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Risk and Inchoate Crimes: Retribution or Prevention?

by
Larry Alexander* and Kimberly Kessler Ferzan**

I. Introduction

In Crime and Culpability: A Theory of Criminal Law,¹ we set forth our vision of what criminal law should look like if it were premised solely on the retributive goal of giving people their just (negative) deserts. We did and do endorse that retributive goal, although we do not, of course, advocate that it be pursued monomaniacly, whatever the cost to other valid social goals.² Offenders receiving their just punishments is a good, but it is only one good among many. We also endorsed and still endorse a retributive side-constraint prohibiting knowingly punishing offenders more than they deserve.³ But that side-constraint does not prohibit risking greater-than-deserved punishment, which all systems of criminal punishment will do to a greater or lesser extent. We did not take a stand on the optimal degree of that risk, such as that entailed by proof beyond a reasonable doubt. Our views on that issue were not central to the book’s principal concerns.

In Crime and Culpability, we argued that negative desert, the measure of just punishment, is solely a function of the culpability of the offender.⁴ We argued further that culpability is itself

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¹ Ibid. at 7–10.
² Ibid. at 8–9, 12–13.
³ Ibid. at chs. 2, 5.
determined by two factors. The first factor is the risks to others’ legally protected interests that the actor believes his action is “unleashing” beyond his ability to alter. Such risks from a single act can be to a variety legally protected interests and can be of various magnitudes. The relevant question for culpability is not which legally protected interests God will perceive to be at risk from the act, nor is it which ones the so-called “reasonable person” will perceive to be at risk. Rather, the proper question is which legally protected interests of others does the actor believe his act is putting at risk. The same goes for the magnitude of those risks. The relevant magnitude of risk is that assessed by the actor, not what magnitude God or the “reasonable person” would assess. (God will, of course, know precisely which legally protected interests are at risk—the ones, if any, that are ultimately actually affected—and will likewise assess all magnitudes of the risks as either one or zero, depending on which will be realized.)

The second factor in the culpability equation are the reasons the actor perceives in favor of and against imposing the risks. Those reasons are based on the facts the actor believes exist at the time of his act—discounted by the probabilities of their nonexistence that he assesses—that count in favor of or against imposing risks to others’ interests. The actor does not have to be motivated by the facts that will justify his risky act for that act to be nonculpable; but he does have to believe those justifying facts exist. Likewise, he does not have to be motivated by the facts that count against his act for those facts to render it culpable, so long, that is, he is aware of those facts that count against the act.

On the other hand, the weight the actor gives to those positive and negative facts that he perceives is immaterial, as is whether he even assesses the negative facts as negative and the positive facts as positive. Whether a fact is positive or negative in the reasons calculus, and how

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5 Ibid. at ch. 2.
much negative or positive weight it carries, is not an issue on which the actor’s opinion matters. What does matter is whether he is aware of those facts when he acts.

In essence, we reduced all culpability assessments to that of recklessness. Recklessness is commonly defined as taking a substantial and unjustifiable risk (to others’ legally protected interests) while adverting to that risk. We argued that the “substantial” prong does no real work independently of the “justifiability” prong, which does all the work. (An unjustifiable risk is always “substantial” no matter its magnitude.) The culpable mens rea of “purpose” is merely a factor on the justifiability axis, a factor that counts against imposing risks on others. The culpable mens rea of “knowledge” is at one end of the perceived magnitude of risk axis. The recklessness analysis can subsume both of those forms of mens rea without loss.

We not only argued that recklessness was the paradigmatic form of culpability and could subsume purpose and knowledge, but we also argued that negligence was not a form of culpability at all. The negligent actor is one who perceives the riskiness of his act as lower than the “reasonable person” would perceive it, or who perceives justifying facts that the “reasonable person” would not perceive. As a result, the negligent actor imposes risks for reasons that would render his act nonculpable were the risks and reason as he perceives them but culpable were they as perceived by the “reasonable person.”

We argued that the negligent actor is not culpable for his negligent act because he is the captive of his misperceptions. Those misperceptions may have been caused by cognitive or characterological defects, but the actor cannot be deemed culpable for these. He has no control over them and their influence on his perception of the world at the time of the negligent act. His only control over his character and cognition is indirect. He can seek to improve them, though he would have to be aware of their deficiencies to have reason to do so. And those very

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6 Ibid. at ch. 3.
deficiencies may blind him to their presence. His negligent act might be the product of an earlier reckless act—an act that he perceived created an unjustified risk that he would later fail to appreciate other risks. (He might have forgone attending a lecture on “Japanese for the street-wise American sailor in Yokohama,” realizing that he was running a risk of dangerously misunderstanding Japanese women, a risk that given his reasons for skipping the lecture was an unjustified one.) Perhaps he is culpable for taking the reckless progenitor (of negligence) act. But that culpability is separate from any culpability that attaches to his negligent act, which we argued is non-existent.

Finally, we argued that the results of reckless acts do not affect culpability and therefore do not affect retributive desert. That is why a reckless act that is reckless because it creates an unjustifiable risk of a later negligent act is culpable independently of the negligent act, if any, that is its product. If the negligent act is due to an earlier reckless act, the actor should only be punished for the reckless act. And he should be punished for it even if it never leads to a negligent act. An actor who culpably imposes a risk to others’ legally protected interests should be punished for that risk-imposition whether or not any harms to those interests result from the act. Results of acts do not affect the culpability and hence the negative desert of the actors.

II. Inchoate Crimes

An inchoate crime as we defined it in Crime and Culpability is one in which the criminal act is prior to the act that unleashes the risk(s) of harm. In other words, it is a crime that occurs while the actor still has the ability to choose to refrain from imposing the risk. On that definition, completed attempts and reckless endangerments are not inchoate crimes. A completed attempt is an attempt to commit a crime by an actor who believes that he has done

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7 Ibid. at ch. 5.
8 Ibid. at ch. 6.
everything necessary to commit the crime and that preventing the crime is now beyond his control. The paradigm of a completed attempt is the actor’s pulling the trigger on a gun that he believes is loaded, in working order, and pointed at a vital spot on the victim. If it turns out the gun is unloaded, or jammed, or misaimed, and the victim is not harmed by the actor’s pulling the trigger, the actor has committed a completed attempt of murder. Similarly, the driver who drives recklessly but manages to cause no injury to life, limb, or property has committed the completed crime of reckless endangerment; for whether injury occurred was beyond his control once he committed the reckless act.

The paradigmatic inchoate crime is the incomplete attempt. In an incomplete attempt, the actor intends to commit a culpable act in the future and has taken some steps toward that end. (How many steps he must take and how close to committing the intended culpable act he must come are matters of controversy and vary from jurisdiction to jurisdiction.) Thus, for example, when Frankie lies in wait for Johnny to return home, at which time she intends to kill him with her .44, she has in most jurisdictions committed an incomplete attempt of murder.

Solicitation, conspiracy, and giving aid to another to assist the latter’s commission of a future crime are often regarded as inchoate crimes. On our analysis, with the exception of a conspiracy in which the conspirator in question intends to carry out the future crime as the principal, these crimes, if they are truly culpable, are properly regarded as completed crimes of reckless endangerment.\(^9\) For the actors have unleashed beyond their control risks of others’ criminal acts by virtue of encouraging or aiding those future acts. Only if the actor retains control over whether those future crimes occur do we have a true inchoate crime.

(What we call “lit fuse” attempts, where the actor has set up the mechanism that will unleash the risk in the near future without any further action on his part, but where he believes he

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\(^9\) Ibid. at 223–25.
can still act to prevent the realization of that risk—as with a lit fuse—has some characteristics of a completed attempt and some of an incomplete attempt. For our purposes here, it should be thought of as a completed attempt and thus as beyond the scope of this article.)

III Are Inchoate Crimes Culpable?

In Crime and Culpability we argued that true inchoate crimes are not culpable and should not be punished. Our arguments that negligent acts were not culpable and that results do not affect culpability were (and are) controversial, but the controversies in which they partook were longstanding and well understood ones. Our position on inchoate criminality, however, provoked a controversy that had little precedent. We think it fair to say that our position on inchoate crimes was the most controversial of all the controversial positions we took. And that is the position we shall revisit and defend in these pages.

So let us return to Frankie, lying in wait for Johnny, intending to kill him with her .44. Until Frankie pulls the trigger of her .44, while aiming it at Johnny’s heart, believing it to be loaded and in good working condition, and not believing she is Superwoman and faster than a speeding bullet, has Frankie committed a culpable act?

Surely there are some culpable acts Frankie may have committed. Carrying around a loaded .44 for no reason other than to kill Johnny may create an unjustified risk of death or injury through an accidental discharge. Likewise, merely driving to Johnny’s house, no matter how carefully, for the sole purpose of killing Johnny, may create an unjustified risk of a traffic accident. For even if these risks are very small in Frankie’s estimation, if her only reason for imposing them is a bad reason—to kill Johnny—then her driving and carrying the .44 are

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10 Ibid. at 220–21
11 Ibid. at ch. 6.
reckless and culpable. And if she reaches the stage when she is pointing the gun at Johnny with her hand on the trigger, the risk of accidental discharge may be so high (in her estimation of the risk) that she is quite culpable for imposing the risk.

Furthermore, in addition to creating risks of accidental discharge or traffic accidents, Frankie may have culpably unleashed a risk of causing fear. For if she realizes that there is a risk that someone—perhaps Johnny, or perhaps a third party—will see her lying in wait with a gun and fear for his or another’s life, then Frankie will be aware that she has unleashed this risk, and she will have done so for a reason—murder—that does not justify the risk.

So there are several culpable acts that Frankie may have committed or be committing in lying in wait for Johnny. But none of them is as culpable as a completed attempt at murder. Nor are any of the relevant risks the risk of Frankie’s intentionally pulling the trigger while aiming at Johnny. In other words, these other possible culpable acts are not acts of attempted murder. And Frankie’s intent to kill Johnny enters into the analysis of these acts’ culpability only to establish that any risks Frankie perceives she is imposing are not justifiable risks.

Those who wish to make incomplete attempts criminal apart from these collateral risks they may impose and of which the attempter may be aware do so because they think Frankie’s intending to kill Johnny (and perhaps taking some steps towards realizing that intention) is what makes Frankie culpable as an attempted murderer. We rejected this, for reasons to which we now turn.

A. The Centrality of Intending a Culpable Act to the Case for the Culpability of Inchoate Crimes

A retributivist case for punishing inchoate crimes such as incomplete attempts ultimately must rest on the premise that intending a future culpable act is itself a culpable act. (Remember: we are excluding from consideration the various risks of harm that an actor, such as Frankie, may
have already unleashed—put beyond her ability to affect—in the course of conduct leading to the intended crime.) Why do we say that the key premise in the case for inchoate criminality is that intending a culpable act is itself a culpable act? After all, the law of incomplete attempts requires not only an intent to commit a wrong but also that the actor have taken steps towards acting on that intent that go beyond “mere preparation.” (Just how the line between “mere preparation” and attempting is drawn is inherently imprecise, and its formulation varies from jurisdiction to jurisdiction; here we shall use the Model Penal Code’s “substantial steps” formulation, which is a representative one.)

The law might have two different concerns in requiring the (incomplete) attempter to have taken “substantial steps” towards acting on a culpable intention. One concern is to corroborate that the actor really does possess the culpable intention. The Model Penal Code states that the requisite substantial steps must corroborate the actor’s culpable intent. This, however, seems unnecessary, as the culpable intent must always be proved “beyond a reasonable doubt.” Moreover, if an act requirement is added for the purpose of constraining the state and curbing abuse, such a rationale is not retributive; the act requirement is not based on what the actor deserves.

The other concern is a concern with dangerousness. The closer the actor is to executing her culpable intention, the more likely she is to execute it unless she changes her mind or someone or something intervenes to prevent her. The problem with this rationale for requiring “substantial steps” is that dangerousness and culpability are independent of one another, and each can be present in the absence of the other. We punish people because they are culpable, whereas we restrain people, when we do so, because they are dangerous. Frankie’s lying in wait for Johnny makes her more dangerous, if she retains her culpable intent, than she was when she
first formed the intent to kill him—perhaps while sitting in a chair in her home, many miles from Johnny’s house. But does it make her more culpable? She is no less capable of changing her mind and relenting; and although she has sunk more costs in her plan to kill Johnny by the time she reaches her house, she still has an overriding reason to change her mind: namely, that her intended act is a culpable one. In other words, she still controls the culpability of her future conduct and still has an overriding reason to see that it is not culpable.

Here is another example drawn from *Crime and Culpability*,\(^\text{12}\) that shows that the culpable intent is what does all the real work in deeming incomplete attempts culpable. Dan intends to kill Victor, who takes a daily walk on a trail that passes under Balanced Rock. Dan purchases a jackhammer and takes it to a point alongside Balanced Rock. He plans to start the jackhammer as Victor walks by so that its vibrations will unbalance Balanced Rock and cause it to fall on Victor. But as Dan sees Victor walking toward Balanced Rock, Dan decides to wait to execute his plan on another day because there are too many picnickers around. Dan departs, leaving his jackhammer behind.

Because Dan arguably took substantial steps towards killing Victor, and because he did not abandon his attempted murder out of a change of heart, Dan would arguably be guilty of an incomplete attempted murder in most jurisdictions and under the Model Penal Code. Now compare Dan with Dana. Dana happens to be picnicking right next to the spot where Dan leaves his jackhammer. Dana also hates Victor, and when she sees him coming, she realizes that she could kill him by starting the jackhammer, and she forms the intent to do so.

Surely if Dan is culpable for his incomplete attempt to kill Victor, Dana, when she forms the intent to kill Victor while sitting next to the jackhammer and Balanced Rock, is equally culpable. After all, *she is intending to kill Victor in exactly the same circumstances that Dan*

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\(^{12}\) Ibid. at 210.
was in when he became guilty of the incomplete attempt. So if Dan is culpable, so is Dana. And if Dana is culpable, it can only be because of her intent to kill Victor. So we would conclude that in Dan’s case as well, it is Dan’s intent to kill Victor that solely accounts for this culpability.

The argument must be, then, that Frankie’s intending to kill Johnny is itself culpable. Substantial steps only prove (perhaps redundantly) that the culpable intention exists. They show that it is an intention, not a mere desire or fantasy, with which we are dealing. And they show that the intention is firm enough to have led the actor to have taken various steps towards executing it. So substantial steps may play an important epistemic role. Nevertheless, it is the intention, not those steps, that has to be the culpable element if Frankie’s incomplete attempt is culpable.

Still, we should note that some authors disagree with us over whether substantial steps are merely evidential. Some have argued that the more steps the actor takes towards executing his intention to commit a culpable act, the more he is “rationally committed” to executing it and under “rational pressure” to do so. But this is an argument that is very close to asserting that it is rational to recover “sunk costs.” In the case of an intention to perform a culpable act, it is always rational to change one’s mind and desist—no matter how many steps taken and how much cost sunk. After all, the culpability of the intended act is in no way diminished by the actor’s previous efforts towards committing it. (“I really shouldn’t be blamed for the murder;

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13 See, e.g., Gideon Yaffe, “Trying, Acting and Attempted Crimes,” Cite. Yaffe does not require the step beyond intending to be a particularly important one for executing the intent. It only has to corroborate the actor’s intent. But because determining that it is such a step requires that we know the intent with which it was taken—was the purchase of the gun made for the intended killing or for marksmanship practice? — we must have independent evidence of intent. The step therefore adds nothing to an intent requirement. If one is “rationally committed” to an illicit end by taking a step in that direction, one is “rationally committed” to it by merely intending it.

14 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, 122–123 (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.
after all, I spent an enormous amount of time planning it and enormous amounts of money on the weapon, the camouflage, the ticket to Rio…”). And the actor will not only be acting most rationally if she changes her mind, but she is also always free to do so.

B. Is Intending a Culpable Act Itself a Culpable Act?

If the element of an incomplete attempt that does the inculpatory work is the intent to commit the crime, we must confront the central question: *Is intending to commit a culpable act itself a culpable act?* If the answer is “yes” then there is a retributive case for punishing inchoate crimes. If, as we argued in *Crime and Culpability*, the answer is “no,” then only acts that unleash unjustifiable risks are culpable, whereas intendings, and the inchoate crimes that they constitute, are not.

Now the case for the culpability of intending a culpable act might seem obvious. After all, if *doing* is wrong, then would it not follow that intending to *do* is wrong?

Surely there is something criticizable in intending a culpable act. That in itself does not show that intending the culpable act is culpable. For if *doing* is wrong, does it follow that desiring to *do* is wrong, or fantasizing about *doing* is wrong? Desiring or fantasizing about something bad is criticizable and may reveal character defects, but it is not a culpable act. Desiring, wishing, fantasizing, et al are not culpable acts because they are not acts at all, and surely not voluntary acts. Because only voluntary acts can be culpable and merit retributive responses, these attitudes toward culpable acts are not themselves culpable. So even if *doing* is a wrong justifying retribution, desiring to *do* is not.

Nonetheless, we did not rest the case against inchoate criminality on the ground that intending a culpable act is not a voluntary act. Instead, we assumed the contrary, namely, that intending *is* a voluntary act. Or rather, and more precisely, we assumed not that an intention, a
mental state, is itself an act, but that forming an intention is an act, and a voluntary one. Our case against inchoate criminality accepted that intendings were different from desirings, wishings, and fantasizings in a way that made intendings potentially eligible for retributive responses.

What we should have added is that although an intention may be merely a mental state, maintaining an intention, like forming one, can be viewed as a voluntary act. Much of our discussion of the culpability, if any, of intending a culpable act was premised on the unstated assumption that maintaining an intention over time was potentially culpable and thus could be viewed as voluntary action.

So both forming and maintaining intentions to commit culpable acts are eligible to be deemed culpable acts, unlike desirings, wishings, and fantasizings. Nonetheless, we concluded that neither forming nor maintaining intentions to commit culpable acts were culpable acts, even if forming and maintaining such intentions were acts. And we believe that conclusion is the correct one.

1. The Difficulty of Distinguishing Intentions from Desires

Intentions are not the same as desires, wishes, and fantasizings. That is clear. What is less clear is how the actors in a criminal justice system—the police, prosecutor, judge, and jury—will be able to distinguish an intention to commit a culpable act from these other mental states. Remember that we are dealing with inchoate crimes—in particular, incomplete attempts. The intended culpable act will not have been committed. At best we have a confession of the defendant and conduct consistent with that confession. But even the actor herself may have difficulty ascertaining whether she intended a future culpable act or merely desired it or fantasized about it. Will Frankie be certain she really intends to shoot Johnny, even if she has
taken a loaded gun and driven to Johnny’s home? And if Frankie cannot be certain she intends to shoot Johnny, can the rest of us be confident that is what she intends?

From this point on we shall assume that this epistemic worry has been overcome and that we can with sufficient confidence distinguish intentions from desires and fantasizings. Still, the murkiness of the line between intentions and these related mental states should itself give us pause about criminalizing intentions.

2. A Big Worry: The Conditionality of Intentions and the Opacity of the Future

Our intentions to engage in future conduct are almost always—perhaps always—conditional. We intend to engage in that conduct in certain circumstances but not in others. Some of those conditions may be present to our minds when we form the intentions. We say to ourselves, “I will go to the store at 3PM unless it is raining or I am at a point in the article I’m working on where I’d best not stop.” Such conditions that will defeat or trigger the intended conduct are called “internal conditions” because they are part of the intentions as we mentally formulate them. On the other hand, most of the conditions that attach to our intentions are “external” in that they are not present to mind when we form those intentions. We will not intend to go to the store at 3PM if we discover that our car won’t start and we would have to walk, or we hear that there has been a massive accident on the road to the store, and so on. We do not consciously advert to all these defeating conditions, but our intended conduct is nevertheless conditional on whether they obtain.

In an incomplete attempt, the intention to engage in the actus reus of a crime is, like all intentions, conditional. Some of the internal conditions that would cancel the intention show that the intention was not an intention to engage in culpable conduct. (“I intend to kill Susan—but only if she is about to shoot Sam, or blow up the White House, etcetera.”) Other internal
conditions do not negate the culpability of the intended conduct but do make that conduct highly unlikely. If Roger intends to steal the Mona Lisa, but only if it is in the Met and not the Louvre, and only if it is not guarded, his conditional intention is culpable but very unlikely to be acted upon. The same is true if Samson intends to kill Delilah if she is ever unfaithful, but he believes (correctly) that she is and will remain faithful.

What is true of internal conditions is true of external conditions. Suppose one intends to drive from San Diego to Los Angeles in two hours time, which requires an average speed of 60 miles per hour. When one forms this intention, he does not advert to the possibility that road and traffic conditions will make 60 miles per hour an extremely unsafe speed. Nonetheless, his dispositions are such that when he sees that he cannot safely drive at that speed, he will abandon his intention to arrive in two hours. Given what he now knows about the road and traffic conditions, his intention to drive to Los Angeles in two hours would be a culpable intention on which to act. However, although he did not consciously consider these adverse road and traffic conditions when he formed the intention to drive to Los Angeles in two hours, these external conditions on that intention were either always present or became present at some time prior to his driving.

The conditionality of intentions makes assessing their culpability much less straightforward than assessing the culpability of the intended acts themselves. As we have said, the culpability of the latter is a function of the risks of varying magnitudes to various legally protected interests that the actor believes his act has unleashed beyond his ability to affect, and the reasons for and against imposing those risks that the actor believes, with varying degrees of certainty, exist at the time of the act.
Consider again Roger the art thief. When he enters the Met, intending to steal the Mona Lisa if it is there and unguarded, he believes the probability that those conditions will obtain and he will steal the Mona Lisa to be vanishingly low. Has he, upon entering, committed burglary (which is really a per se incomplete attempt of the target felony)? Just how culpable is Roger’s entering the Met with that conditional intention?

Or consider, analogously, Marge, the strong arm robber. She says to Vic, “Your money or your life.” She is not bluffing. She intends to shoot Vic if he does not hand over his money. But she believes it is almost certain that Vic will hand it over and that she will not have to shoot him. Marge has committed robbery. Has she also committed assault with intent to kill or attempted murder?

Or return to Frankie, en route to Johnny’s house with her .44. She intends to kill Johnny if she catches him in flagrante with another woman. However, she has never once caught him with any other woman. She believes that it is ninety-nine percent likely that Johnny is not now with another woman. Still, she does intend to shoot him if he is with another woman, which is why she is carrying her .44. How culpable does her conditional intention to kill Johnny make her if she believes it is highly unlikely that the intention will be triggered?

Finally, suppose Maggie intends to drive to her child’s school to pick him up, and she intends to get there in ten minutes. If traffic is moving freely, the road is not icy, and so on, Maggie can get there in ten minutes without recklessly endangering others. And her intention to get there in ten minutes is not unconditional: she would not drive through a Boy Scout parade on the road, mow down pedestrians crossing at crosswalks, and so on. Still, there are some circumstances, quite unlikely but still possible, in which Maggie would drive recklessly to some
degree, to which she may or may not be adverting when she forms the intention to get to the school in ten minutes. How should we assess Maggie’s culpability for so intending?

Perhaps there is a solution to this problem of the conditionality of intentions. For example, perhaps we should assess the culpability of the actor’s intention by asking what probability did he attach to his acting on the intention—or, what is the same thing, what probability did he attach to the conditions obtaining that governed whether he would act? (This, of course, will be difficult and perhaps impossible for those conditions to which the actor did not consciously advert but were nonetheless present dispositionally.) Then we could ask what culpability-enhancing and culpability-mitigating conditions did the actor believe would exist at the time of the intended act, and with what probabilities. The culpability of intending the act would be the average of the culpability of the various scenarios the actor envisioned might obtain at the time of the intended act, weighted by the probabilities he assigned each scenario, and discounted by the probability he attached to his actually engaging in the intended act (the probability that the defeating conditions would not exist).

If this “solution” appears impossibly complex—and it is—the problems of assessing the culpability of intending a (possibly) culpable future act are only beginning. For the actor may assess the relevant probabilities differently at different points in time. Take Roger the art thief, and assume he is charged, not with burglary, but with in incomplete attempt of grand larceny. Roger may, at the time he forms the intention to steal the Mona Lisa, believe that it is quite unlikely that the Met possesses it. Later, he may assess that likelihood as higher (or lower). Similarly, over time he may alter his assessment of the likelihood of its being heavily guarded. Thus, Roger’s estimate of the likelihood that he will ever execute his intention to steal the Mona Lisa will vary over time. Is Roger’s culpability dependent on the point in time at which he is
arrested? Could he have been more or less culpable if he had been arrested sooner (or later)? And is culpability assessed just at the moment of arrest, or is it the average of his culpability from the moment he formed the intention until the moment of arrest, which, too, will vary with the time of the arrest?

What goes for the actor’s estimate of the probability that he will execute the culpable intention also goes for his beliefs about the culpability-relevant facts that will obtain at the time of the intended act. Those beliefs may change during the time in which the intention is held.

For instance, assume that Barb, the law school dean, decides to blow up the football stadium to protest the university’s allocation of funds to the football team instead of a new law school building. At that point in time, she may not have yet considered whether she will blow up the stadium when it is full of people or when it is empty. She may be debating whether to wait until there is a home team present, or whether to ensure that it is a day when no one is in the area. But even if Barb has resolved to blow up the stadium at a specific time, her beliefs about the attendant risks and possible justifying reasons may change several times between the time she forms the intent and the time she detonates the bomb: she may believe at one time that the stadium will be full of fans, at another that it will be empty, at another that it will be occupied only by a terrorist cell, and so on. If she were to detonate the bomb at any of these times, her culpability for doing so would vary enormously—from extremely culpable to possibly not culpable at all in the case of the terrorist cell. Again, is Barb’s culpability determined by her beliefs at the time she is arrested—in which case it may be high if she is arrested at $t_1$ but nonexistent if arrested at $t_2$—or is it determined by the average culpability of her intention from the time of its formation to the time of her arrest? In either case, because her beliefs about risks and reasons will change over time, her culpability level will depend on the pure fortuity of when
she is arrested. (And how does one “average” a culpable intention, as when Barb believes the stadium will be full of fans, and a justifiable one, as when she believes the stadium will contain no one but a dangerous terrorist cell?)

Indeed, not only may Barb’s beliefs about risks and reasons change over time, but she simply may have formed no belief whatsoever about the degree of risk that she will ultimately impose, leaving this “detail” to be filled in later. The ultimate risks and reasons for the intended action and therefore its culpability will be indeterminate at the moment of forming the intention.15

To some, our concern may seem a bit inconsistent with our approach to moral luck. Here is the potential objection to our view. If Frankie shoots at Johnny, but a bird flies in the way, we argue that the bird is irrelevant to Frankie’s blameworthiness. But then, why is it not equally irrelevant that at the time that Frankie forms the intention to kill Johnny, she is unaware of the fact that a flock of birds may later block her bullet or otherwise thwart her plans?

The difference is that when an actor forms an intention as to what he will do later, he understands that his plans are open-ended. Indeed, the law’s difficulty in holding that conspirators intend to kill a police officer (before they pick their victim), or that an accomplice intends to aid a statutory rape (when the accomplice lends his buddy the keys to his apartment

15 One last point. Suppose David has a conditional intention, the condition of which negatives the criminal harm. Suppose he intends to have sex with Darlene, unless she is under 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, unless she is under 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).

(Of course, this problem only arises in connection with crimes that have strict liability elements or elements that 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 problem.)
before the buddy even meets the underage girl), are motivated by the concern that until we see a
situation, we do not know how we will react. We do not even know what we will intend.

Putting the concerns about conditionality of intentions and the opacity of future
circumstances into a broader conceptual framework further clarifies these problems. As Michael
Bratman has noted, our future intentions—our plans—are partial.\(^{16}\) In other words, the
conditionality of intentions is not simply a matter of there being potential circumstances that
might undermine an intention. Rather, intentions are open-ended plans designed to lead to
further deliberation about the specifics. Intentions structure our later means-end reasoning, and
their conditionality is thus a feature of them that cannot be ignored. Any future plan may or may
or may not lead to a future choice to risk harm to another person for insufficient reasons. An
intention to go to the grocery store might lead to a culpable choice if there is heavy traffic and
the actor then chooses to drive fast; but the same intention might turn out to be completely
benign. How can forming the intention to go to the grocery store itself be a culpable act merely
because of the former possibility?

3. Another Big Problem: The Effect of the Duration and Renunciation of Intentions

Because intentions can be held for varying lengths of time, and because they can be
revoked, we must ask how, if they are to be deemed culpable, their culpability is affected by
these features. First, let us compare Hank and Harry. On January 1, Hank forms the intent to
kill Sally next January 1. Later, on July 1, Harry forms the intent to kill Sally next January 1.
On July 2, Hank has held the intention to kill Sally for over six months, whereas Harry has done
so for only a day. Is Hank more culpable than Harry?

a. Assume Duration Does Not Affect Culpability

One view would be that the duration of maintaining the intention is immaterial to its culpability. On July 2, Hank and Harry are equally culpable. And Hank is as culpable on January 1 as he is on July 2 (barring changes in beliefs about conditions and circumstances that were discussed in the previous subsection).

But suppose that Hank now renounces his intention to kill Sally, whereas Harry does not. What effect does his renouncing it have on his culpability, and does it matter why he renounces it? (If he renounces the intended act because he views it as imprudent as opposed to immoral, should that deprive his renunciation of any effect on his culpability?)

If forming and maintaining an intention to commit a culpable act is itself a culpable act, then it is difficult to understand how the culpability that exists at that time can be expunged by later revoking the intention. The past is fixed and contains the culpable act. It cannot be altered. If Hank was culpable on January 1 for intending to kill Sally, he remains culpable for having so intended on January 1 even if he no longer intends to kill her, whether owing to prudence or conscience. Any view to the contrary would suggest our concern was not with past culpable acts but only with present character.

If the culpability of intending cannot be expunged by revoking the intent, and if the duration of maintaining the intention is immaterial, then Harry is just as culpable as Hank even if Harry revokes his intention after thirty seconds, whereas Hank has held his intention firmly for more than six months. Or if Harry is indecisive and forms the intent to kill Sally, then thirty seconds later revokes it (say, for purely prudential reasons), then forms it again, then again quickly revokes it, Harry has committed several culpable acts of intending to kill whereas Hank has committed only one. But it seems odd to deem indecisive Harry more culpable and deserving of more punishment than steadfast Hank.
b. Assume Duration Does Affect Culpability

Alternatively, we might say that Hank’s holding the intention to kill Sally for six months makes him more culpable than Harry, who has held the intention for a much shorter time. The problem is explaining why the duration of the intention should matter. We gave an explanation for why the duration of an act that the actor perceives to be risky matters: it matters because duration affects the degree of risk.\(^{17}\) (Driving for one minute while intoxicated is less risky than driving for an hour in that condition.) But the six month’s duration of Hank’s intention to kill Sally does not make the risk to Sally higher on July 2 than the risk from Harry’s one day’s intention.

Perhaps one could argue that the longer an intention is maintained, the more resolute that shows the actor to be; and the more resolutely an actor holds a culpable intention, the more culpable he is. Both parts of this argument are problematic, however.

First, a person can maintain an intention for a long time and yet not be resolute; for when the time comes to act on that intention, he may change his mind. On the other hand, he may act on an intention formed only a moment ago. Dan may have maintained for weeks the intention to kill Victor by causing Balanced Rock to fall on him; but when the time comes to carry through, Dan thinks better of the idea and abandons the intention. Dana, who just forms the intention to kill upon seeing Victor and the abandoned jackhammer, may act on it.

Second, the link between resoluteness and culpability remains unexplained. Aside from showing that the intention to commit a culpable act really does exist, the resoluteness with which it is held, which is what duration is supposed to demonstrate, at most only affects (negatively)

\(^{17}\) Alexander and Ferzan, supra note 1, at 242–44.
the likelihood of abandonment. It does not affect the culpability of the intention itself.\textsuperscript{18} Perhaps the idea is that the culpability of an intention should be discounted by the strength with which it is held, so that an intention held half-heartedly can only be half as culpable as an intention held resolutely. In any event, we leave it to those who find intentions to commit culpable acts to be themselves culpable acts to work this out.

4. Why Should Incomplete Attempts Merge With Completed Attempts or Successful Crimes?

If forming and maintaining an intention to commit a culpable act is itself a culpable act, then when the actor actually commits the intended culpable act and unleashes the risk beyond his control to recall (or so he believes), why has he not committed \textit{two} crimes? If the risk is realized, why has he not committed both a successful crime and the inchoate crime of intending it? If the risk is not realized, why has he not committed both that inchoate crime and a completed attempt? Indeed, for reasons already mentioned, the culpability of the completed crime or attempt may be less than that of the incomplete attempt because the circumstances that the actor believes exist at the time he unleashes the perceived risk may make his act less culpable than the circumstances he envisioned would exist at the time he formed the intent. When Barb formed the intention to blow up the football stadium on Saturday, she may have thought the stadium would be full of spectators. When on Saturday she detonates the bomb, or tries to, she may realize that there is no home game that day and that the stadium is empty. The only damage the bomb will cause is to the stadium itself. Barb’s final act is culpable, but it is much less culpable than she believed it would be when she formed the intention. Had she been arrested earlier, and if incomplete attempts are culpable, then she would have been more culpable than

\textsuperscript{18} Thus, the duration with which an intention is held is unlike the quality of the deliberation leading up to forming the intention, which \textit{can} affect culpability. \textit{See} ibid. at 166–68.
she was when her intended act was executed. Why then should she not be guilty of two culpable acts?

No one to our knowledge has proposed making an incomplete attempt that then is followed by a completed attempt or successful crime a separate crime from the latter crimes. It is assumed that the incomplete attempt merges with the crime or the completed attempt. If, however, the incomplete attempt is more culpable than the completed attempt or the crime attempted—and remember, for us, results do not affect desert, so completed attempts are all that matter and deserve the same punishments as the crimes they attempt—then any merger would have to go in the opposite direction.

In any event, we are not going to try to resolve this problem. We leave that to the proponents of deeming incomplete attempts to be culpable.

5. The Revocability of Intentions

There is a final problem with deeming intentions to be culpable and punishable, and this concern is decisive for me. This is the problem that intentions are open to reconsideration and thus revocable. On the one hand, if it is not necessarily rational to reconsider one’s intention, 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, although the actor may still exert control over whether the harm does materialize, the risk to the victim has nonetheless increased. One might thus argue that from the actor’s perspective, the risk to the victim has increased because, even from the actor’s perspective, the actor’s balance of reasons has shifted.

19 See Bratman, supra note 16, at 64.
Thus, if this risk is being imposed for insufficient reasons, the actor has committed a culpable act in forming the intention itself.

However, when one is planning to commit a crime, it will always be rational to reconsider. Indeed, many intentions are formed with the proviso that there can always be later reconsideration. Although intentions may serve to guide our future decisions, 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 zero or one—may have increased, because the actor believes he will act as he now intends; but the actor still remains in total control of whether this risk will be unleashed, and he knows this.

Now, it may be said that there is a distinct difference between rationality and culpability. After all, an individual who has lit a fuse will also be under rational pressure to stomp out the fuse, so the pressure to reconsider cannot itself suffice to make the act of forming the intention nonculpable. Even if the actor may be able to change his mind and “revoke” his intention, how does any irrationality in not reconsidering render the initial choice less culpable?

Unlike a lit fuse, however, which the actor may find himself unable to put out even if he now wishes to do so, the actor who only intends to unleash risk in the future knows that he is still in control of his actions. And, indeed, just as crucially, through the exercise of reason and will alone, he may “stop” the harm from occurring. The common law’s focus on locus penitentiae is best thought of not as an opportunity to abandon or renounce but as an opportunity to continue deliberating and change one’s mind. Just as the criminal law seeks to influence the reasons for which one acts, the criminal law should allow room for deliberation, even including room for the

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20 Ibid. at 67.
formation and renunciation of an intention. The actor may still deliberate and think the better of his plan.  

Moreover, often when actors intend an act that may in some circumstances be culpable, the actor will not have considered whether he will really go through with it in those circumstances. Or he may have considered it, believes that he will, but in fact he will not. He cannot know until he actually commits the act in the culpability-creating circumstances (or fails to commit it).

In our view, even if there is rational pressure to stick with one’s intention—pressure that in some way increases the risk of harm—there is also rational pressure to abandon one’s criminal plan, pressure that decreases the risk of harm. Hence, rationality cuts in both directions and cannot therefore point to an increase in risk. In short, an actor cannot regard his future acts as properly subject to a risk assessment; for he cannot regard himself, even given his intention, as a force beyond recall. One may know that forming the intention, or buying the gun, does in some sense make one “more committed” to the crime, but one also knows that one can and should think the better of one’s plan, and this influence serves as an important counterweight. 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 at which he forms the intention to unleash a risk in the future.

IV. Inchoate Crimes and Dangerousness

Up to this point we have been considering whether true inchoate crimes, of which incomplete attempts are the dominant paradigm, are culpable, and if so, how their culpability is to be gauged. We have put aside incomplete attempts that culpably unleash beyond the actor’s control ancillary risks, such as that of the accidental discharging of the intended murder weapon.

the possibility of an auto accident, or the creation of fear. We have concentrated on the act that is the object of the attempter’s conduct, the intended killing or theft or fast driving. We have asked whether intending that conduct, and perhaps taking steps towards executing that intention, is itself culpable conduct, and if so, how culpable.

Suppose, however, that the reason we might wish to punish incomplete attempts and other true inchoate crimes is not a retributive one based on the actor’s culpability, but is rather a preventive one based the actor’s dangerousness. Is that a better reason than the retributive one, given all the problems with assessing the culpability, if there be culpability, of incomplete attempts?

The problems with the preventive rationale for inchoate crimes are these. First, there is the general problem with justifying preemptive incursions on life, limb, and liberty. We do, of course, believe some such incursions are justified. Self-defense is always a preemptive action, one that to be truly defensive, as opposed to retaliatory, must occur before the anticipated act to which it is a defense. Restraining orders, anti-stalking laws, restrictions on sex offenders, and even laws restricting the possession of guns and other potential weapons are all examples of actions that preemptively restrict liberties in order to avert future criminal acts. They are preventive responses to dangerousness rather than retributive responses to culpability.

Assuming that such preemptive restrictions are justifiable, however, does not by itself eliminate the worry about inchoate crimes. For inchoate crimes as a category are both under and over-inclusive with respect to dangerousness. Someone who has never formed a culpable intention may be highly likely to do so in the future. On the other hand, some who form culpable intentions may not be dangerous at all. (Consider someone locked in a cell for life who believes that by committing certain mental acts he can kill the president, or that he can do so by sticking
pins in an effigy; when he performs those acts he is acting culpably, but he is not and can never be dangerous.)

Still, what do we do with someone who we know now possesses an intention to commit an act that we believe might be very culpable if committed? If we catch Frankie lying in wait for Johnny with her .44, intending to shoot him on sight, we cannot just let her go, or so it seems. Even if we could punish her for her culpability in consciously risking an accidental discharge of her gun, a traffic accident en route to Johnny’s house, or causing fear, her culpability and her consequent justly deserved punishment will not be sufficient to allay our fear that she will shoot Johnny once her punishment is served. Her intent to kill Johnny, unless it is renounced forever, makes her a danger to be left at liberty.

Our conclusion is that we should think of inchoate crimes such as incomplete attempts as falling into the category of dangers that might warrant preemptive restrictions of liberty. Our response to inchoate crimes should be governed by the same norms that govern all preemptive responses to predicted dangerousness. It should not be governed by retributivism, for it does not appear to be a response to a culpable act.