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WHY ATTEMPTS DESERVE LESS PUNISHMENT THAN COMPLETE CRIMES*

Rifle ready, an assassin lies in wait. He aims carefully as the intended victim comes in view but holds fire until only a few yards separate them. Then he pulls the trigger. The "victim" walks on, unaware that only a faulty cartridge has saved him from death.

A would-be robber enters a bank, goes to a teller window, hands in a threatening note, and displays a toy pistol. An alert guard, seeing the "weapon", immediately intervenes. The robbery has aborted.

These are both attempts to commit a serious crime. Should they be punished as severely as the corresponding complete crime? The answer of most legal theorists today is: Yes. That is surprising for two reasons.

One reason for surprise is that the answer clearly goes against common practice. Most legal systems statutorily provide for penalties for attempts substantially less severe than for the corresponding complete crimes. And some jurisdictions (for example, Illinois) which for a time yielded to the theorists (especially the American Law Institute's highly influential Model Penal Code) have gone back to providing lesser penalties for most attempts. Legal theory is seldom so out of step with practice.

The other reason the theorists' answer is surprising is that it is (virtually) the theorists' answer. That a few theorists should set themselves against practice is hardly worth notice. We expect theory to be (to some degree) a criticism of practice. But that so

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many theorists, retributivists and deterrentists, rehabilitationists and incapacitationists, could all agree in the face of opposed practice certainly is worth notice. When, as here, the agreement arises not from each appealing to some common principle external to their several theories, but from distinct principles, each internal to the theory in question, we have a state of things inviting one to conclude, “Well, there must be something to it.”

Perhaps there is. And perhaps too it would be worthwhile to find out what “it” is. Nevertheless, I shall not do that here. Instead, I shall try something more risky and so more interesting. I shall try to show that the theorists, though nearly unanimous, are mistaken. I shall argue that, if we accept a certain relatively defensible version of retributivism, we must recognize the injustice of punishing attempts as severely as we punish complete crimes because attempts deserve less punishment. Most retributivists will, I hope, find the argument decisive. Deterrentists, rehabilitationists, and incapacitationists will, I suppose, not find it even relevant except insofar as they recognize justice as an external constraint on what may be derived from their respective theories. But, because most non-retributivists today recognize justice as at least a factor to be considered along with deterrence, rehabilitation, or incapacitation, the conclusion drawn here should be of interest even to them.

There is also a more practical reason for interest in the conclusion drawn here — at least for Americans. The United States Supreme Court has recently revived the doctrine that punishment must be proportioned to the seriousness of the offense. At first, the doctrine was applied only in capital cases. But it has now been extended to cover cases involving a life sentence for repeated conviction of minor felonies. There is no principled reason not to extend it further (though there may well be reasons of policy preventing such an extension soon). The conclusion drawn here

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