

Attempt, Risk-Creation, and Change of Mind: Reflections on *Herzog*

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INTRODUCTION

Herzog, seething with anger towards his ex-wife Madeleine and her lover Gersbach, watches through the window of their house, armed with a gun and waiting for an opportunity to kill them both. On seeing his daughter, Junie, bathed with kindness and humor by Gersbach, Herzog changes his mind and walks away. Although it is hypothetical, Herzog's behavior is all too real. Cases in which defendants, who are bent on committing a crime, make some progress but stop when there is much left to be done are common. With the increased usage of tools within the law for thinking systematically about risk-creation and how best to incentivize or disincentivize activities that create risk, there is an increased interest in conceptualizing cases of this kind as instances of crimes of endangerment. But, as argued here, Herzog has committed no endangerment crime. He has attempted murder, a crime for which he deserves some mitigation in sentence thanks to the fact that he abandoned the attempt.

The question of what crimes Herzog *committed* and the question of crimes *for which he is appropriately held guilty* are distinct. No one is rightly held guilty for crimes he committed unless, among other things, there is sufficient evidence that he committed them. As will be argued here, Herzog has attempted murder. But we know this in part because we have direct insight into the content of Herzog's intentions in coming to Madeleine's house armed. In describing Herzog's state of mind as he drives to the house, Saul Bellow writes:

In spirit [Madeleine] was his murderess, and therefore he was turned loose, could shoot or choke without remorse. He felt in his arms and in his fingers, and to the core of his heart, the sweet exertion of strangling—horrible and sweet, an orgasmic rapture of inflicting death.¹

And, later, when Herzog watches Gersbach through the window:

[Gersbach] was scouring the tub. [Herzog] might have killed him now. His left hand touched the gun²

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¹ SAUL BELLOW, *HERZOG* 255 (1964).

² *Id.* at 257.

We know much that a jury might not: we know Herzog's intention is not, for instance, to kidnap his daughter, using the gun as a bluffing threat. Were that so, he would not have attempted *murder* (although he may have attempted kidnapping). And since a jury might have no reason to think Herzog intended to kill rather than kidnap, or even that he had a completely benign intention—perhaps the gun was to be a gift to Gersbach—a jury might lack sufficient evidence from which to conclude that Herzog attempted murder. But the topic here is not *evidence* of intent. Who knows what evidence the jury might or might not see after all the usual flawed pre-trial investigations and lawyerly wrangling? The question to be addressed is, instead, what crimes Herzog has committed. And so it will be assumed that he intended to kill.

Section I very briefly sketches an account of the nature of attempt developed at length elsewhere.³ The section also explains why, in light of the account of attempt described, Herzog has attempted murder. Section II explains why Herzog ought not to be held guilty of any crime of risk-creation. Section III turns to the question of abandonment and argues that Herzog deserves mitigation in his sentence in light of his change of mind, but does not deserve an affirmative defense.

I. THE NATURE OF CRIMINAL ATTEMPTS

Part of what leads to so much confusion in thought about attempt is that unlike a crime like murder, statutes rarely describe attempts in detail; and, when they do, they tend to use language that is no clearer or more precise than the term “attempt” was to begin with. This should come as no surprise, for in this respect the law is no different than ordinary morality. Consider an example. The father tells the child not to jump on the sofa, no ice cream if she does. Moments later, the child starts to climb onto the sofa with the intention of jumping on it. He stops her and says, “That’s just what I told you not to do!” Imagine that the precocious child replies, “No, you told me not to *jump on the sofa*, you didn’t tell me not to *try* to jump on the sofa. But all I managed to do was *try*.” She speaks the simple truth. But, still, she would deserve to lose out on ice cream. In promising to penalize completion we also, just like that, also promise to penalize attempt. And so it is in the law: criminalization of attempts is accomplished, usually, *automatically* through the criminalization of completion. There is an ordinary notion of trying that we take to be worthy of censure by the state whenever completion is worthy of such censure. In this respect, the logic of the law mirrors the logic of everyday morality.

This simple fact has some important implications.⁴ Notably, it implies that attempts are not special cases of risk-creation crimes. The child deserves the penalty for trying to jump on the couch even if there was no chance she would

³ See GIDEON YAFFE, ATTEMPTS.

⁴ At least, so I’ve argued at some length elsewhere. *See id.* at 21–47.

succeed in jumping on it. Say she's not big enough to climb onto the couch without assistance. Try as she might, she is then bound to fail to jump on the couch. If this were true, her conduct created hardly any risk, if any at all, of that which her father forbade, namely jumping on the couch. But, still, she does not deserve the return of her ice cream privileges. Her attempt is wrongful and properly penalized even in this case. This is one way in which the principle through which we criminalize attempts differs from the principle through which we criminalize risk-creation. This is not to say that risk-creation is not legitimately criminalized; it is, at least sometimes. It is to say, instead, that we should not evaluate attempt law through the lens of risk-creation law. To do so would be like trying to evaluate theft law as if it were a species of murder law. Thefts aren't murders and attempts aren't crimes of risk-creation. They rest on different foundations.

In addition, the idea that attempts are criminalized under the principle linking legitimate criminalization of completion with legitimate criminalization of attempt implies that to determine what is criminalized as an attempt, one is required to determine what ordinary notion of "trying" is implicated in that principle. In what sense of the term "try" is trying to jump on the couch implicated in the proscription against jumping on it? Or, to put the question in the legal context, in what sense of the term "try" is trying to commit a crime implicated in the proscription against committing it? Elsewhere, it's argued that the relevant notion of trying should be understood like so: in the sense that matters to the criminal law, *to try to commit a crime is to have an intention that commits one to all of the conditions involved in completion of that crime, and to be guided in one's conduct by that intention.*⁵ To attempt murder is to have an intention that commits one to causing another's death and to be guided by that intention in one's conduct. To attempt receipt of stolen property is to have an intention that commits one to receiving *something*, and commits one to receiving *property*, and commits one to receiving something *that is stolen*, and to be guided in one's conduct by that intention. So, determining whether someone has attempted a crime requires determining whether he had an intention that committed him to each of the conditions involved in completion of that crime, and whether he was guided in his conduct by that intention.

Two concepts employed in this account of the nature of attempt are particularly important: intention-based commitment and guidance by an intention. What one's intention commits one to is broader than what one intends. For example, consider someone seeking a way to get an insurance payment for his cabin burning down who has not decided whether to burn it himself, or merely to take no precautions and hope for a forest fire. He intends that the cabin burns, but does not intend *to cause* it to burn; for all he's settled on, he might just wait for something else to cause that. Still, his intention that the cabin burns *commits him* to causing it to burn. Were that intention to play its typical role in motivating his behavior, he would, indeed, cause the cabin to burn. So, what his intention

⁵ See *id.* at 72–105.

commits him to is a function not just of what he intends, but also of what would be true were his intention to play its typical role in motivating his behavior.⁶

To be guided by an intention is to be moved, or motivated, by it to do that which is intended. Specifying, however, how motivation differs from other causal influences of intention is no easy matter. A person intends to climb the stairs. This intention causes two things: it causes him to announce “I will ascend the staircase!” and it causes him to take the first step. The intention motivates the taking of the first step, but does not *motivate* the pronouncement. In making the pronouncement he is motivated, instead, by an intention to tell the world of his plans. But how do we distinguish the two causal influences of the intention to climb the staircase? The intention to climb the staircase does *cause* the pronouncement; he certainly wouldn’t make the pronouncement if he did not have that intention. So why is the intention’s influence on the one form of behavior (the first step) motivational, but not on the other (the pronouncement)? The best we can do in answer is to note that were the causal sequence leading to the first step to continue without obstacles and without change of mind, the agent would climb the stairs. The same is not true of the causal sequence leading to the pronouncement. *That* causal sequence will culminate instead in his informing the world of his plans. So, the right way to determine whether the influence of a person’s intention on his behavior is motivational, and so is an instance of *guidance*, is to ask the following question: Had he ability and opportunity to act, and did not change his mind, would the causal sequence in question have culminated in action?

Turning to Herzog, there are two questions that need to be answered in order to determine whether he has attempted murder: first, did he have an intention that committed him to all that’s involved in a completed murder? And second, if he did, was he guided in his conduct by that intention? The latter question is best answered by first determining whether the intention has launched any causal sequences that would end in Herzog’s commission of murder, provided that he had ability, opportunity, and did not change his mind.

As indicated above, we can take Bellow at his word in claiming that Herzog intends to kill Madeleine and Gersbach. Proving this, of course, is no easy matter. In life, unlike art, there are no omniscient narrators who report with accuracy facts about our psychologies that are obscured even from ourselves. Even Herzog has less insight into his mind than the narrator has, so even an honest confession from him, or, on the other hand, a fervent and honest denial that he had the intention to kill, would only be *evidence* of state of mind, and potentially overridden by contrary evidence. And this is putting aside, even, the role that the powerful

⁶ Similarly, intending to receive some property while thinking it likely that the property is stolen is typically to have an intention that commits one to not reconsidering one’s intention should one come to be certain that the property is, indeed, stolen. This is, therefore, to have an intention that commits one to the property one intends to receive being *stolen* property, even though one might be perfectly content to receive unstolen property. As I’ve argued, this is the key to understanding the appropriate *mens rea* standard in attempt with respect to circumstantial elements of the crimes attempted. *See id.* at 129–66.

incentive to lie can play when a defendant is interrogated. Herzog may believe what we know to be false, namely that he had no intention to kill. Such are the difficulties in establishing the facts about what crime a defendant has committed.

But, still, there are facts about a person's intentions. And in this case a leading fact is that Herzog intends to kill. The remaining question, then, is whether he was guided in his conduct by that intention. Is there a causal sequence that would end in Madeleine and Gersbach's deaths should Herzog have ability and opportunity to kill them, and not change his mind? The answer is yes. Had Herzog not changed his mind, he would have killed Gersbach while he was cleaning the tub after the child's bath. And had Herzog not changed his mind, and had the ability and opportunity to do so, he would have killed Madeleine too.

Why do we imagine away Herzog's actual change of mind when determining whether he has attempted murder? Why do we ask what would have happened *had he not changed his mind* when he, in fact, changed his mind? The answer is that we ask counterfactual questions about what would happen because we want to know whether the influence of his intention on his behavior was motivational. Was he *motivated* by the intention when he drove to the house, peered through the window, touched the gun with his hand? The answer to that question does not turn on his later decision to give up the intention. Facts about the nature of a causal relation present at one time do not depend on facts about what actually happens a few minutes later. The causal influence of the intention *now* is the same whether Herzog stays resolute in his decision to kill or changes his mind, or is struck dead by a stray lightning bolt. Whether a causal influence is a motivational influence depends on what will happen in idealized circumstances, circumstances that include the absence of change of mind. That the actual circumstances are not like the idealized ones is not relevant to the matter. To say otherwise would be to accept the absurdity that *anything* that prevented completion—and, in attempt cases, there is always *something* that interfered—undermines the claim that there was guidance. The fact that the child is stopped from jumping on the couch by her father does not show that she was not motivated by her intention to jump; and the fact that Herzog was stopped by a change of heart does not show that he was not motivated by his intention to kill. Still, as we will see in section III, Herzog's change of mind is not entirely irrelevant to the case. Thanks to it he deserves mitigation of his sentence. But it is irrelevant to the question of whether he has attempted murder. Provided that he had the intention to kill, which he did, and was guided by it, which he was, he has attempted murder.

II. THE NATURE OF THE RISKS IN CRIMES OF RISK-CREATION

Had Herzog actually attacked Gersbach and Madeleine, he would have placed his daughter at extreme risk of serious injury or death. What follows? There are two distinct conclusions that one might reach. One might think that this implies that Herzog has, in fact, placed his daughter's life at risk. Or one might think he has *attempted* to place his daughter's life at risk. Both conclusions are erroneous.

The second can be ruled out quickly. It is simply obvious that Herzog does not intend to place his child at risk. He lacks an intention that commits him to placing her at risk, and so he does not attempt to do anything successful that involves the creation of risks to her life.

But what about the conclusion that Herzog has, in fact, placed his daughter at risk? Typically, endangerment crimes are defined so as to include the creation of risks as an element. Consider, for instance, the pertinent part of Illinois's child endangerment statute (the state in which Herzog's crime takes place):

It is unlawful for any person to willfully cause or permit the life or health of a child under the age of 18 to be endangered or to willfully cause or permit a child to be placed in circumstances that endanger the child's life or health.⁷

To be guilty under this statute, a person must actually cause a child to be endangered. So, did Herzog's behavior actually endanger his daughter? The question here is not whether he *intended* conduct that would have endangered his daughter had he performed it; the answer to that question is surely "yes." The question is, instead, whether the conduct that he actually performed—peering into the window while armed with a gun and intent on murder—endangered his daughter.

Consider two different ways of calculating the probability that the daughter would be injured. In the first, we include in the calculations our estimates of the probability that Herzog would perform various endangering acts in the future of his peering in the window. What was the probability that Herzog would change his mind, as he actually did? (The actual occurrence of that event is compatible with it being likely or very unlikely. Even low probability events sometimes happen.) Assuming that he did not change his mind when he did, but went further in pursuit of his murderous aims, what was the probability that he would change his mind at a later point, perhaps when he realized that his act might harm his daughter? What was the probability he would be discovered outside the window? And, if he had been, what was the probability that he would have reacted in a way that placed his daughter in danger? We can imagine answers to these questions that imply that Herzog's conduct risked significant harm to his daughter. If it was a high probability that he would not change his mind, and a high probability that he would attempt to kill Gersbach or Madeleine in his daughter's presence, then thanks to the acts he actually performed, there was a high probability that his daughter would be injured. Under this approach, we are surveying the various worlds that result from the acts he did perform, plus further acts that he might perform, and other circumstances. If in many of the surveyed worlds the child is seriously injured, then Herzog caused significant risks of harm to her.

⁷ 720 ILL. COMP. STAT. ANN. 5/12-21.6 (West 2002).

Alternatively, we calculate the probability of the daughter's injury by assuming passivity on Herzog's part with respect to all that transpires following his act of peering through the window. On this approach, we imagine that his conduct ends there and see what the chances are that things would ensue, without further conduct on his part, and result in the daughter being injured. So understood, the probability of the daughter's injury was exceedingly low. You just can't hurt children by peering in windows.

Strategies for calculating the relevant probability that are different from either of these approaches are also possible. We might, for instance, calculate the probability by including calculations of the probability of *some* of Herzog's possible future acts and not others. Perhaps we ought to consider the probabilities of the *intended* acts, but not acts on which he has not yet settled, for instance, when calculating the probability that the daughter will be injured. However, the notion of risk invoked in risk-creation proscriptions requires that the probabilities be calculated without consideration of the probability of any future, unperformed acts on the part of the defendant. To see this, consider an example: if the alcoholic has a single drink, then chances are that he will have a second, and a third, and a tenth. And when he has ten, he'll meander about in a way that makes it dangerously likely that he will break something that belongs to his host. But the act that risks breaking something of the host's is the act of meandering about, or maybe even the act of having the tenth drink, but not the act of having the first drink, even if that act does indeed make it very likely that he'll eventually meander about dangerously. There's a commonsense notion of the risks produced by an act, under which what an act risks is a product only of what it makes likely *in the absence of further action* and not a product of what it makes likely, taking further action into consideration. And by that measure, as indicated already, Herzog's conduct does not risk much harm, if any, to his daughter, or to anyone else. The result: he has not committed any crime of endangerment.

III. CHANGE OF MIND REVISITED: A GROUND FOR MITIGATION

As indicated in Section I, the fact that Herzog changed his mind does not show that he did not attempt murder. He was moved by his intention to kill to start a sequence of behavior that, had he encountered no obstacles, would have culminated in murder had he not changed his mind. That's sufficient for attempt despite the fact that he did, in fact, change his mind. But the fact of change of mind matters to the case because it matters to the appropriate sentence for the attempt.⁸

One of the things a judge should aim to do in sentencing is to give a sanction harsh enough that, had the defendant anticipated it at the time of the crime, he would have recognized sufficient reason to refrain. But the judge also has a reason

⁸ This section applies a line of thought about abandoned attempts that is described in YAFFE, *supra* note 3, at 287–309.

to issue a lower sanction, if a lower sanction would have been enough to meet this condition. If knowing that he would suffer a year in prison would have prompted the defendant to recognize sufficient reason to refrain, then that's a reason to give a year rather than a year and day.

This is not the only goal that judges should pursue in sentencing. They also ought to have their eye on the deterrence of other people besides the defendant. And they ought to consider whether the sanction is sufficient to express solidarity with the victim in his loss. And there is more besides. But, still, there is reason to pick the minimum sanction that would provide, by the defendant's own standards at the time of the crime, a sufficient reason for him to have refrained.

When a defendant has abandoned an attempt for good reasons, he has already recognized sufficient reason not to complete the crime without anticipation of any sanction. This is not true if he has abandoned in order to avoid sanction, which is why the reasons for abandonment matter to the appropriateness of mitigation.⁹ Therefore, when the defendant has changed his mind, one reason to give a sanction of some particular size is nullified. When a defendant has abandoned an attempt, a judge cannot say, in favor of his decision to give the defendant a year in prison, that anticipation of any lower sanction would not have prompted the defendant to recognize sufficient reason to refrain. Since the defendant recognized sufficient reason to refrain without anticipation of sanction, such a claim would be untrue. Other reasons to sanction remain, however, and so the fact of abandonment mitigates the sentence by silencing a reason in favor of any given sentence without thereby silencing all such reasons.

Herzog does not change his mind simply because he anticipates a sanction. He abandons because he recognizes the irrationality of his antipathy towards Gersbach and the absurdity of his fear for his daughter. He does not need anticipation of the sanction in order to appreciate sufficient reason to obey the law he was attempting to break. The result is that whatever sanction a judge decides to give him, one typical reason for giving it—namely that it is the minimum sanction needed to prompt appreciation of sufficient reason to comply with the law—is not available to be offered in justification of issuing it. There is, therefore, ground for mitigation of Herzog's sentence. This is not to say that there won't be good reason to punish him. There probably will be. Rather, one of the reasons that is typically available will not be in his case. The kind of mitigation of sentence he deserves, then, is this: he deserves to have his sentence calculated to serve other goals of sentencing independent of the goal of providing that which would have prompted recognition of sufficient reason to refrain. While it remains anyone's guess what the correct sentence is, in light of this, we nonetheless know that one kind of reasoning in favor of giving a particular sentence is taken off the table.

⁹ MODEL PENAL CODE §5.01(4) (1962).

CONCLUSION

Whether a person's conduct is criminal depends on whether it is of a sort that has been proscribed. So whether his conduct is the crime of attempt depends on whether it is of the sort that was proscribed when we proscribed attempt. When we step back and recognize what attempts must be if our practice of criminalizing them automatically whenever we criminalize completion is to make sense, we are able to specify attempt's nature with precision. The result, in this case, is that Herzog has attempted murder merely by peering in a window. He committed this crime because he intended to kill and was guided in his behavior by that intention.