Supplemental Papers

THE NATURE AND JUSTIFIABILITY OF NONCONSUMMATE OFFENSES

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INTRODUCTION

In recent years, philosophers of law—led by Joel Feinberg—have made considerable progress in identifying the moral limits of the criminal law. Virtually all of this progress, however, has been achieved in the context of what might be called consummate offenses. According to the conception I develop here, an offense is consummate if the conduct it proscribes causes harm on each occasion on which it is performed. The paradigm, "core" examples of crimes in any jurisdiction, Anglo-American or otherwise, satisfy this description. But not all crimes are consummate. Some offenses proscribe conduct that does not cause harm on each occasion in which it is performed. Such offenses might be called nonconsummate.[1] Relatively little progress has been made in identifying the moral limits of the criminal law in creating and enforcing nonconsummate offenses. In this paper, I hope to make some headway in identifying the moral limits of the criminal law in the context of these offenses. The end product is not a comprehensive theory of nonconsummate criminal legislation—no one purports to have such a theory for consummate offenses[2]—but a set of principles that form a central part of such a theory.[3] These principles help to establish the conditions under which the enactment of various nonconsummate offenses is a justifiable exercise of state authority.

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1. Terminology varies widely among criminal law theorists. "Inchoate" or "anticipatory" are the terms most commonly used to contrast with "consummate." Here I use "nonconsummate" to ensure that the class of offenses I describe is the contrary of the class of consummate offenses. Every offense is necessarily either consummate or nonconsummate.

2. *But see* JONATHAN SCHONSHECK, ON CRIMINALIZATION (1994).

3. A comprehensive theory of nonconsummate legislation would identify the conditions under which persons should be permitted to expose others to various kinds of risks. Developing such a theory would be a massive undertaking. Such a theory would have to address, *inter alia*, whether and to what extent the permissibility of acts that create risks depends on the *kind* of risk in question. It is noteworthy, for example, that extraordinary precautions are taken to ensure that persons are not subjected to risks from food additives, while comparatively few precautions are taken to ensure that persons are not subjected to risks from foods. A comprehensive theory of nonconsummate legislation would have to decide whether such a distinction is defensible.

In Part I, I will briefly describe the larger context in which a theory about the moral limits of the criminal law is needed. In Part II, I will recount the progress that has been made in identifying these limits. In Part III, I will argue that little of this progress is helpful when applied to the special problems that arise in the context of nonconsummate offenses. In Part IV, I will refine the concept of a nonconsummate offense in order to better understand the peculiar difficulties that arise in attempts to justify them. In Part V, I will distinguish two kinds of nonconsummate offenses. In Part VI, I will defend a number of principles that limit the authority of the state to create and enforce each of these two kinds of offenses. In Part VII, I will apply these principles to the specific area of drug offenses, where the justifiability of nonconsummate legislation is problematic.

I. THE PRINCIPLED LIMITS OF THE CRIMINAL LAW

Among the greatest disappointments in the current state of criminal law scholarship is that so much work remains to be done to identify the moral limits of the criminal law. An adequate theory to identify these limits would be extraordinarily valuable. Almost certainly there is too much rather than too little criminal legislation. By one recent estimate, there are over 300,000 federal regulations that may be enforced criminally,[4] even though the bulk of prosecutions continue to be brought by the states. Many commentators agree that the phenomenon of overcriminalization has given rise to a "crisis."[5] Yet the absence of a viable theory to identify these limits leaves commentators without a principled basis to object to further expansions of the criminal law.[6] To question whether a social problem requires a solution within the criminal justice system is tantamount to denying that the social problem exists at all. Unless theorists can point to a set of principles that would be violated by additional uses of the criminal sanction, they become vulnerable to the politically powerful complaint that they oppose such legislation because they are "soft on crime." Thus the absence of a viable theory contributes to additional growth in the reach of the criminal law, with no end in sight.

Although theorists may lack a *principled* basis to protest the ever-expanding use of the criminal sanction, they are not without any basis whatever. The form of their protests has been unchanged for decades. Some commentators worry that the phenomenon of overcriminalization will erode respect for law generally.[7] Others emphasize the potential for corruption and discrimination when the criminal law exceeds its limits.[8] Still others lament the

4. *See* John Coffee, *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 n.94 (1991).

5. The label "crisis" appears to have originated in Sanford Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967).

6. It is still true that "[w]e use the criminal law for as many different ends today as there are ends of social control. It is widely doubted that all of these uses are equally wise. But no one has attempted in any but the most general terms to suggest how decisions about the use of the criminal sanction should be made." Herbert Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 605 (1963).

7. This complaint is expressed in Sanford Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423 (1963).

8. Some of these concerns are raised in Jerome Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968).

inevitable creation of a "crime tariff."[9] And almost every commentator agrees that the criminal law is spread too thinly, diverting precious resources from more serious matters. Each of these familiar complaints has a common structure: they can be expressed in utilitarian, consequentialist, or cost-benefit terms. These allegations can be summarized by the proposition that the use of the criminal sanction is often ineffective and/or counterproductive.

I do not mean to minimize the practical impact of these kinds of complaints. It is hard to argue that the criminal law should be invoked even when it does more harm than good. At the same time, however, the significance of these kinds of complaints should not be exaggerated. Most importantly, these practical considerations make no reference to the *content* of the criminal law. These complaints may be equally persuasive against instances of criminal legislation which almost everyone agrees to be justified.[10] It may be true, for example, that the use of criminal penalties to combat domestic violence is ineffective and/or counterproductive. Few theorists, however, would use this finding as the premise of an argument to decriminalize acts of domestic violence. In other words, commentators who protest the reach of the criminal law by appealing to the kinds of practical considerations cited above seem suspiciously selective in their criticisms. Why do they tend to target some particular offenses but not others?

Clearly, the above considerations cannot suffice to establish the limits of the criminal sanction. What is required is a set of *principles* to restrict the scope of the criminal law. A principle, as I understand it, makes essential reference to the *rights* of persons.[11] Allegations that the criminal law is often ineffective and/or counterproductive do not raise a principled objection in this sense. No one should conclude that the rights of persons are violated simply because the criminal justice system allocates its resources inefficiently or counterproductively.

Principles, of course, are an integral part of Anglo-American jurisprudence. Typically, however, the principles most familiar to our legal system are examined and applied in contexts other than those in which questions about the justifiability of criminal legislation are raised.[12] Consider one example. The principles governing the adjudication of criminal cases, most notably the requirement of proof beyond a reasonable doubt, express an explicit preference for acquitting several guilty persons rather than for punishing one innocent person. It should be clear, however, that whatever principles protect the rights of defendants become relatively unimportant unless a state is careful not to violate the rights of its citizens when it enacts coercive legislation. What is the point of requiring proof of guilt beyond a reasonable doubt if the state has almost unlimited authority to criminalize any kind of conduct in the first place?[13]

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9. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 277-282 (1968).
10. *See* John Junker, *Criminalization and Criminogenesis*, 19 UCLA L. REV. 697 (1972).
11. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90 (1977).
12. The substantive protections of the Bill of Rights provide obvious exceptions to this generalization. Everyone would recognize the violation of rights in legislation that abridged religious expression, for example.
13. This question is raised by Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431 (1958).

The commitment to principles that underlies support for individual rights and personal liberty can best be understood in moral terms. The conception of morality applied here is what might be called critical morality,[14] which must be distinguished from two competing notions with which it is sometimes confused. First, critical morality is distinct from the results of a cost-benefit analysis. Few contemporary theorists suppose that principles can be justified in consequentialist terms. Almost everyone understands that a liberal state should place a value on rights and freedoms beyond that which is afforded by a simple assessment of costs and benefits. Second, critical morality is distinct from the conventional mores of communities. Public opinion polls consistently reveal that many citizens are prepared to sacrifice rights in order to help reduce crime. Only the application of a critical morality can justify the protection of rights against the apparent willingness of many citizens to relinquish them.

Issues of principle are typically neglected in a traditional education about the substantive criminal law. To be sure, most of the leading textbooks adopted in courses in criminal law include a chapter on criminalization. But the materials contained in this chapter—if they are covered at all—seldom discuss the role of principles in the criminalization decision. More frequently, these materials rehearse the practical concerns mentioned above, and remind students that the use of the criminal sanction is often ineffective and/or counterproductive.[15]

The bulk of the student's education in criminal law concentrates on cases and raises few issues of principle. The kinds of questions asked in the study of cases involve the application of an existing statute to a given (real or hypothetical) fact pattern. For example, does a defendant "knowingly possess a controlled substance" when he is "willfully ignorant" of whether the trunk of the car he is driving contains contraband? Such a question, of course, is both difficult and important. Unfortunately, however, the examination of such an issue fails to address deeper and more fundamental concerns. Should possessory offenses be created at all? If some possessory offenses can be justified, what kinds of things should be illegal to possess? What degree of *mens rea* should apply to possession? Is it sensible to require that possessory offenses must be committed knowingly, or should recklessness or negligence suffice for liability?[16] What is the harm sought to be prevented by drug proscriptions? Is there good reason to hold persons who play a relatively minor role in a scheme to distribute drugs liable for the same offenses as persons whose role is more central? In taking the statute proscribing the knowing possession of a controlled substance as the starting point of analysis, critical thought begins somewhere in the middle, and fails to consider deeper issues of principle.

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14. *See* H.L.A. HART, LAW, LIBERTY, AND MORALITY 19-20 (1963). *See also* the "discriminatory conception" of morality developed in Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, *in* MORALITY AND THE LAW 55 (Richard Wasserstrom ed., 1971).

15. A possible exception is the discussion in many texts of the classic debate between H.L.A. Hart and Lord Devlin about the "enforcement of morals." However, the terms of the Hart/Devlin debate are misleading. The central issue is not *whether* morality should be enforced, but *which* part of morality should be enforced. *See infra* part II.

16. Some of these issues are discussed in Douglas Husak & Craig Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis, A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29 (1994).

In order to start closer to the beginning, a nonconsequentialist moral theory of criminalization is needed. Such a theory would limit the authority of the state to create and enforce criminal legislation by identifying a set of moral principles that protects individual rights. In a liberal state, the conditions that justify the use of the criminal sanction must be narrow and restrictive. The daunting prospects of formulating and defending such a moral theory have caused most commentators to retreat from the effort. Fortunately, however, a comprehensive moral theory is not needed in order to make ample progress in the task at hand.[17] Many of the principles to be applied are plausible and acceptable according to whatever comprehensive moral theory one happens to hold.[18] In what follows, I will endeavor to apply the principles of a critical moral theory to nonconsummate offenses, the justification of which raises a peculiar set of difficulties.[19] But first it is helpful to describe the advancements that have been made in the search for a general theory about the moral limits of the criminal law.

II. GENERAL PROGRESS: THE HARM PRINCIPLE AND THE PROTECTION OF RIGHTS

In this Part, I will briefly recount the progress that has been made in defending a general theory about the moral limits of the criminal law. I will summarize the approach I take to be on the right track, and mention a few unresolved problems with this approach. In brief, this approach employs moral rights to establish the limits of the criminal sanction; the criminal law should not be used except to prevent persons from violating the moral rights of others.

Most theorists agree that the criminal sanction should be imposed only for blameworthy and wrongful conduct. This necessary condition of justified criminal legislation might be called the *wrongfulness* requirement. The most persuasive of many possible arguments in support of this requirement focuses on the institution of criminal punishment. Violations of the criminal law, by definition, are subject to the penal sanction. This sanction involves the deliberate infliction of a hardship.[20] The deliberate infliction of a hardship requires a justification. It is hard to see how punishment could be justified unless a person deserves to be punished, and it is unclear how a person could deserve to be punished unless his conduct is blameworthy and wrongful.[21]

There are principled reasons not to criminalize all wrongful and blameworthy conduct, even if the practical difficulties of enforcement could be overcome. Immorality is a necessary, but not a sufficient condition for

17. "Progress on the penultimate questions need not wait for solutions to the ultimate ones." JOEL FEINBERG, HARM TO OTHERS, 1 THE MORAL LIMITS OF THE CRIMINAL LAW 18 (1984).

18. Thus these principles might be part of an "overlapping consensus" among diverse moral conceptions. *See* JOHN RAWLS, POLITICAL LIBERALISM, Lecture IV (1993).

19. Not all of the considerations relevant to the justifiability of legislation are matters of principle. For example, a principled assessment of nonconsummate offenses need not mention the practical role that such offenses play in facilitating law enforcement by helping to secure plea bargains.

20. The most widely-cited definition of punishment includes this requirement. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4 (1968).

21. The implications of a desert-based theory of punishment are explored in detail by ANDREW VON HIRSCH, PAST OR FUTURE CRIMES? (1985); and, more recently, CENSURE AND SANCTIONS (1993).

criminalization. Commentators have struggled to identify that subclass of wrongful conduct that is eligible for punishment.[22] The *harm* requirement provides the most plausible solution to this problem.[23] Joel Feinberg's work represents the most ambitious and impressive defense of what he calls a *liberal* theory of law, characterized as the thesis that the only good reason to subject persons to criminal punishment is to prevent them from wrongfully causing harm to others.[24]

According to Feinberg, "the sense of 'harm' as that term is used in the harm principle must represent the overlap of [normative and non-normative senses]: only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense."[25] In the "normative" sense of harm, A harms B "by wronging B, or by treating him unjustly."[26] In the "non-normative" sense of harm, A harms B "by invading, and thereby setting back, his interest."[27] The need for an overlap of these two senses should be apparent. Harmful but permissible conduct is not eligible for criminal penalties because it fails to satisfy the wrongfulness requirement. Person A might set back the interests of person B—thereby placing B in a "harmed condition"—through a legitimate competition, for example. But A's conduct should not be criminalized because B has not been wronged or treated unjustly. The interests of B may have been set back and *infringed*, but they have not been *violated*.[28] Conversely, harmless but impermissible conduct is not eligible for criminal penalties because it does not set back anyone's interests. Person A might behave immorally without victimizing anyone.[29] But A's conduct should not be criminalized because no one has been harmed.

The "overlap" of these two senses of harm can be expressed succinctly by invoking the concept of rights: All wrongful conduct that sets back the interests of others violates their rights.[30] Thus Feinberg's liberal framework establishes the moral limits of the criminal law by reference to the rights of persons. As expressed succinctly, "criminal prohibitions are legitimate only when they protect individual rights."[31]

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22. *See* Gerald J. Postema, *Public Faces—Private Places, Liberalism and the Enforcement of Morality*, *in* MORALITY, HARM, AND THE LAW 76 (Gerald Dworkin ed., 1994).

23. I make no effort to canvass the many alternative approaches to criminalization. For two competitive accounts, *see* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); and George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993).

24. A liberal theory of the moral limits of the criminal law is so defined at FEINBERG, *supra* note 17, at 26. Feinberg also allows a narrow range of criminal legislation to prevent persons from offending others. *See* JOEL FEINBERG, OFFENSE TO OTHERS, 2 THE MORAL LIMITS OF THE CRIMINAL LAW (1985). This exception to the requirement of harm, however, is unimportant for present purposes.

25. FEINBERG, *supra* note 17, at 36.

26. *Id.* at 34.

27. *Id.*

28. The distinction between a *violation* of someone's interests, which is a wrongful set-back of interests, and an *infringement* of someone's interests, which is a permissible set-back of interests, is developed by Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977).

29. Examples are discussed in JOEL FEINBERG, HARMLESS WRONGDOING, 4 THE MORAL LIMITS OF THE CRIMINAL LAW (1988).

30. FEINBERG, *supra* note 17, at 34.

31. *Id.* at 144.

Feinberg claims no originality on behalf of his general thesis, which he locates squarely in the tradition of John Stuart Mill. The novelty of his approach lies in the details of his explication of the harm principle. In particular, Feinberg's interpretation provides a response to two reservations that have long been expressed about the harm requirement, even by theorists who tend to sympathize with it. First, many commentators have feared that the harm requirement is empty, trivial, tautological, or vacuous.[32] If *any* undesirable consequence can be countenanced as a harm, all serious candidates for criminal legislation will satisfy the harm requirement. Second, many commentators have endorsed the harm principle because they believe that the criminal law should not be used to enforce morality.[33] According to these theorists it is harm, rather than immorality, that should be prevented by the criminal law. Thus harm is sometimes thought to represent an alternative to the proposal that the criminal law should enforce morality.

Among Feinberg's central achievements are his responses to each of these two reservations. He interprets the harm requirement as nontrivial and full of substantive content, much of which is clearly moral in nature. Applications of his liberal theory entail that criminal intervention is unjustified in principle unless (a) the rights of someone are set back by (b) wrongful conduct. According to this view, the harm requirement cannot function as a genuine alternative to the claim that the criminal law should enforce morality, but rather identifies that subclass of immoral conduct that the criminal law should proscribe.

A detailed account of the specific instances of legislation that should be rejected as incompatible with a liberal theory of law requires at least two supplementary theories: first, a theory of moral rights, and second, a theory of wrongful conduct. Feinberg is well aware of the need for these two supplementary theories.[34] He is equally aware that neither of these theories is easy to produce, and he does not pretend to have completed the task. Still, a virtue of Feinberg's account is that it clearly identifies the kinds of work that remain to be completed in order to provide a comprehensive theory of the moral limits of the criminal law.

Even without these two supplementary theories, one would anticipate few difficulties in applying Feinberg's views to justify enactment of the most familiar criminal offenses in Anglo-American law. Consider theft. Rights in personal property that are set back by acts of theft are a familiar part of virtually all theories of rights. In addition, the wrongfulness of theft is widely acknowledged. Thus the application of a liberal theory to justify the creation and enforcement of the offense of theft seems unproblematic.

Moreover, Feinberg's views are equally plausible when applied to reveal the deficiencies in proposals to create new criminal legislation that most everyone would denounce as an unjustifiable exercise of state authority. Consider a hypothetical proposal to enact criminal legislation to prohibit

32. *See, e.g.*, the reservation expressed by GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 403-04 (1978).

33. *See* DOUGLAS HUSAK, PHILOSOPHY OF CRIMINAL LAW 231-37 (1987).

34. Feinberg is well aware of his commitment to "a theory of 'moral rights' that are independent and antecedent to law." FEINBERG, *supra* note 17, at 111. He acknowledges his lack of a moral theory at 17–18, *id.*

persons from dropping out of school prior to graduation. No one doubts the utility of an educated citizenry. But does someone who fails to complete his education act wrongfully (as opposed to foolishly or imprudently)? Does he set back anyone's rights (apart from his own long-term interests)? Unless both of these questions can be answered affirmatively, a liberal theory of law, as explicated by Feinberg, would preclude enacting criminal legislation for this purpose.

Of course, a sponsor of such legislation could always insist that rights *are* set back, and that conduct *is* wrongful, whenever persons drop out of school. It may be impossible to persuade such a sponsor without actually providing supplementary theories of rights and wrongful conduct. In the absence of these two supplementary theories, one can only hope that the intuitive implausibility of these claims would be recognized. In this context, this hope seems reasonable. The judgment that persons should be punished for failing to graduate is not easily brought into "reflective equilibrium" with other judgments about rights and wrongful conduct, both specific and general, that persons tend to endorse.[35] Thus Feinberg's liberal theory of law, when accompanied by widely shared judgments about the supplementary theories required by its application, seems to escape the charge that the harm principle is trivial and vacuous. His theory supports criminal legislation of which most everyone approves, and condemns criminal legislation of which most everyone disapproves. A liberal theory—according to which the criminal law should not be used except to prevent persons from violating the moral rights of others—is enormously valuable to help identify the moral limits of the criminal law.

III. THE SHORTCOMINGS OF A LIBERAL THEORY OF LAW IN THE CONTEXT OF NONCONSUMMATE OFFENSES

The general progress I have described above in identifying the moral limits of the criminal law has its most straightforward application to consummate offenses. An offense is consummate if the conduct it proscribes causes harm on each and every occasion in which it is performed. It is not surprising that a theory about the moral limits of the criminal law would be developed with consummate offenses in mind. The paradigm offenses known to Anglo-American criminal law—arson, rape, murder, and the like—are examples of consummate offenses. Such offenses satisfy both the wrongfulness and the harm requirements for criminalization. Each perpetrator of these offenses violates the rights of others by wrongfully harming them.

Not all criminal offenses, however, are consummate. An offense is nonconsummate if the conduct it proscribes does not cause harm on each and every occasion in which it is performed.[36] Every jurisdiction, Anglo-American or otherwise, includes many instances of nonconsummate legislation. Although the most familiar examples are the offenses of attempt, solicitation, and conspiracy, most jurisdictions have enacted a multitude of these offenses.[37]

35. The use of "reflective equilibrium" to assess moral claims is explicated and defended in John Rawls, *Independence of Moral Theory*, *in* PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 49 (1974).

36. Further refinements of the concept of a nonconsummate offense are developed *infra* parts IV–V.

37. Several additional examples are presented *infra* note 61.

There is virtually no controversy that the state is justified in creating and enforcing at least some nonconsummate offenses.[38] The immediate question is whether and to what extent the progress described above in defending a general theory about the moral limits of the criminal law provides much insight into the issue of whether and under what conditions the enactment of nonconsummate offenses is a legitimate exercise of state authority.

How can a liberal theory that requires both harm to others and wrongful conduct as preconditions for criminal legislation help to distinguish justified from unjustified nonconsummate offenses? Feinberg has little to say about the application of his theory to nonconsummate legislation.[39] In this Part, I will argue that a theory according to which the scope of the criminal law is confined to the protection of moral rights is not especially promising in distinguishing justified from unjustified nonconsummate legislation. Such offenses raise a new set of justificatory concerns that must be addressed by special principles.

The first problem is to reconcile nonconsummate offenses with the harm requirement itself. Is actual harm to others really to be *required* in each and every case that criminal legislation is justified?[40] By definition, perpetrators of nonconsummate offenses need not actually harm anyone. Thus the harm requirement seemingly implies that nonconsummate legislation lies beyond the reach of the criminal law. This result, of course, is absurd.[41] The question is not whether this radical implication should be accepted, but how it can be resisted. At the very least, a revision is needed in the simple formulation of the harm requirement. According to the most plausible such revision, criminal liability is unjustified unless conduct harms *or risks harm* to others. Feinberg sometimes formulates the harm principle as a disjunctive, requiring either harm or the risk of harm to others.[42]

But this revision, however necessary, is not innocuous, and it can be no accident that Feinberg frequently deletes the "...or risks harm..." clause from his formulation of the harm principle.[43] The whole point of the liberal project to which the harm principle is central is to restrict the authority of the state to create and enforce criminal prohibitions. The inclusion of the "...or risks harm..." clause has the potential to undermine this project.[44] The effect of this

38. For a rare dissent, *see* Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, *in* ASSESSING THE CRIMINAL 349 (Randy Barnett et al., eds., 1977).

39. Feinberg's most extensive treatment of nonconsummate offenses takes place in his discussion of what he calls "aggregative harms" and "accumulative harms." FEINBERG, *supra* note 17, at 193–98, 225–32.

40. In light of the apparent justifiability of some nonconsummate offenses, the harm principle may actually be more useful to identify the moral limits of the civil law than the moral limits of the criminal law. The concept of a harmless or noninjurious tort is incoherent, although the concept of a harmless or noninjurious crime is conceivable. According to one commentator, among "the most distinctive doctrinal facts about the criminal law...[is] the limited relevance of harm to the victim." Coffee, *supra* note 4, at 224.

41. Many particular nonconsummate offenses, of course, have been challenged. *See, e.g.*, Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973).

42. *See* FEINBERG, *supra* note 17, at 11, "State interference with a citizen's behavior tends to be morally justified when it is reasonably necessary to prevent harm *or the unreasonable risk of harm* to parties other than the person interfered with" (emphasis added).

43. *See id.* at 26.

44. John Stuart Mill is also notorious for providing several different formulations of his harm principle, some of which contain and others of which delete reference to risk. *See* C.L. TEN, MILL ON LIBERTY (1980).

disjunct is to expand the scope of state authority exponentially. A wide range of conduct that is ineligible for criminalization under the harm principle can be reintroduced as a viable candidate pursuant to this new clause. Almost any example of conduct to which anyone might reasonably object could be said to *risk* harm. Reconsider the above example of legislation that seemed to be clearly incompatible with the harm requirement. Arguably, persons who drop out of school create a *risk* of harm; they are more likely to victimize others than persons who continue their studies. Thus the inclusion of this new clause in the formulation of the harm principle resurrects one of the very concerns that Feinberg had hoped to put to rest. When revised to include this new disjunct, the harm requirement again appears to be vulnerable to the charge that it is vacuous and trivial.

Consider next how the wrongfulness requirement applies to nonconsummate legislation. Unlike the harm requirement, there should be little temptation to revise the wrongfulness requirement in order to accommodate nonconsummate offenses. Still, attempts to satisfy this requirement are somewhat problematic. Recall that in the absence of a supplemental theory of wrongfulness, applications of Feinberg's liberal theory depend upon widely shared judgments about whether conduct is wrongful. Such judgments seem relatively secure in the context of many consummate offenses. There is probably less consensus, however, about the conditions under which it is wrongful for persons to *risk* causing harm to others. Much activity that risks harm to others is an appropriate and necessary part of life in a complex society. The building of bridges, the practice of medicine, and the act of driving an automobile all create substantial risks of harm to others. Clearly, only a subclass of risky behavior is wrongful and eligible for criminal penalties.

Perhaps the subclass of risky behavior that is wrongful can be characterized by inserting the word "unreasonable" in the appropriate requirement. Thus criminal liability is unjustified unless conduct is wrongful, and conduct is wrongful when it actually harms or creates an unreasonable risk of harm to others. Persons are permitted or perhaps even encouraged to create the risks involved in the building of bridges, the practice of medicine, and the act of driving an automobile, as long as these risks do not become unreasonable. But the use of this new qualification, however necessary in preserving the plausibility of the wrongfulness requirement, raises a host of additional questions. Not only must the theorist produce a supplementary account of when conduct creates a risk of harm to others, he must also produce a supplementary account of the circumstances under which the creation of such a risk is unreasonable.[45]

45. Moreover, there is a category of nonconsummate offenses for which the insertion of the qualification "unreasonable" seems unhelpful to identify that class of risky behavior that is eligible for criminal penalties. Feinberg's most extensive treatment of nonconsummate offenses occurs in the context of his discussion of what he calls *accumulative* harms. FEINBERG, *supra* note 17, at 225–232. This category of harms is not explicitly defined. Feinberg indicates, however, that air and water pollution are "paradigmatic accumulative harms." *Id.* at 228. Single cases of pollution cause little or no harm, but exceed a threshold of harm "through the joint and successive contributions of numerous parties." *Id.* at 229. At what point do acts of pollution become unreasonable?

Perhaps the best solution is to dispense with criminal penalties altogether in the context of accumulative harms. The liberal project, after all, is to define the moral limits of the *criminal* law. Feinberg is surely correct to conclude that the best approach to accumulative harms is "an

So far, it may seem possible to salvage Feinberg's liberal project of using the wrongfulness and the harm requirements, suitably modified, to identify the limits of the criminal law. The only obvious complication is that the supplemental theories required to apply these requirements are more complex than one might have hoped. At this point, however, the problems become more acute. The expansion of the scope of state authority brought about by the inclusion of the new "...or unreasonably risks harm..." clause threatens to undermine Feinberg's central hypothesis about the link between the limits of the criminal law and violations of rights. Recall Feinberg's claim that "criminal prohibitions are legitimate only when they protect individual rights."[46] In order to preserve this hypothesis, the liberal must contend that a right is violated whenever persons are exposed to an unreasonable risk of harm—that is, whenever someone commits a nonconsummate offense that is justifiably created and enforced by the state. How plausible is this contention?

Consider the case of attempts, the most familiar and least controversial kind of nonconsummate offense. It may be tempting to claim that the commission of an attempted crime, no less than a consummate offense, violates the rights of the person against whom that crime is attempted. According to this claim, persons have a right not only that others not steal their cars, for example, but also that others not *attempt* to steal their cars.

There are good reasons, however, to question the claim that persons have a right that others not attempt to commit crimes against them. In the first place, the claim that a right is violated by the commission of a criminal attempt is seemingly incompatible with the classification of an attempt as a nonconsummate offense. If persons have a right that others not attempt to commit a crime against them, and harmful conduct (in the relevant sense) is conduct that violates a right, then it follows that the commission of an attempt causes harm. But nonconsummate offenses are conceptually distinct from consummate offenses in that they need cause no harm.[47] If the perpetrator of an

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elaborate scheme of regulation, administered by a state agency empowered to grant, withhold, and suspend licenses." *Id.* at 229. *But see* Feinberg's response to John Kleinig in Joel Feinberg, *Harm to Others—A Rejoinder*, 5 CRIM. JUST. ETHICS 16 (1986). Here he suggests that his project might be better construed as identifying the moral limits of "state coercion," and that the choice between criminal and civil liability should be "determined by such practical matters as the use of available resources, court facilities, police time, enforcement costs, effects on individual expectations, and the like." *Id.* at 17.

46. FEINBERG, *supra* note 17, at 144.

47. Not all theorists concur. According to Paul Robinson, "Inchoate offenses not only create a risk of harm, they are harms in themselves.... The Harm is intangible in character, and society is its object." Paul Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 226, 268 (1975). This position encounters two difficulties. First, it requires a basis to distinguish harmless conduct from conduct that causes intangible harm. Harm that is intangible is easily confused with harm that is nonexistent. Second, this position requires a basis to distinguish inchoate from consummate offenses. If inchoate offenses cause harm, why are they inchoate?

Robinson marshals some scholarly support for his view. *See*, for example, W. Hitchler, *Criminal Attempts*, 43 Dick. L. Rev. 221 (1929). Criminal attempts cause "a sufficient social harm to be deemed criminal." *But see*, Jerome Hall, who writes that "whether 'inchoate' or 'formal' crimes, e.g., criminal attempts, solicitation, conspiracy, perjury, forgery, possession of burglar's tools, and so on, include any harm—cannot be solved by the weight of authority." JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 217-218 (2d. ed. 1960). He concludes that "many more writers and judges who have expressed themselves on the subject, have written that criminal attempts are harmful in the substantive sense." *Id.* at 218.

attempt violates a right, then attempts turn out not to be nonconsummate offenses after all.

Despite this conceptual puzzle, the claim that a right is violated by the commission of a criminal attempt is tempting. Usually it is possible to identify the person who would have been victimized had the attempted offense been successful, and thus to identify the person whose right might be said to be violated. But not all nonconsummate offenses are like attempts in this respect. Consider criminal solicitation. Suppose that Jones operates a "school for bank robbers" and recruits Black as one of his students. Presumably, such conduct both is and ought to be criminal. But does anyone have a right that Jones not teach Black how to rob banks? If so, who? Davis, a bank teller? All persons who would suffer a loss if Black were to rob banks? No answer is unproblematic. The difficulty of identifying those persons whose rights are violated by a nonconsummate offense is not peculiar to criminal solicitation, but is characteristic of many other nonconsummate offenses as well. Consider the possession of burglar's tools. Presumably, such possession both is and ought to be criminal. But does anyone have a right that Green not possess burglar's tools? If so, who? White, his neighbor? All persons who would suffer a loss if Green were to commit burglary? Again, no answer is unproblematic. But whatever answer is ultimately given, the number of rights must be multiplied exponentially in order to preserve the central hypothesis that a right is violated whenever a person commits an offense that is justifiably enacted by the state. Nonconsummate offenses seem to be counterexamples to this hypothesis.

Moreover, much of what legal philosophers have said about the nature and significance of rights would become implausible if it were true that persons possess a right that others not commit whatever nonconsummate offenses are justifiably enacted by the state. In particular, such rights would not override—much less "trump"—competing utilitarian considerations.[48] Presumably, utilitarian calculations would be required to describe the content of any right that would be violated by the commission of a nonconsummate offense. As we have seen, persons cannot have a right not to be subjected to *any* risk, but only to *unreasonable* risks. Any criterion to distinguish reasonable from unreasonable risks would require that the interests of the risk-taker be balanced against those of possible victims.[49] For example, the basis for judging that driving 60 miles per hour on the New Jersey Turnpike exposes others to an unreasonable risk, while driving 55 miles per hour exposes others to a reasonable risk, depends on a delicate utilitarian balancing. If the outcome of this balancing were to change—say, if cars could be made much safer—the content of the alleged right would be expected to change as well. Applications of a criterion to distinguish reasonable from unreasonable risks require the very kind of utilitarian balancing generally believed to be precluded by the rights protected by the criminal law.[50]

A different conclusion, however, is defensible in the context of consummate offenses. The content of the rights protected by consummate

48. *See* DWORKIN, *supra* note 11, at 92.

49. *See* Christopher Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495 (1986).

50. "The line [between crime and tort] depends primarily on whether society is willing to recognize social utility in the value that the criminal derives from his criminal behavior. If it does, the strategy should be to price, rather than to prohibit." Coffee, *supra* note 4, at 238.

offenses—rights not be raped or battered, for example—do not similarly depend on a utilitarian balancing. Any change in the calculation of the utility gained by perpetrators or the disutility suffered by victims would be irrelevant to the content of these rights. Unlike the alleged rights said to be protected by the creation and enforcement of nonconsummate legislation, the rights protected by the creation and enforcement of consummate offenses plausibly "trump" competing utilitarian considerations.

Of course, it is *possible* to embrace any of the foregoing implications of the hypothesis that a right is violated by the commission of each nonconsummate offense justifiably created and enforced by the state. Perhaps there exist as many rights as this hypothesis requires. Perhaps a right can be violated even though the person who possesses the right cannot be identified. And perhaps rights need not override or trump competing utilitarian considerations. None of these suppositions is incoherent. The more defensible alternative, however, is that no one need have a right that persons not commit a nonconsummate offense. No one need have a right, for example, that Jones not attempt to persuade Black to become a bank robber, or that Green not possess burglar's tools. Admittedly, the reason that the state creates and enforces nonconsummate offenses such as solicitation and possession is because such conduct unreasonably increases the risk that harm will occur and that rights will be violated. But it does not follow that any person has a right here and now that Jones or Green not engage in conduct that increases the risk that harm will occur and that rights will be violated. The preferable view is that a right is violated whenever, for example, persons actually rob banks or unlawfully use burglar's tools, but that no right is violated merely by soliciting others to rob banks or by possessing such tools. The state is justified in creating and enforcing nonconsummate offenses because perpetrators risk violating rights, even though no right is violated when these offenses are committed. I conclude that the general progress that has been made in identifying the moral limits of the criminal law, although considerable and impressive, is less helpful in identifying the moral limits of the state in creating and enforcing nonconsummate offenses. A theory of moral rights does not seem to provide the cornerstone of a theory of nonconsummate legislation, as it seems to provide the cornerstone of a theory of consummate offenses. A fresh start is needed in this context. The creation and enforcement of nonconsummate legislation gives rise to special problems that must be addressed by new sets of principles. In what follows, I will attempt to identify, defend, and apply five such principles. First, however, it is important to further refine the concept of a nonconsummate offense itself.

IV. THE NATURE OF NONCONSUMMATE OFFENSES

Thus far, I have supposed that the concept of a nonconsummate offense is straightforward. Unfortunately, it is not. In this Part, I will further refine the concept of a nonconsummate offense. This refinement will result from contrasting my account with a rival conception employed by some criminal law theorists. This exercise is not pursued solely for the sake of analytical clarity. An appreciation of why one conception of a nonconsummate offense is superior to its competitor is essential to the ultimate question of identifying the

conditions under which these offenses are justifiable exercises of state authority.[51]

My account draws the contrast between consummate and nonconsummate offenses by reference to whether the proscribed conduct causes harm on each occasion in which it is performed: perpetrators of consummate offenses cause harm whenever they commit the crime, while perpetrators of nonconsummate offenses do not cause harm on each such occasion.[52] This account can be made somewhat more precise by invoking the distinction between act-types and act-tokens.[53] All act-tokens of an act-type proscribed by a consummate offense are harmful; not all act-tokens of an act-type proscribed by a nonconsummate offense are harmful.[54] The conduct proscribed by a nonconsummate offense creates a *risk* of harm—at least when such an offense is justified.[55] More

51. A given conception of a nonconsummate offense cannot be assessed as superior to its competitors without attending to the purpose(s) for distinguishing consummate from nonconsummate offenses in the first place. There is no necessity that such a distinction be drawn; commentators need a reason to divide the universe of criminal offenses in this way. One attempt to distinguish consummate from nonconsummate offenses should be preferred to another if it better serves the purpose for drawing this distinction. The central purpose of my treatment is normative. One conception of a nonconsummate offense is preferable to its competitors if it more clearly reveals the special difficulties in attempts to justify them as legitimate exercises of state authority. This purpose motivates my distinction between simple and complex nonconsummate offenses *infra* part V.

52. This definition may not succeed in categorizing as nonconsummate all offenses that commentators have described as examples of such offenses. Sometimes perpetrators of what are described as nonconsummate offenses cause harm on each occasion in which the offense is committed. Some theorists still regard such offenses as nonconsummate, if they are designed to prevent an even greater harm. Consider, for example, the offense of assault with intent to commit rape. Each act-token of the act-type of assault is a violation of rights, and thus harmful, even when not accompanied by the intent to rape. Therefore, this offense is consummate as defined here. Still, the presence of the requisite intent to rape makes the risk of harm *greater* than it would have been in its absence. Relative to this greater harm of rape, assault with intent to commit rape might be regarded as a nonconsummate offense.

Apparently George Fletcher would regard such an offense as nonconsummate. In FLETCHER, *supra* note 32, at 131, Fletcher proposes to "become clear about what we mean...generally, by the concept of 'inchoate' liability." Yet he does not offer a formal definition of a nonconsummate or inchoate offense. His general understanding of the nature of a nonconsummate offense must be gleaned from his discussion of various examples. In the context of his treatment of conspiracy, vagrancy, and the dissemination of pornography, he asks, "Are these offenses in the nature of inchoate offenses designed to inhibit a more egregious form of harm?" *Id.* at 132. Thus he apparently believes that an offense can be nonconsummate even if it inhibits actual harm, as long as it is designed to inhibit an even greater harm.

53. The distinction between act-types and act-tokens originates in C.S. Pierce. *See* ALVIN GOLDMAN, A THEORY OF HUMAN ACTION 10–15 (1970). Act-types are universals and act-tokens are particulars, although the metaphysics of this distinction are subject to enormous dispute.

54. *No* token of an act-type proscribed by a nonconsummate offense is harmful if a nonconsummate offense were defined to preclude the occurrence of actual harm. Some commentators understand attempts, for example, as harmless by definition. According to Fletcher, "attempts are cases of failure." FLETCHER, *supra* note 32, at 131. Thus if an act-token of attempted murder succeeds, as when the victim ultimately dies of his wounds, the token is no longer correctly described as an attempt; it becomes murder, not both murder and attempted murder.

55. Nonconsummate offenses are defined negatively, that is, an offense is nonconsummate if it does *not* prevent actual harm. Perhaps theorists should not purport to resolve *by definition* the question of what nonconsummate offenses *are* designed to prevent. I assume that any *justified* nonconsummate offense must prevent the *risk* of harm. But it is *possible* to imagine an offense that proscribed an act-type the tokens of which create neither harm nor the risk of harm. The clearest example of such an offense would proscribe conduct that no sane legislator would want to prohibit, conduct that is praiseworthy and beneficial, such as

precisely, each act-token of an act-type proscribed by a consummate offense creates actual harm; most or all act-tokens of an act-type proscribed by a nonconsummate offense create a risk of harm.[56] This description makes evident the rationale for nonconsummate legislation. To endorse nonconsummate legislation is to expand the function of the criminal law. Legislators create offenses not only to prevent conduct that causes actual harm, but also to prevent conduct that creates a risk of harm.[57]

The foremost difficulty in determining whether a given offense should be categorized as consummate or nonconsummate is to decide whether the proscribed conduct causes actual harm or merely creates a risk of harm. Following Feinberg, conduct causes actual harm if it violates rights by a wrongful set-back of the interests of others.[58] Conduct creates a risk of harm if it increases the probability that harm will occur.[59] Thus, according to the conception adopted here, a nonconsummate offense proscribes an act-type most tokens of which increase the probability that a right will be violated by a wrongful set-back of the interests of another. In the remainder of this Part, I will examine an alternative conception of a nonconsummate offense, and argue that it is inferior to the conception adopted here.

Although no standard conception of a nonconsummate offense can be found in criminal law texts and treatises, few commentators employ the concepts of harm and risk in their definitions of nonconsummate offenses. In fact, few theorists propose an explicit definition of nonconsummate offenses at all.[60] Instead, most commentators simply list examples of such offenses, inviting

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contributions to a worthy charity. Although no crime is an uncontroversial example of such an offense, there is little doubt that such offenses *have* existed. Consider, for example, the offense of distributing contraceptives, invalidated in Eisenstadt v. Baird, 405 U.S. 438 (1972). Arguably, *no* tokens of this offense create a risk of harm. Such offenses are likely to be regarded as unjustifiable exercises of state authority.

56. The claim that *each* act-token proscribed by a nonconsummate offense creates a risk of harm is vulnerable to counterexamples. Some tokens of attempt, for example, have *no* possibility of causing harm. Yet impossible attempts should not be disqualified as nonconsummate offenses *by definition*. Thus I conclude that most, but not necessarily all act-tokens proscribed by a nonconsummate offense create a risk of harm.

57. Thus retributive justice and restorative justice are distinct. Criminal punishment cannot be simply compensatory, since there need be no actual harm for which perpetrators of nonconsummate offenses can compensate.

58. FEINBERG, *supra* note 17, at 34, 144.

59. The central difficulty here is to identify the baseline by reference to which conduct can be said to increase the probability of some outcome. Two possible candidates provide different answers to the question of whether conduct creates a risk. If the relevant baseline is the state of affairs that would result if the person did nothing at all, a given act-token is more likely to be categorized as risky than if the relevant baseline is the state of affairs that would result if the person performed whatever alternative act-token he would perform if he did not perform the given act-token. An example may help to illustrate this difference. The use of contraceptives increases the risk of pregnancy relative to abstinence, but does not increase this risk relative to unprotected sex. Thus the question of whether conduct creates a risk cannot be answered without reference to a baseline, and the choice of a baseline is not always obvious. For a discussion of difficulties in locating the appropriate baseline in the context of omissions, see David Conter, *Feinberg on Rescue, Victims, and Rights*, 4 CAN. J. L. & JURISPRUDENCE 133 (1991).

60. *See* WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW (1986). These commentators do not propose a formal definition of a nonconsummate offense. The sixth chapter of their leading treatise is titled "Anticipatory Offenses, Parties," but does not contain an explicit account of what makes an offense anticipatory. The sections of this chapter include solicitation, attempt, conspiracy, parties to crime, accomplice liability, and post-crime aid. No

the reader to formulate his own definition.[61] In the absence of a formal definition, however, no one can be confident about the accuracy of any list that is presented. In virtue of what characteristic(s) do given examples qualify as genuine instances of nonconsummate legislation?

The most familiar answer to this question—that diverges from my own in not employing the concepts of harm and risk—invokes the mental state of the defendant. Typically, the relevant mental state is the aim, objective, end, or purpose of the defendant. Joshua Dressler, for example, proposes such an account in his leading treatise. His only general observations about nonconsummate offenses appear in the context of his discussion of attempts. He writes: "When conduct is criminalized before it reaches the sixth and final stage we say that the actor has committed an inchoate or incomplete or imperfect offense."[62] This statement must be understood against the background of Dressler's claim that

> [w]hen a wrongdoer intentionally commits a crime it is ordinarily the result of a six-stage process. First, the wrongdoer conceives of the criminal idea. Second, she thinks about it in order to determine if she should proceed. Third, she fully forms the intention to go forward. Fourth, she makes preparations to commit the crime, as by obtaining the necessary means for its commission. Fifth, she begins to commit the offense. Sixth, she completes her actions by successfully attaining her criminal end.[63]

From these remarks, Dressler's conception of a nonconsummate offense can be reconstructed. Criminals have ends, objectives or purposes; sometimes they succeed in attaining them, but sometimes they do not. Ordinarily, conduct is criminalized when a defendant attains her objective, but there is an important exception to this general rule. Nonconsummate offenses proscribe conduct even though the defendant has not "successfully attain[ed] her criminal end."

According to this kind of account, the categorization of an offense as consummate or nonconsummate does not depend on whether tokens of the proscribed act-type cause actual harm or merely create a risk of harm. In fact, the distinction between consummate and nonconsummate offenses is not *really* a distinction between kinds of offenses at all; the status of an offense as consummate or nonconsummate depends solely on the mental state of the person who perpetrates it. I will argue that any such attempt to distinguish consummate from nonconsummate offenses by reference to the mental state of perpetrators should be rejected. This distinction should not be made to depend on whether or not a person happens to have attained her end, objective, plan, or purpose.

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general rationale is offered for why these distinct topics are treated in a single chapter. Any clues to how LaFave and Scott understand the concept of a nonconsummate offense must be gleaned from comments made in the context of their discussions of these topics.

61. Textbooks invariably list solicitation, conspiracy, attempt, and numerous possessory offenses as examples of inchoate crimes. In addition, many commentators indicate that modern penal codes include a number of offenses said to be "defined in the inchoate mode for example, assault, false alarms, indecent exposure, forgery, deceptive business practices, self-abortion, perjury, hindering apprehension, disrupting meetings, and many bribery offenses. English criminal law also has a long and rather similar list of offenses defined in the inchoate mode, including procuring a marriage, bomb hoaxes, burglary, perjury, and impeding apprehension." Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 765–766 (1988).

62. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 329 (1987).

63. *Id.* at 329.

Such conceptions are objectionable because they make the distinction between consummate and nonconsummate offenses *defendant-relative*.[64] Two defendants might perform instances of the same crime with different ends or objectives; according to Dressler's conception, the crime could be consummate relative to one defendant, but nonconsummate relative to another. Suppose, for example, that D_1 steals food with a different "end, objective, plan or purpose" than D_2. Suppose that D_1 steals food in order to eat it; D_2 steals food in order to sell it. If D_1 is arrested after he has eaten the food, but D_2 is arrested before he has sold it, D_1 but not D_2 has attained her end by her act of theft. Similarly, if D_1 is arrested before he has eaten the food, but D_2 is arrested after he has sold it, D_2 but not D_1 has attained her end by her act of theft. A conception of a nonconsummate offense that invokes the perpetrator's mental state entails that one person but not the other has committed a consummate offense, even though both have committed the same crime.[65]

This implication is fatal to any proposal to distinguish consummate from nonconsummate offenses by reference to the mental state of the defendant. The distinction between consummate and nonconsummate offenses should not be relativized to defendants; the categorization of an offense should not have to await further information about the mental state of the person who commits it. This distinction draws a genuine contrast between two kinds of offenses.

A further possible difficulty with such an account is that the end or objective of the defendant may have been "successfully attained" even though she has committed a nonconsummate rather than a consummate offense. Suppose a terrorist plans to frighten and demoralize a population by acts of random violence. As a means to this end, she attempts to kill a number of innocent people. Her plan may have been attained, and the population sufficiently frightened and demoralized, even if the bomb she has concealed is discovered before it explodes. The terrorist's offense of attempted murder[66] should not be conceptualized as consummate because she happens to have attained her objective.[67] I conclude that defendant-relative definitions of a nonconsummate offense that refer to the mental state of the perpetrator are

64. A second example of a defendant-relative account of the distinction between consummate and nonconsummate offenses is provided in Ashworth, *supra* note 61, at 734.

65. It might be objected that theft is a consummate offense because both D1 and D2 have attained their *criminal* end or objective simply by performing actions the law has defined as criminal. Since theft is a crime, both D1 and D2 have attained their end of theft, regardless of what they plan to do with the food they have stolen. According to this objection, however, *no* offense can be nonconsummate. Recall that nonconsummate offenses are crimes too. If the issue of whether the person has successfully attained her end or objective depends on whether she has committed a crime, then agents who commit attempted theft have attained their end or objective no less than agents who actually steal. Thus this objection transforms attempted theft—and all other nonconsummate offenses as well—into consummate offenses.

Much of the difficulty arises from the fact that Dressler fails to define "end." Does "end" mean "purpose," "motive," or neither? But as long as it is coherent to suppose that D1 and D2 can perform the *same* crime with different ends, Dressler's distinction between consummate and nonconsummate offenses is defendant-relative.

66. No issue of "double-effect" is raised in this hypothetical. The terrorist's killing is purposeful; attempted murder is an appropriate charge because he plans death as a means to his end, not as a side-effect he is willing to tolerate in order to achieve some other objective. *See* SUZANNE UNIACKE, PERMISSIBLE KILLING 92-155 (1994).

67. Nor should her offense be conceptualized as nonconsummate if she actually kills but fails to frighten and demoralize the population.

deficient.[68] Unless a preferable alternative can be defended, I will suppose that the best account of the contrast between consummate and nonconsummate offenses invokes the distinction between act-types each token of which causes actual harm, and act-types most tokens of which merely create a risk of harm.

V. TWO KINDS OF NONCONSUMMATE OFFENSES

Nonconsummate offenses, as defined here, come in at least two distinct varieties. This distinction is important, even though I will tentatively propose that the same principles can be used to determine whether either variety of nonconsummate offense is a legitimate exercise of state authority. I will suggest that the difficulties of applying these justificatory principles differ with the kind of nonconsummate offense in question.[69]

The first kind of nonconsummate offense might be called *complex*.[70] A nonconsummate offense is complex if its complete description includes two or more act-types.[71] All such offenses proscribe the performance of an act-type a_1 when the person bears a given relation to another act-type a_2, the latter of which causes a consummate harm.[72] Complex nonconsummate offenses differ in how the consummate offense a_2 is described. Sometimes the latter offense is described specifically.[73] Forgery, for example, involves the alteration "of any writing of another" (a_1) with the purpose to "defraud or injure anyone" (a_2).[74] Sometimes the latter offense is described generally. Riot, for example, involves "participating with [two] or more others in a course of disorderly conduct" (a_1) with the purpose to "commit or facilitate the commission of a felony or misdemeanor" (a_2).[75] The most well-known complex nonconsummate offenses describe the consummate offense a_2 implicitly rather than explicitly. Attempt, solicitation, and conspiracy are examples of such complex nonconsummate offenses. In the case of attempts, a_1 includes any act that constitutes a "substantial step in a course of conduct planned to culminate in his commission

68. Other variants of this kind of definition encounter similar difficulties. Glanville Williams defines an "inchoate offense" as "an offense committed by doing an act with the purpose of effecting some other offense (called the "substantive offense" or "consummated offense" or "completed offense")." *See* GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 402 (2d. ed. 1983).

69. *See infra* part VI.

70. Applications of the distinction between complex and simple nonconsummate offenses require some device to decide how many act-types are contained within a given offense-description. Any such device requires a basis to individuate actions. Several such devices are described in MICHAEL MOORE, ACT AND CRIME ch. 14 (1993).

71. The complete description of a complex nonconsummate offense may include several act-types, the last of which is a consummate offense. Most criminal codes, including the MODEL PENAL CODE, allow nonconsummate offenses to be "compounded." For example, a defendant can be liable for attempting to conspire to commit a crime.

72. More precisely, tokens of the proscribed act-type a_2 cause a consummate harm. Only act-tokens, not act-types, can be causes of particular events. Act-types may be used in causal laws or generalizations relating event-types.

73. As far as I can discern, there is no coherent rationale for why some consummate harms are accompanied by complex nonconsummate offenses, and others are not. For example, some jurisdictions include an offense of threatening someone to secure unlawful entry to occupied premises, but no offense of threatening someone to gain sexual favors. *See* Andrew Ashworth, *Defining Criminal Offenses Without Harm*, *in* CRIMINAL LAW, ESSAYS IN HONOUR OF J.C. SMITH 7, 9 (Peter Smith ed., 1987).

74. MODEL PENAL CODE § 224.1.

75. MODEL PENAL CODE § 250.1(1)(a).

of the crime."[76] Even though the referent of "the crime" (a_2) is not explicitly identified, there can be no attempt in its absence. If an attempt is criminal, what is attempted is necessarily a criminal act-type, which comprises an essential part of the charge brought against the defendant. The same is true of solicitation and conspiracy.[77]

Not all nonconsummate offenses, however, are complex. A nonconsummate offense might be called *simple* if it proscribes a single act-type a_1. Most possessory offenses are examples.[78] Nothing in the form or structure of such an offense indicates that it is nonconsummate; consummate offenses, after all, also proscribe a single act-type a_1. Thus there is bound to be some controversy about whether putative examples of this category are genuine instances of nonconsummate offenses. Such offenses are nonconsummate because tokens of the proscribed act-type need not actually cause harm.

Because each complex nonconsummate offense contains a consummate offense in its complete description, at least implicitly, no guesswork is required to identify the consummate harm which the complex nonconsummate offense is designed to prevent. Simple nonconsummate offenses are quite different in this respect. Because no simple nonconsummate offense contains a consummate offense in its description, even implicitly, a great deal of guesswork is required to identify the consummate harm which the simple nonconsummate offense is designed to prevent. This fundamental difference turns out to be important in attempts to apply whatever principles justify the creation and enforcement of nonconsummate offenses.

VI. THE JUSTIFIABILITY OF NONCONSUMMATE OFFENSES

I have argued that the rationale plausibly used by Feinberg to justify the creation and enforcement of consummate legislation—the protection of rights—is less compelling in the context of nonconsummate legislation.[79] New justificatory concerns arise in the endeavor to decide whether and under what conditions the state has the legitimate authority to proscribe conduct that creates a risk of harm. These new justificatory concerns require special solutions.[80]

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76. MODEL PENAL CODE § 5.01.

77. MODEL PENAL CODE §§ 5.02, 5.03. *But see infra* note 83.

78. Some nonconsummate possessory offenses are complex, requiring a purpose to employ the illegally possessed instrument unlawfully. *See* MODEL PENAL CODE § 5.06. And a few possessory offenses may be consummate. The illegal possession of radioactive materials, for example, is harmful regardless of their use. But most possessory offenses are simple nonconsummate offenses, proscribing merely the "act" of unlawful possession. There is much strain, of course, in describing possession as an act. *See* MODEL PENAL CODE § 2.01(4).

79. *See supra* part III.

80. The sheer number of real and hypothetical offenses that might be created to proscribe conduct that creates a risk of harm underscores the urgent need for a theory to distinguish justified from unjustified nonconsummate offenses. But if the reforms proposed by a number of criminal theorists are heeded, the desirability of a theory to justify nonconsummate offenses would become even greater. Some commentators are dissatisfied about the role that luck, both good and bad, plays in impositions of criminal liability. Illustrations of the significance of luck are typically made in the context of "result-crimes" such as homicide. Two defendants can perform tokens of the same act-type with the same degree of culpability, and yet be guilty of different criminal offenses that vary greatly in the severity of punishment. Whether the victim of an attempt to kill survives is frequently outside the control of the defendant. In order to minimize the significance of luck in impositions of criminal liability, many of these commentators have proposed a systematic reform of criminal codes that would render actual consequences irrelevant

In this Part, I will briefly describe five principles that help to distinguish justified from unjustified instances of nonconsummate legislation.[81] The application of these principles counters the tendency to allow deliberate sacrifices of the welfare of persons to promote whatever greater good is achieved by the creation and enforcement of nonconsummate legislation. These utilitarian trade-offs should be condemned; as with consummate legislation, the punishment of an offender can only be justified by reference to her own desert.

I will introduce these principles in the context of what I have called complex nonconsummate offenses, where they have received more attention from commentators. Then I will tentatively proceed to a consideration of their application to simple nonconsummate offenses, where greater controversy will arise.

A. Complex Nonconsummate Offenses

Complex nonconsummate offenses proscribe the performance of an act-type a_1 when the person bears a given relation to another act-type a_2, the latter of which causes a consummate harm.[82] Some act-tokens a_1, however, might be permissible, especially when considered apart from their relation to a_2. A person might be liable for attempted arson, for example, simply by lighting a match. How can liability for complex nonconsummate offenses avoid punishing persons whose conduct is permissible? Constraints must be placed on the nature of the relation between a_1 and a_2 before liability may be imposed. Courts and legislatures have developed at least five distinct principles to reduce the likelihood that persons will be punished for conduct that should be placed beyond the reach of the criminal sanction.

The first such principle might be called the *consummate criminal harm* requirement. In order to qualify as a consummate offense, most tokens of the proscribed act-type must create the risk of a consummate harm, that is, the risk that a right will be violated. According to the consummate criminal harm requirement, this consummate harm itself must be criminal, at least when it is brought about intentionally. In other words, a nonconsummate offense proscribing an act-type that creates a risk of some undesirable state of affairs cannot be justified unless a consummate offense proscribing an act-type that intentionally causes that very state of affairs would be justified as well.

The consummate criminal harm requirement can easily escape notice because its truth is obvious in the context of complex nonconsummate offenses. A consummate harm is identified (sometimes implicitly) in the complete description of any complex nonconsummate offense. If the state of affairs to be

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to the particular offense that is committed. All offenses would be redefined as nonconsummate offenses. Reformers differ in the details of their proposals. Some would prohibit only tryings. Others would replace result crimes with offenses of endangerment. For present purposes, the differences between these proposals are less important than the similarities. Each proposal would exponentially expand the number and importance of nonconsummate offenses. If these reforms are implemented, the need for a theory to justify the creation and enforcement of nonconsummate legislation would become even more pressing. Some of these issues are discussed in James J. Gobert, *The Fortuity of Consequence*, 4 CRIM. L.F. 1 (1993).

81. These principles are not conjointly sufficient to justify the enactment of nonconsummate offenses. They are only the first step toward a comprehensive theory of nonconsummate legislation.

82. *See supra* part V.

prevented were not itself a criminal harm, liability for a complex nonconsummate offense should not be imposed. For example, liability for criminal conspiracy requires that persons agree to commit a criminal act-type; persons who agree to perform an act-type that is not proscribed have not committed criminal conspiracy.[83]

The rationale for the consummate criminal harm requirement is evident. It cannot be worse to risk bringing about an undesirable state of affairs than to intentionally bring about that very state of affairs. If the act of intentionally causing a result should not be a criminal offense, there could be no justification to enact a nonconsummate offense to prevent persons from creating a risk of that result. Since, for example, the act of intentionally failing to save money neither is nor ought to be a criminal offense, a nonconsummate offense to prevent persons from engaging in conduct that increases the risk that they will fail to save money would be incompatible with the consummate criminal harm requirement, and must be rejected as an unjustified exercise of state authority.

The second principle to help distinguish justified from unjustified nonconsummate offenses might be called the *high culpability* requirement. In the context of complex nonconsummate offenses, this principle withholds liability from the person who performs a_1 unless he bears a high degree of culpability for the consummate harm a_2. It is insufficient that the performance of a_1 happens to make the consummate harm more likely. Selling a firearm to another (a_1), for example, increases the probability that a firearm offense will be committed (a_2), but a nonconsummate offense to proscribe such a sale cannot be justified on this basis alone. After all, many tokens of the act-type of selling a firearm might be permissible. Thus persons who perform act-tokens of a_1 should not be punished unless they have a high degree of culpability with respect to a_2. Commentators disagree about how high this degree of culpability must be. Typically, the Model Penal Code requires that persons perform a_1 *with the purpose* (or *with the intention*) to bring about, promote, or facilitate the consummate harm a_2. The definitions of attempt, solicitation, and conspiracy all require a culpability of purpose.[84]

Waters become more murky, however, when the person who performs a_1 bears a degree of culpability with respect to the consummate harm a_2 that is less than purpose (or intention). Suppose that knowledge replaced purpose as the degree of culpability required by some or all complex nonconsummate offenses. As a result, a person might be guilty of solicitation, for example, by

83. The common law doctrine of conspiracy has been "strongly criticized by commentators" because it appears to reject the consummate criminal harm requirement. At common law, conspiracy requires an agreement to commit an unlawful act, but "unlawful" may be broader than "criminal." *See* DRESSLER, *supra note* 62, at 381.

84. The draftsmen of the MODEL PENAL CODE claim that attempt, solicitation, and conspiracy "have in common the fact that they deal with conduct that is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do. The offenses are inchoate in this sense." MODEL PENAL CODE § 5.01 Commentary at 293. This view, if intended as a definition of nonconsummate offenses, is a variant of the defendant-relative definitions critically discussed *supra* part IV. What is noteworthy for present purposes is that the draftsmen seemingly include the culpability of purpose (here called "design") as part of the *definition* of these complex nonconsummate offenses. I believe that this reference to culpability may confuse what nonconsummate offenses *are* with a condition under which the draftsmen thought these offenses were *justifiable*. My account of the nature of nonconsummate offenses makes no reference to culpability.

performing an act of encouragement a_1 with a practical certainty that it promoted or facilitated the commission of a crime a_2, even though he did not perform a_1 with the purpose of promoting or facilitating that crime. Or suppose that recklessness replaced purpose as the degree of culpability required by some or all complex nonconsummate offenses. As a result, a person might be guilty of solicitation, for example, by performing an act of encouragement a_1 with a conscious disregard of the risk that it promoted or facilitated the commission of a crime a_2. Suppose that a person sold a gun to another knowing or consciously disregarding the risk that it would be used to commit a crime. If the seller had some other, legitimate purpose in selling the gun—to make a profit, for example—his conduct might well be permissible, and punishment would not be justified.[85]

There is ample doubt, of course, that such conduct as selling a gun to make a profit is permissible when the seller knows or consciously disregards the risk that the gun will be used to commit a crime. A comprehensive theory of justified nonconsummate legislation cannot evade the issue of whether act-tokens a_1 are permissible when performed with lesser degrees of culpability with respect to the consummate harm a_2. In order to defend a theory about the authority of the state to create and enforce nonconsummate offenses, there is need not only for a theory of interests the violation of which amounts to a harm—as George Fletcher has indicated[86]—but also a theory of privileges the exercise of which should be protected from legal interference. Whatever shape this theory may take when lesser degrees of culpability than purpose (or intention) are involved, there can be little doubt that tokens of such act-types as selling a gun to another are impermissible when accompanied by the *purpose* to promote or facilitate a consummate harm.

A third principle to protect permissible conduct from criminal liability might be called the *causal* requirement. Since nonconsummate offenses are designed to reduce the risk of a consummate harm a_2, an obvious question in endeavors to justify such legislation is whether the proscribed conduct a_1 really creates the risk of that harm. Ultimately, this determination is empirical. In the context of most existing complex nonconsummate legislation, however, no one would anticipate the need to collect empirical data to support the conclusion that the proscribed conduct creates a genuine risk. Satisfaction of the causal requirement is typically assured by the high culpability requirement. "Common sense" indicates that persons who perform an act-token a_1 with the purpose to bring about a consummate harm a_2 increase the probability that that harm will actually occur. Many attempts, for example, succeed. It is barely possible to imagine that persons are so inept that they do not increase the probability of the occurrence of a consummate harm by performing act-tokens of attempt. The same is true for other complex nonconsummate offenses. For example, it would be astonishing if a great many persons who knowingly gave false reports to a

85. There continues to be a lively debate about whether knowledge is a sufficiently high degree of culpability to give rise to liability for various complex nonconsummate offenses. *See* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 889–896 (1994). Glanville Williams has suggested that recklessness may be sufficient to give rise to liability for some complex nonconsummate offenses. *See* Glanville Williams, *The Problem of Reckless Attempts*, CRIM. L. REV. 365 (1983).

86. *See* FLETCHER, *supra* note 32, at 133.

law enforcement officer with the purpose to implicate another did not actually increase the probability that another would be implicated.[87]

Notice that some conduct a_1 should be placed beyond the reach of the criminal sanction even though each of the foregoing three principles is satisfied, that is, even though a person performs a_1 with the purpose or intention to bring about a consummate criminal harm a_2 and thereby increases the probability of that harm. For example, a person may place an order for a disguise intending to use it to commit a robbery, and be more likely to commit a robbery after placing that order, without thereby incurring liability for a nonconsummate offense. Act a_1 might be said to be too distant or remote from the consummate harm to give rise to liability; the causal contribution made by a_1 is insufficiently proximate to the consummate harm a_2. Thus a fourth principle to limit the authority of the state to enact nonconsummate offenses might be called the *proximity* requirement.

In the abstract, generalizations about proximity are notoriously controversial.[88] Commentators have struggled to characterize the act-types that satisfy the proximity requirement as it applies to the most well-known complex nonconsummate offenses. In the context of solicitation, the Model Penal Code requires a person to "command, encourage, or request," and not merely to casually suggest that another commit a consummate offense.[89] In the context of attempts, the difficulty is to characterize those act-types that constitute genuine attempts, as distinct from "mere preparation."[90] Liability for an attempt requires that a_1 constitutes a "substantial step" toward the consummate harm.[91] Conspiracy requires nothing less than an actual "agreement" to commit a consummate offense.[92] These requirements all protect conduct that is insufficiently proximate in not making a significant and direct causal contribution to the occurrence of a consummate harm.

The proximity principle applies to those complex nonconsummate offenses the descriptions of which explicitly identify a consummate harm, although this requirement is seldom discussed in this context. For example, the risk of the consummate harm of theft is reduced by the creation and enforcement of a complex nonconsummate offense of burglary, defined as entering "a building or occupied structure" (a_1) with the "purpose to commit a crime therein"[93] (a_2). Presumably, the act of "approaching an occupied structure" with a comparable purpose is insufficiently proximate to the consummate harm to give rise to liability. In the context of burglary, the distinction between approaching and entering an occupied structure performs the same function as the distinction between preparation and a substantial step in the context of attempt.

87. *See* MODEL PENAL CODE § 241.5(1).

88. The best discussion is H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW (2d ed. 1985). For a discussion of the complexities of proximity in the context of intervening agents, see Joel Feinberg, *Causing Voluntary Actions*, *in* DOING AND DESERVING 152 (1970).

89. MODEL PENAL CODE § 5.02(1).

90. *See* Barbara Baum Levenbook, *Prohibiting Attempts and Preparations*, 49 UMKC L. REV. 41, 49-50 (1980).

91. MODEL PENAL CODE § 5.01(1)(c).

92. MODEL PENAL CODE § 5.03(1).

93. MODEL PENAL CODE § 221.1(1) (1980).

A fifth principle to reduce the likelihood that permissible conduct is punished might be called the *persistence* requirement. Most jurisdictions allow liability for some complex nonconsummate offenses to be defeated if a person voluntarily abandons whatever contribution he has made to the consummate harm a_2.[94] Abandonment occurs when a solicited crime is prevented,[95] a conspiracy is thwarted,[96] or an attempt is renounced[97] by the person who has committed whatever act-token a_1 would otherwise suffice for liability.

The persistence principle must be endorsed much more tentatively, as its application to nonconsummate offenses has evoked substantial controversy among commentators.[98] Curiously, no defense analogous to abandonment seems to apply to complex nonconsummate offenses other than attempt, solicitation, and conspiracy.[99] Reconsider the crime of burglary. The fact that the burglar who entered the occupied structure with the intention to commit a crime subsequently decided *not* to commit the crime, for whatever reason, does not preclude his liability.[100]

B. Simple Nonconsummate Offenses

The primary difficulty in justifying the creation and enforcement of nonconsummate offenses is that some tokens of the proscribed act-type may be permissible. Five principles—the consummate criminal harm, high culpability, causal, proximity, and persistence requirements—have been developed and applied to complex nonconsummate offenses to help ensure that conduct is not punished when it should be placed beyond the reach of the criminal sanction.

Of course, the same difficulty arises in the context of simple nonconsummate offenses. One might reasonably expect that the five principles described above should apply to these kinds of offenses as well. However, the development of these principles to simple nonconsummate offenses has attracted considerably less attention from commentators. If applied consistently here, these principles might mandate radical revisions in the current state of the law, as they seem to condemn a number of simple nonconsummate offenses as unjustified exercises of state authority. Despite the potentially far-reaching implications of applying these principles to simple nonconsummate offenses, I see no good reason to confine their scope to complex nonconsummate offenses. The bold but tentative thesis of this paper is that it is fruitful to apply similar principles to limit the authority of the state to enact *any* nonconsummate offense, complex or simple. Theorists who dissent must provide a reason *not* to apply one or more of these principles to simple nonconsummate offenses.

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94. The voluntariness of the abandonment is crucial. Abandonment is not voluntary if the person is motivated in whole or in part by the desire to avoid detection or apprehension. See MODEL PENAL CODE § 5.01(4) (1985).

95. MODEL PENAL CODE § 5.02(3) (1985).

96. MODEL PENAL CODE § 5.03(6) (1985).

97. MODEL PENAL CODE § 5.01(4) (1985).

98. *See* PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES 348-349 (1984).

99. For an argument that the defense of abandonment should be extended to other nonconsummate offenses, *see* Paul R. Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377 (1986).

100. Occasionally a defense similar to abandonment defeats liability for what appears to be a consummate offense. Consider retraction as a defense to perjury. *See* MODEL PENAL CODE § 241.1(4) (1980).

The source of much of the difficulty in applying these principles to simple nonconsummate offenses is the uncertainty about the consummate harm that a given offense is designed to prevent. As a result of this uncertainty, it is hard to confidently pronounce that given instances of simple nonconsummate legislation are unjustified. The more cautious conclusion is that some instances of simple nonconsummate legislation are unjustified *if* they are designed to prevent a given result. The foregoing five principles are useful to identify justificatory problems only on the (always questionable) assumption that a given instance of simple nonconsummate legislation is designed to reduce the risk of a given consummate harm.

Consider first the consummate criminal harm requirement. According to this principle, a nonconsummate offense proscribing an act-type that creates a risk of some undesirable state of affairs cannot be justified unless a consummate offense proscribing an act-type that intentionally causes that very state of affairs is justified as well. Since the complete description of a complex nonconsummate offense identifies the consummate harm to be prevented, at least implicitly, the application of this principle to such offenses is relatively straightforward. But the application of this principle to simple nonconsummate offenses is more problematic. Some of the states of affairs that a simple nonconsummate offense might be designed to prevent are (and ought to be) criminal if caused intentionally, while others are not.

What is the consummate harm to be prevented by the offense of selling pornographic films, for example?[101] At least two different answers might be given.[102] Perhaps this offense is designed to reduce the risk of various sex crimes that viewers might commit after exposure to such films. Or perhaps this offense is designed to reduce the risk that viewers will subscribe to an ideology of male domination and gender inequality. Only the first of these answers clearly describes a consummate criminal harm. The intentional perpetration of a sex crime is, of course, criminal. But conduct that risks the spread of an obnoxious ideology should not be criminalized unless conduct that intentionally spreads that ideology should be criminalized as well. In the absence of a clear indication of the consummate harm to be prevented, theorists who apply this first principle to identify the moral limits of the criminal law should remain uncertain about what judgment to pass on the justifiability of this offense.

Consider next the application of the high culpability requirement to simple consummate offenses. Acts that risk causing a consummate harm are frequently permissible unless tokens are performed with a high degree of culpability with respect to that harm. In the context of complex nonconsummate offenses, no theorist has suggested that liability should be imposed unless persons are at least reckless with respect to the consummate harm a_2. What degree of culpability with respect to the consummate harm should be required for simple nonconsummate offenses?

Curiously, the heated debate about the appropriate level of culpability that is needed for liability for such well-known complex nonconsummate offenses as attempt, solicitation and conspiracy has almost no analogue in the

101. MODEL PENAL CODE § 251.4(2)(a) (1980).

102. *See* discussion in GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY (1988). Some of the possible rationales in favor of this offense do not construe it as an instance of nonconsummate legislation at all.

context of many simple nonconsummate offenses. The absence of this debate should give rise to caution among commentators. Consider the radical implications of the high culpability principle when applied to various moving violations that pertain to motor vehicles, such as drunk driving. Clearly, these offenses are nonconsummate; most tokens of the proscribed act-types increase the risk of harm, but need not harm anyone.[103] Presumably, almost all moving violations are designed to prevent the consummate harm of property damage and personal injury that results from traffic accidents. Jurisdictions typically treat moving violations as instances of strict liability.[104] Drunk driving is no exception.[105] Drivers need not even be negligent with respect to the consummate harm to be prevented; liability is imposed even if the defendant can prove that a reasonable person in his circumstances would have behaved similarly.[106] Unquestionably, the imposition of strict liability for traffic offenses such as drunk driving facilitates law enforcement—moving violations would be contested more frequently if the state had to prove culpability—but the failure to require some degree of culpability with respect to the consummate harm is difficult to justify in principle. Commentators have expressed serious reservations about the justifiability of strict criminal liability generally; its use in the context of nonconsummate offenses is even more tenuous.

Now consider the application of the causal principle. Surely legislation that proscribes an act-type to reduce the risk of a consummate harm is unjustifiable unless tokens of the act-type really cause that harm. The need for empirical data to support the claim that the proscribed conduct makes a causal contribution to the consummate harm is much more apparent in the context of simple nonconsummate offenses, especially if the offender has little or no culpability with respect to that harm.[107] "Common sense" is silent about whether some acts significantly increase the probability of a consummate harm. It is reasonable to demand empirical data, for example, to support the conclusion that exposure to pornographic films actually increases the incidence of various sex crimes.[108]

Moreover, any empirical evidence of a causal connection between the proscribed act and a consummate harm is bound to reveal that the degree to which the risk is increased by tokens of the proscribed act is not evenly distributed throughout the population of offenders. In other words, some persons may be much more likely, others somewhat more likely, and still

103. *See* Douglas Husak, *Is Drunk Driving a Serious Offense?*, 23 PHIL. & PUB. AFF. 52 (1994).

104. *See* H. Laurence Ross & David Saari, *Traffic Offenses*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1557 (Sanford Kadish et al. eds., 1983).

105. "[T]here is, remarkably, little case law on what mens rea, if any, is required for proof of drunk driving....Courts gloss over the issue. Most of them...seem to assume that drunk driving is a strict-liability offense." JAMES JACOBS, DRUNK DRIVING 75 (1989).

106. Suppose, for example, that a drinker realized he might get drunk and took reasonable steps to ensure that he would not be driving—but, for unforeseeable reasons, had to drive despite these precautions. *Id.* at 76.

107. Formidable epistemological difficulties can arise in applications of the causal requirement to simple nonconsummate offenses. For example, there may be great uncertainty about whether and to what extent a given substance is carcinogenic. *See* CARL F. CRANOR, REGULATING TOXIC SUBSTANCES (1993).

108. The literature is voluminous. For one skeptical position, *see* George C. Thomas III, *A Critique of the Anti-Pornography Syllogism*, 52 MD. L. REV. 122 (1993).

others no more likely to commit sex crimes after viewing pornographic films. Of course, there may be enormous epistemological difficulties in identifying the particular class of which a given offender is a member. Suppose, however, that a person happens to be a member of the latter class, and is no more likely to cause the consummate harm after performing a proscribed act-token. The justification for punishing such a person seems suspiciously utilitarian; his welfare is sacrificed for the greater good achieved by the creation and enforcement of the nonconsummate offense. In order for punishment to be justified in terms of the desert of the particular offender, he should be afforded the opportunity to show that his act-token did not increase the risk that the consummate harm would occur.

Next, the proximity principle requires that the proscribed conduct must not be too distant or remote from the consummate harm to justify the creation and enforcement of a nonconsummate offense. Again, generalizations about the proximity principle are notoriously tenuous;[109] agreement might be reached more easily by drawing analogies between various nonconsummate offenses. Recall that "approaching an occupied structure" is probably too remote from the consummate harm of theft to justify the enactment of a complex nonconsummate offense analogous to burglary, which requires actual entry into an occupied structure. The same kind of line must be drawn to distinguish justified from unjustified simple nonconsummate offenses. A number of nonconsummate offenses, such as driving while intoxicated, are designed to reduce the risk of the consummate harm of traffic accidents. What conduct is insufficiently proximate to this harm to be beyond the legitimate reach of state authority? If "approaching an occupied structure" is insufficiently proximate to the consummate harm of theft to justify the creation and enforcement of a consummate offense, then "approaching a car" while intoxicated might be insufficiently proximate to the consummate harm of a traffic accident to justify the creation and enforcement of a nonconsummate offense.[110]

Analogies can be helpful, but what is the basis for deciding that a given act-type is "too remote" from a consummate harm to justify its proscription? Perhaps a partial answer can be given by reference to the rationale in favor of the proximity requirement. One of many such rationales invokes a conception of a responsible agent. An act-type a_1 is too distant from a consummate harm a_2 if persons who perform tokens of a_1 might take any number of intermediate steps to minimize the risk of the consummate harm. For example, many persons who become intoxicated in bars call a taxi or find a sober driver to take them home. Because of the availability of these precautions, the enactment of a simple nonconsummate offense of becoming intoxicated in a bar would sweep too broadly. Any such offense would punish persons who would have taken steps to reduce the risk of the consummate harm of a traffic accident. To punish persons without first determining whether they would have taken such steps,

109. It is hard to know how to apply the proximity principle to simple nonconsummate offenses designed to prevent accumulative harms such as pollution, where a threshold of harm is exceeded through the joint contributions of many individuals. Perhaps the difficulty of satisfying this principle is an additional reason to resort to a system of licenses in dealing with these harms. *See* FEINBERG, *supra* note 45.

110. Sometimes the judiciary compromises the proximity requirement by a broad interpretation of the *actus reus* of existing offenses. *See* State v. Mulcahy, 527 A.2d 368 (1987) (defendant held to be "operating" a car while intoxicated even though he had not yet put keys in ignition).

and thus to place them in the same category as persons who disregard these precautions, would treat them as less than responsible agents.

Consider, finally, the persistence principle. I have already mentioned that the current state of the law does not apply this requirement to offenses other than attempt, solicitation, and conspiracy. Still, an act-token proscribed by a simple nonconsummate offense may pose no real risk that a consummate harm will occur. In such circumstances, there is good reason to preclude liability. Thus a person would not be guilty of the offense of possessing an illegal weapon if he took control of the device in order to destroy it or to surrender it to the police, and a person would not be guilty of the offense of littering if he voluntarily cleaned up his trash.[111] Perhaps this doctrine is merely another application of the principle, already mentioned in the context of the causal requirement, that a person who commits a simple nonconsummate offense should be afforded the opportunity to show that her act-token did not increase the risk of the consummate harm.

Clearly, much work remains to be done in identifying the moral limits of the criminal law in creating and enforcing each kind of nonconsummate offense. The same principles that seem relatively uncontroversial in the context of complex nonconsummate offenses give rise to many more problems when applied to simple nonconsummate offenses. But I see no reason to apply these principles to one kind of nonconsummate offense but not the other.

VII. AN APPLICATION: DRUG OFFENSES

In the remainder of this paper, I will briefly apply some of the principles described above to a specific area in which the justifiability of nonconsummate legislation is problematic. I will discuss the use of the criminal law to prevent adults from using drugs for recreational purposes.[112]

The very proposal to apply principles to assess the justifiability of drug offenses is somewhat novel. Most commentators who have expressed reservations about the justifiability of drug prohibitions have argued that such laws are ineffective and/or counterproductive.[113] Few commentators have endeavored to assess whether and under what conditions such legislation is justifiable or unjustifiable in principle.[114]

Drug prohibitions provide the most urgent practical need for a theory about the moral limits of the criminal law. Attempts to apply theories about the scope of the criminal sanction typically focus on such offenses as prostitution

111. MODEL PENAL CODE § 5.07 (1985) provides a defense for "Prohibited Offensive Weapons" if the defendant possessed the weapon under circumstances "negativing any purpose or likelihood that the weapon would be used unlawfully."

112. I explore many of these issues in greater detail in DOUGLAS HUSAK, DRUGS AND RIGHTS (1992).

113. *See* Ethan A. Nadelmann, *Drug Prohibition in the United States, Costs, Consequences, and Alternatives*, 245 SCI. 939 (1989).

114. Libertarian political philosophers provide an exception to this generalization. *See* THOMAS SZASZ, OUR RIGHT TO DRUGS (1992). But the foundational principle of libertarianism—that persons should be free to do as they please as long as they do not harm others—jeopardizes all nonconsummate legislation. This foundation must be supplemented by a set of principles to indicate the circumstances under which the state is justified in preventing persons from creating the risk of harm.

and homosexual conduct.[115] However interesting the theoretical issues connected with these offenses may be, such laws are rarely enforced.[116] By contrast, some 750,000 persons are punished for drug offenses each year, mostly for simple possession.[117] Moreover, many commentators and laypersons have expressed grave doubts about the justifiability of enacting drug offenses.[118] It is remarkable that millions of persons have been and continue to be punished—frequently severely—for conduct that many thoughtful people believe should not be criminalized at all. It is equally remarkable that an extended treatise on the moral limits of the criminal law would have virtually nothing to say about the justifiability of such offenses.[119]

Of course, such legislation need not be construed as nonconsummate at all. Perhaps drug offenses should be interpreted as consummate. According to this interpretation, all tokens of the act-type of drug use cause harm. This interpretation seems highly implausible. Some tokens of the act-type of drug use need not violate anyone's rights. The only possible victim of each token of drug use is the user himself. But paternalistic rationales for criminal legislation are rejected by most commentators,[120] many of whom remain uncritical of criminal penalties for drug use. These commentators favor criminal penalties for drug use because of the effects of such use on persons other than the user. Clearly these effects are contingent and need not occur in each token of drug use. At least *some* tokens of the act-type of drug use do not harm anyone other than the user. Thus proscriptions of drug use are most plausibly construed as nonconsummate offenses.[121] As so interpreted, their justifiability is subject to the principles I describe here.

Drug prohibitions are best construed as examples of what I have called simple nonconsummate offenses.[122] The consummate harm that such offenses are designed to prevent is not identified, even implicitly. No harm would occur

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115. *See* LORD PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965). Homosexuality is Devlin's paradigm of a "morals offense."

116. It is noteworthy that the leading case of Bowers v. Hardwick, 478 U.S. 186 (1986) came to trial after the defendant went to extraordinary lengths to ensure his prosecution.

117. *See* Ethan Nadelmann, *The Case for Legalization*, *in* DRUG LEGALIZATION, FOR AND AGAINST 19, 21 (Rod Evans and Irwin Berent eds., 1992).

118. "Popular support for drug prohibition [is] very broad and very thin." Randy Barnett, *Bad Trip, Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593 (1994). Evidence for this claim is provided by the poll in DRUG PROHIBITION AND THE CONSCIENCE OF NATIONS 226 (Arnold Trebach & Kevin Zeese eds., 1989).

119. Feinberg's only extended discussion of the justifiability of drug prohibitions takes place in the context of paternalism. Here he concludes that the lack of justification for drug prohibitions, at least when enforced against persons who are knowledgeable about the effects of the drugs they are using, is an "easy case" for the liberal. *See* JOEL FEINBERG, HARM TO SELF, 3 THE MORAL LIMITS OF THE CRIMINAL LAW 133 (1987). But surely the more plausible (even if ultimately unpersuasive) case for drug prohibitions construes the proscribed conduct as risking harm to others. Feinberg does not examine this rationale for drug prohibitions.

120. *See* Douglas Husak, *Recreational Drugs and Paternalism*, 8 LAW & PHIL. 353 (1989).

121. One commentator writes, "The appropriate analogy for justification of the drug laws is to the drunk-driving laws. A drunk driver is not guaranteed to cause a traffic accident any more than a crack-addicted woman is guaranteed to spontaneously abort. We outlaw drunk driving rather than merely outlawing the accidents it causes because the activity of drunk driving is unacceptably risky to others." Joel Hay, *The Harm They Do to Others, A Primer on the External Costs of Drug Abuse*, *in* SEARCHING FOR ALTERNATIVES 200, 218 (Melvyn Krauss and Edward Lazear eds., 1991).

122. *See supra* part V.

if drugs were not consumed. But drug use is no more a consummate harm than is drug possession. How might tokens of drug use create a risk of harm to others? Many possible answers have been proposed; I can discuss only a few such answers here.[123] Some commentator or another has purported to link drug use to nearly every evil of modern society. Several of these answers, however, are incompatible with a number of the principles of justified nonconsummate legislation described above.

Consider the application of the consummate criminal harm principle to a rationale for drug prohibitions that has been endorsed by John Kaplan.[124] Drug users tend to become lazy, according to Kaplan, so drug proscriptions are a legitimate means to help ensure that persons become and remain productive. Although Kaplan admits that "both practical and moral questions" are raised in "advocating the prohibitions of [drugs] on the grounds that we must preserve the social productivity of the citizenry," and concedes that "we do not usually think that the government should require us to be productive,"[125] he finds "no logical inconsistency between saying that a government should not punish laziness and saying that it may use its law to prevent access to things that make people lazy—or even aid in their being lazy."[126] Whether Kaplan's claims are *logically* consistent is beside the point. His basis for drug prohibitions is incompatible with a *normative* principle: the consummate criminal harm principle. If applied consistently other than selectively—to contexts other than recreational drug use—the suggestion that the state may punish persons for using devices to facilitate their laziness would be too fantastic to warrant refutation. If deliberate laziness is and ought not to be criminal, persons should be permitted to use devices that increase the risk that they will become lazy.

The same conclusion should be drawn about many other rationales that have been invoked in favor of drug prohibitions. Consider, for example, William Bennett's partial summary of the social evils allegedly caused by drug use: "Drug users make inattentive parents, bad neighbors, poor students, and unreliable employees—quite apart from their common involvement in criminal activity."[127] James Q. Wilson's account is similar but somewhat more detailed. He claims that even if we concede that the state

> should only regulate behavior that hurts other people, we would still have to decide what to do about drug-dependent people because such dependency does in fact hurt other people... These users are not likely to be healthy people, productive workers, good parents, reliable neighbors, attentive students, or safe drivers. Moreover, some people are directly harmed by drugs that they have not freely chosen to use. The babies of drug-dependent women suffer because of their mothers' habits. We all pay for drug abuse in lowered productivity, more accidents, higher insurance premiums, bigger welfare costs, and less effective classrooms.[128]

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123. Of course, the harm to others that might result from drug use varies with the particular drug in question. In this Part, I discuss the general considerations that pertain to the justifiability of drug offenses without distinguishing between different kinds of drugs.

124. JOHN KAPLAN, THE HARDEST DRUG, HEROIN AND PUBLIC POLICY (1983).

125. *Id.* at 131.

126. *Id.* at 132.

127. WILLIAM BENNETT, NATIONAL DRUG CONTROL STRATEGY 7 (1989).

128. James Q. Wilson, *Drugs and Crime, in* DRUGS AND CRIME 521, 524 (Michael Tonry & James Q. Wilson eds., 1990).

Some (but not all) of the alleged evils of drug use described by Bennett and Wilson cannot be used to justify the enactment of drug offenses without violating the consummate criminal harm principle. Since persons are and ought to be permitted to deliberately become bad neighbors, for example, they should also be permitted to engage in conduct that increases the risk that they will become bad neighbors. Notice that this conclusion is compatible with the judgment that bad neighbors create a net balance of disutility. The consummate criminal harm principle serves as a useful reminder that not all the states of affairs that create disutility are criminal harms that should be punished.

Some of the foregoing rationales for drug prohibitions fare no better when the high culpability principle is applied. To be sure, drug possessory offenses typically require that offenders know that they possess a drug.[129] But no culpability whatever is required with respect to whatever consummate harm drug proscriptions are designed to prevent. Return to the list of evils which Bennett and Wilson allege to result from drug use. Some of these evils are consummate harms the proscription of which would satisfy the consummate criminal harm principle. A criminal offense explicitly designed to prevent persons from intentionally producing drug-dependence in babies, for example, would be justifiable in principle. Any such offense, however, would require that persons act with some degree of culpability with respect to that consummate harm. Why punish persons who are not even negligent in creating the risk that this harm will occur? It is hard to understand, for example, how men and infertile women could be negligent that their tokens of drug use will increase the risk that babies will become drug-dependent.

Consider next the application of the causal principle. No evidence is available to support the claim that drug use causes several of the evils alleged by Bennett and Wilson. No reliable studies indicate that drug use causes persons to become "unreliable neighbors," for example. But this rationale for drug prohibitions has already been discredited by the consummate criminal harm and high culpability principles. Thus I will restrict an application of the causal principle to those rationales in favor of drug prohibitions that satisfy the foregoing principles. Among those rationales cited by Bennett (but not Wilson[130]) is the claim that drug users are more likely than nonusers to commit additional crimes. This claim has the potential to justify drug prohibitions. Under the appropriate circumstances, the state has the legitimate authority to enact nonconsummate legislation to prevent persons from engaging in conduct that creates a risk that the rights of others will be violated. But how plausible is the claim that drug use causes persons to commit additional crimes? Attempts to answer this question must carefully distinguish the consequences of drug use *per se* from the consequences of drug *proscriptions*. Many economic crimes committed by drug users are due to the expense of drugs, which in turn is a product of the illegality of drugs. Legalization of drug use would reduce many of the economic crimes committed by drug users. Still, some crimes might be a consequence of drug use per se. Perhaps the psychopharmacological effects of some drugs increase the incidence of criminal behavior.

129. This requirement is sometimes compromised by allowing the state of willful ignorance to substitute for knowledge. *See* Husak & Callender, *supra* note 16.

The adequacy of this rationale ultimately depends on empirical evidence about the causal contribution of drug use to crime. This issue is extraordinarily complicated and the evidence is subject to tremendous dispute, which I cannot hope to summarize here.[131] I will hazard only two brief remarks. First, the most significant empirical question is not what percentage of criminals are drug users, but what percentage of drug users are criminals. No conclusions should be drawn from statistics about the high percentage of criminals who use drugs. These data must be supplemented by further statistics about the low percentage of persons who use drugs and are criminals.[132] Second, no behavior can cause an effect unless it precedes it. Many studies show that drug use does not typically precede criminal activity among adolescents who both commit crimes and use drugs.[133] Some evidence indicates that continued criminality is more predictive of drug use than continued drug use is predictive of criminality.[134] Although there may be reason to believe that the use of alcohol contributes to criminal behavior, some commentators go so far as to conclude that in the case of marijuana, cocaine, and heroin, "[n]o intelligent person really believes such theories today."[135]

Next consider whether drug use is sufficiently proximate to the consummate harm of criminal activity. Although judgments about proximity are delicate and imprecise, serious questions can be raised about whether drug proscriptions satisfy the proximity principle. The path from drug use to crime is indirect. Moreover, any risk of subsequent criminality is not distributed evenly throughout the population of drug users. What can justify the punishment of drug users who pose little or no risk of engaging in subsequent criminality? Consider Bennett's putative justification for targeting causal users in the war on drugs. He contends that the "non-addicted casual drug user remains a grave issue of national concern," even though such a person "is likely to have a still-intact family, social and work life" and "to 'enjoy' his drug for the pleasure it offers."[136] Nonetheless, Bennett continues, the causal drug user should be punished severely, because he is "much more willing and able to proselytize his drug use—by action or example—among his remaining non-user peers, friends, and acquaintances. A non-addict's drug use, in other words, is *highly* contagious."[137]

This argument removes the act-type proscribed by the nonconsummate offense far from the consummate harm to be prevented. According to Bennett, Smith's problem-free and casual drug use should be proscribed because Jones might be persuaded to experiment with drugs. In perhaps no other context is

130. Wilson has repudiated this rationale. He writes, "It is not clear that enforcing the laws against drug use would reduce crime. On the contrary, crime may be caused by such enforcement." Wilson, *supra* note 128, at 522.

131. New evidence (and novel interpretations of existing evidence) become available every week. For a useful introduction, see the contributions in DRUGS AND CRIME, *supra* note 128. *See also* Jeffrey Fagan, *Interactions Among Drugs, Alcohol, and Violence*, HEALTH AFF. 65 (1993).

132. *See* Husak, *supra* note 112, at 197–198.

133. *See* Jan Chaiken & Marcia Chaiken, *Drugs and Predatory Crime*, *in* DRUGS AND CRIME 203 (Michael Tonry & James Q. Wilson eds., 1990).

134. *Id.* at 219.

135. STEPHEN DUKE & ALBERT GROSS, AMERICA'S LONGEST WAR, RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 64 (1993).

136. Bennett, *supra* note 127, at 11.

137. *Id.* (emphasis in original).

this theory of "imitative harms" accepted as an adequate justification for criminal liability.[138] A theory of imitative harms is especially unconvincing in the context of nonconsummate offenses; if Jones *does* succeed in imitating Smith, tokens of his act-type need not harm anyone. In addition, Bennett's argument undermines one of the rationales in favor of the proximity principle, inasmuch as it treats persons as less than responsible agents. Persons who perform tokens of the proscribed act-type a_1 might take any number of intermediate steps to minimize the risk of the consummate harm a_2. For example, Smith might adopt any number of precautions to reduce the risk that persons such as Jones will imitate his drug use. Surely not *all* casual drug users proselytize their use. Placing Smith in the same category as persons who disregard these precautions would treat him as less than a responsible agent.

Finally, consider the application of the persistence principle. Insofar as this principle is the most controversial of the five requirements I have described, my discussion is limited to one possible application. Perhaps this principle should provide a defense to persons who possess drugs under circumstances in which the drugs will not be used and thus cannot lead to a consummate harm. One such circumstance arises when the quantity of drugs possessed is so small as to be unusable. In many such circumstances, there is reason to believe that the person found in possession no longer continues to use drugs. Although few jurisdictions have accepted this defense,[139] the affinities between persons who possess nonusable quantities of drugs and persons who abandon their attempts are worthy of further consideration.[140]

Of course, this very brief attempt to apply the foregoing principles to drug offenses is highly inconclusive. Even if the same principles can be used to assess the justifiability of both simple and complex nonconsummate offenses—as I have tentatively suggested—special difficulties arise in attempts to apply these principles to simple nonconsummate offenses, which do not identify the consummate harm to be prevented. The general lesson to be learned is that the application of principles to distinguish justified from unjustified instances of nonconsummate legislation is much more straightforward if the offense is complex. In any event, this discussion helps to indicate the potential use of a theory of justified nonconsummate legislation. The five principles I have described are an important component of a comprehensive theory of criminalization—a component that has been neglected even by legal philosophers like Feinberg whose work on the general limits of the criminal law is extraordinarily important and valuable.

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138. *See* FEINBERG, *supra* note 17, at 232–243.

139. Although there is some division of authority on the question, most jurisdictions have held that even nonusable quantities of drugs suffice for liability under possessory statutes. *See* GERALD UELMEN AND VICTOR HADDOX, DRUG ABUSE AND THE LAW SOURCEBOOK §§ 6–42 (1985).

140. *See* Note, *Criminal Liability for Possession of Nonusable Amounts of Controlled Substances*, 77 COLUM. L. REV. 596 (1977). Just as there are principled limitations on the scope of the abandonment defense, there are comparable limitations on the circumstances under which the possession of nonusable quantities of drugs should preclude liability. Abandonment constitutes a defense to attempt only "under circumstances manifesting a complete and voluntary renunciation of criminal purpose." MODEL PENAL CODE § 5.01(4). For example, abandonment is not a defense when it is motivated by the desire to avoid apprehension or detection. Similarly, the possession of nonusable quantities of drugs should not preclude liability when the defendant is detected and manages to consume or destroy all but a nonusable quantity. *See Id.* at 602.