

Rethinking Attempt Under the Model Penal Code

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INTRODUCTION

Over the years in teaching criminal law, I particularly enjoyed teaching attempt. It was fun to go through the development of the law, especially the historic struggles to define the point in a sequence of actions at which criminal liability should be imposed on the actor. My favorite case was the 1927 decision, *People v. Rizzo*,¹ where the New York Court of Appeals heaped extravagant praise on the police for “preventing the commission of a serious crime,” but then reversed the conviction of attempted robbery because the acts of the defendants did not come “dangerously near” the planned robbery of a payroll. Something seemed strangely contradictory in this reasoning.

In my teaching, it always seemed to me that the approach to attempt of Model Penal Code, adopted by the American Law Institute in 1962,² had pretty much solved the problems of attempt by offering a good balance on the issues surrounding attempt.

But after working through the hypo provided by Professor Batey, I find myself less certain about the merits of the Model Penal Code attempt provision, especially its approach to punishment for attempts.

I. THE HYPO

Our “facts” involve a despondent man who travels from New York to Chicago, where his ex-spouse lives. In Chicago, he picks up a gun at the home of his deceased father and then goes to the home where his ex-wife lives with their toddler-daughter. Presumably, his intention is to kill his ex-wife. From bushes next to the house, he observes his ex-wife in the kitchen and a man (whom he suspects to be the wife’s lover) giving a bath to the toddler. The despondent man turns away and leaves the area. He is arrested the next day for a traffic offense and found in possession of the gun. Meanwhile, the wife has learned from a neighbor of her ex-husband’s prowling near her home, and she wants charges pressed against him.

Certainly, for his actions near the ex-wife’s home he could be charged with trespassing or, depending on local laws, possession of a concealed weapon without a permit. But there might also be a stalking statute or a “peeping Tom” statute that

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¹ *People v. Rizzo*, 158 N.E. 888 (N.Y. 1927).

² MODEL PENAL CODE § 5.01 (1985).

might cover what he was doing: spying on the inhabitants and invading their privacy. But I am asked to comment on a possible attempted murder charge or a reckless endangerment, or an attempted reckless endangerment charge.

I will start with attempted murder and then proceed to reckless endangerment or attempted reckless endangerment.

II. ATTEMPTED MURDER

As mentioned at the start, courts in the United States had difficulty historically defining the exact point at which a person's actions have gone far enough to constitute the crime of attempt. Hornbooks talk about tests such as the "physical proximity" test,³ which would require that the actor have the power to complete the crime almost immediately. Another related test—originally formulated by Justice Oliver Wendell Holmes⁴—is more flexible, requiring that the actor have reached a point where his conduct is in "dangerous proximity to success."⁵

But the law of attempt in the United States has been heavily influenced by the Model Penal Code, which permits the imposition of attempt liability for conduct at earlier stages in the sequence of events leading up to a crime that was permitted at common law. Model Penal Code § 5.01(1)(c) requires that the actor have completed "a substantial step in a course of conduct planned to culminate in his commission of the crime." The section then explains that conduct is a "substantial step" if it is "strongly corroborative of the actor's criminal purpose."

To help understand how this section should be applied, § 5.01(2) gives seven examples of conduct which "shall not be held insufficient as a matter of law" including "(a) lying in wait . . . [or] searching for . . . the contemplated victim of the crime;" "(c) reconnoitering the place contemplated for the commission of the crime;" and "(f) "possession . . . of materials to be employed in the commission of the crime . . . where such possession serves no lawful purpose under the circumstances."

Under the Model Penal Code approach, the ex-husband seems clearly to have taken at least one and possibly a few "substantial steps" in the course of conduct planned to culminate in the commission of murder. Flying interstate to the wife's city, getting a deadly weapon and bringing it to her home, and checking out the house from a hidden vantage point while armed with a gun would seem sufficient to take the case to the jury, assuming evidence of an intent to kill the ex-wife.

But even though there would be enough to take this case to the jury, I think it would be unwise and unjust for a prosecutor to bring an attempted murder charge against the ex-husband. It would be unwise because the prosecution is very likely to lose this case. The reason is that the Model Penal Code in § 5.01(4) states that it

³ See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW 624 (5th ed. 2010).

⁴ See *Hyde v. United States*, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting).

⁵ See LAFAVE, *supra* note 3, at 625.

is an affirmative defense that the actor “abandoned his effort to commit the crime . . . under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.”

Whether abandonment was a defense to an attempt charge at common law is disputed with most suggesting it was not a defense,⁶ but abandonment seems required in a provision such as the Model Penal Code’s attempt provision because it permits criminal liability rather early in the sequence of conduct leading to the crime. If liability is pushed to an earlier stage in the planning for a crime, it seems imperative to permit abandonment as a defense. Under our facts, abandonment seems strong. It looks like the ex-husband came upon a scene of domestic tranquility with the ex-wife working in the kitchen and her lover tenderly giving a bath to the child from their failed marriage, with the result that the ex-husband changed his mind about killing his ex-wife.

Obviously, a lot would depend on what the ex-husband may have said when arrested or what he might say at trial about the reason or reasons he left the area of the wife’s home. But if the prosecutor charges the ex-husband with attempted first-degree murder, I think it very likely the prosecution will be unable to disprove abandonment beyond a reasonable doubt.

But maybe the facts are not as clear as I have assumed. Let us suppose that the ex-husband when arrested made statements that are ambiguous about his plans. Suppose he said, “I had the gun because I want to kill my ex-wife, but I couldn’t do it yesterday and was planning to come back tomorrow.” The prosecution could use this to argue that this was not “a complete and voluntary renunciation of his criminal purpose.”

My problem with this situation stems from the fact that we have strong reason today to be less trusting of statements of intent than was true even fifteen or twenty years ago. We now know from neuroscience research, some of it popularized in books such as Jonah Lehrer’s *How We Decide*⁷ or David Eaglemann’s *Incognito: The Secret Lives of the Brain*⁸ that we make many decisions, even important decisions, emotionally and at a subconscious level and that it is not the case that we always “reason” to action. The ex-husband did not and maybe could not kill the victim the previous day; will he be able to kill her tomorrow? I do not think we know because I am not sure that even the ex-husband knows what he will do, despite expressing an intent to kill. But a jury may not share my skepticism about statements of intent and a capable prosecutor (perhaps matched against a less skilled defense lawyer) might get a conviction for attempted first-degree murder if the evidence of abandonment is unclear (or if the jurisdiction puts the burden of proof of abandonment on the defense as some states do).

But even if a case can be made that the ex-husband’s actions do not show a complete and voluntary renunciation of his criminal purpose, I want to suggest that

⁶ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 411 (5th ed. 2009).

⁷ JONAH LEHRER, HOW WE DECIDE (2009).

⁸ DAVID EAGLEMAN, INCOGNITO: THE SECRET LIVES OF THE BRAIN (2011).

prosecution under an attempt statute closely modeled on the Model Penal Code provision would be unjust in this situation. I say this because the punishment today for attempted first-degree murder is likely to be very harsh. While at common law, attempt was punished as a misdemeanor, the Model Penal Code changed punishment for attempt radically. The Model Penal Code punishes attempt at the same level as would be imposed for the most serious crime attempted, except that an attempt to commit a felony of the first degree will be punished at the level for a felony of the second degree.

Many jurisdictions follow the Model Penal Code's lead and punish attempt very severely. In Colorado, my home jurisdiction, were the ex-husband convicted of attempted first-degree murder, that would mean the ex-husband would face a prison sentence of sixteen to forty-eight years in prison for attempted first-degree murder (which is actually one sentencing level below what would be imposed for first-degree murder). A sentence of sixteen years—the mandated minimum—would seem extremely unjust for what took place in this case. Yes, the potential victim was harmed by what happened. But no one was actually threatened with a weapon, much less shot.

This sentencing harshness is only partly the fault of the Model Penal Code because sentencing ranges and mandatory minimums have been continually raised to higher and higher levels in the fifty years since the American Law Institute adopted the Model Penal Code. But I think that it was a mistake for the Model Penal Code to provide a model that suggests punishment for all types of attempts should be at the level of the intended crime. Some of my thinking on this issue stems from social science research by Professors Paul Robinson and John Darley on the attitude of citizens to punishment for attempt.⁹ Their studies suggest community support for an approach to punishment for attempt that would provide a standard discount for attempts rather than imposing liability at the same level as the crime attempted.¹⁰ More importantly, for purposes of our hypothetical their research suggests that in punishing attempts statutes should distinguish attempts in which the actor has done all he intended to do (where perhaps the actor fires at the victim but the gun jams) from situations where the actor intends a crime but still has work to do to carry it to completion.¹¹ Obviously, our hypo presents the latter situation.

None of the above is meant to suggest that the actions of the ex-husband did not cause harm to the ex-wife, but no life was taken, no one was injured, and the ex-husband walked away from the scene. Punish the ex-husband for trespassing or stalking or a weapons offense, but attempted first-degree murder seems like a

⁹ PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 205-06 (1995).

¹⁰ *Id.*

¹¹ *Id.*

charge that should not be brought if it has sentencing consequences out of all proportion to the actual harm.¹²

III. RECKLESS ENDANGERMENT AND ATTEMPTED RECKLESS ENDANGERMENT

Reckless endangerment seems unsupportable on these facts. What was the conduct that would constitute reckless endangerment? While the ex-husband had a gun in his possession, many citizens walk the streets with guns (or other weapons) in their possession. They may possess those guns lawfully or unlawfully, but to charge them with recklessly endangering the lives of those who walk near them seems simply an effort to turn one possible crime—unlawful possession of a deadly weapon—into many crimes where the actus reus of endangerment seems to be lacking.

In reaching this conclusion, I am influenced by the Model Penal Code provision on reckless endangerment, § 211.2, which states that it is a crime to “recklessly engage in conduct which places or may place another person in danger of death or serious bodily injury.” This section gives some idea of the sort of conduct intended to be covered by a somewhat vague provision when it states that recklessness and danger shall be presumed “where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the gun loaded.” What the Model Penal Code is saying is that pointing a loaded gun at someone is generally dangerous. But on our facts the gun was never displayed or pointed at anyone.

In the end, if I were the trial judge and the prosecution charged the ex-husband with reckless endangerment on the hypothetical facts, I would not put the case to the jury. While it is true that the ex-husband might have pulled out the gun and threatened or even shot someone, the fact is that he walked away without ever taking the gun from his pocket. Charge him with a concealed weapon offense or trespassing or stalking and punish him for those offenses. But reckless endangerment? There seems no good reason to bring that charge when there are other misdemeanors or minor felonies that would better fit the facts.

Attempted reckless endangerment presents, as an initial matter, the conceptual issue of whether there should be attempt liability for crimes where the mens rea is recklessness. There is a split of authority on this issue. A few states have upheld convictions for attempted involuntary manslaughter,¹³ but scholars tend to think that is not an appropriate use of attempt law. As one of them put it, “It is illogical to say that a person can intentionally commit an unintentional crime.”¹⁴

¹² In the real world, one would hope that a good defense lawyer might help the ex-husband avoid an attempted murder charge by finding a way to make sure that the ex-husband returns to New York with measures in place to help assure that he remains at a great distance from Chicago and his ex-wife.

¹³ See, e.g., *People v. Thomas*, 729 P.2d 972 (Colo. 1986) (en banc).

¹⁴ JOSHUA DRESSLER, *supra* note 6, at 394.

On our facts, the ex-husband wants to kill his ex-wife, and thus attempted first-degree murder is a possibility. One can argue that if he intended to kill her, he was also intending to recklessly endanger her. But was that really his objective? To put it in Model Penal Code language, can we really say that the ex-husband took a substantial step "in a course of conduct planned to culminate in his commission of the crime" of reckless endangerment?

But there are arguments the other way as well: if reckless endangerment is a lesser included of first-degree murder, the actor must also have been planning to recklessly endanger that person. Thus, if it is a substantial step to bring a gun to the intended victim's home to kill her, it can be argued that it must also be a substantial step in a course of conduct planned to culminate in recklessly endangering the victim. But it still seems strange to say that the actor was "attempting reckless endangerment" in a situation where his clear objective was far more serious.

But even if a jurisdiction might permit attempted reckless endangerment, the ex-husband has the same abandonment defense to raise as he would for attempted first-degree murder—he abandoned his effort to commit the crime by walking away from the home of his ex-wife without ever taking the gun from his pocket. He seemed to come to his senses without killing anyone, injuring anyone, or endangering anyone. That is a good thing.

If reckless endangerment is a misdemeanor, as it is in the Model Penal Code, it seems unnecessary for a prosecutor to try for a conviction for attempted reckless endangerment when there are likely other misdemeanors that would better fit the facts without the stretching required for attempted reckless endangerment.

CONCLUSION

I come away from this exercise convinced that the Model Penal Code did a very good job of clarifying the point at which conduct suffices for attempt liability by rejecting common law approaches that often required a physical proximity or a temporal proximity to the crime in favor of the requirement that the person have taken a substantial step "strongly corroborative of the actor's criminal purpose." Especially when the crime is serious, we need to give law enforcement the authority to intervene and stop the crime before it directly threatens injury. The Model Penal Code thus avoids the problem in *Rizzo*—the court complimenting the police for their wonderful work in arresting gunmen looking to rob a payroll, but leaving the gunmen free of any criminal liability so that they may rob as soon as they obtain more accurate information on the place and time of the payroll delivery.

But in so broadening the scope of attempt liability to permit punishment for crimes that may be days or even weeks in the future, the Code's heavily subjectivist approach to punishment is much too severe (especially in these days when criminal codes are littered with high mandatory minimums). It is one thing to declare that one attempting a crime should receive the same punishment as the crime attempted where the defendant has fired the gun but narrowly missed and

quite another to insist that the punishment be the same where a great deal remains to be done. Permitting abandonment as a defense is helpful, but evidence of a “complete and voluntary renunciation” of one’s criminal purpose may be lacking. The better alternative would be to permit criminal liability, but punish much less severely—maybe zero to five years—when we cannot be certain that the defendant would ever have gone through with the crime.

My view of the wisdom of pursuing the ex-husband for attempted first-degree murder is heavily influenced by the draconian punishment he would receive in many jurisdictions if he were convicted.