First Draft of Report #13: Penalties for Criminal Attempts

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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for a new Title 22A of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report No. 13, *Penalties for Criminal Attempts*, is March 2, 2018 (about ten weeks from the date of issue). Oral comments and written comments received after March 2, 2018 may not be reflected in the Second Draft of Report No. 13. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

§ 22A-301 CRIMINAL ATTEMPT

(c) PENALTIES FOR CRIMINAL ATTEMPTS.

(1) An attempt to commit an offense is subject to one-half the maximum imprisonment or fine or both applicable to the offense attempted, unless a different punishment is specified in RCC § 301(c)(2).

(2) Notwithstanding RCC § 301(c)(1), attempts to commit the following offenses may be punished accordingly:

[RESERVED: List of exceptions and accompanying penalties.]

COMMENTARY

3. § 22A-301(c)—Penalties for Criminal Attempts

Explanatory Note. Subsection (c) establishes the penalties for criminal attempts under the Revised Criminal Code. Subsection (c)(1) states the default rule governing the punishment of criminal attempts: a fifty percent decrease in the maximum imprisonment or fine or both applicable to the target offense. Subsection (c)(2) lists those offenses that are exempt from this default rule and specifies the punishment for each exception.

Relation to Current District Law. The D.C. Code's general attempt penalty statute, D.C. Code § 22-1803, establishes a default penalty framework for attempt offenses comprised of two basic rules.[1] First, attempts to commit offenses other than "crimes of violence" are punishable by a maximum of 180 days incarceration, $1000

[1] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both.").

fine, or both.[2] And second, attempts to commit "crimes of violence"[3] are punishable by a maximum of 5 years incarceration, $12,500 fine, or both.[4]

The District's general attempt penalty statute also explicitly recognizes an exception to these two default rules: any attempt offense "made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901" (hereafter, "1901 Code") is subject to the penalties specified in the relevant statutory provisions.[5] This reflects the fact that the 1901 Code explicitly made several kinds of attempts punishable in a manner different from the default penalty, which at the time was set at one-year imprisonment or a $1,000 fine, or both.[6]

For example, two common felonies in the 1901 Code were defined in a manner that effectively punished attempted versions of the offense the same as completed versions of the offense, namely, attempted arson,[7] and attempted malicious destruction of property.[8] And attempted robbery had its own statutory provision subject to a penalty in

[2] *See* D.C. Code § 22-3571.01(4) (setting fines at "$1,000 if the offense is punishable by imprisonment for 180 days, or 6 months, or less but more than 90 days").

[3] D.C. Code § 23-1331(4) ("The term 'crime of violence' means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.").

[4] *See* D.C. Code § 22-3571.01(6) (setting fines at "$12,500 if the offense is punishable by imprisonment for 5 years or less but more than one year").

[5] D.C. Code § 22-1803.

[6] *See* D.C. Code § 906 (1901); Act of March 3, 1901, ch. 19, § 906, 31 Stat. 1321, 1337 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this chapter [Chapter 19], shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both."). Since being enacted in 1901, the District's general attempt penalty statute has undergone two substantive policy revisions. Most importantly, in 1994, the D.C. Council amended it to establish separate default penalty rules for attempts to commit non-violent crimes—subject to a maximum of 180 days incarceration and/or a $1000 fine—and for attempts to commit violent crimes—subject to a maximum 5 years incarceration and/or a $5,000 fine. *See* OMNIBUS CRIMINAL JUSTICE REFORM AMENDMENT ACT OF 1994, 1994 District of Columbia Laws 10-151 (Act 10–238), sec. 105, § 906 (1994). These changes occurred as part of a larger effort to increase judicial case processing by reducing the penalties for more than 40 offenses to make them non-jury demandable (i.e., subject only to a bench trial by a judge rather than a jury) under D.C. Code § 22-705. *See* CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY, JAMES E. NATHANSON, *Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994*, at 3-4 (January 26, 1994) [hereinafter *Judiciary Committee Report*]. Supported by both the D.C. Superior Court and Office of the United States Attorney, the 1994 Act was intended to "relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow for more felony cases to be scheduled at an earlier date." *Id.* Subsequently, in 2012, the D.C. Council raised the maximum fine for attempts to commit violent crimes from $5,000 to $12,500 consistent with the Criminal Fine Proportionality Amendment Act. *See* CRIMINAL FINE PROPORTIONALITY AMENDMENT ACT of 2012, 2012 District of Columbia Laws 19-317 (Act 19-641), sec. 101 (2012); *see also* D.C. Code § 22-1803; D.C. Code § 22-3571.01.

[7] D.C. Code § 820 (1901); Act of March 3, 1901, ch. 19, § 820.

[8] D.C. Code § 848 (1901); Act of March 3, 1901, ch. 19, § 848; *see also* D.C. Code § 824 (1901); Act of March 3, 1901, ch. 19, § 824 (unlawful entry of property).

derogation from the default rule.[9] Accompanying these three explicit exceptions to the 1901 Code's default penalty rule for criminal attempts were three implicit exceptions: "assault-with-intent to" (AWI) crimes,[10] which were enacted to allow "a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end."[11]

The 1901 Code's explicit and implicit statutory exceptions to the default penalty for attempts have undergone little or no change to date.[12] At the same time, many other offense-specific exceptions to the general attempt penalty statute have been added to the D.C. Code over the last century.

Some of these exceptions are communicated through the penalty provisions governing attempts to commit individual or certain groupings of offenses. Illustrative provisions include the D.C. Code provisions setting forth penalties for attempts to commit: (1) various human trafficking related offenses[13]; (2) various sexual abuse-related offenses[14]; (3) various drug-related offenses[15]; (4) manufacture or possession of a weapon

[9] D.C. Code § 811 (1901); Act of March 3, 1901, ch. 19, § 811.

[10] *See* D.C. Code §§ 804-06 (1901); Act of March 3, 1901, ch. 19, §§ 804-06.

[11] *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011). These AWI offenses effectively created a complementary form of attempt liability, which subjected actors to greater punishment for unconsummated conduct that reached the point of an assault. Both AWIs and criminal attempts punish an unconsummated intent to commit a criminal offense; the only difference is that, whereas a criminal attempt requires proof of conduct that is dangerously close to committing that offense, an AWI offense requires proof of a simple assault.

[12] Like the 1901 Code's attempted arson, malicious destruction of property, and robbery provisions, the 1901 Code's AWI offenses also still "remain on the books to this day" in essentially the same form. *Perry*, 36 A.3d at 810-11. First, there is D.C. Code § 22-401—the current version of § 803 of the 1901 Code—which subjects "any assault with intent to kill or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery . . . . to imprisonment for not less than 2 years or more than 15 years." Second, there is D.C. Code § 22-402—the current version of § 804 of the 1901 Code—which subjects any "assault with intent to commit mayhem . . . . to imprisonment for not more than 10 years." And third, there is D.C. Code § 22-403—the current version of § 805 of the 1901 Code—which subjects an "assault[] with intent to commit any other offense . . . . [to] not more than 5 years." Only minor modifications have been made to these offenses since their enactment. For example, §§ 804 and 805 of the 1901 Code are essentially identical to §§ 22-402 and 403 of the current D.C. Code. And § 803 of the 1901 Code, currently reflected in D.C. Code § 22-401, has only been lightly revised: the offense of assault with intent to commit "rape" has been replaced with the related offenses of assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, and assault with intent to commit child sexual abuse. Other than that, the AWI offenses currently contained in Title 22 are substantively the same as those enacted in 1901.

[13] *See* D.C. Code § 22-1837(d) ("Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than 1/2 the maximum fine otherwise authorized for the offense, imprisoned for not more than 1/2 the maximum term otherwise authorized for the offense, or both.")

[14] *See* D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.")

[15] *See* D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

of mass destruction[16]; and (5) use, dissemination, or detonation of a weapon of mass destruction.[17]

Other exceptions to the general attempt penalty statute are communicated through incorporation of the term "attempts" into the definition of a given offense, effectively providing that an attempt to commit that offense is subject to the same punishment as the completed offense.[18] Illustrative provisions in the D.C. Code include the statutory definitions of (1) enticing a child or minor,[19] (2) voter fraud,[20] and (3) public assistance fraud.[21]

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[16] *See* D.C. Code § 22-3154(b) ("A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.")

[17] *See* D.C. Code Ann. § 22-3155(b) ("A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.").

[18] These fully inchoate attempt offenses are to be distinguished from the District's partially inchoate attempt offenses, which incorporate the term "attempt" into a statutory definition, but apply it to only some of the elements in that offense, such as the District's carjacking statute. *See* D.C. Code § 22-2803 (a)(1) ("A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle."); *see also Corbin v. United States*, 120 A.3d 588 (D.C. 2015) (interpreting the phrase "or attempts to do so" to apply only to the force or violence requirement, such that proof that the defendant actually took the vehicle is necessary for a conviction brought under this statute (rather than attempted carjacking, brought under the District's general attempt statute)). Other statutes potentially subject to this kind of partially inchoate reading include: D.C. Code § 22-851 (Protection of district public officials); D.C. Code § 22-1211 (Tampering with a detection device); D.C. Code § 22-1404 (Falsely impersonating public officer or minister); D.C. Code § 22-1409 (Use of official insignia; penalty for unauthorized use); D.C. Code § 22-1713 (Corrupt influence in connection with athletic contests); D.C. Code § 22-1835 (Unlawful conduct with respect to documents in furtherance of human trafficking); D.C. Code § 22-1836 (Benefitting financially from human trafficking); D.C. Code § 22-2707 (Procuring; receiving money or other valuable thing for arranging assignation); D.C. Code § 22-3237.02 (Identity theft); D.C. Code § 22-3251 (Extortion); D.C. Code § 22-3535(f) (Voyeurism); and D.C. Code § 50-2201.05b (Fleeing from law enforcement).

[19] *See* D.C. Code § 22-3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both."); D.C. Code § 22-3010(b)("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact . . . shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[20] *See* D.C. Code § 1-1001.14(a) ("Any person who shall register, or attempt to register, or vote or attempt to vote under the provisions of this subchapter and make any false representations as to his or her qualifications for registering or voting or for holding elective office, or be guilty of violating § 1-1001.07(d)(2)(D), § 1-1001.09, § 1-1001.12, or § 1-1001.13 or be guilty of bribery or intimidation of any voter at an election, or being registered, shall vote or attempt to vote more than once in any election so held, or shall purloin or secrete any of the votes cast in an election, or attempt to vote in an election held by a political party other than that to which he or she has declared himself or herself to be affiliated, or, if employed in the counting of votes in any election held pursuant to this subchapter, knowingly make a false report in regard thereto, and every candidate, person, or official of any political committee who shall

Collectively, the District's "patchwork of attempt statutes"[22] presents two main problems: (1) it lacks a consistent grading principle; and (2) it is confusingly communicated.

With respect to the first problem, at least three fundamentally different grading patterns appear to be reflected in the penalties governing attempts to commit both crimes of violence and non-violent crimes under the D.C. Code.

The first grading pattern, which might be referred to as a "substantial punishment discount," is reflected in the numerous District attempt offenses subject to statutory maxima that are many orders of magnitude below the statutory maxima governing the completed offense. Most often, this kind of substantial punishment discount is produced by a straightforward application of the general attempt penalty statute's default rules.[23]

A substantial penalty discount is perhaps most clearly reflected in the grading of attempts to commit various non-violent crimes. For example, whereas the statutory maxima for felony property offenses such as first degree theft,[24] first[25] and second degree[26] fraud, first degree receiving stolen property,[27] first degree financial exploitation

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knowingly make any expenditure or contribution in violation of subchapter I of Chapter 11 of this title, shall, upon conviction, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.").

[21] *See* D.C. Code § 4-218.01(a) ("Any person who, with the intent to defraud, by means of false statement, failure to disclose information, or impersonation, or by other fraudulent device, obtains or attempts to obtain or any person who knowingly aids or abets such person in the obtaining or attempting to obtain: (1) any grant or payment of public assistance to which he is not entitled; (2) a larger amount of public assistance than that to which he or she is entitled; (3) payment of any forfeited grant of public assistance; or (4) a public assistance identification card; or any person who with intent to defraud the District aids or abets in the buying or in any way disposing of the real property of a recipient of public assistance shall be guilty of a misdemeanor and shall be sentenced to pay a fine of not more than $500, or to imprisonment not to exceed one year, or both.").

[22] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

[23] As noted above, the relevant legislative history underlying the Omnibus Criminal Justice Reform Amendment Act of 1994 indicates that the default rule for non-crimes of violence was set at 180 days to ensure they were non-jury demandable, and, therefore, to increase judicial efficiency. *See Judiciary Committee Report*, *supra* note 6, at 3-4 (noting that the act was intended to "relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow for more felony cases to be scheduled at an earlier date"). At first glance, this seems to explain the substantial punishment discount applied to grade attempts to commit non-crimes of violence. As discussed below, however, the penalties governing many attempts to commit non-crimes of violence under the D.C. Code reflect fundamentally different grading patterns—namely, a proportionate punishment variance or equalized punishment. Likewise, the penalties governing attempts to commit crimes of violence under the D.C. Code also reflect all three of these fundamentally different grading patterns.

[24] D.C. Code § 22-3212(a) ("Any person convicted of theft in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is $1,000 or more.").

[25] D.C. Code § 22-3221(a)(1) ("Any person convicted of fraud in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is $1,000 or more . . . .").

[26] D.C. Code § 22-3221(b)(1) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or imprisoned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct is $1,000 or more . . . .").

of a vulnerable adult or elderly person,[28] unauthorized use of a motor vehicle,[29] and blackmail[30] (not involving a threat of violence[31]) range between 5 and 10 years, an attempt to commit any of those offenses is subject to the 180 day default rule governing attempts to commit non-crimes of violence under the general attempt penalty statute.[32] Likewise, the 10 year statutory maxima applicable to second degree cruelty to children[33] as well as the 20 year statutory maximum applicable to felony threats[34] are also reduced to 180 days under the first default rule.[35] (Neither of these offenses is a crime of violence.[36])

A pattern of substantial punishment discounting also can be seen in the penalties governing a wide range of attempts to commit crimes of violence. For example, whereas first-degree murder[37] and second-degree murder[38] are both potentially subject to a sentence of life in prison under the D.C. Code, an attempt to commit either of those offenses is subject to 5 year default rule governing attempts to commit crimes of violence under the general attempt penalty statute.[39] Likewise, the 30 year statutory maxima applicable to kidnapping[40] and first degree burglary,[41] as well as the 15 year statutory

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[27] D.C. Code § 22-3232(c)(1) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 7 years, or both, if the value of the stolen property is $1,000 or more.").

[28] D.C. Code § 22-936.01(a) ("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . When the value of the property or legal obligation is $1,000 or more, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 10 years, or both.").

[29] D.C. Code § 22-3215(d)(1) ("[A] person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both.").

[30] D.C. Code § 22-3252 (b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[31] *See* D.C. Code § 23-1331(4).

[32] D.C. Code § 22-1803.

[33] D.C. Code § 22-1101(b)(2) ("Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").

[34] D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").

[35] *See* D.C. Code § 22-1803.

[36] *See* D.C. Code § 23-1331(4).

[37] D.C. Code § 22-2104(a)("The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release . . . .").

[38] D.C. Code § 22-2104(c) ("Whoever is guilty of murder in the second degree shall be sentenced to a period of incarceration of not more than life . . . .").

[39] *See* D.C. Code § 22-1803. Note, however, that the District's most severe AWI statute partially softens this discount by applying a 15 year statutory maximum to attempted murders that progress to the point of an assault. *See* D.C. Code § 22-401.

[40] D.C. Code § 22-2001 ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years.").

[41] D.C. Code § 22-801(a) ("Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.").

maxima applicable to first degree cruelty to children[42] and second degree burglary[43] are also reduced to 5 years under the second default rule.[44] And the District's stand-alone attempted robbery statute effectively reduces the 15 year statutory maximum applicable to the completed offense[45] to 3 years for an attempt.[46]

These substantially discounted attempt penalties are to be contrasted with those that reflect a grading pattern that might be referred as "equal punishment," namely, they subject attempts to the same statutory maximum governing the completed offense. The D.C. Code is comprised of numerous attempt offenses that effectively equalize the sanction for attempts, though the D.C. Council has authorized this outcome in a variety of ways.

Most explicit is the District's semi-general penalty provision for drug crimes, D.C. Code § 48-904.09, which broadly states that all attempted drug crimes may be punished as seriously as completed drug crimes.[47] In practical effect, this means that, *inter alia*, an attempt to manufacture, distribute, or possess, with intent to manufacture or distribute, a Schedule I or II controlled substance is subject to the same 30 statutory maximum governing the completed offense.[48]

A pattern of equal punishment is also apparent in those District offenses that statutorily incorporate the term "attempts" into their statutory definition. This includes property offenses such as arson[49] malicious destruction of property,[50] and extortion[51] all

[42] D.C. Code § 22-1101(c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 15 years, or both.").

[43] D.C. Code § 22-801(b) ("Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.").

[44] *See* D.C. Code § 22-1803.

[45] D.C. Code § 22-2801 ("Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[46] D.C. Code § 22-2802 ("Whoever attempts to commit robbery, as defined in § 22-2801, by an overt act, shall be imprisoned for not more than 3 years or be fined not more than the amount set forth in § 22-3571.01, or both.").

[47] D.C. Code § 48-904.09 ("Any person who attempts . . . to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt . . . .")

[48] *See* D.C. Code § 48-904.01(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[49] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[50] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own, of the value of $1,000 or more, shall be fined not more than the amount set forth in § 22-3571.01 or shall be imprisoned for not more than 10 years, or both, and if the property has some value shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

of which, by virtue of incorporating the term attempts into their offense definition, subject attempts to the same 10 year statutory maximum applicable to the completed offense.[52] It also includes prison escape[53] and enticing a child[54] which ensure, through similar means, that attempts to commit those offenses are subject to the same 5 year statutory maxima governing the completed versions of those offenses.[55]

A great many other District attempt offenses exhibit a pattern of equal punishment through more convoluted means. For example, the District's while armed enhancement applies the same flat 30 year statutory maximum add-on to numerous crimes, without regard to whether the underlying crime is completed or merely attempted, through the D.C. Code's definition of "crimes of violence" and "dangerous crimes."[56] In addition,

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[51] D.C. Code §§ 22-3251(a)-(b) ("A person commits the offense of extortion if . . . That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or . . . That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right . . . Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.").

[52] Arson is a crime of violence, MDP is not a crime of violence, and extortion is sometimes a crime of violence. *See* D.C. Code § 23-1331(4).

[53] D.C. Code §§ 22-2601(a)-(b) ("No person shall escape or attempt to escape from [specified institutions] . . . . Any person who violates subsection (a) of this section shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both . . . .").

[54] D.C. Code § 22-3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor, (1) takes that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02, or (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both."); D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact, or (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[55] *See also* D.C. Code § 22-3302(a)(1) ("Any person who, without lawful authority, shall enter, or attempt to enter, any private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than the amount set forth in § 22-3571.01, imprisonment for not more than 180 days, or both.").

[56] More specifically, D.C. Code § 22–4502(a)(1) establishes that anyone who commits a violent or dangerous crime:

> May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses . . . and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years . . . .

See also D.C. Code § 22-2803(b)(1) ("A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie

attempts to commit the least severe forms of theft,[57] fraud,[58] receiving stolen property,[59] financial exploitation of a vulnerable adult or elderly person,[60] and assault[61] are all subject to the same penalty as the completed offense by virtue of the default 180 day rule applicable to non-violent crimes in the general attempt statute.[62] And similarly, an attempt to commit blackmail[63]—when committed in a manner so as to render it a crime of violence[64]—is subject to the same statutory maximum applicable to the completed offense pursuant to the 5 year default rule governing crimes of violence under the general attempt statute.[65]

Perhaps most confusingly and contradictory, however, is that equal punishment appears in a handful of District statutes which, textually speaking, authorize attempts to be punished *more severely* than the completed offense. For example, whereas the completed version of assault with significant bodily injury is subject to a 3 year statutory maximum,[66] an attempt to commit that offense appears to be subject to a statutory maxima of 5 years pursuant to the general attempt penalty statute's default rule for crimes of violence.[67] And whereas the completed versions of unlawful entry of a motor vehicle[68] and taking property without right[69] are subject to 90 days in prison, an attempt

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knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking.").

[57] D.C. Code § 22-3212(b) ("Any person convicted of theft in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property obtained or used has some value.").

[58] D.C. Code § 22-3222(b)(2) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property that was the object of the scheme or systematic course of conduct has some value.").

[59] D.C. Code § 22-3232(c)(2) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both, if the stolen property has some value.").

[60] D.C. Code § 22-936.01(a)("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . . When the property or legal obligation has some value, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 180 days, or both.").

[61] D.C. Code § 22-404 ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[62] *See* D.C. Code § 22-1803.

[63] D.C. Code §§ 22-3252(a)-(b) ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens [to do one of three kinds of acts] . . . . Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[64] *See* D.C. Code § 23-1331(4).

[65] *See* D.C. Code § 22-1803.

[66] DC. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[67] *See* D.C. Code § 22-1803.

[68] D.C. Code § 22-1341 ("It is unlawful to enter or be inside of the motor vehicle of another person without the permission of the owner or person lawfully in charge of the motor vehicle. A person who violates this subsection shall, upon conviction, be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both.").

[69] D.C. Code § 22-3216 ("A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so. A person convicted of taking property

to commit either of those offenses appears to be subject to the 180 day default rule for non-violent crimes under the general attempt penalty statute.[70] Notwithstanding these textual anachronisms, however, District case law appears to preclude a defendant from receiving a sentence for an attempt greater than that authorized for the completed offense.[71] For all intensive purposes, then, these statutes also reflect a pattern of equal punishment.

The District's attempt statutes manifest one other important grading pattern, which is both harsher than a substantial punishment discount but more lenient than equal punishment—what might be referred to as a "proportionate punishment discount." This pattern is reflected in many of the District's more recent attempt offenses, which are subject to a statutory maximum that is pegged to, and is half as severe as, the statutory maximum applicable to the completed offense.

One illustrative example is the semi-general attempt penalty provision incorporated into the Anti-Sexual Abuse Act of 1994,[72] which sets attempt penalties at "1/2 of the maximum prison sentence authorized for the [completed] offense."[73] In practical effect, this applies a proportionate punishment discount to a wide range of sex offenses, including second,[74] third,[75] and fourth degree sexual abuse,[76] second degree child sexual abuse,[77] first[78] and second degree[79] sexual abuse of a minor, and first[80] and second degree[81] sexual abuse of a secondary education student.

Another illustrative example is the similar semi-general attempt penalty provision incorporated into the Prohibition Against Human Trafficking Amendment Act of 2010.[82] That provision also sets attempt penalties at "1/2 the maximum term otherwise authorized

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without right shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 90 days, or both.").

[70] *See* D.C. Code § 22-1803.

[71] In *United States v. Pearson*, the D.C. Municipal Court of Appeals indicated that where the maximum statutory penalty for attempt is higher than the penalty for the completed crime, the court cannot *sentence* the defendant to a penalty higher than the statutory maximum penalty for the completed offense. *United States v. Pearson*, 202 A.2d 392, 393-94 (D.C. 1964). Specifically, the court held that a defendant convicted of attempted petit larceny could not be sentenced to a higher penalty than the maximum penalty for the completed offense. The court declined to declare the attempt statute invalid but suggested that Congress may want to rewrite the penalties and suggested the statute's validity may come into question only where, unlike in *Pearson*, a defendant is sentenced to a greater penalty than the maximum for the completed offense. *Id.*

[72] *See* ANTI-SEXUAL ABUSE OF 1994, D.C. Law 10-257, § 217, 42 DCR 53 (May 23, 1995).

[73] *See* D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.")

[74] *See* D.C. Code § 22–3003.

[75] *See* D.C. Code § 22–3004.

[76] *See* D.C. Code § 22–3005.

[77] *See* D.C. Code § 22–3009.

[78] *See* D.C. Code § 22–3009.01.

[79] *See* D.C. Code § 22–3009.02.

[80] *See* D.C. Code § 22–3009.03.

[81] *See* D.C. Code § 22–3009.04.

[82] *See* PROHIBITION AGAINST HUMAN TRAFFICKING AMENDMENT ACT of 2010, D.C. Law 18-239, § 107, 57 DCR 5405 (October 23, 2010).

for the [completed] offense."[83] In practical effect, this applies a proportionate penalty discount to a wide range of human trafficking offenses, including attempts to commit forced labor,[84] trafficking in labor or commercial sex acts,[85] sex trafficking of children,[86] unlawful conduct with respect to documents in furtherance of human trafficking,[87] and benefitting financially from human trafficking.[88]

The D.C. Council has also, on occasion, applied a proportionate punishment discount to individual offenses through specific attempt penalty provisions. For example, the District's aggravated assault statute—enacted in 1994 as part of the Omnibus Criminal Justice Reform Amendment Act[89]—contains a specific attempt penalty provision halving the 10 year statutory maximum governing the completed offense to 5 years.[90]

Viewed as a whole, then, the District's approach to grading criminal attempts does not reflect any consistent principle of punishment: the D.C. Code manifests at least three fundamentally different patterns in how it grades attempts, without any discernible rationale for the variances. In practical effect, this produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

At the same time, these potential disproportionalities are not immediately apparent given the second fundamental flaw reflected in the District law of attempts, namely, its disorganized approach to codification. For example, notwithstanding the fact that the District's general attempt statute is worded in a way which suggests that the 1901 attempt penalty exceptions remain the only exceptions to the current default penalty rules, the reality is that the D.C. Code is littered with statutory attempt provisions that establish penalties in derogation from these rules. Further, the manner in which these exceptions are communicated is quite inconsistent: some are communicated through individual penalty provisions incorporated into a single offense; others are communicated through semi-general attempt penalty provisions that apply to groups of offenses; and still other exceptions are communicated by including the word "attempt" in the definition of the offense. And on top of all of this complexity rests the District's AWI offenses, which

[83] *Compare* D.C. Code § 22-1837(a)(1) ("[W]hoever violates § 22-1832, § 22-1833, or § 22-1834 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 20 years, or both.") *with* D.C. Code § 22-1837(d) ("Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than 1/2 the maximum fine otherwise authorized for the offense, imprisoned for not more than 1/2 the maximum term otherwise authorized for the offense, or both.")

[84] *See* D.C. Code § 22–1832.

[85] *See* D.C. Code § 22–1833.

[86] *See* D.C. Code § 22–1833.

[87] *See* D.C. Code § 22–1835.

[88] *See* D.C. Code § 22–1836.

[89] *See Perry v. United States*, 36 A.3d 799, 814 (D.C. 2011) (citing OMNIBUS CRIMINAL JUSTICE REFORM AMENDMENT ACT OF 1994, D.C. Law 10–151 (Aug. 20, 1994)).

[90] *Compare* D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both.") *with* D.C. Code § 22-404.01(c) ("Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 5 years, or both.").

add yet another "unnecessary" layer of confusion to the grading of criminal attempts provided by the D.C. Code.[91]

RCC § 301(c) endeavors to remedy these issues by establishing a clear and consistent approach to grading attempts, which renders offense penalties more proportionate. First, RCC § 301(c)(1) adopts a single generally applicable grading principle: a proportionate penalty discount under which the statutory maximum and fine for an attempt is set at one-half of the statutory maximum and fine of the completed offense. This general principle is supplemented by RCC § 301(c)(2), which expressly recognizes the possibility of offense-specific exceptions to be clearly articulated in a single general provision incorporated into the General Part.

The effect of RCC § 301(c) on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses. In some instances, the attempt penalties reflected in the RCC are more severe than those applied by the current D.C. Code for comparable conduct.[92] In other instances, however, the penalties are less severe.[93] And in still other offenses, the penalties are approximately similar.[94]

For those current District attempt offenses subject to a substantial punishment discount, RCC § 301(c)(1) allows for the imposition of sentences for criminal attempts that are significantly greater than those presently authorized under current District law. Illustrative are attempts to commit various non-violent offenses such as first degree theft, first and second degree fraud, first degree receiving stolen property, first degree financial exploitation of a vulnerable adult or elderly person which are, under current District law, misdemeanors subject to statutory maxima of 180 days. Under RCC § 301(c)(1), in contrast, the authorized sentence must be measured in years, particularly where the target property is valuable.[95]

This increase in authorized punishment will also apply to attempts to commit various violent offenses that are currently subject to a substantial punishment discount under District law. Illustrative are attempts to commit first-degree murder and second-degree murder, which, under current District law, are subject to a statutory maxima of 5 years under D.C. Code § 22-1803.[96] Under RCC § 301(c)(1), in contrast, the authorized punishments for attempts to commit these offenses will be increased significantly.[97]

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[91] As the DCCA observed in *Perry v. United States*, AWI offenses have been rendered "unnecessary" by the "[m]odern grading of attempt according to the gravity of the underlying offense." *Perry*, 36 A.3d at 825 (citation and quotation omitted). As discussed below, AWI offenses were originally created to supplement the "relatively trivial sanctions" afforded by criminal attempt offenses employed at common law. Model Penal Code § 211.1 cmt. at 181-82. Since then, however, the District, along with every other jurisdiction in America, has come to realize that attempts can themselves be graded more seriously, contingent upon the severity of the target offense. WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 16.2 (Westlaw 2017).

[92] [RESERVED].

[93] [RESERVED].

[94] [RESERVED]. Notably, under both D.C. Code § 22-3571.01 and RCC § 804, fines are generally cut in half whenever penalties are cut in half. Therefore, the halving of fines provided for in RCC § 301(c)(1) is consistent with, and generally reflects, current District law.

[95] [RESERVED].

[96] [RESERVED]. Note, however, that the District's most severe AWI statute partially fills this gap by applying a 15 year statutory maximum to attempted murders that progress to the point of an assault. *See* D.C. Code § 22-401. Importantly, though, many attempted murders may not reach that level of progress. As the Maryland Court of Appeals has observed:

By contrast, the penalties for current District attempt offenses subject to equal punishment would be lower under RCC § 301(c)(1). This decrease in punishment applies to attempts to commit various non-violent offenses, such as malicious destruction of property and simple assault, which now penalize attempts the same as completed offenses.[98] And it also applies to attempts to commit various violent offenses, such as attempted arson and assault with significant bodily injury. Under RCC § (c)(1), in contrast, the maximum authorized punishment for these attempt offenses is effectively cut in half.

To the extent RCC § 301(c) changes current District law, the changes enhance the proportionality of the District's statutorily authorized punishments. These changes also generally accord with nationwide legal trends, discussed below. And to the extent that the D.C. Council has, in many of its more recently enacted statutes, applied a proportionate punishment discount, they are supported by current District law. Finally, under RCC § 301(c)(2), exceptions to the consistent punishment of criminal attempts are clearly stated.

Relation to National Legal Trends. Subsection 301(c) is in accordance with American legal trends. Consistent with RCC § 301(c)(1), a strong majority of jurisdictions apply a generally applicable proportionate penalty discount to grade criminal attempts. And regardless of which attempt grading principle a given jurisdiction adopts, nearly all of them recognize statutory exceptions consistent with RCC § 301(c)(2).

The historical development of the punishment of attempts, like every other area of attempt policy, can be understood through the competing objectivist and subjectivist perspectives on criminal liability.[99] At the heart of the dispute between these two theories is whether the criminal law—both in determining guilt and calibrating punishment—ought to primarily focus on the dangerousness of an act, or, alternatively, the dangerousness of an actor.[100]

On the objectivist understanding of criminal liability, causing (or risking) social harm is the gravamen of a criminal offense.[101] It therefore follows that greater

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> Because the overt act necessary for an attempt is frequently an assault, the two crimes have a significant overlap. But the overlap is not complete, because an overt act can qualify as an attempt and yet not rise to the level of an assault. For example, an attempted poisoning would qualify as attempted murder, but it would not be an assault, especially if the poison did not come in contact with the victim . . The law of assault crystallizing at a much earlier day than the law of criminal attempt in general, is much more literal in its requirement of "dangerous proximity to success" (actual or apparent) than is the law in regard to an attempt to commit an offense other than battery.

Hardy v. State, 482 A.2d 474, 477 (1984).

[97] [RESERVED]. Practically speaking, the severity of this increase would be mitigated by the repeal of AWI offenses, which afford a more serious penalty to what practically amounts to an attempt to commit some of these offenses.

[98] [RESERVED].

[99] *See generally, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978); Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173 (2011); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L REV. 363 (2004).

[100] FLETCHER, *supra* note 99, at 173-174.

[101] *Id.* at 171; *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05 (6th ed. 2012).

punishment should be imposed where the harm actually occurs and less punishment when—as is the case with an attempt—it does not.[102] From the objectivist perspective, result-based grading is a fundamental component of any just penal system.[103]

The common law approach to grading criminal attempts reflects this objectivist perspective. In the early years of the common law, any attempt "was a misdemeanor, regardless of the nature or seriousness of the offense that the person sought to commit."[104] In later years, legislatures began to apply more serious penalties to criminal attempts, though these penalties were distributed in varying, and frequently haphazard, ways.[105] For the most part, though, these penalties were still significantly less severe than those governing the completed offense.[106] There was, however, one notable exception: "Assault With Intent" to offenses (AWIs), which were "functionally analogous to specific applications of the law of attempt, though generally requiring closer proximity to actual completion of the offense and carrying heavier penalties."[107] But even accounting for AWIs, the common law approach to grading attempts was one that viewed the realization of intended harm as material to evaluating the seriousness of an offense.[108]

This objectivist view of attempt liability is to be contrasted with a subjectivist perspective, under which an actor's culpable decision-making—that is, his or her intention to engage in or risk harmful or wrongful activity—is considered to be the gravamen of an offense.[109] If, as subjectivism posits, an actor's dangerous

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[102] FLETCHER, *supra* note 99, at 173-174.

[103] *See generally* Ashworth, *supra* note 99, at 725; Garvey, *supra* note 99, at 173.

[104] DRESSLER, *supra* note 101, at § 27.05.

[105] Consider, for example, the observations of the Model Penal Code drafters:

> [Common law attempt penalty] statutes fitted into a number of identifiable patterns . . . One common provision set specific maximum penalties, ranging from 10 to 50 years, for attempts to commit crimes punishable by death or life imprisonment, and fixed the penalty for all other attempts at one half of the maximum for the completed crime. Another common provision established a number of categories according to the nature or severity of the completed crime, specifying a different range of penalties, definite prison terms and fines, for attempts to commit crimes encompassed within each category. Closely related was the now common solution in which attempt is graded one class below the object offense. There were also a number of states that used a combination of these approaches. Some jurisdictions, on the other hand, provided a fixed maximum penalty for all attempts encompassed by the general attempt provision. A few . . . authorized a penalty for the attempt that was as great as the penalty for the completed crime.

MPC § 5.05, cmt. at 485.

[106] DRESSLER, *supra* note 101, at § 27.05.

[107] Model Penal Code § 211.1 cmt. at 181-82. AWIs prohibit the commission of a simple assault accompanied by an intent to commit some further, typically more serious, criminal offense. Illustrative examples include assault with intent to commit murder, assault with intent to commit rape, and assault with intent to commit mayhem, each of which require proof of a simple assault in addition to the respective inchoate mental states of intending to commit murder, rape, and mayhem. Offenses of this nature were created to "allow a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end." *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011).

[108] *See* MPC § 211.1 cmt. at 181-82.

[109] *See* DRESSLER, *supra* note 101, at § 27.05 ("Subjectivists assert that, in determining guilt and calibrating punishment, the criminal law in general, and attempt law in particular, should focus on an actor's subjective

decisionmaking ought to be the focus of criminal laws, then there is no reason to distinguish between an actor who consummates an intended harm and an actor (such as a criminal attempter) who does not—both are equally dangerous, and, therefore, both ought to receive the same punishment.[110]

This subjectivist perspective pervades the work of the Model Penal Code, the drafters of which explicitly sought to replace the common law's objectivist approach to grading with one that affords the actual occurrence of the requisite harm or evil implicated by an offense minimal, if any, significance.[111] Illustrative of the Code's commitment to subjectivism is the general principle of equal punishment reflected in Model Penal Code § 5.05(1), which grades most criminal attempts as "crimes of the same grade and degree as the most serious offense which is attempted."

Premised on the subjectivist view that "sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction," the Model Penal Code approach to grading criminal attempts was intended to render results largerly immaterial insofar at the maximum statutorily authorized punishment is concerned.[112] Importantly, though, the Model Penal Code does not equalize the sanction for all attempts. Rather, the general rule stated in Model Penal Code § 5.05(1) is also subject to a narrow, but significant, exception: "[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree." This carve out subjects attempts to commit the most serious crimes—for example, murder and aggravated assault—to a principle of proportionate penalty discounting.[113]

One other aspect of the Model Penal Code's broadly (though not entirely) subjectivist approach to grading attempts bears comment: the elimination of AWI

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intentions (her mens rea)—her choice to commit a crime—which simultaneously bespeak her dangerousness and bad character (or, at least, her morally culpable choice-making), rather than focus on the external conduct (the actus reus), which may or may not result in injury on a particular occasion.").

[110] *See* DRESSLER, *supra* note 101, at § 27.03 ("[A]pplying subjectivist theories, anyone who attempts to commit a crime is dangerous. Whether or not she succeeds in her criminal venture, she is likely to represent an ongoing threat to the community.").

[111] MPC § 211.1 cmt. at 181-82. DRESSLER, *supra* note 101, at § 27.05 ("[T]he criminal attempt provisions of the Model Penal Code are largely based on subjectivist conceptions of inchoate liability, whereas the common law of attempts includes many strands of objectivist thought, as well as some subjectivism.").

[112] Model Penal Code § 5.05 cmt. at 490.

[113] Here's how the drafters of the Model Penal Code justified this collective attempt grading framework:

> To the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan. It is only when and insofar as the severity of sentence is designed for general deterrent purposes that a distinction on this ground is likely to have reasonable force. It is doubtful, however, that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object, which he, by hypothesis, ignores. Hence, there is basis for economizing in use of the heaviest and most afflictive sanctions by removing them from the inchoate crimes. The sentencing provisions for second degree felonies, including the provision for extended terms, should certainly suffice to meet whatever danger is presented by the actor.

Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 1028–29 (1961).

offenses, which were frequently employed at common law. The drafters' decision to omit AWI offenses from the Code's Special Part was based on their view that the "modern grading of attempt according to the gravity of the underlying offense [renders] laws of this type unnecessary."[114]

The Model Penal Code approach to grading attempts has, in some respects, been quite influential. For example, since completion of the Code, many state legislatures have applied more uniform grading practices to attempts, while, at the same time, jettisoning their AWI offenses.[115] Importantly, however, the Code's most significant policy proscription—the subjectivist recommendation of equalizing attempt penalties—has not been hugely influential, either inside or outside of reform jurisdictions. Rather, the vast majority of American criminal codes continue to reflect the common law, objectivist approach to grading attempts.[116]

For example, the criminal codes in 36 jurisdictions contain general attempt penalty provisions punishing most attempts less severely than completed offenses.[117] In contrast, only 14 jurisdictions appear to have adopted general attempt penalty provisions equalizing the sanction for most criminal attempts,[118] though it should be noted that even

[114] Model Penal Code § 211.1 cmt. at 181-82.

[115] As one commentator observes, "virtually all modern codes" have eliminated AWI offenses based on the recognition that "the problem [AWI offenses were created to solve] has been resolved by grading the crime of attempt according to the seriousness of the objective crime." LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 16.2; *but see* N.M. Stat. Ann. § 30-3-3 ("Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary."); Nev. Rev. Stat. § 200.400 ("A person who is convicted of battery with the intent to commit mayhem, robbery or grand larceny is guilty of a category B felony . . . A person who is convicted of battery with the intent to kill is guilty of a category B felony . . . ."); Mich. Comp. Laws § 750.83 ("Assault with intent to commit murder—Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years."). For various jurisdictions that have not modernized their codes and still retain such offenses, see MPC § 211.1 cmt. at 182 n.39 (collecting statutes).

[116] *See generally* DRESSLER, *supra* note 101, at § 27.05 ("At common law and in most jurisdictions today, an attempt to commit a felony is considered a less serious crime and, therefore, is punished less severely, than the target offense.").

[117] *See* Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301; Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664; Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42; Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6; Mich. Comp. Laws Ann. § 750.92; Vt. Stat. Ann. tit. 13, § 9; Nev. Rev. Stat. Ann. § 193.330; P.R. Laws Ann. tit. 33, § 3122; D.C. Code § 22-1803. Note that "Rhode Island defines no attempt offenses at all in its code." Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 956 (2007)

[118] Del. Code Ann. tit. 11, § 531; Haw. Rev. Stat. § 705-502; Mont. Code Ann. § 45-4-103; S.C. Code Ann. § 16-1-80; Md. Code Ann., Crim. Law § 1-201; Conn. Gen. Stat. Ann. § 53a-51; N.D. Cent. Code Ann. § 12.1-06-01; Ind. Code Ann. § 35-41-5-1; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-4; Wyo. Stat. § 6-1-304; Pa. Cons. Stat. Ann. tit. 18, § 905; Wyo. Stat. § 6-1-304; Miss. Code. Ann. § 97-1-7.

where this legislative practice is followed, it's questionable whether the actual sentences imposed for attempts are actually equivalent to those for completed offenses.[119]

Similarly reflective of the Code's relative lack of influence over state level attempt grading policies is the fact that a strong majority of the "modern American codes that are highly influenced by the Model Penal Code" nevertheless adopt an objectivist approach to grading attempts.[120] For example, as one analysis of legislative trends in reform jurisdictions observes: whereas "[n]early two-thirds of American jurisdictions have adopted [MPC-based] codes," fewer "than 30% of these have adopted the Code's [attempt] grading provision or something akin to it."[121]

It's important to point out that within these majority and minority legislative practices, "[c]onsiderable variation is to be found . . . concerning the authorized penalties for attempt."[122] Most significant is that among those criminal codes generally embracing a principle of proportionate punishment discounting, the nature of that discount varies materially.[123] For example, many of these jurisdictions grade attempts at a set number of penalty classes—usually one but occasionally two[124]—below the class affixed to the

[119] "It has been noted," for example, "that even when the legislature imposes similar sanctions for attempts and completed crimes, in practice the punishment for an attempt is less than the punishment for a consummated crime." Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299, 319 n.44 (1996) (citing GLANVILLE WILLIAMS, TEXTBOOK ON CRIMINAL LAW 404 (2d ed. 1983)).

[120] Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 381 (2003).

[121] Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 320 (1994).

[122] LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

[123] This is due, in part, to the fact that the punishment differential between classes varies. For an illustrative example, consider that while Oregon, Colorado, and Arizona all apply a one-grade discount to criminal attempts, the value of that discount varies both between and among jurisdictions.

For example, Oregon's approach treats attempts as a: (1) class A (20 year) felony if the offense attempted is murder or treason (punishable by death); (2) class B (10 year) felony if the offense attempted is a class A (20 year) felony; (3) class C (5 year) felony if the offense attempted is a class B (10 year) felony; (4) class A (1 year) misdemeanor if the offense attempted is a class C (5 year) felony or an unclassified felony; (5) class B (6 month) misdemeanor if the offense attempted is a class A (1 year) misdemeanor; and (6) class C (30 day) misdemeanor if the offense attempted is a class B (6 month) misdemeanor. Or. Rev. Stat. Ann. § 161.405.

Compare this with Colorado's approach, under which a criminal attempt to commit: (1) a class 1 felony (punishable by death) is a class 2 (24 year) felony; (2) a class 2 (24 year) felony is a class 3 (12 year) felony; (3) a class 3 (12 year) felony is a class 4 (6 year) felony; (4) a class 4 (6 year) felony is a class 5 (3 year) felony; (5) a class 5 (3 year) or 6 (1.5 year) felony is a class 6 (1.5 year) felony; (6) a class 1 (1.5 year) misdemeanor is a class 2 (1 year) misdemeanor; (7) a misdemeanor other than a class 1 (1.5 year) misdemeanor is a class 3 (6 month); and (8) a petty offense is a crime of the same class as the offense itself.

Now compare both of these approaches with Arizona's approach—reflected in its maximum statutory guidelines applicable to first time felony offenders—under which a criminal attempt to commit: (1) a class 1 (20) felony is a class 2 (10 year) felony; (2) a class 2 (10 year) felony is a class 3 (7 year) felony; (3) a class 3 (7 year) felony is a class 4 (3 year) felony; (4) a class 4 (3 year) felony is a class 5 (2 year) felony; and a class 5 felony (2 year) is a class 6 (1.5) felony. Ariz. Rev. Stat. Ann. § 13-1001.

[124] States vary widely in the number of penalty classes they use, with most having fewer than those in the RCC. *See* COMMENTARY TO RCC § 801. In states with fewer classes, the difference in penalties between classes is generally greater, such that a downward adjustment of just one class for an attempt penalty may amount to a fifty percent reduction in the maximum imprisonment exposure.

completed offense.[125] In contrast, a substantial number of these jurisdictions either explicitly punish attempts at half the amount of the target offense,[126] or, in the alternative, incorporate some combination of grade lowering and halving of statutory maxima.[127]

Another notable area of variance within American legislative attempt grading practices relates to the recognition of exceptions. A strong majority of American criminal codes explicitly recognize statutory exceptions to their generally applicable grading rules (regardless of rules they actually endorse).[128] But at the same time, the contours of these exceptions vary substantially. For example, numerous criminal codes exempt varying categories of offenses from their generally applicable grading rules—and this is so, moreover, in jurisdictions that broadly endorse a principle of proportionate punishment discounting[129] as well as those that endorse one of equal punishment.[130] Likewise, an even larger number of American criminal codes exempt varying individual offenses from their generally applicable grading rules—which, again, is reflected in jurisdictions that broadly endorse a principle of proportionate punishment discounting [131] as well as those that endorse one of equal punishment.[132]

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[125] Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Nev. Rev. Stat. Ann. § 193.330; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301.

[126] *See* Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[127] Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6.

[128] Among jurisdictions that apply a principle of equal punishment to grading attempts, only about five appear to apply it unequivocally, without exception. Robinson, *supra* note 121, at 320 n.67.

[129] *E.g.*, N.Y. Penal Law § 110.05 (exempting attempts to commit some Class A-I felonies and all class A-II felonies from standard attempt penalty discount); Minn. Stat. Ann. § 609.17(4) (applying different attempt penalty discount to offenses subject to life imprisonment); Ga. Code Ann. § 16-4-6 (applying different attempt penalty discount to offenses subject to life imprisonment or death); Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[130] *E.g.*, Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[131] *E.g.*, Alaska Stat. § 11.31.100 (exempting attempted murder from standard attempt penalty discount); Ariz. Rev. Stat. Ann. § 13-1001 (exempting attempted murder from standard attempt penalty discount); Fla. Stat. Ann. § 777.04 (applying standard attempt penalty discount "except as otherwise provided"); Ill. Comp. Stat. Ann. ch. 720, § 5/8-4 (exempting attempted murder from standard attempt penalty discount); Me. Rev. Stat. tit. 17-A, § 152 (exempting attempted murder from standard attempt penalty discount); Mo. Ann. Stat. § 564.011 (applying standard attempt penalty discount "unless otherwise provided); N.C. Gen. Stat. Ann. § 14-2.5 (applying standard attempt penalty discount "[u]nless a different classification is expressly stated"); Ohio Rev. Code Ann. § 2923.02 (applying standard attempt penalty discount except for attempts to commit various enumerated serious offenses); Or. Rev. Stat. § 161.405 (exempting attempted murder or treason from standard attempt penalty discount); Utah Code Ann. § 76-4-102 (exempting various enumerated serious felonies from standard attempt penalty discount); Wash. Rev. Code § 9A.28.020 (exempting various enumerated serious felonies from standard attempt penalty discount); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Kan. Stat. Ann. § 21-

Statutory variances aside, it is nevertheless clear that American legislative practice, when viewed as a whole, clearly supports the common law, objectivist approach to grading attempts. Less clear, however, is the position supported by expert opinion: there exists a substantial amount of legal commentary on the relevance of results to punishment, which reflects an ongoing and persistent amount of scholarly disagreement over the appropriate grading of criminal attempts.[133] At the same time, there is another perspective on the grading of criminal attempts reflected in the scholarly literature, which seems to provide relatively clear support for the common law, objectivist approach: that of the people.[134]

More specifically, public opinion surveys seem to consistently find that lay judgments of relative blameworthiness view the consummation of results as an important and significant grading factor.[135] For example, in one well-known study, researchers found that the failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades."[136] This substantial "no-harm discount" was reflected where study participants were asked to compare the deserved punishment for two actors who had both done everything necessary from their end to consummate the offense, but where one was, due to circumstances outside of his control, unable to cause the intended harm.[137] And when study participants were presented with a scenario involving an actor

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5301(c)(exempting enumerated list of offenses from standard attempt penalty discount); Wis. Stat. Ann. § 939.32(1) (exempting enumerated list of offenses from standard attempt penalty discount); *see also* Tenn. Code Ann. § 39-12-107 (no attempts to commit class c misdemeanor).

[132] *E.g.*, Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[133] *See, e.g.*, Theodore Y. Blumoff, *A Jurisprudence for Punishing Attempts Asymmetrically*, 6 BUFF. CRIM. L. REV. 951 (2003); Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 BYU L. REV. 553; Russell Christopher, *Does Attempted Murder Deserve Greater Punishment than Murder? Moral Luck and the Duty to Prevent Harm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004); Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes*, 5 LAW & PHIL. 1 (1986); Bebhimm Donnelly, *Sentencing and Consequences: A Divergence Between Blameworthiness and Liability to Punishment*, 10 NEW CRIM. L. REV. 392 (2007); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1 (2007); Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143 (1995); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

[134] *See, e.g.*, Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUDIES 409, 430 (1998) (finding that public opinion surveys generally indicate that members of the public are "objectivist-grading subjectivists."); Dressler, *supra* note 101, at § 27.04 n.54 (citing *id.* and explaining that "people tend to be subjectivist (they focus on an actor's state of mind) in determining what the minimum criteria should be for holding an actor criminally responsible for her inchoate conduct, but once it is determined that punishment is appropriate and the only issue is how much punishment to inflict, they tend to become objectivist (they focus on resulting harm) and favor the common law lesser-punishment result.").

[135] *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 14-28, 157-97 (1995); Robinson & Darley, *supra* note 134, at 427-30.

[136] Robinson & Darley, *supra* note 134, at 428.

[137] *See id.*

who was stopped before he was able to carry out his criminal plans, the reduction in liability appears to have been even larger.[138]

Strong public support for the common law, objectivist approach to grading criminal attempts likely explains why both the drafters of Model Penal Code and most of the state legislatures that pursued their subjectivist approach to grading attempts ultimately decided to exempt the most serious offenses from a principle of equal punishment.[139] As one commentator has observed: "The instances where the Model Penal Code drafters have elected to compromise on their view that results ought to be irrelevant are typically instances, like homicide or causing catastrophe, where their unpopular view of results would be highlighted and most likely to cause public stir."[140]

The RCC approach to grading criminal attempts is consistent with the above considerations. RCC § 301(c)(1) codifies a general principle of proportionate punishment discounting that is consistent with the common law, objectivist approach reflected in a strong majority of jurisdictions. And RCC § 301(c)(2) recognizes the possibility of individual exceptions to this principle, which, again, finds support in majority legislative practice.

[138] *See id.* at 429.
[139] *See* Robinson, *supra* note 120, at 379-85.
[140] *Id.*