

Embarking on a Crime*

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When we define something as a crime, we generally thereby criminalize the attempt to commit that crime. The intuition is that if the law prohibits you from doing something, you shouldn't try to do it either. But as plausible as this intuition is, the details of attempt liability pose vexing problems for legal theory.

The puzzle is to specify what must be the case in order for a criminal attempt to have occurred. A natural first thought is that to answer this question, we should construct a general philosophical theory of what an attempt is. Criminal attempts could then be defined as the subset of attempts that are attempts to commit crimes. This approach would take literally the idea that what we aim to criminalize is trying to perform actions that are crimes, and turn to the philosophy of action for an account of what it is to try to perform an action.

I will argue here that the legal characterization of criminal attempts should indeed be informed by the philosophy of action, but not in the simple way just described. The supposition that what we aim to criminalize are attempts to commit crimes leads to what is extensionally the wrong result: it is far too inclusive. Roughly, an incomplete attempt is an intentional action that was in progress but that failed to culminate in the intended state of affairs. Such act-processes can be-

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gin in mere thought, involve stages that are merely preparatory, and they can be abandoned before they have progressed significantly. The bare initiation of such a process is sufficient for attempting the action toward which this process is guided, but we do not wish to sanction all action-processes directed at criminal ends as soon as they are underway. Rather, most Anglo-American jurisdictions and the Model Penal Code aim to exclude from criminal liability stages of action that occur solely in thought or that amount to “mere preparation,” even if what the agent is trying to do in thinking or preparing is a crime.

The criminal law is thus committed to making substantive distinctions between stages in the structure of an action that is underway but not yet complete, holding that some of these stages fall short of meeting the conditions for attempt liability. However, the legal codifications of this idea have exclusively taken the form of metaphors and representative examples rather than principled distinctions. Attempt liability has been said to begin when the defendant “embarks upon the crime proper”,¹ has “crossed the Rubicon”,² or when he has “taken substantial steps”.³ The Model Penal Code provides a set of examples in which sufficiently substantial steps have been taken to constitute a criminal attempt, but it offers no unifying principle or concrete test for what constitutes substantial steps.⁴ A more literal and principled account is needed, and it is here that I propose that the philosophy of action can contribute to our legal theorizing concerning the deep structure of attempts. However, I will argue that the relevant concept to be explored in this context is not ‘attempting’, but ‘doing’. A process that is an attempt to commit a crime becomes the proper object of criminal sanctions when what the agent *is doing* is a crime.

Defending this proposal will involve arguing that not all parts of an act-process that is the attempt to perform some action ϕ constitute the doing of ϕ . This claim conflicts with the spirit of a recently influ-

¹ As the English courts have held. In *R. v. Gullefer* (1990), the defendant was charged with attempted theft for climbing onto the track at a greyhound race in order to cause the race to be canceled so that his bet would be returned to him. He was found not guilty because he had not “embarked upon the crime proper,” and was instead merely preparing to commit a theft (1 W.L.R. (1063)).

² Lord Diplock in *DPP v. Stonehouse* (1978).

³ Model Penal Code §5.01.

⁴ 5.01 (2).

ential approach to the philosophy of action known as “naïve action theory”.⁵ Naïve action theory emphasizes the explanatory unity of trying, intending, wanting, and intentionally doing, holding that there is “a single generic explanatory relation, or nexus of things” at issue when any of these apparently diverse items feature in the explanation of an action.⁶ The explanatory relation central to this view holds between ‘doings’ – in particular, doing one thing because one is doing another. Any given thing an agent is doing intentionally can be explained by reference to a broader, ongoing action that is the whole for the sake of which the part in question is occurring. When we resort to apparently psychological descriptions of an agent such as “he intends to ϕ ” or “he is trying to ϕ ,” these do not in fact function to refer to distinctive mental states or to behavior that falls short of doing what one had in mind. Rather, they serve to characterize the agent as being already in the process of doing ϕ , but where little or no progress toward success has been made. As Moran and Stone (2009) write,

...intention in a future action does not differ fundamentally from intention in (a present) action, or from intentional action ... all alike are engagements of agency, and enter into the structure of commitment, contradiction and impugning which characterizes performances as opposed to paradigmatic ‘states’. All involve an agent stretching towards a describable future which is not-yet.⁷

I think the metaphysics of naïve action theory is overly deferential to what the agent means to be doing, and that there are in fact deep and explanatorily relevant distinctions between merely intending to ϕ , trying to ϕ , preparing to ϕ , and genuinely doing ϕ . My aim is to use the framework of the criminal law to explore one respect in which these distinctions do important work. Focusing in particular on the legal division between mere preparation and attempt, I will propose a schema for grounding this distinction that makes explicit the kinds of

⁵ Representative formulations of the view include Michael Thompson, *Life and Action* (Harvard University Press 2008) and Richard Moran and Martin Stone (2009), “Anscombe on Expression of Intention,” in *New Essays on the Explanation of Action*, Constantine Sandis, ed, Palgrave Macmillan.

⁶ Thompson (2008), p. 119.

⁷ Moran and Stone (2009), pp. 158-159.

constraints I take to operate on counting as doing what one intends to be doing. To the extent that the proposal vindicates a practice to which the law is committed, and one that is stable under reflective scrutiny, I think this constitutes strong support for the view that the distinctions between intending, preparing, and doing are more than merely superficial. The aspiration is thus to bring legal practice and action theory further into reflective equilibrium with one another.

I

I will begin by specifying in more detail what the legal difficulty is for codifying and justifying attempt liability. The basic challenge is to give a principled account of what must be the case in order for a criminal attempt to have occurred. By definition, the results element of a completed crime will be missing in cases of attempt: the attempter does not bring about the harmful state of affairs the law is enacted to prohibit. But if the relevant harm is not done, the justification for sanctioning the attempter is unclear. Many legal theorists follow J.S. Mill⁸ in holding some version of the Harm Principle: that the only legitimate reason to criminalize behavior is to minimize the non-trivial harming of others. But if applied strictly, the Harm Principle would seem to exclude most attempts on the grounds that they fail to cause the kind of harm the principle requires as a justification for imposing criminal sanctions.

The appeal of the Harm Principle might lead us to suppose that attempts should be criminalized to the extent that they unreasonably increase the *risk* of harm to others. One way of codifying this thought is Oliver Wendell Holmes's "dangerous proximity test," on which one is not guilty of a criminal attempt unless a reasonable objective observer could conclude that the suspect's acts brought him within dangerous proximity of success.⁹ Holmes's justification of attempt liability exemplifies an approach often labeled 'Objectivist' in that it places primary emphasis on the objective probability of success given what the suspect has done. The Dangerous Proximity test extends the reach of

⁸ Mill, J.S. (1869). *On Liberty*. An important example is Feinberg, Joel (1987), *Harm to Others: The Moral Limits of the Criminal Law*, Oxford University Press.

⁹ Holmes, O. Wendell (1881). *The Common Law*. Cambridge: John Wilson & Son.

the Harm Principle to include some attempts, paradigmatically “last act” attempts in which the would-be criminal has done everything he believes to be necessary to bring about his aim. However, there are powerful reasons for thinking that this Objectivist test still excludes too much, as many of the acts that intuitively should qualify as attempts do not substantially increase the probability of harm to anyone.

There are a variety of reasons why this might be the case. Most compellingly, the agent might have a plan in which no one is put at risk until the last moment, when it is too late to intervene. Alternatively, one might intend to perform a type of action that is typically harmful, but fail in the particular case to bring about the intended harm. This might occur because the would-be criminal has false beliefs about his circumstances, thus intending to receive stolen property that was not in fact stolen or to shoot someone with a gun that is not in fact loaded. It might also occur because the agent has alighted on what are in general ineffectual means to her criminal end, as in the case of Carole Hargis and her lover trying to kill Hargis’s husband by putting a non-venomous tarantula into his blackberry pie.¹⁰ A still further possibility is that one’s chosen means might be generally effective but flawed in the particular execution, as when one shoots a loaded gun with the intent to kill someone but misses everyone nearby by a very wide margin. In all of these cases, the agent is engaged in the type of behavior that the law aims to prohibit, and the fact that the token performance did not (yet) create substantial risk of harm is irrelevant to this fundamental point.

These considerations suggest that the Objectivist treatment of attempts is inadequate, and that we should involve “subjective” factors in our assessment of whether an act amounted to a criminal attempt. Specifically, the Subjectivist approach takes attempt liability to depend centrally upon the psychological attributes of intention and character. What is of primary importance on this kind of view is that the agent chose a certain course of action, viewed in a particular light. The fact that the above agents decided to engage in a criminal action reveals that their characters are corrupt and indicates that they are relatively more likely wrongfully to cause harm on another occasion.

¹⁰ Described in Rule, A. (2001) *Empty Promises*, New York: Pocket Books. I learned about this case from Yaffe (2010).

Of course, we do not want to hold people criminally liable merely on the basis of their intentions or flawed character. But at least in cases where the criminal intention has led to a voluntary non-mental act, the Subjectivist holds that the agent should be held liable whether or not the act was successful.

A plausible way of capturing these intuitions is to focus on “trying”, claiming that what we aim to criminalize is trying to commit a crime. An impressively systematic and detailed example of such an approach is developed in Gideon Yaffe’s *Attempts*.¹¹ On Yaffe’s “Guiding Commitment View,” attempts are justifiably censured because attempts, like completed crimes, “spring from a faulty mode of recognition or response to criminal legal reasons”.¹² The idea central to the Guiding Commitment View is that in order to be trying to commit a crime, the agent must be committed by his intention to each of the elements of that crime, and this intention must have causally initiated an act-process that the agent believes will fulfill or serve as means to fulfilling the intention.¹³ More formally, the Guiding Commitment View holds that D attempts C *if and only if* —Ei (where E₁...E_n are all those things that are true if a person C’s), the following criteria are met:

Commitment Criterion: ((Ei is included in X) OR (If D’s intention plays its proper causal role, then Ei)), &

Guidance Criterion: D is guided by his commitment to Ei.

These criteria specify what must be the case for an attempt to occur. Epistemically speaking, to assess whether or not an event was in fact caused by a criminal intention and in the service of that intention, Yaffe proposes the “Completion Counterfactual” as a test:

Completion Counterfactual: If (1) from t₁ to t₂ D has the ability and the opportunity to C and does not fall prey to “execution failure”, and (2) D does not (at least until after t₂) change his mind, then D would C”.¹⁴

¹¹ Yaffe, Gideon (2010). *Attempts*. Oxford University Press.

¹² p. 42.

¹³ Part I, Section 3.

¹⁴ p. 94.

The Completion Counterfactual is designed to capture the distinctive properties of motivation by intention, which if all goes well leads to doing as one intends.

The details of what it means to be committed to each of the elements of a completed crime and how the Counterfactual Conditional can be applied to particular kinds of cases to are vast, and I cannot do them justice here. Instead, I would like to focus attention on a problem that I believe is encountered by Yaffe's approach, but that is a general difficulty for any approach that thinks of criminal attempts in terms of trying to commit a crime. The problem, in essence, is that it threatens to make attempt liability too easy to incur. The crucial point for my purposes is that according to the Guiding Commitment View, a criminal attempt will have occurred as soon as an intention with the requisite content has exerted its motivational influence on the agent. The moment the agent begins to try to commit the crime, in other words, he will be guilty of criminal attempt. Quite simply, this seems to include too much. In particular, I will focus on two charges: (1) that the view includes what are intuitively mere preparations rather than attempts, and (2) that it allows no space for the abandonment of a criminal enterprise before one has genuinely attempted the crime.

First, the Guiding Commitment view faces difficulty in making good on the legal constraint that criminal attempts must be "more than merely preparatory" and constitute "a substantial step" in a course of conduct planned to culminate in the commission of a crime. This constraint reflects the common-sense intuition that one cannot be attempting to—by doing just anything. If Brown has merely bought rat poison but done nothing with it, he has not yet attempted to poison anyone, even if he bought the rat poison solely because he intends to poison someone with it. Or to borrow a vivid example from Yaffe himself, suppose Jones the bank robber believes himself too weak to succeed in his assault and so eats an extra bowl of cereal in the morning, solely with the intention of becoming stronger in order to rob the bank.¹⁵ It is certainly a strain to say that in eating the cereal Jones is attempting a bank robbery. The problem is that the Commitment Criterion and Guidance Criterion can be satisfied even at this far-remote

¹⁵ p. 281.

preparatory stage, and the Completion Counterfactual may well be true at this point. They are acts comprising the initial stage in the process of carrying out a crime, and as such they constitute an attempt to commit that crime according to this approach.

This point is connected to the second worry, which is that the Guiding Commitment view threatens to rule out the possibility of abandoning a criminal endeavor before one has reached the point of incurring attempt liability.¹⁶ We might want the law to allow that someone who completely and voluntarily abandons an activity aimed at committing a crime is not guilty of a criminal attempt if she has not yet exited the merely preparatory stage. The clause “complete and voluntary” is meant to exclude cases where the defendant’s desistance is a mere postponement to a more felicitous opportunity or a reaction to a perceived increase difficulty or probability of detection. The motivation for recognizing voluntary and complete abandonment as a defense stems from the conviction that the law ought to treat its citizens as responsible agents, giving them reason to refrain or desist from criminal enterprises rather than coercing them.¹⁷ A person who sets out to commit a crime has not responded correctly to her legal reasons for action, but in some cases she will have a chance to correct this mistake before harm is done, renouncing the enterprise because she realizes it is wrong. But while the Guiding Commitment approach can certainly allow that abandonment is a mitigating factor, it faces difficulty in accommodating the idea that it should be exculpatory in some circumstances. This is because abandonment will necessarily occur after enough is done to suffice for a criminal attempt.¹⁸

Yaffe is of course aware of these challenges and resourcefully defends the implications of his view. His strategy is to deflate the worry

¹⁶ David Brink raised a similar worry about Yaffe’s view at an Authors Meets Critics session at the 2011 Pacific APA meeting.

¹⁷ Cf. Duff, Antony (1996). *Criminal Attempts*. Oxford University Press. Chapter 13, section 5.

¹⁸ It might appear as though Yaffe’s Completion Counterfactual allows for the contingency that the agent will change his mind, but it does not. For a criminal attempt to occur, it suffices that the Commitment and Guidance Criteria are met. The Completion Counterfactual must be satisfied if the Guidance Criterion is met, but the counterfactual may be true in the beginning stages of a criminal endeavor even if the agent later changes his mind. It merely states that if he did not change his mind, etc., he would succeed.

that the Guiding Commitment view is extensionally inadequate by distinguishing between commission and guilt.¹⁹ He accepts the counterintuitive consequence that one may have already committed an attempt even in the far remote preparatory stages of a criminal endeavor. However, he argues that this will not always be the case, and that we will necessarily lack sufficient evidence for guilt even when it is the case. Return to the example of Jones, who is eating an extra bowl of cereal in the morning. Even if we stipulate that Jones formed the intention to eat the extra cereal solely because he believed it to be a means to robbing the bank, Yaffe maintains that we are not justified in inferring that his intention to rob the bank is motivating his cereal-eating – there are simply too many other intentions that could be at work behind this apparently innocent behavior. In making this claim, Yaffe is drawing a distinction between forming an intention as part of a criminal plan and being motivated by the intention for the criminal end, claiming that it is the latter that is necessary for attempt. If the content of Jones's motivating intention is limited to "eat an extra bowl of cereal" and does not specify that this is in order to rob the bank, then he is not engaged in an attempt to rob the bank even if he would not have the former intention if it were not for the latter. Yaffe's point is not that intentions to make mere preparations will always or even normally be atomistic rather than integrated in this way, but rather that there will always be reasonable doubt that they are integrated. And if there is reasonable doubt that the preparations are motivated by the intention for the criminal end, then we will have insufficient evidence that the Completion Counterfactual is true: we will not be justified in inferring that in the correct circumstances and in the absence of inability, change of mind, and execution failure Jones would have completed the bank robbery. Finally, with respect to abandonment, Yaffe simply accepts that abandonment necessarily occurs after a criminal attempt has been made, and thus that it can serve as a mitigating factor but not a complete defense.²⁰

This evidentiary tactic for saving intuitions about what we ought to be held legally accountable for is unsatisfying for several reasons. Most importantly, it concedes too much. Our intuitions do not rebel merely against the idea that one can be convicted for attempt while in

¹⁹ Yaffe (2010), pp. 281-282.

²⁰ Chapter 11.

the merely in the preparatory stages, or after one has voluntarily abandoned what would otherwise constitute an attempt. It seems to me that we hold the stronger view that such agents have not done something deserving of sanction, and that we are right to hold this view. Not only do we necessarily lack sufficient evidence that Jones has committed an attempt to rob the bank in eating extra cereal; it simply is not true that he has made an attempt as we ordinarily think of it. This is so even if we stipulate that he is directly motivated by his criminal end and not merely an isolated intention to eat the cereal. Further, Yaffe's view seems to have the odd implication that whether or not someone is in fact guilty of criminal attempt in such cases depends upon whether he has happened to "agglomerate" the intentions that constitute his criminal plan, forming and acting on a holistic intention that explicitly represents the preparations as means to the criminal end.²¹ It is unclear why an agent's agglomeration habits should ground a legally relevant difference in what he has done. Finally, it does not seem impossible in principle to have sufficient evidence that Jones's cereal-eating was directly motivated by his intention to rob the bank, if for example he confesses that this is so.

These concerns with Yaffe's strategy of appealing to evidentiary considerations to achieve extensional adequacy suggest that what is in fact needed is a stricter definition of criminal attempt that excludes mere preparations and thereby allows for abandonment to exculpate. It is here that we should turn to the metaphysics of action for aid in providing the basis for such an account. I will proceed to argue that although the Guiding Commitment view nicely captures what it is to try to do something, this is the wrong philosophical notion to focus on. Rather, it is the correct account of what it is to *be doing* something that will provide the needed structure. In the end, I do not suppose that the view I will offer provides a test that will sort all cases into the correct categories from a legal point of view. Rather, it is an effort to delineate what the relevant features of incomplete action are, and thus a guide to where the criminal law should look in imposing liability. Most importantly, it is no part of the aim to capture our moral intuitions concerning who is deserving of blame. The more modest aspiration is simply to specify more concretely what the metaphors of "embarking

²¹ I owe this point to Al Mele.

on a crime” or “taking substantial steps” might mean from a morally neutral point of view.

II

The first step toward an alternative account is to note that in rejecting this version of Subjectivism about attempt liability, we need not embrace the opposite Objectivist extreme. The dialectic between Objectivism and Subjectivism tends to ignore a large area of undistributed middle ground. The solution is to concede that the intention motivating an act is a highly significant factor in determining whether the act constitutes a criminal attempt, but to deny that it is the sole determining factor: whether an attempt has occurred is constrained by other “objective” factors. This may seem an obvious point, but I believe it has been obscured by the mistaken focus on the notion of trying.

‘Trying’ does not belong in the category of events that can be underway but not yet complete. This is revealed by the fact that the verb licenses the inference from the imperfective to the perfective aspect: as soon as there is a point at which an agent is trying to ϕ , it is true that he tried to ϕ even if no progress toward ϕ -ing was made.²² What this shows is that the fact of having tried to ϕ depends only on being motivated by the intention to ϕ . I suspect that something like this line of thought is behind the appeal of highly inclusive accounts of criminal attempts such as Yaffe’s. The reasoning is natural: if what we aim to censure is trying to commit a crime, and if trying is something one has done as soon as a criminal intention has exerted motivational force, then it is quite proper to categorize means undertaken as preparation and abandoned efforts as full-blooded attempts. But given that we in fact seek to exclude these categories from attempt liability, I think this should lead us to shift the focus away from trying.

Rather, I suggest that we should be guided in our investigation by the features of doing. What one is trying to do depends entirely upon one’s motivating intention; what one is doing does not. Constructing a

²² Following the linguist Bernard Comrie in *Aspect: An Introduction to the Study of Verbal Aspect and Related Problems*, Cambridge University Press (1976). These aspectual distinctions in act-concepts trace back to Aristotle’s definition of kinesis (movement), *Metaphysics* Theta 1048b18-35.

plausible theory of criminal attempts depends on clarifying the internal structure of actions that are underway but not yet complete. An initial observation is that we identify these processes using the imperfective aspect of the relevant verb construction, asserting that Brown *is crossing* or *was crossing* the street even if it is never the case that he crossed the street because he was run over. The fact that one can be doing something that one never does is known as the “imperfective paradox,” but this should not suggest that it is at bottom merely a linguistic oddity. Rather, it expresses a fact about processes: they can be directed toward an outcome that does not occur.²³ Nor is this limited to processes that involve agents; it is equally the case that a tree can be falling across the street without ever hitting the other side, if some external force arrests its fall. This is not to say that the same kind of fact serves as the truth-maker for each instance of an incomplete process that is directed at an outcome. Plausibly, in the case of Brown but not in the case of the tree, an intention to reach the other side of the street plays a central role in determining that his movements are directed at that outcome.

To be an action in progress, then, a process must be directed at an outcome in virtue of an agent intending that outcome. By ‘directed at’, I mean that the outcome is privileged, such that if the outcome fails to occur we will take it that something went wrong; the process was interrupted.²⁴ In offering an account of what it is to be in the process of doing something that is a crime, I therefore take Yaffe’s Guiding Commitment View to articulate a more or less correct *necessary* condition on being involved in a process that if uninterrupted would culminate in a completed crime. If the Guidance Criterion is met, it will be the case that such a process is underway, and the Commitment Criterion ensures that the successful outcome of that process is a crime. However, the driving point of this paper is that being the agent of an act-process directed at a criminal outcome is not sufficient. In addition to Yaffe’s criteria, a further constraint is needed to isolate that segment of such processes that constitutes having taken substantial steps.

But as mentioned at the outset, the approach of naïve action theory serves as a cause for pessimism about the existence of any such mark-

²³ For an extensive discussion of this feature of processes, see Ben Wolfson (2012), “Agential Knowledge, Action, and Process,” *Theoria*.

²⁴ Cf. Wolfson (2012).

ers in the deep structure of action in progress. On this view, naïve rationalizations that explain action in terms of some further thing the agent is doing – “I am doing A because I am doing B” – are prior to “sophisticated” explanations that appeal to apparently psychological terms and are always available whenever a sophisticated explanation is deployed. We explain the fact that Jones is holding the bank teller at gunpoint by citing the fact that he *is robbing* the bank. Importantly, on this view, we can equally explain what are intuitively mere preparations in just the same way: Jones is buying a ski mask because he is robbing the bank tomorrow. When we retreat to putatively psychological explanations such as “Jones intends to rob the bank tomorrow,” the naïve action theorist claims that this is simply another way of expressing the fact that what Jones is *now doing* is robbing the bank; he merely has not made significant progress toward his goal.

The naïve action theorist can of course acknowledge that our sophisticated descriptions of action allow us to make finer distinctions within the process that is the doing of an action. However, these distinctions must be merely superficial; from the perspective of action explanation, they are irrelevant. If an action that is now going on is to be explained by another action, the latter action must be something that is also going on right now. If the explanans is something wholly future, and something that may in fact never occur, it is extremely difficult to see how it could function as the explanation of what is happening now.²⁵ This is a familiar criticism of teleological explanations which appeal to future goals. Naïve action theory only evades this criticism by holding that the broader action that rationalizes the proper part in question is also currently in progress. It is essential to the explanation of Jones’s eating cereal and buying a ski mask that his action of robbing the bank is now underway – although again, it is compatible with this fact that the bank-robbing is never completed. Thus, although naïve action theory can allow for further superficial articulation of actions in progress, there will be no deep explanatory difference on this view between pure intending, preparing, and doing.²⁶

²⁵ John Bishop makes this point in his review of Thompson (2008), *Ethics* 122:1, 2011.

²⁶ Thanks to Devlin Russell for pressing me to clarify this point.

But rather than a reason to abandon hope, I propose that we should take this consequence of naïve action theory to cut against that view. We take these categories to have significant consequences in the context of imposing criminal sanctions, and this commitment is stable under reflective scrutiny. The valuable insight of naïve action theory is that act-descriptions in the progressive apply broadly; they have application before success is imminent as well as during periods of inaction, and are compatible with never completing the action. This broadness is precisely what is needed to capture the structure relevant for criminal attempts. However, as Michael Thompson himself is happy to admit, there is also a stricter use of the progressive that can be elicited by the question of when the agent started to ϕ . In this stricter sense, if Jones drops dead before tomorrow, it is quite a strain to insist that he was robbing a bank in his final moments. These linguistic distinctions are not perfectly precise, but I think they can serve as a useful guide.

The suggestion, to a first approximation, is that the joint between preparation and attempt is marked by the strict application of a progressive act-description associated with the relevant crime. Suppose that Brown's crossing the street is an initial event in an act-process directed at lethally poisoning his great-aunt (he is walking to a store in order to purchase rat poison). My claim is that it is false to describe what Brown is doing in crossing the street as 'poisoning his aunt', and that it will in general often be incorrect in the strict sense to describe the entirety of such act-processes in terms of the ultimate goal of that process. That said, the act of poisoning can be underway long before Brown's aunt begins to suffer physical effects; when he puts the toxin in her omelet, perhaps, we are entitled then to say that what he is doing is poisoning her. In general, my proposal for the point at which an agent should in general begin to incur attempt liability is the following:

[Criminal Attempt Criterion]: Where C is a description of an action that is a crime, a person has legally attempted C once he can be correctly described as "doing C."

I take for granted here that to be doing C, the agent must have initiated an act-process directed at having C-ed, and that something like Yaffe's account of these conditions is correct. The Attempt Criterion imposes a further constraint designed to exclude some cases that

will qualify as attempts on more inclusive Subjectivist approaches. This criterion is of course highly schematic. In its application, everything will depend on the particular act-description in question, and many such descriptions may not admit of sharp borders. However, the guideline is substantive in holding that there are general objective constraints that govern the application of progressive act-descriptions, thereby denying that one is always doing whatever one intends to be doing. I will begin the task of articulating those objective constraints here, but I do not take these remarks to be exhaustive. It is also important to emphasize that the form of the Attempt Criterion can be accepted as a guideline for imposing attempt liability while embracing a different substantive view as to how to apply that guideline.

It is crucial to emphasize that the Attempt Criterion allows that one can attempt a crime without succeeding or even nearing success, because one can be doing something one never does. Just as one can be baking a cake while one is merely sitting on the couch waiting for the oven to heat, and one can be breaking and entering even while one is struggling in vain to pick the entrance lock. What is of primary importance is that one intends to be ϕ -ing, and that this intention has motivated some initial act in service of it. However, I do not think these conditions suffice for doing ϕ ; the world must cooperate to some extent. This is the sense in which the approach I am advocating has an Objectivist dimension.

The first objective constraint I wish to propose on being in a process directed at ϕ -ing concerns the possibility of success:

- (1) To be in the process of doing ϕ , it must be possible in the current circumstances, given one's chosen means and holding fixed one's relevant abilities, that one will at some point have intentionally ϕ -ed.

The conditions for having ϕ -ed will be given by the action concept filled in for the variable ϕ . To have ϕ -ed intentionally, those conditions must be met non-accidentally. The agent must bring about the intended state of affairs in the way she had planned and through the exercise of skill rather than mere luck. This qualification eliminates from consideration those possible worlds in which the intended state of affairs occurs as a result of coincidence, as well as those in which

the intention “deviantly” causes the state of affairs to come about in a way that makes the ϕ -ing unintentional. But having restricted our attention to ϕ -ing intentionally, the notion of possibility at work in this context is quite weak. The idea is not that success must be at all likely, but rather than none of the elements required by the success conditions of the agent’s intention can be entirely missing. What is impossible is that the agent will succeed in intentionally ϕ -ing if he entirely lacks the ability, employs intrinsically ineffectual means, or is in circumstances that do not afford a necessary element of success, where ‘circumstances’ are individuated very broadly.

Success will be impossible in the relevant sense when the agent is employing means that are intrinsically ineffectual. It is not the case that Carole Hargis and her lover are poisoning Hargis’s husband in putting a non-poisonous tarantula into his pie despite the fact that their doing so is caused and guided by an intention to poison him, because the selected means are generally ineffectual as a poison.²⁷ The circumstances of action afford a second source of impossibility, depending on whether they supply the elements that are integral to the intended result. Don Quixote is not fighting giants in tilting at windmills, despite his intention to be doing so, because there simply are no giants present. Likewise, to be receiving stolen goods, the goods in question must in fact have been stolen. The relevant circumstances must be individuated in a coarse-grained way that is generous to the plan the agent has in mind, and so will be partly a contextual matter. A third source of impossibility is the ability to do as one intends, which one must not definitively lack. To be running a four-minute mile, one must be an elite athlete, and to be solving a complex logic problem, one must be a trained and talented logician. To be clear, I am not denying that it is possible to succeed in such cases by altering one’s circumstances, locating alternative means, or acquiring the requisite skills. I am merely claiming that unless and until you make these changes, what you are doing is not ϕ -ing.

²⁷ Of course, it is possible that the tarantula might cause his death, or even act as a poison on him in virtue of some idiosyncratic biological property of his. But this would be a case of accidentally bringing about the intended goal rather than an intentional poisoning.

I take the possibility constraint on being in the process of ϕ -ing to be strongly intuitive in some form or other. However, it is important to emphasize that some philosophers have bordered on denying it. For example, some inspired by G.E.M. Anscombe's work have been led to hold that the intention to ϕ embodies "practical knowledge" that one is ϕ -ing. What is practical about the kind of knowledge intrinsic to intentional action on this view is that when there is a mismatch between what the agent takes himself to be doing and what is actually happening – Don Quixote tilting at windmills, for instance – the "mistake is in the performance, not the judgment." That is, the knowledge that one is ϕ -ing is not impugned by failing in one's endeavor to ϕ , even miserably; rather, what is impugned is what happened.²⁸ Don Quixote knows that what he is doing is fighting giants on this view, and so it follows that in some sense it is true that he is, though he is doing so extremely badly. Those who embrace the view that having the intention to ϕ embodies practical knowledge that one is ϕ -ing might claim that in the extremely unsuccessful cases, one cannot even succeed in having the intention to ϕ . But short of that, this kind of view will be extremely permissive about the correct application of the progressive description to intentional action. This is what I am denying in claiming that there are substantive constraints on the possibility of having intentionally ϕ -ed in the relevant circumstances given one's abilities and chosen means.

The constraint articulated in (1) already has substantive implications for inchoate liability. If we restrict criminalization to cases where ϕ amounts to a crime²⁹ and the agent is in the process of ϕ -ing, many cases will be excluded that might be counted as attempts on a thoroughly Subjectivist view. First, so-called "inherently impossible" attempts will not be criminalized. An agent who acts on a plan to kill someone using voodoo will escape criminal liability because he is not murdering anyone in sticking a doll with pins. Many jurisdictions already allow that inherent impossibility – employing means to a crimi-

²⁸ E.g. Adrian Haddock, "The Knowledge that a Man Has of His Intentional Actions", in Ford, Hornsby, and Stoutland, eds., *Essays on Anscombe's Intention*, 147-69 and Matthias Haase, "Knowledge and Error in Action," ms.

²⁹ The relevant act-description need not be the official designator of the crime. For example, the crime might be murder, but the act-description that is relevant for assessing attempt liability might be 'poisoning'.

nal end that are by their nature ineffectual – is a defense to an attempt charge, and I take this to be an appealing result that should be vindicated by a theory of criminal attempt. More controversially, certain kinds of contingent impossibility may also escape criminalization. If the agent's intention is to receive a particular bit of property, falsely believing it to be stolen, then her purchase will not come under the description 'receiving stolen property' and so will not constitute an attempt to do so.³⁰ Likewise, a would-be murderer who shoots a person who is in fact already dead will not be guilty of attempted murder.

These consequences will allow for a significant amount of moral luck. An agent might have a wrongful intention revealing a serious defect in character, and even reasonably believe that success is possible, but fail to incur attempt liability. Such people will be lucky that in spite of their criminal intentions, they failed to be doing anything that would amount to a crime. They might even be just as morally deserving of censure and sanction as their counterparts who were more accurate in their beliefs about what they were doing. But an assumption central to the approach being offered is that the law need not be in the business of eradicating moral luck. Actions have a social meaning, and the law aims to prohibit types of actions that are socially harmful. If one tries but utterly fails to be doing any of the types of actions that are prohibited, one may be morally deserving of censure and even sanction, but one has not come under the purview of the criminal law.

But the possibility constraint does not itself suffice to solve the problem of distinguishing mere preparations from genuine attempts. Although it rules out cases of utterly hopeless plans, it might still rule in what is intuitively the preparatory stage of an effective plan. Let us now focus on cases in which success is not in fact rendered impossible by some feature of the agent, his circumstances, or his action-plan. My second claim is that in some of these act-processes, the beginning stages of a process that is motivated by an intention to ϕ and therefore directed at the end-state endemic to the activity of ϕ -ing are not correctly described as 'doing ϕ ' but rather as 'preparing to do ϕ '.

³⁰ However, if her intention is the de dicto "receive stolen property" then she may be in the process of carrying out the crime even as she currently takes possession of property that was not stolen, if she is disposed to continue to direct her efforts toward acquiring stolen goods.

To distinguish preparing from doing, the solution is to appeal to the agent's beliefs as to whether his circumstances, chosen means, and relevant abilities are present and conducive to possible success. I suggest that preparations have an aim that is distinctive from the doing of the relevant activity, and that this aim will feature distinctively in the explanation of their occurrence: they aim at part at getting into position *to be ϕ -ing at will*. A sufficient explanation of the occurrence of preparations – call them ϕ -ing – will therefore appeal not only to the intention to ϕ , but also to the agent's belief that he will not be able to being the process of ϕ -ing unless he ϕ 's, or performs some suitable alternative to ϕ -ing. Importantly, for the purposes of classifying action as mere preparation, it does not matter whether this belief is true. What is relevant is that the agent believes there are factors of the abovementioned kind such that if he were to implement the intention to ϕ , what he would be doing would not amount to being in the process of ϕ -ing. Preparations are addressed at eliminating these factors.³¹ To be clear, I do not mean to say that preparations encompass anything the agent does with the aim of acquiring the ability to *succeed* in his criminal enterprise. This would include far too much of the actual attempt. And by 'implement the intention,' I do not mean successfully complete; we must still leave room for prevention by external forces, a change of mind, or "execution failure" in doing something one is generally able to do. What I have in mind is more akin to the notion of basic action – something one can do at will, and not by doing something else that is spatiotemporally distinct. Crimes tend not to be basic actions in the sense of being "practically atomic," of course. The point is rather that sometimes one can act on an intention to ϕ only by forming another intention that implicitly has the form ' ϕ in order to be able to ϕ '. Finally, by 'some suitable alternative to ϕ -ing', I mean some other action cognized as a means to eliminating the relevant obstacle. We thus arrive at the following principle:

³¹ This may seem to allow that the agent could in fact be C-ing while falsely believing that he is currently unable to C, thus erroneously classifying his C-ing as preparation to C. But this mistake would entail that the agent does not know how to C, and would thus prevent him from satisfying the condition of intending to C. Thanks to John Bishop for pressing me to clarify this point.

(2) Where C amounts to a crime, an action caused and guided by an intention that commits one to doing C is merely preparatory if it is also caused by the belief that one currently lacks the requisite circumstances, effectual means, or ability to be doing C at will.

This is compatible with the agent taking himself currently to have some small chance of ϕ -ing at will; he must simply not believe that he can.³²

I take the following to be examples of how paradigm cases of preparation are distinguished by being aimed at eliminating obstacles and reaching the point at which one can be ϕ -ing at will. First, if the success conditions of the intended crime require certain circumstantial features, preparation will involve ensuring that those features obtain. Often, this will involve “getting into position,” as exemplified by many of the features offered by the Model Penal Code as marking the transition between mere preparation and substantial steps. If the criminal activity essentially involves a particular type of location – a bank, another’s private residence – then preparation will involve intentionally traveling to that type of location. If it essentially involves a victim, preparation will involve selecting and getting into proximity of the victim. The MPC cites the following as examples of substantial steps: lying in wait, searching for, following the intended victim, enticing or seeking to entice the victim to the place contemplated for the commission of the crime, and reconnoitering or unlawfully entering the place (vehicle, structure, or enclosure) contemplated for the commission of the crime.³³ I take this to serve as confirmation of the claim that being in the circumstances required for the intended crime to take place is necessary to begin committing that crime, and that the stage of getting oneself into the requisite circumstances is preparatory.

Likewise, obtaining what are in fact generally effective utensils to one’s criminal end will fall into the category of acquiring the ability to commit the crime. The MPC cites the possession of materials to be employed in the commission of a crime as sufficient for having taken substantial steps if the materials can serve no lawful purpose under the circumstances. My proposal again vindicates the intuitive appeal

³² Thanks to Luca Ferrero for raising this question.

³³ § 5.01 (2).

of this example. If the intended crime requires the use of some type of implement – poison, a deadly weapon – then the crime will not be underway until the agent is in possession of such an implement.

Third, less concretely, actions taken with the aim of acquiring the necessary skill to commit a crime will fall into the category of preparation. If the agent believes he lacks a skill integral to his plan for committing the crime, then he does not take himself to be able to act immediately on the intention to commit the crime. If he is rational, this belief will cause him to form the intention to develop the requisite skills in order to be able to commit the crime. The subjective characterization of this aspect of preparation is necessary because the agent might underestimate himself; his skill level might in fact be sufficient for it to be possible that he succeed in ϕ -ing in the way he intends to. But our interest is in cases in which the intention to ϕ generates a further intention to develop the skills required for ϕ -ing, and this will occur only if the agent himself lacks confidence that he has those skills. This category will deal properly with cases such as Jones eating extra cereal in order to be strong enough to rob the bank, or perhaps more plausibly, going to the shooting range to improve his marksmanship.

There may be still further ways in which an action can be in service of acquiring the ability to be ϕ -ing at will. We need not attempt to list them all. This kind of preparatory action has the general form ‘ ϕ -ing in order to be able to ϕ ’. Further, it will be causally explained not only by the intention to ϕ , but also by the belief (or high credence) that one cannot do something that will be part of the process of ϕ -ing unless one ϕ ’s or performs some alternative to ϕ -ing. Finally, whether or not this belief is true does not matter for classifying the resulting action as mere preparation.

III

I will end by considering some implications of this approach. What I have argued for is a schema rather than a test that can easily be applied to sort borderline cases. The schema does not eradicate the vagueness at the margins of the distinction between preparing to do something and doing it, since many of our action-concepts do not specify precise conditions under which an action of that type has been initiated. The as-

assessment of whether a defendant has done enough to merit a description under which what he is doing is a crime will admit of some discretion. That said, if I am right about the combination of “subjective” and “objective” factors that contribute to determining what an agent is doing, I believe we achieve an appealing result in many cases that are intractable to approaches that are either purely subjective or purely objective. If we take only the agent’s intention in acting into account, we get the wrong result in cases where what the agent has done is not the kind of thing that is correctly considered part of the action prohibited by the law. Actions exist in the context of social practices, and this means that one cannot be doing something by doing just anything. On the other hand, we often cannot identify what action the agent is in the midst of doing without making reference to his intention and his relevant beliefs about his means and abilities. Criminalizing only behavior that significantly increases the risk of harm will exempt people who are doing what is in fact a crime, and this excludes too much.

The schema places significant weight on our ordinary act-concepts as deployed in the imperfective aspect. One might object to this methodology as overemphasizing mere ways of speaking rather than constructing the kind of objective framework we should desire to inform the criminal law. The first thing to say in reply is that on this view, the fact of the matter as to whether a given act-process has been initiated is not determined by ways of speaking; the linguistic data is meant to be merely a guide to unpacking the structure of these action concepts. We do generally recognize the distinctions that have been pointed to between idly intending, preparing, and doing, and our ways of speaking aim in part at marking these metaphysical distinctions. Second, though this consideration is certainly not overriding, employing ordinary action concepts is exactly what we should aim to do as far as possible in the context of criminal jurisprudence. The further the law abstracts from common sense and introduces recondite prohibitions that do not mirror lay act-descriptions, the less just it is. Ignorance of the law surely is an excuse if knowledge of it requires an inordinate amount of study. We should want to enable people who aim to be law-abiding to succeed. Further, some have argued that the justification for punishing attempts depends in part on the general increase in

social volatility caused by attempts.³⁴ But we would only expect an increase in volatility in response to events that are generally understood as harmful attempts, under familiar descriptions. I therefore think that insofar as the criminal law can encode the ways in which we already apply these concepts, this is a virtue rather than a flaw.

An important assumption I am making here is that the purview of the criminal law need not mirror our assessments of moral desert. The proposed schema will exempt some agents from legal censure who are clearly deserving of moral censure. There will be cases in which the defendant has a defective character, engages in reasoning that fails to respond to his legal and moral reasons, and acts in light of a blameworthy intention, but where he simply fails to be doing something of a type that is prohibited. This is what we might call “censure luck.” But I think this is defensible; it is plausible that the criminal law should be limited to actions that take place in the public sphere, whereas the features that make a person deserving of blame may not be limited in this way.

However, it is equally important to emphasize that the general schema I have proposed can and should be supplemented by specific prohibitions on some kinds of preparations. I think it is proper that general attempt liability take a narrow scope, but there are some actions the state has an interest in prohibiting even preparing to do. For example, some offenses are such that one does not begin doing them until the point at which a significant harm has already occurred. Possibly, the act of rape has not been initiated until penetration has occurred, and yet we do not want to require law enforcement to wait until this point to arrest and charge someone with attempted rape. We ought therefore to enact a specific prohibition on what my view would classify as the preparation to commit a rape. Similarly, with respect to offenses that are extremely harmful such as crimes related to terrorist activity, we may well desire to prohibit preparations these offenses in order to be able to intervene when the crime is still inchoate. The general schema for criminal attempts I have suggested would therefore need to be supplemented with specific prohibitions designed to address the particular features of some types of offenses. But this is as

³⁴ Lawrence Becker (1974), “Criminal Attempt and the Theory of the Law of Crimes,” *Philosophy and Public Affairs*, vol. 3, issue 3.

it should be; our general definition of attempt should err on the side of being overly narrow, rather than risk including behaviors that are not justifiably sanctioned.

Finally, there is the question of how the proposed schema bears on abandonment. On the approach I have outlined, an agent's behavior may be caused and guided by an intention that if successfully executed would constitute the commitment of a crime, and yet that behavior might fall into the category of mere preparation that is insufficient for liability. This is possible because merely acting with the intention of ϕ -ing does not suffice to make it the case that one is ϕ -ing. The intention carries a great deal of weight in determining the correct description of what one is doing, but it is not the sole factor. The view therefore creates a space in which one can initiate a criminal endeavor but abandon it before one has begun doing something that is a crime. This space creates an incentive for the complete and voluntary renunciation of a criminal plan one has adopted before one exits the merely preparatory stage. And as I see it, incentivizing abandonment is precisely why the criminal law ought to exclude the category of mere preparation from the general prohibition against attempting a crime. We should want to create a "locus penitentiae" in which a person can reflect on and respond to his legal and moral reasons not to proceed and desist in light of those reasons. As Antony Duff has pointed out, an overly inclusive law of attempts fails to treat its subjects as rational agents who can be persuaded to obey the law, favoring instead preemptive uses of coercion.³⁵ And if one has committed a criminal attempt as soon as one has taken the first step, there is an "in for a penny, in for a pound" incentive structure potentially favoring proceeding and succeeding in one's aim over desisting. We should want an agent who has begun to implement his criminal plan to have most reason to think better of it and abandon his endeavor, and this space is what the proposed schema creates. This is ultimately the strongest justification for the approach I have defended over other conceptions of attempt: if you try to do something the law prohibits you from doing, you should desist before the point where you are actually doing it.

³⁵ R.A. Duff (1996). *Criminal Attempts*. Clarendon Press, Oxford. P. 387.