INCAPACITATING TERRORISM THROUGH LEGAL FIGHT—THE NEED TO REDEFINE INCHOATE OFFENSES UNDER THE LIBERAL CONCEPT OF CRIMINAL LAW

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I. INTRODUCTION

After weeks of analyzing complicated intelligence information and intensive investigations, the national security authorities discovered the name of the terrorist and his address. He is a twenty-three-year old American college student majoring in chemistry, living alone in a modest rented apartment. According to the intelligence information, he planned to construct a simple bomb, board an airplane, and detonate the bomb en route,

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killing all passengers, most of them American citizens. When the authorities broke into his apartment, they found him sitting at a table with chemistry books, paper, and pencil, trying to figure out a chemical formula. He did not finish the calculation. In fact, he had barely begun. At that time he had not yet ordered any materials for the bomb, had not chosen a particular airplane or flight, or a specific date for his suicide mission.

He was arrested, and during the interrogations he confessed that he had made the decision to become a suicide bomber on an American airplane. But when he was arrested there was no bomb, no materials to construct a bomb, and he confessed that he had not ordered any materials, had not chosen a particular airplane or flight, or a specific date for the attack.

The legal question in criminal law in this case is not simple: Has he committed any offense? It is obvious that he is extremely dangerous to the public, but can we indict him on the basis of his thoughts? These thoughts are dangerous, but he was far from constructing a bomb or detonating it. Should the authorities wait until thoughts become actions, endangering the unwitting public?

This is a common dilemma most western democracies face in their legal fight against terrorism. On one hand, if the state does not exercise its police powers against a dangerous person waiting for an opportunity to execute his crimes, the public is in grave danger, and it is only a matter of time before the danger materializes into a terrorist attack. On the other hand, on what legal grounds could such a person be convicted? Punishing thoughts is a slippery slope that does not necessarily stop at terrorist attacks. The liberal concept of criminal law is opposed to prohibiting thoughts. Clearly, a proper balance is required.[1] If the infrastructure of terrorism cannot be destroyed at its foundation, the danger is far greater than the danger of not preventing a single act of terrorism because that infrastructure remains at large to plan many more attacks.

The accumulated experience in this regard indicates that when the necessary conditions for executing a terrorist attack have been met, the attack occurs within a very short time. Waiting for these conditions to ripen before arresting the perpetrators places society in jeopardy. But arresting people merely because they have criminal thoughts is not less dangerous in social terms.

The present Article proposes that the proper solution lies in the redefinition of inchoate offenses, so that they become legally consistent with the

1. *See e.g.*, Sandra Day O'Connor, *Balancing Security, Democracy, and Human Rights in an Age of Terrorism*, 47 COLUM. J. TRANSNAT'L L. 6 (2009); David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 GOLDEN GATE U. L. REV. 195 (2008); EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM (2006); Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL STUD. 189 (2009); Ed Bates, *Anti-Terrorism Control Orders: Liberty and Security Still in the Balance*, 29 LEGAL STUD. 99 (2009); Emanuel Gross, *How to Justify an Emergency Regime and Preserve Civil Liberties in Times of Terrorism*, 5 S.C. J. INT'L L. & BUS. 1 (2008); Edmond P. Blanchard, *The Role of the Federal Court in National Security Issues: Balancing the Charter against Anti-Terrorism Measures*, 18 CONST. F. 37 (2009).

values of the modern democratic society and are capable of meeting its needs. The solution is not necessarily exclusive to the legal fight against terrorism because criminal law theory is applicable to all offenses, including terrorist attacks but not limited to them. As a result, a redefinition of inchoate offenses will affect all offenses. The Article begins by discussing the existing legal means available for factual incapacitation of terrorism.[2] On that foundation, it examines the role of inchoate offenses in criminal law in the context of counter-terrorism and proposes a redefinition of inchoate offenses as they apply to terrorism.[3] Finally, it addresses the effect of such redefinition on offenses other than terrorist attacks.[4]

II. INCAPACITATION OF TERRORISM

The main objective of state security authorities dealing with terrorism is to incapacitate it. Convicting any given terrorist for acts he has already carried out has a social benefit, but the social benefit would have been far greater had the terrorist attack been prevented. When terrorism is incapacitated, no innocent people become victims. Therefore, this is one of the most important missions of modern national security authorities. But the question remains: How can terrorism be incapacitated before innocent people become victims?

A. Destroying the Infrastructure of Terrorism as the Main Target of Incapacitation Efforts

Analysis of terrorist attacks in the western world since the second half of the twentieth century has revealed that the terrorist attacks themselves are only the tip of the iceberg of terrorist activity.[5] The attacks are the last link in the chain of terrorism. The work plan of terrorism embraces the following activities: draft potential combatants who will become terrorists; create effective propaganda against the social or political targets; train the terrorists; obtain financing for the missions; purchase the necessary materials and devices; collect and analyze intelligence information; plan detailed operative plans for destroying the target; etc.[6] The more sophisticated the terrorist organization's work plan is, the more preparations are required.[7]

2. The incapacitation of terrorism is discussed hereinafter at Part II.

3. Inchoate offenses as an instrument of criminal Law in incapacitating terrorism are discussed hereinafter at Part III.

4. The side effect on non-terrorist offenses is discussed hereinafter at Part IV.

5. *See* Major David E. Smith, *The Training of Terrorist Organizations*, GLOBAL SECURITY.ORG (1995), http:// www.globalsecurity.org/ military/ library/ report/ 1995/ SDE.htm.

6. *See* U.S. ARMY TRAINING AND DOCTRINE COMMAND, A MILITARY GUIDE TO TERRORISM IN THE TWENTY-FIRST CENTURY (2007), *available at* http:// www.au.af.mil/ au/ awc/ awcgate/ army/ guidterr/.

7. RUSSELL HOWARD, REID SAWYER & NATASHA BAJEMA, TERRORISM AND COUNTERTERRORISM: UNDERSTANDING THE NEW SECURITY ENVIRONMENT, READINGS AND INTERPRETATIONS (3d ed. 2008); BRIGITTE L. NACOS, TERRORISM AND COUNTERTERRORISM: UNDERSTANDING THREATS AND RESPONSES IN THE POST 9/11 WORLD (3d ed. 2009); SEUMAS MILLER,

The investigations of the terrorist attacks of September 11, 2001, on the World Trade Center, the Pentagon, and the Capitol found that specific preparations for their execution began in 1998 and took more than three years.[8] The investigations of the terrorist attack on four train stations in Madrid on March 11, 2004, found that the preparations took more than two years.[9] The investigations of the terrorist attack in the subway in London on July 7, 2005, found that the preparations took more than two years. The examples are many.[10]

When a terrorist organization is established, it does not focus on a single terrorist attack but endeavors to establish an infrastructure that supports a series of attacks in the future.[11] If national security authorities succeed in thwarting a given attack at a specific time and place but fail to destroy the terrorist infrastructure on which that attack is based, the organization is likely to use that infrastructure to attempt additional attacks. If the objective of national security authorities is to prevent terrorism, they must focus on destroying the terrorist infrastructure while it is in the making, that is, during the early preparatory stages of execution of most terrorist attacks.

Although various terrorist organizations differ in the ways in which they carry out terrorist attacks, some basic actions are part of the infrastructure of all terrorist organizations. All terrorist organizations act through people who carry out the attacks.[12] These may function as suicide bombers, snipers, bombers, suicide pilots, etc., and every organization must begin by drafting them, an activity that requires the involvement of drafters. The drafters must be well trained in psychology in order to motivate the draftees to become part of the organization.[13]

Draftees are trained in the execution of terrorist attacks, and training requires a plan, a camp, and equipment.[14] Financing is needed to meet these requirements. The financial support of a terrorist organization for the fund-

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TERRORISM AND COUNTER-TERRORISM: ETHICS AND LIBERAL DEMOCRACY (Michael Boylan ed. 2008); M. R. HABERFELD, JOSEPH F. KING & CHARLES ANDREW LIEBERMAN, TERRORISM WITHIN COMPARATIVE INTERNATIONAL CONTEXT: THE COUNTER-TERRORISM RESPONSE AND PREPAREDNESS (2009).

8. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 150 (2004), *available at* http:// govinfo.library.unt.edu/ 911/ report/ 911report.pdf.

9. Javier Jordán & Robert Wesley, *The Madrid Attacks: Results of Investigations Two Years Later*, The Jamestown Foundation (March 9, 2006), *available at* http:// www.jamestown.org/ programs/ gta/ single/ ?tx_ttnews% 5Btt_news% 5D=696& tx_ttnews% 5BbackPid% 5D=181& no_ cache=1.

10. *See, e.g.*, BRUCE HOFFMAN, INSIDE TERRORISM (2006); JONATHAN R. WHITE, TERRORISM AND HOMELAND SECURITY: AN INTRODUCTION (2008); Yoram Dinstein, *Terrorism and Afghanistan*, 85 INT'L L. STUDS. SERIES U.S. NAVAL WAR C. 43 (2009).

11. *See* U.S. ARMY TRAINING AND DOCTRINE COMMAND, *supra* note 6.

12. Anthony Stahelski, *Terrorists Are Made, Not Born: Creating Terrorists Using Social Psychological Conditioning*, J. HOMELAND SECURITY (March 2004), *available at* http:// www.homelandsecurity.org/ journal/ articles/ stahelski.html.

13. Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217 (2002); Fletcher N. Baldwin, Jr., *Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT'L L. 3 (2003); Cara Muroff, Note, *Terrorists and Tennis Courts: How Legal Interpretations of the Freedom of Information Act and New Laws Enacted to Prevent Terrorist Attacks Will Share the Public's Ability to Access Critical Infrastructure Information*, 16 U. FLA. J. L. & PUB. POL'Y 149 (2005).

14. *See* Smith, *supra* note 5.

ing of its activities may come from internal or external sources.[15] Fundraising activity is an intrinsic part of the infrastructure of terrorism. When the organization obtains funds, it needs someone to manage its finances, and therefore the infrastructure also requires professional accountants.[16] Managing the "legal" activity of a terrorist organization vis-à-vis various officials (banks, local authorities, suppliers, etc.) means that the infrastructure needs attorneys as well.[17]

The construction of explosive devices requires the professional knowledge of engineers, chemists, and physicists. Sometimes, additional professional knowledge and experience are needed in fields such as aviation, if the terrorist attack is to be committed by suicide pilots. The terrorist infrastructure is therefore comprised of these and many other functions and activities, and its role is to enable terrorist attacks and to handle all their logistical and other aspects.[18] The terrorist infrastructure is the tree that produces the fruits of terrorist attacks. Destruction of the terrorist infrastructure is tantamount to the destruction of all terrorist attacks deployed by it or that would have been deployed by it.

If the terrorist infrastructure is well established, it is designed to create more than one attack or to create an alternate attack (a "Plan B") in case the primary attack was thwarted by the national security authorities.[19] The infrastructure of terrorism is established and maintained to enable various assault capabilities against the chosen targets. Therefore, the thwarting of a single terrorist attack produced by a terrorist infrastructure is only a temporary measure because an alternate or new attack is imminent depending on the ingenuity of the infrastructure and the availability of resources.[20]

Current intelligence capabilities make it possible to trace terrorist infrastructures from the time of their establishment. It is not a simple task, but it is possible. Consequently, most of the efforts of national security intelligence authorities concentrate on discovering the terrorist infrastructure.[21] Although in emergency situations, owing to specific intelligence about an imminent attack, the main efforts of the authorities are redirected to thwart

15. *See* Herbert Morais, *Behind the Lines in the War on Terrorist Funding*, 20 INT'L FIN. L. REV. 34, 34-39 (Dec. 2001).

16. Richard Barrett, *Time to Reexamine Regulation Designed to Counter the Financing of Terrorism*, 41 CASE W. RES. J. INT'L L. 7 (2009); Sireesha Chenumolu, Note, *Revamping International Securities Laws to Break the Financial Infrastructure of Global Terrorism*, 31 GA. J. INT'L & COMP. L. 385 (2003).

17. Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939 (2006).

18. *See* Eric Herren, *Tools for Countering Future Terrorism*, INT'L. POL'Y INST. FOR COUNTER-TERRORISM (Aug. 15, 2005), *available at* http:// www.ict.org.il/ Articles/ tabid/ 66/ Articlsid/ 196/ Default.aspx.

19. *Id.*

20. JAMES S. CORUM, FIGHTING THE WAR ON TERROR: A COUNTERINSURGENCY STRATEGY (2007).

21. *See* Dennis C. Blair, *Annual Threat Assessment of the U.S. Intelligence Community for the Senate Select Committee on Intelligence* (2010), *available at* http:// www.dni.gov/ testimonies/ 20100202_testimony.pdf.

the attack, in general the main mission of national security intelligence authorities is to trace the terrorist infrastructure.[22]

This choice of national security authorities in most of the western world is the result of a preference for incapacitation over retribution, rehabilitation, and deterrence of offenders in the case of terrorism. When balancing the damage caused by a terrorist attack with the general considerations of criminal law, incapacitation weighs far more than any other consideration.[23] When dozens, hundreds, or perhaps thousands of innocent civilians are liable to lose their lives in a terrorist attack, the rehabilitation of the offenders is a negligible consideration. When a terrorist attack is fueled by propaganda so persuasive that members are willing to commit suicide bombings, no punishment can deter them. And when many innocent civilians lose their lives in a terrorist attack, no punishment can give an offender his "just desert" according to the terminology of retribution in criminal law.[24]

For all the reasons listed above, incapacitation becomes the major consideration of criminal law in the war against terrorism. Preventing terrorist attacks is the highest priority of the national security authorities because the only effective way to prevent terrorism is by incapacitating it. The incapacitation of terrorism is possible only when the efforts of incapacitation are concentrated on destroying the terrorist infrastructure. Therefore, destroying the infrastructure of terrorism is the main goal of the incapacitation efforts against terrorism.

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22. *See* FORT DETRICK ANTI-TERRORISM/FORCE PROTECTION OFFICE, http:// www.detrick.army.mil/ dptms/ atfp.cfm.

23. The general incapacitation considerations are designed to create a physical prevention from being able to commit the offense. For the general incapacitation considerations, see Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); Andrew von Hirsch, *Incapacitation*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 75, 75-82 (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., 3d ed. 2009); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 176-78 (1985); MARK H. MOORE, SUSAN R. ESTRICH, DANIEL MCGILLIS & WILLIAM SPELLMAN, DEALING WITH DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE (1985); AE Bottoms & Roger Brownsword, *Incapacitation and "Vivid Danger," in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 83 (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., 3d ed. 2009); Andrew von Hirsch & Andrew Ashworth, *Extending Sentences for Dangerousness: Reflections on the Bottoms-Brownsword Model*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 85 (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., 3d ed. 2009); Andrew von Hirsch & Lila Kazemian, *Predictive Sentencing and Selective Incapacitation*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 95 (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., 3d ed. 2009); Gabriel Hallevy, *Therapeutic Victim-Offender Mediation within the Criminal Justice Process - Sharpening the Evaluation of Personal Potential for Rehabilitation while Righting Wrongs under the ADR Philosophy*, 16 HARV. NEGOT. L. REV. 65 (2011); Lila Kazemian & David P. Farrington, *Exploring Residual Career Length and Residual Number of Offenses for Two Generations of Repeat Offenders*, 43 J. RES. CRIME & DELINQ. 89 (2006).

24. For the "just desert" concept in criminal law, see Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843 (2002); Douglas Husak, *Holistic Retribution*, 88 CALIF. L. REV. 991 (2000); Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959 (2000); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001).

B. The Legal Problem and Existing Local Solutions

If the incapacitation of terrorism is possible only through the destruction of the terrorist infrastructure, most of the intelligence efforts should be focused on identifying that infrastructure. In a liberal democratic regime, intelligence efforts are aimed at collecting evidence to indict offenders and impose criminal liability on them. But in the case of terrorism, preventing further attacks is no less important. If people involved in the establishment of terrorist infrastructure are released freely, nothing prevents them from establishing a new terrorist infrastructure. To prevent further terrorism, it is imperative to be able to impose criminal law based on evidence collected by national security intelligence authorities.

Most activities of the terrorist infrastructure, however, are categorized as preparatory.[25] If a terrorist blows up a train full of innocent passengers, legally, at the very least, the terrorist can be charged with the individual murder of each passenger. But most of the actions performed by the terrorist infrastructure for the purpose of enabling the terrorist to carry out the attack on the train are considered preparatory and cannot even be classified as attempted murder.[26] In western legal systems, the purchasing of a train schedule and surveillance conducted to find out when trains are most crowded are not considered attempted murder of passengers.[27] But these are part of the activities of the terrorist infrastructure that are essential to the success of the terrorist attack, and are categorized as preparatory activities.

Categorization of the activities of the terrorist infrastructure as "preparatory" is of great significance. Most legal systems recognize three stages in the commission of any offense: (1) preparation to commit the offense; (2) attempt to commit the offense; and (3) the perpetration of the offense.[28] Preparation is not considered a punishable stage, whereas the attempt and perpetration are.[29] Various legal systems differ in their sentencing of an attempted as opposed to perpetrated crime, but all modern legal systems consider the attempt as a punishable stage for which criminal liability is imposed on the offender.[30] Defendants indicted in court and charged with an attempted crime often use the defense argument that their actions represented merely preparation, which did not mature to the point of an actual attempt. If the court accepts the argument, the defendant is exonerated and released immediately.[31]

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25. *See* Brent L. Smith, Jackson Cothren, Paxton Roberts, & Kelly R. Damphouse, *Geospatial Analysis of Terrorist Activities: The Identification of Spatial and Temporal Patterns of Preparatory Behavior of International and Environmental Terrorists* (2007), http:// cast.uark.edu/ assets/ files/ PDF/ ATSExecutive%20Summary.pdf.

26. *Id.*

27. *Id.*

28. GABRIEL HALLEVY, A MODERN TREATISE ON THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW 108 (2010).

29. *Id.* at 109.

30. *Id.* at 110.

31. People v. Hawkins, 621, 723 N.E.2d 1222 (Ill. 2000); R v. Boyle, (1987) 84 Crim. App. 270

Traditionally, preparation has not been considered a punishable offense as it lacks the minimum conduct deemed to be a punishable activity because of the maxim common in liberal criminal law that thoughts alone cannot constitute an offense, and that criminal liability cannot be imposed without a minimal act (*nullum crimen sine actu*).[32] Indeed, preparatory activities are considered tantamount to mere thoughts, even if they were accompanied by various types of activities.[33] Purchasing a train schedule is an activity that does not consist of thoughts alone, but in most legal systems, relative to the perpetration of murder by bombing the train it is deemed preparation.

In most legal systems, delineation of the borders between "preparation" and "attempt" in current criminal law is vague and uncertain. It is commonly stated that more than one act of preparation must occur,[34] but *what* exactly, varies from case to case. But when a specific conduct has been categorized as preparatory and not as an attempt, it is commonly stated that no criminal liability is imposed on the offender.[35] When it comes to the legal fight against the terrorist infrastructure, however, it is vital that such activity not be categorized as preparatory.

If involvement in the creation and establishment of a terrorist infrastructure is categorized as preparatory activity, criminal law is unable to incapacitate terrorism by destroying the terrorist infrastructure. There is no justification for infringing upon the rights of a person who did not commit any offense. If a person's involvement is limited to the terrorist infrastructure, and such involvement is considered preparation, which is not punishable, the person is deemed innocent and infringement of his rights is unlawful. After a brief investigation by the national security authorities, this person would be released and able to resume immediately preparations for the next terrorist attack.

When all preparations have been completed and the terrorist infrastructure has been fully established, the impending terrorist attack is almost inevitable and will occur within a short time. The national security authorities cannot wait until that time because innocent lives are at stake. But if they act too early, when the terrorist infrastructure is still incomplete, all suspects involved are likely to be released because no specific offense has been committed.[36]

(U.K.); R v. Jones, (1990) 91 Crim. App. 351 (U.K.); R v. Gullefer, (1990) 91 Crim. App. 356 (U.K.); R v. Geddes, 1996 W.L. 1090529 (1996) (A.C.) (U.K.); R v. Litholetovs, 2002 W.L. 31422179 (A.C.) (U.K.); R v. Bowles, 2004 W.L. 1372513 (2004) (A.C.) (U.K.).

32. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 576-86 (2d ed. 2005); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 621-32 (2d ed. 1961); Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 843-58 (1928); Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308 (1937); Donald Stuart, *The Actus Reus in Attempts*, [1970] CRIM. L. REV. 505 (1970); Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201 (1980).

33. Hallevy, *supra* note 28.

34. People v. Gallardo, 257 P.2d 29 (Cal. 1953); State v. Bereman, 276 P.2d 364 (Cal. 1954).

35. Hallevy, *supra* note 28 at 110.

36. *See, e.g.*, Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1 (2006); Stuart Macdonald, *The Unbalanced Imagery of Anti-Terrorism Policy*, 18

There are two possible legal solutions to this problem. One is to redefine the legal meaning of an "attempted offense" and derivatively, to redefine all other inchoate offenses. This is a doctrinal change of the fundamental principles of criminal law. The other is to create specific laws prohibiting certain activities pertaining to terrorist infrastructure. Considering the complexities of the problem, western democracies that are fighting terrorism have chosen the second legal solution.[37] Intensive legislative efforts have produced dozens of new statutes prohibiting certain activities frequently performed by the terrorist infrastructure.[38] These statutes prohibit specific activities, including the funding of terrorist organizations, organizing terrorist activities, consulting to terrorist organizations, money laundering in the context of terrorism, quasi-military training, dissemination of terrorist propaganda, and many more.[39]

But choosing the second type of legal solution is problematic for two main reasons. Firstly, specific statutes are designed to prohibit specific types of conduct and not more. Clearly, any statute cannot cover all types of human behavior that relate to terrorism. No legal provision is intended to predict all types of human behavior. Thus, a legal provision that prohibits funding of terrorist activities does not include a prohibition against money laundering, which is a separate crime, but which eventually funds terrorist activities. In any case, a given activity may be designed and carried out,

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CORNELL J.L. & PUB. POL'Y 519 (2009); Hon. Robert D. Sack, *Judicial Skepticism and the Threat of Terrorism*, 31 W. NEW ENG. L. REV. 1 (2009). Nicholas N. Kittrie, *Patriots and Terrorists: Reconciling Human Rights with World Order*, 13 CASE W. RES. J. INT'L L. 291 (1981).

37. *See* McCormack, *supra* note 36.

38. *See*, for example, in the United States: 6 U.S.C. §§ 101, 121, 441-444, 482, 1114 (2006); 8 U.S.C. §§ 1101, 1182, 1184, 1189, 1227, 1231, 1252, 1255, 1258, 1326 (2006); 10 U.S.C. § 2302 (2006); 15 U.S.C. § 2216 (2006); 18 U.S.C. §§ 175, 758, 1965, 2331, 2333, 2337 (2006); 22 U.S.C. §§ 287, 2151, 5201-5203 (2006); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001; in Britain: Counter-Terrorism Act, 2008, c.28; Terrorism (Northern Ireland) Act, 2006, c.4; Terrorism Act, 2006, c.11; Prevention of Terrorism Act, 2005, c.2; Anti-Terrorism, Crime and Security Act, 2001, c.24; Terrorism Act, 2000, c.11; Criminal Justice (Terrorism and Conspiracy) Act, 1998, c.40; Prevention of Terrorism (Additional Powers) Act, 1996, c.7; Suppression of Terrorism Act, 1978, c.26; in Canada: Criminal Code, c.46, part II.1; Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism, Under the United Nations Act, 2001; in New Zealand: International Terrorism (Emergency Powers) Act, 1987 No. 179; Terrorism Suppression Act, 2002 No. 34; Anti-Money Laundering and Countering Financing of Terrorism Act, 2009 No. 35.

39. *See, e.g.*, Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, 65 MOD. L. REV. 724 (2002); C. H. Powell, *South Africa's Legislation Against Terrorism and Organised Crime*, 2002 SINGAPORE J. LEGAL STUD. 104 (2002); David Bonner, *Managing Terrorism While Respecting Human Rights? European Aspects of the Anti-Terrorism Crime and Security Act 2001*, 8 EUR. PUB. L. 497 (2002); Virginia Helen Henning, Note, *Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights*, 17 AM. U. INT'L L. REV. 1263 (2002); K. Curry Gaskins, Note, *Chiquita Goes Bananas: Counter-Terrorism Legislation Threatens U.S. Multinationals*, 34 N.C.J. INT'L L. & COM. REG. 263 (2009); Ben Middleton, *Section 57 and 58 of the Terrorism Act of 2000: Interpretation Update*, 73 J. CRIM. L. 203 (2009); Christopher J. Newman, *Revocations of Control Orders Under the Prevention of Terrorism Act 2005*, 73 J. CRIM. L. 291 (2008); Seth T. Bridge, *Russia's New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists Beyond the Borders of the Russian Federation*, 3 COLUM. J. E. EUR. L. 1 (2009).

with or without legal counseling, in a way that would not be considered criminal by a specific statute.

The argument goes back to the nineteenth century debate between the Anglo-American and European-Continental legal systems over codification.[40] The legal thought in nineteenth century Europe was that the law is able to predict all types of human behavior by formulating specific legal provisions that together can cover all legal situations in any given area.[41] This legal thought resulted in codification and the emergence of a legal codex in Europe that tended toward uniformity where courts were not allowed to change the legal provisions of the codex by way of interpretation.[42]

Anglo-American legal thought differed, believing that it was impossible to predict *all* types of human behavior and that therefore laws should be drafted in a general way allowing courts to match the legal provision to the facts by way of interpretation.[43] It is not necessary to predict every type of human behavior, only to formulate legal principles and use the binding precedent practice (stare decisis).[44] In the course of the nineteenth century, the European-Continental legal systems realized that no legal provision can truly predict every type of human behavior, and some open terms were added to the codification, such as good faith, reasonableness, etc., enabling the courts to match the legal provision to the facts by way of interpretation.[45]

If this realization was successfully applied to the legal areas of contracts, torts, criminal law, corporations, procedure, and many other legal areas, there is no reason why it cannot be applied to terrorism.

The legal fight against terrorism is a relatively new area of law, and this realization must become an essential element of it, as terrorism grows more and more sophisticated. Even if every type of terrorist behavior were to be defined explicitly at some point in time, it would not necessarily include new types of behavior developed in order to evade the given prohibitory legal provisions. Even if legislation could be enacted with all due speed, and after every terrorist attack a new statute were enacted addressing the aspects of that attack, such statute could not be applied retroactively on that attack, and planners of future terrorist attacks would design new types of attack that evade those statutes.[46]

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40. Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U. L.J. 335 (1953); George M. Hezel, *The Influence of Bentham's Philosophy on the Early Nineteenth Century Codification Movement in the United States*, 22 BUFF. L. REV. 253 (1973); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959).

41. *See* Wagner, *supra* note 40.

42. *Id.*

43. *Id.*

44. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Roscoe Pound, *What of Stare Decisis*, 10 FORDHAM L. REV. 1 (1941).

45. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (1969).

46. U.S. CONST., art. I, § 9; Calder v. Bull, 3 U.S. 386 (1798); People v. Stead, 845 P.2d 1156 (Colo. 1993); Smith v. Doe, 538 U.S. 84 (2003); Seling v. Young, 531 U.S. 250 (2001); Kansas v. Hendricks, 521 U.S. 346 (1997); United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997).

Moreover, the enactment of specific statutes is problematic also because these statutes do not necessarily follow the general principles of criminal law. A statute that prohibits given preparatory activities, while full conduct is still required to impose criminal liability, in fact, does not create any legitimate offense. Such prohibition is meaningless under the general principles of criminal law.[47]

Finally, the question remains: What is the criminal liability of a person who merely attempted to commit a preparatory offense? What conduct requirement must be fulfilled in this case to be deemed an attempt to commit a prohibited preparatory activity? This Article suggests that a better solution is to redefine inchoate offenses under the liberal concept of criminal law.

III. INCHOATE OFFENSES AS AN INSTRUMENT OF CRIMINAL LAW IN INCAPACITATING TERRORISM

A. The Modern Rationale of Inchoate Offenses in Criminal Law—Social Harm versus Social Endangerment

The development of modern inchoate offenses in criminal law began as a social response to the "terrorism" of the sixteenth century, which was manifested mainly by offenses committed against national security, such as high treason.[48] There were no legal problems when these offenses were fully perpetrated. The need for a new legal doctrine appeared when police became more efficient and succeeded in arresting offenders before they fully perpetrated the offense.[49] Then, because no offense had been committed, the defendant could ask: On what charge? At the end of the fifteenth century, the English crown established a new court—the Star Chamber Court (*camera stellata*).[50]

By the sixteenth century, when the efficiency of the police in England had increased to the point that a doctrinal legal change was required, the Star Chamber Court developed the maxim of *voluntas reputabitur pro facto*[51] (the desire comes for the act, and sometimes even will be regarded as the act itself) and formulated a doctrine that criminalized inchoate offenses. Under that doctrine, a strong desire to harm society may fulfill the *actus reus* requirement for the imposition of criminal liability—the desire being

47. *See, e.g.*, Amos N. Guiora, *Legislative and Policy Responses to Terrorism, A Global Perspective*, 7 SAN DIEGO INT'L L. J. 125 (2005).

48. Tom Stenson, *Inchoate Crimes and Criminal Responsibility under International Law*, 5 U. PA. J. INT'L. L. & POL'Y (2007).

49. *Id.*

50. Thomas G. Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 AM. J. LEGAL HIST. 221 (1962); Thomas G. Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL HIST. 1 (1961).

51. HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 337 n.128, 13 (G. E. Woodbine ed., S. E. Thorne trans., 1968); JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 222 (1883).

regarded as the act.[52] This was the legal birth of the modern offenses of attempt, conspiracy, and solicitation that were later termed "inchoate offenses."

Incriminating inchoate offenses differ from other specific offenses that are defined based on the social harm caused by their commission. In general, the more severe the social harm, the more severe the offense is. In most modern societies, murder is more severe a crime than theft because the social harm caused by murder is more severe than that caused by theft. An inchoate offender, however, causes no physical harm to anyone. A person who attempted to murder someone but failed, while the potential victim was not even aware of the attempt, causes no social harm. Under the old doctrine, such a person cannot be indicted for any offense relating to murder because no murder has been committed.[53]

Under the modern doctrine of inchoate offenses the social harm is immaterial.[54] The significant factor in criminalizing inchoate offenses is the danger to society that they pose.[55] The attempt to commit murder causes no harm to society but it endangers it. The person who attempted to commit murder but failed is not less dangerous to society than an actual murderer. In most cases, after a murderer has murdered the victim, no further danger is expected because the act of murder has already been accomplished. By contrast, a person who attempted but failed to murder is likely to attempt it again in order to complete the act. Therefore, an inchoate offender is no less dangerous to society than the offender who succeeded in committing the offense.

Thus, it was the need for a response to the social endangerment caused by a criminal who committed an incomplete offense that has led to the modern doctrine of inchoate offenses. Most legal systems worldwide recognize three main inchoate offenses: attempt, conspiracy, and solicitation, although in some legal systems the list of inchoate offenses is longer.[56] All three original inchoate offenses became part of modern criminal law based on the same rationale, namely that social endangerment must be criminalized in the same way as social harm.[57] The absence of harm in these offenses is counterbalanced by the strong and focused desire of the offender.

The attempted offense was shaped after the abolition of the Star Chamber Court in 1641, when the case law created by it was transferred to the ordinary criminal courts.[58] These courts accepted the maxim of *voluntas reputabitur pro facto* (the will is taken for the act), and "attempt" was rec-

52. HALLEVY, *supra* note 28, at 1, 104.
53. *Id.* at 104.
54. *Id.*
55. *Id.*
56. In Britain, in addition to the attempt, conspiracy, and solicitation, the accessory and abettor are also considered inchoate offenders since 2008 due to Article 44 of the Serious Crime Act. Serious Crime Act 2007, c.27.
57. HALLEVY, *supra* note 28, at 105.
58. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 182 (5th ed. 2001).

ognized as a general legal structure that may be applied to all serious offenses, not only in the area of national security.[59] The principle was accepted by the European-Continental legal systems as well.[60] Solicitation was also accepted pursuant to the same maxim, as a special form of attempt.[61] In time, it became a separate inchoate offense based on the criminal attempt concept and may be applied to any severe offense both in the Anglo-American[62] and the European-Continental legal systems.[63]

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59. STEPHEN, supra note 50, at 223-24; Hall, *supra* note 32, at 565-68; SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 5, 69, 161 (6th ed., 2001); William Hudson, *A Treatise on the Court of Star-Chamber*, *in* FRANCIS HARGRAVE, COLLECTANEA JURIDICA: CONSISTING OF TRACTS RELATIVE TO THE LAW AND CONSTITUTION OF ENGLAND 8 (2d ed. 1792) (1791). Hudson argues,

> Attempts to coin money, to commit burglary, or poison or murder, are in ordinary example; of which the attempt by *Frizier* against *Baptista Basiman*, in 5. *Eliz*. is famous; and that attempt of the two brothers who were whipped and gazed in Fleet-street in 44. *Eliz*. is yet fresh in memory.

Id. at 108, and concludes,

> Infinite more are the causes usually punished in this court, for which the law provideth no remedy in any sort or ordinary course, whereby the necessary use of this court to the state appeareth; and the subjects may as safely repose themselves in the bosoms of those honourable lords, reverend prelates, grave judges, and worthy chancellors, as in the heady current of burgesses and meaner men, who run too often in a stream of passion after their own or some private man's affections, the equality of whose justice let them speak of who have made trial of it, being no subject fit for me to discourse of.

Id. at 112-13. *See also* Le Roy v. Sidley, (1662) 82 Eng. Rep. 1036 (K.B.); Mr. Bacon's Case, (1663) 83 Eng. Rep. 341 (K.B.); R v. Johnson, (1689) 89 Eng. Rep. 753 (K.B.); R v. Cowper, (1701) 87 Eng. Rep. 611 (K.B.); R v. Langley, (1703) 91 Eng. Rep. 590 (K.B.); R v. Pigot, (1706) 90 Eng. Rep. 1317 (K.B.); R v. Sutton, (1736) 95 Eng. Rep. 240 (K.B.); R v. Vaughan, (1769) 98 Eng. Rep. 308 (K.B.); Scofield, (1784) Cald. Mag. Rep. 397, 400; R v. Higgins, (1801) 102 Eng. Rep. 269, 275 (K.B.) ("[A]ll offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable."); R v. Butler, (1834) 172 Eng. Rep. 1280, 1280 ("An attempt to commit a misdemeanour created by statute is a misdemeanour itself.") (footnote omitted); R v. Roderick, (1837) 173 Eng. Rep. 347, 347 ("An attempt to commit a misdemeanour is a misdemeanour, whether the offense is created by statute, or was an offense at common law."); State v. Redmon, 113 S.E. 467 (S.C. 1922); Whitesides v. State, 79 Tenn. 474 (1883); Criminal Attempts Act, 1981, c.47, art. 1(1) (U.K.) ("If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."); R v. Walker, (1989) 90 Crim. App. 226 (A.C.) (U.K.) (interpreting Criminal Attempts Act, 1981, c.47, art. 1(1) (U.K.)); R v. Tosti, [1997] Crim. L.R. 746 (U.K.); R v. M.H., [2004] EWCA Crim. 1468 (U.K.).

60. *See, e.g.*, Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt [BGBl] I 3322, §§ 22-24, 26, 30-31 (F.R.G.); C. PÉN. arts. 121-5, 121-6, 121-7 (Fr.).

61. John W. Curran, *Solicitation: A Substantive Crime*, 17 MINN. L. REV. 499 (1933); James B. Blackburn, *Solicitation to Crimes*, 40 W.VA. L. REV. 135 (1934); Walter Harrison Hitchler, Note, *Solicitations*, 41 DICK. L. REV. 225 (1937); Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571 (1961); R v. Daniell, (1703) 87 Eng. Rep. 856 (K.B.); R v. Collingwood, (1704) 87 Eng. Rep. 1029 (K.B.); R v. Vaughan, (1769) 98 Eng. Rep. 308 (K.B.); R v. Higgins, (1801) 102 Eng. Rep. 269 (K.B.).

62. State v. Lampe, 154 N.W. 737 (Minn. 1915); R v. Gregory, (1867) 1 L.R.C.C.R. 77 (U.K.); United States v. Lyles, 4 D.C. (4 Cranch) 469 (D.C. Cir. 1834); Cox v. People, 82 Ill. 191 (1876); Allen v. State, 605 A.2d 960 (Md. Ct. Spec. App. 1992); Commonwealth v. Barsell, 678 N.E.2d 143 (Mass. 1997); Commonwealth v. Flagg, 135 Mass. 545 (1883); State v. Beckwith, 198 A. 739 (Me. 1938); State v. Hampton, 186 S.E. 251 (N.C. 1936); State v. Avery, 7 Conn. 266 (1828); State v. Foster, 379 A.2d 1219 (Me.1977); State v. Blechman, 50 A.2d 152 (N.J. 1946); Smith v. Commonwealth, 54 Pa. 209 (1867); State v. Sullivan, 84 S.W. 105 (Mo. Ct. App. 1904); Director of Public Prosecutions v. Armstrong, (1999)1999 WL 1019606 (Q.B.); Goldman, [2001] Crim. L.R. 894 (U.K.); Jessica Holroyd, *Incitement—A Tale of Three Agents*, 65 J. CRIM. L. 515 (2001).

Although the roots of conspiracy lie in the thirteenth and fourteenth centuries,[64] the modern concept of criminal conspiracy was formulated in the Star Chamber Court. In 1611, the Court ruled that an offense does not have to be completed in order to impose criminal liability on the conspirators.[65] Sheer agreement between the parties creates the social endangerment and it is therefore sufficient to impose criminal liability. Even if the conspirators were apprehended before being able to complete committing the offense or even before beginning their attempt, the conditions for conspiracy are present as long as they banded together in an agreement to commit the offense.[66] The agreement endangers society even if it is not much more than a preparatory action.[67] Conspiracy was accepted as a general inchoate offense that may be applied to any severe offense, together with attempt and solicitation.

Inchoate offenses are instruments of criminal law that empower state police powers to fulfill their mission of protecting society from danger before it materializes.[68] A police officer does not have to wait until the potential offender shoots a bullet through the potential victim's heart. The officer is authorized to arrest the potential offender before the offense is completed, thereby preventing the crime. Inchoate offenses make it possible to impose criminal liability on the potential offender not merely as a potential offender but as an offender who completed the perpetration of the offense.[69]

In the competition between social harm and social endangerment, social endangerment won.[70] It is not only the murderer who is convicted, but also

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63. *See, e.g.*, Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt [BGBl] I 3322, § 26 (F.R.G.) ("Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat."); C. PÉN. art. 121-7 (Fr.) ("Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre."). For more examples, see the German court decisions in RGST 36, 402; RGST 53, 189; BGHST 6, 359; BGHST 7, 234; BGHST 8, 137; BGHST 34, 63.

64. Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 394-409 (1922); JOHN HAGAN, VICTIMS BEFORE THE LAW: THE ORGANIZATIONAL DOMINATION OF CRIMINAL LAW 8 (1983); 13 Edw. I, c.12 (1285); 33 Edw. I, c.10 (1307); 4 Edw. III, c.11 (1330); Y.B., 24 Edw. III, f.75, pl.99 (1351).

65. Poulterers' Case, (1610) 77 Eng. Rep. 813 (K.B.).

66. Timberley v. Childe, (1660) 82 Eng. Rep. 974 (K.B.); Child v. North & Timberly, (1660) 83 Eng. Rep. 900 (K.B.); Le Roy v. Starling Alderman de London, (1662) 82 Eng. Rep. 1039 (K.B.); Le Roy v. Sidley, (1662) 82 Eng. Rep. 1036 (K.B.); R v. Daniell, (1703) 87 Eng. Rep. 856 (K.B.); Jones v. Randall, (1774) 98 Eng. Rep. 706 (K.B.).

67. R v. Jones, (1832) 110 Eng. Rep. 485 (K.B.); State v. Burnham, 15 N.H. 396 (1844); Pettibone v. United States, 148 U.S. 197 (1893); Commonwealth v. Hunt, 45 Mass. 111 (1842); Kamara v. Director of Public Prosecutions, (1973) 57 Crim. App. 880 (H.L.) (U.K.); Criminal Law Act, 1977, c.45 §§ 1(1), (2) (U.K.), *amended by* Criminal Attempts Act, 1981, c.47 § 5 (U.K.).

68. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE AND MINIMAL STATE (1991).

69. David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. AND PUB. AFFAIRS 53 (1989); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. &. CRIMINOLOGY 679 (1994); Leo Kats, *Why the Successful Assassin is More Wicked than the Unsuccessful One*, 88 CALIF. L. REV. 791 (2000); Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 CALIF. L. REV. 813 (2000).

70. *See e.g.*, Robin Antony Duff, *Criminalizing Endangerment*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 43 (R. A. Duff and Stuart P. Green eds., 2005); Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Pro-*

the person who attempted to murder but missed his shot. This sounds fair. But it is not always that simple. What about a person who attempts to murder using a voodoo doll or a toy gun? If a person attempts to murder someone with a toy gun and really believes it will kill the intended victim, he is criminally liable for attempted murder. Although his conduct cannot possibly result in anyone's death, the desire to kill is regarded as being tantamount to killing (*voluntas reputabitur pro facto*).[71]

Is this fair? To answer this question, we must address the concept of moral luck.[72] The shooter who misses his intended victim by two inches will probably try again and again until he succeeds. Although he missed the victim the first time, he remains dangerous to society because his desire is to hit, not to miss. If the police arrested the shooter immediately after he missed the intended victim, it was only a matter of luck that the intended victim escaped with his life. Luck is not legitimate grounds for evading criminal liability, and the shooter is criminally liable for murder (if the victim was actually shot) or for attempted murder (if the victim escaped).

The legal situation is the same with the shooter who uses a toy gun or a voodoo doll. Initially, the shooter thinks that the toy gun will cause death. After a few attempts, he understands that the device is incapable of causing death, but he still desires to kill the victim, and it is therefore likely that he will exchange the toy gun for a lethal device. When he eventually does so, the social endangerment quickly progresses to social harm. As long as the desire to murder exists, the road from a voodoo doll that does not accomplish the job to a lethal device that does is a short one. This justifies treating offenses that pose a danger to society as being more serious than those that cause harm to society.

The applicability of inchoate offenses as instruments of criminal law appears to be very broad. And yet, the current definitions of inchoate offenses are insufficient to incriminate those involved in the creation and establishment of a terrorist infrastructure. Let us examine why.

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cess, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 91 (R. A. Duff and Stuart P. Green eds., 2005).

71. Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 33-34 (1968); John J. Yeager, *Effect of Impossibility on Criminal Attempts*, 31 KY. L.J. 270 (1943); Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and Legal Process*, 53 MINN. L. REV. 665 (1969); David D. Friedman, *Impossibility, Subjective Probability, and Punishment for Attempts*, 20 J. LEGAL STUD. 179 (1991); Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523 (2008); Kunkle v. State, 32 Ind. 220 (1869); People v. Elmore, 261 N.E.2d 736 (Ill. App. Ct. 1970); State v. Smith, 621 A.2d 493 (N.J. 1993).

72. Nils Jareborg, *Criminal Attempts and Moral Luck*, 27 ISR. L. REV. 213 (1993); Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQ. L. 97 (2008); Russell Christopher, *Does Attempted Murder Deserve Greater Punishment than Murder? Moral Luck and the Duty to Prevent Harm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004).

B. The Need to Redefine Inchoate Offenses and the Relativity of Inchoation

We have seen that inchoate offenses were accepted into modern criminal law following the adoption of the maxim *voluntas reputabitur pro facto*. When the *actus reus* requirement of an offense is not met, the strong and focused desire of the offender incriminates him under the relevant inchoate offense. But the maxim has not been applied sweepingly and was subordinated to another maxim, that of *nullum crimen sine actu* (no crime without an act).[73] It is therefore still necessary to perform some act in order for an attempt, solicitation, or conspiracy to be incriminating. The exact requirement is for an overt act that constitutes the specific inchoate offense.[74] The overt act requirement is subordinated to the requirements of the factual element of the offense (*actus reus*), and it can also be expressed by omission (inaction while breaching a statutory duty[75]).[76]

This requirement affects efforts to incapacitate terrorism by destroying the terrorist infrastructure through application of the concept of the relativity of inchoation. Inchoate offenses are always relative to the complete perpetration of a given offense, even if the act that ends up being carried out constitutes some other offense. For example, if a person desires to murder someone by stabbing him and carries out the premeditated plan, but the victim, although severely injured, survives, the action may constitute attempted murder if the intended offense was murder. If, however, the intended offense was not murder but assault or battery, the offense is considered to have been fully committed.

When the legal distance between the offense and the minimal requirement for constituting a related inchoate offense is great, the factual linkage between the inchoate offense and the offense becomes hazy, and the inchoate action may not necessarily be linked directly to the offense. For exam-

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73. Mark D. Yochum, *The Death of a Maxim: Ignorance of Law is No Excuse (Killed by Money, Guns and a Little Sex) "Ignorance of the Law Excuses No Man: Not that All Men Know the Law, but Because it's an Excuse Evcery Man Will Plead, and No Man Can Tell How to Refute Him*," 13 ST. JOHN'S J. LEGAL COMMENT. 635 (1999).

74. *See* Clark Miller, Comment, *The Overt Act in Conspiracy*, 18 BROOK. L. REV. 263 (1952); N. C. Collier, *Criminal Conspiracy Needing an Overt Act to Make It Indictable*, 19 LAW STUDENT'S HELPER 45 (1911); Elizabeth B. Wydra, *Is an Overt Act an Element of the Crime of Conspiracy to Commit Money Laundering*, 2005 PREVIEW U.S. SUP. CT. CASES 146 (2005); Lindsey M. Vaughan, Note, *Criminal Law—Indictment Specificity in Alleging Attempt Crimes—An Indictment for Attempted Illegal Reentry into the United States Is Not Defective because it Fails to Allege a Specific Overt Act*, 75 TENN. L. REV. 167 (2008); State v. Heitman, 629 N.W.2d 542 (Neb. 2001); State v. Ladd, 557 S.E.2d 820 (W. Va. 2001); United States v. Shabani, 513 U.S. 10 (1994); State v. Carbone, 91 A.2d 571 (N.J. 1952).

75. Rollin M. Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659 (1937); Graham Hughes, *Criminal Omissions*, 67 YALE L. J. 590 (1958); Lionel H. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367 (1965).

76. *See, e.g.*, Phil Palmer, *Attempt by Act or Omission: Causation and the Problem of the Hypothetical Nurse*, 63 J. CRIM. LAW 158 (1999); THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE—OFFICIAL DRAFT AND EXPLANATORY NOTES 74 (1962, 1985); R v. Gibbins, (1919) 13 Crim. App. 134 (U.K.); Banks, (1873) 12 Cox C.C. 393 (U.K.); Commonwealth v. Willard, 39 Mass. 476 (1839); State v. Baldwin, 291 N.W.2d 337 (Iowa 1980); State v. McGrath, 574 N.W.2d 99 (Minn. Ct. App.1998); Commonwealth v. Flagg, 135 Mass. 545 (1883); State v. Blechman, 50 A.2d 152 (N.J. 1946); State v. Ray, 882 P.2d 1013 (Mont. 1994).

ple, an offense that begins and ends in money laundering constitutes complete perpetration of the offense. If the investigating authorities discover that the final objective of the money laundering was to aid in the establishment of a terrorist infrastructure in order to commit terrorist attacks and murder innocent people, the relevant offense is murder. In this case, the legal question is whether a person who committed money laundering can be convicted of attempted murder.

If indicted only for money laundering, it is likely that he would be convicted, but the legal linkage of that offense to terrorism would probably not be addressed. Note that in most legal systems money laundering is not prohibited, whereas murder is. When the action committed is not prohibited, the only way the law can consider it incriminating is by linking it to the offense that was the perpetrator's final objective. This linkage is possible only through the legal instrument of inchoate offenses. If money laundering and other strategies used to fund terrorist activities are not considered to be illegal, these activities can be criminalized only by linking them to the offense that is the terrorists' ultimate objective, in this case, murder. And the question of how the factual element of a fundraising activity can become an "overt act" of attempted murder still remains to be answered.

The infrastructure of terrorism consists not only of activities prohibited by legislation. Many activities that support the terrorist infrastructure are not illegal, or not yet. Even if legislation is enacted outlawing some of the activities vital to the terrorist infrastructure, new tactics or strategies, that are not yet prohibited, will be devised and implemented, which are likely to be more efficient, easy, fast, and most important, considered legal. Outlawing these activities one by one through individual legislation brings us back to the disadvantages of this approach, as described above.[77]

The most effective legal solution, therefore, would be to redefine inchoate offenses based on the principle of the relativity of inchoation and formulate a comprehensive doctrine that would embrace all derivative situations that constitute social endangerment, including the establishment of a terrorist infrastructure and involvement with it. All social endangerment associated with terrorism should be incorporated in the new definition in order to incapacitate terrorism. Redefining inchoate offenses would not change the fundamental principles of criminal law or create legal exceptions to these principles, but it would comply with existing principles.[78]

77. *See supra* subpart II.B.

78. McCormack, *supra* note 36; D. C. Pearce, *The Law Commission Working Paper Number 50 on Codification of the Criminal Law, General Principles: Inchoate Offences*, 37 MOD. L. REV. 67 (1974); Note, *Reforming the Law of Inchoate Crimes*, 59 VA. L. REV. 1235 (1973); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989).

C. Redefining Inchoate Offenses

The redefinition of inchoate offenses would adhere to three major aspects of criminal liability: the general course of conduct of redefined inchoate offenses and their justification; the factual element requirement (*actus reus*) of the redefined inchoate offenses; and the mental element requirement (*mens rea*) of the redefined inchoate offenses. Together, these aspects complete the redefinition of inchoate offenses in conformity with the major fundamental principles of modern criminal law.

1. The General Course of Conduct

The general course of conduct of an offense contains three consecutive stages: preparation, which is not punishable in most legal systems; the criminal attempt; and the complete perpetration. Most legal systems consider the second and third stages punishable. The crucial question for our purposes is the following: Where exactly lie the legal borders between the three stages? Although some tests have been proposed, all failed to formulate an accurate distinction that provides the response sought by society to social endangerment. The proposed tests included the proximity,[79] the last act,[80] and the unequivocality test.[81]

The first stage in the course of conduct of an offense is preparation, when the preliminary planning of the offense is performed and the criminal scheme or plan (*iter criminis*) is constituted.[82] This is the stage when the criminal idea is formulated into a plan, which may or may not be operative, well planned, or detailed. Formulating the criminal plan involves nothing more than thoughts, and it should therefore not be punishable. When only one person is involved in the formulation of the criminal plan, the social endangerment, if any, is quite low.

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79. *See*, for example, in the United States, People v. Bracey, 360 N.E.2d 1094 (N.Y. 1977); Sizemore v. Commonwealth, 243 S.E.2d 212 (Va. 1978); People v. Mahboubian, 543 N.E.2d 34 (N.Y. 1989); People v. Acosta, 609 N.E.2d 518 (N.Y. 1993); People v. Warren, 489 N.E.2d 240 (N.Y. 1985); Hyde v. United States, 225 U.S. 347 (1912). In the English Common Law see, R v. Eagleton, (1855)169 Eng. Rep. 826 (L.R.C.C.R.) (U.K.); R v. Button, [1900] 2 Q.B. 597 (L.R.C.C.R.) (U.K.); Robinson, (1916) 11 Crim. App. 124 (U.K.). *Compare* United States v. Desena, 287 F.3d 170 (2d Cir. 2002), *with* Henderson v. R, [1948] S.C.R. 226 (Can.).

80. *Compare* United States v. Colpon, 185 F.2d 629 (2d Cir. 1950), *and* Commonwealth v. Peaslee, 59 N.E. 55 (Mass. 1901), *with* R. A. DUFF, CRIMINAL ATTEMPTS 37-42 (1996).

81. J. W. Cecil Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230 (1933); LEON RADZINOWICZ & J. W. CECIL TURNER, THE MODERN APPROACH TO CRIMINAL LAW 279-80 (1948); R v. Barker, [1924] N.Z.L.R. 865, 874-75 (C.A.) (N.Z.); State v. Stewart, 420 N.W.2d 44 (Wis. 1988); Campbell & Bradley v. Ward, [1955] N.Z.L.R. 471 (S.C.) (N.Z.); *Cf.* United States v. Cruz-Jiminez, 977 F.2d 95 (3d Cir. 1992), *with* United States v. McDowell, 714 F.2d 106 (11th Cir. 1983); United States v. Everett, 700 F.2d 900 (3d Cir. 1983); Lemke v. United States, 211 F.2d 73 (9th Cir. 1954); State v. Mandel, 278 P.2d 413 (Ariz. 1954); People v. Buffum, 256 P.2d 317 (Cal. 1953), *overruled by* People v. Morante, 975 P.2d 1071 (Cal. 1999); Larsen v. State, 470 P.2d 417 (Nev. 1970); People v. Downer, 372 P.2d 107 (Cal. 1962); Police v. Wylie, [1976] 2 N.Z.L.R. 167 (C.A.) (N.Z.).

82. *See, e.g.*, Omri Ben-Shahor & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299 (1996).

The preparatory stage ends at a distinct point, when the planner makes the decision to carry out the criminal plan and commit the offense.[83] The decision is mental and does not necessarily gain immediate expression in a particular activity. As a result, the decision itself is part of the preparation: it is the final stage of the preparation. Making the decision is not punishable, as it is still only preparation. But from that point onward, the person becomes a danger to society because he now intends to carry out his criminal plan and commit the offense. The precise point in time when the personal decision is made to execute the criminal plan is the moment when the person becomes a danger to society.

Many people fantasize from time to time about killing their adversaries, robbing a bank, or stealing something. This is part of human nature and does not necessarily pose a threat to society unless a decision is made to act on that fantasy and commit the offense.[84] Dreaming and fantasizing are legal and not punishable; making the dream or fantasy come true poses a danger to society if it involves an offense. The exact boundary between legitimate thoughts, dreams, and fantasies that pose no threat to society, and acting out those fantasies, which may pose a danger to society, lies in the decision to act on those fantasies and carry them out.

From the moment the decision has been made to carry out a criminal plan, any activity performed pursuant to the criminal plan poses a danger to society. It is no longer ascribed to the preparatory stage and constitutes part of the attempt to commit the offense. The attempt to commit an offense is not a fixed point on the time axis, but rather a range of conduct that can vary from case to case. The attempt, per se, is formed when the decision has been made to execute the criminal plan. The boundary between the preparatory stage and the criminal attempt reflects the borders of social endangerment.

From the moment the decision has been made to commit an offense, subsequent conduct is considered to fall within the range of criminal attempt, which is punishable. The criminal attempt continues until the offense has been perpetrated. An offense is considered to have been completely perpetrated when all the elements of the offense are present. As long as even one element is still missing (whether it is the conduct, the circumstantial, or the consequential element), it is still regarded as an attempt.[85]

If a person desires to rape a woman but discovers that he is temporarily impotent, the conduct element of the offense of rape is missing, and the offense is regarded as attempted rape. If a person tries to shoot someone in the dark and happens to kill the victim's dog instead, the circumstantial el-

83. *See id.*

84. *See, e.g.*, People v. Hawkins, 723 N.E.2d 1222 (Ill. App. Ct. 2000); United States v. Doyon, 194 F.3d 207 (1st Cir. 1999).

85. Donald Stuart, *The Actus Reus in Attempts*, 1970 CRIM. L. REV. 505 (1970); Mark Thornton, *Attempting the Impossible (Again)*, 25 CRIM. L. Q. 294 (1983).

ement of the specific offense of murder is missing, and the offense is deemed attempted murder. If a person tries to shoot someone in the street but misses, the consequential element of the murder is missing, and the offense is treated as attempted murder.

Whether or not an element is missing depends on the precise definition of the offense. The inchoation of a criminal attempt relates to the complete perpetration of the offense. An attempt to commit murder is always relative to the offense of murder. When an offense is completely perpetrated, it is no longer an attempt to commit the offense but the offense itself. In legal systems in which the attempt and the offense are punishable identically, there is no significant relevance to the classification of an activity as attempt or offense, and it is sufficient to prove that the offender made the decision to commit the offense and acted accordingly.

This is the general course of conduct of individual offenses, but when more than one offender is involved, another inchoate offense becomes relevant: criminal conspiracy, the preparatory stage of joint perpetration or co-perpetration. The general course of conduct of offenses is applied whether it involves one offender or more, the only difference being that when more than one person is involved, criminal conspiracy may also be considered to be part of the preparatory stage.

The inchoate offense of conspiracy does not entirely replace preparatory action, and it does not replace the criminal attempt. Criminal conspiracy incriminates part of the preparatory stage when it is committed by more than one person. The criminal conspiracy is constituted when an agreement is reached between conspirators relating to the commission of an offense.[86] Two persons chatting in a café about their fantasy to rob a bank is not considered a conspiracy. But if the two agree to carry out their fantasy by committing the offense of robbery, they become a danger to society and are culpable of criminal conspiracy. If commission of the criminal plan has been initiated but not completed, the offense is a joint attempt or co-attempt; when it is completed, it is considered to be full joint perpetration or co-perpetration.

A person who makes an agreement with himself to commit an offense is making a decision to commit the offense. Conspiracy does not change the general course of conduct of inchoate offenses, but adapts it to situations in which more than one person is involved. The change is minor. Although the decision is not punishable when made by one person because it is still considered a preparatory stage, agreement between two or more persons is punishable as criminal conspiracy. In both cases, whatever preceded the decision or agreement is not punishable because it is still deemed a preparatory stage, but whatever comes after the decision or agreement is punishable because it is considered a criminal attempt. The only difference is in the

86. Theodore W. Cousens, *Agreement as an Element in Conspiracy*, 23 VA. L. REV. 898 (1937); Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L. J. 925 (1977).

decision or agreement: when made by one person it is not punishable (preparatory), but when made by two or more persons it is punishable (conspiracy).

The reason for this differentiation lies in the joint commitment that underlies the agreement between the conspirators to commit the offense. The joint commitment per se poses a danger to society even if the conspiracy to commit the offense is not carried out. This is the difference between a joint fantasy and an operative criminal plan, and it reflects a basis for a criminal organization between the offenders. This reason is at the core of incriminating complicity, and it explains why sentencing of conspirators is harsher than that of a sole offender. The potential for actually committing the offense increases when more than one person pursues the same criminal objective.[87]

According to the concept of the relativity of inchoation, an attempt to commit a conspiracy is inevitable.[88] In most Anglo-American legal systems, conspiracy is considered to be an offense;[89] therefore when two or more parties attempt to agree about committing an offense, it is considered attempted conspiracy. For example, two people meet in the apartment of one of them to agree about committing a joint robbery, but before they agree the police arrest them. They attempted to conspire, but the conspiracy was not accomplished because of their arrest.

If the parties did not succeed to come to an agreement to commit the offense for reasons not under their control, it is likely that they will attempt it again until an agreement is reached. Therefore, the attempt to conspire poses no less of a danger to society than the conspiracy itself. The social harm may be different, but this is immaterial as long as the danger to society justifies incrimination for an inchoate offense, as is the case with attempted conspiracy.[90]

In the case of solicitation the perpetrator persuades another person to commit an offense. Persuasion may be in the form of requests, threats, intimidation, encouragement, entreaties, etc. The general course of conduct of solicitation is identical with that of the offense and also has three consecutive stages: preparation, attempt, and perpetration. A person is culpable for attempted solicitation if he made a decision to solicit but the solicitation was not completed, as for example when the potential target is not convinced and does not intend to commit the offense, or when the solicitor is trying to say something but words fail him because of his excitement. If the

87. For the different association theory behind that concept, see EDWIN H. SUTHERLAND & DONALD R. CRESSEY, CRIMINOLOGY 173 (4th ed. 1970).

88. Note, *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959); Nick Zimmerman, *Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act*, 20 N. ILL. U. L. REV. 219 (2000); Charles H. Rose III, *Criminal Conspiracy and the Military Commissions Act: Two Minds That May Never Meet*, 13 ILSA J. INT'L & COMP. L. 321 (2007).

89. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1310 (2003).

90. *See* subpart III.A.

potential target is solicited and intends to commit the offense, the solicitation is considered to have been completed.

Solicitation poses no less of a danger to society than the offense itself. Although the solicitor does not commit the offense, he planted the criminal idea in the target's mind. Because solicitation is the cause of the perpetration, and the solicitor is considered the intellectual perpetrator (*auteur intellectuel*) of the offense, the solicitor is no less dangerous to society than the actual perpetrator. Moreover, the solicitor can plant the criminal idea in more than one person's mind, posing far greater danger to society than the actual perpetrator.[91] The social harm caused by the solicitor and the perpetrator may be different, but this is immaterial as long as danger to society justifies incrimination for an inchoate offense, as is the case with solicitation and attempted solicitation.[92]

Naturally, solicitation to commit an attempted offense is inherent in the solicitation itself. The solicitor does not solicit a person to commit attempted murder but to murder the victim. If the perpetrator attempts to murder but the offense is not completed, this does not change the culpability of the solicitation. If a person solicits someone to intimidate a victim by shooting in his vicinity, the victim will reasonably think that this is an attempt to murder him. In reality, this is not solicitation to attempted murder but to intimidate, and failure of the potential perpetrator in committing the offense has no effect on the offense of solicitation. Therefore, solicitation to attempt an offense is already inherent in the solicitation itself.

To complete the argument in favor of redefining inchoate offenses, we now turn to the factual element (*actus reus*) and the mental element (*mens rea*) requirements of redefined inchoate offenses.

2. The Factual Element Requirement (actus reus)

According to the general course of conduct of the redefined inchoate offenses, the critical point that differentiates between the non-punishable preparatory stage and the punishable stages of attempt and conspiracy is the moment when the decision is made to commit the offense. From that moment onward, any conduct performed according to the criminal plan (*iter criminis*) is already considered to be part of the attempted offense. The *actus reus* requirement of an attempted offense consists of a range of activities and not of a single type of activity, as is required in most specific offenses. The question that remains to be answered is: What are the borders of the range of activities deemed "attempt"? This question contains two secondary questions, pertaining to the minimum and maximum factual re-

91. *See* subpart III.A.

92. *See, e.g.*, Anthony LaCroix, *Attempted Online Child Enticement: Not Impossible, but Not That Simple*, 5 DARTMOUTH L.J. 97 (2007); Sam E. Fowler, Note, *Criminal Attempt Conspiracy and Solicitation under the Criminal Code Reform Bill of 1978*, 47 GEO. WASH. L. REV. 550 (1979).

quirements. The range of the *actus reus* requirement lies between the minimum and maximum requirements.

The minimum *actus reus* requirement is of great significance because it is also the factual border of criminality. The minimum requirement is the decision to execute the criminal plan and commit the offense, so that any type of conduct performed pursuant to the criminal plan becomes part of its execution. The conduct may be insignificant and negligible, but as long as it is part of the execution of the criminal plan, it is already considered an attempt and not mere preparation. Consider the case of a person who plans to murder someone, and according to the plan he must leave his house, buy a knife, ambush the victim, and stab him to death. If the person made the decision to murder the victim, and according to plan left his house, when the police arrest him based on intelligence information, the offense is already deemed attempted murder.

Thus, from the moment a person made the decision to execute a criminal plan, the offense is no longer preparation. To enter the attempt stage, the execution of the criminal plan must be initiated. Leaving the home with the intent of buying a knife, thereby initiating the execution of the criminal plan, is already within the range of an attempt. Merely leaving one's home (and not having purchased any weapon) is not lethal per se, but when it is part of a criminal plan, which is in the process of being executed, it is considered to be part of the attempt to commit the offense.

This type of minimum conduct can also be expressed by acts or omissions.[93] When an offense is intended to be executed through an omission, the attempt to commit it is also carried out through an omission, as in the case of a parent who makes a decision to starve a child to death despite a legal parent's duty to attend to the child's health, and stops feeding the child. Eventually, the welfare authorities enter the apartment and feed the child. As long as the omission is committed according to a criminal plan and is part of its execution, it is considered attempted murder.

The full execution of the criminal plan is the commission of all factual elements of the offense. If even a small part of the *actus reus* is missing, it cannot be considered more than an attempt. For an offense to be considered an attempted offense, it is sufficient that it contains *almost* all the factual elements but not necessarily all of them. This is true whether the offense is planned to be committed through an action or an omission. In the above example, if the child had died of starvation as planned, the offense would have been complete perpetration of murder. If the child survives, the consequential element of the *actus reus* requirement is missing, and therefore the offense is attempted murder.

In the case of conspiracy, the range of the *actus reus* requirement for an attempt is not as wide. The *actus reus* requirement of conspiracy consists of

93. This is the Model Penal Code approach. *See* THE AMERICAN LAW INSTITUTE, *supra* note 75, at 74-82; Wechsler et al., *supra* note 60.

the agreement between the parties. Any factual elements committed pursuant to that agreement are deemed to be part of the attempt (joint attempt or co-attempt). The factual question of conspiracy is a binary one: has there been an agreement between the parties or not? The agreement contains the criminal plan and the decision to execute it; therefore if there is an agreement between the parties it constitutes conspiracy. The agreement itself is not different from any other agreement in contract law, except for the fact that the subject of the agreement is the joint intention of committing an offense. If no agreement has been made between the parties, the action is not considered a conspiracy.[94]

In the case of attempted conspiracy, the *actus reus* requirement is identical with the *actus reus* requirement of an attempt to commit any offense. In this case, the offense is conspiracy, which is factually expressed by an agreement. Making a decision to conspire and commit an offense is already within the range of attempted conspiracy, but as soon as an agreement is reached between the parties, the offense of conspiracy is complete and considered conspiracy.

The *actus reus* requirement of solicitation contains such activities as requests, threats, intimidation, encouragement, entreaties, etc. The exact method of soliciting is immaterial as long as the goal of solicitation is achieved. The goal of solicitation is to persuade the potential perpetrator to commit an offense; therefore solicitation contains a factual element of result. If the result is not achieved, it cannot be considered more than attempted solicitation because the result is not the commission of an offense by the perpetrator but merely an act of persuasion of the potential perpetrator to commit the offense. If, however, the potential perpetrator attempts but fails to complete the offense, this does not affect the criminal liability of the solicitor because the solicitor already fully completed his part.[95]

3. The Mental Element Requirement (mens rea)

According to the general course of conduct of the redefined inchoate offenses, the *actus reus* of the offense is the formulation of a criminal plan.[96] Formulation of a plan to commit an offense, owing to the decision to do so, constitutes part of the execution of the criminal plan. Consequently, the acts of an inchoate offender cannot be committed negligently or without awareness of the criminal plan. The inchoate offender who formulates a certain plan must know about it, and his conduct must reflect the execution of the plan and the offense committed according to it. Negligence requires

94. Cousens, *supra* note 85; Marcus, *supra* note 85.

95. *See supra* note 93.

96. *See, e.g.*, 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).

no knowledge and therefore cannot be a sufficient mental element to constitute an inchoate offense.

If a criminal plan was executed accidentally or unwillingly, the conduct involves no social endangerment. If the offense was not completed, it involves no social harm either. Therefore, an inchoate activity that bears neither social endangerment nor harm is not punishable. Intent is required to maintain a substantial linkage between inchoate activity and social endangerment. Although knowledge is a necessary requirement for both recklessness and intent, intent and recklessness are insufficient requirements to constitute an inchoate offense.[97]

Various inchoate offenses may have different objectives, but intent is the critical indication. In attempted offenses, the intent is the complete perpetration of the offense. A person who shoots at an intended victim but misses has not committed attempted murder unless he intended to murder the victim. The intent in attempted offenses is to carry out the criminal plan and completely perpetrate the offense. Any given offense may require less than intent, but the attempt to commit it requires intent. For example, in most jurisdictions some types of offenses of manslaughter require recklessness, whereas a deliberate attempt to commit those same types of offenses requires a minimum of intent (in order to complete the perpetration of the murder).

Conspiracy requires two subcategories of intent.[98] One is the intent to agree,[99] the other to achieve an objective.[100] In the case of conspiracy, the objective is the complete perpetration of an offense, which is also the objective of the agreement. The conspirators must intend to agree upon the commission of the offense, and as part of that agreement they must intend to carry out the conspiracy to commit the offense. Attempted conspiracy requires the same *mens rea* as the attempted offense. As far as the *mens rea* requirement is concerned, an attempt to commit conspiracy does not differ from an attempt to commit any other offense. In all types of attempts, there must be intent to carry out a criminal plan. Criminal plans may include specific offenses as well as conspiracy.

Solicitation requires intent to achieve the objective of prevailing upon the solicited person to commit the offense. When a person has no such intent, the danger to society is minor. When a person makes certain statements and as a result, because of his negligence or recklessness, some person is persuaded to commit some offense, the person who made the state-

97. *See, e.g.*, Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443, 470 (1988).

98. Paul Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. ILL. L.J. 627 (1976); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941).

99. State v. King, 74 N.W. 691 (Iowa 1898); Rude v. State, 851 P.2d 15 (Wyo.1993); Elkin v. People, 28 N.Y. 177 (1863).

100. United States v. Childress, 58 F.3d 693 (D.C. Cir. 1995); State v. Toth, 618 A.2d 536 (Conn. App. Ct. 1993).

ment poses little danger to society, although there may be harm to society if the offense was actually committed. A person poses a danger to society only when he intends to solicit others to commit an offense and directs his actions accordingly. Accidental solicitation, negligent solicitation, and reckless solicitation do not reflect the minimum danger to society that is required to be considered incriminating.

Attempted solicitation requires the same *mens rea* as the attempted offense. As far as the *mens rea* requirement is concerned, the attempt to commit solicitation does not differ from the attempt to commit any other offense. In all types of attempt, there must be intent to carry out a criminal plan. A criminal plan may include specific offenses as well as solicitation. The basic *mens rea* requirement for all types of inchoate offenses is intent and nothing less.[101]

D. Redefinition of Inchoate Offenses—Major Role in Incapacitating Terrorism

Let us return now to the example at the beginning of this article. A twenty-three-year old student was arrested, and during interrogation he confessed that he had decided to carry out a suicide bombing on an American airplane. But when he was arrested, there was no bomb and no materials to construct one. He also confessed that he had not ordered any materials, nor had he chosen a flight or a date for the attack. Under the redefined inchoate offenses, criminal liability can easily be imposed on him. The charge would be an attempt to commit the relevant offense he had intended to commit (specifically, the offense of terrorism, murder, etc.).

The moment a person made a decision to commit the offense and acted accordingly, the attempted offense has been constituted even if it is still in the preliminary stages of the attempt. The prospective perpetrator became a danger to society when he made his decision. If he had not been caught at that point, he would have proceeded to commit the offense according to his criminal plan. If he is released after the investigation, it is likely that he will resume his criminal plan, unless the arrest itself deters him or rehabilitates him. The experience of national security authorities around the world shows exactly the opposite.[102] In most cases, following arrest the urge to commit the offense intensifies.[103]

Advancing the incrimination borderline between non-punishable preparation and punishable attempt, conspiracy, or solicitation to the point where the decision to commit an offense is redefined as an inchoate offense could

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101. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1193 (1997); Wechsler et al., *supra* note 60, at 575-76.

102. *See, e.g.*, Tim Stahlberg & Henning Lahmann, *A Paradigm of Prevention: Humpty Dumpty, the War on Terror, and the Power of Preventive Detention in the United States, Israel and Europe*, 59 AM. J. COMP. L. 1051 (2011).

103. *See id.*

play a major role in the legal fight against terrorism.[104] If the major objective of national security authorities in the legal fight against terrorism is to incapacitate terrorism, inchoate offenses can become the most important instrument of criminal law in this fight. Incapacitation of terrorism requires the destruction of the terrorist infrastructure; preventing individual terrorist attacks is not sufficient because the surviving infrastructure will continue to carry out additional attacks.

It is more difficult to create a terrorist infrastructure than to use it. In most cases, terrorism is totally incapacitated in the absence of an infrastructure to support it. Incapacitating terrorist organizations by legal means is possible only by redefining inchoate offenses in criminal law.[105] The terrorist infrastructure is a preliminary stage of terrorist attacks and poses a clear danger to society when it formulates a particular objective of committing a specific offense embodied in a terrorist attack. Indication of that objective begins with the decision to commit the offense. From that point onward, the offender becomes a danger to society.

The key to the criminalization of inchoate offenses is danger to society. Indeed, inchoate offenses are criminal because they pose a danger to society, which constitutes the fundamental grounds for modern legal and social justification to impose criminal liability.[106] By punishing offenses only if harm has been caused to society it is not possible to protect against future threats. To protect against future threats, it is necessary to punish offenses that pose a danger to society. Terrorist infrastructures pose an enormous danger to society, and the only way to eliminate that danger is to destroy the infrastructure.[107] Establishment and maintenance of the terrorist infrastructure is considered to be a preparatory activity preceding the actual terrorist attack, although it already includes the decision to commit a terrorist attack. If it did not include such a decision, there would be no purpose in establishing the terrorist infrastructure.

If inchoate offenses are redefined, all activities related to the terrorist infrastructure would become illegal. They could be considered attempted offenses, solicitation, or attempted solicitation when committed by one person. They could be considered attempted offenses, conspiracy, solicitation, attempted conspiracy, or attempted solicitation when committed by two or more persons. When a person makes the decision to become involved in terrorism, he becomes dangerous to society; following the proposed redefinition of inchoate offenses, his activities would be considered incrimi-

104. *Compare* Kathy B. Weiman, *The Lawyers' War on Terrorism and Human Rights*, 53 BOSTON BAR J. 2 (2009), *with* Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B.C. INT'L & COMP. L. REV. 179 (2009).

105. William Hett, *Digital Currencies and the Financing of Terrorism*, 15 RICH. J.L. & TECH. 4 (2008); John McLoughlin, Gerorgy P. Noone & Diana C. Noone, *Security Detention in Practice: Security Detention, Terrorism, and the Prevention Imperative*, 40 CASE W. RES. J. INT'L L. 463 (2009).

106. W. Ullmann, *The Reasons for Punishing Attempted Crimes*, 51 JURID. REV. 353 (1939); Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 LAW Q. REV. 39 (1977).

107. Ben Saul, *International Terrorism as a European Crime: The Policy Rationale for Criminalization*, 11 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 323 (2003).

nating, and he could be arrested, indicted, and punished on the grounds of the danger he poses to society as reflected by his activities. His property, equipment, and devices could be confiscated, enabling the destruction of the terrorist infrastructure by legal means.

Our discussion applies to all circles of terrorism and terrorists. The funding of terrorist activities may be criminalized by specific offenses and at the same time can also be considered inchoate terrorism. Funding of terrorism is associated with the intention of enabling terrorist attacks. The funding itself is part of the terrorist infrastructure and can be criminalized following the redefinition of inchoate offenses. The relativity of the concept of inchoation links the terrorist infrastructure with the intended terrorist attack itself by a specific and relevant inchoate offense (attempted offense, conspiracy, solicitation, attempted conspiracy, or attempted solicitation). It is no longer mere funding of terrorism but attempted murder (attempt, joint attempt, or co-attempt), conspiracy to commit murder, or attempted conspiracy to commit murder, solicitation of murder, or attempted solicitation of murder.

An additional question that needs to be addressed is the integration of inchoate offenses and complicity. If the financier merely intended to assist the conspirators or the perpetrators by funding their activities, could he be incriminated if arrested before completing the assistance? There is no valid legal reason for preventing incrimination of attempted aiding and abetting, conspiracy to aid and abet, or solicitation of aiding and abetting. In the redefined scheme, the specific offense would be replaced by aiding and abetting: just as attempted murder is incriminating, and just as aiding and abetting in the commission of murder is incriminating, so is attempted aiding and abetting in the commission of murder. Legal systems worldwide already recognize such formulas.[108] Recognition of the linkage between inchoate offenses and complicity widens the net of criminal liability for the incapacitation of terrorism.

The redefined inchoate offenses should not be used only when there is no specific law prohibiting a given activity. The purpose of redefining inchoate offenses is to enable the law to play a greater role in the incapacitation of terrorism. Redefinition of inchoate offenses should be a strategic move in the war against terrorism, so that no it will no longer be necessary to predict exactly every possible human behavior relating to terrorism in order to criminalize it. Any danger posed to society that relates to terrorism should be incriminating as a result of the redefined inchoate offenses.

Terrorist infrastructure is inchoate terrorism, and inchoate terrorism should be criminalized under inchoate offenses.

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108. *See, e.g.*, State v. Tazwell, 30 La. Ann. 884 (1878); State v. Doody, 434 A.2d 523 (Me. 1981); THE AMERICAN LAW INSTITUTE, *supra* note 75, at 30.

IV. SIDE EFFECT ON NON-TERRORIST OFFENSES: A NEW CONCEPT OR A SLIPPERY SLOPE?

Inchoate offenses are general offenses that may be related to any offense, not only to terrorist attacks. The redefinition of inchoate offenses would affect the legal fight not only against terrorism but also against all types of delinquency. As an instrument of criminal law, the redefined inchoate offenses would mark a quantum leap in the destruction of the infrastructure of terrorism as well as of property crimes, human trafficking, sex trade, etc.[109] It might be argued that the extremely high severity of terrorist crimes justifies such a concept of inchoate offenses, but as a new general concept it creates an unjustified slippery slope.

Originally, in the Middle Ages, inchoate offenses were applied only to severe crimes.[110] The transition from social harm justification to social endangerment justification was restricted only to the most severe of crimes. It was only in the eighteenth and nineteenth centuries that the concept of inchoate offenses was expanded as a general one.[111] And in some legal systems inchoate offenses are still restricted to felonies and crimes and are not applied to misdemeanors or petty offenses because the social harm is considered crucial for incrimination and social endangerment alone does not suffice.[112]

Protecting society from danger became the exclusive function of the state only with the adoption of the nightwatchman state model, according to which the modern state must protect the public from danger, mostly before these dangers materialize. Protecting the public from future danger requires the state to consider the social endangerment posed by any given offense because social harm has not yet occurred, and from the point of view of the state, it is hoped that it will not occur at all. Social endangerment is embodied in every future commission of every possible offense. If society sees no social danger in a specific offense, the existence of such an offense is unjustified.

Even the future commission of petty offenses poses a danger to society, whether severe or minor. When an offense poses no danger to society it may be liable under torts law, contract law, property law, etc., but it is not liable under criminal law. Criminal law is not private law, and it is subject to social or public interest, the determinant factor of individual offenses being their social context.

Under modern criminal law, the social endangerment posed by inchoate offenses is not less severe than that of individual offenses.[113] Attempted

109. *See* Jonathan Leiken, *Leaving Wonderland: Distinguishing Terrorism from Other Types of Crime*, 36 CASE W. RES. J. INT'L L. 501 (2004).
110. *See, e.g.*, LUDWIG VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 156-58 (1916).
111. *See, e.g.*, STEPHEN, *supra* note 50, at 227-29.
112. *See e.g.*, C. PÉN. art. 121-4(2) (Fr.).
113. *See* subparagraph III.A.

murder poses as great a danger to society as murder does. Naturally, an actual murder causes far greater social harm than an attempted murder, but the danger to society posed by an inchoate offense may be far greater than that posed by any single individual offense. When the inchoate offense creates an infrastructure to commit further offenses, it poses a greater danger to society than does the commission of an individual offense.

Social endangerment is not the exclusive domain of terrorist attacks. Various types of offenses reflect different types of social dangers, but *all* offenses endanger society. Property offenses constitute a danger to society's property rights and proprietary security. Transportation offenses constitute a danger to society's safe use of the roads. Therefore, if inchoate offenses reflect social endangerment to the same degree as individual offenses do, and if every offense poses a danger to society, then inchoate offenses related to *any* specific offense constitute social endangerment. Therefore, all inchoate offenses related to *any* specific offense can be legally and socially justified as posing a danger to society and imposing criminal liability.

The modern nightwatchman state is mandated to protect the public from all danger, and not only from the dangers of terrorism. If the redefinition of inchoate offenses is justified in relation to terrorism, it is also justified in relation to other offenses. If the social endangerment of an inchoate offense may not appear to be sufficiently severe to be criminally liable, that offense should be abolished for the same reason.[114]

The redefinition of inchoate offenses is not a slippery slope with regard to non-terrorist offenses. Inchoate offenses would be redefined unequivocally, not vaguely. The decision to carry out a criminal plan and commit a given offense is concrete. The redefinition of inchoate offenses would broaden their range and incorporate more types of offenses, but it would still remain a range with a well-defined scope. The redefinition of inchoate offenses is a new concept in inchoate offense doctrine, and the immediate need for it stems from the strategies being employed in the legal fight against terrorism. But there is no reason to restrict this statutory revision strictly to the legal fight against terrorism.

V. CONCLUSION

Terrorism is one of the gravest threats to modern western society. The threat targets the core values of the western world, such as freedom and equality. To defend against this threat, democracies must incapacitate terrorism. The incapacitation of terrorism includes various types of actions,

114. However, in exceptional cases, the *de minimis* defense can be exercised, if recognized in law. That defense enables courts to exonerate the defendant if the social interest or the public interest was minimal. *See e.g.*, Vashon R. Rogers Jr., Note, *De Minimis Non Curat Lex*, 21 ALBANY L.J. 186 (1880); Max L. Veech & Charles R. Moon, *De Minimis non Curat Lex*, 45 MICH. L. REV. 537 (1947).

including intelligence, technological measures, financial methods, and more. One of most critical fights takes place in the legal arena.

The most efficient way to incapacitate terrorism is to destroy the terrorist infrastructure used to prepare the attacks. Preventing one terrorist attack while leaving the terrorist infrastructure intact will not prevent future terrorist attacks by that same infrastructure. The terrorist infrastructure has been categorized as being part of the preparatory stage in the conduct of an individual offense. In most legal systems, this stage is not punishable. Specific offenses can be enacted that prohibit individual activities related to the creation of the terrorist infrastructure, but these offenses cannot cover every type of human behavior involved in the creation of a terrorist infrastructure.

An appropriate doctrinal solution is to redefine inchoate offenses and codify them under offenses that pose a danger to society, which is the legal justification for including them under criminal law. The inchoate offender becomes a danger to society from the moment he makes a decision to execute his criminal plan and commit an offense. From that moment onward, the offender's conduct is incriminating on the grounds of inchoate offenses. The concept of the relativity of inchoation enables the establishment of a linkage between an inchoate offense relating to a terrorist infrastructure and the final potential terrorist attack, which is generally liable under severe specific offenses, such as murder.

A doctrinal amendment of inchoate offenses is not exclusive to the legal fight against terrorism and is intended to be applied to all types of offenses. Given the concrete definition of a statutory amendment, there is no social risk of a slippery slope that would cause human behavior to become excessively criminalized. Inchoate offenses could become a major legal instrument of criminal law in the legal fight against terrorism and against delinquency in general.