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SELLING THE INCHOATE MODE

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Do results matter in criminal law? Many say "No" and recommend redrafting crimes in "the inchoate mode". Others answer "Yes" and defend the division between complete and attempted offences. This paper considers a third (non-general) answer: "Sometimes". Could it be that in some contexts results matter significantly more than in others? Murder and fraud are contrasted; while the former appears to be a "hard sell" for the inchoate mode, the latter has, at least in one major jurisdiction, passed into law and bedded down with apparent ease. Perhaps results matter in murder in a way they do not in fraud. Two contrasts are drawn, first that murder is a "horrific crime", while fraud is not, and secondly, that the core of the wrong of kinds of fraud might be contained in the attempt. Maybe the mistake is to seek for a general answer to the question of whether results matter.

I. The Hard Sell: Murder

As law reform proposals go, "abolish murder" is among the most startling. But no less a philosopher of the criminal law than Joel Feinberg recommended exactly that.[1] Abolish murder, he urged, together with attempted murder, and replace both with the offence of "Wrongful Homicidal Behaviour". In making this proposal, Feinberg was responding to a familiar puzzle. There are numerous variations. One version cites the film and novel *The Day of the Jackal*, the fictional tale of an attempt to assassinate President de Gaulle. Here, the assassin fires his gun, but the President moves at the critical moment, so the bullet misses and he is unharmed.[2] But what if another assassin, call her "Assassin 2", shoots in identical circumstances but this time the President makes no sudden movement and the bullet reaches the President and kills him? "Most legal practice throughout the world," Feinberg observes, "treats failed and successful attempts quite differently". Assassin 2 will be convicted of murder and sentenced (much) more heavily than Assassin 1. But why? Their intentions were identical. The different results in each case depended

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1 Joel Feinberg, "Criminal Attempts: Equal Punishments for Failed Attempts" in Joel Feinberg, *Problems at the Roots of Law: Essays in Legal and Political Theory* (Oxford: Oxford University Press, 2003) at 77–102 [Feinberg, "Criminal Attempts"].

2 The example was cited in Lord Hailsham's opinion in the House of Lords case of *Haughton v Smith* [1975] AC 476.

on factors beyond the control of either assassin. It is no credit to Assassin 1 that the President suddenly and unexpectedly moved. This is not a question of desert but of "luck pure and simple".[3] Legal systems that countenance such different treatment are not, he suggests, committed to the principle of proportionality, which "requires that the severity of the punishment be proportional to the moral blameworthiness of the offense". Feinberg concludes that law like this is arbitrary and, "if the law is arbitrary in some respect, then provided we can improve it in that respect, at a reasonable cost in other values, we should improve it".[4] Hence, both assassins should, in his view, be convicted of the same crime to mark their equal blameworthiness, and a newly minted offence of Wrongful Homicidal Behaviour should be placed on the statute books. Feinberg expresses the hope that such an offence might become so familiar to the general public that it would come to be known simply by its initials, as WHB.

Feinberg did not stop at proposing the abolition of murder. He urged, further, that "we eliminate the causal condition in the definition of *all* so-called completed crimes" [emphasis added].[5] In a similar vein, Andrew Ashworth favours "offences that penalise conduct irrespective of the result – doing an act intended to kill (rather than murder), attacking another person with intent to cause serious injury (rather than causing serious injury with intent), dangerous driving (rather than causing death by dangerous driving)", and so on.[6] Beyond the desirability in principle of abolishing all of these so-called completed crimes, Ashworth takes the same line on sentencing: "the sentence for a completed attempt (where the offender had done everything as intended but failed to produce the outcome) should in principle be the same" as it would be where the outcome is produced.[7] In short, the criminal law would do morally better if it had offences that do not separately criminalise attempts and successes. Crimes, on this view, should be couched in the inchoate mode. It is clear from their writings that both Ashworth and Feinberg know that any such reform will be anything but easy to achieve. A reform programme like theirs, putting offences into the "inchoate mode", is against the grain of most legal systems as well as the attitudes of ordinary people. They know that criminalising homicide in particular without distinct offences of murder and attempted murder is, as I will put it, a hard sell.

It is a hard sell for various reasons. First, although Feinberg's and Ashworth's views are influential, and indeed there are many other distinguished writers who take a similar line,[8] their advocacy of the inchoate mode is far from uncontroversial within academia. An opposing school of thought holds that to cause a death that one intends to cause is morally worse than merely intending or trying to cause such

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3 Feinberg, "Criminal Attempts", *supra* note 1 at 78.

4 Feinberg, "Criminal Attempts", *supra* note 1 at 79.

5 Feinberg, "Criminal Attempts" at 79.

6 Andrew Ashworth, "The Criminal Law's Ambivalence about Outcomes" in Rowan Cruft, Matthew H Kramer & Mark R Reiff, eds. *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (New York: Oxford University Press, 2011) 159–172 at 161 [Ashworth, "Ambivalence"].

7 Ashworth, "Ambivalence", *supra* note 6 at 163.

8 For example, Stephen J Morse, "Reason, Results and Criminal Responsibility" (2004) U Ill L Rev 363; Larry Alexander & Kimberly Kessler Ferzan eds. *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009).

a death. Michael Moore, for example, holds that "causation of a harm that some defendant either tried to bring about, or risked bringing about, increases the blameworthiness of an already blameworthy defendant".[9] Gerald Lang, to similar effect, combines what he calls an "internal claim" with an "external claim":

> **The Internal Claim**: Agents' acts, to be blameworthy, must reflect morally objectionable mental (or internal) states: malicious intentions, and internal states which betray recklessness or negligence. The moral objectionableness of these mental states must be fixed independently of the outcomes of the acts.
>
> **External Claim**: Where the Internal Claim is satisfied, agents will be blameworthy in rough proportion to the badness of the actual harmful luck-dependent consequences of these acts.[10]

The combination of the two claims suggests that in Lang's view, like Moore's, the causation of a harm itself can enhance the quantum of blame due – by virtue of the external claim – to an agent who has been shown to be blameworthy in virtue of the internal claim. The upshot, if these writers are correct, is that criminalising attempts and complete offences separately, as is commonly done, is amply justified because the offender who "completes" is at least somewhat more blameworthy than the attempter. My purpose here is not to seek to resolve this debate between those who, like Feinberg and Ashworth, claim that results are irrelevant to blameworthiness and those who, like Moore and Lang, claim on the contrary that results can enhance blame in certain circumstances. The point for now is that the presence of a strong opposing view within academia is one reason why criminalising in the inchoate mode is a hard sell. A second reason why reform in the inchoate mode, as advocated by Feinberg and Ashworth, is a hard sell is that the intuitions of ordinary people appear to be largely on the side of those who favour retaining and distinguishing both complete offences and attempts, as opposed to combining the two within a single rubric offence.[11] It is certainly difficult to imagine a proposal such as Feinberg's (to abolish murder and replace it with WHB) going down at all well with the general public of any jurisdiction, and it would surely be a vote-loser for governments or political parties. (One can imagine the headlines: "Government to allow killers to get away with murder", and the like.) Ashworth, however, while accepting the evidence that there is a tendency on the part of the general public to judge others partly on the consequences of their actions, also points to situations where the tendency is to focus on "the intention with which the act was done".[12]

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[9] Michael S Moore ed. *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (Oxford: Oxford University Press, 2009) at 21 [Moore, *Causation and Responsibility*].

[10] Gerald Lang, *Strokes of Luck: A Study in Moral and Political Philosophy* (Oxford: Oxford University Press, 2021) at 33 [Lang, *Strokes of Luck*].

[11] Paul H Robinson & John M Darley eds. *Justice, Liability, and Blame: Community Views and the Criminal Law* (Boulder, Colorado: Westview Press, 1995) at 13–28; Julian V Roberts *et al*, "Public Attitudes to the Sentencing of Offences Involving Death by Driving" (2008) 7(7) Crim L Rev 525.

[12] Andrew Ashworth, "Taking the Consequences" in Stephen Shute, John Gardner & Jeremy Horder, eds. *Action and Value in Criminal Law* (Oxford: Oxford University Press, 1993) at 111 [Ashworth, "Taking the Consequences"].

He suggests, in other words, that public opinion about culpability is not unequivocal on the attempt/completion distinction. In any case, reformists generally do not see such public attitudes as an insuperable obstacle to reform. As noted above, Feinberg takes it that reform is dependent on a test of "reasonable cost" to other values, a test that he appears to believe can be passed. Ashworth argues that, "in practical terms, a decision to change the law in this way would depend on a political judgment of what the public (and the lawyers) would accept without significant loss of confidence in the system". Perhaps, he conjectures, "the change might be made gradually". Ultimately, however, Ashworth concludes that the moral principle of the matter should be overriding, and that reform (and the abolition of a distinct offence of murder) is the direction in which the criminal law should move.[13]

II. An Alternative Approach: Don't Sell

An alternative has recently been argued for by Andrew Simester.[14] Simester's response to the question of how one should best promote the inchoate mode in structuring offences is, effectively, "don't do it": that it is neither desirable nor necessary. That, of course, is not in itself a novel position. It is what all retentionists argue for. "If causation matters to serious moral blameworthiness", says Moore, for one – and he believes it does – "then the legal regimes we have are (at least roughly), the legal regimes we ought to have".[15] Strikingly, however, Simester adopts this retentionist conclusion while rejecting arguments of the kind presented by Moore and Lang that I referred to above. Simester's argument contains a reformist premise but a retentionist conclusion. If such a reconciliation is possible, it would have the advantage of obviating the need for (and the difficulty of) trying to secure inchoate offence reform. Simester's argument is examined in this section. Taking Ashworth's reformist position as a foil, Simester focuses on two of the latter's claims. The first is a thesis concerning culpability and punishment:

> **CP**: D's level of culpability is unchanged by outcome luck, and therefore any desert-based sentence should be unaffected by outcomes.

The second turns to "definition and labelling":

> **DL**: Crimes should be defined without reference to outcomes.[16]

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13 Ashworth, "Taking the Consequences", *supra* note 12 at 124.

14 A.P. Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford: Oxford University Press, 2021) at 326–347 [Simester, *Fundamentals*]. For a most interesting response to the same pages of this work that is my focus here, see Grant Lamond, "Criminal Culpability and Moral Luck" (2021) 23(1) Jerusalem Rev Leg Stud 149. It is a mark of how much ground is covered by Simester in these pages, that Lamond's rich discussion leaves undiscussed Simester's treatment of fair labelling – my main interest here.

15 Moore, *Causation and Responsibility*, *supra* note 9 at 22.

16 Simester, *Fundamentals*, *supra* note 14 at 331.

As we will see, Simester endorses the first Ashworthian claim, **CP**, but rejects the second, **DL**. For convenience let us call **DL**'s negation, **DLS**:

DLS: Crimes should be defined with reference to outcomes.[17]

As just said, Simester, in agreement with Ashworth, endorses **CP**. On Simester's account, culpability is dependent on D's engagement with the guiding reasons she had for and against behaving as she did. In determining culpability, this gives rise to questions such as: how well did she choose? What did she intend? To what extent did she pay sufficient attention to the risks? And so on. These questions, Simester emphasises, must be answered with reference to the moment of D's behaviour – not after the fact, once the consequences are known. As he puts it: "[D's engagement with guiding reasons crystallises at the very moment when she behaves as she does, and thereby actuates the outcome-risk of [her behaviour]. Deficient or otherwise, it is unaffected by what happens next."[18] This flatly contradicts Lang's "External Claim" and Moore's view that causation increases the blameworthiness of an already blameworthy defendant. Applying this analysis to our earlier attempted-versus-successful murder case, President de Gaulle's would-be assassin is no more and no less culpable than her doppelganger who succeeds. The fact, as well as the extent, of the culpability is established by the time the results of these actions emerge, having been fixed at the point when the trigger (in each case) was pulled.

Thus far, the account is very much in keeping with Ashworth. Simester departs from him by denying **DL**: "Crimes should be defined without reference to outcomes". In Simester's view, since **CP** does not force **DL** upon us, there is no need for the sort of revisionism of offence definition that writers like Feinberg and Ashworth believe there to be. Can this be correct? After all, if culpability is fixed *ex ante*, as Simester agrees it is, what can the addition of harms and consequences add but arbitrariness and irrelevance? Why, if outcome-luck is not a culpability-enhancer, must a prosecutor be put to the proof of it? At the centre of Simester's answer to this question is a distinction between being *more culpable* and being *culpable for more*.[19] Ashworth is right, agrees Simester, that variations of outcome make no

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[17] Care must be taken in stating what **DLS** commits Simester to. **DLS** is my formulation, not his, although all it does is replace the word "without" with the word "with" in **DL** which he does formulate and deny. However, although "real men don't eat quiche" is falsified by the identification of one real man who does eat quiche, it does not follow from the triumphant production of this man that *all* real men eat quiche. Similarly, "crimes should be defined without reference to outcomes" is falsified by one crime that should be defined with reference to outcomes; but it does not follow from that that *all* crimes should be defined by reference to outcomes. Indeed, Simester restricts his discussion solely to homicide, making no claim at all about any other form of criminality (Simester, *Fundamentals*, *supra* note 14 at 326–347). Essentially, I take **DLS** to commit him to the claim that "homicide should be defined with reference to outcomes". Simester, in some very helpful comments on a draft of this paper, has confirmed that he did not intend to endorse the general claim that "all crimes should be defined with reference to outcomes". Hence, where I refer below to Simester as a "retentionist", this should be taken to leave open the possibility that his is a partially, not comprehensively, retentionist view.

[18] Simester, *Fundamentals*, *supra* note 14 at 334.

[19] Simester, *Fundamentals*, *supra* note 14 at 327.

difference to the degree of an agent's culpability.[20] However, what someone is blamed for depends on what they have done. Can Joseph be blamed for drowning the baby? Only, answers Simester, if the baby in fact drowns.[21] If the baby does not drown, Joseph may yet be culpable, but for something else, say unconscionably risking his baby's life. If the baby drowns, he will be culpable both for the unconscionable risk and for the death – culpable for more. Despite this, Simester suggests, Joseph 1, whose risk did not end fatally, and Joseph 2, whose risk did, may be neither more nor less culpable than each other.[22]

The upshot, for Simester, is that offences must (sometimes) be defined with reference to their outcomes. Attempts and successes should (sometimes) be separately proscribed, as they generally are. Feinberg felt the need to prefix the term "complete crimes" with the words "so-called", as he saw such complete crimes as a category best eliminated. Simester's argument, by contrast, takes it that the distinction between complete and attempted crimes should remain and there is nothing to regret in that. Hence Assassin 1 should be guilty of attempted murder and Assassin 2 should be guilty of murder. Neither is more culpable than the other, but Assassin 2 is (rightly) culpable for more.

However, one might ask why should "culpability for more" be determinative here of how the offences should be formulated, rather than the question of who is (or is not) more culpable? Simester supports his argument against Ashworth rather boldly by invoking the notion of "fair labelling", an idea that Ashworth is himself widely credited with introducing into debates about the criminal law. [23] He argues that the desirability that crimes should be fairly labelled itself points to the rejection of Ashworth's recommended criminalisation in the inchoate mode. Even if the successful attempter is no more culpable than the attempter, Simester emphasises, he has *killed*, and this should be marked in the definition of an offence, on pain of unfair labelling. "Defendants who do not kill", Simester continues, "may reasonably complain that they are being labelled under an inchoate-liability system as if they are murderers – when they are not".[24] In the eyes of the public the possibility – to all appearances – is that this person "committed the more serious wrong".[25] Hence, murder and attempted murder should not share the same rubric.[26]

It would be odd, given his association with the idea of fair labelling, to find that Ashworth ignored fair labelling in the course of arguing in favour of formulating offences in the inchoate mode. Indeed in "Taking the Consequences", he

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20 Simester, *Fundamentals*, *supra* note 14 at 338.

21 Simester, *Fundamentals*, *supra* note 14 at 334.

22 Simester's distinction between "more culpable" and "culpable for more" sounds rather like the distinction between the "degree" and the "scope" of culpability due to Michael Zimmerman, but I will not attempt a comparison here, as the wider interests of Zimmerman would take us too far afield. See Michael J Zimmerman, "Taking Luck Seriously" (2002) 99(11) Journal of Philosophy 553, *cf* Lang, *Strokes of Luck*, *supra* note 10 at 35, 83. He indeed sometimes speaks of "more culpable" in terms of "degree" of culpability and while he does not contrast that explicitly with the term "scope" of culpability, that term does seem to capture his thought in speaking of "culpability for more".

23 See Andrew Ashworth, "The Elasticity of Mens Rea" in Colin Tapper, ed. *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) at 45, 53–56.

24 Simester, *Fundamentals*, *supra* note 14 at 340.

25 Simester, *Fundamentals*, *supra* note 14 at 340.

26 Simester, *Fundamentals*, *supra* note 14 at 339.

does allude to fair labelling but appears in this context to downplay its role beyond relative seriousness. He puts the idea in terms of defining and labelling offences "in a way which conveys the relative seriousness of the offence, and which confines the court's sentencing powers appropriately".[27] There is no mention here of different kinds of wrong. Simester points out that fair labelling is not supposed to be a principle exclusively about *degrees* of wrongdoing. It is also about *kinds* of wrongdoing, about how conduct is represented in a way that is independent of its degree of seriousness. As he sees it, failing to identify, for example, that there has been a killing, and a victim has died, is to label such conduct incompletely and potentially misleadingly, without sufficiently articulating the nature of the wrong.

Simester is right to point out that fair labelling pertains to kinds as well as degrees of wrongdoing. Indeed, Ashworth's own canonical formulation of fair labelling bears this out:

> Its concern is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent the nature and magnitude of the law-breaking.[28]

In this way, Simester, having agreed with Ashworth that any desert-based sentence should be unaffected by outcomes, can still claim that outcomes should often be referred to in offence definitions. However, could it not be said that if Ashworth, in arguing from fair labelling, downplays kinds of wrongs, Simester downplays degrees of wrongs? As we have seen, Simester claims that defendants who tried but failed to kill "may reasonably complain that they are being labelled under an inchoate-liability system *as if* they are murderers – when they are not".[29] Of course, they would not actually be labelled by the term "murderer", it would be something of the order of Feinberg's "WHB", "Wrongful Homicidal Behaviour", or Ashworth's "Doing an Act with Intent to Kill". But, as Simester argues, certain members of the public are likely to see matters differently: where someone is convicted under a rubric that includes murderers, they may come to be seen automatically as murderers themselves without having killed. That does sound like it may be a serious risk. However, does this point not cut two ways? Cannot someone who tried and succeeded in killing not complain that since his level of culpability is unchanged by outcome luck (as Simester himself argues), it is unfair to label him under a *different rubric* from the attempter whose level of culpability was the same? Keeping two rubrics for murder and attempted murder will, surely only reinforce in the public mind the idea that murder is more culpable than the attempt. It is true that, on Simester's rationale, the different rubrics are intended to reflect a difference in kind, not in degree of culpability. But the danger of a serious measure of public misunderstanding seems to exist every bit as much in this two-rubric case as it does in Simester's example, cited above, of the single-rubric case. In the latter, someone

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[27] Ashworth, "Taking the Consequences", *supra* note 12 at 114.

[28] Andrew Ashworth ed. *Principles of Criminal Law*, 6th ed (Oxford: Oxford University Press, 2009) at 78.

[29] Simester, *Fundamentals*, *supra* note 14 at 340.

who has not been convicted of murder is unfairly taken to be a murderer; in the former, someone who has killed and who is (*ex hypothesi*) no more blameworthy than an attempter is unfairly taken to be so.

What emerges is that two aspects of fair labelling, differences in kind and differences in degree, may be in tension with one another, sometimes pulling in different directions, other times inextricably intertwined. Fair labelling is a complex idea with more than one strand to it, and it also stands in a complex relation to other, sometimes rival, ideas.[30] We saw earlier that Moore is a retentionist, but Moore's argument depends on the enhanced culpability of results, an argument eschewed by Simester. In its place, Simester wishes to prioritise fair labelling, yet that not only has the internal tension highlighted here but also depends in large measure on how his proposed labelling will be perceived, taken up and responded to by the public.

I have, then, one source of doubt about Simester's retentionist position, especially about the dependence of its justification upon fair labelling. Of course, Simester is absolutely right that fair labelling matters to homicide. But he needs it to play a very specific function, to represent types of harms and wrongs, not degrees of them. Keeping two rubrics for murder and attempted murder will surely, however, only reinforce in the public mind the idea that murder is more culpable than the attempt. A second source of doubt is specifically over Simester's arguments for endorsing **DLS** in the case of homicide: According to him, homicide should be defined with reference to outcomes and should not therefore be cast in the inchoate mode. Thus far, though, nothing has been said about how reformists like Feinberg and Ashworth would seek to define such crimes in the inchoate mode. Let us therefore take a brief look at Feinberg's proposed offence of WHB. It is interesting to see what it is about it that is objectionable when measured against Simester's desiderata.

Feinberg tells us that there are various ways in which such an offence can be formulated: first degree WHB, second degree WHB, taking life, threatening, endangering, and so on. One option he is entirely happy with "forbids WHB on pain of severe penalty", defining WHB as "any act of murder or attempted murder which…"[31] Presumably, then, if WHB is formulated in this way, it is not defined "without reference" to outcomes – or to the relevant outcome. It does not then appear to violate **DLS**, which, at least in relation to homicide, Simester endorses. Here, the outcome "WHB by murder" is sufficient but not necessary for a conviction of WHB. Feinberg says that while "murder" and "attempted murder" would be referred to in those terms, the causal question would have no bearing on the question of blameworthiness for what is ultimately the offence of WHB. That said, the murder *would* be acknowledged. Secondly, if this is how WHB is formulated, the completer is not more culpable than the attempter, meeting another of Simester's desiderata. And thirdly, if the Defendant is found guilty of WHB by murder, the completer is "culpable for more": the difference in kind is acknowledged, another of Simester's

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[30] Andrew Cornford, "Beyond Fair Labelling: Offence Differentiation in Criminal Law" (2022) 42(4) Oxford J Leg Stud 985 and references therein.

[31] Feinberg, "Criminal Attempts", *supra* note 1 at 80.

desiderata. Many of Simester's further listed concerns at least appear to be dealt with as well. The wrongs and harms of murder and attempted murder are acknowledged to be different, the point that the succeeder kills is not neglected; attempters are plainly not labelled as if they were murderers (WHB by attempted murder); and the victim of a murder is acknowledged, there being scope to "articulate in what way she was wronged".[32] The stumbling block for Simester appears to be the name of the offence itself, WHB, but it is not clear why that should be the case, since on at least one version of it, it conforms with both **CP** and **DLS**.

Let me sum up. Simester endorses Ashworth's **CP**:

> **CP**: D's level of culpability is unchanged by outcome luck, and therefore any desert-based sentence should be unaffected by outcomes.

Ashworth himself takes it that **CP** requires an end to the separate proscription of murder and attempted murder, and a new offence in the inchoate mode, something like "doing an act intended to kill". At this point, there is a fork in the road and Simester parts company with Ashworth so as to endorse **DLS** at least in relation to homicide:

> **DLS**: Crimes should be defined with reference to outcomes.

Simester argues that an idea close to Ashworth's heart of fair labelling can supply the needed justification for a "two-rubric" murder and attempted murder regime. He rightly suggests that Ashworth downplays one aspect of fair labelling – that it pertains to kinds of offences – in the current context, and argues that in order to honour that aspect, crimes should be defined with reference to outcomes and therefore separate offences of murder and attempted murder should remain. However, if Ashworth downplays the role of kinds of offences in fair labelling, Simester, it seems, downplays the role of degrees of wrongdoing. Since he has endorsed **CP**, his assumption presumably is that the question of degree of wrongdoing can be entirely hived off to sentencing where any desert-based sentence – be that for murder or for attempted murder alike – will be unaffected by outcomes. But this ignores the impact of the separation of the offences themselves upon the question of their perceived degree of wrongdoing. I have suggested that keeping two rubrics for murder and attempted murder will surely only reinforce in the public mind the idea that murder is more culpable than attempted murder. Turning to Feinberg's proposal to abolish murder and attempted murder and replace them with WHB, I then asked what about it was objectionable to Simester, given his commitments. Feinberg suggests WHB can be developed in various ways but at least one option on offer does reserve a place for considerations of the nature and kind of offending. Since Feinberg's WHB seems to respect both of Simester's chief requirements, **CP** and in this context **DLS**, it could be that an apparently wide gulf (pro-couching homicide offences in the inchoate mode *v* anti-couching such offences in the inchoate mode) might be resolved by appropriate divisions and sub-divisions within offences. If all that is so, Feinberg

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[32] Simester, *Fundamentals*, *supra* note 14 at 340.

appears to give Simester all he is asking for in one rubric, accommodating the fair labelling concern and honouring **CP**, while Simester's insistence (for homicide) on two rubrics for the completed and for the attempted offence risks diluting or drowning out **CP**, since it likely only reinforces the public sense that murder is more culpable than attempted murder. It is doubtful therefore that fair labelling itself can be a basis for a third way between those, like Ashworth and Feinberg, who endorse **CP** and argue broadly for reform of the structure of offences and those, like Moore, who reject **CP** and argue broadly for the retention of current offence structures.

III. The Easy Sell: Fraud

While murder is a hard sell for those who would rewrite crimes in the inchoate mode, fraud appears to be an easy sell. There is no need to speculate about what *would* happen were fraud to be rewritten in the inchoate mode since essentially this *has* happened in England and Wales. The Fraud Act 2006 created the offence of fraud, stipulating three ways in which the offence could be committed: Fraud by False Representation, Fraud by Failing to Disclose Information, and Fraud by Abuse of Position. In bare outline, the first form of fraud is committed by a defendant who "dishonestly makes a false representation" and "intends by making the representation to make a gain … or to cause loss to another". There is no need to prove that the defendant actually gained anything, or that the victim lost anything, or even that the victim was in fact deceived. The defendant must intend to make the gain or cause the loss by making the representation so there must be, in effect, an attempt to defraud by the defendant. But success is irrelevant to the crime as enacted.

The 2006 offence stands in stark contrast to the offence it replaced, namely Obtaining Property by Deception, which did require the obtaining of property by means of the deception. A defendant who merely intended to obtain property but failed, and merely intended to do so by means of the deception would be guilty of the attempt but not of the complete offence. Similarly, fraud by dishonestly failing to disclose under the 2006 Act requires an *intent by means of* the failure to make a gain or impose a loss. Again, no actual gain or loss is required, neither need the defendant be fooled. The same also goes for Fraud by Abuse of Position. No actual gain or loss is required, nor proof that any gains were made or losses imposed by means of the abuse of position. These 2006 offences are all full substantive crimes yet defined in an inchoate mode.

Despite this, their criminalisation in the inchoate mode has proven largely uncontroversial. It did not encounter any great difficulty in Parliament before being voted through, there is no public campaign for repeal of these offences, and legal professionals report no special difficulty in applying them.[33] This is a puzzle. We observed above the obstacles to getting anything like Feinberg's WHB on the statute books are formidable and yet (what is effectively) WFB – "Wrongful Fraudulent Behaviour" – has passed without major incident onto the statute book in England

[33] Ashworth, "Ambivalence", *supra* note 6.

and Wales and has bedded down successfully in the two decades since. Why is criminalisation in the inchoate mode such an easy sell in the case of Fraud when it is so hard in the case of Murder? The difference cannot be explained by the intractability of the debate about whether one can be more to blame for an intended harm when that harm actually occurs. For either way, that debate cannot explain the difference between WHB and WFB (if I can call Fraud under the Fraud Act that).

In short, while the law of England and Wales has swallowed the Fraud Act with no apparent indigestion, it will not stomach any analogous Homicide Act made up of offences in the inchoate mode any time soon. There appear three possible ways to go about explaining the discrepancy. First, those (like Ashworth) committed to the desirability of a wider reform of offences in the inchoate mode might point with some pride at the Fraud Act as a successful example. In their view, the difficulty with doing anything similar in the case of murder merely serves as a reminder that things take time. The public, politicians, and the legal system (in England and Wales) need to adjust to seeing that homicide in the inchoate mode makes the same sense as fraud in the inchoate mode. Reform, proponents may say, will make the law more just: so, even if it is a long-term or medium-term end, it is a goal worth pursuing. Ashworth argues that the Fraud Act (and some other pieces of legislation in the inchoate mode that have had a smooth introduction into the law), at least gives the lie to the suggestion that offences in the inchoate mode are "unnatural"; indeed, it suggests that the public and the legal system are "ambivalent" on the matter.[34]

An alternative reaction might have it that appearances are deceptive. While fraud in the inchoate mode appears uncontroversial, perhaps this is because it is not well understood by the public. Perhaps such lack of understanding is buttressed by the fact, if it be a fact, that prosecutions are in practice brought only when there is evident gain or loss in fact, or when the victim *does* appear to have been deceived. In short, perhaps a better-informed public in England and Wales, as well as the legal profession, will come to reject the Fraud Act's inchoate-mode offences, restoring consistency in reactions between the cases of murder and fraud.

Neither of these two possibilities sounds very plausible as far as I can see: neither that the public might be brought around to see that murder is here just like fraud, nor that the public will be shocked into calling for the repeal of the Fraud Act once they properly appreciate what it amounts to. I know of no data or further argument to prove or disprove this impression, but both possible responses seem to me sufficiently underwhelming for it to be wise to look elsewhere. Both responses assume that fraud and murder ought to be structured in the same way, *ie*, both should ultimately be in the inchoate mode, or both ultimately should not. Thirdly, then, perhaps the mystery is dispelled if we abandon the assumption that murder and fraud

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[34] Ashworth, "Ambivalence", *supra* note 6 at 170. Ashworth cites bribery as another example: "The Bribery Act 2010 creates two separate offences. The offence of bribing another person, contrary to section 1 of the Act is committed by anyone who 'offers, promises or gives a financial or other advantage' in certain circumstances: the first two terms 'offers' and 'promises,' do not imply that any result has come about or that the bribe has been accepted, but the person still fulfils the definition of the completed crime. The offences relating to being bribed, contrary to section 2 of the Act, are all cases where a 'person requests, agrees to receive or requests a financial or other advantage:' again the first two terms do not imply that any money or 'other advantage' has changed hands, but the person still fulfils the definition of the completed crime." Ashworth, "Ambivalence", *supra* note 6 at 164.

ought to stand or fall together in this matter. What should be rejected, perhaps, is the assumption of generality. Might it be that fraud can work perfectly well couched in the inchoate mode, but the inchoate mode is not suitable for murder?

Let us call the assumption that it is either true in general that results matter to blameworthiness or that it is true in general that they do not, "the generality assumption". Perhaps it is a natural assumption in the light of the "general part" of the criminal law. Speaking of causation as a general requirement of criminal liability, Moore asserts that "one can unproblematically assign causation to the general part because it truly figures in the definition of all crimes …".[35] This is true, he says, of battery, homicide and mayhem as well as of "so-called conduct crimes", such as theft, rape, burglary and attempt. To be sure, the presence of attempt on his list would suggest that the mere invocation of the need for causal requirements built into *actus reus* requirements is not going to give answers to the question of whether results are in the relevant sense more blameworthy, and Moore himself makes no such assumption, arguing separately that results are blame enhancers. Be that as it may, though, it seems plausible to think it a natural step to move from the idea of a unitary "general part" of the criminal law to a single answer to our question regarding the desirability (or not) of recasting separate attempt and complete offences as single-rubric inchoate offences. I have long been suspicious of the idea that, at the deepest level, one should think of criminal law in terms of a unitary general part and have long thought that one must treat generalisations about crimes as a whole with some level of suspicion. Crimes are heterogeneous. At the very least, one should separate out horrific crime (on which more below), crimes that violate rights, and regulatory crimes; no doubt there are other types of crimes too, although that is not an issue I can pursue here.

In what follows, I want to consider two factors that might help to explain why fraud and murder may differ, so that casting crimes in the inchoate mode is justifiable and appropriate in fraud, yet not in murder. First, murder is a "horrific crime", whereas fraud is not. Perhaps the case for separately proscribing results is stronger in the case of horrific crimes than it is for non-horrific crimes. The second suggestion is due to Antony Duff: where the core of a complete wrong is committed in the attempt, there is less of a case for separately proscribing results than in a case where the moral character of the core wrong depends in part on success and failure.[36]

IV. Horrific Crime

I have argued elsewhere that there is a paradigm of crime that can be described as "horrific".[37] The inspiration for this argument is the writings of "the Adamses",[38]

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[35] Michael S Moore ed. *Mechanical Choices: The Responsibility of the Human Machine* (New York: Oxford University Press, 2020) at 38.

[36] R Antony Duff, "In Response" in Rowan Cruft, Matthew H Kramer & Mark R Reiff, eds. *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (New York: Oxford University Press, 2011) at 351–379, 366–367 [Duff, "In Response"].

[37] John Stanton-Ife, "Horrific Crime" in R A Duff, Lindsay Farmer, S E Marshall, Massimo Renzo & Victor Tadros, eds. *The Boundaries of Criminal Law* (Oxford: Oxford University Press, 2010) 138–162 [Stanton-Ife, "Horrific Crime"].

[38] Robert Merrihew Adams ed. *Finite and Infinite Goods: A Framework for Ethics* (Oxford: Oxford University Press, 1999) [Merrihew Adams, *Finite and Infinite Goods*]; Marilyn McCord Adams, "A

and I believe some of their work can be adapted to the context of the law, the criminal law in particular. The horrific as a category is that which evokes moral horror. In ordinary parlance, it is common to describe murder, rape, maiming or torture as "horrific".[39] Moreover, horrific crimes violate *their victims*, as opposed to violating their *victim's rights or interests*. They involve the destruction of or damage to the victim, or sometimes the crossing of the will of victims. To say that horrific crimes violate victims as opposed to violating their rights or interests is not to deny that one can sensibly speak of a right not to be raped, or of a right not to be murdered, but the point here is the sense in which rape or murder victims have had more than their rights violated: they have *themselves* been violated.[40] This idea, as Robert Merrihew Adams argues, "is rooted in an important phenomenon of moral … psychology – namely a sense of horror toward certain types of deeds, a feeling that certain things would be *horrible* to do".[41] Importantly, not all crimes are horrific. Tax evasion is certainly wrong but it does not evoke horror. What is more, not all serious crimes are horrific. The fraud engaged in by Bernard Madoff can be on a vast scale but, while it may be outrageous, it is not horrific. The clearest instantiations of horrific crimes – murder, rape, maiming, torture – suggest that it is directed at the body, or at the self and the body taken as an integral whole. In Merrihew Adams' words, "Most (but not all) violations of a person will assault her body. Acts that mainly damage a person's possessions, what she has as distinct from what she is, will typically not violate her, even if they are quite hostile to her interests."[42] Marilyn McCord Adams understands the idea in terms of "*prima facie* life-ruinous evils".[43] Also stressed by McCord Adams is the impossibility of compensation or anything close to compensation for such evils.[44]

Murder is one of the clearest examples of a horrific crime as understood above. It involves the destruction of an embodied self. It certainly feels intuitively natural to think of this as a violation of the victim. Compensation as "a full and perfect equivalent" of what is lost,[45] or anything remotely approaching that standard, is impossible. Obviously the victim is no longer alive to be compensated and, while in some cases monetary "compensation" to surviving relatives can be paid, this is surely not any sort of substitute.[46] As for the killer, he has participated in a life-ruinous evil. Of course, this raises many questions about what the appropriate response should be, not least for the legal system. It seems clear, though, that any sort of appropriate response will at least require an acknowledgement of the death of the victim.

Fraud is very different. It does not involve the destruction – or damaging – of an embodied self. It certainly feels more apt to characterise fraud as a violation of the

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Modest Proposal? Caveat Emptor! Moral Theory and Problems of Evil" in James P Sterba, ed. *Ethics and the Problem of Evil* (Bloomington, Indiana: Indiana University Press, 2017) at 9–26 [McCord Adams, "A Modest Proposal"].

39 Stanton-Ife, "Horrific Crime", *supra* note 37 at 138–141.

40 Stanton-Ife, "Horrific Crime", *supra* note 37 at 148.

41 Merrihew Adams, *Finite and Infinite Goods*, *supra* note 38 at 104.

42 Merrihew Adams, *Finite and Infinite Goods*, *supra* note 38 at 108.

43 McCord Adams, "A Modest Proposal", *supra* note 38 at 13.

44 McCord Adams, "A Modest Proposal", *supra* note 38 at 17.

45 Robert E Goodin, "Theories of Compensation" in Robert E Goodin, ed. *Utilitarianism as a Public Philosophy* (Cambridge: Cambridge University Press, 1995) 160–180 at 163.

46 *Ibid* at 167.

rights of the victim rather than as a *per se* violation of the victim. A complication here, however, is that it is not uncommon for some victims of successful fraud, especially elderly and vulnerable victims, to say that it feels like they *have* been violated and, where the damage criterion is also met,[47] it may be plausible to say they have been violated, not merely that their rights have been. But I take it that such cases, where the feeling of violation is combined with (lasting psychological) damage to the self, will be exceptional. Compensation of some sort does seem in principle to be on the cards. Often what is lost is fungible, for example money, which makes something approaching "a full and perfect equivalent" of what is lost potentially viable. On the other hand, some defrauded property might be irreplaceable, such as family heirlooms, religious icons, and so on. Again, perhaps in extreme cases of a victim defrauded out of an irreplaceable item, this might combine with damage to the individual in such a way that one might see it as horrific. In general, however, it is surely too strong to say that the participation of perpetrator and victim in the fraud constitutes a *prima facie* life-ruinous evil, even if the perpetrator does need to face up to the serious wrong she has perpetrated.

In short, fraud is not horrific, albeit there might be a small number of exceptional instances. Save perhaps for such unusual cases, fraud does not constitute a violation of an embodied self, although it does involve a violation of another person's rights. Though the matter is not straightforward, one can think, sensibly and generally, in terms of compensation for fraud. How far might this help to explain the puzzle raised above: why have we seen the ready acceptance in England and Wales of the inchoate mode in the Fraud Act 2006, whereas there is no prospect of any such change in the case of murder? For surely, as in murder, the successful fraud remains in a clear sense worse than the attempt? In my view, the explanation lies at least in part in the distinction between horrific and non-horrific crimes. The gap between fraud and murder creates some room for possible meaningful compensation in the former case, where it does not typically involve the destruction or damage of an embodied self. Hence the outcome is less central to identifying what criminal wrong it is that a defendant is to be labelled as having committed. I think that this is at least part of the explanation why casting fraud in the inchoate mode may be appropriate, by contrast with murder.

V. The Core of the Wrong

The second factor that I mentioned earlier (at the end of Part III), was that where the core of a complete wrong is committed in the attempt, there is less of a case for separately proscribing the results of that wrong. Antony Duff, the progenitor of this proposal, has long argued that outcomes matter together with culpability in the criminal law. Recently, however, he has suggested that he, like many others, may

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[47] By "the damage criterion", I am here referring to the characterisation of a horrific violation as one that destroys or damages an embodied person. The case of a victim of a fraud, who is elderly or vulnerable and who feels violated is a serious violation of rights, but if the feeling does not result in, or is not accompanied by any form of (psychological) damage, although borderline, I do not believe that would be sufficient for a horrific violation.

have been too quick to generalise and that "we should all take more seriously the thought that outcomes might sometimes make a legitimate difference to criminal liability, and sometimes not".[48] In particular, in cases of breach of trust and betrayal, outcomes do not always matter in the same way as they do elsewhere.

> If my spouse tries to embark on an adulterous affair, or if my friend tries to defraud me, the core of the complete wrong is committed in the very attempt, whose success or failure makes little difference to my response to the wrongdoer: what matters is that she betrayed my trust, and the betrayal is complete as soon as the attempt is made. In such cases, the personal dimension of the wrong, the betrayal by someone whom we should be able to trust utterly is crucial; but perhaps something similar could justify the law's inchoate definitions of fraud and bribery; the core wrong is the dishonesty or corruption that the attempt to defraud or to bribe involves, and the way in which the attempt undermines our institutions, even if it fails.[49]

It is certainly plausible to suggest, in the context of close personal relationships of trust, that the betrayal is essentially complete as soon as the attempt is made. It is less clear perhaps how to transfer the same thought to fraud, where the core wrong is dishonesty and the personal dimension will normally be missing. The transition is perhaps easiest in relation to one of the three forms of fraud from the law of England and Wales mentioned above, namely, Fraud by Abuse of Position. As we have noted, this offence is couched in the inchoate mode. The prosecution needs to establish that the defendant dishonestly abused a safeguarding position – which might be, say, that of manager in a care home for elderly residents with dementia – and did so with intent to make a gain or cause a loss, there being no need to prove any actual gain or loss.[50] Here one does have a betrayal of trust, a wrong which surely is complete where there is clear evidence of the attempt even if it failed. It is, of course, worse if the attempt succeeded, but there is at least a possibility of compensation (via the civil law in particular) if money was the property involved. And, as Duff suggests, the betrayal is complete as soon as the attempt is made. It seems to me that this is a promising line of inquiry in the murder/fraud distinction, although more will be needed to vindicate this thought for fraud in general, where relationships are typically at arm's length.

VI. Conclusion

I have been concerned to investigate a mystery. Why is it simultaneously such a hard sell, despite the eminence of various supporters of the idea, to reform homicide and recast the current offence of murder into the inchoate mode, when doing the same

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[48] R Antony Duff, "Reply" in Rowan Cruft, Matthew H Kramer & Mark R Reiff, eds. *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (New York: Oxford University Press, 2011) at 366.

[49] *Ibid* at 366–367.

[50] Fraud Act 2006 (c 35) (UK) s 4.

recasting for fraud has already proved, at least in one major jurisdiction, such an easy sell? Duff has urged that we should "abandon the attempt to decide between two wholly general claims (that the criminal law should always, or that it should never, attach weight to actual outcomes), in favour of a more nuanced discussion of the significance of outcomes in relation to different kinds of offence".[51] In that spirit, I explored one possible difference-maker, *ie*, whether a crime is horrific in nature, as murder, maiming, rape, and torture are. My tentative conclusion is that if a crime is horrific in nature, that is a strong reason for attaching weight to actual outcomes. Murder is horrific and there is therefore such a reason to attach weight to the outcome of murderous conduct. As for fraud, since it is not typically horrific in nature, there is no such reason. The conclusion is tentative as much work remains to be done. We need further to explore various kinds of horrific and non-horrific crimes in order to see how well the hypothesis plays out for other offences. Duff's own suggestion, that where the core of a complete wrong is committed in the attempt, there is less of a case for separately proscribing the results of that wrong, is also promising. The argument works well in situations of trust, where betrayal is essentially complete upon perpetration of the attempt; whether it can also be extended to offences of property based on dishonesty remains to be seen.

In the course of this paper, I have avoided endorsing either of the two opposed starting points, respectively that results enhance blame, and that results are irrelevant to blame. My concern has been primarily with how the debate might develop. To that end, I examined Simester's very interesting and highly original attempt at finding some middle ground in the debate. His distinctive retentionist argument is based on a premise endorsed from a leading reformist, Andrew Ashworth. However, I concluded that given his commitment to **CP** the important concerns he raised are probably best contained in the reformist proposal of Joel Feinberg. If that is right, it suggests the importance of turning our attention to when and how putative legislative "single-rubric" reforms are to be formulated. If I have not already overworked the selling metaphor in this paper, I will close with the observation that selling the inchoate mode ought to be retail, and not wholesale.

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[51] Duff, "In Response", *supra* note 36 at 367.