distinctions in its offense definitions, it becomes harder to make those distinctions meaningful by placing the different offenses into different punishment categories, without in turn adopting an unwieldy number of categories. To put it differently, it may be easy to specify offense conduct with precision, but one will not necessarily be able to specify the proper offense punishment with parallel precision—a narrowly defined form of conduct may merit very different punishments in different circumstances.

Fourth, the existence of numerous offenses, some of which might apply to the same conduct, gives rise to the possibility of improperly imposing liability for multiple offenses all of which address the same underlying harm or risk.[176] As I have noted elsewhere, double-jeopardy rules for included offenses are far too lenient, and unclear, to effectively or predictably police this multiple-liability problem.[177] For example, although authority

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173. *Cf.* Michaels, *supra* note 24, at 73–74 ("[D]escriptive standards risk failure if they do not describe or at least make an excellent proxy for the judgments of blameworthiness that underlie the offense. If facts that a standard designates as determinative of liability do not reflect the determinants of culpability, the descriptive standard will, from a blameworthiness perspective, be significantly underinclusive, overinclusive or both and, at least in some cases, will produce bad results.").

174. Felony murder can be seen in this way. It eliminates any requirement of culpability as to causing death, substituting a conduct requirement (committing the underlying felony) that categorically and irrebuttably imputes the otherwise required culpability. *See* ROBINSON & CAHILL, *supra* note 25, at 65–69.

175. See Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes,* 56 HASTINGS L.J. 633, 643–44 (2005) (offering examples, from Illinois law, of specific endangerment offenses whose grading is inconsistent with general endangerment offense).

176. *Cf.* Green, *supra* note 20, at 335 ("Redundancy occurs when the same conduct is covered by more than one provision of the code. . . . Such duplication is problematic in at least three ways: it is confusing, it may lead to unfair multiple prosecutions and the potential for double jeopardy problems, and it is structurally inelegant.").

177. *See* Cahill, *supra* note 143, at 605.

varies depending on the jurisdiction and exact nature of the offenses,[178] endangerment offenses are not always treated as included offenses of murder or even attempted murder.[179] As offenses proliferate, even if they are written with relative precision and specificity, it becomes increasingly likely that multiple offenses will address the same conduct without either being an included offense of the other, giving rise to the potential for excessive punishment, or at the very least, giving prosecutors a significant bargaining chip enabling more favorable plea bargains.[180]

C. Thin Codes and Thick Codes

Given all the problems endangerment offenses generate, one might wonder why an exception was made here to the general rule of having the attempt provision address inchoate offenses—or, having been made here, why similar exceptions

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178. *See* State v. Rumbawa, 17 P.3d 862, 866 (Haw. Ct. App. 2001) ("Thus having the same end result and with a lesser degree of culpability in reckless endangering as compared to attempted murder, reckless endangering in the second degree is a lesser included offense of attempted murder . . . .").

179. *See* State v. Palmer, 513 A.2d 738, 742 (Conn. App. 1986) ("It is possible to commit the crime of attempted murder under our penal code without first committing the crime of reckless endangerment in the first degree. The trial court, therefore, correctly refused to charge that reckless endangerment in the first degree was a lesser included offense of the principal charge of attempted murder alleged in the two counts of the information against the defendant."); People v. Serrano, 697 N.Y.S.2d 814, 818 (N.Y. Sup. 1999) ("Reckless Endangerment in the First Degree is not a lesser included offense of Attempted Murder in the Second Degree since it is possible to commit the latter without necessarily committing the former."); State v. Keller, 695 N.W.2d 703, 714 (N.D. 2005) ("Thus, a person can be convicted of attempted murder for having taken a substantial step toward commission of the crime of murder even if there never was, in fact, a substantial risk of serious bodily injury or death to another as required for reckless endangerment. Therefore, reckless endangerment is not a lesser included offense of attempted murder."); State v. Newbern, 975 P.2d 1041, 1046 (Wash. App. 1999) ("Although we find no Washington case holding that reckless endangerment is a lesser included offense of attempted murder, courts in other jurisdictions have determined that it is not because it is possible to attempt a murder without creating a risk to human life that rises to reckless endangerment. . . . We agree with these cases."); *cf.* State v. Rush, 50 S.W.3d 424, 426 (Tenn. 2001) ("[W]e conclude that neither reckless aggravated assault nor felony reckless endangerment are lesser-included offenses of attempted second degree murder. We conclude, however, that the offense of misdemeanor reckless endangerment is a lesser-included offense of attempted second degree murder. . . .").

180. It is, of course, entirely possible that such duplicative offenses are *intended* to strengthen prosecutors' hand in this way. *Cf. infra* note 233 and accompanying text (discussing tendency of thick code to empower prosecutors).

were not made elsewhere as well, or why the general rule is the general rule in the first place. At least some of the arguments against ARH, after all, seem to be general arguments against the idea of "attempt" as a blanket category, if not necessarily against the idea of inchoate liability itself.

That is to say, RE seems no better or worse than various other offenses that could be used to reduce reliance on the general attempt provision or even replace that provision altogether. If RE is preferred to ARH, why is "attempted murder" preferred to some equivalent specific offense such as "assault with intent to kill"? One possible answer is a systematic preference for thin codes over thick ones. The idea behind having a single attempt provision seems to be that to the extent possible, a criminal code should have fewer and broader provisions rather than more and narrower ones.

This apparent preference for thin over thick goes unstated and unsupported, however.[181] Unfortunately, neither code drafters nor commentators have devoted much attention to explaining or analyzing general questions regarding whether, when, and why a code should seek to be thin or thick, even though the choice has serious implications with respect to who (legislatures, prosecutors, judges, or juries) exercises effective control over the content and development of criminal law.

For example, notwithstanding the thin sensibility its attempt provision suggests, the Model Penal Code does not seem to follow any systematic meta-rules about how to write or structure its rules.[182] Both its General Part and its Special Part indicate sympathy for the idea of a thin code, but with some markedly thick elements, whose relative girth is typically unexplained. For example, in addition to developing general

181. Though the Code and its commentary offer no explicit description or justification of its methodology, Gerald Lynch has suggested that the Code's arguably thin approach derives from its framers' general philosophy of punishment, which saw rehabilitation rather than retribution as central to criminal justice. According to Lynch, this rehabilitationist focus naturally led to a Code with relatively few, spare offense definitions, as much of the ultimate task of specifying a particular punishment for a particular offender was expected to depend on later, individualized determinations of the offender's personality, background, and amenability to reform, as opposed to the nature of the offense itself. *See* Lynch, *supra* note 24, at 309–11.

182. *Cf.* Green, *supra* note 20, at 325 ("The Model Penal Code has precious little to say about the organizing principles that underlie the special part. In comparison to the elaborate exegesis on general part concepts such as culpability such reticence is striking.") (internal footnote omitted).

provisions to cover attempt and other inchoate crimes (conspiracy and solicitation), the Code's General Part creates a single provision to address accomplice liability.[183] The Code also sets out default rules for the culpability levels required for criminal liability, so that individual offenses need not specify the requisite culpability for each particular element.[184] Further, in addition to embracing the idea of using a single provision of potentially broad and varied application rather than specific provisions, the Code sometimes suggests a thin approach to the writing of those individual provisions. For example, the defense for "mental disease or defect"[185] is written in broad language whose content must be, and is meant to be,[186] determined *ex post* in individual cases:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.[187]

The provision does not further clarify what it means to "appreciate" the nature of one's conduct, or to possess a "substantial capacity" to do so, or for that matter, to possess a "mental disease or defect" in the first place.

Yet other areas of the General Part are much thicker, without any explanation of the basis for making those parts thick when others are thin. The justification provisions, for example, are both numerous and lengthy.[188] The defense-of-property provision alone spans several pages of rules, exceptions, and definitions.[189] Nothing about the notion of a justification, as opposed to an excuse like the "mental defect" defense, inherently requires this level of precision. Indeed, if anything,

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183. *See* MODEL PENAL CODE § 2.06 (1985).
184. *See id.* § 2.02(4)–(5).
185. *See id.* § 4.01.
186. *See id.* cmt. 3 at 172 ("It was recognized, of course, that 'substantial' [for purposes of the crucial inquiry as to "substantial capacity" under § 4.01] is an open-ended concept, but its quantitative connotation was believed to be sufficiently precise for purposes of practical administration. The law is full of instances in which courts and juries are explicitly authorized to confront an issue of degree.").
187. *Id.* § 4.01(1) (brackets in original).
188. *See generally id.* art. 3.
189. *See id.* § 3.06.

justification provisions call out for greater simplicity, as they define rules of conduct that apply in situations demanding split-second decisions by everyday citizens.[190] Similarly, although the Code seems to simplify the notion of culpability by defining only four culpable mental states and creating default rules for their application, the definitions of those mental states involve a complex and hardly intuitive parsing of offense elements into three categories—conduct, circumstances, and results—with each mental state defined by reference to each of those categories.[191] (Strangely, though, the Code takes a thin approach to dealing with the three categories themselves, offering no definitions of "circumstance" or "result" and only a broad, and quite unhelpful, definition of "conduct."[192])

The Model Penal Code's Special Part also has both thin and thick aspects, with no clear policy explaining why it adopted the chosen mode in a given case. The approach to theft offenses, for example, embraces a thin vision of offense definition, consolidating into "a single offense"[193] (albeit an offense with eight different flavors[194]), with "a unitary grading scheme,"[195] the various common-law offenses of "larceny, embezzlement, obtaining by false pretenses, cheating, blackmail, extortion, fraudulent conversion, receiving stolen property, and the like."[196] Yet the Code also retains various other common-law offenses, including thick offenses that redundantly address

190. *See* Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes,* 95 NW. U. L. REV. 1, 10 (2000) (hereinafter Robinson et al., *Five Worst*); *see also* Paul H. Robinson et al., *Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication,* 86 J. CRIM. L. & CRIMINOLOGY 304, 310–12 (1996) [hereinafter Robinson et al., *Conduct and Adjudication*].

191. *See* MODEL PENAL CODE § 2.02(2) (1985); *see also* George P. Fletcher, *Dogmas of the Model Penal Code,* 2 BUFF. CRIM. L. REV. 3, 6 (1998) ("Suffice it to say that the definitions [of culpability terms in the MPC] are so complicated that one wonders whether any judge has ever mastered them."). *But see* Paul H. Robinson, *In Defense of the Model Penal Code: A Reply to Professor Fletcher,* 2 BUFF. CRIM. L. REV. 25, 34 (1998) ("My initial reaction is to simply disagree that [the MPC's culpability] provisions are too complex. My first year, first term students master them quickly. Why not judges and instructed jurors?").

192. *See* MODEL PENAL CODE § 1.13(5) (1985) (defining "conduct" as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions").

193. *Id.* § 223.1(1).

194. *See id.* § 223.2–.9.

195. *Id.* § 223.1 explanatory note at 148 (1980); *see also id.* § 223.1(2) (setting out grading of theft).

196. *Id.* § 223.1 cmt. 2 at 127.

specific combinations of other existing offenses: for example, arson,[197] burglary,[198] and robbery.[199] If anything, the overall result suggests a preference for thin codes where possible, given that the approach to theft reflects an explicit desire to simplify and consolidate, whereas the retained common-law offenses may have been kept inadvertently or for purely pragmatic reasons, such as the Code drafters thinking that state legislatures would look askance at a "model" criminal code without any arson, burglary, or robbery offenses.

To summarize, the Model Penal Code's General Part—its major achievement[200]— seems to reflect an effort to tackle individual substantive areas in isolation without any overarching theory or even guidelines as to how to write criminal law. Its Special Part is similarly inconsistent on this score, although it hints at a preference for thin over thick, both in its particular drafting decisions and in its overall length: all of the Code's offenses combined take up less than 17,000 words, which is even shorter than the General Part.[201] The General Part's relative length, on the other hand, itself also suggests a desire for the Code to be thin on the whole, seeking to do as much as possible with general provisions of broad application instead of precise

197. *See id.* § 220.1. Arson is a property-damage offense aggravated to incorporate the jeopardy to human life that attends fires and explosions. *Cf. id.* § 220.3 (defining "criminal mischief," a general property-damage offense). Yet by recognizing a general endangerment offense (in addition to the existing assault and homicide offenses), the Code has a separate means for addressing that distinct harm or risk. *See id.* § 211.2 (defining offense of recklessly endangering another person).

198. *See id.* § 221.1. Burglary combines trespass with attempt (the intent to commit some further crime), with the trespass itself standing in to satisfy the attempt conduct rule. *Id.; cf. id.* § 5.01 (defining the offense of attempt); *id.* § 221.2 (defining the offense of trespass). Thus, like reckless endangerment, burglary deals with a specific inchoate-crime situation: an attempt occurring in the context of a trespass.

199. *See id.* § 222.1. Robbery combines theft and assault. *See id.* (defining burglary as injury or threat occurring "in the course of committing a theft"); *cf. id.* § 211.1 (defining assault offense).

200. *See, e.g.,* Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real,* 1 OHIO ST. J. CRIM. L. 219, 222 (2003) (referring to "the great Wechslerian achievement of the [Model Penal Code's] general part" and noting that "[t]hose portions of the general part of the Code that are widely regarded as failures by academics . . . are the exception, rather than the rule"); Lynch, *supra* note 24, at 298 ("I think it is fair to say . . . that the continuing influence of the Model Penal Code today is far greater with respect to the 'general part' of the criminal law than with regard to the 'special part.'").

201. Judging by my electronic copy, the Special Part of the Model Penal Code is 16,972 words, whereas its General Part is 17,954 words—a count which excludes articles 6 and 7 of the General Part, dealing with sentencing and corrections.

specific offenses.

Perhaps this lack of an underlying code-drafting approach should not be surprising, as the Model Penal Code also arguably lacks any underlying substantive theory of criminal law[202]—or rather, might have too many underlying substantive theories,[203] which amount to no consistent theory at all. Even so, it is especially troubling that the Code, which was after all designed to serve as a model of code drafting, failed to adopt (or apparently, even think about adopting) any clear, uniform methodology.

At least, it's troubling to me. Yet the Code's silence as to these methodological drafting issues is nearly matched by the relative paucity of academic work in this area.[204] The fundamental distinction between thick and thin basically tracks the thoroughly familiar rules-versus-standards debate,[205] which in some ways makes it all the more interesting how few scholars seem to have spent much time trying to apply that debate to the particular context of criminal law. Frequently, any consideration of how criminal codes are supposed to work, or how best

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202. George P. Fletcher, *Criminal Theory in the Twentieth Century,* 2 THEORETICAL INQ. L. 265, 285 (2001) ("The Code fails to take a clear stand on the issues that . . . constitute the primary themes of twentieth-century jurisprudence in criminal law. These include the normative theory of culpability [and] the problem of a comprehensive theory of crime. . . .").

203. *See* Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions,* 82 NW. U. L. REV. 19, 21 (1987).

204. For examples of work that has been done in this area, see Gardner, *supra* note 24, at 206, 246–49 (discussing and critiquing British Law Commission's effort toward thin-code-style generalization); Green, *supra* note 20, at 326–31 (discussing, for several particular types of criminalizable conduct, whether it makes more sense to reform the law by creating new crimes or expanding existing ones); Lynch, *supra* note 24, at 325–48 (offering one of the first thorough efforts to conceptualize the proper allocation of liability issues as between "offense elements" and "sentencing factors"); Simons, *supra* note 24, at 306–28 (discussing possible use of broad versus precise formulations to capture the concept of negligence).

205. The voluminous literature on rules versus standards includes the following: RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 20.3 (6th ed. 2003); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Colin S. Diver, *The Optimal Precision of Administrative Rules,* 93 YALE L.J. 65 (1983); Joseph R. Grodin, *Are Rules Really Better than Standards?,* 45 HASTINGS L.J. 569 (1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis,* 42 DUKE L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited,* 79 OR. L. REV. 23 (2000); Carol M. Rose, *Crystals and Mud in Property Law,* 40 STAN. L. REV. 577, 580 (1988); Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175 (1989); Pierre Schlag, *Rules and Standards,* 33 UCLA L. REV. 379 (1985); Cass R. Sunstein, *Problems with Rules,* 83 CAL. L. REV. 953 (1995).

to write them, is tacit—implied in the course of dealing with some other question.[206]

Further, the two figures who have spent the most time addressing drafting issues, George Fletcher[207] and Paul Robinson,[208] seem to reach entirely contrary opinions as to whether (or more accurately, when) a code should be thin or thick. Their divergence, though, is not a clearly drawn battle line about the relative merits of all-thin or all-thick. Rather, each indicates, without necessarily stating expressly, the belief that a code should have some thin parts and some thick parts.

Of the two, Robinson has devoted more attention to specific issues related to code drafting and has developed a more thorough account. His central position as to thin versus thick depends on an initial commitment to a specific principle of criminal-code writing: that the criminal law should distinguish between two different kinds of rules, which Robinson calls "rules of conduct" and "rules of adjudication."[209] Conduct rules provide an *ex ante* statement to the public regarding what behavior is allowed and prohibited, while adjudication rules determine *ex post* which violations (or violators) of the conduct rules are to be held criminally liable.[210]

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206. For example, many academic articles resolve particular criminal law problems with "there-ought-to-be-a-law" solutions, proposing some new provision that will directly address and resolve the problem in question and thereby indicating an implicit willingness to have, if not an explicit preference for, a thick code that deals with particular situations by adding particular new offenses. If any legislature were to adopt all of the new offenses criminal law scholars have proposed over the years, the resulting code would be very thick indeed.

207. *See* GEORGE P. FLETCHER, BASIC CONCEPTS IN CRIMINAL LAW (1998); FLETCHER, *supra* note 48; Fletcher, *supra* note 202; Fletcher, *supra* note 191; George P. Fletcher, *Truth in Codification*, 31 U.C. DAVIS L. REV. 745 (1998) (hereinafter Fletcher, *Truth*).

208. *See, e.g.*, ROBINSON, *supra* note 62; Robinson et al., *Five Worst*, *supra* note 190; Robinson, *supra* note 191; Robinson et al., *Conduct and Adjudication*, *supra* note 190; Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857 (1994).

209. *See generally* Robinson et al., *Conduct and Adjudication*, *supra* note 190.

210. *See id.* at 306–07. The distinction Robinson makes here is similar to one made earlier by Meir Dan-Cohen. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (distinguishing between criminal law's "conduct rules" addressed to general public and "decision rules" addressed to officials determining liability). A large part of Dan-Cohen's purpose in using the distinction, however, was to offer a descriptive account explaining why some existing criminal rules are structured as they are, rather than a normative theory of how to write criminal law. *See id.* at 636–64. As a normative claim, Dan-Cohen defends what he calls "selective transmission"—"the transmission of different normative messages to officials and to the

Having made this distinction, Robinson argues that the conduct rules should be as thin as possible: there should be as few rules as possible,[211] and they should be simply written and accessible,[212] for the sake of providing clear notice to the general populace.[213] (Interestingly, Dan Kahan has also suggested the utility of having relatively broad offenses with simple terms rather than long, precise definitions, but he takes that position because he does *not* want offenses to give completely clear notice.[214] Instead, he describes what he calls the "prudence of ob-

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general public. . . ." *id.* at 635—as a permissible, and perhaps justifiable, tool or strategy of criminal law. *See id.* at 667–77. He does not, however, clearly express a position as to when this tool should be used or what rules should be characterized as conduct rules rather than decision rules. *Cf. id.* at 667 (noting that the author's claims "do not add up to an endorsement of selective transmission" but "only clear the way for evaluating competing substantive moral considerations—an endeavor that I do not undertake"). To the extent Dan-Cohen offers a position as to whether the expression of the different rules should follow different drafting methods, his position seems to track Robinson's: conduct rules should be simple and accessible, but decision rules can be complex and "may be enhanced by the use of a technical, esoteric terminology that is incomprehensible to the public at large." *Id.* at 668.

Dan-Cohen does hint at the potential of a thin code to achieve the goals of both conduct rules and decision rules simultaneously. He writes that a code written in "ordinary language" can both guide conduct *and* define decision rules, if the language is given a distinct, more technical interpretation when employed at the decision-rule stage. *See id.* at 652 ("The ordinary language of a law defining an offense frames the conduct rule that the law conveys to the general public; the technical legal definitions give content to the decision rules conveyed by the same law.").

211. *See* Robinson et al., *Conduct and Adjudication, supra* note 190, at 308–10.

212. *See id.* at 310–16.

213. *See id.* at 304 ("To effectively communicate to the public, the code must be easy to read and understand. . . . Readability, accessibility, simplicity, and clarity characterize a code that most effectively articulates and announces the criminal law's rules of conduct.").

214. *See* Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous,* 96 MICH. L. REV. 127 (1997). Kahan describes his view:

> Because the means by which bad people can invade the rights of others are infinitely numerous and diverse, any attempt to specify them all by statute is bound to be incomplete. If the law prohibits altering or counterfeiting vehicle titles, for example, offenders will attempt to achieve the same effect by inducing state agencies to issue genuine titles containing false information; if it prohibits the interstate transportation of forged checks, they'll wait until they cross state lines before signing them; if it bans sawed-off shotguns defined as those with barrels of less than 17.5 inches, they'll meticulously cut them down to 18. Delegating power to an agency to close such gaps as quickly as they are discovered is one device for responding to the law's persistent incompleteness; another, even more common one is *prudent obfuscation* of the law's outer periphery. Statutory terms like "fraud," "thing of value," and criminal

fuscation," suggesting that broad terms are desirable precisely because their reach is ambiguous, encouraging would-be criminals to err on the side of lawfulness rather than carefully skirting around the fringes of a clear prohibition.215)

Robinson's position as to adjudication rules is somewhat more complicated: although he again supports making the rules as general and broad as possible, he acknowledges that precision and complexity are sometimes warranted.216 Robinson, then, tends to favor a thin code, but with some possible thickness in the adjudication rules.

Fletcher, on the other hand, takes nearly the opposite view. He also distinguishes between rules designed to guide citizens (which he associates with the special part of a criminal code) and rules designed to guide officials (which he associates with the general part).217 Precisely because offense definitions must guide conduct, Fletcher suggests that they demand some degree of thoroughness and precision.218 Accordingly, Fletcher has criticized the Model Penal Code for essentially being too *thin* as to at least some of its offense definitions, as in its deci-

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> "enterprise" are vague enough to "encompass a wide range of criminal activity, taking many different forms and [attracting] a broad array of perpetrators operating in many different ways." They remove offenders' temptation to look for loopholes ex ante by giving courts the flexibility to adapt the law to innovative forms of crime ex post.

Id. at 138–39 (quoting H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248–49 (1989)). Kahan does not object to complexity in *malum prohibitum* offenses, such as violations of the tax code, *see id.* at 147–48, although he generally suggests the criminal law should avoid such offenses in favor of punishing immoral conduct, *see id.* at 153.

215. *See id.* at 129 ("[P]rivate knowledge of the law *isn't* unambiguously good. The more readily individuals can discover the law's content, the more readily they'll be able to discern, and exploit, the gaps between what's immoral and what's illegal. The law must therefore employ strategies to discourage citizens from gaining knowledge for this purpose.").

216. *See* Robinson et al., *Conduct and Adjudication, supra* note 190, at 321–22 ("A code of adjudication can benefit from being made shorter and more streamlined, just as . . . a code of conduct could so benefit."); *id.* at 304–05 ("The adjudicators, on the other hand, can tolerate greater complexity. Clarity and simplicity are always a virtue, but the judgments required of adjudicators necessarily limit how simple the adjudication rules can be.").

217. *See* Fletcher, *Truth, supra* note 207, at 753 (citing Dan-Cohen, *supra* note 210).

218. *See* Fletcher, *Truth, supra* note 207, at 752 ("[T]he nearly universal principle of modern criminal justice, *nulla poena sine lege* (no punishment without prior legislative warning), requires that a democratically elected legislature specify the contours of liability. . . . [L]egislatures have the competence and indeed the duty to lay down the rules defining particular offenses.").

sion to consolidate all theft offenses; Fletcher prefers the common law's thicker approach.[219]

Yet Fletcher finds the Model Penal Code too *thick* with respect to some issues: for example, he thinks the Code's culpability and causation rules (clearly "adjudication rules" under Robinson's scheme) are too elaborate and complex.[220] (He takes the same position as to the Code's justification provisions,[221] thereby agreeing with Robinson, who agrees that they should be thinner because, in his conceptualization, they define conduct rules.[222]) Indeed, as to many complex theoretical issues that Robinson would consider to be matters of adjudication, Fletcher endorses thinness to the point of emaciation, preferring a "deferential" code that does not necessarily offer rules of its own, even broad ones, but relies instead on outside sources to resolve some matters:

> [A] "deferential" code . . . endorses a theoretical structure for solving problems and may contain some detailed provisions on specific areas, but it proceeds on the assumption of partnership with both the courts and the theoretical community. A deferential code, therefore, has a proper sense of its own limits. To be sure, it avoids trying to solve controverted philosophical issues.[223]

Fletcher points approvingly to the German Criminal Code as a deferential code and also cites the U.S. Constitution as a document of the deferential variety.[224]

Another commentator who has written on these issues in some detail is Alan Michaels, who has set out a contrast between "descriptive" and "judgmental" models that partly (but not entirely) parallels the thin-versus-thick account this Article

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219. *See* Fletcher, *supra* note 202, at 283–86; Fletcher, *supra* note 191, at 11 ("[T]he Code simply abolishes the historically crafted distinctions between larceny and embezzlement, which gave the common law offenses sharp edges. . . .").

220. *See* Fletcher, *supra* note 191, at 5–8; *see also* Fletcher, *Truth, supra* note 207, at 748.

221. *See* Fletcher, *supra* note 191, at 8–10 (criticizing elaborate definition of "unlawful force"); Fletcher, *Truth, supra* note 207, at 748–49 (same).

222. *See* Robinson et al., *Conduct and Adjudication, supra* note 190, at 310–12.

223. Fletcher, *Truth, supra* note 207, at 750; *see also id.* at 756 ("That which is not expressed in deferential codes, and which resides in the theoretical infrastructure, might even be more relevant than that which is actually laid down in black letter rules.").

224. *See id.* at 750–51.

presents.[225] For Michaels, a descriptive rule "defines criminal liability by reference to facts,"[226] whereas a judgmental rule would "define criminal liability in plainly indeterminate terms that call for appraisals, assessments, or judgments beyond findings of fact."[227] This distinction maps onto the thick-thin distinction to the extent the descriptive method would demand thorough, precise, and numerous (in other words, thick) definitions of criminal rules, while the judgmental method might more easily apply fewer, broader, and more flexible (in other words, thin) general concepts such as "reasonableness" or "wrongfulness."[228] The analogy is imperfect, however. For example, Michaels notes that a "criminal code defined entirely by reference to how a law-abiding person or typical person would behave could be understood as fully descriptive,"[229] though such a code would be thin under my account. At any rate, for purposes of the present exploration of the thick-thin debate, Michaels seems to take no firm position, as he ultimately calls for a "judgmental descriptivism" approach that would combine features of the two methods he describes.[230] Even so, his formulation is worth mentioning here, as it certainly has some overlap with this Article's framing of the issues, and the similarities and differences between the two may be illuminating.[231]

The limited existing literature addressing criminal-code writing, then, offers contrary positions as to whether and when it is desirable to follow the thin-code model, the thick-code model, or some amalgam of the two. This article does not expect, or seek, to categorically resolve the issue, or to provide a fully developed theory of criminal-code writing. Rather, the

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225. *See generally* Michaels, *supra* note 24.

226. *Id.* at 62. *See also id.* at 63 ("If omniscience as to facts would leave virtually no doubt about how the case would be decided, a standard is descriptive. Put differently, under a descriptive standard, two juries presented with identical cases should reach the same result.").

227. *Id.* at 64.

228. Michaels also discusses how his distinction compares to the rules-standards distinction noted above. *See id.* at 63 n.55; *supra* note 205 and accompanying text.

229. *Id.* at 82 n.154.

230. *See id.* at 81–85.

231. For example, it may be interesting to note that Michaels characterizes the Model Penal Code as demonstrating a general (though not overwhelming) preference for descriptivism, *see id.* at 64–65, while he hints that both Robinson and Fletcher (and Kahan as well) favor judgmental rules, or at least acknowledge their inevitability, *see id.* at 66–67.

present purpose is to call attention to this heretofore largely neglected problem and offer some preliminary observations. (In the following section, I also identify some current, and common, practices that show the dangers of ignoring the issue altogether by adopting various provisions that fail to follow any sound or consistent scheme.) Here I offer four general considerations that criminal law drafters should bear in mind.

First, and most centrally, it must be recognized that the choice between a thin and a thick code is a choice about the allocation of institutional authority.[232] A thick code, with many fixed and precisely defined offenses, represents a relatively greater assertion of lawmaking prerogative on the legislature's part. By specifying with detail the contours of particular offenses, and the levels of punishment that attach to each, the legislature limits the power of judges and juries to shape the law's content. At the same time, a thick code also arguably shifts the balance of power among those who implement the code toward prosecutors and, again, away from judges and juries. More different offenses, even if they are defined fairly narrowly, may mean more different potential charges, or combinations of charges, as to which a prosecutor may negotiate a plea. Also, the more precisely defined are the punishments that attach to each crime, the more accurately the prosecutor (and the defense) can predict the practical effect of entering into a plea agreement, making bargains more certain and therefore more likely. Various commentators on sentencing guidelines, especially the federal sentencing guidelines, have observed that although they appear to reflect an exertion of authority by the legislature or sentencing commission, their complexity and precision ultimately operates to give greater power and discretion to prosecutors.[233]

A thin code, adopting fewer provisions each of which has a broader and more flexible reach, has the opposite effect: it

232. *Cf.* Lynch, *supra* note 24, at 343–48 (discussing institutional roles of legislature and judiciary as significant aspect of decisions about allocating liability issues between "offense elements" and "sentencing factors").

233. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication,* 93 CAL. L. REV. 1585, 1634 (2005) ("In the context of federal sentencing, the Sentencing Guidelines clearly—and largely intentionally—restricted judicial authority and shifted power to prosecutors."); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow,* 117 HARV. L. REV. 2548, 2559 (2004) ("[R]ule-based sentencing gives prosecutors control—not just over bargained-for sentences, but over post-trial sentences as well.").

delegates some lawmaking authority from the legislature to the judges and juries who decide the exact boundaries of the flexible provisions *ex post*.[234] Those players ultimately determine, often in the context of fulfilling a "factfinding" role, the meaning of terms such as "reasonable"[235] or "substantial risk"[236] or "substantial step."[237] I have suggested elsewhere that there are sound reasons to grant judges and juries such an institutional check on legislative power.[238] At the same time, there are obviously valid concerns, commonly expressed in the sentencing literature,[239] about balancing the desirability of case-by-case liability decisions with the concomitant risks of arbitrariness and disparity.

In any event, the central point is that criminal-law drafters must recognize the institutional consequences of adopting one structure or formulation instead of another.[240] Husak's argument about the overinclusiveness of seemingly narrow, conduct-oriented inchoate offenses is apposite here.[241] He suggests that thick codes' precise offenses, or at least the inchoate ones—to the extent they define offenses by reference to conduct and not to some harm of legitimate concern—will inevitably reach instances of the conduct that do not actually threaten the relevant underlying harm. Thinner provisions focusing on broad categories of harm, rather than narrow instances of con-

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234. *Cf.* Simons, *supra* note 24, at 315–17 (discussing how general negligence standard empowers factfinder to give substantive content to legal standard).

235. *See, e.g.,* MODEL PENAL CODE § 2.02(2)(d) (1985) (defining "negligently"); *id.* § 2.09(1) (describing the affirmative defense of duress); *id.* § 210.3(1)(b) (defining manslaughter); *id.* § 250.2 (defining disorderly conduct).

236. *Id.* § 2.02(2)(c)–(d) (defining "recklessly" and "negligently"); *id.* § 2.13 (defining entrapment defense); *id.* § 3.07 (defining rules for use of deadly force); *id.* § 3.11(2) (defining "deadly force"); *id.* § 210.0(3) (defining "serious bodily injury").

237. *Id.* § 5.01(1)(c).

238. *See generally* Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder,* 2005 U. CHI. LEGAL F. 91.

239. *See* Stephen Breyer, *Federal Sentencing Guidelines Revisited,* 14 CRIM. JUST. 28, 35 (Spring 1999) ("Like law itself, the guidelines sought a better balance between rules that promote uniformity among cases, and practices that focus upon fairness and equity in the individual case."); Steven L. Chanenson, *The Next Era of Sentencing Reform,* 54 EMORY L.J. 377 (2005); Norval Morris, *Towards Principled Sentencing,* 37 MD. L. REV. 267, 285 (1977) (advocating presumptive guidelines as means of enhancing uniformity while maintaining discretion).

240. *See* Cahill, *supra* note 143, at 601–04 (discussing need to consider institutional roles of different players when deciding whether to define a rule as an offense element or a sentencing factor).

241. *See* Husak, *supra* note 21, at 605–15; *see also supra* note 172 and accompanying text.

duct, may avoid such overbreadth—but then again, they also may not. One problem is that their scope is unpredictable *ex ante* precisely because they are ambiguous about the conduct they prohibit. Their effective reach will be determined after the fact by law enforcement, prosecutors, and juries. Such offenses might not be overbroad in the sense of applying to identifiable cases that do not deserve punishment. Even so, they may still overdeter if people refrain from engaging in conduct that is actually allowed but whose status is unclear *ex ante,* or may create problems with discretionary enforcement, as Husak notes.[242] But Husak's analysis suggests that the inchoate provisions of a thick code may also confer great discretion on the police, on whom we must rely to rein in the offenses' tendencies toward overbreadth.

Second, as the Robinson and Fletcher positions make clear, it is entirely possible that a code should be thick for some purposes and thin for others. Because of the disparity concerns just noted, for example, criminal sentencing rules have become extremely thick in the last few decades. This trend may represent an overreaction against an aspect of criminal law that had been thin to the point of skeletal emaciation, but also may reflect a particular concern for precision in the rules fixing the amount of liability, as opposed to the rules determining whether liability exists. On the other hand, the distinction between sentencing issues and, say, what Robinson would characterize as "conduct rules" can be fairly slippery. The categorization of a particular factor may depend in part on an overt legislative decision about how to characterize it, given the procedural and other consequences following from the choice.[243] Perhaps sentencing rules should be thinner, but offense definitions should simultaneously be made thicker. This is *not* to say, however, that the choice between thick and thin is meaningless, or that it is acceptable for a code to be thick, thin, or both in an indiscriminate and unprincipled way. The next section discusses the dangers of inattention to the issue.

Third, although it is easy to characterize thick codes as rigid and unwavering while thin codes are more elastic and adaptable, the thin approach carries its own risks of a more

242. *See* Husak, *supra* note 21, at 623 ("Law enforcement might become too discretionary in the absence of a statute that unambiguously proscribes such conduct as heroin possession.").

243. *See* Cahill, *supra* note 143, at 602–04.

pervasive conceptual ossification of our approach to criminal law. Over time, broad legal constructs that seek to map onto entire general categories of issues may become confused with the underlying conceptual categories themselves, or reified as if they represent some objectively true, immutable fact. That is to say, there is no such thing, out in the world, as an "attempt;" the idea of attempt is merely a legal formulation designed to deal with a set of situations that seem meaningfully similar. Yet criminal law theorists now tend to view issues of inchoate liability through the prism of "attempt" simply because that is how the law has chosen to formulate the issue.

Finally, there may be some ways to structure criminal law that go beyond, or harmonize, the thin-thick dichotomy. For example, one solution Paul Robinson and I have proposed in the past, and which the Model Penal Code itself indirectly suggests, is to write a thin code, but supplement that code with official commentary that has the effect of fleshing out its rules.[244] The commentary might offer clear and precise illustrations of how the code should apply to predictable and recurring situations, while the code itself would retain the flexibility to accommodate unforeseen cases.

In any event, as the next section discusses, many modern codes are both thin and thick with respect to the same types of rules, creating multiple overlapping provisions to address the same conduct or issue, with no clear reason for doing so. While it may make some sense to be thin for some purposes and thick for others, it is dangerous to pile thickness onto a thin frame.

D. The Dangers of Mixing Thick and Thin

In the ARH case, the Model Penal Code adopted a thick solution out of step with its usual thin preferences. If that were the end of the matter, perhaps this would be nothing more than an interesting legal footnote. But many legislatures have replicated or exacerbated the problem by enacting codes that generally follow the thin model, but then supplementing those codes with numerous new, specific offenses.[245] The later provisions often duplicate and overlap with provisions in both the general part (such as the complicity, conspiracy, and attempt

244. *See* Robinson & Cahill, *supra* note 175, at 654–55.

245. *See id.* at 635–36 (noting large number of additions to criminal codes after enactment, and observing that *rate* of amendment is accelerating).

provisions) and the special part (such as broad theft offenses or assault offenses). One example of this practice is the proliferation of specific endangerment offenses supplementing the more general RE offense, as discussed in Part II.B.

Those endangerment offenses, coupled with the preexisting attempt provision, raise issues of applying inchoate liability to offenses that are themselves inchoate. If a code has a general attempt rule and also defines numerous inchoate offenses to which the attempt rule might apply, the basis of criminal liability begins to slide further and further from the actual harms the criminal law seeks to address. Unfortunately, the modern trend is to keep a general attempt provision—often a provision with broad terms, such as demanding only a "substantial step" toward an offense for attempt liability to apply—yet also to add more and more offenses, many of which cover inchoate conduct.[246]

Even without the "double-inchoate" problem, layering specific offenses over other, more general offenses leads to redundancies and inconsistencies in the law. As I have discussed elsewhere, these duplications are neither unimportant nor harmless, but cause several significant problems.[247] First, overstuffed criminal codes make it more difficult for the average citizen to understand what the criminal code commands. Rather than promoting the principle of notice, today's criminal law creates an impregnable network of prohibitions that no one but a criminal law expert could decipher.

The notice problem is further exacerbated by the increasing level of criminalization. As William Stuntz has put it, we are moving "ever closer to a world in which the law on the books makes everyone a felon."[248] Even attorneys, police officers, and other law enforcement officials cannot grasp all of the prohibitions of modern criminal law. The increasing complexity, inconsistency, and unfamiliarity of most criminal codes also

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246. *See* ASHWORTH, *supra* note 37, at 420–21 (noting several offenses "defined in the inchoate mode" and noting that "[t]here is little evidence that these extensions of the criminal law are carefully monitored, or that the implications of applying the inchoate offenses [like attempt] to crimes defined in the inchoate mode have ever been systematically considered").

247. The balance of this section's discussion draws on Robinson & Cahill, *supra* note 175, at 638–40. For a provocative recent critique of some of these positions, see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. ___ (forthcoming 2007).

248. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001).

increase the likelihood of costly mistakes by both lawyers and trial judges and of disparate treatment. Any given official can only be expected to become familiar with a digestible set of "pet" offenses—but different officials may have different pet offenses, or differing levels of familiarity with the intricacies of the law, making arbitrary treatment more likely.

This ties in to a second problem, which is that the criminalization trend effectively destroys the rule of law. The creation of new statutory offenses may seem like an acceptable and even desirable exercise of legislative prerogative, fully in keeping with the core principles of legality that are central to criminal law. But the modern expansion of criminalization also reflects a shift of practical authority away from the legislature to prosecutors and police, who now have broad discretion over who gets punished and how much they are punished. As Douglas Husak has noted, the combination of that broad discretion with the modern trend toward "all-encompassing offenses . . . is destructive of the rule of law."[249] Arrest, punishment, and the level of punishment are now determined as much by the ad hoc decision-making of individual law enforcement officials as by the legal rules.[250]

Third, overlapping offenses introduce considerable difficulties into the interpretation and implementation of a statutory scheme because the relationship between multiple overlapping offenses is often unclear. Specific offenses that duplicate a preexisting general offense call into question the scope of the general offense. Even if offenses do not contradict each other, efforts to use all available offenses at once to obtain multiple punishments only introduce confusion.[251]

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249. Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 269 (2003).

250. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

251. For example, current Illinois law limits the total aggregate sentence for all consecutive sentences committed as part of a single course of conduct to the sum of the maximum terms for the two most serious offenses. *See* 730 ILL. COMP. STAT. 5/5-8-4(c)(2) (West 2002). In a recent case interpreting this rule, the Illinois Supreme Court held that the consecutive-sentence provision effectively trumped a separate statutory sentence aggravation, so that the maximum allowed sentence for the defendant's *five* offenses of conviction was less than—in fact, less than half of—the sentence for which he would have been eligible had he committed only *one* of the offenses. *See* People v. Pullen, 733 N.E.2d 1235, 1238–39 (Ill. 2000).

The defendant, Dennis Pullen, pleaded guilty to five counts of burglary, which is typically a Class 2 felony. *Id.* at 1236. Normally, Pullen's various prior convictions would have led to sentencing him as a Class X offender under Illinois law.

Finally, as noted above, multiple overlapping offenses generate inconsistent punishment levels[252] or run the risk of improper multiple liability.[253] Perhaps a purely thick code could create a long list of specific offenses and identify particular levels of punishment for each. But then such a code would have to make those offenses mutually exclusive so that improper multiple liability would not be possible: if an act were arson, it would *only* be arson, and not property damage or RE also.

On the other hand, a very thin code might define only a small handful of offenses, taking the view that arson is unnecessary if property damage and RE already exist to address the types of harm arson would also cover. In that case, though, the offenses would need to be "stackable," so that conduct (like arson) creating or threatening multiple harms would lead to liability for multiple offenses, each of which would contribute in some way to the offender's total punishment. Either scheme (no multiple liability, or multiple liability whenever possible) might be feasible for a completely thick or thin code. As a code mixes thick and thin, though, it becomes necessary to confront the tricky task of defining principles for when multiple liability is allowed and when not, or else to acknowledge the likelihood of multiple liability being imposed (or at least threatened in plea negotiations) in inappropriate cases.

Id.; *see* 730 ILL. COMP. STAT. 5/5-5-3(c)(8) (West 2002) (requiring that defendant convicted of Class 1 or 2 felony, who has committed two past offenses of Class 2 or higher, "shall be sentenced as a Class X offender"). If Pullen had pleaded guilty to a *single* count of burglary, he would received a sentence of at least 6 to 30 years, and would have been eligible for an "extended term" sentence of 30 to 60 years. *See id.* 5/5-5-3.2(b)(1) (allowing extended term based on recidivism); *id.* 5/5-8-2(a)(2) (allowing extended-term sentence of 30 to 60 years for Class X felony).

Because he was convicted of *multiple* counts, however, the court had to apply Illinois' consecutive-sentence provision. *Pullen*, 733 N.E.2d at 1237; *see also* 730 ILL. COMP. STAT. 5/5-8-4(c)(2) (West 2002). The court interpreted that provision to require that the defendant could receive, at most, twice the extended-term sentence for the underlying, unaggravated Class 2 felony of burglary. *Pullen*, 733 N.E.2d at 1239–40. A Class 2 felony carries an extended-term sentence of 7 to 14 years, *see* 730 ILL. COMP. STAT. 5/5-8-2(a)(4) (West 2002), so the maximum sentence for Pullen would be 14 to 28 years, instead of the 30 to 60 years available if the consecutive-sentence rules has not come into play. *See Pullen*, 733 N.E.2d at 1240 ("We recognize that it may seem anomalous for defendant to have been eligible for a longer sentence if sentenced 'as a Class X offender' for a single crime than if he were subject to consecutive sentences for multiple crimes . . . . However, we are not at liberty to rewrite the statute in the guise of interpreting it.").

252. *See supra* note 175 and accompanying text.

253. *See supra* notes 176–80 and accompanying text.

CONCLUSION

Most American criminal codes started out fairly thin and have grown increasingly thick. Perhaps there is a reason to prefer the added bulk: whereas a thin code must be nimble and move around a lot, sometimes jerkily, to cover the necessary ground, a thick code can take up the same space just sitting there.

Such is the seeming reaction of law to the notion of attempted reckless homicide: for a code to remain thin while recognizing such an offense, it would need to contort itself in odd ways, causing a result somehow more problematic than any possible cost from the seemingly modest bit of added thickness a reckless endangerment offense would add. As it turns out, though, no such contortions would be necessary: wrapping an attempt provision around reckless homicide is entirely possible —indeed, some codes already do it, although most of those don't realize it—and despite the claims of critics, doing so does not demand any unattractive reshaping of the law or entail any significant harm. Further, and more importantly, the urge to splurge in adopting new crimes, once indulged, proves difficult to contain, resulting in the worst combination of all: a thick body of law whose heft does not enhance, but only duplicates and complicates, an underlying thin frame.