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Defining Inchoate Crime: An Incomplete Attempt

Michael T. Cahill*

Moses might have killed him now. His left hand touched the gun . . . He might have shot Gersbach as he methodically salted the yellow sponge rectangle with cleansing powder. There were two bullets in the chamber. . . . But they would stay there. Herzog clearly recognized that. Very softly he stepped down from his perch, and passed without sound through the yard again Firing this pistol was nothing but a thought

To shoot him!—an absurd thought. As soon as Herzog saw the actual person giving an actual bath, the reality of it, the tenderness of such a buffoon to a little child, his intended violence turned into *theater*, into something ludicrous. He was not ready to make such a complete fool of himself.¹

* * *

I applaud the Journal for coming up with the idea for this mini-symposium, which effectively turns the tables by making a bunch of professors answer what amounts to a final exam question in criminal law. To follow exam convention and state the conclusion first: I am not convinced Herzog is liable for anything, except perhaps a weapons offense (assuming his possession of the gun was unlawful) and a trespass offense. With the exception of possible burglary liability (about which more later), I think this result is fairly straightforward as a legal matter, but the issues raised here point to a broader and significant conceptual question—what makes a crime *inchoate*?—to which I also hope to provide a brief answer, though I can do little more than gesture toward a full explanation of that answer.

* Associate Dean for Academic Affairs and Professor of Law, Brooklyn Law School. I thank Professor Robert Batey for inviting me to participate in this symposium, and I also thank the editors of the journal for their work and their assistance. For valuable feedback on earlier drafts of this article or on the ideas it contains, I thank participants in faculty colloquia at Pace Law School (particularly Noa Ben-Asher, Adele Bernhard, Chris Fabricant, Alexander Greenawalt, Andrew Lund, Audrey Rogers, and especially host Luis Chiesa) and at Florida State University College of Law (particularly Rob Atkinson, Shawn Bayern, Curtis Bridgeman, Adam Hirsch, Steve Johnson, Jake Linford, Wayne Logan, Caprice Roberts, Mark Seidenfeld, Mark Spottswood, and Sam Wiseman, and most especially host and all-purpose consigliere Dan Markel).

¹ SAUL BELLOW, *HERZOG* 257–58 (Viking Press 1964).

I. HERZOG'S (LACK OF) LIABILITY

As to any sort of attempted offense against the person (homicide, assault, or reckless endangerment), I think there are two obstacles to liability for Herzog. First, it is not clear that he has performed enough conduct to satisfy the requirements of attempt. If one of the various common-law “proximity” tests were in place, it is unlikely his conduct would be near enough to completion of the offense to satisfy the test. But even under the “substantial step” test prevalent under modern codes,² his satisfaction of the test is questionable. While his conduct fits several of the categories that legally suffice (or more precisely, are “not insufficient”) to count as a substantial step—such as “lying in wait, searching for or following the contemplated victim of the crime” or “reconnoitering the place contemplated for the commission of the crime”³—the conduct will not be treated as a substantial step unless it is “strongly corroborative of the actor’s criminal purpose.”⁴ Herzog was likely driven to spy inside the house for complicated reasons and may be able to claim his observable behavior provides no such strong corroboration of a purpose to harm or kill.

In any case, and far more importantly, in tandem with imposing a more easily satisfied conduct requirement for attempt, modern criminal codes provide a *renunciation* defense that Herzog seems rather evidently to satisfy.⁵ Even where one has satisfied the rules for attempt liability, one can essentially erase one’s liability by renouncing the crime prior to completion. All indications are that Herzog abandoned his efforts, for reasons unrelated to the likelihood of achieving the crime or of being caught, and had no plan to resume them. Whether he had ever meaningfully intended to commit the crime, he had a change of heart well before the point of completion and freely decided against carrying it out.

The renunciation defense exists for situations precisely like this one. Where an actor voluntarily and completely renounces before committing the offense, any initial presumption about the actor’s willingness to commit the offense has been undercut, and the grounds for blaming the actor, or considering him dangerous enough to merit incapacitation, have been undermined. (The common law’s stricter conduct test for attempt reflected, in part, a similar concern that the actor must have a *locus poenitentiae*, or opportunity to repent of his criminal intention, before liability would be appropriate.)

² See, e.g., MODEL PENAL CODE § 5.01(1)(c) (2010).

³ *Id.* § 5.01(2)(a), (c) (2010).

⁴ *Id.* § 5.01(2) (2010).

⁵ See, e.g., *id.* §§ 5.01(4), 5.02(3), 5.03(6) (2010); see also *id.* § 5.01 cmt. at 360 n.279 (1985) (citing 21 state codes—including those of Florida, New York, Ohio, Pennsylvania, and Texas—with renunciation defenses for attempt similar to MPC’s); *id.* § 5.03 cmt. at 459 nn.259–60 (providing similar citations for renunciation defense to conspiracy). Some states have also adopted a renunciation defense via case law.

II. THE LARGER ISSUE: CONCEPTUALIZING INCHOATE OFFENSES

The interesting thing, or anyway one interesting thing, about the renunciation defense is that it applies only for the category of *inchoate* offenses. One cannot, as a legal matter, undo or wipe away one's liability for a theft by returning the stolen item, even if one does so before anyone realizes it has gone missing. Such post-theft restitution of the stolen property might influence a prosecutor to exercise discretion and forgo bringing a case, or might be a basis (formalized or not) for mitigating the offender's sentence, but it does not create a full and outright defense to liability, as renunciation does for attempt and other inchoate offenses, such as conspiracy.

This category of inchoate crime is significant both doctrinally and conceptually. Doctrinally, in addition to the renunciation defense unique to inchoate offenses, there are limitations on the availability of multiple-offense liability for such crimes: modern codes generally prohibit imposition of liability for two distinct inchoate crimes (such as attempt and conspiracy) toward the same target offense,⁶ and also prohibit imposition of liability for both an inchoate crime and the target offense of that crime.⁷ While these doctrinal rules need not depend on, or track, an offense's formal status as "inchoate" or not, the legitimacy of their rationale depends on identifying *some* underlying and coherent trait(s) defining the set of crimes to which they should and should not apply. Otherwise it is unclear why some crimes, for example, receive a renunciation defense while others do not.

Developing a definition of inchoate crime is also practically important because of the increasing tendency of modern criminal codes to define both (1) general "inchoate" offenses (such as attempt and conspiracy), which potentially apply to preparatory efforts toward any specific offense; and (2) particular substantive offenses that also seem "inchoate" in that they do not demand any concrete harm (or wrong), but involve only the potential for such harm or preliminary conduct in the direction of bringing about such harm. This creates the possibility of liability for an inchoate offense toward another offense that is itself also inchoate. Such doubly inchoate liability may allow the criminal law to extend further and further beyond the actual harms or wrongs it is meant to address. Clearer understanding of the category would enable identification of whether a given ostensibly substantive crime is properly seen as inchoate (and therefore probably should not be eligible as a basis for attempt or conspiracy liability).

As a broader theoretical matter, the scope of inchoate offenses is significant because such offenses mark the limits of the State's criminalization authority. It is

⁶ See, e.g., *id.* § 5.05(3) (2010) (limitation applies specifically to article defining "inchoate" crimes).

⁷ See, e.g., *id.* § 1.07(1)(b) (2010). A number of states reject this rule for conspiracy, allowing liability for both conspiracy and the target offense, which suggests possible dissensus (or even schizophrenia, given the common adoption of a renunciation defense for conspiracy) as to whether conspiracy is truly an inchoate offense or whether group criminality should instead be seen as generating a freestanding harm all its own.

possible to distinguish three types of conduct that may be subject to criminal sanction: conduct creating *harm*; conduct that, even if not harmful, is *wrongful*;⁸ and *inchoate* conduct, a residual category for conduct that is not itself harmful or wrongful but seems somehow sufficiently close to a criminalizable harm or wrong as to be criminalizable also. The contents of this last category—crimes that by definition involve conduct that merely relates to but does not itself constitute a substantial harm or wrong—will determine the outer boundaries of what conduct the state may legitimately criminalize.

Accordingly, an important issue with inchoate liability lies in determining its exact object or scope: if such liability demands no harm or wrong, precisely what *does* it demand? Given its importance, the task of defining the exact contours of this category has received surprisingly little attention. Scholars typically define or categorize inchoate crimes only in the negative, as crimes that are *not* consummate, and even this distinction is unexplained.⁹ What is needed instead is an affirmative account of the inchoate category—not merely a “definition,” as if the category has some independent existence and meaning waiting to be ascertained and described, but rather a conceptual framework to support the claim or intuition that recognizing this category is useful, i.e., that (understood properly) it can advance our understanding of how criminal law works or should work. The two existing accounts of the proper scope of the category take the position that inchoate crimes are characterized by either (1) the creation of a sufficiently significant *risk* of harm, even though harm itself need not occur, or (2) the offender’s *intent* that a prohibited harm or wrong should occur.¹⁰

In earlier work, I opposed the intent-based view of inchoate crimes, implying some support for (but expressing no firm opinion as to) the risk-based view.¹¹ This symposium provides an opportunity to refine my views somewhat. I continue to think that criminalization of risk-creation is appropriate, but I think risk-creation falls within the first category of criminalizable conduct; it is justified by the state’s interest in preventing harms, which is expansive enough to merit prohibition of act-types that are likely to cause harm even if specific instances of those act-types cause no harm.

I also continue to reject the position that inchoate crimes are rooted in the offender’s intent in the usual sense, though I do think the essential nature of inchoate crimes relates in large part to the offender’s mental state, rather than the objective risk they involve. In my view, inchoate offenses punish based on a

⁸ Some question whether conduct in this second category should be subject to criminal liability, but that debate is irrelevant to the current discussion.

⁹ See Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 165–66 (1995) (“[F]ew theorists propose an explicit definition of nonconsummate offenses at all. Instead, most commentators simply list examples of such offenses, inviting the reader to formulate his own definition.”).

¹⁰ For discussion and citations, see Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1215–16 (2009).

¹¹ See *id.* at 1216–17.

specific kind of culpability: not the offender's culpability as to the elements of the crime, but his culpability as to *the performance of conduct* that will satisfy the elements of the crime.¹² For example, with murder, the key question is not (only) whether the actor desires the death of the victim, but whether he is committed to a course of conduct that would, if completed, bring about the death of the victim. Inchoate offenses demand not only proof of the purpose or intent that the offense's requirements should come to pass, but also proof of the actor's *resolve*—his dedication to ensuring that the offense *will* come to pass, by his hand or with his active support. It is this particular form of culpability, demonstrating both the actor's dangerousness and his ill-desert, that justifies punishing conduct that does not itself generate the harm, wrong, or risk demanded for substantive liability.

On this account, the category of inchoate crimes is defined by two features: (1) incomplete conduct toward some ultimate offense (this is what makes the crime inchoate, rather than consummate); and (2) the actor's firm commitment to the performance of the as-yet-unperformed conduct that would complete that offense (this is what makes the conduct worthy of punishment at all, rather than "mere thoughts" or "mere preparation").¹³

¹² Both Paul Robinson and Antony Duff have similarly focused on this sort of culpability in explicating the requirements of attempt liability specifically, but have not characterized it as a defining feature of inchoate liability more broadly. For discussion of Robinson and Duff's views, see Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 903–07 (2007).

¹³ Larry Alexander and Kimberly Ferzan's work adopts a similar, but not entirely congruent, understanding of the nature of inchoate crimes; moreover, Alexander and Ferzan also adopt the distinct position that inchoate crimes, thus understood, are not culpable and therefore should not be criminalized:

An inchoate crime . . . is one in which the criminal act is prior to the act that unleashes the risk(s) of harm. In other words, it is a crime that occurs while the actor still has the ability to choose to refrain from imposing the risk. On that definition, completed attempts and reckless endangerments are not inchoate crimes . . .

The paradigmatic inchoate crime is the incomplete attempt. . . .

Solicitation, conspiracy, and giving aid to another to assist the latter's commission of a future crime are often regarded as inchoate crimes. On our analysis, with the exception of a conspiracy in which the conspirator in question intends to carry out the future crime as the principal, these crimes, if they are truly culpable, are properly regarded as completed crimes of reckless endangerment. . . .

[T]rue inchoate crimes are not culpable and should not be punished.

Larry Alexander & Kimberly Kessler Ferzan, *Risk and Inchoate Crimes: Retribution or Prevention?* in *SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS* (G.R. Sullivan & Ian Dennis eds., forthcoming April 2012); see also Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1139 (1997) ("The mental states [required for inchoate crimes] 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."); *id.* at 1181 ("Our proposals amount to eliminating inchoate crimes and then covering much of their territory with recklessness liability."). See generally LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A*

III. RAMIFICATIONS OF THE PROPOSED DEFINITION

This definition would generate results that are largely consistent with, but sometimes different from (and in my view, where different, better than), those that obtain under the current categorization of various offenses. Some of its implications are outside the scope of the fact pattern that animates this symposium, so I will not dwell on them here.¹⁴ Instead, I will focus my further comments on the application of this definition to two offenses that are implicated by the *Herzog* scenario: burglary and reckless endangerment. Contrary to the current understanding—or at least the current casual assumption; as noted above, there has been hardly any thorough consideration of which crimes are and are not inchoate—my definition would hold that burglary is an inchoate offense, while reckless endangerment is not.

Burglary consists of a trespass (i.e., unlawful presence on another's property) coupled with the intent to commit a further offense on the property. (Some codes require that the intended offense be a felony, others do not.) Most American criminal codes grade burglary as a quite serious offense, both in absolute terms and relative to the rather low offense grade for mere trespass (commonly a misdemeanor). Because the distinguishing feature of burglary is the requirement that the actor have the purpose to engage in some future course of criminal conduct, burglary is an inchoate offense under my proposed definition.¹⁵

This generates several meaningful legal consequences, some of which track existing doctrine, some of which do not. Some, though not all, jurisdictions bar

THEORY OF CRIMINAL LAW 197–225 (2009) (defending the position that inchoate crimes are not culpable).

¹⁴ Under the definition I have proposed, accomplice liability would constitute a form of inchoate liability, because it depends on the accomplice's culpability as to the performance of further conduct constituting the offense—in this case, the further conduct is to be performed by the principal rather than by the accomplice herself. I consider this superior to the outcome under current rules, which impute full liability for the substantive offense to the accomplice based on the principal's conduct, but I will not pursue the matter here.

Taking another example, under my proposed definition, *completed* attempts (those for which the actor has fully performed all requisite conduct, but the offense elements have not been satisfied, such as the classic "shoot and miss" scenario) would *not* be inchoate offenses. Among other things, this means that the renunciation defense available for incomplete attempts and other inchoate crimes should not be available for completed attempts. I consider this also to be the proper outcome, but will not discuss it further here.

¹⁵ Indeed, it is not clear why the common-law offense of burglary still exists under modern codes, rather than being subsumed into the category of attempt. At common law, the offense of burglary was created to compensate for the demanding conduct requirements, and low penalties, then existing for attempt offenses. Under the common-law test for attempt, entering another's dwelling to commit an offense would not necessarily suffice to constitute an attempt to commit that offense, and even where it did—where the intruder had not only entered, but was about to commit the crime—only misdemeanor liability would attach. Yet modern codes have altered significantly the nature of attempt liability, so that the offense typically is complete at an earlier stage and the penalties can be substantial. Accordingly, it would probably make sense to eliminate the independent offense of burglary and treat conduct amounting to burglary as an attempt to commit the target offense.

liability for both burglary and its target offense (i.e., the offense for which the intrusion is made), a rule consistent with the view that burglary is inchoate, as it follows the general rule that liability for an inchoate offense is subsumed into liability for the completed target offense. On the other hand, many states allow for inchoate liability toward the target offense of burglary (such as attempted burglary or conspiracy to commit burglary), which should be seen as troubling or even prohibited outright as “doubly inchoate” and hence too far removed from the target harm to ground liability. (To be more precise, it should not ground liability derived from the conduct’s relation to the target offense; liability for trespass or attempted trespass would still be available, but heightened liability based on one’s pursuit of the target offense should not be available where one has in essence only attempted to attempt that offense.)

If trespassing on the lawn or other private property, rather than entering the house, suffices to generate liability for burglary—which is unlikely, as most definitions of burglary demand unlawful entry into a building¹⁶—then Herzog may well be liable for burglary if he has the intent to kill Gersbach (or anyone else) at the time he commits the trespass. But another significant legal consequence of my account of inchoate crime would apply here: because burglary is an inchoate offense under my definition, Herzog should be able to claim a defense based on his later renunciation of the plan to commit that crime. He would, however, still potentially be liable for trespass (again, if trespass onto non-enclosed property suffices for liability). Existing doctrine, though, allows no renunciation defense for burglary—a situation I find undesirable given burglary’s underlying substantive resemblance to attempt and other inchoate crimes. If burglary is defined to require entry into the house, it is possible Herzog committed attempted burglary (an offense whose existence is questionable under my proposed view), but he would have a renunciation defense for that under both existing law and my proposed view.

Turning to reckless endangerment, that offense is not inchoate under the definition I have articulated. Reckless endangerment does not involve preliminary conduct toward some end, but involves a completed course of conduct, with no need for the actor to have intended some additional conduct beyond that which he performed. The conduct is complete because it has generated an objective result required under the terms of the offense; what makes the offense somewhat unusual is that the requisite result is not actual harm, but the creation of a *risk* of harm.¹⁷

¹⁶ *But cf.* FLA. STAT. § 810.011(1)–(2) (2007) (defining “structure” and “dwelling,” for burglary purposes, to include “the curtilage thereof”).

¹⁷ The Model Penal Code’s formulation does not require that any danger actually be created, but most codes reject this formulation (and rightly so, in my opinion). For a summary of the requirements of various general reckless-endangerment offenses, see Cahill, *supra* note 12, at 924–32.

To be clear, this does not entail the view that risk is a harm all its own, as some people consider it to be. Compare Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963 (2003) (arguing that risk is a harm), with Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1444 (2003) (“[T]he argument that risk is itself a kind of

Yet the risk is no less a result of the actor's conduct for being intangible: as with any other result element of an offense, liability cannot arise unless it is proved to have existed and, importantly, to have been *caused* or brought about by the actor's conduct and not some other origin. Thus reckless endangerment is a consummate and not an inchoate offense, as it does not require any further conduct on the actor's part, but does require the manifestation of an identifiable risk of harm that did not exist prior to the actor's conduct.

In the situation at hand, I do not believe Herzog created such a risk. The Model Penal Code, and some state codes, allows a presumption of both the required danger and recklessness "where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded,"¹⁸ but Herzog did not even do that.

If reckless endangerment is not itself an inchoate offense, then potentially it would be acceptable to have liability for inchoate offenses toward reckless endangerment. For example, where no objective risk to another person is actually created, but an actor has the required purpose to engage in a course of conduct that, if completed, would create such a risk, then the actor might face liability for an *attempt* to endanger. In my view, this is the proper result: liability for attempts or conspiracies to endanger should be legally available.¹⁹ This makes no difference in Herzog's case, however, for even if his conduct constitutes an incomplete attempt to endanger, he would have available the same renunciation defense he has for any other attempt offense.

IV. CONCLUSION

The category of inchoate criminal conduct is generally understood to be substantial in some senses of that word—both large and important. At the same time, however, the definition of the category has thus far lacked substance, itself remaining inchoate: unclear, undeveloped, and amorphous. The foregoing discussion, though also inchoate—tentative, preliminary—in its own right, has sought to give firmer shape to this significant but slippery class of crimes. If the account I have offered is not persuasive, hopefully it might at least stimulate some

consequential harming . . . must be abandoned."). The important thing is that the conduct constituting reckless endangerment is complete once it has generated the risk, whether or not the risk is thought to constitute harm.

¹⁸ VT. STAT. ANN. tit. 13, § 1025 (2010); *see also* MODEL PENAL CODE § 211.1 (2010); TEX. PENAL CODE § 22.05(c) (2010); *cf.* WYO. STAT. ANN. § 6-2-504(b) (2010) (offense is committed, not just presumed, if one "knowingly points a firearm at or in the direction of another, whether or not the person believes the firearm to be loaded").

¹⁹ *See, e.g.*, PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 161–64 (1998); *cf.* Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 484 n.119 (1990) ("[I]nsofar as reckless endangerment requires creation of risk, it might itself be considered a result crime. In theory, then, a person might potentially be liable for attempted reckless endangerment. However, such attempt liability would probably require a belief that one is creating, or has purpose to create, the risk.").

effort to provide a better account that would fill the current conceptual void, or else serve to demonstrate that this often-used categorization is fundamentally incoherent and/or unhelpful and should simply be abandoned.