

Wresting Control from Luck: The Secular Case for Aborted Attempts

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The effort to rid criminal responsibility of factors beyond the agent's control created an opportunity for a new balance in the law of attempt between aggravated penalties and full exoneration for voluntary renunciation. The present analysis claims that the opportunity has been missed both in Israel and in the United States because of an unwarranted concern for the moral tenor of renunciation. Analysis of the difference between (rare) successes and (frequent) failures in renunciation cases is offered in support of the proposition that the proper balance between ex post and ex ante considerations is only applied where courts (and sometimes legislators) empathize with the victims of specific crimes (e.g., markets, children, judges). In other cases (e.g., rape, murder), immediate victims are readily used as means to prevent uncertain future crime. The claim is also made that concern with the moral tenor of renunciation creates an anomaly in modern criminal law. While the decision to initiate a crime act (the "go act") is judged on ever narrower pictures of character and motive, the decision to abandon it before actual harm is inflicted (the "stop act") increasingly attracts interest in the inner processes behind it. I claim that the anomaly manifests the danger of blurring the line between reality (no actual harm) and fantasy (harm imagined and willed by the defendant) when the struggle against luck is not properly checked.

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INTRODUCTION

The history of criminal attempt is the history of a quest to banish luck from criminal responsibility.¹ To paraphrase Thomas Nagel's definition of moral luck, modern law has gone a long way to ignore factors beyond the agent's control.² While ultimately committed to the elimination of harm, modern criminal law has gradually shifted its focus from actual harm to the purposeful conduct of those who seek to inflict it. Mindful of human limited control of events, we now punish individuals for willfully setting harm in motion, regardless of actual failure or success beyond their control. My main argument in the present analysis is that we may have carried the campaign against luck too far. We do seem to have realized the self-evident need to create massive incentives for offenders to regain control just before they finally relinquish it, but we have miscalculated the details, either in their original design or in their judicial application. Rather than letting attempt offenders walk free when they change their minds, we too often insist that they renounce evil and change their hearts. Insisting that renunciation must be spontaneous, we deny them exoneration when we suspect a whole range of self-serving "economic" motives triggered by changing circumstances. Even when they are still free to accomplish the crime to some degree, we offer them little incentive to desist if, for instance, chances of detection increase or expected returns from crime decrease.

Using American and Israeli materials, I advance three themes against this trend. First, I claim that spontaneous moral renunciation of a crime in overt mid-attempt is too rare to justify an explicit legal rule. The realities of crime detection, often observed in moral luck scholarship,³ make legal incentives relevant only to the typically brief final stage of attempt, when the actions of the offenders burst into the open and interact with the real world in all its complexity. If the impact of the physical world is not allowed to figure

1 Yoram Shachar, *The Fortuitous Gap in Law and Morality*, 6 CRIM. JUST. ETHICS 12 (1987).

2 "Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck." Thomas Nagel, *Moral Luck*, in MORAL LUCK 57, 59 (Daniel Statman ed., 1993).

3 See recently Bernard Harcourt, *Embracing Chance: Post-Modern Meditations on Punishment* 27 (John M. Olin Law & Economics Working Paper (2d Series) No. 318, 2006).

in the calculus of renunciation, then exoneration will inevitably reserved for the few devilishly clever saints who happen to attempt a crime.

Second, I argue that when the personal cost of exoneration becomes too high to be effective, the social cost of deterrence is unjustly imposed on those unlucky victims who are immediately targeted. The protection of potential future victims from a non-repentant offender who escapes with impunity in the present is indeed a valid social interest, but it is unclear why the present victim should bear the main burden of that protection. Her bad luck in being at the scene of the crime may be accepted with resignation when nothing can be done to save her, but if impunity can be granted to the offender, it should be. Assuming she is worth the same as future potential victims, she must not be sacrificed to protect them. I advance this argument by pointing out the fact that courts and legislators seem to lose patience with *ex post* considerations when preferred victims are endangered. While immediate rape victims are readily abandoned to their bad luck, children, judicial integrity and even economic institutions are saved.

Third, I argue that spontaneous moral rebirth as a precondition for exoneration in aborted attempt goes against the grain of all modern criminal law. Renunciation speaks the language of religion in a deliberately secularized environment. When we try a person in a modern court, all we want to know is what he knew and what he wanted when he acted, not why, and we focus both questions on a particular crime, not on tendencies or character. When a person aborts an attempt he stops acting and stops wanting to commit the particular crime. We need not ask why. We have no right to demand that his decision be any more voluntary or permanent than when he began the attempt. The stop-act, I claim, need not be any richer in spirituality than the go-act.

A point of clarification is required for readers who are unfamiliar with the technicalities of criminal law. The issue under discussion here is the attempt itself, not any accomplished crime committed in the process. When a person actually assaults a victim in an attempt to rape but quits while still able to (i.e., quit or rape), he remains, under the most secular of interpretations, guilty of assault even if acquitted of attempted rape. To fully appreciate the sense in which attempt can be "undone," it is therefore essential to mentally expunge all accomplished crimes from the scene of the crime. In a slightly exaggerated version, attempted rape should be likened to the case of a lone actor who moves on his victim in a series of otherwise perfectly legal acts but aborts inches before grabbing her, still unnoticed, leaving no noticeable ripple on the surface of reality. My point is not that he has done nothing, but that what he has done is different. If his action is in other respects legal,

it only derives its criminal sense from intent, and if intent stops and rape is averted, only fantasy remains.

I. THE RAPIST AND THE SUIT

I begin by juxtaposing two decisions by the Supreme Court of Israel, one (which I call the Rapist) involving an Arab Bedouin who attempted to rape a Jewish woman,⁴ and the other (the Suit) involving a business corporation that attempted an anti-trust violation.⁵ They were both able to accomplish the crime, but they thought again and changed their minds. Both acted out of pure self-interest. Neither the Rapist nor the Suit showed any sign of moral repentance. There was no remorse, no penitence, no conversion, no spiritual rebirth. They simply stopped seconds before committing the (accomplished) crime. The victim was not raped, and the market for elevators in Jerusalem remained free. The Rapist was convicted of attempted rape, and received a penalty (six years) comparable at that time (1999) to penalties for first-time young rapists with no prior convictions. The Suit was acquitted. Both argued renunciation, only the Suit succeeded.

The Suit was a well-established incorporated business. Two of its senior officers offered a small competitor an illegal price-fixing, market-sharing deal and the competitor pretended to agree. All that remained for the Suit to commit itself was the final word of its CEO. He did not give it. All he offered at the crucial meeting was to buy out the competitor. There is no detailed account of the meeting, but the upshot of it is eminently clear. It was about profit, perhaps even war, not ethics. The Suit was big, the competitor small, and the CEO was just being commercially more aggressive than his officers. The Suit showed no sign of developing a sudden aversion to illegal practices. In fact, it was convicted in the same case of another, fully accomplished (earlier) anti-trust agreement with another competitor and there was no indication in the present case of any soul searching prior to the last-minute abandonment of the plan. The Suit simply changed its mind for economic reasons. The Court quoted the Suit's argument in full agreement:

Renunciation . . . need not be a "moral" renunciation stemming from a change in values occurring in the [perpetrator] It is enough that the [perpetrator] changes his mind about committing the crime, even

⁴ CrimA 401/99 Mazarwa v. State [1999] IsrSC 53(3) 561.

⁵ CrimA 7399/95 Nechushtan Industries Elevators v. State [1998] IsrSC 53(2) 105.

if for economic, social or other reasons, [which are] not necessarily "moral-normative."⁶

Before I move to the Rapist, I need to mention another Suit who was acquitted in Israel without fuss.⁷ He was an insurance agent who forged his partner's claims in order to divert commissions to himself, and even submitted the claims to the insurers. He later changed his mind, and somehow amended the papers before payment was made. Consequently, he was only indicted for attempt to defraud. Once the District Court was convinced that he was not in fact caught out by his boss before he moved to amend the papers, it spent no time deciphering the Suit's real motive. Did he catch word of a colleague who went to jail? Was Yom Kippur particularly inspiring that year? Was the expected profit cut even thinner by an undisclosed associate on the take who became too greedy? Did his ex-wife suddenly decide to remarry, thus relieving him of his alimony obligations? Or did he just wake up one day and decide it was just not worth the hassle? The Court, so it seems, could not care less. The Suit had a choice, he made the right one, and the money went where it belonged.

The Rapist, too, had a choice and made the right one. He gave up. His intended victim was not raped. She was an athlete, stronger than the average girl, and this changed his calculation. He had bargained for rape, not a wrestling contest, and when he could not get the one without the other, he just went away. As strong as she was for a woman, he was stronger than she, and he could still have raped her had he insisted, but the price had gone up by a few bruises.

There is a difference between the Suits and the Rapist. At least as far as legally proven facts go, only the Rapist reacted to external circumstances. Only he waited for his luck to turn for the worse before he quit, while the Suits just packed up and left like the good boys they were brought up to be. I will have a lot to say about this difference later in the American context, but I will ignore it at this stage and assume that all three protagonists, including the Rapist, acted voluntarily. They were not caught, they were able to perform, but for different reasons they just lost the will to. But just a year after acquitting the Suit, the Supreme Court of Israel went to great lengths to stress that selfish calculation was not enough. The Israeli law of renunciation, the Court said, "is designed for the Penitent, not for the one who has [his own] interest in mind."

"Penitent" is my own translation, but I think it reflects the magnitude

⁶ *Id.* at 130 (author's translation).

⁷ CrimC (Jer) 1397/05 State v. Chen [2006] Tak-Shal 2006(1) 13425.

of the term. The Hebrew origin is "Ba'al Teshuva," the headiest of all traditional Jewish expressions for spiritual rebirth. "Where Ba'alei Teshuva stand," says the Talmud, "even perfect *tzadikim* cannot stand," even the saintliest of saints.⁸ But to deserve this privileged spot in heaven, there is serious work to do. Some Rabbis suggest a four-step procedure, some cut a corner and require only three, but abandonment of one's evil ways is definitely not enough. There must be confession, there must be regret and there must be a clear commitment to future purity.

So what is the law of Israel on renunciation? The decisions in the cases of the Suit and the Rapist ignore each other, but despite the fact that the Justice who wrote the former concurred in the latter, the two cases cannot possibly be reconciled. If there is one feature of *Teshuva* common to the entire Judeo-Christian tradition, it is that it is not about material profit. So is renunciation about contrition, remorse and spiritual rebirth, or about "economic, social and other reasons"?

I am tempted to say that there is one law for Suits and one for Rapists in Israel, but I need to say more. If we take our cues from the formal hierarchy of sources in Israeli law, i.e., plain statutory language, legislative intent and precedent, the Court got it right in the Rapist. I have plucked the Suit from oblivion to demonstrate how well we can understand the need to adapt the law to human measure when the defendants resemble us. Rapists don't. Neither did the Murderous Wife.⁹ She set out to kill her husband twice, but both times stopped short of going all the way. Supreme Court President Barak's ultra-moralistic tones in denying her the defense of renunciation have finally removed any remaining doubt about the state of the law in Israel.

The Murderous Wife was a nurse. She nearly killed her husband with injections of some drug, but when he lingered longer than expected she called an ambulance and he was saved. Two years later she solicited a hired killer to repeat the exercise, but failed to pay him the advance he demanded. The issue of voluntariness is even more acute here than in the Rapist. She could have refrained from calling the ambulance, and she probably could have paid the advance, but the price would have been much higher than the few bruises in the case of the Rapist. In the first incident, her husband screamed, her daughter was home, and she faced a high risk of exposure if she did not call the ambulance. In the second incident, the advance was relatively small, but the overall price was high and she feared being indebted to the killer. The case could have been decided on the issue of voluntariness

⁸ Babylonian Talmud, *Berachot* 33B (author's translation).

⁹ CrimA 5268/04 Minin v. State [2005] Tak-EI 2005(4) 924.

alone, but it was not, and the Court's choice to search her soul serves to tint renunciation in the brightest moralistic shades of *Teshuva*.

Here is the leading paragraph, which combines Supreme Court President Barak's own words with quotes from other cases:

The exemption from criminal responsibility is conditioned on the existence of renunciation. This renunciation does not consist in the mere giving up of accomplishing the crime because of external circumstances. Renunciation is an *inner mental process* guiding the perpetrator to prevent the accomplishment of the crime. "Renunciation must stem from *inner conviction*, not some external hardship." "We are concerned with renunciation that *grows from the depth of the perpetrator's heart* and from a *mental inability* to go on and complete the conduct" ¹⁰

To put the text in context, here is the language of Section 28 of the Penal Law:

Whoever attempts to commit an offence shall not bear responsibility for the attempt if, from the desire of his heart only and out of renunciation (*Harata*), he desisted from completing the act¹¹

A word is necessary at this stage about translation. I have used "renunciation" for the Hebrew word *חרטה* (*Harata*) in both the Law and the decision I have quoted. Other translations like "compunction" or "remorse" are perhaps better in context, but they would give *Harata* a sharper moralistic flavor and would thereby preempt the main issue at hand. For all I know, the legislator could have suffered a bout of rhetorical repetitiveness, meaning in *Harata* no more than "of his own free will only" all over again. I have therefore used the slightly more ambiguous "renunciation" and have left it to the expansive language of the Court to paint *Harata* with the distinct shades of mental depth conveyed in the passage quoted above. *Harata*, says the court, is a process, not a fleeting fancy, a conviction, not a thought, it grows from the heart, not the mind, and from its depth, not its surface. Even more importantly, it is not just a loss of will, but a mental inability to will the completion of the crime. It is, in other words, a major mental meltdown of evil design and a triumph of virtue.

¹⁰ *Id.* at 7-8 (citations omitted) (author's translation).

¹¹ Penal Law, 5737-1977, § 28, LSI [Special Vol.] 4 (1977-78), amended by Penal Law (Amendment No. 39) (Preliminary Part and General Part), 5754-1994, S.H. 348 (author's translation).

To push the point even further, I need to move the focus from the Murderous Wife's first scene, where she came close to killing her husband with her own hand, to the second scene, where she came close to hiring another to do it for her. Here she was accused of solicitation, not attempt, and the applicable rule for renunciation is different. Section 34 provides simply in its relevant part:

[Whoever solicits a person to commit an offence] shall not bear responsibility for the solicitation . . . if he prevented the commission of the offence . . .¹²

There isn't a single word here about free will, let alone *Harata*. The Murderous Wife prevented the commission of the offence in the most effective way conceivable in a world motivated by greed and self-interest. She undid the potential hiring by simply not hiring. The killer wanted money, she did not give him any, the husband lived. She did not do anything active to prevent the commission of the offence, but this was only because in the particular circumstances of the case all she had to do was to refrain from action. And yet, this is how the Court decided:

Appellant did not show that she acted to prevent the crime or its completion The fact that appellant did not pass the money to [the killer] does not in itself raise an exemption The [lower] court rejected the claim of appellant that she refrained from paying the advance in order to prevent the murder of her husband She did not pay the advance because she could not raise the required sum and feared being indebted to the hired killer.¹³

What then can we make of this? Did the Murderous Wife lose her appeal because she did nothing or because her inaction was not sufficiently virtuous? I find the latter possibility wrong in principle, as I do in much of the present analysis, but the former is so specious it must be ignored. Not paying was as much breaching or calling off the contract (or the negotiations) as, in a trivially different case, calling the killer to tell him she was not going to pay would have been. What brought the ire of the law on her could not possibly be the fact that she broke off the deal by inaction. It must have been that when she did fail to act, it was not "in order to save her husband." What was wrong with her was not that she did not do, but that what she did was done for money or out of fear, not for love, and this, I argue, is importing

¹² Penal Law § 34 (author's translation).

¹³ *Id.* at 9-10 (author's translation).

most of the moralistic package into renunciation-of-solicitation through the back door.

So is "mental inability . . . stemming from the depth of the perpetrator's heart" a precondition for renunciation in Israeli law, not only of attempt but also of solicitation? The plain language of the law says not, and so does plain logic. But an Israeli scholar, probably expressing the views of the leading architect of the new Penal Law reform, argues that it does.¹⁴ President Barak, referencing her in the case of the Murderous Wife, says that he need not settle the issue, but if my interpretation of the reasoning in the quoted passage is correct, there can be no doubt where his sympathy lies. If an imaginary Murderous Wife took an army to the hired killer to take back any advance she had already paid, he would still deny her the exemption if he believed she did so for selfish reasons. Nothing but the sudden transformation of hate, greed and malevolence into virtuous love will do, and even then only if it emerges from within.

I have gone into the minute details of the legislative and judicial language in Israel to illustrate the claim that the quest for virtue in renunciation gathers momentum, and, if unchecked, can tip the whole inchoate and derivative responsibility out of balance. To regain control over one's own actions in the middle of one's own active attempt is hard enough, and reducing any incentive to do so by requiring compunction, regret and remorse is to my mind unwise. But to do so in the context of the different forms of complicity is much worse. Complicity involves putting other humans in motion. This is exactly why a wise legislator insists that accomplices not only shut themselves off but that they foil the crime. To compound the difficulty of this task by an additional unrealistic requirement of virtuous, selfless motive is sheer recklessness in social control. There is probably nothing anyone could have done to make the Murderous Wife love her husband, but had she known she'd go to prison regardless of her actions, she would probably have come up with the money to pay the hired killer to finally murder her husband. And having paid that sum and spent twelve years in jail, she'd at least have come out a happy widow, free at last.

The spill of ultra-moralism in Israeli law from attempt to complicity is a side-story in my present account. I conclude the present Part with another lone quasi-Rapist.¹⁵ He intended to rape but left his victim alone when she developed an asthmatic bout. The dissenting judge saw nothing

14 Dafna Netanyahu, *Exemption for Renunciation*, 3 ALEI MISHPAT 145 (2003) (Hebrew).

15 CrimC (Hi) 92/97 State v. Michaeli [2000] Tak-Meh 2000(1) 8633.

short of a moral singularity. "Hearing the [asthmatic] grunts," he suggested, "the defendant woke up and gave himself an account (דין וחשבון) of the evil of his ways and then stopped." The majority disagreed regarding the facts, not the principle. They saw no moral revival. The Rapist faced new circumstances, recalculated and quit. Quoting the language of section 28 ("from the desire of his heart only and out of renunciation"), the judges insisted that it "carries a sense of earnestness (כנות)" and that it "conveys rehabilitation (חזרה למוטב)." Again, there is something lost in translation here, and since nuance is the issue in this complex world of reasons for action, I must linger for a while longer. "Waking up," "account," "earnest" and "rehabilitation" are the best I can do, but the undertones of religious repentance lie heavier in the Hebrew original. In חזרה למוטב one literally returns to the Good, not just to a house, and דין וחשבון is not just any business account. It is the very one, so every observant Jew is reminded daily, exacted on Judgment Day. Renunciation, the court waxes poetic, is not a light matter and the ways of the Lord are mysterious. If men see the light even in the face of Asthma, even on the brink of abomination, they deserve forgiveness. Anything else won't do.

A ray of skeptic pragmatism emanating from these clouds of incense only accentuates their impact. What, asks one of the judges in dictum, if an "external factor" talks the perpetrator into recognizing "the evil of his ways or [the threat of] punishment by Heaven"? She is undecided, but by testing the boundary of the absurd external/internal divide even slightly, she touches on a basic truth. The best of moral behavior can be induced by selfish fear of harm, and much of it can originate in this sense "externally." But why stop there? There is nothing more altruistic about fear of Heaven than about fear of police sirens,¹⁶ and asthma is no more "external" than great teachers past or present. If anything, this seemingly insignificant query by a thoughtful judge accentuates the asymmetry I attempt to describe in the present analysis. While we stopped caring long ago if the Devil stands behind the go-act, we somehow expect God to stand behind the stop-act, and we are wasting His time.

I may be exaggerating. The truth is perhaps that Israeli judges talk too much, and far too colorfully, but that what they do is not different from what judges do elsewhere, say in Model Penal Code America. After all, between

16 Like most everything else, Mark Kelman said it more eloquently: "In a world where selfish calculation is acceptable, all renunciations are in significant senses partial." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 630 (1980).

two Suits, two Rapists and a Murderous Wife, they could reach the same decision on the basis of American-style voluntariness alone, rather than on the basis of any deep moral additives. There were no proven external factors in the cases of the two Suits, ergo they must have desisted voluntarily. There *were* major external factors in the cases of the two Rapists and the Murderous Wife, ergo they must not have desisted voluntarily. Perhaps so, but I believe that American judges talk too little and hide, perhaps from themselves, the deep moralistic undertones that have permeated their law of renunciation.

II. AMERICAN RAPISTS

The Lord plays an interesting game of hide-and-seek in one of the lesser known cases involving American rapists who changed their mind.¹⁷ The Rapist attacked his victim, intending to rape her. She fought back, and she also told him she was menstruating. She also mentioned the name of the Lord a number of times. He did not react to the Great Name the first few times, but when it was mentioned again, just on the verge of accomplishment, the Rapist stopped. As often happens in such cases, on appeal the New Hampshire court puzzled about the actual reasons for which the rapist desisted, and ultimately upheld the conviction on the basis of issues of burden of proof. But the categorization of the potential reasons is illuminating. If the Lord had nothing to do with it, as the state argued, and the Rapist changed his mind because of the fight or because of the menstruation, then there was no renunciation because the stop-act was not voluntary. If, on the other hand, the Lord did have something to do with it and the Rapist had a change of heart, the stop-act may have been voluntary. But, again, if the Lord had something else to do with it and the Rapist simply lost his erection when he heard His name, then again there was no renunciation, because there was no stop-act at all.

Despite the inevitable vulgarity, I find this particularly illuminating. The impotence in the third option accentuates the fact that the Rapist in the first option was unwilling, not unable. Like the first Israeli Rapist, he may have been surprised by the resistance, but he was stronger and when he chose to stop he was amply equipped physically and sexually to do otherwise. The impotence in the third hypothetical also accentuates the fact that the Rapist in the second option is as present in real life as, say, fairies or angels. While

¹⁷ *New Hampshire v. Jernigan*, 577 A.2d 1214 (N.H. 1990).

totally absorbed in a sudden outburst of Heavenly light, he is still sexually aroused and perfectly able to rape.

As I have been saying, men like that rarely inhabit human society, even in America. Guidebooks have been saying so in less dramatic, more practical fashion when they warn students¹⁸ and practicing lawyers¹⁹ against renunciation. As experience accumulates over the decades and courts nationwide throw out every possible stop-act as either involuntary or incomplete, it now borders on professional negligence for lawyers to advise renunciation as a major line of defense. To stand any real chance of success, it requires full candor in admitting the attempt itself, including the underlying and necessarily ugly intent, and then the hope to prove a sudden inner change of heart, pure of any shade of the outside world, free of doubt. In other words, the defendants do not stand a chance. I offer two relatively famous cases for the proposition that American courts simply won't attribute a stop-act to inner motives. At most, they might do so in dicta and find the renunciation incomplete.

A man decided to rape a woman after he could not find anything to steal from her.²⁰ She talked him out of it, saying she was pregnant. He saw her maternity clothes, took her word for it and left. The Supreme Court of liberal Wisconsin insisted that her pregnancy was an "extraneous factor" and upheld his conviction for attempted rape. Another man attempted to rape a woman in her home.²¹ She talked him out of it, telling him she would have sex with him voluntarily, but suggested they go for a drink first. He took her word for it and they went outside. She evaded him, went back into her apartment and closed the door. The Rapist knocked, asked for a tissue, and when she refused, he left.

The court, perhaps surprisingly, decided that there may have been "enough for the jury to have concluded that defendant voluntarily stopped the sexual assault, apparently in response to the victim's intimations concerning future gratification," but immediately went on to say there was "no reasonable view of the proof, however, that the abandonment of the criminal enterprise was complete." If we take any of this seriously, it was the knock on the door that sealed his fate. He should not have asked for a tissue.

Let me digress for a minute. Like all Rapists, the last one was not an angel. He should not have been there in the first place. What really sealed

18 JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 657 (5th ed. 2004).

19 A.D. Marrus, *What Must Be Known to Prove Renunciation*, N.Y. PENAL § 40.10 (Consol. 2006).

20 *Le Barron v. State*, 145 N.W.2d 79 (Wis. 1966).

21 *People v. Taylor*, 598 N.E.2d 693 (Ct. App. N.Y. 1992).

his fate was the fact that he broke into the home of an innocent woman armed with a knife, terrorized her and tried to have sex with her against her will. The fact that he was sufficiently stupid or vain or both to believe that his victim somehow fancied him did not make him a model citizen. The fact that she was both smarter than him and more courageous than most victims in such situations did not entitle him to any praise. So he was not an angel. But he could have raped her when he was still inside her apartment, and, for all I know, he could have forced his way back in after she left him outside, the way he entered the first time. My point is that he was not an angel, but that if there is any point in rewarding rapists for renunciation, it cannot be confined to angels, and it cannot possibly hang on tissue papers. So, to take the Court of Appeals of the State of New York seriously, and with it all relevant American courts, we must assume the existence of a deeply felt retrenched resistance to the very idea that violent offenders be rewarded for stopping what they should not have started in the first place.

III. THE ARCHITECTS' ORIGINAL INTENT

I have so far depicted the law of renunciation in terms of a conflict between its original design and its actual application in the courts. The real story is at least partially different.

Let me start with the architects of the Israeli Law. Renunciation was on the drafting board for a full fourteen years before the law was enacted in 1994 as part of a major reform of the general part of the Penal Law.²² The two-pronged formula requiring that the stop-act stem both from the perpetrator's "will" and from "renunciation" (*Harata*)²³ was already included in an early 1980 draft.²⁴ Four years later, the first prong was redrafted.²⁵ Instead of the simple "will," it now read "desire of [the perpetrator's] heart," and further accentuated the requirement by insisting that the desire stems "only" from his heart. The strong moralistic sway of the formula was repeatedly emphasized in commentaries by expressions such as "strong inner transformation,"²⁶ "true penitence"²⁷ or

22 Penal Law, 5737-1977, § 28, LSI [Special Vol.] 4 (1977-78), amended by Penal Law (Amendment No. 39) (Preliminary Part and General Part), 5754-1994, S.H. 348.

23 For the translation of *Harata*, see discussion *supra* p. 145.

24 For the draft text and explanatory note, see 10 MISHPATIM 203, 219 (1980) (Hebrew).

25 For the draft text and explanatory note, see 14 MISHPATIM 127 (1984) (Hebrew).

26 In the 1980 Bill. See *supra* note 24.

27 Miryam Gur-Arye, *The Criminal Code Bill*, 24 MISHPATIM 9, 41 (1994) (Hebrew).

the Latin *locus poenitentiae* (place of repentance).²⁸ The strongest of all indications of the legislators' original intent finds expression in the policy reasoning offered for the exemption as a whole. After describing the penitent perpetrator in terms of "penology," the original 1980 drafters promise in pseudo-Halakhic language:

It is assured that such a man will not return to his evil ways any more, and there remains no reason to inflict any further torment on him.

So what does all this have to do with the reality of crime in Israel or elsewhere? How often can we really expect a major, lasting, moral revival in the middle of an ongoing criminal enterprise? The answer, as best expressed by the chief architect of the law himself, is "in rare cases."²⁹

So if acquittals are rare in Israel, it is at least not a surprise.³⁰ The walls of renunciation have been raised high by statute, and few can penetrate. But what about American law? The leading statutory formula for the past forty years has been the Model Penal Code's "complete and voluntary" renunciation, presumably less demanding than the Israeli formulation.³¹ The Commentary accompanying the Code is indeed much more moderate in its approach.³² It does suggest the terms "repentance or change of heart" once,³³ but the overall tone is far less moralistic. At one stage, for instance, the Commentators clarify that their formula "does not impose on the defendant the impossible burden of proving that henceforth his conduct will be lawful."³⁴ More importantly, perhaps in an effort to gain support for the principle, the Commentators present a picture of renunciation as an exemption that already exists and that is widely used in state courts nationwide. The overall impression of their vision of renunciation is of a practical principle for a practical nation, based on utilitarian calculations.

If so, their vision has failed, for they too set the walls too high. Reliable empirical data on the frequency of the application of any general principle

28 2 S.Z. FELLER, ELEMENTS OF CRIMINAL LAW 96 (1987) (Hebrew).

29 *Id.*; see also Gur-Arye, *supra* note 27, at 41 ("exceptional cases").

30 In fact, Netanyahu, *supra* note 14, even protests some of the few acquittals, including The Suit, see *supra* note 5, and an older case of an accomplice who changed his mind, CrimA 290/88 Garar v. State [1989] IsrSC 43(4) 696.

31 For analysis of the American law of renunciation, see Paul Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377 (1986).

32 2 AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES pt. 1, § 5.01(4), at 357 (1985).

33 *Id.*

34 *Id.* at 358.

in America is rare, and proof is impossible, but any anecdotal evidence of available sources would support the impression of contemporary scholars and practitioners that renunciation does not work.³⁵ When the gavel falls, American judges won't let go.

So why should we care? If the architects of American criminal law simply misjudged the numbers of real-life offenders who would ever meet the exact requirements of "complete and voluntary" renunciation, and if they were right in assuming that the utilitarian goals they were aiming to achieve could only be achieved under such strictures, then they can only be accused of wasting some time and paper. But I believe that the problem is different. It is not the numbers they got wrong but the norms, and the numbers are just the symptom.

There is a historical perspective to my argument. The last fifty years have been an exciting time in the history of the law of inchoate crime, especially the law of attempt, and my underlying assumption is that judges or legislators or both have been carried away in the excitement and have gotten some of their calculations wrong.

Attempt has not always been a part of criminal law.³⁶ It was almost totally absent from traditional legal systems, both religious and secular, and made its first meaningful English debut in the 16th century. Its origin in unpopular royal justice slowed its integration into the common law, and it maintained a limited, low-key existence well into the 20th Century, both in England and in related legal systems. Its actus reus was restricted in different ways, and it carried a significantly lower maximum penalty across the range of crimes. The message was therefore clear: attempted crime was a minor reflection of the crime itself, however close to accomplishment. If the crime occurred, penalty was harsh; if not, it was not.

The implication for the subject at hand is clear. As long as the penalty for attempt was guaranteed to be lower than that for the accomplished crime, there was ample incentive to desist. However termed legally, all action up to and including the final act was foreplay. Serious responsibility only kicked in when the crime, the real one, actually happened.

All this changed at a rapid pace as a result of the waves of law reform all across the common law world in the last decades. The point of entry from preparation into attempt has been pushed back, remaining doubts about impossibility have been removed and the range of penalties has been

35 See sources cited *supra* notes 18-19; see also Evan Tsen Lee, *Cancelling Crime*, 30 CONN. L. REV. 117, 151 (1997).

36 Shachar, *supra* note 1.

pushed all the way up to the territory of the accomplished crime. A vast new mirror-territory has been created, where only the perpetrator's physical actions and a very narrow segment of his mind are reflected, and the rest of the real world disappears. All we see in this mirror-territory is how the perpetrator acts in relation to an imaginary event, imagined in his mind. Once we see a crime in that mirroring mind, we treat it as if it happened. attempt, we are increasingly saying, is like the crime it attempts. It is as if it happened.

I find this whole development one of the most important steps in the humanization of criminal law. Nothing serves human dignity better than judging individuals for the interaction between their own minds and their own bodies, ignoring as best we can anything in the world outside beyond their control. My problem with the mirror-territory of attempt is therefore not that we have created it, but that we have lost sight of the delicate relations between it and reality itself. The whole point about the mirror-territory is that it is *not* reality, and that different rules apply. The same respect for human dignity that has put the individual, as is, in the mirror-territory, requires respect for his decision to remove himself from it, as is, on the same terms of entry.

The reason I invoke this image in a historical context is that, as a historical fact, renunciation was introduced into the world as part of the same reform waves that created the mirror-territory of attempt. Reformers got it right. If a person voluntarily puts himself in the mirror-territory, he should be allowed to remove himself voluntarily. But my claim is that the reformers have got it only partially right. They have broken the rules of their own game by insisting that voluntariness on the way out be infinitely greater than on the way in. They have, in other words, objectified the image and won't let it go.

Here is a less fanciful way to put it. All reformers have to some extent grasped the fact that closing the penal gap between attempt and accomplished crime may result in serious under-deterrence. When the threat of serious punishment — equal perhaps to the punishment for the accomplished crime — fails at the entry point, the incentive to desist disappears, and, assuming an underlying intention to commit the offence, the law can only observe helplessly as real harm is inflicted. My claim in this version of attempt reform is that while reformers have grasped the problem, they have not done nearly enough to solve it. If, once they cross into attempt-territory, Rapists cannot escape serious punishment by recalculating selfish gain, they might as well rape for the same price. The costs must therefore be radically altered, if prevention of harm and the protection of victims is the law's aim.

IV. RENUNCIATION POST AND ANTE

I have so far refrained from direct reference to a major concern in the calculus of prevention and protection. It is often argued that exempting aggressors who abandon their criminal design when external circumstances become unfavorable may save their immediate victim but expose future victims to attack when circumstances improve.³⁷ If, the argument goes, exemption for renunciation is based primarily on calculations of deterrence, there is no reason to assume that opportunistic abandonment will result in any reduction in future risk. Ex post considerations trump ex ante ones, and the bad luck of the immediate victim may justify her sacrifice for the greater good. If the Rapist knows he will walk free today if he freezes now when police sirens approach, he will rape tomorrow when police is busy elsewhere, and if he would rather rape his immediate victim for the same price if he knows he will be punished anyhow, then the chips must fall where they fall: the victim will be raped because she was there today, and tomorrow's victims will be safe in the knowledge that the Rapist is in jail.

I think the argument is wrong, but I need first to refer to a basic fault in common thinking about attempt and deterrence. When potential offenders contemplate crime, prepare for it and cross the line of attempt, they aim to succeed, not to attempt, and punishing inchoate crime therefore carries no deterrent effect. Potential offenders who are still undecided when they cross the line of attempt lack the requisite mens rea, and are therefore irrelevant to the architecture of deterrence. In my opinion, it also makes no sense to waste deterring messages on offenders who desire the object crime but work on some detailed pre-designed incremental plan to "test the waters" one step at a time. My unsubstantiated guess is that they are much too rare to bother about. It must also be remembered throughout the present analysis that whatever actual harm is committed in the course of attempt is typically amply covered by existing offences. A would-be rapist who burglarizes his victim's home or kidnaps her on the road and then uses violence to subdue her is liable to pay for each of these "steps."

What all this boils down to is the suspicion that if deterrence is largely wasted on attempts in the first place, then a serious miscalculation on the issue of renunciation may leave us with a major net loss in terms of deterrence. The threatening message may not do much to prevent the attempt itself, but it may obstruct its harmless termination by the offender himself. While *pre-planned* incremental attempts may be rare, the opposite is not

³⁷ See, e.g., AMERICAN LAW INSTITUTE, *supra* note 32, at 358.

true. With the exception of psychotic aggressors, most offenders are fully sensitive to changing circumstances as the attempt progresses, and are ready to abandon the attempt for any number of selfish factors. If no real harm was done until that stage, we need to be particularly careful not to exacerbate the situation by caring too much about future potential crime. The price, we need to remember, may include not only public expenditure and the welfare of the offender, but also the welfare of the "immediate" victim.

All utilitarian calculations in criminal law are vulnerable to the common argument that they treat offenders as means. Experience shows that the emotional power of this argument is often weakened by lingering traces of instinctive anger against offenders. People may be entitled to dignity, we often feel, but offenders are somehow entitled to less. Our primeval instincts can even find ways to exclude the offender's kin from our stingy calculus of dignity. Being no more than the offender's extension, they too must perhaps contribute their share of agony to the general stockpile of deterrence. But what stretch of any dark retributive instinct can extend the same sentiment to potential victims? How can we make one innocent victim pay for the protection of later potential victims without depriving her of her unique moral worth? What else can she be if not a means to an end?

Let me recount a story, stripped of all non-essential issues. A Rapist approaches a Present Victim in complete stealth, crossing the line of attempt, causing neither harm nor alarm. He is a minute away from actual rape, but hears the steps of a guard about to start an unexpected security check. Neither escape nor instant moral transformation are an option, but actual detection may take an hour. If offered impunity now, the Rapist will willingly give himself up and immediately embark on a search for a Future Victim. If threatened with severe punishment regardless of whether he gives himself up now or rapes and tortures the Present Victim until actually detected, he will prefer to rape and torture her before he goes to prison. This, after all, is what he came for in the first place, so he might as well rape her for the price.

Legal systems that prefer the latter choice out of considerations of utility use the Present Victim to protect the Future Victim. If we assume that she is as worthy of protection as the future victim, all she can be told in justification of her suffering is that it was her bad luck to be useful in such a manner. My argument here is that while the utilitarian calculus can indeed be callous on paper, it probably never is in practice. When people care about victims, they rarely sacrifice some to save others, even for a net gain. They would rather save the immediate victim and hope, even irrationally, to be able to save the others as well. If immediate victims are sacrificed because of their bad luck in being in the wrong place at the wrong time, it is more likely that they

belong to a group of victims we care little about. We may then speak the language of general utility, but we are in fact driven by self-serving anger.

This is probably why we let Suits walk free when they quit their criminal design without the slightest sign of remorse. We do so not only because we love them more than we love Rapists, but because we love their victims (e.g., the insurance industry and the market for elevators) more than we care for victims of rape.

To demonstrate the point, I next present the case of two offences where the urge to punish was trumped by the urge to prevent immediate harm so soundly that renunciation was allowed to operate even beyond the line of completion.³⁸ Both cases could be explained in terms of shifts in the formal definition of particular elements of the offence, but I think that there is a more substantive instinct at play behind them.

V. POST-CRIME "RENUNCIATION" AND FAVORED INTERESTS

When is perjury complete? An obvious answer should be — when the lying witness steps down from the witness box. When is the kidnapping of a child complete? An obvious answer should be — when the kidnapper removes the victim from legal custody. And yet, a number of jurisdictions have created a period of grace where the lie can be retracted or the victim be returned with full or partial impunity. In the case of perjury, the end-point of the typical grace period is the verdict,³⁹ expressing a clear delineation of the act (the lie) and the subsequent concrete harm (the wrongful verdict). In the case of kidnapping, the grace period varies⁴⁰ and can even be unlimited,⁴¹ reflecting the fact that concrete harm (anguish, the fear of the child or of the parent) typically merges with the act, but tends to accrue in "natural" time, unrelated to any concrete subsequent event.

I raise these particular statutes by way of testing the sentiment behind *ex ante* and *ex post* calculations in the law of renunciation. If a person who actually lied under oath can get away with his crime if he recants at any time

38 See the issues discussed in KAPLAN, WEISBERG & BINDER, *supra* note 18, at 658.

39 See, e.g., N.Y. PENAL LAW § 210.25 (2007).

40 In Minnesota, for instance, it was 14 days when *State v. Andow*, 386 N.W.2d 230 (Minn. 1986), was decided in 1986, but has since been reduced to 48 hours. MINN. STAT. § 609.26 (2007).

41 ARIZ. REV. STAT. ANN. § 13-1302 (2007) (offering reduced punishment for return of the kidnapped child any time before arrest); ALASKA STAT. § 11.41.300 (2007) (same as in Arizona, but also 24 hours *after* arrest).

before the end of the proceedings, we expose all future victims of perjury to a theoretically endless game of act-and-retreat. Similarly, if a disgruntled father gets a grace period any time he kidnaps his child from lawful custody, we expose the child and all involved to an endless sequence of abductions. And yet, we prefer to have the truth or the child now and leave tomorrow to the future, even though tomorrow is infinitely longer and contains a limitless number of potential replications of the crime.

Why do we decide in this way here and not in, say, in a host of property offences where most if not all of the concrete harm can be rectified by returning the property?⁴² My instinctive answer is that we care about the victims of perjury and child-snatching more than we care about victims of property crime, and that despite cold logic it is here that we refuse to sacrifice the present for future greater good.

My point is not that we sacrifice logic when we panic about things we care about, but that we think morally best when we care. The heightened empathy we all feel with children is too obvious to elaborate,⁴³ but who are the victims we care so much about in perjury? My suspicion is that they are the judges. At the end of any day in court, it is their signature that sends innocent people to be punished or guilty persons to roam the streets again. It is their eternal salvation that may be jeopardized if they do not do the right thing when they have the chance to do it. The lesson we should take from perjury and child snatching is therefore that we think *ex ante* when we really care. The flip side of the message is that when we say we think *ex post* we may in fact be hiding a very different urge that has nothing to do with rational utilitarian calculations.

A clarification is due at this stage. None of the examples of grace periods was about voluntariness. In both perjury and kidnapping, reward is only offered for a voluntary act, to the exclusion of cases where "external" circumstances changed the perpetrators' selfish calculations. I have only raised these two cases to show how, in the case of some offences but not others, an act can be "undone" even after its accomplishment, and to claim that the difference can best be explained on the basis of special empathy with the victims. In all other cases, I argue, it is really the urge to punish for past misconduct that determines the outcome, not considerations of future utility.

42 Here, as in the rest of the analysis, I ignore post-conviction remedies and informal discretionary measures.

43 I have argued elsewhere that progress in criminal law reform starts almost invariably from issues of reproduction, i.e., sex and children. Yoram Shachar, *Criminal Law and Culture in Israel*, 7 PLILIM 77 (1998) (Hebrew).

I have very little to say about the urge to punish, except to acknowledge its overwhelming influence over what we do. All I can say here is that it takes a lot of real sympathy for the real victims of crime to trump the urge, once it kicks in. If I am correct in this assumption, then we do not have enough sympathy with the victims of rape in either the United States or Israel when we insist that pre-rape renunciation be limited to the rare cases of spontaneous moral rebirth.

VI. UNDOING ATTEMPTS AND MIRROR REALITIES

Essential to my reasoning against ex post considerations in the law of renunciation has been the argument that responsibility in modern criminal law is restricted to temporally defined events, not to past histories or future tendencies. But the argument can be widened and carried further to explain why all aborted attempts should result in exoneration.

Law has accustomed itself to using close-ups, narrow angles and snapshots at the point of entry, and it cannot be allowed to change frames at the point of exit. We no longer require life stories in order to ascribe blame. We do not ask offenders how long they contemplated their crime. Now is good enough. We therefore must not ask about tomorrow. We do not ask why, either, or how deep. What offenders want now, however superficially, is good enough. We therefore must not ask why they quit and how deep their commitment is not to want to carry out the crime again tomorrow.

To take a simple example, in the past we differentiated between premeditated and "chance medley" homicides. In some parts of the world we even counted hours. There were forty-eight-hour homicides and twenty-four-hour homicides, and the former counted more than the latter. Suspecting long-term motivations, we differentiated between parricide, infanticide, regicide and a whole range of other homicides. When we discounted provocation from premeditation, we measured "cooling off" times, and we wasted ink on the difference between physical and mental preparation. All this is gone, together with offenders who "lurk" and those who do not, and with long lists of different types of, say, theft depending on identities, relations and time scales. We now ask to know very little about defendants who are accused of crime. We do not want to know who and what they are. We do not want to know the depth or the nature of their relations with the victim. Anyone, even a husband, is good enough as a rapist, and anyone is good as a victim. We do not want a wide angle, and we definitely do not want any length of time or depth of motivation. For better or for worse, all we want to know in the case of, for instance, attempted rape is whether

at the moment of attempt defendant Anyman had the simple intention of having sex with Anyperson regardless of consent, and moved his body in that direction. Whether he saw it as "sex" or as torture, whether he wanted to please or to oppress, whether he wanted any woman or a specific one, and most of all whether he is a Rapist or not, is all the same to us. So if all we care about is his almost anonymous will to rape now, and his body motions now, than surely all we deserve to know about renunciation is that he called off the decision to rape now and ordered his body to stop.

Of equal importance is the symmetry of voluntariness. At the point of entry we do not measure voluntariness by degrees of selfishness or altruism. Unless a gun is pointed to his head or he is moonstruck (and, often, not even then), we do not want to hear a word about the whole set of circumstances social, economic or other, that converged and led to the specific decision to commit the specific crime in the indictment. Respecting the perpetrator's humanity and autonomy, we call him free, and his action voluntary. We owe him the same respect when he decides to quit. Be it for the most selfish of reasons, so long as he is not actually shackled, as long as he can physically perform, we must call him free and call his action voluntary.

My argument from symmetry is not an argument for formal elegance or for crude fairness. The conditions for criminal responsibility at the point of entry, where attempt "begins," are not particular to that moment. They relate to the offence-event in its entirety. When I argue that conditions for the exonerating stop-act should be identical to the conditions for the go-act, I in fact claim that the conditions for criminal responsibility disappear, leaving no justification for punishment. If wanting to rape is all that is necessary for responsibility, regardless of, say, the reason for wanting it, than not-wanting should simply count as non-wanting, regardless of its reasons.

If we do not care if people are evil when they decide to act, we can't possibly insist that they be virtuous when they decide to stop. We certainly need to know whether they had some control over their stop-act, but I see no reason to demand that it be more robust than the control we demand for the go-act. Voluntary action is never really free. It is constrained by both external and internal circumstances, and we have made a clear decision in modern criminal law to ignore almost all of them at the moment of the go-act. We don't care if people succumb to social or economic pressure from the outside or to intense amorous impulses. At best, we let people go if there is a gun pointed to their heads at the go-act or if they are hypoglycemic, and then only if they cannot be blamed for these circumstances.

Why then do we want so much more from the stop-act? Why do we all insist that to be voluntary it must be completely detached from the outside world, and why do some of us speak in terms reserved for the most profound

of all religious acts? Why, in other words, do we demand virtue to exonerate when we ask for so little to blame?

My only guess is that we have somehow become caught up in our own fantasy in the excitement of banishing luck from the criminal law. If attempt was really all the "doing" we ultimately cared about, then, once begun, it could not be undone and the asymmetry between the go-act and the stop-act would be justified. To use a closely related metaphor, if *P* actually stole from *V*, there is nothing he can do by act or omission to really "undo" the stealing. If, for any of a host of reasons, we offer *P* a post-crime scheme of exoneration, he has no claim for symmetry. "Bringing and giving back" does not undo the "taking and carrying," and "now I am sure it's yours" cannot possibly counteract even the "I suspected so but took it anyhow." But attempted theft is not *really* like theft, and attempted rape is not really like rape. The sense in which they cannot be undone is fundamentally different from the sense in the metaphor. What we really care about is theft and rape, not attempted theft or rape. When we say, as we finally do in most civilized legal systems in recent years, that attempted rape is like rape, we don't mean it literally, or at least we shouldn't. The only act of attempt that is really identical with the accomplished crime is the last-act, where the gap between danger and harm is beyond human control, and therefore irrelevant. Any act prior to the last can and should be undone by a stop-act, requiring no less (but no more) than the basic requirements of any criminal act, including a bare minimum of voluntariness.

VII. IN LIEU OF A CONCLUSION

The campaign against luck in criminal law has prompted a relatively recent movement in Anglo-American law to extend liability for attempt and make it similar to the liability for the accomplished crime. The defense of renunciation has been wisely created for the first time in Anglo-American history as a remedy to the excesses of this movement, but I have argued throughout the present analysis that the ingredients have been grossly miscalculated and the remedy isn't working. The logical requirement that renunciation be voluntary has in fact been extended in America to the unrealistic requirement that abandonment be free of all external circumstances, and Israel has made the ultra-moralistic nature of this requirement explicit.

I conclude with a brief description of the maturity of European law on attempt and renunciation, taken from an excellent scholarly analysis published in Israel in the formative years of the local debate. Summarizing

two centuries of European law reform, Ernst Livneh had this to tell Israeli reformers on voluntariness in renunciation:

Common to all these laws is the condition that the perpetrator who abandoned an attempt did so willingly and not under the pressure of any other factor. The exemption is not available to anyone who desists because he or his preparations were discovered, or because he found that the crime cannot be accomplished On the other hand, the laws make do with the fact that the perpetrator changed his mind as result of his own decision. They do not inquire into the motive of his inaction. Even if he abandoned the attempt for a base reason such as a dispute with an accomplice or fear that the [attempt] would be discovered (as distinguished from the fear that it was already discovered!), he is entitled to the benefit of the law, for abandonment from free will is required, not abandonment from good will.⁴⁴

An almost identical description of European Law was offered in America at around the same time.⁴⁵ I have chosen the Israeli one because, as in anything else about renunciation, its rejection has been vocal and explicit. In the Suit, the Supreme Court quoted Livneh in full, down to the last dramatic sentence, only to declare:

The law in our country is different. Here we do inquire into the motive of the perpetrator.

I find this regrettable. Offenders who abandon control over harm to the vagaries of luck should indeed be punished as if harm in fact occurred. But those who regain control and prevent the harm from actually occurring should not be tested for perfect virtue. Choice is never perfect. We request very little real choice at the point of entry, and deserve nothing more at the point of exit.

Finally, I see the wasteful story of renunciation in attempt as part of the unresolved tension in Anglo-American criminal law between reflective rationality and instinctive anger. When we reform our codes throughout the ages, we are almost always driven by the aspiration to base responsibility on the actor's control of action, not on the vagaries of luck. On rational reflection, we have understood that crimes committed while in control

44 Ernest Livneh, *Abandonment of Crime or Attempt ("Active Renunciation")*, 4 MISHPATIM 105, 107-08 (1972) (Hebrew) (author's translation).

45 Dietrich Oehler, *Attempted Crimes*, 24 AM. J. COMP. L. 694, 701 (1976) ("The motives causing the perpetrator to withdraw are irrelevant; it is of no importance whether it is repentance or the fear of being discovered.").

deserve harsh punishment, and that crimes prevented while in control deserve exoneration. But experience increasingly shows that we just can't act on this reflection. We keep legislating exonerating rules that don't work. Some years ago I showed that Provocation has been wasting everybody's time in the Israeli judicial system for decades.⁴⁶ Seventeen years, one scandal⁴⁷ and several major law reforms later, nothing has changed. With the exception of two highly controversial and comparatively inexplicable cases,⁴⁸ provocation has never worked. But arguments are still made, decisions are written, lectures are given, all recounting a specter that will never materialize.⁴⁹ Saints don't kill, men often do, and despite endemic denial, they don't inhabit the same planet. The same goes for coercion. A while ago we reshaped it in Israel,⁵⁰ apparently to better fit earthly realities, but much judicial ink has since been spilled to explain why, for instance, terrified taxi drivers⁵¹ and hapless, poverty-stricken couriers⁵² should die rather than carry the terrorists or the drugs that kill us.

The same goes for renunciation. We introduced it in some parts of the common law world about fifty years ago, to counterbalance a general trend to get tougher on inchoate crime. Those who go all the way, we seemed to be saying, should pay the full price. Those who stop should go free. It looked like a straightforward deal, fit for a brave new world, and it made sense. Luck, we seemed to be saying, should have nothing to do with punishment. It should be about what people do, the inner processes that drive what they do and the dangers they create, but not about what actually happens to happen. After generations of half-hearted confusion with inchoate crime, it suddenly made perfect sense to concentrate all our anger on those who use control to activate their God-given machine in the service of evil, at least after they cross the line from preparation to attempt, but to offer a

46 Yoram Shachar, *The Reasonable Person in Criminal Law*, 38 HA-PRAKLIT 78 (1990) (Hebrew).

47 See the account in Orit Kamir, *How Reasonableness Killed the Woman: The Hot Blood of "The Reasonable Man" and "The Typical Israeli Woman" in the Doctrine of Provocation in the Case of Azoalos*, 6 PLILIM 137 (1997) (Hebrew).

48 CrimA 30/73 Shmulevitz v. State [1973] IsrSC 27(2) 598; CrimA 3071/92 Azoalos v. State [1995] IsrSC 50(2) 573.

49 But see a recent call for change in Further Hearing 1042/04 Bitton v. State [2006] Tak-El 2006(4) 2221.

50 Penal Law, 5737-1977, § 34.12, LSI [Special Vol.] 4 (1977-78), amended by Penal Law (Amendment No. 39) (Preliminary Part and General Part), 5754-1994, S.H. 348.

51 CrimA 1285/03 Assor v. State [2003] Tak-El 2003(3) 1793.

52 CrimA 3964/00 Jesus v. State [2003] IsrSC 57(2) 1.

full bucket of mercy to those who exercise equal control, perhaps greater, against inertia, to shut off the machine. It's fair to say, fifty years into the game, that we can't honor the deal. We just can't let go. We are too angry to forgive, and we won't.