Criminalizing Endangerment

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I. ATTACKS AND ENDANGERMENTS

Some crimes (types or tokens) consist in attacks on legally protected interests. If I shoot at you, intending to injure you; or start a fire, intending to damage your property; or lie to you, intending to obtain money from you: I attack your interests in physical integrity, in property, in not being harmfully deceived—attacks against which the criminal law protects you. If my attack is successfully consummated, I am (absent a further defense) guilty of wounding with intent, of arson, or of obtaining by deception. If my attack is unconsummated, I am guilty of attempting to commit one of those crimes; attempts are attacks that fail.

Other crime types or tokens consist in endangering rather than attacking legally protected interests. If, without intending harm, I act in a way that I realize might injure you or damage your property, I endanger your physical security or property; if, without intending to deceive, I tell you that a certain bank is financially secure, realizing that my statement might be false and might induce you to open an account with that bank, I endanger your interest in having accurate financial information to act upon. The criminal law protects these interests against such endangerments. If the endangerment is

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1. See Offenses Against the Person Act, 1861, c. 100, § 18 (U.K.); Criminal Damage Act, 1971, c. 48, § 1 (U.K.); Theft Act, 1968, c. 60, § 15 (U.K.). Since wounding with intent requires an intention to injure, this crime type consists in an attack. Since arson does not require an intention to damage, that crime type does not consist in an attack; but since such an intention is sufficient mens rea for the offense, some tokens of that type consist in attacks. Obtaining by deception requires an 'intention of permanently depriving' the victim, and most tokens of this crime type will indeed be attacks; but given the extended definition of 'intention' in section 6, and the fact that 'deception' need only be 'reckless', the crime type does not consist in an attack.

consummated—you are injured, your property is damaged, or my statement is false—I might be guilty of wounding, of criminal damage, or of fraudulent inducement to make a deposit. If the endangerment is not consummated, I might or might not be guilty of an offense, since English and American law have no general offense of unconsummated endangerment analogous to that of unconsummated attack. The Model Penal Code (§ 211.2) could convict me of 'reckless endangerment' if I risked causing you serious physical injury, but English law could convict me only if I endangered you in one of the specific ways that are criminalized. Neither system criminalizes endangering property as such, although I could be guilty if I endangered it by, for instance, causing an explosion or starting a fire. In neither system is it normally criminal to make a statement that I realize might be false, unless it actually is false or misleading.

My primary interest is in the ways in which endangerment is, or should be, criminalized. However, we must first attend (in § 2) to the distinction between attacks and endangerments, as two distinct types of criminal wrong, before turning (in § 3) to the structure and scope of endangerment offenses.

II. DISTINGUISHING ATTACKS FROM ENDANGERMENTS

An attack is an action or omission that is intended to harm some value or interest. I can attack your body by trying to injure you; your tangible property by trying to steal or damage it; your reputation by slandering you; your intellectual property by plagiarizing your work. Attacks need not, however, be directed against particular people: they can be indiscriminate, aimed at whoever happens to be in their

3. Offenses Against the Person Act, 1861, c. 100, § 20 (U.K.); Criminal Damage Act, 1971, c. 48, § 1 (U.K.); Banking Act, 1987, c. 22, § 35. I can endanger another inadvertently and non-culpably, see infra note 12 and accompanying text; in these cases, however, only the endangerer who is at least reckless commits an offense.

4. See, e.g., Road Traffic Act, 1988, c. 52, § 2 (U.K.); see also infra text accompanying notes 60–63.


way; they can be aimed at institutions or practices, or even at more abstract values, as when we call propaganda an attack on truth.

Both harm-intending *mens* and harm-threatening *actus* are necessary for an attack. Firing a gun might endanger *V*, but it attacks *V* only if it is intended to harm *V*. To form an intention to harm *V*, however, or to make preparations to actualize that intention, is not yet to attack *V*: the attacker must progress beyond the ‘merely preparatory’, to be ‘in the process of committing’ the attack; and his actions must engage appropriately with the world.\(^7\)

A certain hostility toward its object is intrinsic to an attack. It need not be motivated by hatred: a contract killer or a fraudster might feel no such animus toward their victims. Their actions, however, manifest a practical hostility toward the interests or people they attack, in that those actions are aimed against those people and their interests; their intentional structure is determined by the harm that they are to cause. One who intends what would normally count as harm might deny that her action is in this sense hostile: someone who commits voluntary euthanasia might argue that her action manifests the compassion that motivates it; someone engaged in consensual sado-masochism might claim that his actions display the mutual respect, and concern for each other’s pleasure, that structure this sexual encounter. What such people deny, however, is that their actions constitute attacks, because they deny that what they intend constitutes harm (just as a surgeon would deny that the amputation she carries out constitutes an attack, since it is intended to benefit rather than to harm the patient). There is of course room for disagreement in such cases, and others would insist that such actions still constitute wrongful attacks: in the case of euthanasia, on the person killed (taking the right to life to be inalienable) or on the more abstract value of life; in the case of sado-masochism, on the person’s ‘real’ interests, or on some value that the person embodies.\(^8\) This, however, would be to argue that what these agents intend does constitute harm, and that their actions do manifest practical hostility toward the interests or values against which they are now seen as stand to.

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7. Criminal Attempts Act, 1981, c. 47, § 1(1) (U.K.); R. v. Gullefer, [1990] 1 WLR 1063 (on “attempt,” marking the fact that in ordinary discourse attempts are attacks (The Model Penal Code (§ 5.01) stretches the idea of attempt further, to include any “substantial step” toward the crime)). See Duff, supra note 2, at 53–61, 385–97. This is not to imply that we should never criminalize “merely preparatory” conduct. See infra text accompanying notes 88–89.


directed. Such examples show, not that attacks are not by definition hostile actions that are intended to do harm, but that there can be normative disagreement about what counts as an attack.

Attacks typically endanger their objects: in attacking V, I create a risk that she will suffer the harm I am trying to do her. However, I can endanger V without attacking her, and our concern here is with endangerments that do not constitute attacks: ‘endangerment’ will hereafter mean ‘endangerment that is not an attack’. Our concern is also with endangerment as something that human agents do. Many dangers, including some arising from human beings, involve no human agency. There is a danger that visitors to my sickbed will catch my infectious disease, but I am not endangering them, unless I am failing to do something that I should do to protect them—such as isolating myself. If I am a kind of person who is likely to commit crimes of violence, I might be called dangerous, and risk-fearing governments might look for ways of controlling or incapacitating me: but I endanger others only if and when I begin to actualize my dangerous disposition in violent action.

I endanger another if by act or omission I create a significant risk that he will suffer harm (a risk is ‘significant’ if it provides a reason against acting as I do, or for taking precautions in acting thus). If the risk is not actualized, I merely endanger him; if it is actualized, I endanger him and harm him. I endanger him whether or not I realize, or could reasonably be expected to realize, the risk that I create: while mens rea is necessary for an attack, endangerment need involve only an actus reus—an act or omission that actually creates a suitable risk. Criminal liability for endangerment can therefore be strict: I can be guilty of an endangerment offense even if I did not (and could not reasonably have been expected to) realize the risk I created. If, however, criminal liability should depend on fault, and we ask what species of fault could justly make an agent criminally liable for the danger she creates, we will naturally think not of an intention to do harm, but of recklessness as the paradigm of fault, and of indifference (rather than hostility) to the threatened interests as the practical attitude that culpable endangerment displays. Someone who culpably endangers others does not thereby display an active hostility toward them; but in her willingness to take the risk of harming them, and her failure to take adequate precautions against doing so (or even to


notice the risk she is creating), she shows that she does not care as she should for their interests.

Given this distinction between attack and endangerment, we can see how they constitute two distinct types of criminal wrong, with different internal structures. One consists in an attack on some legally protected interest—an action structured by the intention to harm that interest, displaying practical hostility toward it. The other consists in a failure of proper concern. I fail to take proper steps to avoid, or even to notice, the danger that my conduct creates, and thus take the risk that I will cause harm to others: but that harm is not the object of my action; rather, it is a side-effect that I fail to care about as I should. If I attack someone, the non-occurrence of the harm that I intend marks the failure of my action—that is why the action displays hostility to its victim. If I merely endanger them, however, the non-occurrence of the prospective harm does not mark the failure of my action: it might even be a source of relief for me—whereas one who intends harm cannot, without forswearing that intention, be relieved at his failure to cause it.\(^\text{13}\)

The difference in moral character between the kind of wrong I do to one whose interests I attack, and the kind of wrong I do to one whose interests I culpably endanger, lies in part in the difference between being guided by wrong reasons and not being guided by right reasons. If I wrongfully attack you, the harm that I intend figures in my reasons for acting as I do: I act thus because I believe that by doing so I will harm you—though that is not a reason by which I should be guided. If I culpably endanger you, by contrast, my reasons for acting as I do may be perfectly legitimate; what goes wrong is that I am not guided by the reason against acting thus (the reason for

\(^\text{13}\) This distinction clearly has quite a lot in common with that drawn by Jeremy Horder between "crimes where the focal case of wrongdoing is the defendant’s active engagement in bringing about (or trying to bring about) some consequence, and crimes where the focal case of wrongdoing is the defendant’s (culpable) passivity, his or her failure to do enough to prevent an outcome.” Jeremy Horder, The Classification of Crimes and the Special Part of the Criminal Law, in Defining Crimes: The Special Part of the Criminal Law 21, 33 (Anthony Duff & Stuart Green eds., 2005). I cannot discuss the differences between us here. It is also close in spirit to Kenneth W. Simons, Rethinking Mental States, 72 B.U. L. Rev. 463 (1992). See also Kenneth W. Simons, Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”? : Examining the Requisite Connection Between Mens Rea and Actus Reus, 6 Buff. Crim. L. Rev. 219, 313–15 (2002). For a critique of Simons, see Kimberley Kessler Ferzan, Don’t Abandon the Model Penal Code Yet! Thinking Through Simons’s Rethinking, 6 Buff. Crim. L. Rev. 185 (2002). Contrast Larry Alexander, Insufficient Concern: A Unified Conception of Criminal Culpability, 88 Cal. L. Rev. 931 (2000) (for a critique of which, see Joshua Dressler, Does One Mens Rea Fit All? Thoughts on Alexander’s Unified Conception of Criminal Culpability, 88 Cal. L. Rev. 955 (2000)).
refraining from the action, or for taking precautions) that the risk of harm to you provides.

This difference in moral character is, however, concealed by some familiar approaches to understanding criminal wrongdoing. It is concealed most thoroughly if we combine a simple understanding of the Harm Principle with a 'choice' model of criminal fault. On Feinberg's version of the Harm Principle, we begin (analytically) with some identifiable harm, such as injury to the person or damage to property; we then identify some human action as the cause of that harm, which gives us an *actus reus*. This 'conduct-cause-harm' model does not yet give us a conception of criminal fault, but one might naturally approach that issue by asking about the conditions given which the action's agent should be held criminally liable for the harm for which she is causally responsible—which is also to ask, if we think that criminal liability should track culpable moral responsibility, about the conditions given which she is culpably morally responsible for that harm. A tempting answer, especially for those who find their intellectual home in a liberal neo-Kantianism, is that responsibility and culpability must depend on choice: I am responsible for the harms I choose to cause, and culpable if I have no justification or excuse for that choice. From this perspective, intention and recklessness (defined as conscious risk-taking) exemplify the same type of fault, since both consist in the choice to cause or to risk causing harm: the only difference is that intention is a more serious fault, since the merely reckless agent does not choose actually to cause harm. Negligence is then either not a species of 'fault' at all, since it involves no culpable choice; or a lesser type of fault, consisting in a failure to make choices (the choice to attend, or to take care) that one could and should have made.

This model of criminal liability has been variously criticized. One criticism concerns the concept of harm, and whether we can—as Feinberg insists—always identify the harms that are to ground

liability independently of the wrongful actions that generate them.\textsuperscript{16} Another focuses on the austere typology of wrongs that the ‘conduct-cause-harm’ model implies: it identifies and categorizes wrongs primarily by reference to the interests that they harm, and the extent of the agent’s culpable responsibility for those harms—whereas, critics argue, an adequate account of the kinds of wrong that properly concern the criminal law must draw on a richer, ‘thicker’, set of ethical-legal concepts that reflect not just the causation of harm, but the way, the context, and the spirit in which harm is done.\textsuperscript{17} A third kind of objection focuses on choice as the supposedly essential determinant of criminal liability: quite apart from the question of whether ‘choice’ can be so defined that it suffices for criminal liability (whether we can specify a conception of ‘free’ choice that will be sensitive to all the defenses that the law should recognize), it is objected that choice is not necessary for liability—that we must look as well, or instead, to the attitudes or dispositions that are revealed both in agents’ choices and in their unchosen responses.\textsuperscript{18}

I will not rehearse these objections, or possible responses to them, here. Instead, I want to note, first, that the moral difference between attacks and endangerments is also less visible if we focus not on choice, but on the dispositions or character traits that lie behind and inform choice and action; and second, that the abstraction and conceptual thinness of the ‘conduct-cause-harm’ model of criminal wrongdoing might be more apt for endangerment offenses than for attacks.

As to the first point, compare an agent who attacks another’s property not from malice, but simply as a means to a further end, with one who consciously takes an unreasonable risk of damaging another’s property in the course of his intended enterprise: one cuts down his neighbor’s tree because it blocks his view; the other aims to burn his own trees, but realizes that the fire might spread to his neighbor’s tree. Each, we might think, displays the same vice or defect of character—a willingness to damage others’ property in

pursuit of his own ends, a serious indifference to others' rights and interests; and we might then think that each commits the same kind of wrong. If, however, we attend to the intentional structure of their actions, and the practical attitudes manifested in (part-constituted by) those actions, we can see that the actions constitute different types of wrong. One is structured by the intention to damage another's property; it is oriented toward and guided by the wrong that that intention involves. The other is not thus structured by or oriented toward wrong. The argument that there is a significant moral difference between attacks and endangerments thus depends on the argument that criminal liability should be grounded in the character of our actions.

As to the second point, one objection to a 'conduct-cause-harm' model for attacks is that by separating the harm from the conduct that causes it, it hinders a recognition of the way in which the character of the harm is partly determined by the meaning of the harming action as an attack. The distinctive harm suffered by the victim of theft, for instance, is not just that he loses property, a loss that could equally be caused by natural mischance: it is that his property is stolen—that the thief violates his interests and rights. Once we thus focus on the wrong, on the harm qua wrongful, we see the importance of the thick ethical concepts that characterize different kinds of wrongful attack—characterizations that are unavailable on the 'conduct-cause-harm' model. In the case of endangerments, however, that separation might not be so distorting, since the agent's action is not structured by an intention to harm. What is wrong with action that endangers another's life or property is, we might say, precisely that it is liable to cause harm—harm that we can identify independently of the action that causes it. If I am injured or my property is damaged, not by an attack, but by another's culpably dangerous conduct, I am still wronged, but the harm I suffer does not now seem different in character from the harm I would suffer if I was injured or my property was damaged by natural causes. In criminalizing attacks, we might say, we are criminalizing harmful wrongs—wrongs that do or threaten a relevant kind of harm; endangerment offenses, by contrast, criminalize wrongful harms—harm-causing or harm-threatening conduct that is wrongful because it is potentially harmful.


The tasks of definition and categorization might therefore be simpler for endangerment offenses than they are for offenses that consist in attacks. We must attend to the likelihood, nature and seriousness of the harm that is caused or threatened, to the worth of the conduct that creates the danger—all these bear on the wrongfulness of the conduct. We must also attend to whether the agent was or should have been aware of the risk, which bears on her culpability. We need not, however, attend to the other kinds of factor, such as the context in which, the intention with which, or the means by which the harm was done, that bear on the moral character of an attack.

To distinguish attacks from endangerments as different types of criminal wrong is not yet to claim that this distinction is either exhaustive or exclusive—that every crime type or token can be classed unequivocally either as an attack or as an endangerment. It is tempting to think that the distinction should be exhaustive—that we should criminalize only what either attacks or endangers some protected interest; but this might be a trivial truth if we identify a public interest in the criminalization of any conduct that we see good reason to criminalize. As for exclusivity, existing offense definitions often capture both attacks and endangerments: I am guilty of criminal damage if I damage another's property either purposely or recklessly, and of simple assault if I cause bodily injury either purposely or recklessly. I comment later on whether this is consistent with recognizing attacks and endangerments as different types of wrong, but we must first turn briefly to a different question, that of how sharply attacks and endangerments can be distinguished. Two issues are worth noting.

24. See infra text accompanying notes 53–58.
25. A third issue, which I cannot pursue in detail here, concerns the scope of the intention that an attack requires: that it surely need not encompass every aspect of the action that is essential to its character as an attack. Rape is an attack on its victim's sexual interests and integrity. Rape, and attempted rape, require an intention to sexually penetrate the victim, but neither requires intention (or knowledge) as to her lack of consent, although if she consented the action would not constitute an attack; in English law it is enough that the rapist does not reasonably believe that the victim consents. Sexual Offences Act, 2003, c. 24, § 1(1)(c) (U.K.). The criminal law here follows the contours of the extra-legal concept of attack: but how do we determine just what must be intended if an action is to constitute an attack? I have proposed a solution to the analogous question in the law of attempts elsewhere, see Duff, supra note 2 at 5–29: the “intent to commit an offense” required for an attempt is an intention such that the agent would commit the relevant offense in carrying it out. That solution should also help with attacks, but I cannot
A. Intended Endangerment

An agent might intend, not to cause substantive harm, but to create (or to expose another to) a risk of harm: I set fire to the house of my rival in love, knowing he is inside, intending thereby to frighten him into leaving town by exposing him to a risk of death or serious injury. I attack his property, since I intend to damage it; but surely I also attack him, even if I do not intend to injure him and will be relieved if he escapes without injury. The same is true if I force you into a 'game' of Russian roulette; or if I try to see how close I can swing my golf club to your precious vase without actually hitting it, when the risk of hitting your vase is part of the point of the exercise. (The last example shows that the agent who intends to create a risk need not do so in order to create fear.)

Such intended endangerments should count as attacks. One way to support this claim is to argue that the risk of harm is itself a harm, so that one who intends to endanger intends to do harm. Such an argument has some plausibility: we have an interest in being safe—in being securely free of the risk of substantive harm; that interest is set back when I am endangered, even if no substantive harm ensues. First, however, we should distinguish such harm from the kinds of substantive harm on which it is parasitic—perhaps by calling it a 'secondary' harm: the risk of injury is 'secondary' to the 'primary' harm of actual injury in that I have an interest in not being exposed to such risk only because I have an interest in not being injured. Second, we anyway do not need to count risks as harms in order to count intended endangerments as attacks. We need only note that intended endangerments share the crucial features of attacks: they are aimed against those whom the agent intends to endanger; they are intended to threaten, if not to harm, their victims' interests; they manifest hostility rather than mere indifference. I will therefore take endangerments, as distinct from attacks, to consist in the creation of

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26. Compare Hyam, [1975] AC 55 (Lord Hailsham held such an intention to be sufficient mens rea for murder.).


28. See Claire Finkelstein, Is Risk a Harm?, 151 U. Pa. L. Rev. 963 (2003). Finkelstein is right to argue that we can see risk as a harm, but she relies too heavily on the argument that we must do so if punishment for endangerment is to be consistent with the Harm Principle, id. at 987–99: for the Harm Principle, in either its Millian or its Feinbergian version, permits the criminalization of conduct that causes or threatens to cause harm.

risk without any intention to cause either the relevant substantive harm or the risk of it.

(There are also offenses that consist in acting in ways that cause or might cause fear, but need not involve the creation of actual risk. If I threaten to kill you, intending you to fear that I will carry out the threat, I commit an offense, even if I do not intend to carry it out and there is no risk that I will.\(^3\) If I use 'threatening, abusive or insulting words' within the hearing of someone who is 'likely to be caused harassment, alarm or distress thereby', I might be guilty of an offense.\(^3\) Such offenses constitute attacks, if they are intended to cause fear; if they are not intended to cause fear, they constitute endangerments.)

B. 'Oblique' Intention

The intention to harm that attacks require is what is often called 'direct' intention; so-called 'oblique' intention, the foresight that my action will cause harm as a side-effect, is not enough. One who acts with or despite such foresight of harm does not manifest the kind of hostility that an attack involves. She rather manifests her utter indifference to the harm she expects to cause: she might wish or hope that the harm would not ensue, but she is practically indifferent to it, in that its prospect makes no difference to her action. Rather than treating foresight of harm as a species of intention, as the terminology of 'oblique intention' suggests, we should treat it (absent a justification) as the limiting case of recklessness; someone who acts with such foresight commits an extreme type of endangerment.

In classing 'oblique intention' with recklessness, rather than with 'direct' intention, I set myself against many theorists, and what might be becoming the authoritative definition of intention in English criminal law:\(^3\) I am claiming not just that we can analytically distinguish confident foresight from 'direct' intention (which is uncontroversial), but that that distinction marks a significant moral difference—a difference not necessarily in degree of culpability or responsibility, but in moral kind. I will not try to defend that claim.

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\(^3\) Offenses Against the Person Act, 1861, c. 100, § 16 (U.K.). See also Criminal Damage Act, 1971, c. 48, § 2 (U.K.).


here, but the distinction I draw between attacks and endangerments clearly depends on it.

The rest of this paper will focus on endangerments as distinct from attacks, and on the question of how we should criminalize various types of endangerment.

III. CRIMINALIZING ENDANGERMENT

If we ask why we should criminalize endangerment at all, an initial answer seems easy. We owe it to each other not merely not to attack each other, but to take reasonable care that we do not harm each other in the course of our activities. However uncertain the scope or stringency of our responsibilities to help others avoid harms from other sources might be, and however uncertain we might be about just what care we should take not to cause harm ourselves, we cannot deny that we have some responsibility to try to avoid causing harm by what we do. Sometimes harm is unavoidable; sometimes we cause it justifiably, either because it is not a harm that in the particular context we have reason to avoid causing, or because the reason we have to avoid causing it is outweighed by better reasons in favor of acting as we do. The fact, however, that a contemplated action might well injure others' interests is, normally, a good reason against undertaking that action, or for taking precautions against the prospective harm; and it often provides a conclusive reason against the action. If we act, without justification, in a way that we realize might harm others, when that prospective harm provides a conclusive reason against acting thus, we do wrong; we do wrong to those whom we thus endanger. The wrong consists not merely in creating a risk of harm, but in creating an unreasonable or unjustified risk of harm—a risk whose unexcused creation manifests our lack of proper concern for the interests of those we endanger.

To say that one who creates an unjustified risk of harm does wrong is not yet to say that her conduct should be criminalized. To show that it should even in principle be criminalized, we would


34. I focus here on endangering others, and cannot discuss offenses that involve endangering the agent rather than others. See, e.g., Road Traffic Act, 1988, c. 52, §§ 14, 16 (U.K.) (on seat belts and crash helmets). I also focus on individual rather than corporate activities, although the latter are the source of many of the most serious dangers that concern the criminal law: since our ideas of responsible agency are grounded in our conception of individual agency, an account of how dangerous conduct should be criminalized must begin with dangerous conduct by individuals.

need to show that it is: (1) a matter that should concern the law at all, rather than being a purely private matter to be dealt with by those involved; and (2) that it should be a matter for the criminal law, rather than for the civil law (as a dispute between the endangerer and the endangered) or for a regulatory regime applying its own, non-criminal rules and penalties. This would involve showing that the conduct in question is not just (potentially) harmful, but wrong, and that the wrong is a 'public' wrong that merits recognition and condemnation by the polity: that it is public either materially, in that it threatens harm to the collective rather than to identifiable individuals, or symbolically, in that it is a kind of wrong to individuals that should concern their fellow-citizens collectively.

I take it that many types of endangerment do constitute public wrongs in this sense, but I cannot pursue that issue in detail here. Nor can I pursue the question of what kind of fault is appropriate for endangerment offenses, though I suggested that recklessness is the paradigm fault in endangerment: the practical indifference that the reckless agent shows exemplifies the wrongfulness of endangerment. This is not to say that recklessness should be the requisite fault for all endangerment offenses, which would be to condemn the many existing offenses that require only negligence, or that make liability to some degree strict, but I cannot pursue here the questions of when, if ever, negligence is an adequate basis for

36. The latter possibility is especially relevant to corporate activities. However, while regulatory agencies often seek to secure compliance without direct recourse to criminal prosecution, see Keith Hawkins, Law as a Last Resort: Prosecution Decision-Making in a Regulatory Agency (2002), they usually operate under the aegis of and in ultimate reliance on a criminal law that defines endangerment offenses for which individuals or corporations can be convicted and punished.


38. I leave aside here the question of whether recklessness always requires awareness of the risk one is taking. See supra text accompanying note 18. However, the argument that recklessness can be constituted by the very failure to notice a risk, when that failure manifests the appropriate indifference, is strongest when the risk is integral to an attack, as when a violent assailant displays "extreme indifference to the value of human life," Model Penal Code § 210.2(b) (Proposed Official Draft 1962), in his very failure to advert to the obvious risk that he will kill his victim, see Miller and Denovan (unpublished decision 1960), in G.H. Gordon, 2 The Criminal Law of Scotland 303–07 (M.G.A. Christie, 3d ed. 2000–2001); Parr v. H. M. Advocate, 1991 SLT 208, or when the actualization of the risk turns an action into an attack, as when a man is convinced, without good reason, that a woman on whom he forces sexual penetration consents to it, see Morgan, [1976] AC 182, Cogan and Leak, [1976] QB 217. Perhaps recklessness in pure endangerment offenses always requires conscious risk-taking: but I cannot pursue this possibility here.
criminal liability, or when, if ever, liability can properly be strict.\textsuperscript{39} I want to focus instead on the different ways in which we can criminalize endangerment.

We can distinguish three general modes of criminalization.\textsuperscript{40} One identifies as a ‘public’ wrong, meriting authoritative condemnation by the criminal law, conduct that is already wrongful. Another gives a more precise specification of a wrong whose scope is pre-legally controversial or unclear. The third criminalizes conduct that was not wrongful prior to its legal regulation, but that, once legally regulated, becomes wrongful in virtue of the way it hinders the ends that the regulation serves. Dangerous driving exemplifies the first mode, as a \textit{malum in se}. The offense of allowing a dog bred for fighting ‘to be in a public place without being muzzled or kept on a lead’ exemplifies the second mode.\textsuperscript{41} Owners of such dogs have some pre-legal responsibility to take precautions against the harm that they might cause, but people disagree about its precise scope; the law provides a clear determination of that responsibility. The offense of having a firearm without a certificate exemplifies the third mode.\textsuperscript{42} Without a legal regulation requiring certification, it could not be wrong to possess a firearm without a certificate, but if the creation of such an offense is justified, it is because the regulation helps to prevent harms of relevant kinds. Breaches of the regulation are therefore wrongful because they threaten to undermine that harm-preventive goal.\textsuperscript{43}

We can clarify these different modes of criminalization, and the problems of principle that they sometimes present, by drawing some more systematic distinctions between different kinds of endangerment offense, and examining some of the issues that those distinctions raise.\textsuperscript{44}

\textbf{A. Consummate v Nonconsummate Offenses}

Endangerment offenses are \textit{consummate} if their commission requires the actualization of the relevant risk, the occurrence of the relevant harm; wounding and criminal damage, when committed

\begin{itemize}
\item \textsuperscript{39} See Appraising Strict Liability (A. P. Simester ed., 2005).
\item \textsuperscript{40} See Duff, supra note 37 at 56–66; see also R.A. Duff, \textit{Crime, Prohibition and Punishment}, 19 J. Appl. Philos. 97 (2002).
\item \textsuperscript{41} Dangerous Dogs Act, 1991, c. 65, § 1(2)(d) (U.K.).
\item \textsuperscript{42} Firearms Act, 1968, c. 39, §§ 1–2 (U.K.).
\item \textsuperscript{43} See infra text accompanying notes 67–81.
\item \textsuperscript{44} See Douglas N. Husak, \textit{The Nature and Justifiability of Nonconsummate Offenses}, 37 Ariz. L. Rev. 151 (1995) (usefully analyzing several of these distinctions).
\end{itemize}
recklessly, are examples. They are nonconsummate when they are defined 'in the inchoate mode', and do not require the actualization of the risk; reckless endangerment and dangerous driving are examples. Two structural questions arise here.

First, the law sometimes distinguishes consummate from nonconsummate endangerment offenses: it distinguishes homicide from reckless endangerment, and causing death by dangerous driving from dangerous driving. Sometimes, however, it criminalizes only the consummate offense, as with criminal damage. Sometimes it criminalizes only the nonconsummate offense, as with perjury—a sworn witness who makes a material statement that she does not believe to be true commits perjury whether or not her statement is false, or believed. I will discuss shortly the question of whether we should have a general offense of nonconsummate endangerment, analogous to that of attempt: the question here is why the law should sometimes distinguish consummate from nonconsummate forms, and sometimes not. The main reason to distinguish them lies in the argument that 'resulting harm' makes a significant difference to the character and seriousness of the wrong committed: one who causes the harm that she recklessly risks causing commits a wrong different from, and more serious than, one who fortunately does not cause the harm; she has something more to repent and to answer for. I will not rehearse that argument here, but if resulting harm is thus significant, we must question the practice of defining some offenses in the inchoate mode: should not the law mark that significance by distinguishing consummate from nonconsummate versions of all offenses?

One answer might be that the resulting harm is not always that significant: for instance, that the essential wrong involved in perjury lies not so much in its possible effects (the court being misled) as in

45. Offenses Against the Person Act, 1861, c. 100, § 20 (U.K.); Criminal Damage Act, 1971, c. 48, § 1(1) (U.K.).
48. See supra text accompanying note 5.
49. Perjury Act, 1911, c. 6, § 1 (U.K.). For other examples, see Ashworth, supra note 46. The example of perjury reminds us that it might not always be clear just what the threatened harm is: is it that the statement is false; or that it is false and believed; or that it is false and believed, and leads to an incorrect or unjust decision?
the contempt for the law that the perjurer displays. This answer seems implausible for perjury (if my recklessness as to the truth of my evidence leads to an unjust verdict, I have surely committed a greater wrong than if I am disbelieved), and for 'result crimes' generally: if a crime's wrongfulness does not significantly depend on any further consequences of the offender's conduct, it is a 'conduct crime', not a result crime defined in the inchoate mode. A more plausible answer is that definition in the inchoate mode makes it easier to prove guilt when it might be hard to prove that a defendant's conduct did cause the relevant harm: but this would suggest at most that both consummate and nonconsummate versions of the offense should be available, not that they should not be distinguished. I return shortly to the question of how broad the range of nonconsummate offenses should be, but the argument so far suggests that when we have good reason to criminalize nonconsummate as well as consummate endangerment offenses, we also have good reason to distinguish them.

The second question is: if attacks and endangerments are distinct types of wrong, should the law not define them as distinct types of offense? Sometimes it does so: wounding with intent is distinguished from wounding (which can be committed recklessly) in English law, murder requires an intention at least to cause serious bodily injury, and one who causes death through mere recklessness is guilty only of manslaughter. Often, however, it does not: D commits the same offense of criminal damage whether she damages V's property deliberately or only recklessly, the same offense of assault whether

51. On "result" and "conduct" crimes, see Gordon, supra note 38, vol. I, at 59. Rape is a conduct crime, see Smith & Hogan, supra note 31, at 30–31, since while it can have devastatingly harmful consequences for its victim, its essential wrongfulness lies in the very act of rape: it is therefore so defined that its commission does not require proof of the occurrence of such further harmful consequences; but we should not say that it is defined "in the inchoate mode".

52. See Ashworth, supra note 46, at 17–18, for some salutary skepticism about this answer.

53. Offenses Against the Person Act, 1861, c. 100, §§ 18, 20 (U.K.). See Violence: Reforming the Offenses Against the Person Act 1861Annex (Home Office, 1998) (Draft Offences Against the Person Bill §§ 1–2) [hereinafter Draft Offences Against the Person Bill].

54. See Smith & Hogan, supra note 31, at 359–61 (although English law seems to count certain foresight as intention, see supra text accompanying note 32). Even when the mens rea of murder is defined in terms of "recklessness," as with "wicked recklessness" in Scots law, it is arguable that the recklessness that is to make a killer guilty of murder must be displayed in the course of an attack on another person. See Gordon, supra note 38, vol. II, at 295–310; compare Model Penal Code § 210.2(1)(b) (Proposed Official Draft 1962).

she injures V deliberately or recklessly. Of course there are limits to the extent to which the law's definitions of offenses should reflect significant moral distinctions, but it should in principle reflect a categorial difference such as that between attacks and endangerments, both to advance 'fair labeling', and to ensure that matters that bear significantly on sentencing (as the difference between deliberate and merely reckless actions surely should bear) are properly proved in court. This might cause problems if the prosecution can prove that $D$ recognized a risk of the relevant harm, but is not sure that it can prove intention. These problems, however, could be remedied by counting the endangerment form of the offense as an 'included' offense in relation to the attack form.

B. General v Specific Offenses

We can focus now on nonconsummate endangerment offenses, since these raise the main questions that concern us here.

Such offenses can be more or less general or specific, as to the interest that is threatened, or as to the way in which it is threatened. Robinson proposes a general offense of 'act[ing] in a way that creates a substantial and unjustified risk of causing a result made criminal by this Code': an offense that specifies neither a particular kind of threatened harm nor a particular mode of conduct. Existing offenses are more specific in one or more ways: as to the type of (usually serious) harm that is threatened; or as to the (usually especially dangerous) activity that creates the risk; or as to the agent (someone

56. Model Penal Code § 211.1(1) (Proposed Official Draft 1962). See also Smith & Hogan, supra note 31, at 411–19 (on assault and battery); Draft Offences Against the Person Bill, supra note 53, § 3 (defining a single offense of "intentionally or recklessly caus[ing] injury").

57. See Ashworth, supra note 32, at 89–92.


61. See, e.g., Road Traffic Act, 1988, c. 52, §§ 2, 4, 12, 22, 40 (U.K.); Explosive Substances Act, 1883, c. 3, § 2 (U.K.) (causing explosions that are "likely to endanger life or to cause serious injury to person or property"); Dangerous Dogs Act, 1991, c. 65, § 3 (U.K.) (criminalizing those in charge of dogs that are "dangerously out of control in a public place" (and defining danger in terms
with special responsibilities) who creates the risk; or as to the (usually especially vulnerable) potential victims.

The obvious question is: why should we not operate with a wholly general endangerment offense like that proposed by Robinson, analogous to the law of attempts? Why should we instead maintain this incomplete kaleidoscope of specific offenses?

A retributivist argument in favor a general offense is that even if the non-occurrence of the harm makes a significant difference to the character of the endangerer's conduct, one who culpably risks causing a kind of harm that would make her criminally liable if it ensued still commits a wrong, of a kind that in principle merits public condemnation. A consequentialist argument is that such an offense would provide a more effective deterrent against dangerous conduct, and so against actually harmful conduct. A related argument is that absent such a general offense, legislators are prone to try to fill perceived gaps in the law with often ill-drafted new specific offenses, to criminalize kinds of conduct that come to be seen as worryingly dangerous.

On the other hand, from the point of view of penal desert, we must ask whether the kind of wrong involved in nonconsummate endangerment is always serious enough to merit the coercive attentions of the criminal law, and the various costs that criminalization involves. This question gains force if, as I have argued elsewhere, the non-occurrence of a prospective harm makes a more significance difference to the moral character of the action in the case of endangerment than it does in the case of attack: while a failed attack is structured by the harm it is intended to do, a luckily harmless act of endangerment is further removed from the harm that it might have caused, but did not cause; the former is still intrinsically or essentially harmful, while the latter is only potentially harmful. As

of injury to the person); Food Safety Act, 1990, c. 16, § 8 (U.K.) (selling food that "fails to comply with food safety requirements").


64. See Criminal Attempts Act, 1981, c. 47, § 1 (U.K.); Model Penal Code § 5.0 (Proposed Official Draft 1962) (neither offense is entirely general: English law criminalizes only attempted indictable (not summary) offenses; the Model Penal Code criminalizes only attempted crimes, not attempted violations). I leave aside here the issue of how we should specify the conduct element of such an offense.


66. See Duff, supra note 2, at 363–66.
for efficient deterrence, we should note that such a general offense would no doubt be enforced even more selectively than are our existing endangerment laws, given both the likely concentration of resources on what are perceived as the more serious kinds of harm, and the extent to which endangerment is often only noticed when it actually causes harm. Given the familiar dangers involved in allowing officials too extensive a discretion in selecting which cases to investigate or prosecute, we might see good reason to limit that discretion by criminalizing only the more serious kinds of endangerment: those that are more serious in virtue either of the kind of risk that they create, or of the fact that they actually cause the threatened harm—which is what our existing laws effectively do. Such considerations do not tell us just how general or specific, in which ways, our endangerment laws should be, and do not rule out a 'reckless endangerment' offense as general as that defined by § 211.1 of the Model Penal Code: they do suggest, however, that we have reason not to embrace a wholly general offense of the kind proposed by Robinson.

C. Explicit v Implicit Offenses

Endangerment offenses are explicit when their commission requires the actual creation of the relevant risk—a risk specified in the offense definition; they are implicit if their definition does not specify the relevant risk (the risk that grounds their criminalization), so that they can be committed without creating the risk. Dangerous driving and 'reckless endangerment' are explicit endangerment offenses. Driving 'with alcohol concentration above prescribed limit', speeding, pretending to be a legally recognized doctor, are implicit endangerment offenses, although the conduct that they criminalize is criminalized because it is liable to lead to kinds of harm that concern the criminal law, no explicit reference to such harms appears in these offense definitions. Conviction for an explicit endangerment offense requires proof that the defendant created a risk of harm of the relevant kind; no such proof is required for an implicit endangerment offense, nor would proof that the defendant did not create such a risk—for instance that this driver's competence was not impaired by consuming an amount of alcohol that put her over the limit—save her from conviction.

67. See Husak, supra note 44, at 168–69 (on “complex” and “simple” non-consummate offenses).
68. See Road Traffic Act, 1988, c. 52, § 5 (U.K.); Road Traffic Regulation Act, 1984, c. 27, §§ 81-89 (U.K.); Medical Act, 1983, c. 41, § 49 (U.K.).
69. The “explicit”/“implicit” distinction drawn here depends on identifying the kind of harm with which each offense is primarily concerned: where there is
Explicit endangerment offenses typically declare 'standards', whereas implicit offenses lay down 'rules'. To convict a person of an offense of explicit endangerment, the court will have to find not just that he created a significant risk of harm that constituted a reason against acting as he did, but that, for instance, the risk was 'substantial and unjustifiable', or that his conduct fell 'far below what would be expected of a competent and careful' agent, and would have been seen as obviously dangerous by such an agent. Such determinations will require attention not merely to the seriousness and likelihood of the threatened harm, and to the value of the activity that creates the risk, but to the context of that activity and to the responsibilities (to take care or precautions) that can plausibly be assigned to the defendant and to others.

The merit of criminalizing endangerment through offenses of explicit endangerment is that—if the law is properly applied—we criminalize only those who actually endanger others in ways that deserve condemnation. The drawback is that, unless we can rely on some quite specific shared understandings of what counts as an 'unreasonable risk', and of what kinds of care agents should take, in a range of contexts, the standards that courts have to apply will not be the polity's shared standards, but will be the individual standards of uncertainty or disagreement about what the harm is, there might therefore also be uncertainty or disagreement about whether the offense is one of explicit or of implicit endangerment.

73. Cases involving the risk of HIV transmission through sexual intercourse exemplify the issues here. See Model Criminal Code Officers Committee, Non Fatal Offenses Against the Person 75–87 (1998), available at http://www.aic.gov.au; Lanham, supra note 60. The risk is statistically low, perhaps 1 in 2,000; so, does criminalization mark a familiar kind of moral panic, or a judgment based both on the seriousness of the harm and on the breach of trust? However, to talk of a breach of trust presupposes a particular view of the parties' responsibilities in sexual activity—a view that might be arguable in some contexts.
74. Perhaps not all those who commit explicit endangerment offenses actually endanger others: the reckless driver who rounds a blind corner on the wrong side of the road might reasonably deny that he has endangered anyone, if there was in fact no one there. However, his conduct is still criminally dangerous, given the real (and unjustified) risk of someone being there. It is cases like this that justify the Model Penal Code's definition ([§ 211.2] of "reckless endangerment" as "conduct which places or may place" others in danger, and that show why "or may place" is not. See Lanham, supra note 60.
each court and its members—which generates the familiar defects of uncertainty in the law’s content, and unpredictability and inconsistency in its application. This drawback grounds one reason in favor of offenses of implicit endangerment, as a brief look at some familiar road traffic offenses will illustrate.

English law defines explicit endangerment offenses of driving when unfit through drink or drugs, and of dangerous driving; and implicit endangerment offenses of driving with more than a specified concentration of alcohol in one’s blood, and of exceeding the specified speed limit. The implicit offenses lay down rules that are intended to capture part of the content of the standards declared in the explicit offenses. An obvious attraction of such implicit offenses for prosecutors is that they make proof of legal guilt easier; but that does not speak to their justice. Another, wider attraction is that they promote certainty and consistency: citizens can know what they may or may not do; courts can apply the law with greater consistency. Such offenses will, however, capture some drivers whose conduct is not in fact appropriately dangerous: a driver whose capacity and willingness to drive safely are not impaired by an amount of alcohol that puts him over the legal limit still commits an offense if he drives after drinking that much, though he does not thereby create the increased risk of harm that justifies this drink-driving law; so too for a driver whose skills and car are such that she can drive as safely at speeds well over the legal limit as others can at speeds within the limit. Can it be fair to demand that such people obey these laws, and just to convict them if they do not?

Such people might still be acting dangerously: if they believe that they are driving safely, but cannot rightly claim to know that they are safe after drinking that much or at that speed, we might say that in driving as they do they take an unreasonable risk that their belief is false. The point is not just that human beings are fallible. It is rather that there are particular reasons for mistrusting drivers’ judgments on such matters: we are notoriously prone to exaggerate our driving skills, and someone who is in a hurry, or who has already had a drink, is not well placed to decide whether he can drive safely at that speed,

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75. Road Traffic Act, 1988, c. 52, §§ 2-5 (U.K.); Road Traffic Regulation Act, 1984, c. 27, §§ 81-89 (U.K.).
76. See Ashworth, supra note 32, at 85–86.
77. It might be hard to identify the point at which another drink would put me over the limit, but the law conveys the message that drinking any alcohol before driving is risky (“Don’t drink and drive”), which opens the way to the “thin ice” principle: once we start to drink we are on thin ice, and “can hardly expect to find a sign which will denote the precise spot where [we] will fall in.” Knuller, [1973] AC 435, 463 (Lord Morris). See Ashworth, supra note 32, at 74–75.
78. Hence the common complaint that rules, if they are not under-inclusive, are over-inclusive.
or after another drink. We can thus see some implicit endangerment offenses as specifying precautions that everyone should take against causing or risking harm, in contexts in which we should not trust our own case-by-case judgments about how to act safely. Given the risks involved in the activity concerned, given our proneness to misjudgment, we should follow relatively simple rules (‘Don’t drink and drive’; ‘Don’t exceed the speed limit’), rather than allowing ourselves to decide on each occasion how fast to drive or how much to drink before driving. The law demands not just that we drive safely, but that we ensure that we do so; such implicit endangerment offenses declare that part of what we must do to ensure safety is to obey these restrictions.

Surely, however, there are people who know that they can safely break such rules: drivers who know that they can drive safely although over the legal limit as to their speed or alcohol intake. Can we argue that they nonetheless ought to obey such laws; or must we admit that they should injustice be exempt, and that to convict them is to sacrifice their rights for the sake of the greater social good that flows from not allowing such public exceptions to the law? We might appeal to two considerations. First, we owe it to each other not merely to ensure that we act safely, but to assure each other that we are doing so, in a social world in which we lack the personal knowledge of others that could give us that assurance. We provide such assurance, in part, by visibly following public safety-protecting rules, such as the speed limit. Second, a driver who claims to know that he can safely ignore such rules claims a certain superiority over his fellows: they must obey these rules, because they cannot be trusted to decide for themselves, but I need not. What is wrong with such a claim is not that it is false (though it often will be), but that it is a denial of fellowship with my fellow citizens: a recognition of fellow citizenship (and of the dangers involved in allowing exemptions to the law’s demands) should motivate me to accept such laws even if I believe (truly) that they are unnecessary in my case. At least so long as the demands the law makes on me are not that onerous, this is a modest burden that I ought to accept as an implication (and expression) of citizenship.

79. This argument embodies a familiar rule-consequentialism. See R.M. Hare, Moral Thinking: Its Levels, Method and Point (1981).
80. Compare Health and Safety at Work Act, 1974, c. 37 §§ 2-3 (U.K.) (on employers’ duties to ‘ensure, so far as is reasonably practicable’, the health and safety of their employees and others).
81. Similar considerations also apply to the requirements that drivers be licensed, after passing a test, and that they carry at least third party insurance: these are ways of ensuring and assuring that drivers are minimally competent and that payment will be made for the damage they cause.
The arguments sketched here will not justify all the implicit endangerment offenses that our laws currently contain—nor should they; but they can justify some such offenses.  

D. Direct v Indirect Offenses

Endangerment offenses are *direct* if the relevant harm would ensue from the criminalized conduct without any intervening wrongful human action; they are *indirect* if the harm would ensue only given further, wrongful actions by the agent or by others. Thus, dangerous driving standardly involves direct endangerment, as does causing a dangerous explosion. Carrying firearms or offensive weapons in public, however, involves only indirect endangerment, since the relevant harms would normally ensue only if the firearms or weapons were then misused by the carrier or by others. A complication arises when the intervening actions would be by children, or by people who are acting quite reasonably. If I supply a gun to a child, or wave a gun at someone who does not know it is unloaded, harm might flow from what the child does with the gun, or from what the other person does to escape the perceived threat; but my conduct might still count as ‘directly’ dangerous, if we see the intervening agency as suitably ‘innocent’. We should count endangerment as strictly ‘indirect’ only if the occurrence of the relevant harm would depend on a genuine, non-innocent, *novus actus interveniens*.

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82. But see Douglas Husak, *Malum Prohibitum and Retributivism*, in Duff and Green, *supra* note 13, for a critique of this line of argument.

83. See *supra* note 61.


Offenses of direct endangerment are in principle unproblematic—or no more problematic than the doctrines of causation on which they depend. Offenses of indirect endangerment are, however, more problematic, whether the occurrence of the harm would depend on the agent’s own further actions, or on those of others.

What argues against criminalizing conduct that would become directly dangerous only in virtue of further actions by the agent herself is the general principle of respect for autonomy: the law should not prohibit intrinsically harmless conduct on the mere grounds that the agent might go on to create a risk of harm, since this fails to treat citizens as responsible agents who can be expected to recognize and respond to the good reasons that the law anyway offers for not going on to create such risk. This principle is qualified when the law criminalizes conduct that is preparatory to an intended attack, but such a qualification is already controversial, as denying the agent a suitable ‘locus poenitentiae’. If we also extend the law to cover cases in which what is in prospect is not an attack, but mere endangerment, we surely separate the law of endangerment too far from the wrongful harms that should be its primary focus. The only other kind of case in which the principle might be qualified is that in which there is particular reason to think that the agent cannot be trusted to be responsive to reasons; an example might be the drunk-driving provision that criminalizes not just anyone who ‘drives or attempts to drive’, but anyone who ‘is in charge of a motor vehicle’ when over the limit.

Usually, of course, conduct that is indirectly dangerous in virtue of what the agent might do is also indirectly dangerous in virtue of materials that they knew would be used for glue sniffing. In *Khaliq*, the buyers were children, but the court did not rely on this, and, in *Ulhaq*, they were adults; the offense was thus treated as one of indirect endangerment.


89. See Duff, *supra* note 2, at 35–37, 386–89.

90. Bearing in mind that if the agent acts with the intention of going on to endanger others, his conduct is preparatory to an attack, not to mere endangerment. See *supra* test accompanying notes 26–31. Compare Explosive Substances Act, 1883, c. 3, § 3(b) (U.K.) (possessing or making explosives “with intent by means thereof to endanger life”).

91. Road Traffic Act, 1988, c. 52, § 5(1)(b) (U.K.). It is worth noting, however, that under section 5(2) it is a defense for a person charged with this offense “to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle” while he was over the limit. *Id.* § 5(2).
what others might do. When the occurrence of a direct risk of harm would depend on the conduct of others, we must ask different questions about the extent of our responsibilities to assist in preventing crime: how far can a polity justifiably demand that its citizens constrain their own otherwise lawful conduct because of the risk that others might take advantage of it, or be encouraged or enabled by it, to commit crimes? I do not have, and do not think we can aspire to, a general answer to this question: without the kind of detailed examination of different offenses that we cannot embark on here, the most we can say is (vaguely) that we surely have some such responsibility, and that its precise scope will depend on weighing such factors as the onerousness of the restraint it involves, and the likelihood and seriousness of the offenses that might then ensue.

My aim in this section has not been to answer the various questions, or to solve the various problems, that I have identified. My aim in the paper as a whole has rather been to clarify the character of endangerment as a distinctive kind of wrongdoing (distinct in particular from attacks), to show the different ways in which endangerment offenses can be structured and defined, and to raise some of the questions that must be answered if we are to develop a just and acceptable criminal law of endangerment.
