

12-1-2011

## Inchoate Crimes at the Prevention/Punishment Divide

Kimberly Kessler Ferzan

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### Recommended Citation

Kimberly K. Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 SAN DIEGO L. REV. 1273 (2011).  
Available at: <https://digital.sandiego.edu/sdlr/vol48/iss4/8>

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# Inchoate Crimes at the Prevention/ Punishment Divide

KIMBERLY KESSLER FERZAN\*

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## I. INTRODUCTION

The state has a strong interest in preventing harm to its citizens. Simultaneously, however, it must take its citizens' liberty and autonomy seriously as well. Although it may ask citizens to suffer small deprivations

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in the name of enhanced security for all, as it does when we go through security at the airport, the state cannot engage in substantial liberty deprivations that violate rights.<sup>1</sup> A state cannot deprive an individual of his liberty for the good of others anymore than it can take a citizen's property without fair compensation.

It has commonly been thought that the primary avenue for substantial liberty deprivations is the criminal law. Here, when the state acts, its conduct is justified by the offender's desert. The criminal law thus respects the autonomy and liberty interests of citizens. Some theorists have argued that the criminal law is the only autonomy-respecting mechanism for depriving rational agents of substantial liberty.<sup>2</sup> However, in *Beyond Crime and Commitment*, I argued that the state is also justified in engaging in substantial liberty deprivations to prevent an actor from committing a criminal act when the actor has become *liable* to preventive intervention.<sup>3</sup>

As I argued, prior to punishment, the state has grounds for preventive interference when an individual has decided to risk or cause unjustifiable harm to others and has performed any act in furtherance of that intention.<sup>4</sup> The reason why the state may intervene is because the actor is *liable* to this interference. Because the actor has formed an intention that he ought not to have formed, and because the actor has then acted on that intention, the actor has forfeited his right against the state's action designed to stop the actor from proceeding with the planned criminal act. Depending on the case, intervention may range from electronic monitoring and curfews to detention.

Liability-based prevention intervention is based upon the same moral principle that underlies justified acts of self-defense. When a culpable aggressor tries to harm an innocent victim, the victim is permitted to

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1. For a defense of the autonomy-respecting view, see Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 873, 877 (2011), where he "argue[s] instead that an individual may not be deprived of his liberty unless the reasons for doing so respect his status as an autonomous person"—by which he means "a person who has reached a threshold capacity to use practical reason to frame and pursue a conception of a good life." For a survey of types of preventive measures and their rationales, see generally Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, HARV. NAT'L SEC. J. (2011), [http://www.harvardnsj.com/wp-content/uploads/2011/01/Vol.-2\\_Klein-Wittes\\_Final-Published-Version.pdf](http://www.harvardnsj.com/wp-content/uploads/2011/01/Vol.-2_Klein-Wittes_Final-Published-Version.pdf).

2. See Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56, 58 (2004) ("We cannot detain [dangerous people] unless they deserve it and desert requires wrongdoing. In the interest of liberty, we leave potentially dangerous people free to pursue their projects until they actually offend, even if their future wrongdoing is quite certain. Indeed, we are willing to take great risks in the name of liberty.").

3. Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, MINN. L. REV. (forthcoming 2011).

4. *Id.*

stop the aggressor because the aggressor has forfeited her right against such preventive actions.<sup>5</sup> Thus, the victim does not wrong the aggressor when the victim harms the aggressor in an effort to thwart the attack.

The problem is that my argument—that the state may preventively intervene when an actor has formed an intention and taken any act in furtherance of it—looks suspiciously like inchoate offenses. Hence, even if the underlying theory for preventive interference is sound, the question is why the criminal law ought to surrender this territory to an alternative regime. In this Article, I argue that inchoate crimes are best dealt with under a preventive regime. Part II argues that inchoate crimes and preparatory offenses are primarily aimed at preventing a harm and not at punishing those who deserve it. It also revisits concerns with punishing incomplete attempts that Larry Alexander and I have voiced previously. Part III considers Alec Walen’s recent proposal to combat terrorism through the criminalization of threats as an inchoate offense. It also addresses general concerns with Walen’s proposal and claims that Walen does not resolve the problems with inchoate criminality set forth in Part II. Part IV addresses how to choose between the regimes if both are normatively justifiable. It argues that there is no “right to be punished” that favors punishment, nor is there any reason in principle that procedural and legality guarantees could not be extended to a preventive regime. Part IV also argues that a prevention regime can survive against the objections raised against punishment because it can be responsive to concerns about intentions’ conditionality, duration, and renunciation in a way the criminal law cannot. Finally, Part IV turns to proportionality measures and argues that prevention is clearly superior to punishment if we truly wish to intervene and detain individuals to prevent them from harming us.

## II. INCHOATE CRIMES’ PREVENTION-BASED RATIONALE<sup>6</sup>

The state criminalizes conduct the occurrence of which it wishes to prevent.<sup>7</sup> Hence, to say that any crime is about punishment *or* prevention

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5. See Kimberly Kessler Ferzan, *Culpable Aggression: The Moral Basis for Liability to Defensive Killing*, OHIO ST. J. CRIM. L. (forthcoming 2012).

6. Portions of this Part draw from Ferzan, *supra* note 3.

7. See Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 279, 281 (R.A. Duff & Stuart P. Green eds., 2011) (“[E]ven the purest retributivists must recognize that a concomitant of the decision to declare certain conduct

forces a false dichotomy. One reason to criminalize murder is simply to minimize the occurrence of it. However, it is similarly confused to say that anything the state wishes to prevent can be done through the use of the criminal law. For those theorists like me, who believe that criminal punishment requires *desert*, there must be something culpable about the actor's behavior that warrants punishment, as opposed to some other regulatory measure. So to retributivists, the question is whether the actor's conduct is itself blameworthy, not whether it is somehow dangerous. The criminalization of murder prevents its occurrence, but the commission of murder is itself a culpable act worthy of punishment.

It is also the case that the preventive rationale exists when a crime has been completed. When we incarcerate a murderer, we kill two birds with one stone—we inflict punishment *and* we prevent *this actor* from committing (most) additional crimes by incarcerating that actor. And in a world of limited resources, it is fair to say that retributive justice may simply be too expensive if there is not some secondary benefit that comes from punishment.<sup>8</sup>

Although most punishment will therefore come with a dash, if not two cups, of prevention, the converse is not true. A preventive regime that focuses on dangerous propensities due to age, gender, race, or genetics need not require the actor to do *anything*, much less anything blameworthy. The airport screening system screens *you* not because you have done anything blameworthy but because it is fair to ask you to suffer this minimal privacy invasion in order to maintain security for all—a result that does benefit you.

The question is what to do with those acts that appear to lie on the prevention/punishment border. Perhaps the primary battleground between prevention and punishment is the area occupied by inchoate crimes and preparatory offenses. This Part argues that these crimes are truly aimed at prevention *and are not based on blameworthiness*. Thus, if the state were to enact the liability-based preventive regime I have proposed, these crimes ought to be decriminalized and some ought to be reclassified

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to be a serious wrong and therefore criminal is a commitment to reduce the frequency of that conduct.”); *see also* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 3, 6 (2009) (noting “the criminal law aims at preventing harm” and “the criminal law both creates and reflects value by announcing which conduct is sufficiently wrong to deserve blame and punishment”).

8. *See generally* DOUGLAS HUSAK, *Why Punish the Deserving?*, in *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS* 393, 393 (2010) (arguing that “a political theory is required in addition to a moral theory if we hope to identify the conditions in addition to desert that must be satisfied in order to justify state punishment”).

as actions for which an individual can become liable to preventive interference.<sup>9</sup>

### A. Attempts

Assume that Alex thinks that one day he may want to kill Betty. He has no firm intention at this point. He buys some burglar's tools (for example, a screwdriver and a crowbar), figuring that he may have some use for them sooner or later; perhaps the use will be illegal but perhaps not. Later, he forms the intention to kill Betty. Still later, he buys a gun. Next, he follows her to figure out her routine. Then, he waits outside her house until it is night. Then, he uses his burglar's tools to break in. Then, he goes to her bedroom. Then, he shoots her in the head. Under current law, Alex can be punished for a preparatory offense—such as possession of burglar's tools, or later for attempt—at the point he buys the gun or when he lies in wait. And finally, of course, if the state has failed to intervene before the offense, the state can punish Alex for the completed crime.

When criminal law struggles to determine when Alex has gone beyond “mere preparation” and has actually “attempted” the offense, it struggles with two competing considerations.<sup>10</sup> The first is the state's interest in prevention. We want the police to be able to intervene. We want the police to stop Alex before it is too late.<sup>11</sup> On the other hand, we want to take Alex's liberty and free will seriously.<sup>12</sup> The common law called this the *locus poenitentiae*—the opportunity that Alex ought to have to repent.<sup>13</sup> Indeed, the common law did not allow for abandonment of

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9. Some actions that are currently crimes ought not ground either a preventive or punitive response by the state.

10. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 396 (5th ed. 2009) (“A major difficulty in drawing a line between noncriminal preparation and a criminal attempt is that courts are torn by competing policy considerations.”).

11. See *id.* (“[T]here is the understandable desire of courts and legislators to ease the burden on the police, whose goal it is to prevent crimes from occurring.”).

12. See *id.* (“[I]f courts authorize too early police intervention, innocent persons, as well as those with still barely formed criminal intentions—persons who might voluntarily turn back from criminal activity—may improperly or needlessly be arrested.”).

13. See *King v Barker* [1924] NZLR 866 (CA) 873 (noting a prior court's reasoning that when the defendant has not committed the last act and “has stopped short of this, whether because he has repented, or because he has been prevented, or because the time or occasion for going further has not arrived, or for any other reason, he still has a *locus poenitentiae*, and still remains within the region of innocent preparation”).

attempts precisely because it placed the act requirement far enough along the continuum so as to already create room for a change of heart.<sup>14</sup>

Although states adopt a range of *actus reus* formulations for attempts, Alexander and I have argued that to deserve punishment, one must unleash a risk of harm over which one believes one no longer has complete control.<sup>15</sup> Notably, this would place punishment at the far end of the continuum, and police intervention in a “crime” would not be possible at any preparatory stage.

Why not think that merely forming an intention is itself a culpable action warranting punishment? To put this more crisply, the question is whether forming an intention or maintaining an intention is a culpable act or omission that the state ought to punish. There are three primary reasons to reject punishment for the formation or retention of an intention. First, it is difficult to distinguish intentions from desires, wishes, fantasies, and the like.<sup>16</sup> When Alex has “thought” about killing Betty, how do we, and how does he, distinguish this thought from a firm intention? Second, how should the law take account of duration and renunciation if forming an intention is a culpable act?<sup>17</sup> If one changes one’s mind multiple times, are there more crimes? Should it matter that some actors form an intention earlier than others? Notably, if the formation and retention of an intention is itself a crime, then it would seem that the answers to these questions should be yes because the actor has “acted” multiple times by forming multiple intentions and the actor has “possessed” the intention for longer. Yet, both of these answers seem counterintuitive because renouncing an intention, even if one returns to it, appears to indicate less culpability. Moreover, because holding an intention itself does not increase the risk of harm to anyone as it continues over time, it is hard to see why possessing the intention for longer would aggravate the “offense.” Thus, the problem is that neither alternative seems correct: if forming an intention is an act and possessing an intention is an omission—to rid oneself of it—then our typical responses dictate in favor of greater culpability for greater acts and longer omissions. For instance, in cases of possession, it is worse to have a grenade for a year than to have it for a minute. But these precepts

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14. See PAUL H. ROBINSON, *CRIMINAL LAW* 695 (1997) (“The common law had no need for a renunciation defense in order to encourage potential offenders to stop short of the offense. When criminal liability for an attempt attaches late in the process between preparation and commission, as with the common law’s proximity tests, the actor has an incentive to stop in his planned offense because by doing so he avoids all liability.”).

15. See ALEXANDER & FERZAN WITH MORSE, *supra* note 7, at 197.

16. See *id.* at 202.

17. See *id.* at 206–07.

appear to be false for intentions. So, we might wonder how we should understand the culpability inherent in forming and holding intentions.

Third, and most important, is the concern that intentions are conditional in ways that affect the culpability of the actor and whether that actor will ultimately choose to perform the action.<sup>18</sup> Imagine that you asked yourself quite seriously one day what you would do if your spouse ever cheated on you, and you resolve, quite resolutely, that you would kill him. Is that sufficient for attempted murder? And if not, is part of the reason why we reject this assessment because we think that what we will do ultimately turns on a number of conditions, some of which we are conscious of and some of which we are dispositionally affected by? The intention to have sex with that attractive woman across the room may seem unconditional, but it may ultimately turn on the woman's consenting, being above age, and not having bad breath. As Michael Bratman has noted, our future intentions, our plans, are partial.<sup>19</sup> The function of intentions is to guide future deliberation, but this means that we will be open to amending our plans as facts are revealed to us. An intention to drive to the grocery store at forty miles per hour will not hold if one encounters a school zone, sees a car accident, or winds up in the pouring rain.

Centrally, the gravamen of Alexander's and my objection is that if intentions are conditional—internally in ways the defendant adverts to and externally in terms of the defendant's dispositions—then we are quite hard pressed to say that the defendant will actually choose to cause the later harm. Moreover, because Alexander and I believe completed attempts and completed crimes ought to be punished equally, we are even more troubled at this significant punishment. Intentions are gappy and conditional *guides* to future conduct that we reconsider and abandon. Our practical reasoning abilities allow us to retain complete control over when and if these intentions will be translated into an action that risks harm to other people.

Although one might argue in response that attempts need an action in addition to the intention, it is also hard to see why the act, short of performing an act that the defendant believes can cause harm without

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18. *See id.* at 203–06.

19. *See* MICHAEL E. BRATMAN, INTENTIONS, PLANS, AND PRACTICAL REASONS 28–29 (CSLI Publications 1999) (1987).

further action, affects the defendant's culpability.<sup>20</sup> If the reason to require an act is to corroborate that the intention is resolute, the act does not add to the defendant's desert but serves only an evidentiary purpose. If the act is a proxy for dangerousness—the closer the actor is, the more dangerous the actor is—the problem is that dangerousness and culpability come apart. One can be culpable without being dangerous—think of inherently impossible attempts, such as using a voodoo doll to kill—and one can be dangerous without being culpable—think of someone with a severe mental illness. Even on this view, the actor's getting closer to success does not add something to desert; it merely adds to our anxiety that the actor will succeed.

Thus, there is substantial reason to doubt that incomplete attempts punish blameworthy conduct. Rather, it seems that many inchoate offenses are truly pockets of prevention, not punishment. When Alex follows Betty, he may still choose not to harm her at all. As Stephen Morse has noted, “[E]xcept for the criminalization of ‘last-act’ cases, inchoate criminality is largely preemptive, rather than a response to behavior that itself risks harming others.”<sup>21</sup> Indeed, as Morse notes, the clearest evidence that most of attempt law is preventive is the abandonment defense. In no other area of criminal law can the defendant simply “erase” the criminal wrongdoing.<sup>22</sup> “We permit active abandonment because until the last act, there is always a genuine chance that the inchoate criminal does not ‘really’ mean it.”<sup>23</sup>

The language of cases, wherein courts decide when a defendant has committed a sufficient act for attempt liability, likewise reveals attempt law's preventive nature. Consider *State v. Reeves*, wherein the court upheld a jury finding that the defendant was a delinquent child because she attempted second-degree murder.<sup>24</sup> Tracie Reeves and her friend, Molly Coffman, spoke on the phone and decided to kill their middle-school homeroom teacher by placing rat poison in her drink.<sup>25</sup> Coffman brought rat poison on the bus to school, bragged about the plan to a friend on the bus, and at school placed her purse next to the teacher's coffee cup.<sup>26</sup> The other bus rider informed a teacher, and the school intervened at this

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20. See 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 ed., forthcoming 2012).

21. Stephen J. Morse, *Neither Desert nor Disease*, 5 *LEGAL THEORY* 265, 288 (1999).

22. *See id.*

23. *Id.* at 289.

24. *State v. Reeves*, 916 S.W.2d 909, 910, 914 (Tenn. 1996).

25. *Id.* at 910.

26. *Id.*

point.<sup>27</sup> The Tennessee court faced a question of first impression. Early Tennessee precedent had required the attempt to be quite close to completion, but Tennessee had since adopted the language of the Model Penal Code (MPC) requiring “a substantial step.”<sup>28</sup> Ultimately, the court found the girls’ conduct was sufficient for attempt. The court’s reasoning was that a rigid requirement would undermine the “preventative goal of attempt law”<sup>29</sup>:

The shortcomings of the [prior precedent] with respect to the goal of prevention are particularly evident in this case. As stated above, it is likely that under [the prior precedent] no criminal responsibility would have attached unless the poison had actually been placed in the teacher’s cup. This rigid requirement, however, severely undercuts the objective of prevention because of the surreptitious nature of the act of poisoning. Once a person secretly places a toxic substance into a container from which another person is likely to eat or drink, the damage is done.<sup>30</sup>

With this sort of offense, the court is not focusing on the desert of the defendant—what has been done—but on what the defendant might do. The court’s goal is to set the act requirement at a point that will stop the defendant. It does not discuss the defendant’s culpability and desert. It focuses instead of the state’s preventive goals.

Notably, this is not true of solicitation or conspiracy. When one solicits another person to commit a crime, one has lit a metaphorical fuse. The agent may go through with the offense even if the solicitor wishes to call the agent off.<sup>31</sup> Equally true, a coconspirator may harden the resolve of compatriots, making it more likely that they will commit the crime with or without the coconspirator. In both cases, the defendant has unleashed risks that can no longer be controlled through will alone.<sup>32</sup> This is not true in the case of early attempts. By a mere change of mind, there will be no crime.

Now, returning to Alex, there may be some culpable acts that he does commit along the continuum. Carrying around a gun for no reason other than to harm someone may create an unjustified risk of death through

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27. *Id.*

28. *Id.* at 910–13.

29. *Id.* at 914.

30. *Id.*

31. For this reason, the renunciation defense is not available unless the defendant persuades the solicited party not to commit the offense or otherwise prevents its commission. *See* MODEL PENAL CODE § 5.02(3) (1962).

32. To have a renunciation defense to a conspiracy charge, the defendant must thwart the conspiracy’s success. *Id.* § 5.03(6).

accidental discharge. And if Alex drives to the house, the risks he imposes by driving are all unjustifiable given the reason for which he imposes those risks. And when Alex points the gun at Betty, he also risks the gun's accidentally going off.<sup>33</sup> If Alex consciously disregards these risks, he is culpable for imposing them, too. But these crimes are not what are at stake here. The question is what the grounds are for punishing Alex for attempting to kill Betty at some point prior to his pulling the trigger.<sup>34</sup>

Certainly, the state wants to stop Alex from killing Betty. But is the criminal law punishing blameworthy conduct? Or is it looking for an intervention point for prevention? That is, inchoate attempts, far from offering a principled desert basis, appear to side-step the issue in favor of prevention. But if it is a system of prevention that we want, then we should focus on working out the details of a preventive system.

### *B. Preparatory Offenses*

The problem of preventive goals' being pursued through the use of criminal punishment goes beyond the formulation of the *actus reus* for an attempt. In efforts to reach potential criminals, legislators create preparatory offenses. The possession of burglar's tools is an example of a preparatory offense.<sup>35</sup> Possession of burglar's tools is a crime,<sup>36</sup> and yet at the time Alex possesses the tools, he has not formed the intention to use the tools illegally. Moreover, there is nothing harmful in the possession of these tools. The justifications for the law are that it allows early police intervention and eases prosecutorial burdens, not that it tracks retributive desert.<sup>37</sup> The state creates new completed offenses,

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33. See Alexander & Ferzan, *supra* note 20.

34. There may be other possible offenses as well. A defendant's awareness of a dangerous character trait may give rise to a duty to seek to change the behavior, particularly when the defendant will seek mitigation later for inadvertence or lack of control. See ALEXANDER & FERZAN WITH MORSE, *supra* note 7, at 85, 167. Morse has suggested that a defendant may likewise have an obligation to take affirmative steps to prevent acting on a culpable intention. See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 152–54 (1996). But see Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, 15 CRIM. J. ETHICS 3, 9–10 (1996) (arguing that a potential offender's duty is not to perform the act, as opposed to being obligated to turn himself in).

35. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 835 (2001) ("By last count, New York law recognized no fewer than 153 possession offenses; one in every five prison or jail sentences handed out by New York courts in 1998 was imposed for a possession offense.").

36. See, e.g., N.Y. PENAL LAW § 140.35 (McKinney 1999).

37. See Dan Bein, *Preparatory Offences*, 27 ISR. L. REV. 185, 201 (1993) ("I believe there is an additional criterion, having to do with pragmatic considerations of

ultimately ignoring that they are mere preparatory steps towards the commission of the crime the state wishes to prevent. As Michael Moore notes,

The problem with . . . “wrongs by proxy” is that [they] give liberty a strong kick in the teeth right at the start. Such an argument does not even pretend that there is any culpability or wrongdoing for which it would urge punishment; rather, punishment of a non-wrongful, non-culpable action is used for purely preventive ends.<sup>38</sup>

Paul Robinson has cautioned that the use of the criminal law for regulatory purposes undermines its moral strength.<sup>39</sup> Moreover, because these offenses may include nonculpable conduct, they risk creating a chilling effect and deterring law-abiding citizens from engaging in permissible activities.<sup>40</sup>

For instance, consider *State v. Ansari*, wherein the defendant challenged the constitutionality of the crime of enticing a minor over the Internet.<sup>41</sup> The Utah appellate court upheld the statute’s constitutionality—a statute that was intended to allow intervention prior to a crime of attempt, conspiracy, or solicitation.<sup>42</sup> The statute does not require a substantial step: “If the predator is caught early in his effort, the State may charge Internet enticement, and if caught after the crime had developed, the State may have evidence to charge the greater crimes of attempt, conspiracy, and solicitation.”<sup>43</sup> In other words, even after courts and legislatures struggle to draw a line between preparation and an attempt, this line can be erased by the creation of another crime that occurs prior to the attempt. It is further erased when the jurisdiction punishes the

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enforcement rather than substantive considerations. It is the need to provide the police with the means for making preventative arrests.”).

38. MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 784 (1997).

39. Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 213–14 (1996).

40. See Daniel Ohana, *Responding to Acts Preparatory to the Commission of a Crime: Criminalization or Prevention?*, 25 CRIM. JUST. ETHICS 23, 28 (2006) (noting that criminalizing preparatory acts can have a chilling effect on socially beneficial activity).

41. *State v. Ansari*, 2004 UT App 326, ¶¶ 2–5, 100 P.3d 231, 234.

42. See *id.* ¶ 6, 100 P.3d at 234–35 (quoting UTAH CODE ANN. § 76-4-401 (LexisNexis 2003)).

43. *Id.* ¶ 21, 100 P.3d at 238.

attempt to commit the proxy crime, producing a double inchoate offense even further removed from the ultimate crime.<sup>44</sup>

Proxy crimes do not punish for blameworthy behavior. Proxy crimes are purely for prevention. As Chris Slobogin observes, “The gravamen of these crimes is not what the person thought, but the objective risk posed. In many cases, that risk is not very high, and in some it is nonexistent, but the state exerts its police power anyway.”<sup>45</sup> If we believe the state ought to intervene against preparatory behavior, then the state ought to come clean with principles of prevention that are not principles of punishment.<sup>46</sup>

The preventive desire is particularly evident in the rash of crimes enacted in the United Kingdom in response to terrorism. Early inchoate offenses, such as possession and association with enumerated organizations, have been criminalized not based on the blameworthiness of the actor but on the state’s need to intervene.<sup>47</sup> Nevertheless, because of the profound dangerousness of actors, the penalties are stiff, including life imprisonment.<sup>48</sup>

In summary, what attempt law and preparatory offenses do is to allow the state’s preventive regime to be concealed within the criminal law. Although the desert in these cases is minimal or nonexistent, the criminal law allows for intervention, and sometimes significant incarceration, in order to prevent the dangerous from committing offenses. However, if incomplete attempts and preparatory offenses are truly based on preventive rationales and have little, if anything, to do with retributive desert, then criminal law ought to surrender this territory to a preventive regime.

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44. See Ashworth & Zedner, *supra* note 7, at 284–85 (arguing these extensions are unprincipled). For a general analysis of this category, see Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989).

45. CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 148 (2006); see also Bernadette McSherry, *Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences*, in *REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW* 141, 153 (Bernadette McSherry, Alan Norrie & Simon Bronitt eds., 2009) (“It is . . . probably more appropriate to see preparatory offences as a separate species of offences existing outside the general justifications for inchoate offences and developing in an ad hoc manner in response to policy concerns.”).

46. Cf. Dubber, *supra* note 35, at 917–18 (noting that possession offenses indicate “just how anxious the modern state is to pursue its incapacitative mission, so eager in fact that it is willing to enlist the services of an offense that runs afoul of most, if not all, of the fundamental tenets of traditional American criminal law”).

47. See Lucia Zedner, *Fixing the Future? The Pre-emptive Turn in Criminal Justice*, in *REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW*, *supra* note 45, at 35, 50 (“Criminalisation of activities remote from the actual commission of an act of terrorism is justified by the need to furnish the legal grounds for action against individuals at the very earliest stages of preparation.”).

48. See, e.g., Terrorism Act, (2006) § 5(3), 11(1) HALS. STAT. (4th ed.) 422.

## III. A CASE FOR CRIMINALIZATION: WALEN ON THREATS

Whereas my view on proxy crimes is hardly controversial, my view that the *actus reus* for attempts should be placed far along the continuum is considered less than gospel. Because my argument is that the state can intervene as a matter of prevention but not punishment once an individual forms an intention and acts upon it, we should consider the strongest case set forth for criminal punishment at this early stage. As a recent example of the case for the punishment of quite inchoate incomplete attempts, let us consider Alec Walen's argument for the broad criminalization of threats.

A. *Walen's Argument*

Walen and I agree that the state cannot engage in long-term preventive detention if it does not respect the autonomy of the detainee. Whereas I opt for a liability-based prevention system, Walen favors a broadening of the criminal law. Specifically, he argues that "threatening, in the sense of stating one's intention to commit a [crime]," is itself an inchoate offense.<sup>49</sup> Walen claims that the communication of an intention can serve as the *actus reus* for threats in the same way that a substantial step or dangerous proximity serves as the *actus reus* for attempts.<sup>50</sup>

On Walen's view, the purpose of criminalization is not to predict future criminality but rather to punish for what the actor has already done.<sup>51</sup> Specifically, "[w]hat matters in forming a criminal intention is that one has *already* chosen to flout the law."<sup>52</sup> Although Walen's theory could arguably support using threats as an inchoate offense for any crime, Walen argues that it should be limited to cases such as terrorism and similarly significant crimes in order to strike the balance between freedom from a police state and the need to prevent harm.<sup>53</sup>

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49. Alec Walen, *Criminalizing Statements of Terrorist Intent: How To Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 804 (2011).

50. *See id.* at 834–35.

51. *See id.* at 840.

52. *Id.*

53. *Id.* Walen also unravels the rather confused jurisprudence on threats in his piece. His excellent argument in this regard is orthogonal to the project at hand, but it is worth noting that despite my criticisms in the text, there is much to admire about Walen's overall effort.

### B. Assessing the General View

My first worry about Walen's argument is his use of the formation of the intention to "flout the law" as the culpable act. Although I agree that rule of law values can be protected by the criminal law, it seems that this does not capture the culpability that Walen wants to capture. That is, the wrong of threatening terrorist activity is not the same wrong as walking on the grass, or speeding three minutes after passing a police car with a radar gun, or even committing arson. Rather, the impermissible act, on the best interpretation of Walen's view, should be geared not towards the wrong that one does to the criminal law but to the wrong that one does by disvaluing the lives of prospective victims. An intention to commit any crime is an intention to flout the law. What Walen wants, though, is the culpability of choosing to flout *a particular law*. That is, I think that Walen needs to refine exactly what he views the culpable act to be and exactly why it is culpable. Reframed, it will raise two puzzles for Walen. First, how disrespectful or culpable is it to intend to harm someone when one can prevent this harm through reason and will alone? Second, and relatedly, how much punishment does this act deserve? (I will return to this question in Part IV.) To put these points another way, flouting the law may be complete at intention formation, but that is not the worrisome inchoate offense of prospective terrorism that Walen believes he is capturing within the net of his proposed inchoate offense.

Walen also seeks to differentiate among conditional intentions, with some counting as threats but others not.<sup>54</sup> Here, too, it seems that further work is necessary to find a principled dividing line. As noted above, intentions are often conditional, both internally in ways that the actor acknowledges and externally in ways that the actor may not consciously advert to but that would nevertheless cause the plan to be abandoned. Consider those actors who will only engage in culpable conduct if a condition obtains, where the condition is neither exculpatory nor inculpatory itself but rather affects the probability that the actor will actually engage in the conduct. The MPC view is that a conditional intention counts as an unconditional intention unless the condition negates the harm or evil sought to be prevented.<sup>55</sup> The MPC approach yields that Abe and Alex, who agree to kill their wives if they win the lottery, are guilty of conspiracy to commit murder; that Bob who points a gun at Vickie and sincerely threatens, "Your money or your life," is guilty of attempted murder; and Walen's example, that Carl who announces to his friend,

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54. *See id.* at 845.

55. MODEL PENAL CODE § 2.02(6) (1962).

“I will blow up an American embassy if the United States invades Yemen,” is guilty of a criminal threat.

Walen purports to solve the conditionality problem with the following standard:

I suggest the following gets at the heart of the core distinction between intention and fantasy: if the condition is sufficiently likely to arise that the actor is actively or regularly watching to see if it has arisen, and if he is ready to act on his illicit intention if the condition does arise, then he should be treated as if he has the unconditional intention.<sup>56</sup>

Notice the components: First, there is a requirement that the condition be “sufficiently likely.” Is this probability to be viewed from the actor’s perspective? The actor may think an event highly likely that will not occur, or think one unlikely that will. Risk depends on perspective. Second, there is a desire-state component—the question of whether the defendant is watching and preparing to act on it. These two components can come apart. Indeed, in our first piece on this issue, Alexander and I noted the complexities of focusing on probabilities and on desire states.<sup>57</sup> Abe and Alex may hope and desire that they hit the lottery but estimate the chances as very low. Bob, on the other hand, may estimate the chances to be quite high that Vickie will not comply, yet very much hope that she will. Carl may also strongly desire the condition not obtain, although he is prepared for the possibility that it will.<sup>58</sup> One may hope and act in furtherance of a low probability event, such as winning the lottery, or dread a high probability event, such as a robbery victim’s standing her ground. Walen fails to specify which condition makes the difference, particularly when they diverge. Nor does he justify precisely why we would need both. Is the person who plans in favor of a low probability event not

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56. Walen, *supra* note 49, at 846.

57. See Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1143–44 (1997).

58. We also worried that although internally conditional intentions appear distinguishable from externally conditional ones, this is not the case. What are we to say about the respective culpabilities of the actors above when compared with David and Don, who conspire to kill their wives tomorrow; Edgar, who intends to kill Vera after she hands over the money; and Fred, who views all U.S. actions as grounds for engaging in acts of terrorism? Alexander and I presented the concern that although the first group appears less culpable than the second group, it is also the case that the second group would desist if certain conditions obtained, despite the fact that they did not consciously advert to them, and thus, both groups are equally capable of renouncing their criminal intentions. *See id.*

culpable for flouting the law in Walen’s opinion, or is the person just not sufficiently dangerous for the law to worry about?

*C. Does Walen Solve the Problems with Inchoate Criminality?*

In defending his approach, Walen specifically takes on the arguments that Alexander and I have presented against inchoate criminality, arguing that each objection is surmountable.<sup>59</sup> Let us turn to Walen’s proposed solutions to the problems Alexander and I have raised.

With respect to distinguishing intentions from desires and fantasies, Walen states that the evidence will sometimes meet this burden by looking to “the sincerity with which the message is communicated, whether it is repeated, the context in which it is said, and the person’s general character.”<sup>60</sup> The problem, however, is not that we cannot always separate intentions from fantasies—after all, my intention to go to the store this Saturday to buy groceries is hardly a fantasy, nor is it merely a nightmare. The problem is exactly how to patrol their border when even the agent may not know which one it is. If Walen wants to punish threats but not articulated fantasies, then there needs to be a way to confidently distinguish them. Moreover, Walen’s reliance on character evidence to determine whether something is a fantasy or an intention is even more problematic, especially in the context of terrorism and similar offenses. Are we truly allowed to assume that a good person’s fantasy is a bad person’s firm intention?

Walen also purports to solve another problem with the conditionality of intentions. Alexander and I have noted that the degree of culpability of the final act will depend on the conditions that the actor adverts to at that time.<sup>61</sup> But earlier in the planning process the actor may not have formed any beliefs whatsoever about these later conditions. The later conditions may be inculpatory—an intention to drive fifty miles per hour becomes criminal if it holds in the face of rainy roads and children crossing the street—or exculpatory—an intention to blow up a football stadium as a protest may suddenly become justified just prior to blowing up the stadium when the actor notices the stadium is being used by terrorists about to detonate an offsite dirty bomb. Walen is unwilling to inculcate those with seemingly unconditional intentions if they do not anticipate the inculpatory condition. However, he is willing to punish those who form an intention to do something wrongful, arguing “[i]f she shows a general indifference to the lives of others, or sees some extra

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59. Walen, *supra* note 49, at 846–53.

60. *Id.* at 847 (citing *United States v. Parr*, 545 F.3d 491, 498 (7th Cir. 2008)).

61. See Alexander & Kessler, *supra* note 57, at 1152–53.

value in killing innocents, then her culpability should be high, perhaps nearly as high as if she intended to kill innocents.”<sup>62</sup> But this response fails to see the puzzle. The puzzle is that the intention is supposedly an inchoate offense that leads up to the eventual offense. And we might presuppose that culpability should build over time. But this simply is not the case. Culpability will fluctuate over time as conditions change and the plan is reformulated. Moreover, because intentions are generally gappy and conditional, there are likely to be substantial changes over time.<sup>63</sup>

As for duration, Walen denies that duration matters.<sup>64</sup> He believes that all that matters is sufficient time to determine that the intention is sincerely and firmly held.<sup>65</sup> But why? Or to put the point another way, why not maintain that whatever is culpable about forming an intention is also culpable about maintaining the intention? Indeed, given that Walen does not argue that this must actually increase the risk of harm to the victim at all, is there not more “flouting” the longer the intention is held? If not, why not? He never tells us why we should choose that duration does not matter on his view, and he certainly does not purport to solve this problem for inchoate offenses generally.

Finally, consider our concern about renunciation. First, Walen makes the curious assertion that someone who vacillates only commits one culpable act because “what [the defendant] is doing is vacillating with regard to a single intention. He does not commit a second culpable act when he accepts it again; he reenters the stream of his earlier culpability, losing whatever benefit may have come to him from renunciation.”<sup>66</sup> I do not see why he thinks this is so. Charitably, one might read Walen as follows: if the defendant truly vacillates in a way that evinces that the defendant has not truly formed the intention yet, then it is one intention. But—one might fill in for Walen—it should also be the case that if one

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62. See Walen, *supra* note 49, at 847–48.

63. In *Danger: The Ethics of Preemptive Action*, Larry Alexander and I also question why incomplete attempts merge with completed attempts and successful crimes. That is, if Walen believes that we should punish Carl for his early threat, but when he later acts, he acts under circumstances in which he reasonably believes he is justified, should these two crimes merge? And how does one merge a culpable threat and a later justified action? See Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, OHIO ST. J. CRIM. L. (forthcoming 2012).

64. See Walen, *supra* note 49, at 849–50.

65. *Id.* at 850.

66. *Id.*

forms an intention, renounces, and later reconsiders, it is also possible that those are two separate culpable acts. That is, I find it implausible that Walen truly wants the defendant to just “reenter the stream of his earlier culpability” no matter why and when the defendant reconsiders. If I drop a grenade (perhaps *gently put down* would be a better description) and then pick it up, and do this five times, why have I not engaged in a number of voluntary acts? Not to mention that how long I hold the grenade may matter. If a terrorist changes his mind but reconsiders one year later, why would Walen think of this as one act of flouting the law? In summary, Walen fails to resolve the puzzles of inchoate criminality.

#### *D. Comparing the Views*

It bears noting that Alexander and I certainly have the ability on our view to criminalize threats not as inchoate offenses but as completed offenses themselves. To the extent that one communicates a threat and causes or risks causing fear for no good reason, one has engaged in unjustifiable conduct. Walen’s argument cleanly disentangles two different reasons to criminalize threats: First, as completed offenses, which do not require sincerity but do require culpability as to causing fear. Second, as inchoate offenses, which are an early step in a criminal plan and which require sincerity but do not require one to cause fear. Walen’s focus is on the latter case, but the former avenue is available to Alexander and me.

The critical divergence between Walen’s approach and the Alexander-Ferzan view takes place at stage one. The question is whether the formation of the intention is itself a culpable act worthy of the criminal law’s concern. Alexander and I answer no because our future choices are subject to our will in ways that are critically important. An individual may choose not to commit the crime; conditions may obtain that increase or decrease culpability; and actors have no reason to view themselves (and we have no reason to view them) as anything other than rational agents who can see the error of their ways. That is, to us, the critical feature of wanting to punish an early actor is not a significant amount of desert at  $t_1$  but rather a desire to stop the actor from acting at  $t_2$ . But if what we want is prevention, not punishment, then, as I argue above, we should do prevention and not disguise it as criminal punishment.

The Walen view, however, takes the formation of that intention as itself a kind of completed offense. That is, I think there is a deep tension in Walen’s argument between his claim that he is creating an inchoate offense and the way that he treats this offense in relation to later criminality. Walen does not truly care what the actor does next. The crime is complete at  $t_1$ . To Walen, at  $t_1$ , the actor has flouted the law, has intended the

impermissible, and deserves punishment for that act. Even though later conditions may obtain that change the culpability, which Alexander and I but not Walen believe raise difficult issues, to Walen, *a* crime ends at  $t_1$ . For this reason, Walen seems ambivalent at best about the availability of a renunciation defense. The crime is done.

What becomes critically important to see is that on Walen's view, the measure of proportionate punishment must then turn on the crime that ends at  $t_1$ . Thus, Carl should still be punished for threatening to blow up the American embassy if the United States invades Yemen even if he (1) ultimately acts under circumstances that he knows are justified, (2) ultimately changes his mind three minutes later, or (3) continues to deliberate about this plot for years before the plot's culmination in the killing of millions of innocent people. For Walen, later acts should neither increase nor decrease the desert attached to the threat at  $t_1$ . I turn to the measure of desert below.

#### IV. CHOOSING BETWEEN REGIMES

One may think that my view of liability to preventive interference goes a long way towards criminalization. I am willing to concede the state has a legitimate interest in interfering with the autonomy of the individual. I am willing to concede the individual has relinquished this autonomy through voluntary acts. I am relying on culpability, an ingredient that is central to the criminal law. If this looks like a crime, why not call it a crime? Even if one is persuaded by Walen's claim that we *can* retributively justify punishing threats, I maintain there are persuasive reasons to opt for a preventive regime. To me, this question truly turns on proportionality concerns and how the state's interest is related to its liberty-depriving response. However, before I turn to this central claim, I wish to clear out arguments for criminalization that I do not believe ultimately support preferring punishment to prevention and to respond to the concern that my own preventive regime falls prey to the same difficulties I have raised about punishment of inchoate offenses.

##### *A. Is Punishment More Protective or Respectful?*

In his work, Slobogin argues that when punishment is applicable, we should opt first for punishment.<sup>67</sup> Indeed, he views this as a "right" to be

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67. See SLOBOGIN, *supra* note 45, at 124–29.

punished.<sup>68</sup> Slobogin claims that to respect the autonomy of an actor, we must employ the criminal law when it is available, rather than branding an individual as dangerous in a way that is dehumanizing.<sup>69</sup> Although this requirement may be justified with respect to Slobogin's view of preventive detention, which focuses on the undeterrability of the actor, it has little purchase against my view, which is autonomy respecting.

The question must be reframed as whether there is a requirement to punish when the alternative view also respects autonomy. I do not see why. Consider questions that prosecutors must ask when they decide whether to prosecute a case. Among these questions is whether a civil remedy is available. Prosecutors are told that a case that lies at the border of contract law and criminal fraud should be dealt with as a civil matter if possible. Now, we might ask where that *should* comes from. Part of the rationale is expense—criminal cases are more costly. Part of the concern is proportionality—it is often the case that the hard treatment and stigma that come with a criminal conviction are, as a practical matter, too severe relative to the culpability involved. Thus, if a case lies at the border, a civil remedy prevents the offender from being dealt with too harshly. Whatever the reasons, it is simply not the case that there is a *right* to be punished that we enforce in our current practice, nor that such a claim has any normative pull when analyzed against a background of civil remedies and sanctions.

Of course, the regime I propose is more criminal-like than a lawsuit by a government agency or private actor. There is the involvement of the state. There may be a significant investment of resources. And many of the benefits that accrue from prosecutorial declinations will not obtain in these circumstances. The point for now is that if my regime is autonomy respecting, there is no reason to opt for punishment first. And, indeed, we have never required the state to punish when other autonomy-respecting civil remedies are also available.

Another reason to endorse punishment over prevention is because the criminal law has well-worked-out procedural safeguards. These rights include the right against self-incrimination, the requirement of proof beyond a reasonable doubt, the right to confront witnesses, and the like. That is, before the state can lock you up, it must produce persuasive proof against you without your assistance. Although some of these requirements are questioned even within the context of the criminal law itself, there is no reason in principle why they could not also apply to preventive interference. That is, if we need these procedural safeguards, then so be it. We should have them.

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68. *Id.* at 125.

69. *See id.*

Along with procedural concerns, there are more general “legality” concerns that might accompany choosing a civil regime. Within this broad concept, we might include such concerns as wanting to constrain the state with an act requirement, notice and open publication, a ban on ex post facto laws and bills of attainder, and statutory interpretation in compliance with the rule of lenity. Here, too, there is no reason in principle why these requirements could not be applied. Moreover, I think that these sorts of rules should—indeed, must—be applied because of the way that my proposed system intersects with the criminal law. That is, what is prohibited under my system is an intention to commit a crime. Therefore, my regime should only pick out those individuals that currently intend to do something against the law.

In addition, the system I am proposing would be subject to its own constraints. In his careful study comparing prevention with punishment, Andrew Ashworth reaches five tentative conclusions, including that

[w]here a preventive measure does not amount to punishment but still involves a significant loss of rights, especially where there is a deprivation of liberty, it can only be justified if and insofar as the basis for prediction is sound and the principles of necessity, subsidiarity and proportionality are satisfied.<sup>70</sup>

I concur with these restrictions. That is, we should only preventively intervene if such intervention is necessary to stop the actor. For instance, if it turns out that the threat of criminal sanction is itself sufficient to deter most car thieves, we should not use preventive interference mechanisms because most prospective criminals will change their minds before they complete the offense. Additionally, the requirement of subsidiarity requires that the government use the least intrusive means possible. So, if electronic monitoring and curfews are successful in preventing certain violent offenses, the state could not lock up the individual to prevent those crimes. Finally, proportionality requires that we not blow a crime out of proportion. There is a puzzle here that we see in self-defense as well. Are we allowed to use deadly force to stop an aggressor who threatens nondeadly force if that is the only way to stop the attacker? May we lock up an individual permanently if that is the only way to stop the actor from committing a crime for which the penalty is, say, a maximum of seven years’ imprisonment? Actors arguably remain liable for as long as they harbor the intention, and this certainly can exceed how much

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70. Andrew Ashworth, *Punishment and Prevention: Some Distinctions, Relationships and Implications* (forthcoming) (manuscript at 18).

punishment they might deserve. My (admittedly tentative) conclusion is that the state should nevertheless be restricted to the maximum amount of incarceration designated for the offense. If nothing else, such an upper limit would restrict state abuse. Certainly, in cases of terrorism and sexual predators, there will still be cases where long-term prevention will be justifiable.

*B. Does Prevention Present the Same Puzzles as  
Inchoate Criminality?*

Another question is why my preventive scheme is not hoisted upon my own “antipunishment for inchoate crimes” petard. That is, why do the same concerns about punishing fantasies, conditionality, renunciation, and duration not counsel as much against prevention as they do punishment? In my view, these concerns actually support a prevention regime rather than undermine it.

Let us consider renunciation and duration first. The state has reason to prevent an individual from acting for as long as, but not one minute longer than, the period in which the individual holds a criminal intention. Now, it is certainly the case that individuals who fluctuate in their intentions may ultimately be held for longer or shorter than is necessary simply because we lack the epistemic and practical resources to determine the exact moment when an intention is renounced or reaffirmed. So, someone held might be subject to six months’ detention, although that person abandoned the intention after four months. Still, as a normative matter, fluctuations do directly impact liability.

Now, consider conditionality. If an individual intends something that is not currently a crime—driving fifty miles per hour home—though the intention will hold in the face of inculpatory events—a horrible rainstorm as she drives by a school—the individual has not currently chosen to risk harming others. She may therefore be dangerous, or what Alexander and I call an “anticipated culpable aggressor,” but she is not culpable now. An individual who has a seemingly culpable intention—to harm Joe—that is actually externally conditional—unless Joe cries—and that she will abandon should not be punished as if she will follow through. But for the moment, she does so intend to harm Joe, and the state is therefore rightly concerned with her. The state thus has reason to get her to change her mind, and indeed, if it succeeds, then the individual’s intention was also externally conditional on whatever it was that the state did!

Prevention and punishment differ on who should bear the risk of error as to whether the actor will commit the offense. Consider Albert, a culpable aggressor, who points a gun at Bridget and says, “I am going to kill you.” Bridget cannot justify killing Albert *because Albert deserves*

*it.* After all, Albert may change his mind in just one minute, and if he did so before Bridget fired the gun, she certainly could not claim that shooting him afterwards was punishment—nor could the state later execute him. On the other hand, if Bridget shoots him before he changes his mind, she can rightly claim, “Look, it was by your voluntary act that I am in this position. Sure, you may change your mind, but I cannot count on that. You aim to harm me, and in so doing, you forfeit your right against my stopping you until the moment when you abandon that intention. I am permitted to take you at your word.” That is, in terms of overinclusion, the risk of error is properly borne by the culpable aggressor because in instances of prediction, there is always a risk of error. Between a culpable aggressor and an innocent victim, it is fair to place the risk of error on the culpable actor who initiated the situation in the first place.

Finally, consider the concern about distinguishing intentions from fantasies. The act requirement I propose helps alleviate this concern because the difference between wanting one’s mother-in-law dead and buying a gun is a rather clear line. Although, as Walen suggests, some individuals act out their fantasies,<sup>71</sup> I am somewhat comfortable claiming that individuals who have this much control over their fantasies can be called to answer for them and to abandon them in the face of state intervention. You get to have your dreams. But you are not permitted to buy the gun and tell us you are only playing.

### *C. Why Proportionality Favors Prevention*

The central reason to opt for a preventive regime is because what we really want is prevention. To put the point another way, if we opt for punishment and stay true to retributive principles that both Walen and I share, we simply cannot achieve enough within the realm of the criminal law. That is, the deserved punishment will be exhausted before our preventive desires are.

How much punishment does a threat deserve? Imagine that David forms the intention to kill Barbara tomorrow; he tells his friend Joe; and Joe tells the police. How much punishment should David receive if all he has done is formed the intention? Ashworth and Zedner argue that “the sentence for a preparatory offence ought to be determined by reference

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71. See Walen, *supra* note 49, at 837.

to the crime intended by the offender, but then significantly discounted by reference to the fact that only an early stage of preparation has been reached.”<sup>72</sup>

The state’s interest in the defendant in the early stages is not retribution for wicked wrongdoers. Indeed, in terms of investing resources, those who walk around with culpable intentions seem to be of little retributive concern to the state in comparison with other criminals and in comparison with nonretributive ways one could spend the government’s money. Recall the crime to Walen is that of “flouting the law.” The reason why the state is interested in the defendants early on is because of prevention. The reason the state may want to intervene now is to prevent the crime later. The state’s primary interest here is not the evil that has been done but the evil that we predict the defendant might do.

Compare two actors, Ira and Paul. Ira formed the intention to kill his victim. Then he changed his mind. Paul formed the intention to kill his victim, and the police stopped him. He still has the intention. In a world of limited resources, the state should care about Paul more than Ira. Ira formed a culpable intention, and that was it. Now, we do punish people for petty offenses, including stealing candy bars, and maybe the state ought to invest as many resources in the Iras of the world as in the candy-bar bandits. But it seems clear that the state ought to be more concerned with Paul *not because of what he has done* but *because of what he might do*. Whatever punishment it is that Ira deserves for flouting the law strikes me as insubstantial for precisely the reason we should worry about punishing inchoate activity. Ira has the ability to change his mind and simply cause and risk no harm to anyone whatsoever. And Ira is aware of this revocability when he announces his first intention. In contrast, the reason why the state should continue to care about Paul is precisely because he has not revoked his intention, and that makes him dangerous to us.

Indeed, a particularly telling example of just this phenomenon is Douglas Husak’s contribution to this issue, which takes exactly the opposite approach, seeking to shift prevention into the criminal law. Husak seeks to advance desert conditions that render someone criminally liable, and likely, intending to commit a crime and taking an act in furtherance would meet Husak’s test. But then Husak must grapple with proportionality. Here, tellingly, he assimilates the dangerous characteristic over which the actor has control, such as the possession of an intention to the possession of an illegal weapon, and Husak states that people “remain deserving of punishment as long as they possess

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72. Ashworth & Zedner, *supra* note 7, at 286; *see also* Ohana, *supra* note 40, at 25.

these properties. . . . The desert base for their punishment is continuous; it survives as long as they exhibit the characteristics that predict future harm.”<sup>73</sup>

However, the problem is that most possession offenses do not work quite the way Husak wants them to. Assume that Steve steals a Picasso from Jeremy and has it for five months. Now, for the duration of the time that he has this Picasso he is harming Jeremy, and Steve deserves a certain quantum of punishment—an amount that arguably increases over time. Indeed, even if Steve ultimately returns the Picasso—Steve was only using it to impress a girl—he still deserves punishment for the five months of possession, and this punishment can and will be imposed *after* the crime is completed. We certainly would not entertain Steve’s claim, “But I don’t have it anymore,” as a reason to release him from jail.

Our preventive desires do not look quite like this. If we want to detain someone for *just as long as that person harbors a criminal intention*, then what we want is detention that is directly responsive to the current existence of a threat, rather than a response that punishes *ex post* for having been a threat for a certain duration in the past. Prevention, not punishment, is the regime that has the desired sensitivity to the actor’s current dangerousness.

## V. CONCLUSION

To be fair, one might say that Walen has a square peg he is trying to fit into a round hole, but the hole I offer for the square peg is actually triangular. I wish to take a culpable action, subject it to hard treatment and stigma, make the intervention last as long as prevention requires—subject perhaps to some upper limits—and call it prevention. Walen wishes to take a culpable action, intentionally subject it to hard treatment and stigma, and claim that it deserves lengthy detention—to meet preventive ends—and call it punishment. To my mind, the label truly should turn on what the state is primarily trying to do—to punish with stigma and harsh treatment, or to detain to prevent harm.

Problems of criminalization and problems of preventive detention both need serious scrutiny and require sustained theoretical treatments. Both practices are currently overinclusive and undertheorized. So, whichever side theorists come out on, it is time for them to get to work.

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73. Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173, 1199 (2011).

