

THE ECONOMICS OF THE LAW
OF CRIMINAL ATTEMPTS:
A VICTIM-CENTERED PERSPECTIVE

Omri Ben-Shahar*
Alon Harel**

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*Assistant Professor of Law and Economics, Tel-Aviv University
and S.J.D. Candidate, Harvard Law School.

**Senior Lecturer of Law, Hebrew University, Israel.

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* Assistant Professor of Law and Economics, Tel-Aviv University and S.J.D Candidate, Harvard Law School; Senior Lecturer of Law, Hebrew University, Israel. We are grateful to Scott Altman, Sarah Clarke Ben-Shahar, Miriam Gur-Aryeh, Marty Levine and Mike Otsuka for helpful comments on previous drafts. The Olin Program in Law and Economics at Harvard Law School provided financial assistance for the research of this article.

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ABSTRACT

Potential victims can take various measures against crimes directed towards them. In designing an optimal law enforcement regime, the role assigned to victims has to be carefully examined. This article raises concerns whether potential victims will have the proper incentives to engage in precautionary measures. Victims' benefits from precautions may diverge from the social benefit, leading to a distorted amount of precautionary activity. It argues, however, that criminal law policy may resolve this distortion and provide victims with optimal incentives by tuning the sanctions inflicted upon criminals according to their victims' conduct. Applying this idea, the article offers a justification for the legal treatment of pre-crime activities, especially the law of attempt. Ordinarily, attempts are treated more leniently than completed crimes. This practice affects the incentives of potential victims to take measures which lead attempts to fail. The more lenient the punishment for attempts, the smaller the return to prevention measures. The degree of leniency can be tuned to provide optimal prevention incentives for victims.

* Assistant Professor of Law and Economics, Tel-Aviv University and S.J.D. Candidate, Harvard Law School; Senior Lecturer of Law, Hebrew University, Israel.

INTRODUCTION

A criminal act ordinarily involves two parties, a perpetrator and a victim. Criminal law scholarship in general, and economic analysis in particular, traditionally endorse a perpetrator-centered perspective. Under this perspective, all factors relevant to the design of criminal norms emanate from attributes of actual or potential perpetrators of crime. Justifications for punishment and the severity of punishment are based exclusively upon characteristics of the criminal's behavior or mental state. The victim's role is confined to the suffering of harm, while her conduct prior to the crime is generally of no normative concern.¹

This article challenges the perpetrator-centered perspective and proposes a complementary perspective -- a victim-centered one. The article argues that the perpetrator-centered perspective is too narrow because it overlooks the important role that victims have in pre-crime settings. In particular, it neglects the victims' role in taking precautions and protecting themselves against crime, a neglect which leads to a socially undesirable investment in precautionary measures.² By approaching criminal

¹ Introductory presentations of the economic analysis of criminal which exemplify the perpetrator-centered perspective can be found in A. Mitchell Polinsky, *AN INTRODUCTION TO LAW AND ECONOMICS* (2d ed. 1989) ch. 10; Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992), ch. 7; Robert Cooter and Thomas Ulen, *LAW AND ECONOMICS* (1988), ch. 11-12.

² Previous studies have examined the decision making of victims in investing in precautions and have exposed some of the reasons for the inefficiencies in the investment in precautions. See Robert Barr and Ken Pease, *Crime placement and Deflection*, 12 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 277 (1990); C.T. Clotfelter, *The Private Security and the Public Safety*, 5 *JOURNAL OF URBAN ECONOMICS* 388 (1978); Derek B. Cornish and Ronald V. Clarke, *Understanding Crime Displacement: An Application of Rational Choice Theory*, 25 *CRIMINOLOGY* 933 (1987); Ronald V. Clarke, *Introduction*, in *SITUATIONAL CRIME PREVENTION* (Ronald V. Clarke ed. 1992), pp. 21-27; Ronald V. Clarke, *Situational Crime Prevention*, 4 *CRIME AND JUSTICE* 225 (1983); P.J. Cook, *The*

law from a victim-centered perspective, the article aims to facilitate a systematic study of victims' incentives to engage in precautions against crime and of the way criminal law norms shape these incentives.³

The normative premise this article embraces is that of efficiency. It views crime as a social cost that consists of the cost of harm to victims, the cost of precautions taken by victims against harm, and the government's enforcement cost.⁴ Inasmuch as criminal law norms are aimed at reducing these costs, studying victims' incentives to take precautions becomes analytically important and economically worthwhile.⁵

The victim-centered perspective enriches not only the normative study of

Demand and Supply of Criminal Opportunities, 7 CRIME AND JUSTICE 1 (1986); T. Gabor, *Crime Displacement*, 6 CRIME AND JUSTICE 100 (1978); Steven Shavell, *Individual Precautions to Prevent Theft: Private versus Socially Optimal Behavior*, 11 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 123 (1991). K. Hui-Wen and I.P.L. Png, *Private Security: Deterrence of Diversion?*, 14 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 87 (1994); Thomas A. Reppeto, *Crime Prevention and the Displacement Phenomenon* 22 CRIME AND DELINQUENCY 166, (1976). This literature does not offer, however, a victim-centered perspective of criminal law, since it does not address the effects of criminal law norms on victims' investment in precautions.

³ The victim-centered perspective of criminal law restores a symmetry between criminal law and other fields of law. Contract law issues directives to victims of breached contracts as well as to those who have committed such breaches. See *infra* note 94. Tort law scrutinizes the behavior of alleged victims of tort as well as that of alleged tortfeasors in order to determine liability. See *infra* note 95. It has long been understood that different models, studying various areas of law, all share a common approach in their focus on the behavior of the "passive parties" as much as they focus on the behavior of the "active parties." See R.C. Cooter, *Unity in Tort, Contract and Property: A Model of Precautions*, 73 CALIFORNIA LAW REVIEW 1 (1985). Criminal law has not been commonly understood to fit this unified view. In this sense, the victim-centered perspective that this article advances unites the analytical model of criminal law with that of other areas of common law.

⁴ See ESSAYS ON THE ECONOMICS OF CRIME AND PUNISHMENT (Gary S. Becker and William M. Landes, eds., 1974).

⁵ A recent study estimates the spending by potential victims in physically protecting their property to have exceed \$160 Billions in one year. See D.N. Leband and J.P. Sophocleus, *An Estimate of Resource Expenditures on Transfer Activity in the United States*, 107 QUARTERLY JOURNAL OF ECONOMICS 959 (1992).

criminal law, but also provides a positive theory of various existing criminal law doctrines. Doctrines that are ordinarily understood as aimed at influencing perpetrators of crime, can now be provided with additional rationales, that stem from the incentive effects on potential victims. The article will demonstrate this analytical usefulness of the victim-centered perspective by applying it to one of the most intractable doctrines in criminal law theory -- the treatment of criminal attempts.

The main insight that runs through the victim-centered perspective is the following. Criminal law norms can induce victims to take efficient levels of precautions by graduating the sanctions imposed upon criminals in accordance with the behavior of their victims. In particular, if a victim takes the efficient level of precautions, her offender will be sanctioned by a "high" sanction. If a victim takes an inefficient level of precautions, her offender will be sanctioned by a "low" sanction. The differentiated sanctions will lead to differentiated deterrence: rationally calculating criminals will more often target victims who have taken inefficient levels of precautions. Consequently, it is argued, victims will have an incentive to take the efficient level of precautions.

Our previous work has already pointed out some of the ways in which criminal law influence victims' behavior.⁶ This article adds to the study of victims' incentives in two primary aspects. First, It draws a distinction between local and global incentive schemes. Previous work has focused exclusively on **local incentives**, that is, incentives

⁶ See Alon Harel, *Efficiency and Fairness in Criminal Law: the Case for a Criminal Law Principle of Comparative Fault*, 82 CALIFORNIA LAW REVIEW 1181 (1994), and Omri Ben-Shahar and Alon Harel, *Blaming the Victim: Optimal Incentives for Private Precautions against Crime*, 11 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 434 (1995).

which encourage or discourage the usage of certain specific precautions. Local incentives are necessary when a particular precautionary measure, in a given context, is used inefficiently. Several criminal law doctrines were analyzed according to their effect on victims' choice of specific precautions.⁷ In contrast, this article points out the importance of using **global incentives** -- incentives which influence the aggregate investment of victims in precautions. Global incentives are necessary when a particular distortion operates upon victims indiscriminately, regardless of the crime against which they protect themselves or the measures they use. Most importantly, this article will illustrate that entrenched doctrines of criminal law, in particular the treatment of criminal attempts, provide global incentives for potential victims of crime to change their investment in precautions.

Another way in which this article extends previous work is by emphasizing the direction of the distortion in victims' behavior. In some previous work, it was assumed that the law needs to induce victims to **increase** their investment in precautions, which would otherwise be too small.⁸ This article takes a more systematic view at victims' investment in precautions. It exposes several factors that distort the incentives and concludes that the main concern should be victims' overinvestment in precautions. Thus, it argues that criminal law needs to induce victims to **reduce** their investment in precautions. The doctrine of attempt, it shows, is an incentive mechanism that leads

⁷ See *infra* text accompanying notes 35-37.

⁸ See Harel, *supra* note 6. In Ben-Shahar and Harel, *supra* note 6 the assumption of victims' underinvestment in precautions was dropped, and the analysis focused on one factor that may lead to overinvestment in precautions.

victims to reduce their precautions.

The article is organized as follows: Section I examines the pervasiveness of the perpetrator-centered perspective in the existing law and economics scholarship. It argues that the exclusive focus on the incentives of criminals is incompatible with the economic role of criminal law. Designing deterrent measures aimed at criminals is one, but not the only manner in which costs of crime can be curbed. Since victims' investment in precautions is a significant component of the social cost of crime, it is also important to understand what shapes their incentives to invest. Section II then turns to analyze the incentives operating upon potential victims. It concludes that there are conflicting forces, which may sometimes lead to overinvestment in precautions, and in other cases to underinvestment.

Section III articulates the main normative proposition of the analysis. It demonstrates how criminal law norms provide incentives for potential victims to engage in precautions. By understanding how these incentives are affected, the section develops a mechanism for the design of optimal incentives.

Section IV explores how traditional doctrines in criminal law, in particular the law of attempts, can be reinterpreted as mechanisms that provide potential victims with incentives to take optimal precautions against crime. It surveys the main current debates regarding the doctrine of attempt, within traditional scholarship and within law and economics. The section then addresses one of the most difficult questions that arise in these debates -- why do many legal systems treat attempts more leniently than complete crimes? In particular, why does this leniency exist in situations in which the attempt

failed to become complete crime due to factors beyond the perpetrator's control? In addition, this section addresses the problem why is a perpetrator of preparation exempted from criminal liability? What are the factors which determine the boundaries between non-punishable preparation and punishable attempt? In applying the victim-centered perspective to the analysis of criminal attempt, a new justification is developed for the pervasive practice which treats pre-crime activity in general, and attempts in particular, more leniently than complete crimes.

I. THE DOMINANCE OF THE PERPETRATOR-CENTERED PERSPECTIVE

Traditional theories of punishment view criminal sanctions exclusively from a perpetrator-centered perspective. A brief sketch of the traditional justifications for criminal sanctions can support this observation. Textbooks of criminal law often state four theories concerning the major functions of punishment: deterrence, retribution, incapacitation and reformation (or rehabilitation).⁹ All of these theories focus exclusively on the actual or potential criminal. Deterrence (either general or specific) is understood as the effort to deter a **potential criminal** from committing crimes in the future.¹⁰ Retributive theories, on the other hand, are interested in inflicting suffering on the **actual criminal** who, under these theories, deserves to be punished.¹¹ Incapacitation

⁹ See, e.g., Jerome Hall, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed., 1960), 297-309.

¹⁰ See generally Franklin E. Zimring and Gordon J. Hawkins, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973).

¹¹ For a good discussion of different theories of retributive justice see R.A. Duff, *TRIALS AND PUNISHMENTS* (1986), 187-204; C. L. Ten, *CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION* (1987), 38-65; J. G. Cottingham, *Varieties of Retribution*, 29 *PHILOSOPHICAL Q.* 238

focuses on the **criminal** who cannot be deterred and hence should be incapacitated.

Finally, rehabilitation theories study how to reform **criminals** and return them to society.¹² Under all of these theories, criminal law focuses on the acts or mental states of criminals (either potential or actual) and regards victims' behavior or mental state as irrelevant to the concerns of criminal law.

Economic analysis of criminal law joins the general trend of a perpetrator-based perspective. Starting with Becker¹³, who developed the modern economic model of criminal law, attention has been devoted exclusively to the optimal design of incentives for criminals. In Becker's original analysis, as in many studies which followed,¹⁴ the

(1979).

¹² For new attempts to defend rehabilitation theories, see, e.g., Duff, *id.* at 233-266; Jean Hampton, *The Moral Education Theory of Punishment* 13 PHILOSOPHY AND PUBLIC AFFAIRS 208 (1984). Admittedly, there are theories of punishment which cannot easily be categorized under those four headings. Such theories, however, have not been influential in legal circles. The most prominent of those theories is the expressive theory of punishment which regards punishment as expressing societal condemnation of criminal behavior. See Duff, *id.*, at 235-239; Joel Feinberg, *The Expressive Function of Punishment*, in Joel Feinberg, *DOING AND DESERVING* (1970), 95. However, the expressive theory is not exempted from the deficiencies of the other theories. For our purposes it is sufficient to note that it focuses solely on the criminal and neglects the role of the victim.

¹³ Gary S. Becker, *Crime and Punishment: an Economic Approach*, 76 JOURNAL OF POLITICAL ECONOMY 169 (1968).

¹⁴ See, for example, George J. Stigler, *The Optimum Enforcement of Laws*, 78 JOURNAL OF POLITICAL ECONOMY 526 (1970); A. Mitchell Polinsky and Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AMERICAN ECONOMIC REVIEW 880 (1979); A. Mitchell Polinsky and Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 JOURNAL OF PUBLIC ECONOMICS 89 (1984); Steven Shavell, *Specific versus General Enforcement of Law*, 99 JOURNAL OF POLITICAL ECONOMY 1088 (1991); Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information about Whether Acts are Subject to Sanctions*, 6 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 93 (1990); Arun Malik, *Avoidance, Screening and Optimum Enforcement*, 21 RAND JOURNAL OF ECONOMICS 341 (1990); James Andreoni, *Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?* 22 RAND JOURNAL OF ECONOMICS 385 (1991); A. Mitchell Polinsky and Steven Shavell, *A Note on the Optimal Fines When Wealth Varies Among Individuals*, 81 AMERICAN ECONOMIC REVIEW 618 (1991); A. Mitchell Polinsky and Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of*

focus was on the optimal trade-off between the magnitude of sanctions and the probability of apprehension. These analyses concentrated on the most efficient means by which society can deter **criminals** from committing harmful acts. In this entire branch of literature, the victims' role was limited to the suffering of crime harm; monitoring victims' behavior was not considered a policy objective.¹⁵

Posner and Shavell have each extended the Becker-type analysis to study a broader set of issues relating to criminal enforcement.¹⁶ Posner developed the insight that criminal sanctions should be designed to generate deterrence where tort liability and monetary "fines" are ineffective (due to the actor's solvency problems, or to the inherently low probability of detection). Shavell studied the optimal use of non-monetary sanctions -- ones which are costly for society to administer. Both Posner and Shavell used their theories to rationalize various criminal doctrines, such as intent,

Fines, 35 JOURNAL OF LAW AND ECONOMICS 133 (1992); Lucian A. Bebchuk and Louis Kaplow, *Optimal Sanctions When Individuals Are Imperfectly Informed about the Probability of Apprehension*, 21 JOURNAL OF LEGAL STUDIES 365 (1992); D. Mookherjee and I.P.L. Png, *Monitoring vis-a-vis Investigation in Enforcement of Law*, 82 AMERICAN ECONOMIC REVIEW 556 (1992); Louis Kaplow, *The Optimal Probability and Magnitude of Fines for Acts that Definitely are Undesirable*, 12 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 3 (1992).

¹⁵ A typical model belonging to this literature would have a "population" of potential criminals, who are rational calculators, and who stand to gain a benefit b if they commit the harmful act. Their act imposes a harm h on the victim and on society. Society can invest a cost of x in detecting criminals, to bring the probability of detection to $p(x)$. If caught, the criminal is punished by a sanction s . Thus, a risk-neutral individual would commit the act if and only if $b > p(x)s$. Becker, *supra* note 13, demonstrated that any given enforcement policy can be improved simply by increasing the sanctions and reducing the probability of detection by the same proportion. Deterrence would remain unchanged, while some costs of detection will be saved. If Becker's logic is followed to an extreme, it would prescribe the administration of maximal sanctions, coupled with very low probabilities of detection. The literature that followed Becker tried to reexamine Becker's model under more complex assumptions, and to determine when low sanctions will be desirable.

¹⁶ Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUMBIA LAW REVIEW 1193 (1985); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUMBIA LAW REVIEW 1232 (1985).

attempt, causation, conspiracy and defenses. In doing so, they continued the trend of focusing exclusively on criminals, as the parties whose behavior should be monitored.

Lately, economists devote increasing attention to the incentives operating upon potential victims.¹⁷ Recognizing that victims' investments in precautions is a significant economic activity, estimated by some to cost hundreds of billions of dollars each year,¹⁸ economists examine whether this investment is excessive. These studies advance the understanding of victim's incentives and highlight the divergence between the good of individual victims and the good of society. What these studies do not do, however, is to point out the connection between the enforcement policy and the victims' investment in precautions against crime.

In sum, economists addressed both criminal law and victims' investment in precautions, but they failed to explore the relations between these two issues. Economists who devoted their attention to criminal law ignored the effects that criminal law has on victims.¹⁹ Economists who devoted their attention to the victims' behavior -- in particular, to their investment in precautions -- failed to explore how criminal law influences that behavior.²⁰ Thus, despite the explicit urge of economists investigating

¹⁷ See Steven Shavell, *Individual Precautions to Prevent Theft: Private versus Socially Optimal Behavior*, 11 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 123 (1991); K. Hui-Wen and I.P.L. Png, *Private Security: Deterrence or Diversion?*, 14 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 87 (1994).

¹⁸ See Leband and Sophocleus, *supra* note 5. This study concludes that in 1985 victims have spent an amount exceeding \$160 billions on protecting the physical access to their property.

¹⁹ See *supra* text accompanying notes 13-16.

²⁰ See *supra* text accompanying notes 16-18.

criminal law to reconsider and challenge traditional justifications for criminal law norms, a perpetrator-centered perspective was endorsed -- the very same perspective which characterizes the more traditional scholarship of criminal law.

This conclusion is surprising for two reasons. First, there is an important sense in which the perpetrator-centered perspective endorsed by Becker, Posner, Shavell and others is incompatible with the fundamental presuppositions of their own theories. Efficiency considerations dictate that criminal law should minimize the total costs of crime to society, defined as the sum of the expected costs of crime and the costs of precautionary measures against crime.²¹ If the fundamental objective of criminal law is to minimize the costs of crime as defined above, criminal law norms should be evaluated with respect to their effect on the incentives operating upon potential victims to take efficient precautions.

Second, the emergence of economic analysis as an independent school of thought is often attributed to Coase, *The Problem of Social Cost*.²² One of the most influential insights of *The Problem of Social Cost* draws attention to the incentives operating upon potential victims of torts to invest in precautionary measures and to the manner in which these incentives can be manipulated through tortfeasors' liability.²³ Why has this insight not been imported from the economic analysis of tort law into the economic analysis of criminal law?

²¹ See Becker, *supra* note 13; Cooter and Ulen, *supra* note 1, at 536-9.

²² 3 JOURNAL OF LAW AND ECONOMICS 1 (1960).

²³ See also John P. Brown, *Toward an Economic Theory of Liability*, 2 JOURNAL OF LEGAL STUDIES 323 (1973).

Three arguments can perhaps justify this failure on the part of economic analysis of criminal law to explore the manner in which criminal law influences victims' behavior. The first is a division of labor argument. Under this argument, criminal law is a means of providing incentives for criminals. Arguably, other mechanisms are better suited to provide incentives for potential victims to take efficient precautions against crime. Unfortunately, no attempts to explore systematically alternative mechanisms by which potential victims can be induced to invest efficiently in precautions were proposed in the literature.²⁴

The second argument questions whether criminal law can significantly influence the incentives of potential victims to take precautions against crime. Criminal law imposes sanctions on criminals and hence primarily influences the incentives operating upon criminals. Section III will contest this argument and illustrate that criminal law inevitably provides some incentives for potential victims to invest in precautions and that it is therefore important to adopt rules which provide victims with incentives to invest efficiently in precautions.

The third argument endorses the view that victims' incentives to take precautions against crime are optimal under the current system and therefore there is no need to tinker with these incentives. Arguably victims of crime bear the full expected costs of the crime directed against them. Consequently, they have adequate incentives to take optimal precautions. If indeed these incentives are optimal, any attempt to

²⁴ This neglect is evident in light of the extensive literature on victims' incentives in other areas of law. See, for example, Cooter, *supra* note 3.

influence potential victims in one way or another will distort the efficient incentives which already operate under the current system. The following section will explore systematically the incentives operating on potential victims and expose the distortions in these incentives. It will conclude that given these distortions, and absent a corrective mechanism, victims' investment in precautions is likely to be inefficient.

II. THE DISTORTED INCENTIVES OF POTENTIAL VICTIMS OF CRIME

Potential victims take precautions to reduce the costs of crime they bear. In situations in which potential victims bear the full expected costs of crimes directed against them and the full cost of their own precautions, we can expect their investment in precautions to be optimal. In such situations, any attempt to induce potential victims to change their investment in precautions will lead to inefficiencies. If, however, victims' precautions generate external effects, such that the well-being of other individuals is affected, then we can predict that victims' investment in precautions will not be optimal. The discussion below examines several external effects that victims' precautions may have. First, we look at factors that may lead to overinvestment in precautions, and later we look at factors that may lead to underinvestment in precautions.

A. Overinvestment in Precautions

Victims may overinvest in precautions if precautions generate negative externalities, i.e., if there are costs which they do not bear that arise from their

precautions. Here are some cases which involve external costs.

Crime diversion. One factor that may lead to excessive investment in precautions, and which has gained much attention in the literature, is the diversion or displacement of crime.²⁵ Often, precautions are successful in preventing harm to the victim that installed them, yet at the same time divert the criminal to act against other, less protected, victims. If, for example, a potential victim builds an impenetrable fence around her house, a theft that would otherwise have occurred at her house may now occur at a neighboring estate. Similarly, if a car owner installs a sophisticated anti-theft device, the car thief may find his victim further down the street. Whenever precautions lead merely to crime diversion, they have no social value, since they do not reduce the social cost of crime. However, since these diverting precautions have a private value to their users, they will in fact be utilized. Hence, crime diversion leads to excessive precautions.

Criminals' Benefit. Another external cost that arises from victims' precautions is the reduced benefit from crime that criminals enjoy. With greater precautions, a successful crime becomes harder to accomplish, and the benefit that criminals gain from

²⁵ See Robert Barr and Ken Pease, *Crime placement and Deflection*, 12 CRIME AND JUSTICE: A REVIEW OF RESEARCH 277 (1990); C.T. Clotfelter, *The Private Security and the Public Safety*, 5 JOURNAL OF URBAN ECONOMICS 388 (1978); Thomas A. Reppeto, *Crime Prevention and the Displacement Phenomenon*, 22 CRIME AND DELINQUENCY 166, (1976); Derek B. Cornish and Ronald V. Clarke, *Understanding Crime Displacement: An Application of Rational Choice Theory*, 25 CRIMINOLOGY 933 (1987); Ronald V. Clarke, *Situational Crime Prevention*, 4 CRIME AND JUSTICE 225 (1983); Ronald V. Clarke, *Introduction*, in SITUATIONAL CRIME PREVENTIONS (Ronald V. Clarke, ed., 1992), pp. 21-27; P.J. Cook, *The Demand and Supply of Criminal Opportunities*, 7 CRIME AND JUSTICE 1 (1986); T. Gabor, *Crime Displacement*, 6 CRIME AND/ET JUSTICE 100 (1978); Shavell, *supra* note 15; Hui-Wen and Png, *supra* note 15.

it is less often realized. This argument rests on our willingness to accept criminals' benefit from crime as part of social welfare. There is an ongoing debate whether criminals' benefit from crime ought to be included in the social welfare calculus at all, namely, is society considered better-off if, other things equal, its criminals are wealthier.²⁶ Put differently, if one considers theft to be a mere transfer of wealth, from the victim to the criminal, one is implicitly including the criminals' benefit as an element of social welfare. Hence, if we put some positive value on criminals' benefit, even if this value is discounted significantly, we are faced with the concern that criminals' benefits will be deprived by victims' overinvestment in precautions.

Harm from precautions. Often, victims' precautions involve hazardous activities that, aside from preventing the completion of the crime, may also harm either other potential victims or the criminals themselves. For example, potential victims who carry defensive weapons occasionally use them inaccurately, harming other victims or the criminals unnecessarily. Or, home and car alarms which are set off inadvertently may cause noise nuisances that harm neighbors. However, as these costs are not borne entirely by the victims that install the precautions, victims have the tendency to utilize them excessively.

²⁶ Becker, *supra* note 13, suggested originally that criminals' benefit should be counted as part of social welfare. In a famous response, Stigler held the contrary. See George J. Stigler, *The Optimum Enforcement of Laws*, 78 JOURNAL OF POLITICAL ECONOMY 526 (1970). For a survey of law and economics writers' positions in this debate, as well as for arguments why criminals' benefits should not count, see J.L. Lewin and W.N. Trumbull, *The Social Value of Crime*, 10 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 271 (1990), and the response by F.S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 225 (1993).

B. Underinvestment in Precautions

Victims may underinvest in precautions if precautions generate positive externalities, i.e., if there are benefits that arise from their precautions which they do not appropriate. Here are some cases which involve external benefits.

Deterrence as a public good. Some precautions have a "public good" property: once installed, they benefit other victims as well.²⁷ Take for example a street light that a homeowner installs in front of her house to deter burglars. Other homeowners, whose gates are illuminated by the light, benefit from it without bearing its cost. Or, similarly, stockholders in a corporation who take precautionary measures to prevent embezzlement by corporate officials benefit all other stockholders. Thus, the social gain from these types of precautions exceed the private gain to the victims that apply them, which implies that some socially valuable measures will not be applied.²⁸

Prevention of future harms. Victims' precautions may yield benefits distinct from the immediate benefit for which they were intended. If, for example, detection

²⁷ Public goods are characterized by two features: 1) jointness of supply 2) the impossibility or the inefficiency of exclusion. Jointness connotes the fact that the consumption of the public good by one person does not detract from the benefits enjoyed by others. The impossibility or inefficiency of exclusion means that consumers cannot easily be excluded from enjoying or benefitting from the public good. For a definition of public goods, see Dennis C. Mueller, *PUBLIC CHOICE II* (1989), 11.

²⁸ This phenomenon has been noted by criminologists as well as by economists. See Ronald V. Clark, *Introduction*, in *SITUATIONAL CRIME PREVENTION*, *supra* note 23, pp. 3, 25; Terrance D. Miethe, *Citizen-Based Crime Control Activity and Victimization Risks: An Examination of Displacement of Free Rider Effects*, 29 *CRIMINOLOGY* 419, 422 (1991), and economists, see Shavell, *supra* note 17, at 124.

measures (e.g., closed-circuit cameras) lead to the apprehension and incapacitation of criminals, future potential victims of these apprehended criminals benefit. Likewise, if failure to succeed in crime leads some criminals to turn to legal activities, the precautions that led to this failure benefit future potential victims. But since the victims that choose these precautions do not appropriate their entire future benefit, underinvestment in precautions arises.

Hence, there are various factors that may distort victims' incentives to take precautionary actions. Some precautions may be used excessively, other may be used sub-optimally. Empirical examination may determine which activity is subject to which type of distortion. For the purpose of this discussion, it suffices to conclude that, in general, we cannot expect victims to engage in optimal precautions. Later on in the analysis some conjectures regarding the actual direction of the overall distortion will be offered.²⁹ But first let us begin by proposing a general analytical solution to the inefficiency -- a solution that is independent of the direction of the distortion.

III. HOW CAN VICTIMS' INCENTIVES BE CHANGED THROUGH CRIMINAL LAW?

A. The Provision of Victims' Incentives Through Criminal Law

As explained above, potential victims may sometimes take excessive precautions, and other times engage in too little precautions. This section will explore the means by which criminal law can simultaneously provide incentives for those victims who invest

²⁹ See Section IV.D.2, *infra*.

too much in precautions to reduce their investment, and to those victims that invest too little to increase their investment.

Demonstrating how criminal law provides incentives for victims requires a two-stage analysis. At the first stage, it will be shown that criminal law can influence the manner in which perpetrators of crime choose their victims. At the second stage, it will be shown that the shift in the manner in which perpetrators of crime select their victims -- a shift which can be induced by criminal law norms -- influences, in turn, the investment of potential victims of crime in precautionary measures.

Criminal law can influence the manner in which criminals select their victims by graduating the sanctions imposed upon criminals in accordance with their victims' behavior. Harsher sanctions will be imposed on criminals who target victims that took optimal precautions. This would deter criminals from targeting such victims and, consequently, would lead victims to take optimal precautions. To illustrate how this works, consider the following example. Assume a society consisting of two types of potential victims: type A and type B. Type A victims engage in optimal precautions, while type B victims take an inefficient amount of precautions. Criminal law norms can impose harsher sanctions on criminals who target type A victims than on criminals who target type B victims. Such a rule encourages the rationally calculating criminals to shift from type A victims to type B victims and consequently imposes larger expected costs on type B victims.³⁰ The increased risks borne by type B victims will, in turn,

³⁰ This result can be achieved if instead of raising the sanctions imposed upon criminals who select type A victims society would raise the enforcement efforts in a way that raises the probability that criminals who direct their crime against type A victims will be caught and punished. In other words, in order to manipulate the manner by which criminals select their victims, one needs to

induce potential victims to behave in the desired manner and thus enjoy the better protection enjoyed by type A victims. Criminal law can, therefore, by manipulating the manner in which criminals are punished, induce potential victims to engage in an efficient amount of precautions.

Provided certain premises are satisfied, this result applies to a broader set of victims' behaviors, some even outside the context of precautionary activity.

Theoretically, criminal law can provide incentives to potential victims to respect their neighbors, contribute to charitable organizations or pay their taxes, simply by imposing harsher sanctions on criminals who target victims who conform with these norms. The broad spectrum of desirable behaviors which, theoretically, can be reinforced through this mechanism raises difficult moral questions regarding the proper role of criminal law in regulating societies.³¹ This section will focus exclusively on one type of behavior which the law wishes to encourage, namely efficient investment in precautions against crime.

The diverse and conflicting incentives operating on potential victims, in particular, the fact that some potential victims invest too much in precautions while others invest too little, require the legal system to provide potential victims with a diverse and conflicting array of incentives. Incentives should be provided in order to effectuate larger investment in precautions on the part of those who invest too little as well as smaller investment in precautions on the part of those who invest too much. It

differentiate the **expected** punishment

³¹ We are grateful to Scott Altman for first raising this objection. it is discussed in detail in Section IV.D.3 *infra*.

is our goal to show, therefore, that proper incentives can be provided to potential victims that will guarantee efficient behavior even when the patterns of distortions vary.

Let us change our example and assume that there are now three classes of victims: type A victims who still invest optimally in precautions, type B who invest more than efficiency requires and type C who invests less than efficiency requires. Criminal law can simultaneously induce type B victims and type C victims to invest optimally as well as preserve the incentives operating on type A victims to invest optimally. Lower penalties meted out to criminals who direct their activity against type B victims and type C victims will induce criminals to target victims of types B and C and consequently will induce type B and type C victims to modify their investment in precautions in accordance with efficiency. At the same time, the higher penalties that protect victims of type A reinforce their choice of optimal behavior.

This reasoning is premised on two implicit assumptions which need to be established. First, precautions can influence the selection of victims by criminals only when victims' precautions can be observed by criminals in advance. Non-observable precautions cannot affect criminals' behavior and consequently cannot influence victims' investment in precautions.³² Second, criminals' behavior can influence victims' investment in precautions only if potential victims understand and anticipate the patterns of criminals' decision making and, in particular, the considerations influencing criminals' decision to target one victim rather than another. Let us examine these premises and the degree to which they can be satisfied .

³² See Ben-Shahar and Harel, *supra* note 6, at 451-3; Harel, *supra* note 6, at 1197.

Most precautions taken by victims are visible and can be detected by criminals. The use of locks, bars, steel doors and many other conventional precautions are visible and hence can influence the manner in which victims are selected by criminals. Even when precautions taken by certain victims are not visible, victims often notify potential criminals of the existence of the precautions.³³ A successful crime requires a thorough investigation of the precautions taken by potential victims and it is reasonable therefore to presuppose that criminals invest resources in identifying victims' precautions prior to the crime.

It is more difficult to establish the second presupposition, namely the claim that potential victims anticipate the considerations influencing criminals' selection of victims. Fortunately, such a strong presupposition is not required for the purposes of this article. One need not assume that potential victims **know** how criminals select their victims in order to establish the weaker claim that potential victims behave **as if they had such knowledge**. We believe that this weaker proposition can be established.

Potential victims are likely to know the efficacy of precautions against crime. In particular, they will inquire how often potential victims who use a particular precaution are victimized. If criminals are less likely to target potential victims who invest efficiently in precautions, those victims will be less prone to be victimized and consequently other potential victims will be induced to invest efficiently. Potential victims need not understand the precise mechanisms which operate here; in particular,

³³ This raises interesting issues regarding the credibility of such notices. Some discussion of this matter is offered in Ben-Shahar and Harel, *id.*

they need not understand that a low rate of victimization should be attributed to the incentives provided by criminal law. All that is assumed is that victims do not make systematic errors in understanding and learning from the experience of others.³⁴ Hence, a system that differentiates criminals' punishment according to their victims' precautions can induce optimal precautions even if victims do not fully comprehend the rationale of the system.

If the two presuppositions underlying the argument are sound, victims' investment in precautions can be manipulated by providing incentives to criminals to shift from victims who invest efficiently in precautions to victims who invest too much or too little in precautions. Criminals will react to these incentives by directing their activity towards victims who invest inefficiently in precautions and consequently potential victims will adjust their investment in precautions and conform with the dictates of efficiency.

B. Global versus Local Incentives

Once the mechanisms for providing incentives for potential victims are clarified,

³⁴ This assumption resembles the assumption of rational expectations in economic models. The concept of rational expectations implies that, in the "long term", individuals do not make forecasting errors and do not base their behavior upon consistently misguided beliefs. Their assessment of the information is no worse than the assessment that can be made by the economist who studies the model. Either by learning, evolution or the inherent laws of statistics, individuals' assessments are assumed to be correct, on average. See Thomas Sargent, *Rational Expectations*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (J. Eatwell et al., eds., 1987), vol.4 p. 76; S.M. Sheffrin, *RATIONAL EXPECTATIONS* (1983). Thus, if criminals follow a given pattern of behavior, such as the choice of victims suggested above, victims will subsequently behave as if they expect such patterns of choice from criminals, even if these victims do not have the cognitive knowledge regarding criminals' motivations.

one can classify these incentives into two major types: global incentives and local incentives. Global incentives operate in an indiscriminate manner. They affect and alter indiscriminately the incentives of potential victims to invest in precautions. Local incentives, on the other hand, are designed to encourage or discourage potential victims from taking certain specific precautions.

It is important to specify the circumstances which justify the usage of global incentives and those which justify the usage of local incentives. The usage of global incentives does not require any judgments concerning the efficiency of any specific precaution. It requires a judgment concerning the overall patterns of behavior of potential victims, in particular, whether potential victims **as a whole** overinvest or underinvest in precautions. If one knows that most potential victims will either overinvest or underinvest in precautions, one can provide global incentives to decrease or increase the precautions in order to remedy this inefficiency. Local incentives, in contrast, can be utilized precisely under the opposite circumstances. In order to use local incentives, one need not make judgments whether most victims are likely to overinvest or underinvest in a certain precaution. Instead, one needs to make a judgment that a certain precaution is efficient and therefore that its usage needs to be reinforced or that it is not efficient and therefore that its usage needs to be discouraged.

Problems of inefficient investment in precautions by victims can be addressed by criminal law norms that have either global or local applicability. Normatively, a norm which provides global incentives will be appropriate whenever there is a general phenomenon of inefficient investment, and norms which provide local incentives will be

desirable whenever victims invest too much or too little in a particular precaution. The remaining task is to supply this general approach with concrete substance and to demonstrate how it applies in practice, i.e., to describe criminal law doctrines which serve to manipulate victims' investment in precautions.

Here are some examples for criminal law's usage of local incentives in controlling the behavior of victims of crime. The mitigation of the sanctions on offenders who commit homicide as a result of provoked uncontrollable passion provides incentives to potential victims to abstain from provocative behavior.³⁵ Criminal law increases the risks imposed upon provokers and thus increases the costs of provocation. Similarly, the "no retreat rule" under which a person is permitted to use deadly force to combat an attack directed against her even if she could have avoided using the deadly force by retreating is a means to increase the risks imposed upon the victim, who is in this particular case also the initial aggressor.³⁶ The classification of property offenses, in particular the distinction between theft, burglary and robbery, is another example for a practice that provides incentives to potential victims to protect their property.³⁷

These doctrines, however, cannot remedy the disposition of potential victims of crime to invest non-optimally in precautions because of the limited scope of their operation. These doctrines can provide merely local incentives that induce potential victims to take specific precautions against specific crimes. They are based upon a

³⁵ See Harel, *supra* note 6, at 1211-1217.

³⁶ See *id.*, at 1217-1219.

³⁷ See *id.*, at 1219-1226.

judgement that a certain precaution is efficient and therefore that its usage should be encouraged. None of these doctrines, however, can remedy a more global phenomenon of inefficiency, namely a disposition on the part of victims to overinvest or underinvest in **all** types of precautionary measures. The next section will analyze the law of pre-crime activities and interpret it as providing global incentives to potential victims of crime to reduce their investment in precautions. The global applicability of the law governing pre-crime activities highlights the importance of endorsing a victim-centered perspective in criminal law.

IV: THE TREATMENT OF PRE-CRIME ACTIVITIES: A VICTIM-CENTERED PERSPECTIVE

A. Introduction

The perpetrators of pre-crime activities, such as attempts and preparation, are treated leniently under traditional criminal law. Attempts are punished less severely than complete crimes and preparation is ordinarily not subject to criminal liability at all.

Most American jurisdictions stipulate that the perpetrator of an attempt to commit a crime will be punished less severely than the perpetrator of a complete crime.³⁸ The rule is pervasive despite a wide range of critiques directed against it.³⁹ The

³⁸ See, e.g., N.Y. PENAL CODE, §100.05; CALIFORNIA PENAL CODE §664

³⁹ Some of the foes of the practice believe that attempts should not be punished at all. See, e.g., Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts* 53 OHIO LAW REVIEW 1057 (1992). But most of the critics believe that attempts should be punished in the same manner as the complete crime. See, e.g., Lawrence Becker, *Criminal Attempt and the Theory of the Law of Crimes* 5 PHILOSOPHY AND PUBLIC AFFAIRS 262 (1976); Sanford Kadish, *Supreme Court Review, Foreword: The Criminal Law and the Luck of the Draw*, 84 NORTHWESTERN SCHOOL OF LAW JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 679 (1994).

Model Penal Code's (hereinafter, "MPC") proposal to change the rule and equalize the sanctions imposed for attempts to commit a crime with those imposed for complete crimes has been rejected by most U.S. jurisdictions.⁴⁰ Similarly, many foreign jurisdictions foster the practice of lenient treatment for attempts.⁴¹

The persistence of the practice despite the wide range of critiques targeted against it is indicative of deep seated sentiments -- sentiments which were articulated by Adam Smith, over two hundred years ago, as follows:

Our resentment against the person who only attempted to do a mischief, is seldom so strong as to bear us out in inflicting the same punishment upon him, which we should have thought due if he had actually done it. In the one case, the joy of our deliverance alleviates our sense of the atrocity of his conduct; in the other, the grief of our misfortune increases it.⁴²

But Adam Smith is quick to identify a conflicting intuition which guided most of the

⁴⁰ There are, however few exceptions which endorsed this rule. See, e.g., CONN. GEN. STAT. ANN. §53a-51; DEL. CODE ANN. title 11, §531;

⁴¹ See, e.g., THE CRIMES ACT of New Zealand, §311; THE RIOTOUS ASSEMBLIES ACT 17 (1956) of South Africa, §18(1). Some commentators have argued that the gap between the sanctions for attempts and complete crimes is gradually eroding in common law countries. See Yoram Shachar, *The Fortuitous Gap in Law and Morality*, 6 CRIMINAL JUSTICE ETHICS pp. 13-14 (1987). Indeed, some foreign jurisdictions changed the law and allowed the judge to impose the same sanction for attempts and complete crimes. See, e.g., THE CRIMINAL ATTEMPTS ACT of England, §4; THE PENAL CODE of Germany, §23; THE PENAL CODE of Israel, §34(d). But even in these cases, there are important exceptions to the rule. See, e.g., THE CRIMINAL ATTEMPTS ACT of England, §4(5) and THE PENAL CODE of Israel, §§27,34(c). It has been pointed out that even when the legislature imposes similar sanctions for attempts and complete crimes, in practice, the punishment for an attempt is less than the punishment for a consummated crime. See Glanville Williams, TEXTBOOK ON CRIMINAL LAW (2d ed., 1983), p. 404.

⁴² Adam Smith, THE THEORY OF MORAL SENTIMENT 100 (1976) (originally published 1759).

critics of the practice and say:

His real demerit, however, is undoubtedly the same in both cases, since his intentions were equally criminal; and there is in this respect, therefore, an irregularity in the sentiments of all men, and a consequent relaxation of discipline in the laws of, I believe, all nations.⁴³

Contemporary scholarly literature has not advanced much beyond the astute observations of Adam Smith.⁴⁴ The basic conflicting intuitions identified by Adam Smith remain intact. On the one hand, a complete crime raises more resentment and outrage than an unsuccessful attempt to commit the very same crime.⁴⁵ On the other

⁴³ *id* at 100.

⁴⁴ See Bjoern Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than An Attempted Crime?* BRIGHAM YOUNG UNIVERSITY LAW REVIEW 553, 556-7 (1986) (claiming that no progress has been achieved in the last two hundreds years); Mordechai Kremnitzer, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely than an Attempted Crime? A Comment on Prof. Dr. Bjoern Burkhardt's Paper*, 4 BRIGHAM YOUNG UNIVERSITY JOURNAL OF PUBLIC LAW 81 (raises doubts whether any progress has been made since Plato!)

⁴⁵ Most legal scholarship assumes, often without any empirical support, that individuals regards harm as relevant to criminal sanctioning. See James Fitzjames Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND Vol. 3 311-12 (1883); George Fletcher, RETHINKING CRIMINAL LAW 483 (1978); Kadish, *supra* note 39, at 688-9; Kremnitzer, *supra* note 44, at 81-2; Daniel Mandil, *Chance, Freedom and Criminal Liability*, 87 COLUMBIA LAW REVIEW 131 (1987); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code and in the Common Law*, 19 RUTGERS LAW REVIEW 725, 748 (1988).

Some have challenged the claim that people tend to believe that punishment for attempts should be lower than the punishment for the complete crime. Schachar believes that while such an intuition prevails on an instinctive level, it does not prevail when individuals reflect on the subject matter. See Schachar, *supra* note 39, at 22-23. Empirical research seems, however, to verify the belief that people in general believe that punishment for attempts should lower than the punishment for the complete crime. See Paul H. Robinson and John M. Darley, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 14-28 (1995).

We believe that these intuitions are prevalent. The difference in the intuitions concerning the proper treatment of the perpetrator of an attempt and the perpetrator of a complete crime resides not merely in a judgment that the latter deserves harsher punishment or that the latter is more blameworthy. There is a qualitatively different attitude towards the two. Winch has beautifully articulated the difference when he pointed out that a man who commits a murder thereby becomes a murderer while a man who attempts murder may in a technical sense be labelled attempted

hand, it seems that the culpability of the perpetrator of a complete crime does not differ from the culpability of the perpetrator of an attempt to commit the same crime if the failure is due to circumstances which are beyond the perpetrator's control.⁴⁶

A similar accusation is often directed against the doctrine of preparation, which establishes the exemption of early pre-crime activities from criminal liability. Drawing the distinction between attempt and preparation has proven to be difficult and very often arbitrary.⁴⁷ The existence of such a distinction serves to decrease even further the sanctions on pre-crime activities. Thus, both the leniency of the treatment of attempts and the exemption on preparation can be interpreted as two ways by which criminal law

murderer, but such a label has a different ring to it. See Peter Winch, *Trying and Attempting*, 45 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 209, 224 (Sup. 1971).

⁴⁶ A failure to complete the crime is often described as an event which happened "merely" by chance or luck rather than as ones which is controlled by the agent. The claim that attempts should be punished as severely as the complete crime because the failure is merely a matter of chance or luck is frequently mentioned both by those who endorse its implications and believe that attempts should be punished as severely as the complete crime as well by those who eventually reject this view and believe that attempts should be treated more leniently. See, e.g., Andrew Ashworth, *PRINCIPLES OF CRIMINAL LAW* 396 (1991); Ashworth, *supra* note 45, at 733; Burkhardt, *supra* note 44, at 553, 566-8; Duff, *Auctions, Lotteries, and the Punishment of Attempts*, 9 LAW AND PHILOSOPHY 1 (1990); H.L.A. Hart, *Intention and Punishment* in H.L.A. Hart, *PUNISHMENT AND RESPONSIBILITY* 131 (1968); Kadish, *supra* note 39, at 689-90; David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHILOSOPHY AND PUBLIC AFFAIRS 53 (1987); Daniel M. Mandil, *Chance, Freedom, and Criminal Liability*, 87 COLUMBIA LAW REVIEW 125 (1987); Richard Parker, *Blame, Punishment, and the Role of Result*, 21 AMERICAN PHILOSOPHICAL QUARTERLY 269 (1984); J.C. Smith, *The Element of Chance in Criminal Liability* 1971 CRIMINAL LAW REVIEW 63.

Many, however have argued against the view which describes the failure of an attempt as an event which happened merely by chance or luck and pointed out that "among the cases of success we will find more instances of careful planning and high-level performance than among the cases of failure" and therefore that the failure of an attempt is an indicator of the lesser threat from the activity. See Kremnitzer, *supra* note 44, at 87; Note, *Why Do Criminal Attempts Fail? A New Defense*, 70 YALE LAW JOURNAL 160, 166 (1960); Shachar, *supra* note 39, at 12. For an excellent discussion of the role of luck in the law, see Note, *The Luck of the Law: Allusions to Fortuity in Legal Discourse*, 102 HARVARD LAW REVIEW 1862 (1989).

⁴⁷ See *infra*, text accompanying notes 61-68.

reduces the costs of pre-crime activities for criminals.

This article suggest that the lenient treatment of attempts and preparation can be rationalized as an incentive scheme directed to victims of crime. Thus, it is appropriate to begin with an analysis of the way in which attempts and preparation are treated under criminal law. Then, some of the existing theories which aim to justify the lenient treatment of pre-crime activities will be explored. Given the nature of this investigation, the primary focus will be the treatment of attempts and preparation within economic analysis of law. Lastly, it will be illustrated how, by endorsing a victim-centered perspective, one can arrive at a new explanation for why attempts and preparation ought to be punished less severely than complete crimes. More specifically, the article will argue that punishing pre-crime activities less severely than complete crimes (as reflected both in the lenient treatment of attempts as well as the exemption of preparation from criminal liability) provides a global incentive for potential victims to reduce their investment in precautions. The larger the gap between the sanctions imposed upon the failed crime and the complete crime, the lesser the investment of potential victims in precautions. This article suggests (although it does not provide a conclusive proof) that such a reduction may be socially desirable given the incentives operating upon potential victims of crime to overinvest in precautions against crime.

B. The Treatment of Attempts in Criminal Law: A Brief Doctrinal Survey

The doctrinal treatment of attempts is often regarded as the "more intricate and

difficult of comprehension than any other branch of criminal law".⁴⁸ This section will not discuss all the intricate doctrinal questions concerning the treatment of attempts.⁴⁹ Instead, it will discuss the actus reus and the mens rea required for an attempt.

1. Actus Reus

Both courts and scholars distinguish between attempts which are punishable and preparation which is not punishable. Drawing the boundary between unpunishable preparation and punishable attempts has, however, haunted judges since the very criminalization of attempts.⁵⁰ The variety of tests proposed by scholars and judges -- tests which purport to distinguish between mere preparation and full fledged attempts -- illustrate the complexity of the problem.⁵¹ The proximity test questions whether the defendant's act was sufficiently proximate to the intended crime.⁵² Under this view, no

⁴⁸ See *Hicks v. Commonwealth* (1889) 86 Va. 223, 9 S.E. 1024.

⁴⁹ Two important doctrinal problems will not be discussed in this article. Impossible attempts have sometimes been considered unpunishable. See MODEL PENAL CODE AND COMMENTARIES: OFFICIAL DRAFT AND REVISED COMMENTS, Part I 307-317. Contemporary scholarship criticized this view and many codes explicitly sanction impossible attempts. See, MPC Commentaries *id.* The abandonment defense is another important doctrinal debate occupying much of the scholarly writings on the subject. See, e.g., Paul R. Hoerber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CALIFORNIA LAW REVIEW 377 (1986).

⁵⁰ See *Regina v. Eagleton* (1855) 169 E.R. 826 (1926); Donald Stuart, *The Actus Reus in Attempts*, CRIMINAL LAW REVIEW 505 (1970).

⁵¹ For a survey of the different tests, See Crocker, *supra* note 39, at 1077-1093; MPC Commentaries, *supra* note 49 at 321-329; G.L. Peiris, *Liability for Inchoate Crime in Commonwealth Law*, LEGAL STUDIES 31, 41-54; Donald Stuart, *The Actus Reus in Attempts* (1970) CRIMINAL LAW REVIEW 505-510.

⁵² See Glanville Williams, CRIMINAL LAW THE GENERAL PART 622 (2d ed., 1961). The test traces to *Eagleton*, *supra* note 50, at 835, where was formulated as follows:

"Acts remotely leading towards the commission of an offense are not to be considered as

act is indictable as an attempt unless it is a step towards the execution of the criminal purpose and is an act directly approximating to, or immediately connected with the commission of the offense which the person has in view.⁵³

The advocates of the proximity test provide a variety of tests as to the required degree of proximity. These tests include the test of the "last proximate act",⁵⁴ "dangerous proximity to success".⁵⁵ Others have rejected the proximity test in favor of the equivocality test originally developed by Salmond.⁵⁶ Under the equivocality theory, an attempt is "an act of such a nature that it is itself evidence of the criminal intent with which it was done. A criminal attempt bears criminal intent upon its face."⁵⁷ The

attempts to commit it, but acts immediately connected with it are."

⁵³ For a good description and critique of the test, see Russell, ON CRIMES (12 ed., by J.W. Cecil Turner, 1964) vol. 1, p. 182.

⁵⁴ The test was rejected by courts as well as by scholars as too rigid. See, e.g., *People v. Bracey*, 41 N.Y. 2d 296, 392 N.Y.S. 2d 412, 360 N.E. 2d 1094 (1977); *Sizemore v. Commonwealth*, 218 Va. 980, 243 S.E. 2D 212 (1978). See also MPC commentaries at 321 (1985).

⁵⁵ Holmes' dissent in *Hyde v. United States*, 225 U.S. 347, 32 S.Ct. 793, 56 L. Ed. 1114 (1912); *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N.E. 770 (1879). See MPC commentaries, *supra* note 49 at 322-333.

⁵⁶ Salmond, JURISPRUDENCE (7th ed. 1924); Cecil Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE LAW JOURNAL 230 (1934); *People v. Coleman*, 350 Mich. 268, 86 N.W.2d 281 (1957); MPC Commentaries, *supra* note 49 at 326-329.

⁵⁷ Salmond, *id* at 404. Turner described the test as follows:

"If the example may be permitted, it is as though a cinematograph film, which had so far depicted merely the accused person's acts without stating what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question then the accused has done what amounts to an 'attempt' to attain this end. If there is more than one reasonably possible answer, then the accused has not yet done enough."

See Turner, cited in Williams, *supra* note 52, at 629.

equivocality theory, although endorsed by some courts and legislatures,⁵⁸ has been criticized by most scholars as well as by the drafters of the MPC.⁵⁹ The advocates of the probable desistance test argued that a criminal attempt requires an act which in the ordinary course of events would result in the commission of the crime except for intervention of extraneous factor.⁶⁰ The drafters of the MPC preferred to characterize attempt as "an act or omission constituting a substantial step in a course of conduct planned to culminate in commission of the crime."⁶¹

But while novel tests were developed and more sophisticated arguments developed to rebut these tests, some scholars raised doubts about the feasibility as well as the desirability of developing such a test. The skepticism arises from suspicion as to whether a distinction between preparation and attempts can be drawn **regardless of what is being attempted**. Given that crimes are so radically different and diverse, it was argued that there is no way in which a useful characterization of conduct

⁵⁸ The test had some popularity in other jurisdictions. New Zealand courts have endorsed the test in *Campbell and Bradley v. Ward* [1955] N.Z.L.R.471. The case has been criticized by most of the commentators. See, e.g., Williams *supra* note 52, at 629-631; Stuart, *supra* note 51, at 507-8. Eventually this standard was abolished in New Zealand by legislation in 1961. See CRIMES ACT 1961, No. 43, §72(3). Some British courts endorsed this principle. See, e.g., *Davey v. Lee* [1967] 2 ALL E.R. 423 (Q.B.)

⁵⁹ Hall, *supra* note 9, at 581; Williams, *supra* note 52, at 629-631. There are, however, some exceptions. Fletcher endorses the equivocality theory and regards it as supportive of his more general theory of "manifest criminality". See Fletcher, *supra* note 45, at 141-6 (1978).

⁶⁰ *United States v. Stephens*, 12 F. 52 (C.C.D.Ore. 1882); *People v. Gibson*, 94 CAL. APP. 2d 468, 210 P. 2d 747 (1949); *State v. Schwartzback*, 84 N.J.L.268, 86 A. 423 (Ct. Err and App. 1913); *State v. Brown*, 95 N.C.685 (1886); *State v. Hurley*, Vt. 28 , 64 A. 78 (1906). See also Robert H. Skilton, *The Mental Element in a Criminal Attempt*, 3 UNIVERSITY OF PITTSBURGH LAW REVIEW 181 (1937). MPC Commentaries, *supra* note 309-310.

⁶¹ See MPC §5.01(1)(c).

constituting an attempt can be made without specifying what the complete crime is.⁶² Even the less skeptical voices who support maintaining the distinction between preparation and attempts concede that the characterization of the actus reus in attempts must remain imprecise and that the difference between preparation and attempts is a difference in degree rather than in kind.⁶³ The commentary of the MPC acknowledges the impreciseness of its own guidelines,⁶⁴ and adds a list specifying conduct which as a matter of law can be categorized as attempt in order to remedy some of the inherent imprecision.⁶⁵

⁶² Thurman W. Arnold, *Criminal Attempts-The Rise and Fall of an Abstraction*, 40 YALE LAW JOURNAL 53, 57 (1930). Arnold endorsed a legal realist position and argued that no useful general tests can be developed for attempts as a general category. The claim that the boundaries between preparation and attempts depends upon the crime attempted or on other facts particular to the case at hand is also supported by some judges and many traditional criminal law scholars. See *Commonwealth v. Kennedy*, 170 Mass. 18, 20, 22, 48 N.E. 770, 771 (1897). Fletcher, *supra* note 45, at 141; P. R. Glazerbrook, *Should We Have a Law of Attempted Crime?* 85 THE LAW QUARTERLY REVIEW 85-6 (1969); Francis Bowes Sayre, *Criminal Attempts* XLI H.L.R. 821, 837-842 (1928) 845, 859; Oliver W. Holmes, *THE COMMON LAW* 68-9 (1923); Rollin M. Perkins, *CRIMINAL ATTEMPTS AND RELATED PROBLEMS* 327; Paul Kichyun Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U. LAW REVIEW 1170, 1175 (1957); Glanville Williams, *supra* note 52, at 622.

⁶³ Hall, *supra* note 9, at 584. The same position was stated by Holmes in *Commonwealth v. Peaslee*, 177 Mass. 267, 272, 59 N.E. 55, 56 (1900). There, Holmes said as follows:

"Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent is complete, it renders the crime so probable that the act will be misdemeanor... As was observed in recent case, the degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite".

Naturally, this position raises concerns for undue vagueness which is inconsistent with the rule of law. See Ashworth, *supra* note 45, at 768.

⁶⁴ See MPC Commentaries, *supra* note 49, at 329.

⁶⁵ MPC sections 5.01 (2).

At the same time, other scholars challenge not merely the feasibility of drawing a precise distinction between preparation and attempts, but also the desirability of drawing such a distinction on the grounds that:

"The exact point at which [such preliminary steps] become criminal cannot, in the nature of things, be precisely ascertained, nor is it desirable that such a matter should be made the subject of great precision. There is more harm than good in telling people precisely how far they may go without risking punishment in the pursuit of an unlawful object."⁶⁶

Skepticism concerning the feasibility or the desirability of drawing a precise boundary between preparation and attempts does not preclude however the importance of drawing some boundaries. Most legal systems endorse a three stage scheme under which complete crimes are punished harshly, attempts are often punished less harshly and preparation is not punishable at all.⁶⁷ The boundary between preparation and attempts is imprecise. It is possible that its imprecision is inherent and cannot be

⁶⁶ J.F.A. Stephen, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (2d ed. 1890) p. 83, cited in P.R. Glaerbrook, *supra* note 62, at 85.

⁶⁷ Theoretically rather than dividing the criminal act into three discrete stages, one could increase the criminal sanction continuously in accordance with the stage of completion of the crime. This idea is hardly novel. In fact, it was used in some legal systems. See Eugene Rankin Meehan, *The Trying Problem of Criminal Attempt-Historical Perspectives*, 14 U.B.C. LAW REVIEW 137, 140 (1979)

Some provisions of the Federal Sentencing Guidelines can be regarded as implementing precisely a scheme under which the degree of completion of a crime determines the severity of the sanction. Section 2A2.1. (b) (1) of the FEDERAL SENTENCING GUIDELINES MANUAL specifies the punishment for attempted murder as follows:

- (a) if the victim sustained permanent or life-threatening bodily injury, increase [the sanction] by 4 levels; (b) if the victim sustained serious bodily injury, increase by 2 levels; or (c) if the degree of injury is between that specified in subdivisions (a) and (b), increase by 3 levels.

A general rule which grades continuously the sanctions in accordance with the degree of completion of the offense cannot be easily administered due to the intractable difficulties in determining the degree of completion of the offense.

remedied,⁶⁸ but legislatures and courts can affect the position of the boundary between attempt and preparation, by expanding the domain of one and shrinking the domain of the other. Policy considerations should determine whether such an increase or decrease in the scope of activities which are classified as preparation is desirable even if drawing a precise line between preparation and attempts is not a feasible or desirable undertaking. Thus, despite the impreciseness of the test governing this issue, it is valuable to explore the effects of redrawing the boundaries between preparation and attempts. In particular, it is important to examine the effects of redrawing this boundary on the incentives operating on both criminals and victims.

2. Mens Rea

The mental element required in criminal attempts is that of actual intent to commit the actus reus of the crime attempted.⁶⁹ Attempt requires intention as to the actus reus of the complete offense even if the complete offense is one which requires merely negligence or recklessness or strict liability. For example, a person who negligently attempts to drive a car with no brakes may not be convicted of attempt to drive a dangerous vehicle despite the fact that, had he succeeded, he would have be

⁶⁸ See *supra*, text accompanying notes 62-65.

⁶⁹ See J. C. Smith, *Two Problems in Criminal Attempts Re-Examined: I*, 1962 CRIMINAL LAW REVIEW 136; Williams, *supra* note 52, at 618-620 (1961); Glanville Williams, *supra* note 41, at 406-410. The same rule applies also in the US. See MPC section 5.01 (1). The MPC commentaries, *supra* note 49, at 301, emphasizes that the mens rea required in this section of the MPC is "designed to follow the conventional pattern". See also Sayre, *supra* note 62, at, 837-842.

convicted of the completed act. This position was criticized by some scholars,⁷⁰ but it has been endorsed by the MPC.⁷¹ A debate surrounds the precise scope of this rule.⁷²

In the following sub-sections, the traditional justifications for the law of attempts will be explored. It will be demonstrated that the existing justifications rely exclusively on a perpetrator-centered perspective.

C. Perpetrator-Centered Theories

It has been established that criminal law has traditionally been lenient towards pre-crime activities. This leniency had two primary manifestations. First, criminal law norms governing attempts often maintain a gap between the sanctions imposed on the perpetrators of attempts and the sanctions imposed on the perpetrators of complete

⁷⁰ Hall, *supra* note 9; Paul H. Robinson, *A Functional Analysis of Criminal Law* 1994 NORTHWESTERN LAW REVIEW 857, 890-896; Smith, *id.*; Donald Stuart, *Mens Rea, Negligence and Attempts*, 1968 CRIMINAL LAW REVIEW 647, 655-662.

⁷¹ See *supra* note 69. Some common law systems seem to reject this principle. See G.L. Peiris, *Liability for Inchoate Crime in Commonwealth Law*, LEGAL STUDIES 30, 32-33.

⁷² It is clear that the requirement of purpose applies to the conduct of the perpetrator and the results that conduct causes. But many believe that the purpose need not encompass all of the circumstances included in the definition of the offense. See, e.g., Ashworth, *supra* note 46, at 400; Peiris, *supra* note 71, at 34-5; Skilton, *supra* note 60; Smith, *supra* note 69; Glanville Williams, *The Problem of Reckless Attempts*, CRIMINAL LAW REVIEW (1983) 365; R. J. Buxton, *Circumstances, Consequences and Attempted Rape*, CRIMINAL LAW REVIEW (1984) 25. For an attempt to provide a theoretical justification for distinguishing the conduct from the circumstances, see Arnold N. Enker, *Mens Rea and Criminal Attempt*, AMERICAN BAR FOUNDATION RESEARCH JOURNAL (1977) 845, 866-878.

Under the view which distinguishes between the intent regarding the conduct and the intent regarding the circumstances, a burglar who breaks and enters at five to six without advertent to the time may be convicted in breaking and entering at night because he intends to commit the burglary and is oblivious merely to one of the circumstances under which the offense is committed. See Smith, *supra* note 69, at 136-7. The narrow view under which intent applies to the conduct and the consequences, but not to the circumstances was also endorsed by the MPC. See MPC Commentaries, *supra* note 49, at 301.

crimes. Second, criminal law maintains a distinction between preparation and attempts, and exempts a broad range of pre-crime activities from criminal liability by labelling these activities 'preparation'. As mentioned, the relative leniency of criminal law towards pre-crime activities has often puzzled criminal law scholars as well as moral philosophers.⁷³ Scholars differ radically in the result of their normative investigation. But despite the divergence in the views and perspectives of various scholars, a perpetrator-centered perspective has been consistently maintained.

Non-utilitarians have offered several theories that focus on aspects which are perpetrator-regarding. One branch of theories focuses on the arguably lesser culpability of the perpetrator of an attempt relative to the culpability of the perpetrator of a complete crime.⁷⁴ Another branch of theories focuses on the liberties of the perpetrator, which arguably are infringed if attempts are punished.⁷⁵ Yet another branch focuses on the opportunity of the perpetrator of an attempt to desist -- an opportunity of which the perpetrator of the complete crime deprived herself. This opportunity to desist is necessary in order to provide the perpetrator with an opportunity to repent.⁷⁶ All these non-utilitarian approaches share a common focus on the perpetrator of the crime and are therefore classified here as perpetrator-centered theories.

Utilitarian theories in general and economic analysis of law in particular also

⁷³ See discussion accompanying notes 44-46.

⁷⁴ The general term used to describe these theories is moral luck. See MORAL LUCK, (Daniel Statman, ed., 1993).

⁷⁵ Crocker, *supra* note 39.

⁷⁶ Duff, *supra* note 46 at 34-35.

adhere to a perpetrator-based perspective. These theories maintain that the differential treatment of attempts is intended to provide incentives for the perpetrators of crime to desist and, hence, to prevent the harms. Under this view, the lesser punishment for attempts is aimed to induce the perpetrator to abandon his plan and refrain from completing the crime.⁷⁷ Again, this explanation concentrates on the effect of the sanction on the perpetrator of the crime.⁷⁸ Let us explore in some detail the traditional justifications for the differential treatment of attempts in the law and economics literature and establish the claim that these justifications are indeed exclusively perpetrator-centered.

Economic theories that examine the optimal punishment of attempts have been offered separately by Posner and Shavell. Posner argues that attempts ought to be punished, in order to increase the expected cost of crime to criminals.⁷⁹ This way, additional deterrence is generated without making the punishment for the completed offense more severe. Posner supports the practice of punishing attempts less severely

⁷⁷ Originally, the argument appeared in Cesaare Beccaria, *ON CRIMES AND PUNISHMENTS* 69 (1989) (1st. ed 1764). For an effective critique, see Hart, *supra* note 46, at 130; Lewis, *supra* note 46.

⁷⁸ There is, however one important exception to the perpetrator-centered perspective. Some have pointed out that the victim of a crime has strong vengeful feelings towards the criminal, so that hurting the offender gives the victim something they value. These sentiments were labelled by Bentham "vindicative satisfaction". See Jerney Bentham, *THE PRINCIPLES OF MORALS AND LEGISLATION* (1988, originally published at 1781), pp. 158-9. These sentiments would be particularly intense if the crime was successfully completed. See Ashworth, *supra* note 45, at 744-745; Hart, *supra* note 46, at 131. Many have resisted this argument by pointing out the illegitimacy of taking into account vengeful sentiments. See Kadish *supra* note 39, at 693; Hart, *id.* This argument is, however, under our classificatory scheme a victim-centered one and is therefore an exception to the general tendency of criminal law to focus upon perpetrator-centered arguments.

⁷⁹ Posner, *supra* note 16, at 1217-1218.

than completed acts on the basis of "marginal deterrence".⁸⁰ The idea of marginal deterrence suggests that once a criminal already commits a punishable act, he should be provided with incentives to refrain from committing a more severe act. Once a criminal places himself on the continuum of severity of criminal actions, marginal deterrence is required to deter him from moving along this continuum towards more severe acts.⁸¹ In the context of attempts, marginal deterrence is required "[To] give offenders an incentive to change their minds at the last moment".⁸² That is, once the criminal act begins, it is desirable to deter the actor from culminating it. Posner argues, in addition, that preparations to commit a crime (such as the announcement of one's intention to do so) should not be treated as attempts and should not be punished at all, because of the lower probability that they will actually lead to harm.

Shavell, in a more systematic analysis, raises similar justifications for the treatment of attempts.⁸³ He iterates that punishing attempts raises the expected sanction without increasing the magnitude of the sanction to the completed offense. If, under

⁸⁰ The original theory of marginal deterrence within modern law and economics scholarship was developed by Stigler, *supra* note 14. An excellent synthesis of this theory was advanced later by Shavell. See Steven Shavell, *Specific versus General Enforcement of Law*, 99 JOURNAL OF POLITICAL ECONOMY 1088 (1991), and Shavell, *A Note on Marginal Deterrence*, 12 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 345 (1992). See also Wilde, *Criminal Choice, Non-Monetary Sanctions and Marginal Deterrence: A Normative Analysis*, 12 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 333 (1992).

⁸¹ Stigler and Shavell's treatments of marginal deterrence intended to show why it is desirable to punish some offenses less severely than others, namely, why it would be disadvantageous to punish every single offense with the maximal feasible sanction.

⁸² Posner, *supra* note 16, at 1217.

⁸³ Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUMBIA LAW REVIEW 1232, 1249-52 (1985); Shavell, *Deterrence and the Punishment of Attempts*, 19 JOURNAL OF LEGAL STUDIES 435 (1990).

some constraints, the magnitude of the sanction for the complete crime cannot be raised, and if detection of attempted acts is a byproduct of the detection effort invested against complete acts, then society can gain added deterrence "cheaply" by punishing the detected attempts. In invoking the marginal deterrence argument to justify a less severe punishment of attempts, Shavell points out that such treatment is useful only when the criminal can potentially reevaluate and abandon his act, that is, attempts that were not carried out fully (preparation?). In the case of attempts that were fully carried out yet failed due to chance, Shavell argues that marginal deterrence plays no role and such attempts should, therefore, be punished as severely as completed acts.⁸⁴

Shavell stresses an additional justification for punishing attempts less severely -- a "statistical" justification. He argues that when an attempt fails, this is indicative of the lesser danger that the act imposes. Since different acts may pose different degrees of dangerousness, and since this degree is not always evident, a failure of an attempt may be regarded as evidence that the act was, a priori, less likely to result in harm, and thus it should be punished less severely.⁸⁵

Although many economists endorse the Posner-Shavell treatment of attempts,⁸⁶ it

⁸⁴ Shavell considered the possibility that punishing attempts that failed by chance less severely would still generate marginal deterrence, by deterring the criminal from attempting again and subjecting himself to the risk of an increased penalty if he succeeds. Shavell rejects this argument by arguing that marginal deterrence from renewed attempts can be provided even if attempts are sanctioned as severely as completed acts, by raising the sanction with the number of attempts.

⁸⁵ See also *supra* note 46.

⁸⁶ See, e.g., Samuel Kramer, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 398 (1990).

is not without difficulties. Its marginal deterrence application justifies the lenient treatment of attempts as providing incentives for rational criminals to "change their minds" and abandon a plan which they have already begun to pursue. One may wonder why rational individuals would even begin the pursuit of a crime if they expect to change their minds in the process. If the incremental sanction imposed on completed acts is sufficient to generate marginal deterrence, why does it not generate full deterrence and prevent the initiation of pre-crime activities? After all, a criminal who commits an attempt intends for its success, and takes into account the sanction for completed acts. If that does not deter him, why would the same sanction deter him when he has already begun the act and has only to decide whether to finalize it? The very same assumption that underlies the marginal deterrence theory -- the assumption of rational behavior -- raises difficulty in the consistent application of the theory.⁸⁷

Additional difficulties arise with respect to the statistical justification of attempts. In some cases, the failure of the attempt does indeed provide indication for its lesser degree of dangerousness. But many attempts fail strictly due to chance, and do not reflect a weaker potential of the perpetrator. In such cases, there is no statistical basis for lenient treatment.⁸⁸

Aside from the analytical difficulties of the Posner-Shavell approach, its

⁸⁷ See Shavell, *Deterrence and the Punishment of Attempts*, 19 JOURNAL OF LEGAL STUDIES 435, 455-6, for a discussion of this difficulty.

⁸⁸ Shavell, *id.*, pp. 452-4, discusses this objection and concludes that the statistical justification of the lenient treatment of attempts is justified only if the attempt was deliberately *abandoned* by the perpetrator, and not if the attempt was *interrupted*. Only in the former case a failed attempt indicates a lesser dangerousness of the act.

perspective is limited by being strictly perpetrator-centered. Posner and Shavell focus exclusively on the incentives guiding the perpetrators of crime and (as in the statistical justification) on how courts can distinguish ex post between different types of perpetrators. In light of this unilateral dimension, and in light of the evident difficulties it raises, the next section of the paper will explore a different economic understanding of the law of attempt. It will argue that the treatment of attempts can be rationalized by a different approach -- a victim-centered perspective. This approach does not, in any way, contradict or conflict the perpetrator-centered approach. In fact, it shares the rationality and efficiency premises of the Posner-Shavell approach and complements it to form a broader and more applicable set of justifications for criminal law's treatment of attempts.

D. Punishing Pre-Crime Activities: A Victim-Centered Perspective

This section will argue that the leniency towards pre-crime activities is a mechanism which provides global incentives for potential victims to reduce their investment in precautions. Two aspects of the legal treatment of pre-crime activities will be addressed: the gap between the sanctions for attempts and the sanctions for the complete crime, and the reluctance of criminal law to punish preparation. It will be argued that both these principles are subtle mechanisms which reduce the expected costs of punishment for criminals who target overly-cautious victims. Consequently, both principles provide incentives for criminals to shift their criminal activity from less cautious victims towards more cautious ones and thereby provide incentives for

potential victims to reduce their investment in precautions.

After describing this incentive effect of the legal treatment of pre-crime activities, an evaluation of its normative justification will be made. It will be argued that providing victims with incentives to reduce their precautions is desirable in situations in which victims are more likely to overinvest. Some concerns leading to the conclusion that victims indeed overinvest in precautions will be highlighted. However, the two facets of the analysis, the positive and the normative, are independent of each other. One may dispute the article's normative claim that victims ought to be given incentives to reduce their investment in precaution, while at the same time embrace the positive characterization of the incentive effects of the law of attempt.

1. The Incentive Effects of Sanctioning Pre-Crime Activities

(a) *Attempts versus Completed Acts*

This sub-section will explore the incentives provided to potential victims under a scheme which maintains a gap between the sanctions imposed for attempts and complete crimes. The conclusion will be that the larger the gap between the sanctions imposed for attempts and those imposed for complete crimes, the lesser the incentives of potential victims to invest in precautions.

Precautions against crime taken by potential victims reduce the chances of successful completion of the crime. Such precautions reduce the chances of success either by increasing the chances that the perpetrator of crime will not complete the activities he plans to commit, or by increasing the chances that, even if the perpetrator

of crime complete his plan, the desired consequences of the plan would not be realized. Consequently, crimes directed against more cautious victims are more likely to fail and end up being classified as attempts and punished accordingly. Put differently, the more potential victims invest in precautions, the more likely they are to be the victims of unsuccessful attempts to commit crimes rather than the victims of complete crimes.

The very same conclusion is grounded in an additional independent observation. Precautions taken by potential victims of crime force potential criminals who target those victims to go through a longer sequence of pre-crime activities. The longer sequence of pre-crime activities exposes the perpetrator to a larger risk of being interrupted before the completion of the crime. Hence, a crime directed against more cautious victims is more likely to wind up being classified as an attempt than a crime directed against a less cautious victim.

These findings imply that criminals targeting highly-cautious victims are more likely to be influenced by sanctions imposed for attempts than criminals operating against less cautious victims because it is the former type of criminal whose actions are likely to wind up being unsuccessful attempts. As the sanction for attempts decreases relative to the sanction for completed acts, the expected cost of sanctions facing criminals decreases, regardless of the type of victim they target. But this expected cost of sanction decreases **more** if the criminal targets a victim of the overly-cautious type. Consequently, as the sanction for attempts decreases, cautious victims become more attractive targets. Some criminals are, therefore, likely, under a rule which exculpates or mitigates the sanctions for attempts, to substitute their targets and choose to act against

cautious victims, rather than against less cautious ones.

The following hypothetical example should illustrate the incentive effects that mitigated sanctions have on criminals. Suppose victims can take one of two levels of precautions, "high" or "low". If the low level of precautions is taken, the criminal's probability of success is .75 (and the probability of failure is thus .25), and if the high level of precautions is taken, the criminal's probability of success is .25 (and the probability of failure is .75). Assume that the probability of detecting and sanctioning a criminal is the same whether or not the act succeeds.⁸⁹ If the criminal commits a completed crime, he is punished by 8 years of imprisonment. To see the effect of mitigated treatment of attempts, let us consider four possible treatments of attempts. In Case I, attempts are punished identically as complete crimes -- a sanction of 8; In case II, attempts are treated more leniently, and receive half the sanction -- 4. In Case III attempts are treated even more leniently with a sanction of 2, and Case IV involves the ultimate leniency, a sanction of 0. The following table summarizes the expected sanctions the criminal faces:

⁸⁹ One may argue that the probability of detecting and sanctioning attempts is different than that of complete crimes. It may be that attempts are harder to detect, either because they often go unnoticed, or because the absence of harm reduces victims' and witnesses' incentives to report the acts. The opposite may also be true: if a crime fails due to some precautionary measure, this same measure may lead simultaneously to the detection of the criminal (e.g., alarm sirens). Notice, that the higher the probability of detecting an attempt, the more important becomes the legal policy of sanctioning attempts, because more often this policy needs to be applied. However, the analysis of the incentive effects of the law of attempt is independent of the probability of detection. As long as attempts are sometimes detected, sanctioning them leniently will generate the discussed reduction in investment in precautions.

	Case I	Case II	Case III	Case IV
Expected Sanction if Precautions are "Low"	8	7	6.5	6
Expected Sanction if Precautions are "High"	8	5	3.5	2

As criminal law moves towards more lenient treatments of attempts, the expected sanction falls for both High and Low precaution levels.⁹⁰ But, as the table demonstrates, the sanction falls much more sharply if the precaution level is high. In the extreme, if attempts are not punished at all (Case IV), the difference in the expected sanction is 4 years (6 years if the precaution level is "Low", 2 years if "High".) Thus, as the treatment of attempts becomes more lenient, high levels of precautions lose more of their deterrent factor.

In light of this effect on criminals' choice of victims, the victims' incentives to engage in precautions can now be examined. Under a system that mitigates the sanctions for attempts, victims will find it less profitable to engage in a high level of precautions, relative to a system that punishes attempts and completed acts equally. Establishing a high level of precautions is less profitable because these precautions would lead more criminal acts to fail and be classified as attempts. As argued, the reduced sanction for attempts raises criminals' tendency to select highly cautious

⁹⁰ To understand how the expected sanctions are calculated, take Case II for example. If the level of precautions is low, the expected magnitude of sanction is $.75 \cdot 8 + .25 \cdot 4 = 7$. If the level of precautions is high, the expected magnitude of sanction is $.25 \cdot 8 + .75 \cdot 4 = 5$. This ratio of 7 to 5 is maintained as long as the probability of detection is uniform across attempts and complete acts. When the probabilities diverge, the ratio may change, but the qualitative difference between the cases remains in tact.

victims. Thus, victims who choose high levels of precautions will become more favorable targets if attempts are sanctioned leniently. Consequently, victims will have an incentive to reduce their precaution level. As the example above demonstrates, victims' incentives to choose a low level of precautions are augmented as attempts are treated more leniently. By choosing a low level of precautions, victims in fact choose to be protected by a relatively higher sanction, that is, to deter more criminals from targeting them.

To be sure, there are other benefits to high levels of precautions that victims may still enjoy. For one, the reduced likelihood that the crime will succeed is (perhaps the most) significant benefit from setting high levels of precautions, and this benefit is not affected by the treatment of attempts. This article's claim rests on the analysis of merely one benefit that arises from precautions -- the deterrent effect. It has been demonstrated that as the sanction for attempts decreases, the deterrent effect of precaution subsides, and thus, in equilibrium, less precautions will be exercised.

In the taxonomy introduced above, the law of attempt provides **global** incentives to reduce victims' precautions. It is global, because it regulates victims' incentives across many types of victim behavior and across many types of criminal offenses. Any type of activity by victims that reduces the chance that a crime will succeed -- protecting one's home, carrying defensive weapons, monitoring one's agents, etc. -- will be influenced by this incentive device. And many types of offenses, including all those that are directed against specific victims, are in the domain of this scheme.

Lastly, it should be noted that the victim-centered approach holds regardless of

the content of the law. Different regimes may treat criminal attempts differently, some more leniently, others more strictly. Each will affect the victims' incentives differently, with the stricter regimes leading to higher levels of victims' precautions. What this positive analysis demonstrates is that by focusing on victims' incentives, the interplay between the sanctioning policy and the levels of precautions can be determined. Before turning to the normative evaluation of the different treatments of attempt, another positive aspect of the law of attempt will be examined -- the incentive effects of distinguishing between preparation and attempt.

(b) Attempt versus Preparation

Section IV.B surveyed one of the more intricate doctrinal problems in criminal law, namely the elusive boundaries between preparation and attempts. While it was argued that drawing a precise boundary between preparation and attempt is not manageable, it was nonetheless maintained that criminal law norms can expand the stage of (unpunishable) preparation and hence diminish the (punishable) stage of attempts or, alternatively, diminish the stage of preparation and expand the stage of attempts. This section will argue that the choice to expand one stage at the expense of the other affects victims' investment in precautions.

The activities preceding a crime directed against overly-cautious victims are longer and more complex than the activities preceding a crime directed against less cautious victims. The risks that pre-crime activities targeting a cautious victim will be interrupted (and the perpetrator be subject to the sanctions that the legal system imposes

upon these activities) is therefore larger. Criminals who target cautious victims are therefore more affected by the sanctions imposed by the criminal system on pre-crime activities. The expansion of the non-punishable stage in the pre-crime activities at the expense of the punishable stage reduces the expected cost of sanctions facing criminals, regardless of the type of victims they target. But this expected cost of sanctions decreases **more** if the criminals target the more cautious victims. Thus, the longer the non-punishable preparation stage, the greater are the incentives of criminals to target cautious victims. These dispositions on the part of criminals influence, in turn, the investment in precautions of potential victims of crime. For similar reasons as were discussed above, the longer the non-punishable stage of pre-crime activities, the smaller is the investment in precautions of potential victims. The increased disposition of criminals to target cautious victims will induce potential victims to reduce their investment in precautions.

(c) *Summary*

Modifying the sanctions for attempts and modifying the boundaries between preparation and attempts can be described as legal mechanisms aimed at modifying the expected costs of pre-crime activities. Criminal law can treat pre-crime activities harshly (by increasing the sanctions on attempts; or by expanding the scope of attempts at the expense of preparation) or it can treat pre-crime activities leniently (by reducing the sanctions for attempts or by expanding preparation at the expense of attempts).

Sub-sections (a) and (b) show that criminals who target overly-cautious victims

are more sensitive to the sanctions that govern pre-crime activities. Consequently, modifying the sanctions for pre-crime activities (either by modifying the sanctions for attempts, or by modifying the boundaries between attempt and preparation) influences discriminately the expected costs imposed upon criminals who target highly cautious victims and criminals who target less cautious ones. Reducing the sanctions for pre-crime activity leads to a greater reduction of costs for criminals who target highly-cautious victims. This leads, in turn, to a decline of victims' incentives to overinvest in precautions.

2. The Efficiency of the Law of Pre-Crime Activities

This article argued that treating pre-crime activities leniently, as most legal systems do, leads victims to reduce their investments in precautions. Is this a desirable outcome?

In Section II, the distortions in victims' choice of precautions were examined. The conclusion was ambiguous. Conflicting forces drive victims to take either too much or too little precautions, and the direction of the distortion cannot be determined unambiguously. Absent a thorough empirical investigation, the conjectures to be postulated are speculative, based on common sense and anecdotal evidence.

We believe that in a large set of situations, the dominant source of distortion of victims' incentives is the diversion of crime, which leads victims to take **excessive** precautions. Take property crimes for example. Many types of victims' precautions, particularly those that operate as protective measures that reduce the chances of harm to

the victims, merely divert crime to other scenes. If a victim builds a fence around her house, the burglary will occur elsewhere; if a victim installs car anti-theft devices, the car thief will turn to another target; If a robber seizes a small loot from his victim, he is likely to reengage in robbery; etc. If diversion of crime is the result of victims' precautions, the level of precautions will be socially excessive.⁹¹ Thus, inasmuch as precautionary activities are observable to criminals, there is a concern that overinvestment in precautions will arise.⁹²

Similar reasoning applies to other types of offenses, including violent crimes. If one victim's precautions merely transfer the crime to another victim, there is no social gain from these precautions and they ought to be deterred. Similarly, if victims refrain from various types of everyday activity in order to limit their exposure to random crime, the amount of crime does not necessarily decrease, and yet society bears the cost of suppressed activity. This is another instance in which victims should be driven to engage in a lesser degree of protection.

In support of these theoretical conjectures regarding the amount of precautions, one need only measure the size of annual spending on precautionary activity in the U.S. In a study done by economists looking at the fiscal year 1985, it was estimated that victims' spending on limiting the physical access to their property was over \$160

⁹¹ See Section II.A *supra*.

⁹² Shavell, *supra* note 17, proves this proposition.

billion.⁹³ Domestic security expenditures by the private sector exceeded in that year the public military spending.⁹⁴ If one is convinced by these numbers that a social overinvestment in precautions exists, then a global mechanism to reduce spending, such as the one herein examined, gains merit. Hence, one may conclude that it makes economic sense to treat attempts leniently, thereby provide victims with global incentives to reduce their levels of precautions.⁹⁵

3. Objections

(a) *The Limits of the Mechanism*

We argue that treating pre-crime activities more leniently leads criminals to shift towards relatively more cautious victims. Clearly, this does not mean that criminals will target exclusively the highly-cautious victims. A problem arises, however, in

⁹³ See Leband and Sophocleus, *supra* note 5. That study estimated the total expenditures on transfer activities, including government enforcement, criminals' effort, insurance and litigation to be in excess of \$400 billions. The victims' precautions category, which totals more than \$160 billions, includes the estimated cost of locks, alarms, and guards, to both residences and businesses.

⁹⁴ Leband and Sophocleus, *id.*, report an annual spending of just under \$150 billions on military in 1985.

⁹⁵ This conclusion seems to conflict with some of our conclusions in previous work. See Harel, *supra* note 6. This alleged incoherence can, however, be explained by pointing out that the previous work focuses on local rather than global incentives. As section II illustrated a variety of competing incentives operate on potential victims. It is possible that while most of potential victims overinvest in precautions and therefore need to be provided with incentives to reduce their investment, some potential victims underinvest in certain precautions. Under these circumstances, it is rational for criminal law to reduce (by using global incentives) the overall investment in precautions while reinforce locally the usage of those precautions which are considered to be desirable or efficient. The law governing pre-crime activities operates therefore as a global incentive for potential victims to increase their investment in precautionary measures. At the same time, criminal law maintains a variety of doctrines which provide local incentives for potential victims to increase their investment in specific precautions. See text accompanying notes 35-37, *supra*.

determining the effect on victims who tend to take intermediate levels of precautions.⁹⁶

To illustrate the problem, consider the following example. Denote a rule which treats pre-crime activities leniently LR and a rule which treats pre-crime activities harshly HR. Assume that there are three types of potential victims: type A victims who take low levels of precautions, type B who take an intermediate level of precautions and type C victims, the highly cautious ones. Under the regime HR, some criminals target A, some target B and some target C. What happens if we move to the regime LR? Some of the criminals previously targeting type A victims will shift to type B victims or to type C victims, and some of the criminals targeting type B victims will shift to type C victims. It is unclear whether type B victims will be made worse off under LR. than under HR. Thus, we cannot determine in abstract how the rule will affect the victims that take intermediate levels of precautions.

This analytical shortcoming of the proposed approach does not lead, however, to the unravelling of the incentive mechanism. The first thing to note is that it is not always clear with what type of incentives we wish to provide victims who take intermediate levels of precautions. The normative claim that victims should take less precautions applies in cases in which victims otherwise take excessive precautions, and not in cases in which victims behave moderately. Second, and more importantly, one should keep in mind that the social objective is not necessarily to monitor each victim's actions perfectly, but to implement more efficient macro levels of precautions. A successful regime is one that will lead to an overall reduction of spending on

⁹⁶ We are grateful to Mike Otsuka for this argument.

precautions, even if some victims are not affected (or adversely affected) by the general trend. Thus, if type B victims do not reduce their (still excessive) precautions, the LR regime may be desirable given its overall effect.

(b) Is Criminal Law the Proper Tool?

Under the victim-centered perspective, criminal law can be designed to affect the incentives operating upon victims to take precautions against crime. Thus, the addressees of criminal law injunctions are, under this analysis, not merely potential criminals but also potential victims. This approach expands both the range of individuals who are depicted as the addressees of criminal law injunctions as well as the set of activities criminal law aims to induce.

This expansion raises difficult questions concerning the proper role and boundaries of criminal law. If criminal law can be used to provide incentives to potential victims to take precautions, why can it not be used in the same manner to provide incentives for potential victims to be good citizens in other sectors of life? Can one induce individuals to contribute to charity, or pay their taxes or alimony on time by manipulating the criminal sanctions that are inflicted on crimes committed against these individuals? If such a proposal seems pernicious, why is it legitimate to use criminal law in order to induce potential victims to take efficient precautions against crime? Namely, which categories of behavior should society induce on the part of potential victims through the mechanism of differentiating the sanctions imposed upon crimes directed against these victims?

Admittedly, the logic of this article's approach fits any kind of victim behavior. But this "mechanical" conformity is not the whole picture. There are other factors that ought to determine when an applicable incentive mechanism should be utilized. Specifically, it may be legitimate to use differentiated sanction to monitor victims' precautions, while it may be illegitimate to use it to monitor other types of non-virtuous behavior.

A full exploration of the role and boundaries of criminal law, and of the behavior it can legitimately induce, is beyond the scope of this paper. Let us, however, provide several reasons supporting the claim that inducing individuals to take efficient precautions is within the sphere of legitimate criminal law application.

First, by regulating the behavior of potential victims, criminal law does what other areas of law have long been recognized to do.⁹⁷ Contract law, through doctrines of reliance and mitigation, issues directives to victims of breached contracts as well as to those who have committed breaches.⁹⁸ Similarly, tort law, through contributory negligence doctrines, induces action not only by potential tortfeasors, but also by the victims of torts.⁹⁹ Criminal law is ordinarily regarded as an exception in this respect,

⁹⁷ See Cooter, *supra* note 3.

⁹⁸ For discussions of various types of victims' incentives see Posner, *supra* note 1, at 126-8. On victims' incentives to make reliance investments see Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL JOURNAL OF ECONOMICS 466 (1980); William P. Rogerson, *Efficient Reliance and Damage Measures for Breach of Contract*, 15 RAND JOURNAL OF ECONOMICS 39 (1984); Shavell, *The Design of Contracts and Remedies for Breach*, 98 QUARTERLY JOURNAL OF ECONOMICS 121 (1984). On victims' incentives to reveal information see Lucian A. Bebchuk and Steven Shavell, *Information and the Scope of Liability for Breach of Contract: the Rule of Hadely v. Baxendale*, 7 JOURNAL OF LAW ECONOMICS AND ORGANIZATION 77 (1993); Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts*, 99 YALE LAW JOURNAL 87 (1989).

⁹⁹ Steven Shavell, *ECONOMIC ANALYSIS OF ACCIDENTS LAW* (1987), ch. 2.

but only because its rhetoric presupposes an exclusively perpetrator-based perspective.

Second, there seems to be an inherent difference between the investment in precautions and other activities undertaken by victims, which suggests that the only type of victims' behavior criminal law can effectively induce through the mechanisms analyzed above is their investment in precautions. Criminal law can induce potential victims to take efficient precautions through the influence it has on criminals and its ability to induce criminals to select certain victims rather than others. Such an influence depends upon the access that criminals have to the information concerning the relevant behavior of potential victims. Thus, if the legislature wishes to induce certain behaviors on the part of the potential victims through differentiating the sanctions imposed upon criminals in accordance with the behavior of the victims, it can do so effectively only if criminals have information concerning the behavior of the victims. But while it is likely that, during their pre-crime activities, criminals obtain information concerning the precautions taken by their victims, it is less likely that they will have information concerning other virtues or vices of their victims. A criminal can observe whether his victim installed locks and alarms, but not whether his victim paid her taxes, contributed to charity or treated her neighbors respectfully.

Nevertheless, one has to concede that even if criminals could observe whether their victims paid taxes or contributed to charity, it would be unjustifiable to differentiate the sanctions imposed upon criminals on the basis of such behavior by victims. Victims' investment in precautions against crime is a natural component in the social costs of crime and thus it is a natural normative target for criminal law. Put

differently, both precautions and sanctions are aimed at deterring crime, and, thus, designing a scheme that conditions one on the other seems a natural method of implementing optimal deterrence.

(c) *Criminal Law versus Fiscal Policy*

Even if it is morally legitimate to use criminal law in order to provide incentives for potential victims to invest efficiently in precautions, such incentives could also be provided through other fiscal measures, such as taxation and subsidization of precautionary activity.¹⁰⁰ Should society use direct fiscal measures or should it use criminal law to monitor victims' behavior?

A full comparison of the advantages of these two enforcement methods is beyond the scope of this article.¹⁰¹ It may be that taxing or subsidizing precautions may, under certain circumstances, be superior. It is worthwhile, however, to specify at least one advantage of the system proposed here over direct tax or subsidy. Many of the precautions used by potential victims are simply not taxable. A decision to go or not to go to the cinema, to walk or not to walk in the park, to provoke or not to provoke a potential aggressor or to lock or not to lock one's car are not the type of decisions which can easily be controlled through taxation. Hence, using taxes or subsidies are practical means to guarantee efficient investment in precautions only when precautions

¹⁰⁰ See Ben-Shahar and Harel, *supra* note 6, at 444. We are grateful to Scott Altman and Eric Talley for discussion of this issue.

¹⁰¹ Some general analytical guidelines are provided in Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 JOURNAL OF LAW AND ECONOMICS (1993)

are a quantifiable consumption product, traded in a market. Since many of the precautions used by potential victims cannot be taxed, the criminal law mechanism that this article examines becomes necessary in their control.

V. CONCLUSION

This article develops two main themes: a positive and a normative. Under the positive theme, the manner in which pre-crime activities are treated in criminal law influences the pattern by which criminals select their victims. Consequently, it influences the investment of potential victims in precautions. This positive theme was derived under standard economic assumptions, that is, the assumptions of rationality and foresight on the part of perpetrators and potential victims of crime.

Under the normative theme, the law of pre-crime activities promotes efficiency because it leads to a reduction of the investment of potential victims in precautions. This claim depends, however, upon the conjecture that, in the absence of special treatment of pre-crime activities, potential victims will overinvest in precautions. The diversity of conflicting factors which distort victims' investment in precautions makes the normative claim more speculative. The law of pre-crime activities could be justified on efficiency grounds only if the distortions which motivate victims to overinvest are more powerful than the distortions motivating victims to underinvest.

The victim-centered perspective that this article advances can be extended in various directions. One theme for future research is to provide the theoretical

framework with empirical verification. By comparing the different observed patterns of behavior of potential victims across jurisdictions which treat pre-crime activities differently, one could verify (or refute) the positive predictions of this article. Or, alternatively, by examining the changes in the patterns of behavior of potential victims as a result of changes in the legal treatment of pre-crime activities could, again, provide an empirical test for the theoretical predictions.

Another theme for possible extension is to apply the victim-centered approach to other areas of criminal law, to shed different light on familiar doctrines. Are there common practices which are ordinarily justified with respect to their effect on criminals, and which can now be understood also with respect to their effect on victims? Lastly, the victim-centered perspective can be extended within its theoretical apparatus, if examined under less restrictive informational assumptions. One may inquire, for example whether victims can be induced to take optimal precautionary measures even when these measures are not observable by criminals or courts.

One cannot conclude but with the standard proviso that characterizes economic analysis of law. This article proposes an insight, not a reform. It seeks to understand the effects of legal regimes, not to design one. The reader may elect to reject the normative premise underlying the analysis, as well as its moral implications. In such a case, the article contributes an understanding of the price of these moral considerations. If society is reluctant to use criminal law as means of inducing behaviors by potential victims, it needs to be informed of some important yet less obvious ensuing costs.