

Chapter Six: When Are Inchoate Crimes Culpable and Why?

I. Incomplete Attempts

Having argued that results are neither necessary nor sufficient for blameworthiness or punishability, we must still answer the question of what type of action is necessary for the actor to be said to have acted culpably. While this problem is traditionally addressed within the doctrinal rubric of the *actus reus* for incomplete attempts, the problem for us applies more generally. We must specify an *actus reus* formulation for all crimes.

There are various potential *actus reus* formulations, drawn along the continuum between when the actor forms an intention and when resulting harm does or does not result. We contend that it is only at the time the actor engages in the last act, and thus unleashes a risk of harm that he believes he can no longer control through exercises of his reason and will, that he has performed a culpable action.

In this Chapter, we begin by setting forth the principles that underlie our adoption of the “last act” formula. We then survey the various points along the inchoate crime continuum, from the formation of the intention, to the Model Penal Code’s substantial step test, to the common law’s dangerous proximity test, to the last act test. In our view, it is only the last act -- the act through which actor believes he has relinquished control over whether he has created an undue risk of harm (or proxy conduct) -- that is a culpable act.

Our Theory of Culpable Action

Underlying our defense of the last act test are three separate, but related, claims. First, the criminal law aims to influence the actor’s reasons for action. Second, an actor can change his

mind until he has unleashed a risk of harm over which he no longer has control through the exercise of practical reasoning eventuating in an act of will. Third, an actor should only be punished for what he *has done* and not *what he will do*.

In determining what should count as a culpable act, we should thus first take account of the way that the law aims to influence conduct: actors act for reasons, and the criminal law gives an actor a powerful reason to abstain from engaging in unduly risky behavior. The law thus influences (or should influence) the actor's practical reasoning.

Not only does the law seek to influence the actor's reasons for action, but also the law can continue to influence these reasons until the point at which the actor engages in some conduct that (he believes) has unleashed a risk over which he no longer has complete control. To illustrate, if the actor is thinking about shooting his victim, he can still change his mind. However, if the actor has already fired the gun, he can no longer prevent the result from occurring or reduce the risk thereof.

It may be objected that our theory of control is over and under inclusive. The actor may not control his reasoning, and can control the result. For example, he may not have complete control over whether he will decide to engage in the action – perhaps he will suddenly become distracted – and he may have control over whether the result occurs – he can snuff out the fuse that he has lit. But there is an important difference between these cases; this difference lies in the ability for reason alone to affect whether the outcome occurs. In the former case, although the actor may (fortuitously for him) forget his criminal plans, these plans were still subject to revision through practical reasoning; however, in the latter case, although the actor may decide to

take another action in order to try to avert the harm, merely changing his mind is not alone sufficient to prevent the harm from occurring.¹

This brings us to our third point: the law should not punish an actor based on a prediction that the actor will ultimately engage in criminal conduct. When determining whether an *actus reus* formulation is sufficient to demonstrate that the actor has acted culpably, the law cannot focus on what the action reveals about what the actor *might do*; rather, the action itself – what the actor *has done* – must ground blame and punishment. For the reasons discussed below, we believe that only the last act formulation punishes the actor for what she has done.

Intentions

The starting point along the continuum is with the actor's criminal intention. In our view, intentions cannot themselves constitute culpable acts. A preliminary question is whether intentions are actions at all -- and thus potentially culpable acts -- or are intentions merely the states of mind that accompany other acts? There are, of course, many kinds of mental acts that are performed intentionally. Mathematical calculations, silent prayers, and attempts to remember fall into this category. Are intentions about future conduct like this, so that they can be criticized, not just for the traits of character they reveal -- as would an involuntary flash of anger at seeing one's spouse acting flirtatiously around others -- but as culpable acts themselves? Are intentions themselves subject to voluntary control in the way that acting on intentions is subject to voluntary control?

¹The actor who lights the fuse in order to burn down another's property or blow up an inhabited building is culpable at the moment he lights it because even if he changes his mind, he may not be able to snuff out the fuse. He may black out, or be prevented by another, etc. And,

The view that an intention might itself be a culpable act rests on two presuppositions. First, this view presumes that forming an intention alters the world in some way that is material to the criminal law's concerns. That assumption is surely met, at least under many standard philosophical accounts of intentions. Under those accounts, intentions alter the balance of reasons for the actor. Before he forms the intention, he has reasons A, B, and C in support of doing the act and reasons X, Y, and Z against doing it. After he forms the intention, he has a new reason for doing the act, namely, the intention itself, a reason that makes the act more likely.²

Second, this view presumes not only that forming intentions changes the world in the way indicated, but that forming intentions is something we do intentionally. If this assumption is granted, then we can say that forming a culpable intention -- an intention to commit a future culpable act -- is itself a culpable act.

Again, the argument we are considering here is not that it is the intention, itself, that is the culpable act, but rather the formation of the intention.³ To illustrate, suppose a person has a certain belief/desire set. Ordinarily, this person will form an intention to act based on his

of course, when the lit fuse passes the point that the actor believes puts it completely beyond his power of recall, his culpability is at its zenith.

²See MICHAEL E. BRATMAN, *INTENTIONS, PLANS, AND PRACTICAL REASON* 80 (Harvard University Press 1987); JOSEPH RAZ, *PRACTICAL REASONS AND NORMS* 65-71 (Hutchinson & Co. 1975). For a somewhat different view that holds decisions to act to be actions, but not reason altering actions, see THOMAS PINK, *THE PSYCHOLOGY OF FREEDOM* 125-28, 137-65 (Cambridge University Press 1996).

³See BRATMAN, *supra* note 2, at 103 (implicitly acknowledging that forming an intention is an action while discussing the Toxin Puzzle, in which a Genie offers you a million dollars if and when you form the intention to drink a very unpleasant but harmless potion after you have received the money: "[T]he million-dollar reason is a reason for a present action of causing yourself so to intend; this reason is relevant to deliberation about whether so to act now, not to whether to drink the toxin later") (emphasis added). For a different view of the Toxin Puzzle, see PINK, *supra* note 2, at 137-65.

evaluation of his beliefs and desires and a decision regarding what is the best course of action to take in light of them.⁴ Based on this decision, the actor forms an intention, a plan to engage in that course of action. Hence, although intending, by itself, is not an act but rather a mental state, the mental act of deciding what to intend is potentially a culpable act.⁵

However, even if the formation of the intention is an action, it does not necessarily follow that it is a culpable action that unleashes a risk of harm to the potential victim. On the one hand, if it is not necessarily rational to reconsider one's intention,⁶ the decision to do wrong may be the point at which the balance of reasons has shifted for the actor, and he has committed the culpable -- unreasonably dangerous -- act. The formation of the intention might then be analogous to the lighting of a long fuse where, while the actor may still exert control over whether the harm does materialize, the risk to the victim has nonetheless increased.

However, when one is planning to commit a crime, it will always be rational to reconsider.⁷ Indeed, many intentions are formed with the proviso that there can always be later

⁴See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 140 (Oxford University Press 1993) (noting that "[i]n the face of conflict between prima facie desires, there seems to be a resolution when the actor decides which of the alternative courses of action he is going to pursue").

⁵The triggering of this decision need not be an intentional action itself. Otherwise the objection would be that of regress: one must intend to intend, will to will, decide to decide. Cf. *id.* at 115 (discussing GILBERT RYLE, *THE CONCEPT OF MIND* 67 (The University of Chicago Press 1949)). Our everyday lives present us with many situations where we make choices without deciding that we should first think about choosing. Thus, a belief, a thought, or desire, none of which is controllable, might trigger the deliberations. Nevertheless, the actor does have control over his deliberations and knows right from wrong at the point at which he decides what he plans to do. If John is confronted with his wife sleeping with his best friend, he might suddenly think that he wants to kill her, but he still controls whatever decision he might take in light of that desire.

⁶BRATMAN, *supra* note 2, at 64 ("nonreflective (non)reconsideration of a prior intention is the upshot of relevant general habits and propensities").

⁷Cf. *id.* at 67 ("[I]t seems plausible to suppose that it is in the long-run interests of an agent occasionally to reconsider what he is up to, given such opportunities for reflection and

reconsideration. Moreover, unlike a lit fuse, which the actor may find himself unable to put out, the actor knows that he is still in control of his actions. Although intentions may serve to guide our futures, they are not irreversible, nor may they be carried out without any further effort on our part. The risk from the actor's point of view -- objectively risk is always 0 or 1 -- may have increased, but the actor still remains in control of whether this risk will be unleashed. Forming an intention is not analogous to being in a trance where the actor has put a chain of events into motion that he is unable to reconsider. Rather, we always know that our intentions may be changed up to the point of acting on them. Indeed, intentions are formed with the knowledge that we can renounce. Thus, intentions are guides to future actions that do not prevent our later reconsideration. It follows that an actor has committed a culpable act only at the point where the actor has truly relinquished control, not at the point where he forms the intention.

Another related point decisively supports our argument against allowing the formation of an intention to constitute a "culpable act." Gerald Dworkin and David Blumenfeld make the point that the lines between intending, on the one hand, and fantasizing, wishing, desiring, and wanting, on the other, even if philosophically clear, are quite difficult to draw as a practical matter, even for the actor himself. As they point out:

This . . . objection has two aspects, the difficulty of the authorities distinguishing between fantasizing, wishing, etc. and even more importantly the difficulties the individual would have in identifying the nature of his emotional and mental set. Would we not be constantly worried about the nature of our mental life? Am I only wishing my mother-in-law were dead? Perhaps I have gone further. The resultant guilt would tend to impoverish and stultify the emotional life.⁸

given the stakes are high, as long as the resources used in the process of reconsideration are themselves modest").

⁸Gerald Dworkin & David Blumenfeld, "Punishment for Intentions," 75 MIND 396, 401 (1966).

This objection, of course, has no purchase when we are dealing with completed crimes and completed attempts. Nor does it apply to cases where one solicits or encourages another to commit a crime, which we shall argue should count as recklessness toward the victim even in the absence of purpose if the criteria for recklessness are otherwise present. It does apply forcefully, however, to incomplete attempts, where it is the actor's attitude toward his own future conduct that is at issue.

Substantial Step

For the reasons we reject treating intentions as culpable acts, we likewise reject the Model Penal Code's substantial step formulation.⁹ The Model Penal Code's *actus reus* for an incomplete attempt is quite early in the process from intention to completion. It analyzes, not how close to completion the actor is, but whether the actor's action corroborates his intention.

Because the substantial step test exists only as evidence that the actor in fact has a settled intention, it fails for the same reasons that an intention alone cannot be sufficient. Although it is true that the Dworkin/Blumenfeld objection no longer exists – we are more certain the actor intends his action because he takes an action that corroborates that intention – the problem is that even at this point, whether the actor causes harm is completely within his rational control. If actors have complete control over their future choices, then no matter how firm their present resolve, they can always change their minds and refrain from imposing the risk.¹⁰ And often,

⁹Model Penal Code § 5.01(1)(c) (1985).

¹⁰Some have argued that once the actor takes a step that is, for him, solely a means to his intended criminal act (and not a means to alternative ends), the actor is at that point in time “rationally committed” to accomplishing the intended criminal act and is under “rational pressure” to do so. *See, e.g.*, Gideon Yaffe, “Trying, Acting and Attempted Crimes” (unpublished manuscript, on file with the authors). Because it is always rational for one to refrain from acting criminally -- at least in the absence of a justification -- we fail to see how the notion of rational pressure can be cashed out. The idea that it is somehow incoherent to abandon

when in the future they become fully aware of the risks their act will impose, they will cease intending to impose it.¹¹

bad ends that one has taken some step or steps to achieve smacks of recovering sunk costs. Some forms of coherent life narratives are more attractive than others, and there is nothing attractive, much less rational, about persisting in pursuing bad plans. In any event, given that the actor is always free to reconsider whether he will impose a risk of harm or proxy conduct no matter how many steps he has taken in that direction, so long as he has not taken the last step (he believes) necessary, he cannot be deemed culpable: he has not yet imposed *any* risk of harm.

Daniel Ohana argues that the more costs the actor has sunk into her criminal plan, the more likely she is in fact to carry it out. Daniel Ohana, "Desert and Punishment for Acts Preparatory to the Commission of a Crime," 20 CANAD. J. LAW & JURISP. 113,122-23 (2007). He concludes that the actor is culpable and hence deserving of punishment for having formed the plan and made some preparations for carrying it out. *Id.* at 124. Again, we disagree. The actor has still not unleashed an unjustified risk, given that until she completes the last act necessary to execute her wrongful plan, she remains in complete control and can abandon it at any point, regardless of the costs she has sunk.

¹¹Another objection to substantial step attempts that applies to all current forms of inchoate criminality -- incomplete attempts, solicitation, conspiracy, and before-the-fact forms of complicity -- is that there is no good way to deal with conditional intentions. (And, of course, all of our intentions regarding future acts are in fact conditional, even if we do not consciously advert to the conditions that would cause us to cease intending what we currently intend.) First, the law treats, as it must, conditional intentions as intentions. But it does not stipulate any requisite level of probability that the actor must attribute to the condition's obtaining. Thus, if David intends to kill Darlene if and only if she has been unfaithful, the law of inchoate criminality presumably deems his intention to kill sufficient whether he thinks Darlene's infidelity highly likely or highly unlikely. (If a burglar enters a house intending to steal only diamond jewelry, is he not guilty of burglary if he believes the odds of the owner's possessing diamonds are less than fifty percent? Twenty percent? One percent?)

Second, it is immaterial whether the actor hopes the conditions on his intention will or will not obtain. David may hope that Darlene has not been unfaithful. But nonetheless, he still has the (conditional) intention to kill her.

Third, suppose David has a conditional intention, the condition of which negatives the criminal harm. Suppose he intends to have sex with Darlene only if Darlene is over the legal age. It appears that at this time, David's intent is perfectly lawful. (*See* Model Penal Code § 2.02(6) (1985).) But if, "Have sex with Darlene if she is over the legal age" is the major premise of David's practical syllogism, the minor premise might be "Darlene is (thankfully) over the legal age." If so, then the conclusion David reaches is "Have sex with Darlene." For inchoate criminality, which intention should control -- the intent in the major premise, which is legal, or the intent in the conclusion, which, if David is in error regarding Darlene's age, is illegal? Because David has not yet done what he intends to do, it is ambiguous whether he intends to have sex with Darlene (because he mistakenly believes she is over the legal age) or not to have sex with her (because he intends to have sex only if she is over the legal age).

Finally, the requirement of a substantial step looks arbitrary from the standpoint of assessing culpability. Consider Dan, who purchases a jackhammer with the intention of causing vibrations that will topple Balanced Rock and kill Victor if Victor walks under it. Arguably, Dan has undertaken a substantial step attempt when he takes the jackhammer to a spot near Balanced Rock and waits to see if Victor walks under it. But is Dan different from Dana, who is picnicking near Balanced Rock, notices that she is next to a jackhammer, and forms the same intention that Dan has formed? Dana has done nothing other than form an intention. Yet she is in exactly the same position as Dan and just as culpable (or, we would argue, just as *nonculpable*).¹²

Dangerous Proximity

Although different jurisdictions have adopted an array of *actus reus* formulations for attempts, here we wish to focus on those tests the gist of which is that the actor is close to completing the crime and thus that intervention is necessary and punishment warranted.¹³

(Of course, this third problem only arises in connection with crimes that have strict liability elements or elements which require only the *mens rea* of negligence. And because we do not regard negligence as culpable -- and strict liability is the antithesis of culpability -- we would reject the very underpinnings of this third problem.)

The problems of conditional intentions are sufficient to cause a complete rethinking of inchoate criminality -- incomplete attempts, solicitation, conspiracy, and complicity. *See generally* Larry Alexander and Kimberly Kessler, "Mens Rea and Inchoate Crimes," 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997). Our approach here, which is to handle inchoate criminality under the rubric of recklessness, eliminates the problems of conditional intentions by eliminating the requirement that one intend criminal conduct. *See infra* notes 19-20.

¹² Another consequence of having substantial step attempts is that to motivate renunciation, one essentially has to deem the attempter guilty of a crime at T₁ that disappears from the history books at T₂, the time of the renunciation.

¹³ *E.g.*, *People v. Rizzo*, 158 N.E. 888, 889 (N.Y. 1927); *see generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.06[B][3]-[4], at 425-427 (4th ed. 2006).

Now, unlike more sweeping proposals to detain those whom we predict to be dangerous, here we assume that the actor currently intends harm and has taken an action that appears (to someone) to reveal that the actor is dangerous. Thus, we are using dangerousness to cull out those actors who not only have an intention to take an unjustifiable risk but who have also committed some act.

There are two problems with this approach. First, “dangerousness” in itself is not tied exclusively to culpability or intentions. If we really care about those who are dangerous, why should we require an intention at all? For example, if based on our assessments of his character and our knowledge of the world, we can predict that John, who has no present purpose to rape Mary, will in fact do so (if we do not intervene), why should we distinguish John from the equally but no more dangerous Joseph, who currently has the purpose to rape Mary? From the standpoint of dangerousness, there is no reason to care about culpability at all.

Secondly, when we speak of “dangerousness,” what precisely do we mean? Dangerousness is a prediction that an actor will cause or risk future harm. Do we mean to punish only those actors who are *actually* dangerous or only those who *appear* dangerous? If the latter, from whose point of view are we making the assessment of apparent dangerousness? In terms of the actor’s actual dangerousness – the risk that the actor will complete her attempt – that risk is a function of whether, when, and how we choose to intervene. In a very real sense, no actor arrested for an inchoate crime is ever *really* dangerous, for her arrest made the intended crime unlikely or impossible.

If one accepts that inchoate criminality is most plausibly premised either on dangerousness or on general wickedness of character rather than on the commission of culpable acts, then the role of intention looks merely evidentiary. For intentions are neither necessary nor

sufficient for dangerousness or bad character. And if inchoate criminality is premised on either dangerousness or wickedness of character, and not on culpable acts, then it is in tension with the presumption that actors freely choose whether they will act dangerously or wickedly. Until the actor completes an attempt, he is just at one end of a continuum with others who harbor culpable intentions and dangerous beliefs. Until he takes what he believes to be the last step necessary to cause the social harm, he can always reconsider. Whether he will or not – which, together with the probability of other harm-negating events, is the determinant of how dangerous he currently is – is, we presume, a matter of his free choice and thus one over which he has complete control.¹⁴

Last Acts

¹⁴Can one not argue that one who takes a substantial step towards imposing a risk of harm (or proxy conduct) has acted recklessly because, for insufficient reason, he has increased the risk through making it more likely that if he does *not* change his mind, he will succeed? In other words, has he not recklessly increased the chance of his own recklessness? Is he not farther along toward recklessness than those whom we forbid to own, say, machine guns, even when they have no present intention to use the machine guns illicitly? After all, our actor *does* have a present illicit purpose. *A fortiori*, should we not deem him culpable?

The case is not parallel to substantial step attempts. It is, rather, the case of making otherwise harmless conduct into a proxy crime because it too frequently culminates in culpable acts. Once possessing a machine gun is made into a proxy for ultimate harms, then risking possession for no sufficient reason *is* culpable, or at least it could be so argued. (For our analysis of proxy crimes and culpability, see Chapter Eight.) Where possessing a machine gun is not itself illegal, however, it cannot be deemed illegal by virtue of increasing the risk that if its possessor forms the intent to do something risky with it, he is more likely to succeed in imposing such a risk (than if he did not possess it). Nor can possessing it with such an intent be deemed a culpable act without begging the question in issue, namely, whether substantial step attempts are indeed culpable. (Possessing a machine gun might be culpably reckless if there were sufficient risk of its accidentally firing or perhaps falling into the hands of terrorists.)

In short, our position is that one cannot regard one's own future conduct that will be fully under the control of one's reason and will as a risk that one's present conduct is imposing. For that reason, substantial step attempts are not culpable acts.

For these reasons, we believe it is only when the actor has committed the “last act” that she has committed a culpable act. When an actor forms an intention and engages in other preparatory behavior, she may know that what she intends to do is forbidden by the criminal law, but she also knows that she retains complete control over whether she will actually so act. The law still influences her, and she may decide to reconsider or to stop at any moment. She has the ability to choose not to risk harm to her victim.

It is only when the actor does something that she believes increases the risk of harm to the victim in a way that she no longer can control that she has engaged in a culpable act. This is the point where “what she does” ceases to be guided by her reason and will. This is the point where harm may occur even if she changes her mind. It is at this moment that the law calls upon the actor to refrain from acting, and she acts culpably when she ignores the law’s commands.

Some Qualifications and Further Applications

Even if the criminal law were to endorse our view that “last acts” are the appropriate targets of criminal liability, there are a few clarifications to be made. First, we qualify our position by discussing when the preparation for one crime can also constitute a last act for another. Second, we discuss how our test applies to “lit fuse” cases. Then, we turn to the application of our test to instances of so-called “inherently impossible” attempts. Finally, we discuss the implications of our view for other inchoate crimes.

When Preparatory Acts are Also Last Acts

There are two qualifications of our position, both revealing how preparatory acts may themselves be culpable acts. The first refers back to the question we raised in Chapter Two regarding whether Frankie is reckless in driving (carefully) to Johnny’s house for the purpose of

shooting him. Her driving might be a substantial step attempt (cf. lying in wait; “casing” the scene; and so forth), but as such it isn’t culpable. However, because driving itself creates a risk of harm to others, if she consciously disregards *that risk* by driving, then, given her illegitimate purpose in driving, she is culpably reckless (if only slightly so).

Or, to take a different example, the aggressor who, with murder in his heart, points a gun at his intended victim, has not yet committed a completed attempt because he has not yet pulled the trigger and imposed the risk he intends to impose. But he has created an unjustifiable risk that the gun will *accidentally* discharge and wound or kill someone. So, to the extent that he consciously disregards that risk by pointing the gun, he is culpable for imposing *that risk* before he pulls the trigger.

We see no problem with treating either of these actors as guilty of some degree of culpable risk creation. Moreover, because the risks created by Frankie’s driving and by brandishing a weapon are lower than the risks Frankie and the murderous gun brandisher intend to impose at a future time, if Frankie and the gun brandisher renounce their murderous intentions and desist from their plan to kill, they will be less culpable than they would be if they consummated their present plans and shot at their intended victims. If that lower culpability entails a lower level of punishment, they will thus have some nonmoral incentive to desist from their murderous plans, even if they will not escape punishment altogether.

The second qualification of the position that incomplete attempts are not culpable is this: When one is about to attempt to impose a severe risk on another, one may be culpable for creating a risk of an apprehension of danger (causing fear) for no sufficient justification. (Because one is intending to commit a culpable act at a future time -- that is, because one is intending to impose a risk at a future time for no sufficient reason -- the present creation of the

risk of causing fear will perforce lack a sufficient justification.) In that way, substantial step attempts could be culpable, not as attempts, but as the unjustifiable creations of risks of causing fear.

Our analysis bears on the justification for self-defense. In discussing self-defense in Chapter Four, we referred to “culpable aggressors.” Because such persons will not yet have completed their attempts, they are at most incomplete attempters. And if incomplete attempts are not per se culpable, then what makes a culpable aggressor “culpable”? The answer is in the preceding paragraph. They have culpably created a risk that their intended victim will believe he is in great peril, or that others will believe the intended victim is in great peril. Unlike “innocent aggressors” -- lunatics, the young, the mistaken -- such aggressors will have created, without excuse, this apprehension for the worst of reasons: their desire to kill, injure, or put at risk of same. This fact may make defensive force against them *socially* and not just *personally* justified. (See Chapter Four.) (If, however, the actor is mistaken in believing he is facing a culpable aggressor, his act of self-defense will be excused -- personally justified -- not socially justified.) And the culpability of the culpable aggressors may justify arresting them before they have imposed the ultimate risk they intend to impose because they are *presently* imposing a culpable risk of fear creation and perhaps of an accident.

Both of these qualifications may lead to regress concerns. If substantial step attempts -- doing X with the intent to impose a risk in the future for no good reason (that is, the intent to be reckless in the future) -- is itself reckless for either of these two reasons -- it itself creates an unjustifiable increase in risk to a legally protected interest, or it itself creates an unjustifiable risk that it will cause fear -- then not only is it a culpable act, but acts preceding *it* may be culpable. So suppose doing Y with the intent to do Z in the future is culpable for either of these reasons.

What about doing X with the intent to do Y in the future with the intent to do Z in the future? Or doing W with the intent to do X in the future, with the intent to do Y in the future, with the intent to do Z in the future?

What is critical, however, is the actor's conscious disregard of the risk. When the actor engages in early preparation, he may not perceive his actions as creating any additional risk to the victim – after all, he may change his mind. On the other hand, he may very well contemplate that engaging in the preparatory actions increases the risk of harm to the victim through increasing the risk of an accident or through increasing the risk of causing fear. Thus, whether the actor commits a culpable act, and how far back into preparation we might wander in looking for a culpable act, depends upon the actor's decision making and how he perceives his actions and the risks they create.

Lit Fuse Attempts

There is a category of attempts that are “last act” attempts but that are in another sense incomplete attempts. (In the MPC, they fall under § 5.01 (1)(b), the section for “last act” result-causing attempts; but unlike other (1)(b) attempts, such as firing a gun or triggering a bomb, they are renounceable under § 5.01 (4).) These are what we call “lit fuse” attempts. Their paradigm is lighting a fuse with the intent to burn down or blow up something, but also with, for at least some time, a perceived chance to eliminate the danger. For a period of time, the arsonist may be able to put out the fire before it causes damage, or snuff out the fuse before it reaches the dynamite or fire propellant.

So let's take, as a paradigmatic case, an actor who lights a dynamite fuse intending to blow up V's building. The fuse is of a length such that it will take one minute from the time it is

lit to set off the dynamite. For most of that minute, the actor will have the opportunity, if he changes his mind, to snuff out the fuse.

Let us first consider his lighting of the fuse. Here, the critical question is whether the actor is aware that his actions create a culpable risk. For the most part, a criminal actor, although believing he retains some control over whether the dynamite will detonate, also recognizes that he may not be able to prevent such detonation. He may slip and fall. He may be rendered unconscious by something. And so forth. If the actor truly believed that he was not creating such a risk, he would not be reckless. But we believe that these cases are extremely rare. Rather, the actor lighting the fuse (often with the purpose to cause the harm) recognizes that he now has unleashed a risk over which he no longer has complete control.

But perhaps he is in fact able to control the detonation. He can snuff out the fuse. Here, our view is that the actor is under a continuing duty to do so. Lighting the fuse is analogous to pushing someone who cannot swim into a pool – the drowning can still be prevented. The actor now has a duty to avert the peril he has created.

If the actor retains the ability to snuff out the fuse and chooses not to do so, then he is guilty of a culpable omission. And in general, the more of the minute that passes without his changing his mind, the higher the risk that were he to change his mind, he would fail to snuff out the fuse.

In summary, because of the risk that he will fail to snuff it out if he were to change his mind, the actor's merely lighting the fuse with the intent to detonate is culpably risky (reckless). And because of the increasing risk over time even if he were to change his mind, when he has *not* changed his mind, his culpability (recklessness) increases as the minute elapses.

This approach also creates an incentive to renounce. If he does change his mind and tries to snuff out the fuse, his culpability is set at the level it has reached at that point in time, regardless whether he then succeeds in snuffing out the fuse. Because his culpability increases throughout the minute, if his punishment likewise increases proportionately, he has some nonmoral incentive to change his mind and try to snuff out the fuse.¹⁵

Impossible Attempts

Our approach also makes sense of the perennially thorny problem of impossible attempts.¹⁶ In all cases of impossibility, the actor has committed the last act. Failure occurs, however, not because the actor's performance errs or some other variable actively intervenes, but because success was impossible *ex ante* on that occasion. For example, the actor shoots the potential victim with the intent to kill and the bullet pierces the victim's heart, but the victim is already dead.¹⁷ From the vantage point of practical reason, impossible attempts are indistinguishable from other last-act completed attempts because in all of these cases the actor has tried to produce a prohibited harm and has done what would be a sufficient act if the surrounding circumstances were as the actor believed them to be. Whether failure is produced by poor performance, active intervention, or unknown states of affairs is irrelevant to the law's ability to guide the actor's conduct.

¹⁵One should compare and contrast this "lit fuse" scenario with the ordinary case of reckless conduct extended through time -- e.g., reckless driving. There is a problem that we take up in Chapter Seven regarding how to individuate the crime or crimes committed by virtue of such conduct. But clearly, the longer the actor drives in what he believes is an unduly risky manner -- with *his* estimate of the risks and the law's conception of *unduly* as the material ones -- the more culpable he is.

¹⁶In a very real sense, *all* attempts are impossible ones; some fact about the world rendered it incapable of succeeding. The gun was misaimed, or had blanks, or was jammed, etc. The misaimed gun is in principle no different from a failed attempt to kill through voodoo.

¹⁷*See* *People v. Dlugash*, 363 N.E.2d 1155, 1162-63 (N.Y. 1977).

In cases of impossible attempts, it may be difficult to determine whether the actor intended to produce the prohibited harm, because the actor's manifest conduct may appear innocent to others who do not know what the actor intends and believes. For example, suppose an actor takes and carries away an umbrella he believes belongs to another with the intent permanently to deprive that person of the umbrella, but the umbrella in fact belongs to the actor.¹⁸ In such cases, it might be exceedingly difficult to prove the necessary *mens rea*, but the difficulty is purely epistemic. The actor is morally a last-act attempted umbrella thief and the actor's desert is indistinguishable from that of those who succeed. The actor is no different from one who speeds through a school zone believing he is creating a high risk to children when unbeknownst to him, it's a school holiday, and there are no children (or adults, pets, or parked vehicles) anywhere near. That actor has engaged in a reckless act that from a better epistemic vantage point appears safe. Indeed, the impossible attempter is no different from one who fires a gun at someone when everyone but him knows the gun is empty, or is a toy gun, or that he is in a video game simulator.

Our view also provides a sensible approach to cases of so-called inherent impossibility, those in which the actor commits a last-act attempt, but success is impossible because the actor uses means utterly ill-adapted to achieving the prohibited harm. For example, imagine an actor who tries to crack a bank safe using the beam from an ordinary flashlight. Unlike the case of standard impossibility, success in this case was possible only if one suspends the causal laws of

¹⁸See CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 600 (Sanford H. Kadish & Stephen J. Schulhofer eds., 7th ed. 2001). For a more realistic but still problematic case, see *United States v. Oviedo*, 525 F.2d 881, 882 (5th Cir. 1976) (defendant sold an uncontrolled substance that he said was heroin to an undercover agent and was charged with attempted sale of a controlled substance; defendant claimed that he knew the substance was uncontrolled and intended only to "rip-off" the buyer).

the universe. If the actor is just foolish or careless, then the actor is fully capable of being guided by reason and the law. Consequently, the actor is a fully culpable last-act attempter and should be treated the same as other last-act attempters and as those who successfully complete the crime.¹⁹

Reconceptualizing Other Inchoate Crimes

Once we understand what a culpable action is, there is no need to have separate crimes of solicitation and conspiracy, or the form of criminal liability known as complicity. Instead, the kinds of conduct so criminalized should be brought under the heading of recklessly increasing the risks of others' criminality through unjustifiably risking, encouraging, or aiding others' criminality.

This reconceptualization has many advantages. For one thing, it does not require that the actor's *purpose* be to facilitate the others' crimes. The actor need only be aware of an unjustifiable risk that he is helping or encouraging future crimes. (Many gang members act without the purpose the law demands -- they assist other members' criminal acts out of a desire to help fellow gang members rather than in order that the crimes they assist be committed -- and most judges and juries ignore the law and convict, as they should. Dropping the purpose requirement eliminates this hypocrisy.) Legitimate merchants can be protected by making a sale at market price conclusively justifiable. And free speech concerns regarding solicitation (for example, a fiery speech to an angry crowd) can be protected in a similar manner.

¹⁹The same goes for the voodoo doctor who sticks the pin in the effigy believing he is killing his victim, or the poisoner who mistakes the packet of sugar for the packet of strychnine.

In some cases, however, the mistake may indicate that the actor is not a rational agent and therefore cannot be guided by reason. If so, such an actor should be excused.

A second advantage of this recklessness approach to inchoate crimes comes from the holism of that approach. Instead of having to prove that the actor's purpose in soliciting, agreeing, or aiding was to promote some specific crime -- which is often impossible -- one need only prove that he adverted to increased risks of various possible crimes.²⁰

This form of culpable recklessness is also like lit fuse attempts. Frequently, there will be a temporal gap between the time of the actor's encouragement or aid and the time that the others whom he has encouraged or aided will impose the risks. And during that time, it will frequently be possible for one who has a change of heart to revoke his aid or encouragement. (And, of course, having culpably created a peril, he has an affirmative duty to take steps to eliminate it.²¹)

²⁰The gang member who is told to drive a car to a specific location and does so, who believes that he is aiding some crime, but who does not know whether the crime is a robbery, a bombing, a killing, or something else, does not have the purpose to commit any particular crime. Nonetheless, such persons are routinely convicted as accessories to whichever crime the gang commits. *See, e.g.,* Director of Public Prosecutions for Northern Ireland v. Maxwell, (1978) 3 All E.R. 1140. This not only bends the requirement that the aider intend the crime committed; it also wreaks doctrinal havoc when no crime is committed, as the Model Penal Code, for example, makes an aider into an attempter when the principal commits no crime. *See* Model Penal Code § 5.01(3) (1985). But which of the contemplated crimes did our gang member "attempt" through his aid of driving the car to the location? On our approach, based on the recklessness of giving the aid with respect to all the various possible crimes, and uninterested in the actual results, this doctrinal problem is averted.

As is true under the criminal law generally, one can be guilty through soliciting or aiding conduct that is committed by another who by virtue of excuse or lack of *mens rea* is not himself guilty of a crime so long as one has solicited or aided the *actus reus*. Under our approach, if the one whose conduct the actor encourages or aids is himself imposing risks for his own good reasons, then if the actor is aware of those good reasons, the fact that the *actor's* reasons would not justify the risk imposition does not make the actor's act of encouragement or aid culpable. He is encouraging or aiding what he knows to be justifiable conduct. On the other hand, if the actor believes the risks are higher than the principal believes them to be, or believes that the justifying facts that the principal believes exist do not exist, the actor is culpable even if the principal is not.

²¹Obviously, when the actor has committed a culpable act, and the act has caused harm (or what the actor perceives as harm), but the actor believes the harm, unlike instant death or destruction of property, can still be mitigated by him if he so chooses, the actor has an affirmative duty to take such mitigating action. If he fails to do so, then regardless whether his

As time passes, the risk that were he to have a change of heart, he would fail to revoke his aid or encouragement increases. So the actor's recklessness in giving aid or encouragement increases over time, just as with lit fuses. Renunciation and withdrawal of the aid or encouragement fixes culpability at the level it has reached as of that time, and it forecloses further increased culpability and increased punishment therefor. So again, there can be a nonmoral incentive to renounce and withdraw one's aid or encouragement.

Finally, it is worth noting that the actor's culpability in all of these inchoate crime scenarios is completely unaffected by whether the others, whose wrongful acts the actor has risked bringing about through aid or encouragement, ever commit such acts. Complicity disappears as a concept. Each person is culpable for the risks *he* unjustifiably increases. Nor is the actor's culpability affected by whether his words of encouragement to the principal are actually heard or understood, or his aid actually received. What matters is whether the actor believes that he has acted to impose a risk of harm (or proxy conduct) for no sufficient reason, and whether the actor has subsequently attempted to mitigate or eliminate that risk, thus limiting the degree to which he is culpable.

mitigating action would have been either necessary or sufficient to prevent further harm, he has acted culpably. He now is on the hook for *two* culpable acts -- the initial culpable act that caused (apparent) harm, and the subsequent culpable omission to take (apparently) necessary and sufficient mitigating action. Thus, it follows, perhaps surprisingly but nonetheless correctly, that one assailant who wrongfully shoots and kills his victim is guilty of one culpable act -- one wrongful (successful) attempt -- whereas another assailant who wrongfully shoots and wounds his victim and then leaves the victim to die from those wounds rather than saves the victim is guilty of two culpable acts, each as culpable as that of the first assailant.