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MENS REA AND INCHOATE CRIMES

LARRY ALEXANDER* & KIMBERLY D. KESSLER**

I. INTRODUCTION

When a defendant engages in proscribed conduct or in conduct that brings about a forbidden result, our interest focuses on his state of mind at the time he engages in the proscribed conduct or the conduct that causes the result. We usually are unconcerned with his state(s) of mind in the period leading up to the conduct. The narrative of the crime can begin as late as the moment defendant engages in the conduct (or, in the case of completed attempts,¹ believes he is engaging in the conduct).

Criminal codes do not restrict themselves to proscribing harmful conduct or results, however, but also criminalize various acts that precede harmful conduct. Thus, codes punish agreeing to engage in criminal conduct,² soliciting such conduct,³ and taking a substantial step toward engaging in such conduct.⁴ Codes also elevate the seriousness of some crimes if they are committed with the purpose of committing some further crimes. Thus, trespass or breaking and entering become burglary if committed with the intention to commit

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¹ A completed attempt is one in which the actor believes the harm is occurring (when it is not) or is beyond his ability to prevent. *But see infra* Appendix A.

² *See, e.g.*, MODEL PENAL CODE § 5.03 (1985) (defining the crime of conspiracy).

³ *See, e.g.*, MODEL PENAL CODE § 5.02 (1985) (defining the crime of solicitation).

⁴ *See, e.g.*, the following subsections of MODEL PENAL CODE § 5.01 (1985), which define the crime of attempt to include various forms of "incomplete attempts," *i.e.*, attempts that have not yet become irrevocable by the defendant: § 5.01(1)(c) (taking a substantial step toward engaging in criminal conduct); § 5.01(1)(b) (acting with the purpose or belief that a prohibited result will occur without further conduct on the actor's part, but where the defendant still retains the ability to prevent the result from occurring, such as where she has lit the fuse but still believes she can snuff it out); and § 5.01(3) (acting in a way that would make defendant an accomplice in another's crime or attempted crime were the latter to attempt such crime).

other crimes on the premises.⁵ Or simple assault can become a more aggravated offense if committed with the intent to kill, to rape, or to maim.⁶

What mental states are required for these “inchoate crimes”—i.e., crimes that are preliminary to bringing about the harms that are the criminal law’s ultimate concerns? The mental states cannot be identical to those required for completed crimes and completed attempts, for the defendant committing an inchoate crime is aware or believes that there is still time to desist and renounce. That awareness or belief is at least one qualitative distinction between the mental states of completed and inchoate crimes.

For an inchoate crime such as conspiracy, solicitation, or incomplete attempt, criminal codes usually require that the defendant must have the purpose to engage in the forbidden conduct. This requirement is ambiguous in two respects. First, purposes with respect to future conduct can be conditional, unlike the purposes that accompany completed conduct, which, however conditional they once were, become unconditional at the point of decision. The conditions attached to purposes regarding future conduct can be either internal (subjectively entertained by the defendant) or external (factors that, given defendant’s dispositions, would cause him to alter his purposes once he becomes aware of them). If some but not all conditional purposes satisfy the purpose requirement of inchoate criminality, which do and which do not? Orthodox doctrine conceals this difficulty.

Second, the requirement that defendant have as his purpose the commission of future criminal conduct is ambiguous with respect to the requisite mental states for the various elements of the future crime. Thus, if a completed crime (or attempt) requires only negligence regarding an element, or treats the element as a matter of strict liability, what mental state does the requirement of “purpose” for inchoate crimes entail for such an element?

These two ambiguities in the requirement of purpose for inchoate crimes are obviously linked whenever the defendant’s purpose is internally conditional on the nonexistence of a particular element. Thus, if killing a cop is an aggravated murder, and the status of the victim as a cop is a matter of strict liability, then if defendant has as his purpose the killing of X only if X is not a cop—and, at the moment of the law’s intervention, defendant believes X is not a cop and thus (at that moment) intends to kill him—does defendant have the requisite

⁵ See, e.g., MODEL PENAL CODE § 221.1(1) (1985).

⁶ See, e.g., CALIFORNIA PENAL CODE § 220 (West 1997).

purpose for inchoate criminality?⁷

Our plan is first to explore separately these two ambiguities in the purpose requirement for inchoate crimes and then to explore the linkage, if any, between them. Section II will thus address the problem of conditional purposes; Section III will address the problem of the relation between the mens rea required for completed crimes and attempts and the mens rea required for inchoate crimes; and Section IV will address the linkage between these two issues.

The mens rea discussion in Sections II-IV will disclose some deep theoretical difficulties in the justifications for having inchoate crimes. In Section V we shall turn normative. Should we jettison inchoate crimes from the repertoire of the criminal law? Or should we retain inchoate crimes and reconsider the standard justifications for criminal punishment?

II. CONDITIONAL PURPOSES

A. INTERNALLY AND EXTERNALLY CONDITIONAL PURPOSES

Conditional purposes in a strict sense are purposes that the actor—who for our purposes will be referred to as the defendant—subjectively holds to be conditional on the occurrence or nonoccurrence of some event, including acquiring certain beliefs. We shall refer to conditional purposes in this strict sense as internally conditional purposes, because the conditions are part of defendant's own understanding of his mental state.⁸ Externally conditional purposes are purposes that will in fact be renounced by defendant if some event occurs but which at present are viewed by defendant as unconditional.

Some common examples of internally conditional purposes of interest to the criminal law include a purpose to kill unless defendant is allowed to escape,⁹ a purpose to rape unless the victim is a virgin,¹⁰

⁷ We do not address the problems of negligence and strict liability regarding circumstances in completed crimes. Whether negligence is culpable and thus merits retributive punishment, or whether negligence and strict liability are justifiable bases for criminal punishment for reasons of deterrence even if they do not reflect culpability, are beyond the scope of this paper, at least insofar as completed crimes are concerned.

⁸ Michael Moore distinguishes two kinds of internally conditional purposes: (1) those of the form, "D intends [A, unless C]," and (2) those of the form, "D intends [if not C, D intends A]." Conversation with the authors (Fall 1994). The second is an intention with respect to a future intention and the condition that will trigger it. We believe nothing of consequence for the criminal law rides on this distinction, and so we shall ignore it.

⁹ See, e.g., *Commonwealth v. Richards*, 293 N.E.2d 854 (1973) (conviction of assault with intent to kill upheld where defendant only intended to kill if necessary for his escape). *Accord* Wis. STAT. § 943.30 (West 1955); *McKinnon v. United States*, 644 A.2d 438 (D.C. App. 1994); *Commonwealth v. Hogg*, 311 N.E.2d 63 (Mass. 1974); *Thompson v. State*, 36 S.W. 265 (Tex. Crim. App. 1896); *State v. Dooley*, 26 S.W. 558 (Mo. 1894); *State v. Morgan*, 25 N.C. 186 (1842). *But see* *State v. Irwin*, 285 S.E.2d 345 (N.C. 1982); *State v. Kinnemore*,

and a purpose to steal unless there is no money in the house.¹¹ In all of these cases the defendant has as his purpose the commission of a crime unless some condition obtains or fails to obtain. Moreover, in none of these cases does the condition negate the criminality of the purpose. In other words, killing is still a crime even if necessary to effect an unlawful escape, having forcible sex is still a crime even if the victim is not a virgin, and stealing is still a crime even if the thing stolen is money.

All purposes to engage in future criminal conduct are *externally* conditional if there are some circumstances that will cause defendant to desist from his plan to engage in that conduct. The counterpart externally conditional purposes to those in the above examples would be the following: defendant's subjectively unqualified purpose to kill, where defendant will not in fact kill if he is allowed to escape; defendant's subjectively unqualified purpose to rape, where defendant will not in fact rape if he discovers the victim is a virgin; and defendant's subjectively unqualified purpose to steal, where defendant will not in fact steal anything if there is no money. The criminal law assumes that externally conditional purposes are sufficient for inchoate criminality because in most states and under the Model Penal Code, inchoate crimes are renounceable, and renunciation could not occur were the original purpose not conditional on the event that triggers the renunciation.¹² Moreover, the criminal law is clear that internally conditional purposes can be sufficient for inchoate criminality;¹³ and, given that, it would be very strange if externally conditional purposes were not.

The conditionality of defendant's purpose is of interest only in

295 N.E.2d 680 (Ohio. Ct. App. 1972); Craddock v. State, 37 So. 2d 778 (Miss. 1948); Stroud v. State, 95 So. 738 (Miss. 1923).

See also *People v. Connors*, 97 N.E. 643 (Ill. 1912) (conviction of assault with intent to kill upheld where defendant's condition for not killing victim was that the victim remove his overalls); *People v. Hamil*, 314 N.E.2d 251 (Ill. App. Ct. 1974) (conviction for attempted rape upheld where defendant told victim he would rape her unless she was a virgin); *People v. Vandelinder*, 481 N.W.2d 787 (Mich. Ct. App. 1992) (solicitation of murder conviction upheld where defendant's solicitation conditioned plot on victim's failure to agree to unlawful demands); *State v. Simonson*, 214 N.W.2d 679 (Minn. 1974) (larceny conviction upheld where defendant's purpose was to permanently deprive the owner of the property unless he received a reward).

¹⁰ See *Hamil*, 314 N.E.2d at 251.

¹¹ See MODEL PENAL CODE § 2.02(b) commentary at 247 (1985); see also *Harwick v. State*, 49 Ark. 514 (1887) (burglary conviction sustained where defendant's purpose was to steal the statutory minimum amount for burglary if that amount was present in the safe).

¹² See, e.g., MODEL PENAL CODE §§ 5.01(4), 5.02(3), 5.03(6) (1985). See generally Paul R. Hoerber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377, 382, 421 n.180 (1986).

¹³ See, e.g., MODEL PENAL CODE § 2.02(6) (1985).

cases of inchoate crimes. In completed crimes¹⁴ the conditionality of defendant's original purposes is immaterial because those purposes have become unconditional by the time of the crime. Inchoate crimes, however, contemplate future completed crimes, crimes that have not yet occurred. In an inchoate crime, the defendant's purpose is to bring about a future crime, and that purpose can be internally and externally conditional in all sorts of ways.

B. THE SIGNIFICANCE OF PURPOSES BEING INTERNALLY CONDITIONAL

What significance, if any, should attach to the fact that defendant's purpose to engage in future criminal conduct is consciously conditional? In the following subsections we explore the variety of answers to this question that have been or might be proposed, beginning with the Model Penal Code.

1. *The Model Penal Code and the Immateriality of Conditions*

The Model Penal Code, in § 2.02(6), states:

When a particular purpose is an element of an offense, such element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.¹⁵

In other words, the Model Penal Code treats conditions attached to criminal purpose as immaterial unless they negate the criminality of the purpose.

The Model Penal Code's answer to our question might seem radical. Consider John and Jack, who agree after buying a ticket in the lottery that if they should win the jackpot, they will murder their wives and spend their millions on high living. The Model Penal Code would label this agreement a conspiracy to murder, despite the fact that John and Jack's chance of winning is infinitesimal.

Or consider Jake, who points a loaded gun at Vickie and threatens her with death unless she gives him her purse. Armed robbery, surely. The Model Penal Code, however, would also appear to deem this an assault with intent to kill or even an attempted murder, despite the fact that Jake both hopes and expects Vickie will hand over the purse. After all, under § 2.02(6), Jake's conditional purpose is to be treated as if it were an unqualified purpose to kill Vickie.

The Model Penal Code's answer is also inconsistent with much of

¹⁴ Completed crimes for our purposes include completed attempts, those in which defendant has taken the last act he believes necessary to complete the crime and in which he believes he has lost the power to prevent the crime from occurring.

¹⁵ MODEL PENAL CODE § 2.02(6) (1985).

the case law. For example, in several cases involving threats to kill made to effect escape or some other goal, courts have reversed convictions of assault with intent to kill.¹⁶ Although the courts' reasoning in these cases is less than transparent, and other courts have reached opposite conclusions, intuitively it seems a stretch to treat these cases as assaults with intent to kill or as attempted murder.

Why did the authors of the Model Penal Code take such an absolutist position on conditional purpose? The Comments to the Code do not disclose the underlying reasoning, but perhaps the authors saw no way to draw lines within the class of internally conditional purposes other than excluding those conditions that negative the criminality of the purposes. In any event, given the extremity of the Model Penal Code's absolutist approach and the absence of reasons offered to support it, we should examine alternatives before embracing it as the only plausible approach to conditional purposes.

2. *Remote Chances, Hopes, and the Absence of True Purpose*

One possible reaction to our example of John and Jack agreeing to kill their wives if they should win the lottery is that the extremely low probability of the condition's being realized casts doubt on the existence of the purpose to kill. In other words, if a purpose is conditional on an event or fact that defendant realizes is highly improbable, we can reasonably doubt that his conditional purpose is really a purpose at all, as opposed perhaps to an idle fantasy.¹⁷ What we really intend to do in circumstances that are quite unlikely to occur may be opaque to us, even if we think we know. After all, our awareness of the improbability of the event disengages us from serious consideration of what we would do were it to occur. Two billionaires who agree that they will turn to a life of robbing banks if they should ever find themselves destitute cannot really know that they intend to do so and thus cannot really at present intend to do so.

The improbability of triggering conditions thus can serve as an epistemic ground for skepticism about the existence of a conditional purpose. This use of improbability is not inconsistent with the Model Penal Code's absolutist position since it does not require any particular probability for criminal liability but rather uses the probability of a

¹⁶ See, e.g., *Craddock v. State*, 37 So. 2d 778 (Miss. 1948); *Stroud v. State*, 95 So. 723 (Miss. 1923); *State v. Irwin*, 285 S.E.2d 345 (N.C. 1982); *State v. Kinnemore*, 295 N.E.2d 680 (Ohio Ct. App. 1972).

¹⁷ Consider the following statement: "Furthermore, isn't the series—fantasying, wishing, desiring, wanting, intending—a continuum, making it a rather hazy matter to know just when a person is intending rather than wishing?" Gerald Dworkin & David Blumenfeld, *Punishment for Intentions*, 75 MIND 396, 401 (1966).

condition only as it bears on the seriousness or reality of the criminal purpose.

Nor *could* the improbability of a condition conclusively negate a criminal purpose. For suppose, in addition to John and Jack's agreeing that they will kill their wives if they hit the jackpot, we find that they have bought guns and ammunition and tickets to Rio for themselves and their girlfriends for the day after the jackpot winner is announced. We might then conclude that they do have a serious conditional purpose to kill their wives despite the improbability of the condition's being realized.

The epistemic role that a condition can serve in distinguishing real purposes from mere fantasies is a function, not only of the probability of the condition's obtaining, but also of the nature and strength of the defendant's desires with respect to its obtaining. Thus, in the case of our armed robber, Jake, who threatens Vickie with death unless she hands over her purse, we might doubt that he does have the conditional purpose of killing her if his desire that she hand over her purse so dominates his desire to kill that we believe he is bluffing.

Again, however, there will be some cases like Jake's in which we can infer a conditional purpose to kill in addition to those cases in which we infer only a bluff. And in the former cases we are back where we started. If we believe the Model Penal Code's absolutist approach to conditional purposes, even as qualified by allowing probabilities and hopes to bear on proof of purpose, is still too extreme, then we must look at other options.

3. *Intending the Improbable*

Another possible reaction to our example of John and Jack agreeing to kill their wives if they should win the lottery is that improbability negates purpose in a stronger sense than the epistemic sense we examined in the previous subsection. In other words, one might argue not just that improbability suggests a fantasy rather than a purpose, but that as a conceptual matter, one cannot intend the improbable.

First, let us be clear that the notion of improbability at work both in this argument and in our examples is an epistemic one. That is, we are assessing the probability of an event from some finite person's point of view, not from the God's-eye view, where the "probabilities" of all events are either one or zero. And the person whose point of view we are interested in is the defendant, for it is his estimate of the probability of the triggering condition that bears on whether he can

be said to intend the consequent.

Now, is it true that John and Jack cannot as a conceptual matter have killing their wives as their purpose if they believe their chance of winning the jackpot is infinitesimal? We think it is not true. Or, put positively, we think that the concept of purpose extends to purposes conditional on improbable events.

Consider the Cowardly Jackal, who, like the Jackal in Forsyth's page-turner,¹⁸ agrees with the O.A.S. that he will attempt to assassinate De Gaulle. He will get some money for the attempt and a good deal more if he succeeds, so he very much wants to succeed. Unlike Forsyth's Jackal, however, Cowardly Jackal ranks not getting caught far ahead of getting the bonus for succeeding. He therefore decides to shoot at De Gaulle from the Eiffel Tower, where his chances of getting caught are quite low, but where so too are his chances of killing De Gaulle. Let us assume the latter are one-in-a-million, or at least that is what Cowardly Jackal takes them to be.

Now suppose Cowardly Jackal takes his one-in-a-million-shot at De Gaulle and actually hits and kills him. He escapes, goes gleefully to O.A.S. headquarters to pick up his bonus, and after doing so is turned in by an informant. He is charged with purposeful homicide. Can he legitimately claim that he lacked the purpose to kill because he thought his odds of success were quite low? Of course not.

Now suppose Cowardly Jackal misses De Gaulle. If he would have been guilty of purposeful homicide had he succeeded, then it seems correct to say that he is guilty of attempted homicide. His "purpose" is identical to his purpose in the example in which he succeeds in killing De Gaulle.

Of course, in these two examples, we are dealing with a remote possibility that Cowardly Jackal will achieve the object of his act, not with a remote possibility that he *will* act. So let us alter the examples somewhat and replace Cowardly Jackal with Superstitious Jackal. Superstitious Jackal is a better shot than Cowardly Jackal—his odds of killing DeGaulle from the Eiffel Tower are, he estimates, one in half a million, not the one in a million odds facing Cowardly Jackal—but he believes that he will not escape detection if the Fates are against him, which they are half the time. He can tell when the Fates are against him if he fails to call a coin flip correctly. So before he proceeds to climb the Eiffel Tower and shoot, he intends to flip a coin and to continue only if he calls it correctly.

Now before he flips the coin, Superstitious Jackal believes that there is a one-in-a-million chance he will kill De Gaulle—a chance of

¹⁸ JOHN FORSYTH, *THE DAY OF THE JACKAL* (1971).

0.000002 that his bullet will kill if he fires, multiplied by a chance of 0.5 that he will fire. His hope is that he will kill De Gaulle, for then he gets a sizable reward. Is it incorrect to say that he intends to kill De Gaulle at this point in time?

Surely not. Or at least, surely not if we wish to allow for the possibility of any conditional purposes. After all, in the garden variety and apparently unproblematic case of conditional purpose—the defendant agrees to rob the bank tomorrow if he does not come into riches tonight and if the bank is not impregnable—we have probabilities upon probabilities.

So let us alter the case slightly so that it becomes the case of Bold-Superstitious Jackal. Bold-Superstitious Jackal's plan is to detonate by remote control an atomic device in Paris, one that will almost surely kill De Gaulle. However, Bold-Superstitious Jackal will only proceed with this plan if he receives a signal from the Fates, namely, if a certain string of six numbers are drawn in the French lottery, the odds of which are one in a million. Again, he wants to kill De Gaulle to get the reward; and again, he realizes the odds he will succeed are one in a million. Is his purpose to kill De Gaulle?

It is difficult to see how the answer in this case could differ from the answer in the preceding one. The overall odds as estimated by the defendant are the same. The defendant's hopes are the same. We conclude that the improbability of the condition does not render a conditional purpose conceptually impossible.¹⁹

4. *Hope and Regret*

Our example of Jake pointing a gun at Vickie and demanding her purse suggests another tack for limiting inchoate criminal liability based on the conditionality of the criminal purpose. Recall that Jake not only expects that his condition for not killing Vickie will be met, but also *hopes* that it will be met. That is, he would rather take Vickie's purse than take her life. Perhaps we should say, as some courts have

¹⁹ We also believe that any attempt to stipulate a threshold level of probability—as estimated by the defendant—below which the defendant will be deemed to lack purpose would be misguided. For example, compare Jim, who enters Vanessa's house intending to kill her if she is there, which he hopes is the case, but which he believes is 0.49 probable, with Jason, who enters Vern's house intending to kill Vanessa if she is there with Vern, which he hopes is *not* the case, but which he believes is 0.51 probable. If we set the stipulated probability at 0.5, then Jason has entered with the intent to kill, but Jim has not. Yet distinguishing them this way seems quite counter-intuitive.

For a recent expression of the contrary position, namely, that a threshold probability of 0.5 should be a requirement for finding purpose, see Neal Kumar Katyal, *The Probable Failure of Conditional Purpose*, 32 CRIM. L. BULL. 25 (1996).

said,²⁰ that Jake does not have the purpose to kill Vickie because of his hope that she will comply with his condition for not killing her.

Notice that this argument does not turn on any doubt about what Jake intends if Vickie does *not* comply. We are assuming that he does seriously intend to kill her in that event. However, he would rather get her purse without killing her. The argument is that his conditional purpose to kill should not be deemed the purpose to kill necessary for inchoate criminality if what Jake *hopes*—as opposed to what he expects or stands ready to bring about—is that the condition for killing will not be triggered.

It should be easy to see that, despite what appears to be at least modest case support, this argument is unsatisfactory. To begin with, in many, perhaps even most, instances of completed crimes or attempts, the criminal may have hoped that he could have achieved his ends legally or through a lesser crime, and he may truly regret that such options were not available. Yet, we deem his crimes to have been committed purposely despite those hopes and regrets. Why then should the inchoate crimes with conditional purposes be treated differently?

Second, if Jake expects Vickie to resist, though he hopes she does not, this approach would dictate that he be acquitted of assault with intent to kill, but that John and Jack, who hope but do not expect to win the lottery, be convicted of conspiracy to murder. This difference in results, if not completely counter-intuitive, is at least sufficiently in tension with intuition to suggest that hopes cannot play the central role this argument would have them play.²¹

5. *Dangerousness*

Perhaps what we should be seeking within the class of defendants with conditional purposes are those defendants whose conditional purposes mark them as “dangerous.” For example, if John and Jack are unlikely to win the lottery and thus unlikely to kill their wives, but Jake is likely to be resisted by Vickie, whom he will then have to kill, then criminal liability should attach to Jake’s but not to John and Jack’s conditional purpose.

Notice that the argument based on dangerousness is different

²⁰ See *supra* note 16 and accompanying text.

²¹ Moreover, it will probably also be the case that hope is much too strong a criterion for distinguishing among conditional purposes. Most Johns and Jacks probably also hope that if they do win the lottery, their wives will die without their having to kill them. Put differently, it’s a rare defendant whose ends necessarily require the commission of criminal acts.

from the argument—which we have already rejected²²—that as a conceptual matter, one cannot intend the improbable. Here, the argument is that although one can have such a purpose, it may render one sufficiently harmless to preclude criminal punishment.²³

The most straightforward application of this argument would look at the probability of the triggering or defeating condition's obtaining and gauge dangerousness on that basis alone. However, there are two possible ways of assigning a probability to the condition, and each runs into difficulties.

First, assume that the relevant probability is the subjective probability that defendant himself assigns to the condition's obtaining. Thus, suppose defendant intends to rape the mystery woman, X, who has just walked into the bar, but if and only if X is Margaret Thatcher. And suppose defendant believes—at the point when he is arrested for an inchoate crime²⁴—that the chance that X is Margaret Thatcher is one-in-three. We would then decide whether a one-in-three chance of the triggering condition's obtaining renders defendant sufficiently dangerous to justify inchoate criminal liability.

There are several problems with the subjective probability approach to dangerousness. Least important is the problem of choosing the threshold probability that makes a conditional purpose "dangerous." Any such threshold will be arbitrary; but if that were all that were problematic, perhaps such a threshold would be serviceable.

A more serious problem is the fact that the defendant's estimate of the probability has really nothing to do with how dangerous he is in fact. The probability that he estimates to be low may in fact turn out to be a probability of one; the probability that he estimates to be high may in fact turn out to be a probability of zero. If he truly possesses a firm intention to act if the condition obtains and to refrain from acting if it does not, then whether he is dangerous is more a function of how the world is and less a function of his current beliefs about the world.

Finally, a threshold test geared to defendant's estimate of the probability of the condition's obtaining produces anomalous results. If Cowardly Jackal kills DeGaulle from the Eiffel Tower, he has purposely killed DeGaulle even if before he shot he estimated his chances at one-in-a-million. If he fires and misses, this should count as a com-

²² See *supra* Part II.B.3 (discussing "Intending the Improbable").

²³ Cf. MODEL PENAL CODE § 5.05(2) (1985) (allowing mitigation where the defendant's attempt is inherently impossible).

²⁴ Perhaps defendant has agreed with an undercover cop that he will rape X, so that the charge is conspiracy to rape. Or perhaps he has taken some substantial steps toward raping X, such as obtaining a rope to bind her, so that the charge is attempted rape.

pleted attempt since all that distinguishes this case from the previous one is the result. In this case, however, Cowardly Jackal is no more dangerous than Bold-Superstitious Jackal, who planned to proceed with a foolproof method of killing DeGaulle if a one-in-a-million string of numbers is drawn in the lottery. Yet, presumably Bold-Superstitious Jackal does not estimate the probability of the condition's obtaining to be high enough for us to deem him to be criminally liable on this approach.

The subjective approach to assessing dangerous conditional purposes appears unpromising. Therefore, it is worthwhile to discuss whether there is an objective alternative available.

The difficulty with an objective approach lies in assessing the "objective" probability that the condition will obtain. Probability is best thought of as an epistemic notion. From a God's-eye point of view, the probability of any event in all its particularity is either one or zero. In our rape example, if X is not Margaret Thatcher, then the God's-eye probability of her being so is zero. For limited human observers, however, probabilities are relative to some vantage point, some stock of information (and lack of other information). If X looks like Dolly Parton, then it may appear quite improbable to those in the bar with defendant that X is in fact Margaret Thatcher. But if X is Margaret Thatcher and has been dressed up by her maid to look like Dolly Parton, then to the maid it will appear almost certain that X is Margaret Thatcher.

If we want to say that conditional purposes may suffice for inchoate criminality if the conditions are not too improbable, whatever too improbable means, then from what vantage point do we assess the probability of the condition? Is it enough that X is not Margaret Thatcher? What if she is, but it is unlikely (from what perspective?) that she would be? What if she is, but it is unlikely that defendant will believe she is, or, conversely, she is not, but it is unlikely that defendant will believe she is not? What courses of action prior to defendant's consummating a completed attempted rape are we predicting defendant, X, and others will take?

Perhaps all these permutations can be dealt with in one fell swoop by assuming that the only material probability is the probability that, *without intervention*, the crime will be completed. Thus, given what we know about defendant, X, and others, how likely is it that defendant will commit a completed crime? If we can specify the point at which the probability is high enough, we will then be able to distinguish inchoate crimes from noncriminal acts in cases of internally conditional purposes. The vantage point for assessing probabilities on this account would be that of the authorities (the police? a court? a

jury?).

This approach takes us from a theoretical frying pan and places us within a theoretical conflagration. Our focus has shifted from defendant's state of mind—his conditional purpose—to defendant's dangerousness, a matter regarding which his state of mind is only one of many relevant factors. Why should we cull out from among all who are dangerous only those with certain intentions? Put differently, if D_1 is overall more dangerous than D_2 , but D_2 has a conditional criminal purpose and D_1 currently has no criminal purpose, why should the criminal law restrict its reach to D_2 ? For example, if based on our assessments of his character and our knowledge of the world, we can predict that D_1 , who has no present purpose to rape X, will in fact do so (if we do not intervene), why should we distinguish D_1 from the equally but no more dangerous D_2 , who has an internally conditional purpose to rape X?

More importantly, if dangerousness is our quarry, why should we acquit D_1 because he *presently* lacks a criminal purpose, but convict D_3 , who we predict will *not* rape X but who has a present internally unconditional but externally conditional purpose to rape X? From the standpoint of dangerousness, neither the distinction between internally conditional and internally-unconditional-but-externally-conditional purposes, nor the distinction between defendants with present criminal purposes and those without present criminal purposes, is material.

Finally, not only does objective dangerousness bear only a contingent relation to the presence and internal conditionality of criminal purpose at the time of intervention, but it is also a function of whether and how we choose to intervene. Suppose we predict a defendant will have sex with Lolita, who is underage, unless he discovers and/or comes to believe that she is underage. If he has sex with her, and the jurisdiction makes her being underage a matter of strict liability, defendant will have committed statutory rape.

Imagine now that defendant has not yet had sex with Lolita, but he has gone far enough in that direction in terms of *actus reus* for inchoate criminal liability. Suppose, for example, he is in the bedroom with her, and they are both undressed. Now imagine in addition three possible states of mind defendant might possess. First, assume that he has not yet formed the intent to have sexual intercourse with her, but that when he perceives her naked beauty in the next moment, he will, and the intent will be internally unconditional. Second, assume that he currently has the purpose to have intercourse with her, but only if she is over the age of consent. Third, assume that he has an internally unconditional purpose to have intercourse, but

the purpose is externally conditional on her being over the age of consent. That is, if defendant comes to believe she is underage, he will cease having the purpose to have sexual intercourse with her.

Now suppose we could shout into the bedroom and inform defendant of Lolita's age. And suppose defendant would believe us. If defendant had the first state of mind, he still might not desist. Yet because he does not yet have the purpose to engage in intercourse, he, though dangerous, has committed no crime.

If defendant had the second or third state of mind, however, his dangerousness in terms of the likelihood that he would commit a crime would be a function of our act of intervening. And if by intervening we make the crime unlikely to occur, then in what sense was the defendant "dangerous" in any way that distinguishes him from the rest of humanity and which points to his unique suitability for criminal punishment? Moreover, if dangerousness is our concern, on what possible basis can we distinguish the internally conditional purpose from the purpose that is internally unconditional but externally conditional?

Dangerousness, then, is a function of many things, and possession of a criminal purpose and whether that purpose is internally conditional are neither necessary nor sufficient for dangerousness. Moreover, objective dangerousness is a function of whether, when, and how we choose to intervene. In a very real sense, *no defendant charged with an inchoate crime is ever dangerous, for his arrest has made the intended crime unlikely or impossible*. Thus, dangerousness will not help us distinguish among internally conditional purposes.

6. Culpability

The last possibility for distinguishing among internally conditional purposes might be in terms of the relative degree of culpability they evidence. Perhaps, for example, purposes to commit crimes that are internally conditional on events or circumstances that are highly improbable reflect less culpability than purposes conditional on highly probable events or circumstances.²⁵

The problem is that culpability does not seem to turn either on the probability of the condition or on whether the purpose is internally conditional. Normally, we assess defendant's culpability in the context of his having attempted to produce a prohibited state of affairs. The defendant has knowingly taken what he has estimated to be

²⁵ The relevant probabilities here will have to be defendants' subjective estimates. Objective probabilities are either one or zero; and others' subjective estimates do not bear logically on the culpability of criminal defendants.

a particular risk that, without further action on his part, the prohibited state of affairs will occur. In other words, he has subjectively created and relinquished control over a certain level of risk. Additionally, he has acted with a particular attitude regarding whether the risk's eventuating would be desirable or undesirable. These factors—and others having to do with why he was willing to unleash such a threat—go into our assessment of his culpability.

In the context of inchoate crimes, however—at least those contemplating *his* future acts—the defendant has not unleashed the risk. He still believes that he retains full control over whether the risk will be created. All we have in terms of culpability is his present attitude toward the prohibited harm, as reflected both in his *mens rea* and in the preliminary acts that he has taken. He is culpable, not for what he has done, but for his attitudes about what he may do.

If this is so, then it seems artificial to distinguish between internally conditional purposes and externally conditional ones. The defendant who does not believe he will desist were a certain condition to obtain—but who in fact will—seems no more culpable than one whose subjective intent is explicitly conditional. Also he seems less culpable than the latter in cases where we have good reason to believe the latter will ignore the condition when it occurs and persist in his criminal undertaking. The conditions that will affect our purposes are never fully transparent to us until they obtain.

Nor does the defendant's subjective estimate of an internal condition's probability affect his culpability in any way that correlates straightforwardly with the magnitude of that probability. We may, with justification, deem John and Jack more culpable than Jake, even though the former estimate a lower probability of killing their wives than the probability the latter estimates of killing Vickie.

7. *The Immateriality of the Distinction Between Internally and Externally Conditional Purposes: Is The Model Penal Code Correct?*

The Model Penal Code does not distinguish between defendants whose purposes are externally conditional and those whose purposes are internally conditional.²⁶ Nor does it distinguish among defendants within the class of those with internally conditional purposes.²⁷ Our examination of alternative approaches has failed to uncover one whose applications match our intuitions. It has instead confirmed the Model Penal Code's implicit assumption that nothing relevant to

²⁶ See MODEL PENAL CODE § 2.02(6) (1985).

²⁷ See *supra* Part II.B.1 (discussing "The Model Penal Code and the Immateriality of Conditions").

criminal liability tracks either the distinction between internally and externally conditional purposes or the distinction among internally conditional purposes based on probability estimates, hopes, dangerousness, or culpability.

We should say a bit more about the first distinction—between internally and externally conditional purposes—and why we believe the Model Penal Code is correct not to distinguish the two. Externally conditional purposes are simply those purposes that are subjectively unconditional—the defendant is not adverting to any circumstances or events that will bring about his renunciation of the purpose—but that will in fact be renounced if various circumstances obtain or events occur. Once we accept that as a conceptual matter, one can have a purpose conditional on something that one believes is improbable,²⁸ then the equation of internally and externally conditional purposes is easy. Nothing that conceivably bears on criminal liability tracks the distinction between internally and externally conditional purposes. Neither culpable character traits nor dangerousness tracks the distinction. And eliminating internally conditional purposes as grounds for criminal liability would make convictions for inchoate crimes virtually impossible: all the defendant would need to do would be to create a reasonable doubt that his purpose was internally unconditional.

Therefore, the Model Penal Code seems correct to treat (internally) conditional purposes as “purposes.” Yet, we looked at alternatives to the Model Penal Code because the Model Penal Code criminalizes acts that intuitively seem unsuitable for criminal liability, and it classifies many criminal acts as more serious than they appear to be. If the problem, however, is neither the Model Penal Code’s equation of conditional and unconditional purposes nor its failure to distinguish within the class of conditional purposes, perhaps the problem is more fundamental than a problem of not distinguishing among purposes. Perhaps the problem is instead with the very idea of inchoate criminality.

C. RECONSIDERING INCHOATE CRIMINALITY THROUGH THE PRISM OF PURPOSE

Thus far we have focused primarily on distinctions among conditional purposes and between (internally) conditional and unconditional (externally conditional) purposes. There is, however, another distinction worth examining, one that surfaced in our discussion of dangerousness, and that is the distinction between those who have a current purpose to commit a crime and those who do not. Inchoate

²⁸ See *supra* Part II.B.3 (discussing “Intending the Improbable”).

criminality turns on that distinction, yet that distinction cannot bear such weight.

Whatever purposes suffice for inchoate criminality, the law assumes that such purposes are renounceable.²⁹ Therefore, if a defendant currently has a purpose to commit a future crime, then whether or not that purpose is internally conditional, the law assumes that its being conditional does not affect criminal liability, for the law assumes that something may arise before the crime is consummated that will lead defendant to renounce the purpose and desist.

Let us then compare two defendants. One has as his purpose the murder of his wife and has taken sufficient steps toward that end to be guilty of an inchoate crime.³⁰ Yet an ideal observer, with knowledge of defendant's character and all other relevant facts, can correctly predict that if defendant is not arrested now, but is allowed to proceed, he will encounter his parish priest, with the result that he will have a change of heart and renounce his criminal purpose.

The other defendant currently has no criminal purpose. However, our hypothetical ideal observer can predict that in the near future, after having watched a lurid movie, defendant will form the intention to kill his wife, take substantial steps in that direction, and, unless stopped, do so.

The first defendant, if arrested now, is guilty of an inchoate crime, even though he will not commit a completed crime if left alone. He has the *mens rea* of purpose and has committed the *actus reus* of either conspiracy or attempt. The second defendant is not guilty of an inchoate crime even though he will commit a completed one if left alone. Even if he otherwise satisfies the *actus reus* requirement—say, he has bought the gun with which he will eventually kill his wife, although at the time the purchase was for an innocent reason—he has not acted with the required *mens rea* of purpose.

What is the justification for holding the first defendant criminally liable but not the second? The second is more dangerous. And it is difficult to maintain that the first is more culpable, at least if the connection between *mens rea* and culpability is that culpability is the degree to which certain blameworthy defects of character are revealed by a particular act, and *mens rea* is evidence of culpability.

The truth is that so long as the criminal law's requirement of purpose for inchoate criminality is satisfied by a purpose that is renounce-

²⁹ See, e.g., MODEL PENAL CODE §§ 5.01(4) (renunciation of attempt), 5.02(3) (renunciation of solicitation), 5.03(6) (renunciation of conspiracy) (1985). See also Hoerber, *supra* note 12, at 382, 421 n.180.

³⁰ Assume he has agreed with another to kill his wife (conspiracy), or has taken substantial steps toward killing her himself (attempt).

able, then it is difficult to understand how purpose can be a necessary condition for criminality. If Daniel, undressed and about to enter Lolita's bedroom, does not presently have a criminal purpose—say, to have sex with underage Lolita—but we can predict with great confidence that he will have such a purpose when he sees her undressed, then why is he now innocent of any crime when David, whose current purpose is to have sex with Lolita, but who will renounce that purpose when he learns her age, is guilty of attempted statutory rape?³¹

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,³² then the role of purpose looks to be merely evidentiary. For purpose, whether internally conditional or not, is 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 defendants freely choose whether they will act dangerously and wickedly. Until the defendant 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 over which he has free choice.

There is surely an uneasy tension between treating him legally as if he possesses free choice and is the author of his destiny, criminal or otherwise, and treating him legally as if his future choices are predictable. Free choice is a bedrock assumption of liberal theories of criminal law. Predictable choice seems to be the bedrock assumption of inchoate criminality.³³ For if it is not, all that is left as a candidate is a wicked state of mind, something that can be quite remote from the socially harmful act to which it is directed and which makes it wicked.

³¹ It is true, of course, that Daniel will come within the net of inchoate criminal liability at a later point in time barring unforeseen events that prevent his going into Lolita's bedroom or that affect his sexual desires. Nonetheless, in terms of dangerousness and wickedness of character, Daniel may presently surpass David. Moreover, there may be reasons why we can intervene now, before Daniel forms the criminal purpose and commits the *actus reus* of an inchoate crime, and not later, between the time he commits the inchoate crime and the time he consummates it.

³² See *infra* Part V (where we examine whether inchoate criminality is premised on culpable acts).

³³ See *infra* note 72 (where we note the relation between inchoate criminality and preventive detention based on dangerousness).

D. A NOTE ON SOLICITATION, COMPLICITY, AND INCHOATENESS

We should say a brief word about when solicitation and complicity raise the problem of conditional purpose we have associated with inchoate crimes and when they do not. In both crimes, the principal who will carry out the target crime is someone other than the defendant. Therefore, when and why is *defendant's* conditional purpose a problem?

The answer is that defendant's conditional purpose is a problem as long as he is capable of withdrawing his encouragement or aid and effectively leaving the principal in a condition comparable to one in which he had never been solicited, encouraged, or aided by defendant. Until that point, solicitation and complicity remain inchoate for our purposes here.

There is one further complication. In many cases, defendant will not have complete control over whether he can withdraw his support from the criminal enterprise. Therefore, he is not in an exactly parallel position to the defendant who is planning to commit a crime himself but who can always prevent the crime by changing his mind. Encouragement of another always creates a risk that one will fail in an attempt to withdraw one's support, or that one will be rendered incapable of withdrawing support. There is no analogue to this problem when dealing with incomplete attempts or bare conspiracies.³⁴

E. CONDITIONAL PURPOSES AND INCHOATE CRIMINALITY: SOME INITIAL CONCLUSIONS

What have we shown in our examination of conditional purposes? First, we have shown that in some cases where conditional purposes are present and the Model Penal Code would dictate criminal liability, imposing such liability seems quite problematic. Second, we have shown that in determining criminal liability, conditional purposes cannot be distinguished on the basis of such facts as probability, hope, dangerousness, or wickedness. Third, we have shown that the Model Penal Code is correct, not only in not distinguishing among conditional purposes on those bases, but also in not distinguishing between conditional purposes and unconditional (externally conditional) purposes. Finally, we have shown that if inchoate criminality rests, not on the commission of culpable acts, but on dangerousness or wickedness, then purpose of any kind should neither be necessary nor sufficient for criminal liability.

We have raised problems with inchoate criminality through its

³⁴ *But see* Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 29 n.93 (1994).

purpose requirement and the ability of conditional purposes to satisfy that requirement. It is time to turn our attention to another set of problems with inchoate criminality, those raised by strict liability and negligence elements of completed crimes.

III. INCHOATE CRIMES AND MENS REA AS TO CIRCUMSTANCES

There is an ongoing controversy in the criminal law over the *mens rea* required for inchoate crimes. Although almost all criminal codes require that the defendant act with the purpose that some future crime be committed, the scope of this purpose requirement is what is controversial. The controversy can best be illustrated through examples.

A. THE ELEMENT IN QUESTION IS A CIRCUMSTANCE AND IS A MATTER OF STRICT LIABILITY FOR THE COMPLETED CRIME

1. *The Problem*

Assume that the crime in question is assaulting a federal officer, and the federal law makes the status of the victim (as a federal officer) a matter of strict liability. In other words, if one carries out an assault on someone who is in fact a federal officer, he is guilty of the federal crime even if he did not know or have reason to know (was nonnegligent in not knowing) that the victim was a federal officer. Or, to return to the statutory rape examples of the previous Section, assume that sexual intercourse with a girl under 18 years of age is a crime even if defendant nonnegligently believes the girl is over 18. Finally, assume that driving a vehicle with an expired registration is a crime irrespective of the driver's purpose, beliefs, or reasonableness.

These examples of strict liability elements and strict liability crimes are, of course, problematic even when we are dealing with completed crimes. Many believe strict liability elements and crimes unjustifiably sacrifice nonculpable or less culpable defendants at the altar of social welfare. But however much strict liability in criminal law may be normatively problematic, there is nothing conceptually problematic about it.

Once we turn from completed crimes, including completed attempts, to inchoate crimes, things get murkier. To demonstrate this, let us take four types of inchoate criminality and apply them to the three crimes—assault on a federal officer, statutory rape, and driving with an expired registration—that serve as our examples.

2. *Examples*

a. Conspiracy

(1) D_1 and D_2 agree that they will assault V , who they do not know or have reason to know is a federal officer.

(2) D_1 and D_2 agree that they will have sexual intercourse with V , who they do not know or have reason to know is under 18.

(3) D_1 and D_2 agree that D_1 will drive his car to the store. Neither knows or has reason to know that D_1 's car registration has expired.

b. Incomplete Attempt

(1) D_1 buys a blackjack and lies in wait with the purpose of assaulting V , who D_1 does not know or have reason to know is a federal officer.

(2) D_1 entices Lolita, who he does not know or have reason to know is under 18, into a motel room with the purpose of having sexual intercourse.

(3) D_1 takes out his car keys and opens his car door with the purpose of driving his car. He neither knows nor has reason to know his car's registration has expired.

c. Solicitation

(1) D_1 encourages D_2 to assault V , who D_1 does not know or have reason to know is a federal officer.

(2) D_1 encourages D_2 to have sexual intercourse with Lolita, who D_1 does not know or have reason to know is under 18.

(3) D_1 encourages D_2 to drive D_2 's car to the store. D_1 neither knows nor has reason to know that D_2 's car registration has expired.

d. Complicity

(1) D_1 gives D_2 a set of brass knuckles with the purpose of having D_2 assault V , who D_1 does not know or have reason to know is a federal officer.

(2) D_1 gives D_2 keys to a motel room with the purpose of having D_2 seduce Lolita, who D_1 does not know or have reason to know is under 18.

(3) D_1 gives D_2 's car a jump start with the purpose of having D_2 drive to the store. D_1 neither knows nor has reason to know D_2 's car registration has expired.

3. *Analysis of the Examples*

All of the examples raise the same issue: Should elements that

are matters of strict liability for completed crimes also be matters of strict liability for inchoate crimes (or for accomplice liability for a completed crime), so that the mere existence of the element is sufficient for conviction of the inchoate crime? (For purposes of analyzing this issue, one must assume that strict liability elements *can* be justified for *completed* crimes.)

a. The Model Penal Code's Approach

The approach of the Model Penal Code to attempt liability is to require defendant to have as his purpose the commission of conduct that will in fact be the *actus reus* of a crime—or, if the crime is a result crime, to have as his purpose the bringing about of the forbidden result (or to believe the forbidden result will occur as a consequence of the conduct)—but then to let the *mens rea* for all other elements be identical to the *mens rea* required for the completed crime.³⁵ D₁ would satisfy the requirements for liability in all of the examples since his purpose in all of them is either to commit the *actus reus*—assaulting V, having sex with Lolita, or driving the car—or to have D₂ commit the *actus reus*. However, the Code, while it does not reject the ap-

³⁵ With respect to attempts, the Model Penal Code requires that defendant act "with the kind of culpability otherwise required for commission of the crime." MODEL PENAL CODE § 5.01 (1985). The Comment on this section makes it clear that the *mens rea* for circumstances—every element other than the conduct that is the *actus reus*—is governed by the target crime's *mens rea* requirements. MODEL PENAL CODE § 5.01 Commentary at 301-03 (1985).

Notice that following the Model Penal Code's approach to its logical extreme results in absurd results for strict liability cases. For example, suppose selling mislabelled drugs is a strict liability offense. *It follows from the logic of the Model Penal Code that one who sells properly labelled drugs has committed attempted sale of mislabelled drugs.* It was his purpose to engage in the conduct (selling the drugs) that would have been an offense if the strict liability element (mislabelling) had been present, and he had the mental state required by that element (none). Moreover, if he took a substantial step towards selling the properly labelled drug with the purpose of selling it, he would be guilty of an incomplete attempt. See Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 480-81 n.109 (1990).

Because this implication of § 5.01 is outrageous and obviously unintended, one should read an objective core into what is otherwise a completely subjective account of attempts. If a strict liability element (mislabelling)—or a negligence element (unjustifiable risk)—is *not* present, then one can attempt to commit the crimes that include these elements only if one has as his purpose—hopes—that they are present, believes them to be present, or believes there is a substantial and unjustifiable risk that they are present (i.e., an inculpatory mistake at the level of recklessness or above).

There is a similar argument that recklessness under the Model Code, which is otherwise a subjective matter, requires that the substantial and unjustifiable risk actually exist, so that one who believes himself to be driving at an unsafe speed cannot be reckless if his actual speed is a safe speed. Instead, he would be guilty of "attempted recklessness." See MODEL PENAL CODE § 2.02(2)(c) (1985). *But see* Alexander, *supra* note 34, at 17-20 (criticizing the notion of objective risk).

proach it adopts for attempts for other forms of inchoate criminality, does not endorse that approach. Instead, it leaves the matter unresolved.³⁶

b. Case Law

The case law on this issue is sparse and conflicting. In the federal courts, the leading case is *United States v. Feola*,³⁷ in which the Supreme Court upheld a federal conspiracy conviction despite the defendant's lack of knowledge regarding a jurisdictional issue (the victim's status as a federal officer). The Court emphasized the dangerousness and blameworthiness of the conspiracy, though their connection to the jurisdictional issue was left opaque.

In *Feola* the Court distinguished *United States v. Crimmins*,³⁸ a Second Circuit case in which Judge Learned Hand overturned a conviction for conspiracy to transport stolen securities in interstate commerce. The defendant did not know the source of the securities and thus was unaware of their connection to interstate commerce, the touchstone of federal jurisdiction. Although such absence of knowledge would have been immaterial had the offense been completed, Judge Hand regarded it as quite material to the conspiracy charge, arguing by analogy that one cannot be guilty of conspiracy to run a traffic light that one does not know exists. Oddly, only one year before, in *United States v. Mack*,³⁹ Judge Hand had upheld a conviction for conspiracy to violate a law requiring notification of the United States government of a prostitute's status as an alien even though the defendant was unaware that the prostitute in question was an alien.

The state conspiracy cases, though rare, seem to align with *Crimmins* rather than *Feola*. In a New York case, *People v. Powell*,⁴⁰ a conviction for conspiracy to violate a *malum prohibition* criminal law of which defendant was ignorant was struck down. The court argued that defendant's ignorance meant that he lacked the requisite "corrupt motive" for the conspiracy conviction. And courts in both Pennsylvania and Massachusetts followed the reasoning in *Powell* in similar cases.⁴¹

Outside the conspiracy area, the case law on the relation between

³⁶ With respect to conspiracy, solicitation, and complicity, MODEL PENAL CODE §§ 2.06, 5.02, and 5.03 self-consciously leave the issue in question to the courts to resolve. See MODEL PENAL CODE § 2.06 commentary at 311 n.37 (1985); § 5.02 commentary at 371 n.23; § 5.03 commentary at 408-14.

³⁷ 420 U.S. 671 (1975).

³⁸ 123 F.2d 271 (2d Cir. 1941).

³⁹ 112 F.2d 290 (2d Cir. 1940).

⁴⁰ 63 N.Y. 88 (1875).

⁴¹ See *Commonwealth v. Benesch*, 194 N.E. 905 (Mass. 1905); *Commonwealth v. Gormley*, 77 Pa. Super. 298 (1921).

inchoate crimes and strict liability offenses or elements is almost completely nonexistent. One English case, *Gardner v. Akenroyd*,⁴² rejected attempt liability in the context of a strict liability crime. Another English case, *Johnson v. Youden*,⁴³ took the same approach to a charge of complicity in a strict liability offense.

c. Scholarly Commentary

The few scholars who have addressed the issue of the requisite mens rea for inchoate criminal liability with respect to the target crime's strict liability elements have disagreed with one another. Robinson and Grall endorse importing the level of mens rea with respect to circumstances required for the target offense into the inchoate offense.⁴⁴ Under that approach, D₁ would have committed inchoate crimes in all of our examples. Model Penal Code drafters Wechsler, Jones, and Korn endorse the Code's delegation of the matter to the courts (except with respect to attempts).⁴⁵ Smith also endorses the Model Penal Code's approach to the issue in the context of attempts.⁴⁶

On the other hand, there are commentators who are leery of automatically transporting strict liability elements in target offenses into the counterpart inchoate crimes. LaFave and Scott oppose such a move, although they do so primarily because they oppose strict liability.⁴⁷ Enker, however, opposes the move—at least in the context of attempts—on a different basis.⁴⁸ Enker agrees that when a crime is completed, strict liability (or negligence liability) for various elements may serve a deterrent function. On the other hand, when the crime is inchoate, neither strict liability nor negligence liability is necessary for either general or specific deterrence. Enker gives an example of a man about to drive a car that, unbeknownst to him, has defective brakes. Enker asks what would be accomplished by prosecuting the driver rather than warning him. Indeed, Enker would even make the strict liability element of knowledge inapplicable (at that level of

⁴² 1952 II. Q.B. 743.

⁴³ 1950 I. K.B. 544.

⁴⁴ Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 740-43 (1983).

⁴⁵ Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy: Part Two*, 61 COLUM. L. REV. 957, 971-77 (1961).

⁴⁶ J.C. Smith, *Two Problems in Criminal Attempts Reexamined*, 1962 CRIM. L. REV. 135, 143; J.C. Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 435 (1957).

⁴⁷ WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 431 (1972).

⁴⁸ Arnold W. Enker, *Mens Rea and Criminal Attempt*, 1977 AM. B. FOUND. RES. J. 845, 874-79 (1977).

“mens rea”) to inchoate crimes. In essence, Enker proposes making recklessness the minimum level of culpability for all elements of inchoate crimes.⁴⁹

Finally, Fletcher argues that D_1 's false beliefs in our examples should be exculpatory—even though they would not be so were the crimes completed—if those false beliefs are causally relevant to D_1 's conduct.⁵⁰ In other words, if D_1 would not assault V if he knew V was a federal officer, have sex with Lolita if he knew her age, or drive the car if he knew its registration had expired, then D_1 should not be deemed guilty of the inchoate offense.

d. Summary of the Analysis

It is clear that neither the case law nor the scholarly literature unequivocally resolves the issue of D_1 's liability in our examples. However, we believe that both Enker and Fletcher provide useful insights. Moreover, the criticisms of their asymmetrical positions (as between target and inchoate offenses) gain much of their force by focusing on attempts, *which are not necessarily inchoate crimes*.

We shall return to the basic insight underlying the Enker and Fletcher positions after we have examined negligence in inchoate crimes.⁵¹ We can preview their relevance, however, as well as how Sections II and III of this article are related, by noting that the sting of Enker's objection to symmetry—why arrest rather than warn?—and Fletcher's—why arrest if, upon discovering the facts, defendant would not be motivated to commit the crime?—points to the significance of conditional purposes. If D_1 's purpose is internally (subjectively) conditional on the noncriminality of his conduct—that is, if his purpose is to assault V only if V is not a federal officer, to have sex with Lolita only if she is over eighteen, and to drive the car only if its registration is current—and he intends the conduct that is the *actus reus* of the completed crimes only because his factual minor premises are mistaken, then, if he is made aware of his factual mistakes, he will desist from carrying out the completed crime.

Now critics may object to this defense of asymmetry between inchoate and completed crimes regarding mens rea and argue that, as we have described D_1 's internally conditional purposes, D_1 would not be guilty of the inchoate crimes because he lacks the purpose to commit them. Recall that Model Penal Code § 2.02(6) states that a condi-

⁴⁹ See Simons, *supra* note 35, at 514-15 n.205 (criticizing Enker for the asymmetry between attempted and completed crimes that Enker endorses).

⁵⁰ George P. Fletcher, *Constructing a Theory of Impossible Attempts*, 5 CRIM. JUST. ETHICS 53 (1986).

⁵¹ See *infra* note 58 and accompanying text.

tional purpose does not count as the statutorily required "purpose" if the condition negatives the criminality of the conduct, which in each of our examples it does. Therefore, the objection might go, we have given examples, not of unjustifiable inchoate crimes, but of conduct that current law would regard as noncriminal.

We doubt that the objection is sound, because we doubt that it represents the standard interpretation of when conditions negate the criminality of purpose. D_1 's purpose can be characterized on both an abstract and a concrete level. On the abstract level, the purpose is "to do C [the actus reus], unless X [a criminalizing condition] obtains." On the concrete level, given D_1 's belief that X does not obtain, his purpose is merely "to do C." Therefore, D_1 has both an abstract internally conditional purpose and a concrete internally unconditional purpose. And we see no evidence in the case law or in the Model Penal Code that the courts are or should be interested in D_1 's abstract purpose rather than his concrete purpose.

In any event, whether we are right or wrong in our reply to this objection—and we would be delighted were the objection well taken and the state of the law more in accord with what we recommend—there is no reason to treat the defendant with an abstract internally conditional purpose differently from the defendant whose criminal purpose is internally unconditional but externally conditional. In other words, there is no reason why D_1 should fare better if he actually thinks to himself, "I would not assault V were he a federal officer, which he is not," or "I would not have sex with Lolita if she were under eighteen, which she is not," than if he does not subjectively entertain the possibility of his contemplated conduct's criminality but would desist were he made aware of that fact. And there is absolutely no indication that the cases and commentators who endorse the *Feola* symmetry approach to the *mens rea* of inchoate crimes would be at all hesitant to convict the latter defendant. (None of the cases or commentators even hint at the relevance of a counterfactual inquiry regarding external conditions, except, of course, for proponents of asymmetry like Enker and Fletcher).

B. THE ELEMENT IN QUESTION IS A CIRCUMSTANCE AND REQUIRES A MENS REA OF NEGLIGENCE FOR THE COMPLETED CRIME

Let us take the three crimes in the previous section—assaulting a federal officer, statutory rape, and driving a car with an expired registration—and assume now that the crimes require that defendant be negligent with respect to whether the victim is a federal officer, the girl is under eighteen, and the registration has expired. (Again, we

shall assume that negligence liability is unproblematic for the completed crime).⁵² For defendant to be negligent with respect to these elements, he must fail to be aware of a substantial and unjustifiable risk that the element exists when he should be aware of it.⁵³

Apparently, no court or commentator has realized in the discussion of mens rea requirements for inchoate crimes that negligence cannot be straightforwardly transported from completed to inchoate crimes. That is because with respect to inchoate crimes, we must ask not what risks of the material elements obtaining the defendant was taking at the time of the completed crime, but what unjustifiable risks he is presently thinking of taking at the contemplated future time of his target crime, and whether those present risks of future risks are unreasonable. And there is no body of law or commentary that is helpful in addressing *that* inquiry.

Consider that I have a present purpose to drive from my house to my office in fifteen minutes. I might subjectively entertain the thought that I will carry out this plan only if traffic and weather conditions permit, but, alternatively, I might not think about these potentially purpose-defeating conditions at all. Suppose the latter, and suppose further that the road conditions at the time I plan to leave for the office are such that I would have to drive criminally negligently to get to my office in fifteen minutes. If I commit the *actus reus* of an inchoate form of negligent driving, for example by taking a substantial step toward getting in my car or by agreeing with another that I will drive to the office in fifteen minutes, have I committed "attempted negligent driving" or "conspiracy to drive negligently"? Or, put differently, can I be negligent now for planning to do something that will be negligent when done? Can I be so even if there is no reason to believe I will not alter my conduct if and when I see that carrying out my plan will be unjustifiably risky?

The problem of symmetry between completed and inchoate crimes with respect to elements that require negligence is even more serious than the previous paragraph suggests. *In theory*, if D₁ takes an unreasonable risk that V is a federal officer, Lolita is under eighteen, and the car is unregistered, and commits what otherwise would be the completed crime, then if V turns out not to be a federal officer, Lolita turns out to be eighteen, and the car turns out to be registered, D₁ is

⁵² But see Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84, 98-101 (1990). Recklessness, because it rests on a culpable choice, is completely unproblematic as a basis for criminal liability. See Alexander, *supra* note 34, at 3-7.

⁵³ See MODEL PENAL CODE § 2.02(2)(d) (1985).

guilty of the *completed attempt* of the target crimes.⁵⁴ This is true despite the fact that the objective risk that V would be a federal officer, Lolita would be underage, or the car would be unregistered was zero.⁵⁵ Now suppose we move D₁ back in time to the point at which he commits the putative inchoate crime, intending at that point to engage in the future conduct that would constitute the completed attempt. Given that the objective risk of the elements obtaining is zero, but also that at the time of the completed attempt D₁ could act “negligently” with respect to those elements, how do we characterize his earlier conduct? Whatever problems exist with respect to criminalizing inadvertence to risk at the time of the completed crime pale in comparison to criminalizing the purpose to engage in future conduct that may be risky when it is performed. Although we might be able to construct a notion of what constitutes a reasonable advertence to risk of future inadvertence to risks, the whole idea of anticipatory negligence—i.e., failing to advert to a risk that one will in the future fail to advert to a risk (that may objectively be zero)—is deeply problematic.

C. A NOTE ON SOLICITATION AND CONSPIRACY

The conceptual and normative problems regarding strict liability and negligence liability in inchoate crimes are exacerbated when the crime the defendant is trying to bring about is to be committed by another. When D₁ solicits, encourages, or aids D₂ in assaulting V, seducing Lolita, or driving the unregistered car, and the statuses of V, Lolita, and the car are matters of strict liability or negligence, what does the law prescribe for D₁?

Three possible scenarios exist. First, D₂ has committed (or has completed an attempt to commit) the target crimes. Second, D₂ has not yet acted, but he is beyond the influence of D₁. Third, D₂ has not

⁵⁴ Even the subjectively oriented Model Penal Code does not criminalize these examples as completed attempts. See MODEL PENAL CODE § 5.01(1)(a) (1985). Nonetheless, the general logic of attempts would dictate that characterization. See, e.g., Simons, *supra* note 35. For if we switch the examples and focus on a case where the central conduct, and not just a circumstance, is negligent, the case becomes cloudier under the Model Penal Code. For example, if driving 90 miles per hour is “criminally negligent driving,” and, because I have not repaired my speedometer, I purposely take an unreasonable risk that I am driving 90, then even if I am in fact not driving 90, I have arguably committed “attempted negligent driving.” And the logic of that example extends to the examples in the text. See also Simons, *supra* note 35, at 479-83. Finally, there is no difficulty in saying that one can run a negligent risk of X even though the objective risk of X is zero (because X does not in fact exist). The only difficulty is specifying the perspective from which the negligent risk—greater than zero and less than one—is calculated, given that the defendant in a true negligence case is not advertent to the risk. But this is a problem with negligence generally. See Alexander, *supra* note 52, at 98-101.

⁵⁵ Objective risks are either one, if the fact in question obtains, or zero, if it does not.

acted, and D₁ still has the ability to withdraw his encouragement and aid.

In the third scenario, D₁'s relation to the target crimes is on a par with his involvement in cases where he has conspired or made a substantial step attempt. Therefore, the analysis of this scenario should track the analysis of the prior two sections.

What about the first and second scenarios? The Model Penal Code leaves their resolution to the courts.⁵⁶ Case law is almost nonexistent.⁵⁷ What is clear is that there are strong reasons in favor of asymmetry between the target crime and its solicitation/complicity.

The strongest case for symmetry occurs when there is close temporal and spatial proximity between the point of D₁'s involvement and the point of D₂'s commission of the crime. Close proximity will increase the chance that the situation will appear to the solicitor/accomplice much as it appears to the principal. Put differently, the situation will appear to D₁ much as it would appear to him were he, not D₂, the principal. For example, it is easier to grasp the idea that D₁ is negligent in not advertent to the risk that the principal will unreasonably not advert to or be appropriately persuaded by the risk of some element if there is temporal and spatial propinquity between the two times of inadvertence.

Even if D₁ is very close to standing in D₂'s shoes temporally and spatially, there may be other respects in which his being a separate person should defeat a claim that D₁ shares in D₂'s negligence. Most importantly, D₁ may lack D₂'s knowledge base. For example, if D₁ encourages D₂ to drive D₂'s unregistered car, only D₂ and not D₁ would likely be considered negligent with respect to the car's being unregistered, especially if D₁ had no knowledge of or responsibility for the car's registration status. (This ignorance would not, of course, exculpate D₁ if the registration were a matter of strict liability.)

There will be other scenarios where D₁ is removed in time and space from the target crime. If D₁ urges D₂ to seduce Lolita, can D₁ be "negligent" for failing to advert both to the risk that Lolita is underage and the risk that D₂ will not advert to that risk (or will consciously ignore it)?

IV. THE LINKAGE BETWEEN CONDITIONAL CRIMINAL PURPOSE AND MENS REA AS TO CIRCUMSTANCES

The problems we have discussed in Sections II and III—the problem of conditional purpose and the problem of mens rea as to circum-

⁵⁶ See *supra* note 36 and accompanying text.

⁵⁷ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05(3) (1987).

stances—while capable of being separately analyzed and resolved, are linked. The latter problem arises because the core criminal purpose that serves as the touchstone of inchoate criminal liability can be conditional, both internally and externally, in ways that make completion of the crime uncertain. A person may intend to drive a car only on the internal—i.e., subjectively held—condition that its registration is current. Or he may intend to do so without that internal condition, but with an external condition to the effect that he will not in fact do so if he were to become aware that the registration is not current. If prior to the time at which he intends to drive he mistakenly believes the car's registration is current, the discussion in Section III asks whether he has committed an inchoate version of the crime of driving an unregistered car if the currency of the registration is a matter of strict liability (or negligence).

Significantly, the question of Section III only arises because the purpose in an inchoate crime is always conditional internally and externally in ways that make uncertain whether the *actus reus* of the completed crime will occur. The driver arrested at T_1 for the inchoate crime of, say, attempting to drive an unregistered car, or conspiracy to drive an unregistered car, at T_2 may have noticed the expired registration and chosen not to drive. The driver arrested at T_1 for attempting or conspiring to drive negligently because he (unconditionally) intended to drive to a specific destination in fifteen minutes, at T_2 may have noticed the terrible road conditions and chosen to change his estimated time of arrival. If purposes regarding future conduct were unconditional, we could merely ask whether the conduct presently intended will likely be negligent or violate a strict liability norm at the time it is supposed to occur. Because we would have interdicted defendant's course of conduct prior to the consummation of his purpose, we would have to speculate about what its factual circumstances would have been had it not been interdicted. But we would not have to speculate about how defendant's purpose would have been affected by the passage of time and his acquisition of information. His purpose would remain fixed.

Thus, when our defendant intends to drive from point A to point B, no matter what, we need only predict the road conditions, the traffic, and other factors to determine whether in so intending he is attempting negligent driving. Because the defendant's purpose is fixed, at this inchoate stage we need not worry about whether the defendant would have had a change of heart. Our analysis does, however, require predictions about how the world would be at the time the defendant planned to drive.

Once we drop the assumption of an unconditional criminal pur-

pose in favor of the realistic view that even internally unconditional purposes are almost always externally conditional in a variety of ways, then interdiction at the inchoate stage of criminality makes it quite uncertain not only whether a completed crime would have occurred without our interdiction, but also what the nature of that crime would have been. Indeed, our travelling defendant, in the face of poor road conditions, might have: (1) decided to take more time (and would have been guilty of no crime at all); (2) decided that getting to point B was more important than the lives he was risking (and then would have been reckless); or (3) remained unreasonably unaware that driving from A to B in fifteen minutes presented an unjustified risk (and then would have been negligent).⁵⁸

Strict liability and negligence depend much more on how the world is and less on what defendant believes and desires than do the higher levels of *mens rea*. The liability of our driver with a fixed and unconditional purpose depends entirely on how the world happens to be at the time he drives. Adding the internal and external conditions that accompany all purposes make the line between inchoate crimes and completed crimes that have negligent or strict liability elements anything but a straight one.

V. PROPOSED REFORMS

A. THE GENERAL CASE FOR INCHOATE CRIMES

Despite the conditionality of his criminal purpose, the defendant who commits a true inchoate crime, such as an incomplete attempt or conspiracy, usually has shown himself to have a less than totally admirable character and to pose some threat to the rights of others protected by the criminal law. Ordinarily, however, neither a wicked character nor the danger it represents suffices for criminal liability. What distinguishes the inchoate criminal from others who are wicked and dangerous is that the former has formed a criminal intention and taken some steps toward accomplishing his intended result.

B. THE ELIMINATION OF INCOMPLETE ATTEMPTS

We contend that those steps that, under the Model Penal Code, suffice for the *actus reus* of (incomplete) attempt—those that are a

⁵⁸ Note that the presence or absence of a conditional purpose, be it internal or external, will never actually be a factor for the eventually negligent actor because it is his lack of awareness and failure to trigger the condition that makes him negligent. This is not to accept the inchoate form of negligent driving, however, because prior to his driving we cannot tell whether the driver will become aware of circumstances that will trigger an internal or external condition and cause him to alter his plans.

substantial step toward completion of the crime and strongly corroborate the criminal purpose—cannot be said to be inherently dangerous. That is, although those steps remove obstacles to completion of the crime and in that sense make the crime more likely, they are not acts that singly or jointly increase the risks to others *in the absence of criminal intentions* and in that sense are not dangerous in themselves.

If the *actus reus* of an incomplete attempt is not itself dangerous, then defendant's committing the *actus reus* cannot be considered a culpable act. The reason is that for an *act* to be culpable, the act must appear to defendant to increase risks to others in a way that is not dependent on defendant's further choices. In other words, defendant cannot view his own future choices as matters subject to his prediction. Indeed, so long as defendant views himself as having control over any future choices to create risks that will then be beyond his control, it is doubtful that even he, much less the law, can clearly distinguish *in terms of risks already present* between what he intends on the one hand and his mere wishes or fantasies on the other. Thus, even though an incomplete attempt requires an act as well as purpose, the act required is not a culpable act because, from defendant's point of view, the act does not increase others' risks. It does not increase others' risks because, from defendant's point of view, those risks cannot materialize without a further choice or choices by defendant, a matter over which he believes himself to have total control.⁵⁹

Perhaps, however, we should focus not on the acts that manifest the criminal purpose but on *the act of intending* the future crime. Are intentions themselves *acts*—and thus potentially *culpable acts*—or are intentions merely the states of mind that accompany other acts?

⁵⁹ See Alexander, *supra* note 34, at 29 n.93. Preparatory acts do increase the risk to the intended victims in this sense: defendant cannot, or believes he cannot, carry out his intended crimes without performing them. They also increase the risk that others will commit the crime, at least in some cases. In that sense, there is a distinction between the inchoate crimes of incomplete attempts on the one hand and conspiracy, solicitation, and complicity on the other. See *infra* Part V.C. Also, some preparatory acts increase the risk that defendant himself will bring about the harm (even if not technically committing the crime) through accident, insanity, or some other form of nonresponsible conduct. For example, pointing a gun at someone for the purpose of killing him may count as a culpable act of reckless endangerment because of the chance of accidental discharge.

It is important also not to mistake our claim about culpable acts to be a claim that those who commit culpable acts are more wicked—i.e., have a more debased character—than those who commit only the preparatory acts required for inchoate criminality. Many who do not commit culpable acts at all are more wicked than many who do, just as many who never form a criminal purpose are more wicked than many who do. We are neither attempting to conform the criminal law to the contours of the class of those with wicked characters, nor are we attempting to banish the influence of luck on criminal liability. See John Greco, *A Second Paradox Concerning Responsibility and Luck*, 26 METAPHILOSOPHY 81 (1995); Alexander, *supra* note 34, at 24-25.

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?

To us, the most coherent justification both for inchoate criminal liability and for having a criminal purpose—whether internally or externally conditional—as a requirement for such liability is not (as we have said) wickedness or dangerousness, but rather rests on the assumption that *forming an intention to engage in future criminal conduct is itself a culpable act*, and sufficiently culpable to justify invoking the machinery of the criminal law. This assumption in turn rests on two further assumptions.

First, the assumption 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.⁶⁰

Second, the assumption 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.⁶¹ To illustrate, suppose a person has a certain belief/

⁶⁰ See MICHAEL E. BRATMAN, INTENTIONS, PLANS, AND PRACTICAL REASON 80 (1987); JOSEPH RAZ, PRACTICAL REASONS AND NORMS 65-71 (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 (1996).

⁶¹ See BRATMAN, *supra* note 60, 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

desire set. Ordinarily, this person will form an intention to act based on his evaluation of his beliefs and desires and a decision regarding what is the best course of action to take in light of them.⁶² Based on this decision, the actor forms an intention, a plan to engage in that course of action.

Thus, John hates his wife. He desires that she die. He believes that if he kills her, he will not be caught. He weighs these beliefs and desires against other beliefs, such as the belief that murdering is wrong or that he used to love his wife, and the desires these beliefs summon, and *decides* today to kill her on Saturday. Through this process John comes to intend today to kill his wife on Saturday. According to Bratman, John's theory of heuristics will determine whether it is rational for John to reconsider his intention.⁶³ It may not be rational or necessary for John to reconsider his intention come Saturday: He will simply act on it.

Hence, while intending, by itself, is not an act but rather a mental state,⁶⁴ the mental act of deciding what to intend is potentially a culpable act. Moreover, the 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.⁶⁵ However, 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.

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, 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.

view of the Toxin Puzzle, see PINK, *supra* note 60, at 137-65.

⁶² See MICHAEL S. MOORE, *ACT AND CRIME* 140 (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").

⁶³ BRATMAN, *supra* note 60, at 64 ("nonreflective (non)reconsideration of a prior intention is the upshot of relevant general habits and propensities").

⁶⁴ Cf. MOORE, *supra* note 62, at 116, 119-20 (arguing that a volition, a kind of intention, is a mental state).

⁶⁵ See, e.g., *id.* at 115 (discussing GILBERT RYLE, *THE CONCEPT OF MIND* 67 (1949)).

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.

A rejoinder to this argument for treating formation of a criminal intention as a culpable act is that when one is planning to commit a crime, it may always be rational to reconsider.⁶⁶ An even better rejoinder may be that many intentions are formed with the proviso that there can always be later 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.⁶⁷ While intentions may serve to guide our futures and to keep us from being Sartrean persons,⁶⁸ they are not irreversible nor may they be carried out without any further effort on our part. The risk may have increased but the actor still remains in control of whether this risk will be unleashed. Forming an intention is not like being in a trance with the actor 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 making incomplete attempts crimes. Gerald Dworkin and David Blumenfeld make this point in *Punishment for Intentions*,⁶⁹—namely, 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 Dworkin and Blumenfeld 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

⁶⁶ Cf. BRATMAN, *supra* note 60, 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 given the stakes are high, as long as the resources used in the process of reconsideration are themselves modest”).

⁶⁷ The defendant who lights the fuse surrenders control of the risk he poses to his victim. If, for some reason, he is incapacitated, the harm will occur. However, if the actor with a culpable intention is incapacitated, he simply will not unleash the risk of harming his victim.

⁶⁸ See MOORE, *supra* note 62, at 141 (“Recognizably human people are non-Sartrean; they regard their decisions, resolutions, choices, etc. as fixing matters that do not again need recalculation”) (footnote omitted); see also BRATMAN, *supra* note 60, at 111.

⁶⁹ Dworkin & Blumenfeld, *supra* note 17, at 401.

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.⁷⁰

This objection, of course, has no purpose 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.⁷¹ It does apply forcefully, however, to incomplete attempts, where it is the actor's attitude toward his own future conduct that is at issue.

Thus, we have shown that all purposes with respect to future acts are conditional, if not internally, then surely externally. We have shown that the Model Penal Code's approach to conditional purpose, which treats all conditions, unless they render the purpose non-criminal, as immaterial, no matter how unlikely they make the crime, is the only approach that is coherent and that avoids drawing morally arbitrary lines. We have shown that although the Model Penal Code's approach to conditional purpose is the most defensible approach, it leads to counter-intuitive results in many cases. We have concluded that the source of the problem is not the Model Penal Code's treatment of conditional purpose, but the Model Penal Code's endorsement of treating a defendant's harmless acts as inchoate versions of later harmful acts that *he* will later *possibly* commit. We have rejected the idea that an act is culpable simply because one has taken an otherwise harmless step toward a crime that one (always conditionally) has the purpose of committing. And we have rejected the more plausible idea that forming a criminal intention is itself a culpable act.

We are left then with the notion that the defendant who commits a substantial step—that is, an incomplete—attempt, although certainly a person with a wicked character and quite likely a person who is dangerous, is not a person who has as yet committed a culpable act and is thus not a fit subject for criminal liability.⁷² We would there-

⁷⁰ *Id.*

⁷¹ See *infra* Part V.C.

⁷² We leave open the possibility, of course, for preemptive action against such a defendant, premised either on self-defense, defense of property, defense of others, or on the established mechanisms for official preventive detention. Put differently, until the defendant completes an attempt, he is not a criminal, but at a certain point he will be subject to various preemptive defensive responses.

For some interesting ruminations on preemptive action against the dangerous, see Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. Rev. 157 (1996); Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. Rev. 113 (1996).

fore change § 5.01 of the Model Penal Code—the attempt section—to eliminate incomplete attempts (§§ 5.01(1)(c) and 5.01(2)) and references thereto.⁷³

C. MAKING RECKLESSNESS THE REQUISITE MENTAL STATE
FOR SOLICITATION

The actus reus of solicitation is conduct that encourages another to commit a crime. The actus reus of conspiracy is an agreement to commit a crime. In both crimes, the actus reus itself, without regard to defendant's mens rea, increases the likelihood that a crime will be attempted.

To illustrate this point, imagine Carrie who wishes to kill Lauren. Rather than go at it alone, she asks Brian if he will help her. At this

⁷³ There is a reference to § 5.01(1)(c) in § 5.01(4), the renunciation subsection. We would also reword that subsection to make clear that renunciation is available only in cases when, although the attempt is complete, the harm is still within the actor's control (the long lit fuse cases).

The attempt section as we would reform it would read as follows:

SECTION 5.01. CRIMINAL ATTEMPT

- (1) *Definition of Attempt.* A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
 - (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
 - (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
 - (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.
- (2) *Conduct Which May Be Held Substantial Step Under Subsection (1)(c).* [Eliminated.]
- (3) *Conduct Designed to Aid Another in Commission of a Crime.* A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person. [*But see infra* notes 79-82 and accompanying text].
- (4) *Renunciation of Criminal Purpose.* When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section *but the achievement of the particular result can still be prevented by the actor*, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim. [*But see Appendix A infra.* If our suggestion there for treating renunciation as the absence of a criminal omission is accepted, the motives behind renunciation become immaterial.]

point, solicitation has occurred. Also, note that Carrie has unleashed a risk of harm on Lauren since Brian may decide that killing Lauren is a great idea even without Carrie's help. Thus, even if Carrie backs out now, the risk of harm to Lauren has increased.

Now assume that Brian agrees. We have a conspiracy. If Carrie changes her mind now, she has still unleashed the risk that Brian will complete the crime without her assistance. Indeed, the rationale for punishing conspiracy, and sometimes punishing both it and its object crime, is the increased risk created by group criminality.

In solicitation and conspiracy, then, we have crimes in which defendant's conduct is dangerous apart from his mental state. That point in turn suggests that we rethink the mens rea requirements for these crimes. Although the Model Penal Code requires a purpose that the crime be committed as the *mens rea* for both solicitation and conspiracy,⁷⁴ this requirement makes no sense where the danger stems from the encouragement of others to commit the crime. Recklessness should suffice as the mens rea for solicitation. Recklessness, with its notion of conscious disregard of *unjustified* (and substantial) risk, takes into consideration all legitimate reasons one might have for conduct that one realizes might be taken by someone else as encouragement to commit a crime when the conduct's purpose is not such an encouragement.⁷⁵

Consider, for example, Iago, who continually gives Othello hints pointing to Desdemona's infidelity. If Iago's purpose is that Othello kill Desdemona, we have a garden variety case of solicitation, except that it is complicated by the question of whether solicitations must be transparent to the solicitee—whether he must realize he is being solicited—or whether they can be opaque, as is Iago's. Suppose, instead, that Iago's purpose is not that Othello kill but only that Othello be tortured by unjustified jealousy and rage. Is there any reason to let Iago off the hook if he is aware that there is a substantial risk that Othello will kill? We think not.

Although an actor is not culpable for forming a criminal intention or for taking an otherwise harmless step toward realizing that in-

⁷⁴ See MODEL PENAL CODE §§ 5.02(1), 5.03(1) (1985).

⁷⁵ Indeed, we would make recklessness rather than purpose the mens rea for complicity generally, which solves a major problem with the Model Penal Code's requirement of purpose. Furthermore, acts that would count as complicity were a crime committed would count as reckless endangerment rather than attempt, at least if substantial step attempts were eliminated. See *id.* § 5.01(3) (1985) (making all acts sufficient to establish complicity into attempts even if the crime aided or encouraged is not committed or attempted by the other person).

On the role of the substantiality of risk component of recklessness, see *infra* Appendix B.

tention, he *is* culpable for encouraging others to commit criminal acts, even if his purpose is innocent, at least if he is reckless regarding the likelihood that they will commit those acts.⁷⁶ We would therefore reform § 5.02(1) to reflect this shift from purpose to recklessness as the premise of criminal liability.⁷⁷

Additionally, recklessness should be required as the lowest mens rea for all elements of inchoate crimes regardless of the mens rea required in the completed crime. Effecting this reform does not require redrafting of the Model Penal Code beyond that required by the prior reforms. Dropping incomplete attempts takes attempts out of the category of inchoate crimes altogether. For completed attempts, the mens rea with respect to each element should be exactly the same as the mens rea required for the completed crime. Thus, if shooting a peace officer is an aggravated version of shooting a person, and if the status of the victim as a peace officer is a matter of strict liability where the attempt is successful, that element should also be a matter of strict liability if the attempt is unsuccessful (i.e., the bullet misses).⁷⁸

⁷⁶ We should note the issue of whether free speech is threatened by reducing the mens rea for criminal solicitation from purpose to recklessness. Currently, garden-variety criminal solicitation is arguably subject to the requirement of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that the soliciting speech be directed to inciting and likely to incite the audience to imminent lawless acts (although the likelihood component seems absent in those many cases that involve solicitation of informants or undercover police). We doubt that the directed-to-inciting component of the *Brandenburg* test makes recklessness with respect to inciting an unconstitutional basis for criminal liability because the justification component of recklessness takes into account any First Amendment values and concerns. If Fred has been told that uttering "the red fish swims at dawn" will trigger a homicidal rampage by a maniac, and the phrase has no significance (as opposed to semantic meaning) for Fred, if Fred then utters the phrase—say, because he just likes its sound—he should be subject to criminal punishment, the First Amendment notwithstanding, even though inciting the homicidal rampage is not Fred's purpose.

On the general issue of criminalizing acts that increase the probability of others' criminal offenses, see Andrew von Hirsch, *Extending the Harm Principle: "Remote" Harms and Fair Imputation*, in HARM AND CULPABILITY 259-76 (A.P. Simester & A.T.H. Smith eds., 1996). On the relevance of this issue to freedom of speech law, see Larry Alexander, *Incitement and Free Speech* (forthcoming) (on file with author).

⁷⁷ Section 5.02 provides as follows:

SECTION 5.02. CRIMINAL SOLICITATION

- (1) *Definition of Solicitation.* A person is guilty of solicitation to commit a crime if with the culpability otherwise required for its commission, with recklessness regarding the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

It should be noted that the conditions explicitly placed on the request to commit the crime are material only as they affect defendant's belief in the likelihood that the crime will occur. Defendant's purpose in making the request is material only as it affects defendant's justification for doing so.

⁷⁸ We actually would prefer making recklessness the basis for attempt liability in all cases in which recklessness would suffice for the completed crime. Thus, we would prefer

Finally, aiding or attempting to aid should be treated as a form of criminal recklessness. The attempt section of the Model Penal Code, § 5.01(3), deems as an attempt conduct designed to aid another in the commission of a crime and that would make one an accomplice were that crime actually committed or attempted.⁷⁹ We see no reason to distinguish the treatment of such conduct from the treatment we have urged for solicitation.⁸⁰ Indeed, we would deem all present aid-

to redraft § 5.01(1)(a) and § 5.01(1)(b) as follows:

SECTION 5.01. CRIMINAL ATTEMPT

- (1) *Definition of Attempt.* A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
- (a) purposely or, where recklessness regarding conduct is sufficient for liability for the completed crime, recklessly engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
 - (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or, with the belief that it will cause, or, where recklessness regarding the result is sufficient for liability for the completed crime, with the belief in the substantial and unjustifiable likelihood that it will cause such result without further conduct on his part; or
 - (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Nonetheless, we have not presented the case for this—namely, that results should never matter for criminal liability—in this article. *But see* Alexander, *supra* note 34; Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183 (1994). We wholeheartedly embrace the very implications of subjectivism that Duff believes should constitute a *reductio* of that position. *See* R.A. Duff, *Subjectivism, Objectivism and Attempts*, in HARM AND CULPABILITY 19-44 (A.P. Simester & A.T.H. Smith eds., 1996). Duff correctly notes that subjectivism should entail distinguishing complete and incomplete attempts, which is, of course, what we are advocating. *See id.* at 30.

For some further thoughts on the relation of recklessness to attempts, see *infra* Appendix B.

⁷⁹ For the text of § 5.01(3), see *supra* note 73.

⁸⁰ In fact, the Model Penal Code recognizes the tight connection between liability for solicitation under § 5.02(1) and liability for attempt under § 5.01(3) in two ways. First, solicitations are one way a defendant becomes an accomplice under § 2.06(3)(a)(i) (“A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it . . .”). Second, the punishment for soliciting a crime and the punishment for attempting it are the same under the Code. MODEL PENAL CODE § 5.05(1) (1985). Because we believe that recklessness (as well as higher forms of culpability) should be punished the same whether or not it eventuates in actual harm, *see e.g.*, Alexander, *supra* note 34, at 7-17, we would categorize as completed crimes all those acts that make one responsible for the conduct of another under Model Penal Code § 2.06. Further, the punishment for these completed crimes would not depend upon whether the crime was ever carried out or attempted by the principal, so long as the actor acted recklessly with respect to the principal criminal’s attempt, at least where recklessness suffices for the completed crime.

Note that making harm completely immaterial to criminal liability also eliminates any argument against making recklessness itself entirely subjective. Currently, it is unclear whether the substantial risk of which the actor must be conscious to be reckless must actually exist (be “objective”). *See supra* note 35. For example, is one reckless when he believes he is driving at 100 miles per hour, an unsafe speed, but he is actually driving 50 (a safe speed)? Or is he only attempting to be reckless? We believe it should make no difference.

ing or attempting to aid another's future crime as encouragement of that crime, a form of solicitation for which recklessness should suffice, as a *mens rea*.⁸¹ If solicitation is thus broadened to include aid and attempts to aid, § 5.01(3) could be entirely eliminated.⁸²

We should also note that the reforms we propose answer the problematic question of what specific crime the actor is deemed to have encouraged if purpose is not the required *mens rea*. The answer is that he is liable for encouraging the specific conduct he is consciously aware of substantially risking. In other words, we ask what conduct did he specifically contemplate, either as his conscious object (purpose) or as certain (knowledge) or highly likely (reckless) to occur.

D. THE ELIMINATION OF CONSPIRACY LIABILITY

Finally, we advocate the elimination of conspiracy liability. As discussed below, the culpable acts for which we want to punish conspirators fall within our expansive definition of solicitation. Moreover, some defendants who are currently deemed conspirators have not committed any culpable acts and thus should not be punished.

In examining conspiracy liability, it is helpful to deal with three separate situations. Let us first deal with the situation where A and B agree that A will commit the crime. For example, A approaches B with the idea of robbing a bank. B says, "Wow, that sounds fantastic. Here, borrow my gun. I'll help you plan which bank to rob."

In examining the relative culpability of the parties, B's encouragement and aid have increased the risk of harm to the bank, and therefore B has committed a culpable act.⁸³ As for A's culpability, we

That is, recklessness and attempted recklessness—if that is what the hypothetical describes—should both be punishable, and to the same extent, whether they result in harm or not. Completely subjectivizing recklessness as we prescribe also eliminates the philosophically troubling notion of regarding risks as objective rather than as merely reflections of epistemic limitations. See Alexander, *supra* note 34, at 17-20. (In other words, because all risks are either one or zero, the distinction between "subjective" and "objective" versions of recklessness collapses).

⁸¹ We leave the more general issue of recklessness and complicity to future scholarly treatment. For articles pointing in the direction we think correct, see Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997); Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25 (1996).

⁸² If our suggestion that recklessness count as an attempt for all crimes in which it suffices as the *mens rea* for the successful crime is adopted, see *supra* note 78 and accompanying text, solicitation and attempt could also be punished the same, as the Model Penal Code currently prescribes.

⁸³ Note that we are employing throughout this article a particular conception of what makes an act a culpable act. A culpable act is one that the actor believes increases the risk of harm to another's protected interests and for which the actor's reasons for acting do not justify his imposing that risk. See Alexander, *supra* note 34, at 3-5. Whether the actor is

may view him as having increased the risk of harm in one of two ways.

First, we may view A's *agreement* to commit the crime as a culpable act. If conspiracy is to be a crime separate from solicitation and cognate crimes that are premised upon encouraging others, it must be because A, in agreeing with others that *he* will commit the crime, has increased the risk of his own criminality. Agreeing would be the culpable act that unjustifiably increases the danger to the victims of the contemplated crimes.

Note that if defendant's agreement to commit a crime himself, and not (solely) his encouragement of others, is the basis of his conspiracy liability, his purpose should be immaterial. A defendant can agree in a way that commits him without having intended to carry out the agreement. Mental reservations do not relieve the defendant of or negate his commitment if they are unexpressed. Conscious awareness that one is objectively "agreeing" suffices as the requisite mental state for declaring one morally and legally bound.⁸⁴

Requisite mental state aside, however, we are inclined to reject the argument that agreements to commit crimes are culpable acts by those who are to commit the crimes. Put differently, we deny that when A agrees with B that A will commit a crime, A, by virtue of his agreement with B, has acted recklessly by increasing the danger to A's intended victim. A's commitment to illegality is both morally and legally⁸⁵ renounceable. Nor has A's balance of reasons been shifted in favor of committing the crime. If A can be presumed to know the law, he can be presumed to know that his "commitment" is illusory.

The second basis for finding that A has committed a culpable act arises when A's conscious object is to involve B in his scheme by convincing B to help him commit the crime. That is, A is purposefully involving another party. Even if there is only a slight chance that B will agree to help him, in seeking B's help A is purposefully risking harm in the same way that one can set a bomb that has only a minute chance of going off. How does A's involvement of B necessarily increase the risk of harm where A, and not B, is going to commit the crime? A may have increased the risk because by giving B the idea, B may commit the crime without A. The question of whether A should be responsible for such an action collapses into the question of

acting with the purpose to cause the harm goes to his reasons for acting and suggests a much greater likelihood that the act is culpable than if the actor's purpose is not itself proscribed.

⁸⁴ See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2-2 (1987).

⁸⁵ See MODEL PENAL CODE § 5.03(6) (1985) (providing that renunciation of criminal purpose is an affirmative defense to conspiracy).

whether he should be liable for solicitation: whether if, by giving B the idea, A unjustifiably and substantially increased the risk of harm, and if so, whether A should be held criminally responsible.

In this situation, we have two actors who are potentially being held responsible for their encouragement of the other to commit the crime. However, the expansive definition that we have adopted for solicitation provides the justification for punishing both of these defendants.⁸⁶ There is no need for a separate crime of conspiracy.

Now let us look at the case where A and B agree that they *both* will commit the crime. If A approaches B with the result that A and B decide to rob a bank together, both have committed culpable acts. B is giving aid and encouragement to A for his plan, and A has given the idea, as well as aid and encouragement, to B. Once again, the risk increase is attributable to acts of A and B that are within our definition of solicitation.

Finally, we should consider what happens when A and B agree that B will commit the crime. Here, let us assume that A approaches B and asks B to kill A's wife, C. B agrees.

Once again, A increases the risk to C by giving B an idea that he might act on even without A. But what has B done? Assume B is a hired hit man who works for the Mafia. A, an old family friend, asks B to kill A's wife even though "domestic disputes" are not part of B's business. B agrees. Later, the mob tells B that they need him, and B tells A to find someone else. When, if ever, has the risk to C been increased as a result of B's actions? The answer is that B's acceptance of the job did not increase the risk to C. Indeed, if anything, until B carries out the plan or renounces it, B's acceptance *decreases* C's risk by making it less likely that A will kill C himself or find someone else to kill C.

Thus, the approached actor—the person who is not the one with the initial idea but is the only one who will carry out the crime—does not increase the risk of harm to anyone. So long as we believe that his mere agreement does not increase the risk of *his* committing the crime, B, by agreeing with A, has not increased the risk of harm. B has not committed a culpable act.

We must note the narrowness of this category, however. The actor must be the only person planning to commit the actus reus of the underlying crime. Moreover, his involvement must be limited to his agreement to act; he cannot be encouraging or facilitating the approacher in any way. Thus, if the hit man had said, "Call my friend Bob, he'll do it for you since I can't," this exception would not apply

⁸⁶ See *supra* note 77.

to him. As soon as the actor is generating ideas that the approacher could later use with someone else, he is increasing the risk that the crime will be committed and falls within the ambit of our reckless solicitation.⁸⁷

Thus, there is an asymmetry in conspiracies. The approached actor never increases the risk, whereas the approaching actor only increases the risk by recklessly inducing—soliciting—his co-conspirator to commit the crime. We therefore would eliminate the crime of conspiracy altogether in favor of a sufficiently capacious notion of solicitation.

E. RECKLESSNESS, ELIMINATION OF INCHOATE CRIMES, AND MENS REA AS TO CIRCUMSTANCES

Our proposals amount to eliminating inchoate crimes and then covering much of their territory with recklessness liability. In substituting recklessness liability for purpose-based inchoate crimes, we not only avoid the conditional purpose conundra of Section II, but we also solve the puzzles regarding mens rea as to circumstances adumbrated in Section III.

For example, suppose killing by strangulation is a higher degree of murder than killing by sword. Iago “solicits” Othello to kill Desdemona by hinting at her infidelity. Whether Iago is guilty of soliciting the higher degree of homicide or the lower will turn on the specific risks of which he is consciously aware. Only if he is reckless regarding every element of a crime—in the case of the higher degree of homicide, the element of killing by strangulation—can he be guilty of soliciting that crime. Recklessness is the universal solvent for circumstantial mens rea.

VI. CONCLUSION

We hope we have demonstrated, first, that the puzzles of conditional purpose stem at bottom from the criminal law’s choice to deem forming a criminal purpose to be a culpable act subject to criminal punishment. Because all purposes regarding future acts are conditional, once the law criminalizes such purposes, it has no way to draw lines and avoid counter-intuitive results. The second point we hope to have demonstrated is that the controversy over the collateral mens rea for inchoate crimes—a controversy that the Model Penal Code does not even attempt to resolve—stems from the same decision to criminalize acting with the purpose to bring about a future crime.

⁸⁷ How substantially must he increase the risk to be deemed criminally reckless? See *infra* Appendix B.

We believe that decision is erroneous. Once we reject the idea that acting with a purpose or forming a purpose to commit a future crime is itself a culpable act—and thus reject the notion of incomplete attempts as culpable acts subject to criminal sanction—and we premise criminal liability for aiding and soliciting others to commit crimes on recklessness regarding others' criminal acts, we can resolve both problems at once. The mens rea issues surrounding inchoate criminal liability at bottom reflect inadequate notions of what is—and what is not—culpable action prior to the commission of completed crimes.

APPENDIX A: RENUNCIATION

Buried in our proposed reforms is the question of renunciation of attempts.⁸⁸ The typical incomplete attempter of homicide who buys the gun may change his mind later, and the criminal law as it now stands would call this renunciation. We, however, would not even place incomplete attempts within the bounds of the criminal law. Without incomplete attempts, is there anything left to the renunciation defense?⁸⁹ Consider the following three cases:

1. Albert ties up Veronica and places dynamite under her. He then lights the ten foot fuse.
2. Betty gives Vera poison which increases the probability of death by ten percent each minute. Betty has the antidote to the poison and can save Vera by giving it to her as late as nine minutes, fifty-nine seconds after Vera drinks the poison.
3. Carla is a world famous surgeon. She shoots Victor, knowing that she can easily remove the bullet, but that if she does not, Victor will die.

Under the current regime, Albert is capable of renouncing. Carla's performing surgery and Betty's administering the antidote would render their crimes attempted murders instead of murders. However, because we endorse the view that Darla, who shoots at Victor and misses, is as culpable and deserving of punishment as Edward, who shoots and kills, how can Carla and Betty be deemed to have successfully renounced? Are Carla and Betty less guilty of an attempt than Darla? And if Carla and Betty cannot renounce, why can Albert?

If we view completed attempts as those in which the actor has unleashed a risk over which he no longer has complete control, all three actors have committed completed attempts. If Albert, Betty, and Carla were to be hit by lightning, all three harms would materialize without any further action by them. Yet we do feel the intuitive pull that Albert, at the very least, should be able to renounce his crime.

Additionally, it is doubtful that there is any real difference among these three cases. Carla may have unleashed a greater risk of harm than Betty, and Betty's risk may be greater than Albert's, but all three

⁸⁸ In our proposed revision of the attempt section of the Model Penal Code, we left the renunciation section essentially intact. See *supra* note 73.

⁸⁹ We should note that renunciation as a defense to completed attempts is more problematic for us than for some theorists because we both endorse the view that materialization of harm is irrelevant, both to the defendant's culpability and his punishability. See Alexander, *supra* note 34; Kessler, *supra* note 78.

actions could eventually result in death, and all three actors have purposefully unleashed this risk of death. However, all three actors may still prevent the death. What should we do with Albert, Betty, and Carla?

Consider these crimes to have two parts: the act and the ability to act again to stop the harm. In analyzing the crimes this way, we could posit omission liability for Albert, Betty, and Carla if they do not stop the harm. If an actor shoots and does not have the ability to remove the bullet, under the current law, we do not require him to try. But in cases such as Albert's, Betty's, and Carla's, where the actors do have the ability to stop the harm, we could punish them more severely if they do not. Does this omission approach really work? Are we willing to say that if Carla opts to let her victim die, she is guilty of a two-fold murder? (If so, of what is Carla guilty if she saves Victor? Presumably, Carla is guilty of attempt, which we would punish the same as murder, but not murder by omission.) Is every murder like Carla's really a two-fold murder—both a killing and a failing to prevent dying? Clearly this does not correspond to our general view of such homicides.⁹⁰

Another approach might be a finding of reckless action when the actor renounces the crime. Thus, Albert, when he lights the fuse, is reckless as to his ability to prevent the harm. Even if Albert stomps out the fuse, he is guilty of reckless endangerment, and his recklessness would increase with each foot of the fuse he allows to burn. The same approach would work with Betty. Perhaps we could even say that Carla was only reckless if she removed the bullet.

This approach is problematic, to be sure. If we retain the distinction between purposeful and reckless crimes, Albert, Betty, and Carla would all receive less punishment than actors who committed the same crimes—lighting the fuse, giving the poison, and shooting and mortally wounding—but were caught before they had the chance to renounce. They would also receive less punishment than those who try to light the fuse but find that the lighter does not work, try to give poison but find that the victim drops the food in which it is contained, and try to hit the victim but shoot and miss. Yet, when Albert, Betty, and Carla acted, they all engaged in purposeful attempts. They were not merely reckless as to the harm they might cause their victims; they wanted those harms to materialize. They were just more or less reckless as to their ability to prevent the harms should they have a change of heart.⁹¹

⁹⁰ This approach also changes our general view about renunciation: rather than offering the renunciation defense as a carrot, we are using the failure to renounce as a stick.

⁹¹ There are cases where the defendant's renunciation shows that he lacked a fixed purpose to commit the crime. In those cases (where purpose does not actually exist), the

Still another approach is to deny them the defense of renunciation altogether. We could take the position that having committed the last act, these actors may not be permitted to renounce. Given our elimination of incomplete attempts, there would no longer be room for renunciation in the criminal law; there would be only regret. If an actor actually kills his victim, his regret does not factor into our determination that he is a murderer. Our three actors—Albert, Betty, and Carla—purposefully unleashed risks. Perhaps the harms will materialize, perhaps they will not; but all three actors have shown themselves to be extremely culpable and worthy of punishment.

But, do we not want them to be able to renounce? These three people still have the ability to stop the harm, and we surely want to encourage them to do so. They may be culpable for having unleashed these risks of harm, but they still have the ability to save three lives. Should we not encourage them to do so by mitigating their punishments when they prevent harm?

Accepting this argument would not be accepting a consequentialist view of punishment. Rather, we could believe that all three are extremely culpable but that our concern for innocent life is more important than punishing them fully. After all, the criminal law does not singlemindedly pursue the goal of matching punishment to culpability, but allows that goal to be compromised by all sorts of other policies. So we could punish completed attempts less severely if the defendants stop the harm from materializing.

A problem with this solution is the one that arises with the recklessness approach: the shooter, Darla, who misses, gets punished to the full extent of the law, but Carla, who shoots and hits but removes the bullet, does not. How can this be justified? Both were equally culpable at the time they fired the bullets, but one gets a lesser punishment (and indeed, of the two, the one who actually hits the victim!).

One way to retain the benefits of renunciation is this: renunciation should play a role only at the sentencing stage. Albert, Betty, and Carla are all attempted murderers and deserve to be punished as such. Indeed, they all deserve to be punished the same as successful murderers. However, subsequent to their culpable actions, they have rendered aid that is relevant to the punishment that they should receive. This is consistent with the practice of reducing the sentence of those who render substantial assistance to the authorities. Just as luck would have it that some criminals have knowledge of other crimes that figures into the reduction of their sentences, some actors will have the

ability to prevent the harm, and doing so will figure into their sentence.

Moreover, because a judge might justifiably take into account the regret of a defendant whose victim did die, taking into account the abandonment of a crime does not lead to inconsistent results; any defendant who shows remorse or regret, whether he fails to produce the harm (misses), succeeds in producing the harm (murders), or stops the materialization of the harm, is eligible for a reduction in sentence. In determining criminal liability, however, as opposed to sentencing, we cannot treat those who renounce as noncriminal, because they did purposefully (or, in other cases, knowingly or recklessly) unleash a risk of harm. Nor can we treat those who happen to be able to stop the harm differently from those who do not.

In the end, the approach we (very tentatively) favor is the first one we described, namely, treating these situations as involving more than one potentially criminal act. Albert, Betty, and Carla commit a crime when they light the fuse, administer the poison, and fire the shot.⁹² If they then find themselves in position to remove or reduce a risk that they created, but do not remove or reduce the risk, they are guilty of a second criminal act by omission.⁹³ Thus, Carla, who shoots and wounds and then fails to prevent Victor's death, is guilty of two crimes, unlike Edward, who shoots and kills instantaneously, but like Felicia, who shoots and misses and then shoots again (whether or not she hits the second time). Felicia is guilty of two attempts because she fires twice. Because her second violation of a negative duty (not to fire) is no different from Carla's violation of an affirmative duty (to save Victor, whom she has placed at risk of dying), they should be treated the same way. Likewise, Albert and Betty are guilty of two crimes if they do not put out the fuse or give the antidote. True, Edward is guilty of only one crime because of the "luck" that his bullet killed instantaneously. But then, such circumstantial luck—that which presents or fails to present people with opportunities to make culpable choices—is ineradicable. Felicia is guilty of two attempts for

⁹² Whether these crimes should be deemed purposeful attempts or only reckless—because even Carla knows there is a chance she will be in position to save Victor if her shot does not kill him instantaneously and she has a change of heart—is an issue we take up more fully in Appendix B, *infra*.

⁹³ Omission liability is premised on having and violating an affirmative duty to act generated by placing the victim at risk. See DRESSLER, *supra* note 57, § 9.07(E)(1). The problem of how many omissions are involved with a continuously burning fuse, continuously acting person, or continuously worsening gunshot wound victim is a thorny issue we leave to others; however, it is no different from the issue of how many crimes are committed in a continuing course of criminal conduct, such as kidnapping or removing money bill by bill from a wallet.

firing twice—as she should be—only because of the “luck” that her first shot missed.

As we said, however, our favoring this solution to the renunciation problem is quite tentative. We invite others, if they are with us in the abolition of incomplete attempts, to try their hand.⁹⁴

⁹⁴ For a different approach to renunciation, one that connects it to whether defendant was really trying to accomplish the illicit result, see Hoerber, *supra* note 12, at 394-96.

APPENDIX B: INCOMPLETE ATTEMPTS AND RECKLESSNESS

By urging elimination of incomplete attempts, have we jumped from a theoretical frying pan into a theoretical fire? Consider the following kind of case. Dan is driving towards Virginia's house, where he intends to shoot and kill her. His loaded gun is on the front seat of the car. While driving, Dan ponders the possibility that before he gets to Virginia's house, there is the remote chance that either Virginia will dart out into the path of his car and be killed, or that his gun will accidentally discharge and kill Virginia. He estimates the probability of Virginia's dying in those ways as one in a million. Although Dan's plan is to kill Virginia in a different way, he would be just as pleased if she were to die in either of those two types of accidents. The question is: if Dan is not, while driving, guilty of an incomplete attempt—because we have abolished incomplete attempts—is he guilty instead of (1) a completed attempt; (2) reckless endangerment; or (3) nothing at all?

To assess these options we must recall the case of Cowardly Jackal, who takes a one-in-a-million (by his estimate) shot at De Gaulle from the Eiffel Tower.⁹⁵ We said that were Jackal to hit and kill De Gaulle, he would be guilty of purposeful homicide (because the killing of De Gaulle was his conscious object in firing). We also said that if the bullet missed, Jackal would be guilty of a completed attempt (to kill).

Either of two approaches can lead to the Jackal's being guilty of a completed attempt. One is to continue to distinguish acting with the conscious object (purpose) to kill from acting with conscious disregard of a substantial and unjustifiable risk of death (recklessness regarding death). The Jackal is guilty of attempted homicide based on his purpose for acting. He is not guilty of recklessness regarding death because, although he was aware that he was creating an unjustifiable risk, he was not aware that the risk was *substantial*.⁹⁶

The alternative approach leading to the Jackal's criminal liability is to make recklessness the all-purpose mens rea, with purpose going only to the justifiability of the risk. If recklessness retained the requirement that the contemplated risk be substantial, we would end up with the unacceptable anomaly—because guilt should not turn on results—that the Jackal would be guilty of criminal homicide if he hit De

⁹⁵ See *supra* note 18 and accompanying text.

⁹⁶ See MODEL PENAL CODE § 2.02(2)(c) (1985) (defining recklessness as acting with conscious disregard of a substantial and unjustifiable risk). The point in the text assumes, of course, that the relevant risk in question is only the risk to De Gaulle. If De Gaulle is surrounded by people, so that the risk of killing someone is substantial, the point in the text does not apply.

Gaulle but guilty of nothing if he missed. A further step would be to eliminate the requirement for recklessness that the contemplated risk be *substantial* and retain only the requirement that it be *unjustifiable*. Thus, consciously taking a one in a million risk of killing another might not be reckless where one's purpose for acting is legitimate but would be reckless where one's reason for acting is to bring about death.⁹⁷

Let us now return to Dan and Virginia to consider these options at the point in time when Dan is still driving toward Virginia's house. First, has Dan completed an attempt on Virginia's life under the approach that distinguishes purposeful attempts from recklessness? Dan has increased his assessed risk to Virginia to one in a million, just as did the Cowardly Jackal with respect to De Gaulle. Moreover, once he drives by, that risk is based on factors outside of his control (Virginia's darting out, the gun's discharging), just as was the risk for Cowardly Jackal (the bullet hitting De Gaulle once it was fired). Thus, we might deem Dan guilty of a completed attempt even at this otherwise preparatory stage.

Of course, one difference between Dan's case and Cowardly Jackal's case, which many will view as precluding completed attempt liability for Dan, is that Dan's plan is not to kill Virginia by having her dart out in traffic or having his gun accidentally discharge, but rather is to kill her by shooting her himself, a much more certain means. Cowardly Jackal, by contrast, planned only the one in a million shot.

Should this distinction make a difference? If it does, then we end up with another potential anomaly. Consider David, who, like Dan, wants Virginia dead. Unlike Dan, however, David does not plan to shoot Virginia. Rather, he plans only to drive near her house with a loaded gun in his car, hoping either that Virginia will accidentally dart in front of his car or that his gun will accidentally discharge and kill Virginia. David is identical to Cowardly Jackal. If Cowardly Jackal is guilty of a completed attempt when he fires, David is guilty of a completed attempt when he drives. But if David is guilty, why should not Dan also be guilty?

There is, however, one way to distinguish Cowardly Jackal and David from Dan. Cowardly Jackal and David estimate the likelihood of success of their respective actions to be one-in-a-million. Dan, on the other hand, while he would be happy to see Virginia die from this

⁹⁷ In suggesting eliminating the requirement that the risk be substantial we do not mean to eliminate reliance on defendant's subjective estimate of the risk. That subjective estimate is the risk that is assessed in terms of its justifiability (which is an objective legal standard). Eliminating defendant's subjective estimate of the risk in favor of some notion of objective risk would conflate recklessness with negligence.

one in a million chance, intends to employ a much more certain means, namely, shooting her. With respect to that means, Dan's attempt is at present incomplete and noncriminal. If Dan knew he had no chance of shooting Virginia, there is no reason to believe he would drive near her house with a loaded gun. He is like someone who plants a bomb in a building he believes is empty in order to collect insurance on the building, but who knows there is a remote but greater than zero chance that his archenemy will be in the building and die from the bomb, which he hopes (but, of course, does not believe) is the case. Even if he were to discover that his archenemy is definitely not in the building, his bombing plan would be unaffected. He surely seems different from Cowardly Jackal and hence from David. But he is indistinguishable from Dan with respect to the remote chance of killing. Neither the bomber nor Dan "intends" to kill his enemy through bombing or driving a car respectively.⁹⁸

How does Dan fare under a recklessness approach? First, if the substantiality requirement is retained, Dan is not reckless. But if Dan is not reckless, neither is David. That means that if David's one-in-a-million chance plan succeeds, he is criminally liable, but if it fails, he is not, an unacceptable result from our viewpoint (because it makes criminal liability turn on the luck of success).

Therefore, David either must be guilty of nothing even if his plan succeeds and Virginia is killed, or he must be guilty of recklessness whether or not his plan succeeds. If he is guilty of nothing, then Cowardly Jackal, his exact analogue, is guilty of nothing, even if he hits De Gaulle. Because that cannot be the correct outcome, David must be guilty of recklessness. But for David to be guilty of recklessness, the substantiality of risk requirement must be eliminated, which would also mean Dan is guilty of recklessness before he reaches Virginia's house.

On balance, the option we prefer—again, quite tentatively—is the one that distinguishes Dan and David. David is guilty of a completed attempt because he drives near Virginia's house for the purpose of increasing her risk of dying by auto accident or accidental discharge of a gun. Dan is not guilty of a completed attempt because that is not his purpose, though such results would please him.

If one rejects this option, however, then one should either eliminate the substantiality requirement for recklessness and make recklessness the *mens rea* for all crimes or make everyone in these scenarios who both hopes for a result and believes he has increased

⁹⁸ See BRATMAN, *supra* note 60, at 143-52 (distinguishing "intending" a consequence from desiring it).

the chances of that result, however slightly, guilty of a completed attempt.⁹⁹ In the latter case, the distinction between attempts and recklessness would be retained and would turn on the presence or absence of desire for the result; and both Dan and David, as well as Cowardly Jackal and the building bomber, are guilty of completed attempts. If, however, one eliminates the desire that anyone die from auto accident, accidentally discharging gun, fired gun, or bomb, no one is criminally liable at all, even if someone does die.

Eliminating the requirement that the contemplated risk be substantial makes all our actors reckless and criminally liable regardless of results. Desire for someone's death only enters into the justifiability of the risk-taking, which would be the sole determinant of criminal liability.¹⁰⁰ A considerable increase in criminal liability would follow, especially if one rejects, as we do, the materiality of results.¹⁰¹

Finally, one option that is clearly objectionable is to both make recklessness the all-purpose criminal mens rea *and* retain the substantiality of risk requirement. Doing so would make both Dan and David free of criminal liability, even if Virginia in fact dies from the car or accidental gunshot. But it would also free Cowardly Jackal from criminal liability, even if he hits De Gaulle.

⁹⁹ Cf. *supra* text accompanying notes 20-21 (discussing hope and regret as they bear on the problem of conditional purpose).

¹⁰⁰ Of course, the risk-taking to be assessed in terms of justifiability would be defendant's subjective estimate of the risk. See *supra* note 87.

¹⁰¹ For example, if one accepts our recklessness approach to solicitation, elimination of the substantiality requirement could make even joking about committing a crime a criminal act.

APPENDIX C: RECKLESSNESS, SOLICITATION, AND MERCHANTS

Using recklessness as the premise for solicitation does raise one problem: what about merchants who are reckless as to the illegal use of goods they sell in the ordinary course of business? Should we punish a convenience store clerk for selling condoms to a man who is with a rather young-looking woman? Should we punish the liquor store owner who sells champagne to a man for his daughter's high school graduation?

How do we determine whether these merchants were reckless? Do we balance their right to each individual sale against the danger each sale presents (because the loss of any one sale versus the danger it may present may always yield that it is reckless for the merchant to sell the goods), or do we include their general right not to have to police their businesses constantly (after all, it is one thing to ask a merchant not to sell to minors and another to tell the merchant not to sell to people who then might sell to minors). Moreover, even if we are assured that recklessness and its concept of an "unjustifiable" risk will protect these merchants, what do we do about the knowing merchant, one who assesses the danger from the sale to be 100%?

We recommend a *per se* rule excluding these sales from liability. Thus, an actor who sells goods or services in the regular course of his trade shall not be deemed to have rendered aid or encouragement that is sufficient for solicitation liability. This exception, however, does not encompass those cases where the merchant has a "stake in the venture," as defined by the common law, for example, where the merchant requests and receives more compensation because he knows he is aiding a crime, or where he provides aid or encouragement in addition to providing the goods or services (as, for example, would occur if defendant purchases a gun and the merchant provides advice on how best to shoot the intended victim).

APPENDIX D: THE SCOPE OF THE ELIMINATION OF INCOMPLETE ATTEMPTS

Our proposal to eliminate incomplete attempts might be only mildly controversial were it confined to the law of attempts. However, the cases cited to illustrate the problem of conditional purpose reveal that many crimes are actually forms of incomplete attempts.¹⁰² Indeed, any crime requiring intent to engage in some future act or omission is a form of incomplete attempt. That category includes burglary (entry of a building "with purpose to commit a crime therein"),¹⁰³ kidnapping (unlawful confinement for various future-act-oriented purposes),¹⁰⁴ theft (unlawful taking of property "with purpose to deprive . . . [the owner] thereof"),¹⁰⁵ and various forms of aggravated assault, such as assault with intent to rape or kill.¹⁰⁶ These crimes are really two crimes combined, one of which is an incomplete attempt. Thus, burglary usually consists of a trespass plus an incomplete attempt to commit another crime (such as theft). Even theft is a combination of a conversion plus a purpose—quite possibly internally conditional¹⁰⁷—to permanently deprive the owner of his property.

Therefore, the logic behind our proposal to eliminate incomplete attempts points us toward a quite radical overhaul of the criminal law, not just some mild tinkering with the section on inchoate crimes. We see no way to escape that conclusion. Nor do we believe it is a *reductio ad absurdum*.

¹⁰² See *supra* note 9. See also Jeremy Horder, *Crimes of Ulterior Intent* in HARM AND CULPABILITY 153-72, 160-63 (A.P. Simester & A.T.H. Smith eds., 1996).

¹⁰³ See, e.g., MODEL PENAL CODE § 221.1(1) (1985).

¹⁰⁴ See, e.g., *id.* § 212.1 (1985).

¹⁰⁵ See, e.g., *id.* § 223.2(1) (1985).

¹⁰⁶ See, e.g., CAL. PENAL CODE § 220 (West 1988).

¹⁰⁷ For example, Dan might take Vickie's television set with the purpose of keeping it only if its picture is sharper than his television set's picture.