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# Attempted Stalking: An Attempt-To-Almost-Attempt-To-Act

“This is simply absurd. . . . The refinement and metaphysical accumen [sic] that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.”<sup>1</sup>

## INTRODUCTION

The difficulties the Georgia Supreme Court experienced in conceptualizing an attempt-to-attempt-to-act, or what has more recently been called a “double inchoate crime,”<sup>2</sup> have not been solved. Indeed, double inchoate crimes exist, and their existence is more vexing now than it was when the Georgia Supreme Court decided *Wilson v. State*<sup>3</sup> nearly 125 years ago.<sup>4</sup> Double inchoate crimes are more troublesome today because today’s lawmakers are expanding the areas that they regulate and are regulating conduct that was likely imponderable 125 years ago.<sup>5</sup>

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1. *Wilson v. State*, 53 Ga. 205, 206 (1874). Riley Wilson was indicted for assault with intent to commit murder after threatening to shoot Solomon Davis if Davis attempted to enter Wilson’s house. *Id.* at 205. A jury found Wilson “guilty of an attempt to make an assault.” *Id.* Wilson appealed and the Georgia Supreme Court reversed his conviction, stating that: “As an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it, or to state the matter still more definitely, it is to do any act towards doing an act towards the commission of the offense.” *Id.* at 206.

2. See Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 5 (1989) (defining a double inchoate crime as an inchoate offense where the immediate object is another inchoate offense). For further discussion of double inchoate crimes, see *infra* Part III.

3. 53 Ga. 205 (1874).

4. *Id.*

5. See generally LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993). The crimes that have created the most startling changes in the criminal law are the regulatory and economic crimes. *Id.* at 294. Regulatory offenses deal with health and safety, conservation, finance, and environmental protection. *Id.* at 282. Additionally, there are areas that need regulation because they are fairly new or are changing rapidly. For instance, computer technology has created a whole new area of law that requires significant regulation. Although many of the substantive criminal laws, i.e. murder, rape and arson, have not changed, there has been some significant changes in terms of the way these crimes have been defined. *Id.* at 294. For example, although it may have been a crime to possess narcotics at the turn of the century, it is doubtless that the penal codes of most states have been amended several times to include new drugs that were not in existence at the time the codes were enacted. Not only do definitions of crimes change over time, but crimes are often created that deal with problems

One hundred and twenty-five years ago, the United States was a more open, less populated place where citizens had more freedom to act as they pleased with less concern for the potential harm they could cause others. Today, the increasing population, the close proximity of citizens, and the ability of people to travel readily throughout the country requires lawmakers to impose criminal sanctions on individuals for conduct likely to cause harm,<sup>6</sup> even though it may not cause harm on every occasion. This is the policy behind inchoate crimes<sup>7</sup> – to punish activities before a harm occurs, a harm which society is ultimately concerned with preventing.<sup>8</sup> Some of the recently enacted crimes which are arguably inchoate include crimes of recklessness, crimes of possession, and crimes such as stalking where the government is seeking to prevent conduct which in itself is not physically harmful<sup>9</sup> but has in the past proved to be the precursor to serious criminal acts.<sup>10</sup> The creation of these “inchoate” offenses is not terribly troublesome – they rest on sound public policy.<sup>11</sup> However, when “inchoate” crimes such as these are enacted, the legislature implicitly creates an attempt of the same crime. This is so because almost all fifty states have enacted general attempt statutes – statutes which create a crime of attempt and apply to all of the other offenses enacted.<sup>12</sup>

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as they develop. *See, e.g.*, *Chicago v. Morales*, 119 S. Ct. 1849 (1999). *Morales* describes the Gang Congregation Ordinance which was recently enacted to fight the gang problem in Chicago. *Id.* at 1854. The ordinance, which was later struck down by both the Illinois and the United States Supreme Courts, provided that when a police officer observed a person who he reasonably believed to be a gang member loitering in a public place with one or more other persons, he could order them to disperse, remove them from the area, or arrest them if they did not leave. *Id.*

6. *See generally* FRIEDMAN, *supra* note 5, at 13 (describing how the “pathologies of a mobile society demanded new techniques of control”).

7. For discussion of inchoate crimes, *see infra* Part I.

8. *See* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1139 (1997).

9. *See* Brenda K. Harmon, *Illinois' Newly Amended Stalking Law: Are All the Problems Solved?*, 19 S. ILL. U. L.J. 165, 171-72 (1994); *see also* Robert A. Guy, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 1013 (1993) (stating the argument of critics of antistalking laws who believe that stalking conduct is “innocuous” and that antistalking laws make criminal and innocent behavior indistinguishable).

10. *See* J. William David, *Is Pennsylvania's Stalking Law Constitutional?*, 56 U. PITT. L. REV. 205, 208 (1994) (stating that ninety percent of all women murdered each year have been stalked by their slayer, and that rape and assault victims usually see their attackers repeatedly before the crime occurs, indicating they have been stalked).

11. According to a recent survey conducted by the Center for Policy Research, about 24 percent of stalking cases reported are prosecuted. Patricia Tjaden, *The Crime of Stalking: How Big is the Problem* (visited Sept. 16, 1998) <<http://www.fiu.edu/~victimad/natstudy.html>>.

12. A general attempt statute is a legislative creation, often based on the Model Penal Code, providing for punishment whenever any felony or misdemeanor is attempted. *See*

Although the use of a general attempt statute in conjunction with any of these arguably inchoate crimes raises some controversial issues, the use of a general attempt statute in conjunction with the antistalking laws is especially disturbing. Attempted stalking is a more difficult construction mainly because stalking involves activity that does not itself rise to the level of an attempt.<sup>13</sup> As a result, attempted stalking requires more "refinement and metaphysical acumen" to discern than is required for an attempt-to-attempt-to-act. Attempted stalking requires a consideration of an attempt-to-almost-attempt-to-act. This comment is devoted specifically to the offense of attempted stalking. Part I analyzes the exact constitution of inchoate crimes and ultimately classifies all inchoate crimes as either complex inchoate or simple inchoate. Part II discusses the history of antistalking laws, and applies the analysis from Part I to the crime of stalking, attempting to determine whether stalking is a complex inchoate crime, a simple inchoate crime, or not inchoate at all. Part III analyzes the various double inchoate constructions, as well as the double inchoate crime of attempted stalking. Part IV discusses several different challenges to double inchoate constructions. Finally, Part V considers the justifications for, and criticisms of, attempted stalking and double inchoate crimes.

## I. INCHOATE CRIMES

The goal of our system of justice is to prohibit harmful conduct.<sup>14</sup> However, not all crimes result in harm, and so our system also criminalizes

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WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *CRIMINAL LAW*, § 6.2, at 497 (2d ed. 1986). See also, for example, *MODEL PENAL CODE* § 5.01 (1985), on "Criminal Attempt," which in relevant part states:

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

13. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 27.02[F], at 351 (2d ed. 1995) ("[S]tatutes prohibiting stalking . . . punish conduct that is merely preparatory to a criminal attempt.").

14. See generally Alexander & Kessler, *supra* note 8, at 1138.

acts that precede harmful conduct.<sup>15</sup> Crimes that are punished before the harm that is the ultimate concern of society occurs are called inchoate crimes.<sup>16</sup> Historically, there has been confusion surrounding the question of what exactly constitutes an inchoate crime. Clearly, attempt, solicitation, and conspiracy are the three major crimes expressly recognized as inchoate.<sup>17</sup> However, there is some question about whether there are other inchoate crimes (besides attempt, solicitation, and conspiracy). A fine example of the confusion surrounding inchoate crimes is in the American Law Institute's (ALI) Model Penal Code (MPC).<sup>18</sup>

Article five of the MPC is entitled "Inchoate Crimes."<sup>19</sup> The introduction to article five states that article five's task is to deal with attempt, solicitation, and conspiracy "systematically."<sup>20</sup> The introduction proceeds to say that these crimes are inchoate because "they deal with conduct that is designed to culminate in the commission of a substantive offense."<sup>21</sup> The

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15. *See id.*

16. *See id.* at 1139. These crimes are also called nonconsummate offenses, *see* Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 151 (1995) [hereinafter *Nature and Justifiability*], or anticipatory offenses, *see* Nathan R. Sobel, *The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation*, 32 BROOK. L. REV. 257, 257 (1966). This is not to say that inchoate crimes can never result in the ultimate harm that they are meant to protect against; it only means that choate or consummate offenses always result in the ultimate harm whereas inchoate offenses may or may not result in the ultimate harm. *See generally* Husak, *Nature and Justifiability*, *supra*, at 164. For example, reckless driving (which is arguably inchoate) is criminal because it may result in the ultimate harm of injury to a person. A person who commits the offense of reckless driving can be convicted of reckless driving for driving at an excessive speed as well as for driving at an excessive speed and injuring someone. In the alternative, a person convicted of murder (which is a complete, or choate, crime) can only be convicted of murder if the ultimate harm occurs that proscribing murder attempts to prevent – the death of another person. *See also* DRESSLER, *supra* note 13, § 27.01, at 347. Dressler describes an inchoate crime as the completion of the first four or five stages of a six-stage process, the six stages being: 1) conceiving the idea to commit a crime, 2) evaluating the idea to determine whether to proceed, 3) forming the intention of going forward with the plan, 4) preparing to commit the crime, 5) commencing the commission of the crime, and 6) completing the acts, thereby achieving the criminal goal. *Id.*

17. *See* DRESSLER, *supra* note 13, § 27.01, at 347.

18. The MPC is a model code containing the general principles of criminal responsibility and definitions of specific offenses. *See* DRESSLER, *supra* note 13, § 3.03, at 22. It was published by the American Law Institute in 1962 and, in the time since its publication, it has been influential in the revision of thirty-seven state penal codes. *Id.* at 22-23. The extent to which states have adopted the MPC varies. Some state legislatures have adopted only small portions, others have enacted many of the code's provisions. *Id.* at 23. Additionally, the MPC has become a standard in law school criminal law courses, and is often used by courts as an aid in interpreting state criminal statutes. *Id.*; *see also* MODEL PENAL CODE foreword at xi-xii (1985).

19. *See* MODEL PENAL CODE art. 5 introduction at 293 (1985).

20. *Id.*

21. *Id.*

MPC then acknowledges that these three crimes are not the only crimes that punish before they have resulted in a greater evil, because other “substantive offenses also have a large inchoate aspect.”<sup>22</sup> In essence, the ALI states that attempt, solicitation, and conspiracy are inchoate and that there are other crimes that seem inchoate but are not included within the inchoate crime section. In addition to mentioning these crimes, and not including them in the section on inchoate crimes, the ALI confuses the issue further by not mentioning some arguably inchoate crimes, but then including them within the inchoate crime section. Specifically, the ALI criminalizes the possession of instruments of crime<sup>23</sup> and prohibits certain “offensive weapons,”<sup>24</sup> thus implying that, in addition to attempt, solicitation, and conspiracy, possession of instruments of crime and offensive weapons are inchoate crimes as well.<sup>25</sup>

Thankfully, scholars have cleared up some of the confusion surrounding inchoate crimes by classifying inchoate crimes into two categories.<sup>26</sup> First, attempt, solicitation, and conspiracy are categorized as “complex” inchoate crimes<sup>27</sup> – complex because they become a crime only when used in conjunction with another crime (an object or target offense), and are not

22. *Id.*

23. MODEL PENAL CODE § 5.06 (1985).

24. MODEL PENAL CODE § 5.07 (1985).

25. *See generally* MODEL PENAL CODE § 5.01–5.07 (1985). All of the crimes in Pennsylvania’s inchoate crime chapter, which is essentially the MPC’s proposed inchoate crime chapter, are considered by its courts to be inchoate. This includes not only sections the same as sections 5.06 and 5.07 in the MPC, but additional sections such as 18 PA. CONS. STAT. ANN. § 909 (West 1998) (“Manufacture, distribution or possession of master keys for motor vehicles”), 18 PA. CONS. STAT. ANN. § 910 (West 1998) (“Manufacture, distribution or possession of devices for theft of telecommunications services”), 18 PA. CONS. STAT. ANN. § 911 (West 1998) (“Corrupt organizations”), 18 PA. CONS. STAT. ANN. § 912 (West 1998) (“Possession of weapon on school property”), 18 PA. CONS. STAT. ANN. § 913 (West 1998) (“Possession of firearm or other dangerous weapon in court facility”). *Cf.* Commonwealth v. Crocker, 389 A.2d 601, 603 (Pa. Super. Ct. 1978) (holding that the crime of possession of an instrument of crime is an inchoate offense).

26. *See, e.g.,* Husak, *Nature and Justifiability*, *supra* note 16, at 168-69. Husak describes offenses as being complex nonconsummate and simple nonconsummate. *Id.* Nonconsummate offenses are complex if they proscribe an act type  $a_1$  when the person committing the act type  $a_1$  bears a given relation to another act type  $a_2$ , and  $a_2$  causes a consummate harm. *Id.* at 168. Using the example of an attempt, act type  $a_1$  includes any act that constitutes a substantial step towards the commission of a crime, the crime being act type  $a_2$ . *Id.* Nonconsummate offenses are simple if they proscribe a single act type  $a_1$ . *Id.* at 169. For example, a crime of possession simply proscribes one act type  $a_1$  – the act of possession. *See generally id.; see also* DRESSLER, *supra* note 13, § 27.02[F], at 351 (classifying certain offenses which prohibit conduct that is further from completion than a criminal attempt as inchoate crimes “in disguise”). For the purpose of this Comment, crimes will be referred to either as complete, complex inchoate, or simple inchoate.

27. *See* Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599, 602 (1998) [hereinafter Husak, *Reasonable Risk Creation*].

crimes in and of themselves.<sup>28</sup> A second category of inchoate crimes are called "simple" inchoate crimes<sup>29</sup> – simple because they are their own offense, they do not need a target or object offense such as the complex inchoate crimes need. There is no statutory combination needed to create these crimes. A brief examination of both complex inchoate crimes and simple inchoate crimes provides a useful foundation for understanding what category an offense falls into and why combining two inchoate crimes is so troublesome.

#### A. COMPLEX INCHOATE CRIMES

As mentioned, the three complex inchoate crimes are attempt, solicitation, and conspiracy.<sup>30</sup> These are not crimes in and of themselves, rather they are only criminal when used in conjunction with or when applied to another crime.<sup>31</sup> For example, there is no crime of attempt, no crime of conspiracy, and no crime of solicitation.<sup>32</sup> Instead there are crimes such as attempted murder, conspiracy to commit robbery, and solicitation of battery.<sup>33</sup> In this example, the offenses of murder, robbery, and battery are called the target or object offenses. They are the target or object of the attempt, solicitation or conspiracy. Essentially, all of these crimes result from the combination of an attempt, a solicitation, or a conspiracy statute with a statute proscribing another crime, such as murder or robbery. Additionally, complex inchoate crimes do not create a crime when they are applied to an object that is not criminal.<sup>34</sup> For instance, an attempt could not apply to "walking down the street" to create a new crime of "attempted walking down the street." Each of the three complex inchoate crimes, though now expressly recognized as offenses in the United States,<sup>35</sup> originated in common law England.<sup>36</sup>

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28. *See id.* at 602-03.

29. *See id.* at 604.

30. *See id.* at 602. Although attempt, solicitation, and conspiracy are currently the only complex inchoate offenses, others have been proposed. For instance, an all encompassing general statute called "reckless endangerment" has been proposed, *id.* at 621-22, and a general statute called "criminal facilitation" was included with the proposed Federal Criminal Code, *see* M. CHERIF BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 226 (1978).

31. *See generally* Husak, *Reasonable Risk Creation*, *supra* note 27, at 602-03.

32. *See generally id.*

33. *See generally id.*

34. *See generally* Husak, *Nature and Justifiability*, *supra* note 16, at 169 ("If an attempt is criminal, what is attempted is necessarily a criminal act-type, which comprises an essential part of the charge brought against the defendant. The same is true of solicitation and conspiracy.").

35. *See* DRESSLER, *supra* note 13, § 27.01, at 347.

36. *See* LAFAVE & SCOTT, *supra* note 12, § 6.1(a), § 6.2(a), § 6.4(a).

## 1. Conspiracy

Conspiracy, for example, was originally an English statutory construction.<sup>37</sup> The early English courts interpreted the statutes and created what are now the conspiracy laws<sup>38</sup> that make it criminal for two or more persons to agree to commit a criminal act or a series of criminal acts.<sup>39</sup> In the United States, conspiracy exists in most jurisdictions by statute.<sup>40</sup> Additionally, many of the state conspiracy statutes are based upon the MPC's proposed conspiracy statute that applies to all crimes.<sup>41</sup>

## 2. Solicitation

Instead of being a product of policy makers like conspiracy, solicitation and attempt developed through case law.<sup>42</sup> In the 1801 case of *Rex v. Higgins*<sup>43</sup> the defendant was indicted for soliciting a servant to steal from his master. The judges recognized that this was the first time a person had been charged with solicitation outside of the realm of bribery, perjury or forgery.<sup>44</sup> Nonetheless, for policy reasons the judges chose to recognize the offense of solicitation.<sup>45</sup>

Soon thereafter, the United States also began to recognize the crime of solicitation.<sup>46</sup> Today, most United States jurisdictions have created

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37. *See id.* § 6.4(a), at 525. During the reign of Edward I, three conspiracy statutes were enacted – First Ordinance of Conspirators, 1292, 20 Edw. I; Second Ordinance of Conspirators, 1300, 28 Edw. I; and Third Ordinance of Conspirators, 1305, 33 Edw. I. The enactment of these statutes was intended to correct the abuses of ancient criminal procedure. *Id.* Specifically, the conspiracy statutes dealt only with conspiring to create false accusations or false indictments. LAFAVE & SCOTT, *supra* note 12, § 6.4(a), at 525.

38. *See id.* at 525-26.

39. *See* DRESSLER, *supra* note 13, § 29.01[A], at 393.

40. *See* LAFAVE & SCOTT, *supra* note 12, § 6.5(h), at 568.

41. MODEL PENAL CODE § 5.03 (1985) states in part:

(1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

42. *See* LAFAVE & SCOTT, *supra* note 12, § 6.1(a), at 486-87, § 6.2(a), at 495-97.

43. *Id.* § 6.1(a), at 486 (citing 102 Eng. Rep. 269 (1801)).

44. *Id.*

45. *Id.* at 487.

46. *Id.*



comprehensive statutes to cover the solicitation of all crimes.<sup>47</sup> The jurisdictions which have not created a general solicitation statute still follow the common law rule that soliciting another to commit a felony is punishable as a misdemeanor.<sup>48</sup>

### 3. Attempt

In addition to holding that soliciting someone to commit a crime was in itself a crime, the *Higgins* court also held that "all such acts or attempts as tend to the prejudice of the community, are indictable," thus crystallizing the crime of attempt.<sup>49</sup> Attempts soon began to be prosecuted based on the idea that the intention of doing a felonious act could be inferred from the actual act.<sup>50</sup> However, the mere intention of committing a crime would not suffice,<sup>51</sup> instead, there had to be some conduct on the part of the defendant.<sup>52</sup>

In the United States today, the common law rule that attempting to commit a crime is in itself an offense<sup>53</sup> has been codified in almost all jurisdictions through general attempt statutes.<sup>54</sup> Most of these statutes cover an attempt to commit any felony or misdemeanor,<sup>55</sup> and nearly all have at least these two elements: 1) an intent to engage in crime; and 2) conduct

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47. "[T]hirty-three states punish solicitation as a statutory offense . . ." Robbins, *supra* note 2, at 91; see, for example, MODEL PENAL CODE § 5.02 (1985), which states in part:

(1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

48. At common law, soliciting another to commit a misdemeanor that would "breach the peace, obstruct justice or otherwise be injurious to the public welfare" could also be punished as a misdemeanor. LAFAVE & SCOTT, *supra* note 12, § 6.1(a), at 487.

49. *Id.* § 6.2(a), at 497. Criminal attempts had surfaced at several different times in England prior to *Rex v. Higgins*. See *id.* at 495-96. For instance, in the fourteenth century, defendants who were found guilty of unsuccessful attempts at felonies were often convicted of a felony. *Id.* at 495. In the fifteenth century, the crime of attempt developed still more in the Court of Star Chamber. *Id.* at 496. However, this court was abolished in 1640 and the crime of attempt would not resurface again until the 1784 case of *Rex v. Scofield*, Cald. 397 (1784). *Id.* In *Scofield*, the defendant attempted to set fire to the house he was renting. *Id.* The court stated in convicting the defendant that "[t]he intent may make an act, innocent in itself, criminal; nor is the completion of an act, criminal in itself, necessary to constitute criminality." *Id.* Finally, *Rex v. Higgins* solidified the place of attempts in English law. *Id.* at 496-97.

50. See generally *id.* at 496.

51. *Id.* at 495.

52. See *id.*

53. See 21 AM. JUR. 2D *Criminal Law* § 175 (1998).

54. See *supra* text accompanying note 12.

55. See MODEL PENAL CODE § 5.01 cmt. 9 at 362 (1985).

constituting a substantial step towards commission of the crime.<sup>56</sup> Additionally, an attempted crime will usually be sentenced a step lower than the object offense. For instance, in a jurisdiction with different classes of felonies, e.g., class one, class two, etc., an attempt to commit a class one felony is punishable as a class two offense.<sup>57</sup> The law of criminal attempts has gained some uniformity from the codification of the common law rule, yet criminal attempts still remain one of the most difficult subjects in criminal law.<sup>58</sup>

Each of these three complex inchoate crimes has a similar justification for being part of the criminal law – to wit, to prevent the ultimate harm that

56. 21 AM. JUR. 2D *Criminal Law* § 175 (1998). With regard to the first element, an attempt is a specific intent crime. *Id.* § 176. This means that the person attempting the crime must intend to commit that particular crime. *Id.* For this reason there is no such thing as attempted negligence or attempted recklessness. *See id.* With regard to the second element, there is significant discussion about the distinction between attempt and preparation. *See, e.g., id.* § 177. Generally, an attempt has to come “within dangerous proximity to success” to be considered an attempt. *Id.* However, the act need not be the “last proximate act” before the commission of the crime. *Id.*

57. See, for example, 720 ILL. COMP. STAT. ANN. 5/8-4 (West 1993 & Supp. 1999), which states in part:

(c) Sentence.

A person convicted of an attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted but, except for an attempt to commit the offense defined in Section 33A-2 of this Act,

(1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that an attempt to commit first degree murder when at least one of the aggravating factors specified in paragraphs (1), (2) and (12) of subsection (b) of Section 9-1 is present is a Class X felony for which the sentence shall be a term of imprisonment of not less than 20 years and not more than 80 years;

(2) the sentence for attempt to commit a Class X felony is the sentence for a Class 1 felony;

(3) the sentence for attempt to commit a Class 1 felony is the sentence for a Class 2 felony;

(4) the sentence for attempt to commit a Class 2 felony is the sentence for a Class 3 felony; and

(5) the sentence for attempt to commit any felony other than those specified in Subsections (1), (2), (3) and (4) hereof is the sentence for a Class A misdemeanor.

58. See Douglas Husak, *Attempts and the Philosophical Foundations of Criminal Liability*, 8 CRIM. L.F. 293, 295-98 (1997) (reviewing R. A. DUFF, *CRIMINAL ATTEMPTS* (1996)). Duff’s book attempts to deal with four topics that have been consistent problems in the area of criminal attempts. *Id.* Specifically, the four problems are: 1) what level of mens rea should the law require for criminal attempts; 2) what type of actus reus should the law require; 3) are there impossible attempts which should not be criminalized; and 4) should failed attempts be punished any less severely than they would had they been successful. *Id.* *Criminal Attempts* also discusses the philosophical and moral limitations of criminal liability. *Id.*

would result if the attempt, solicitation, or conspiracy were successful.<sup>59</sup> This reasoning and justification for the complex inchoate offenses is the same as the reasoning and justification for the simple inchoate offenses, namely to punish behavior which is likely to lead to a more serious harm.

#### B. SIMPLE INCHOATE CRIMES

In addition to the complex inchoate crimes that require a separate substantive offense as their object, many crimes develop at common law or statutorily<sup>60</sup> that have a major inchoate element.<sup>61</sup> These crimes often develop as a means of punishing an actor before a certain harm is completed.<sup>62</sup> Society has an interest in punishing a person before they have achieved the ultimate harm because it would be too onerous for society to wait until a person has been harmed before the actor could be punished. For example, common law larceny punishes a person for "[t]he unlawful taking and carrying away of someone else's personal property with the intent to deprive the possessor of it permanently."<sup>63</sup> Larceny punishes before the harm is completed, i.e. before the person committing the larceny uses up the property or before the rightful owner dies, because society has an interest in punishing an actor before he or she permanently deprives another of their property.<sup>64</sup> Other simple inchoate crimes include crimes "where a purpose to cause greater harm than that which is implicit in the actor's conduct is an element of the offense"<sup>65</sup> such as common law assault,<sup>66</sup> burglary,<sup>67</sup> and larceny;<sup>68</sup> crimes of risk creation such as reckless driving<sup>69</sup> and drunk driving;<sup>70</sup> crimes of possession;<sup>71</sup> and

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59. Solicitation is criminal because punishing solicitation helps prevent the harm that would result if the solicitation were successful. See LAFAVE & SCOTT, *supra* note 12, § 6.1(b), at 488. Attempts have the primary function of allowing authorities to intervene and convict before a crime is completed. See Robbins, *supra* note 2, at 48. Conspiracy serves as a way to punish actors who have displayed their criminality, as well to deter the continuing dangers of a conspiratorial relationship. See LAFAVE & SCOTT, *supra* note 12, § 6.4, at 525.

60. See DRESSLER, *supra* note 13, § 27.02[F], at 351.

61. See Robbins, *supra* note 2, at 9.

62. See generally *id.* at 16.

63. BLACK'S LAW DICTIONARY 885 (7th ed. 1999).

64. See OLIVER W. HOLMES, THE COMMON LAW 72 (1881).

65. MODEL PENAL CODE art. 5 introduction at 293 (1985). The greater harm usually called for in these crimes is the commission of a felony or another crime. See *infra* text accompanying notes 66-72.

66. Assault is defined as an unlawful "attempt to commit battery . . ." BLACK'S LAW DICTIONARY 109 (7th ed. 1999) (emphasis added).

67. Burglary is defined as "[t]he common-law offense of breaking and entering another's dwelling at night with the intent to commit a felony." *Id.* at 191 (emphasis added).

68. Larceny is defined as "[t]he unlawful taking and carrying away of someone else's personal property with the intent to deprive the possessor of it permanently." *Id.* at 885 (emphasis added).

69. Reckless driving, as well as most crimes requiring a mens rea of recklessness, seek

regulatory crimes such as practicing medicine without a license, or carrying a firearm without a permit.<sup>72</sup> Admittedly, these classifications are not hard and fast. Practicing medicine without a license, for example, may be more similar to a crime of risk creation. Likewise, possession of a firearm without a valid license may be either a crime of possession or a regulatory offense. Some of these simple inchoate crimes have origins similar to that of complex inchoate crimes and others have much more modern origins.

The crimes of possession and the regulatory offenses are recent American statutory inventions,<sup>73</sup> whereas the crimes of assault and burglary developed at various times in common law England.<sup>74</sup> Some of these crimes came into existence before the crime of attempt developed in order to fill a gap in the law, while others developed in conjunction with the crime of attempt.<sup>75</sup> For instance, assault came into existence before the crime of attempt and was in fact originally defined in terms of an attempt – as an attempted battery.<sup>76</sup> Over time, the inchoate aspect, or the attempt element,

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to prevent the ultimate harm of death or bodily injury to a human being, and destruction of the property of another. See LAFAVE & SCOTT, *supra* note 12, § 3.7, at 232.

70. The ultimate harm that proscribing drunk driving prevents is the increased risk of a crash that causes personal injury, property damage or both. See Husak, *Reasonable Risk Creation*, *supra* note 27, at 606.

71. The items which are most often the subject of possession offenses include: burglary tools, "illegal firearms . . . , explosives, forged and counterfeit articles and devices for making them, gambling devices and records, obscene materials with intent to distribute, devices for theft of telecommunications services, bootleg sound recordings with intent to sell, eavesdropping devices, and goods with altered or removed identifications." Robbins, *supra* note 2, at 99-100. Ultimately, the evil or harm which a crime of possession seeks to prevent would depend upon the object being possessed. See *generally id.* at 100-01. The evil or harm is different whether the person is possessing a weapon, burglary tools, or drugs. *Id.* Criminalizing the possession of heroin, for example, is meant to protect against heroin use, or possibly the economic crimes committed by heroin addicts. See Husak, *Reasonable Risk Creation*, *supra* note 27, at 613. Whereas proscribing the possession of burglary tools is meant as a way to arrest a potential burglar before their conduct has reached the level of an attempt. See DRESSLER, *supra* note 13, § 27.02[F], at 351.

72. See Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1544-45 (1997). Regulatory offenses are those offenses which fall under the authority of federal, state, or local administrative agencies and deal with the environment, product safety, workplace safety, labor and employment, transportation, trade, the issuance of securities, the collection of taxes, housing, and traffic and parking. *Id.* at 1544. Generally, these statutes will call for civil penalties, criminal penalties or sometimes both. *Id.*

73. Regulatory crimes have always existed from the colonial period onward, but the number and scope of regulatory offenses has expanded vastly within the twentieth century. See FRIEDMAN, *supra* note 5, at 282. See also Jerome H. Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588, 620-21 (1968) (describing the increasing boundaries of the criminal law with regard to drug offenses).

74. See *generally* Robbins, *supra* note 2, at 17, 20 & n.70.

75. See *id.*

76. See *generally id.* at 17.

of assault has diminished.<sup>77</sup> This is most obvious in statutes that define assault as “intentional frightening.”<sup>78</sup> The attempt element of assault disappeared in many jurisdictions so that assault could be treated as a separate substantive offense, distinct from a battery and with its own mental element.<sup>79</sup> On the other hand, burglary<sup>80</sup> developed at roughly the same time as the attempt laws.<sup>81</sup> Burglary developed because there was a gap in the law; people committing what is now burglary could not be arrested for an attempted felony because the law at the time required too much proximity for an attempt and a burglar’s conduct did not reach this level of proximity.<sup>82</sup>

## II. STALKING: COMPLEX INCHOATE CRIME, SIMPLE INCHOATE CRIME OR COMPLETE CRIME?

### A. THE HISTORY OF ANTISTALKING LAWS

The antistalking laws vary significantly from state to state.<sup>83</sup> Generally, stalking is defined as “willful, malicious, and repeated following and harassing of another person.”<sup>84</sup> Most state stalking statutes require the alleged stalker to engage in a course of threatening behavior and through that behavior, the alleged stalker must intend to cause his or her victim fear.<sup>85</sup> The crime of stalking is a new creation. In fact, prior to 1990 the crime did not exist.<sup>86</sup> However, between 1990 and 1994 all fifty states and Washington D.C. created antistalking laws.<sup>87</sup>

The legislative fury that produced the stalking statutes sprung from the recognition of the seriousness of “stalking behavior.”<sup>88</sup> Legislators, police, prosecutors and the victims themselves had attempted a variety of ways to

77. *See id.*

78. *See generally id.* at 42-43.

79. *See id.* at 18.

80. *See supra* text accompanying note 67.

81. *See* Robbins, *supra* note 2, at 20 n.70 (citing MODEL PENAL CODE § 221.1 commentary at 62-63 (Proposed Official Draft 1980)).

82. *See id.*

83. *See generally* Norman M. Garland, *Criminal Antistalking Laws a Fifty State (and D.C.) Survey*, at 2 (visited Sept. 24, 1998) <<http://people.we.mediaone.net/normgarland/index.html>>. (“Although there is a common purpose underlying all state antistalking laws, there is little uniformity in how they define and address the problem. [S]ome states do not enumerate specifically the types of conduct that are prohibited, some states proscribe lying in wait, some states include surveillance in the description of stalking behavior, and many stalking statutes prohibit nonconsensual communication.”).

84. *See id.*

85. *See id.*

86. *See* Harmon, *supra* note 9, at 165.

87. *See* David, *supra* note 10, at 205-06.

88. *See generally* Guy, *supra* note 9, at 992.

criminalize or prevent this behavior.<sup>89</sup> For example, victims themselves would seek civil remedies such as damages for trespass, assault, invasion of privacy, intentional infliction of emotional distress, or an injunction.<sup>90</sup> Prosecutors would use laws that criminalized some of the stalking activity such as those proscribing harassment, trespass, and loitering.<sup>91</sup> Additionally, prosecutors attempted to indict stalkers for criminal attempts.<sup>92</sup> However, these efforts were without effect.

The attempt to prevent and punish stalkers was largely unsuccessful for several reasons. First, civil remedies sought by victims were difficult to enforce.<sup>93</sup> Often times, the burden was on the victim to pursue the relief.<sup>94</sup> Enforcing the injunction or the decision in their case could be costly and may have required the victim to reappear in court.<sup>95</sup> Second, prosecutors' attempts to stop stalkers were also largely ineffective. Often the elements of the crimes prosecutors charged stalkers with were too narrowly drawn to encompass stalking activity.<sup>96</sup> Finally, the attempt laws were ineffective for two reasons. First, a stalker's conduct did not point to any one crime that a prosecutor could charge them with attempting – there was no target offense. Second, the complained of conduct was a course of conduct rather than just a single isolated event.<sup>97</sup> As a result, prosecutors and police had to wait until “the person actually injured” someone before they could take action.<sup>98</sup> Unfortunately, the injury the police and prosecutors were waiting for all too often turned out to be murder.<sup>99</sup>

After a series of murders that followed “stalking behavior,” including the murder of Hollywood actress Rebecca Schaefer, the California legislature

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89. See Kathleen G. McAnaney et al., *From Imprudence to Crime: Antistalking Law*, 68 NOTRE DAME L. REV. 819, 875-91 (1993) (listing the laws used before 1990 to criminalize stalking behavior as well as the civil remedies used prior to 1990 such as injunctions and tort remedies).

90. See Guy, *supra* note 9, at 997.

91. See McAnaney, *supra* note 89, at 883.

92. See *id.* at 887-88.

93. See *id.* at 875-82.

94. See Guy, *supra* note 9, at 997.

95. See *id.*

96. See McAnaney, *supra* note 89, at 883. For instance, most statutes proscribing “menacing” require the victim to be in fear of *imminent* serious physical injury. *Id.* at 883 (emphasis added). Further, crimes like harassment did not cover activity such as following, which is often in a stalker's repertoire. *Id.* at 886.

97. See *id.* at 887-91.

98. 87th Ill. Gen. Assem., House Proceedings, May 20, 1995 at 69, Representative Thomas Homer.

99. See McAnaney, *supra* note 89, at 838 (quoting FBI statistics and an estimate by a director of Virginians Against Domestic Violence, thirty percent of women homicide victims are killed by husbands and boyfriends, of those, approximately ninety percent of the victims were stalked before they were murdered).

became the first state to create an antistalking law.<sup>100</sup> In the next four years the other forty-nine states and the District of Columbia would do the same.<sup>101</sup>

## B. STALKING AS A COMPLETE CRIME

Determining whether an offense is inchoate or complete is a difficult undertaking.<sup>102</sup> Moreover, attempts to determine whether stalking is inchoate or complete have produced contradictory results.<sup>103</sup> The main argument supporting the conclusion that stalking is a complete crime is that if stalking is inchoate it should therefore share many of the same characteristics of other inchoate crimes.<sup>104</sup> Other inchoate crimes require the elements of: 1) the intent to commit a secondary or target offense, 2) an act that is part of the commission of that secondary offense, and 3) they usually create criminal liability without the necessity of manifest injury.<sup>105</sup> Attempted murder, for example, requires the intent to commit the secondary offense of murder, along with some act which tends to be part of the commission of murder, and the murder must not be committed, in effect the ultimate harm must not occur.

Stalking, it is argued, shares none of these characteristics. First, there is no secondary offense for stalking. Stalkers are arrested before there is any indication that they will rape, batter, kidnap, or kill.<sup>106</sup> Second, even if the stalker's intent to commit a secondary offense could be shown – if the stalker admitted he or she intended to kill his or her victim – it is likely that at the time of arrest, the stalker may not have done any act which is part of the commission of a murder. This is so because a stalker's conduct is usually a "course of conduct" rather than a single act.<sup>107</sup> For instance, a stalker's conduct may consist of harassing a person at home or work, or engaging in

100. See *id.* at 823. In addition to Schaeffer's death, the deaths of five Orange County, California women who had each obtained a restraining order against a former spouse or boyfriend due to harassment, but nonetheless were killed by their harassers, spurred the first stalking statute. *Id.*

101. See David, *supra* note 10, at 205-06.

102. See generally Husak, *Nature and Justifiability*, *supra* note 16, at 165.

103. See generally Elizabeth A. Patton, *Stalking Laws: In Pursuit of a Remedy*, 25 RUTGERS L.J. 465, 508 (1994) ("Stalking is by nature an inchoate crime; it is unfinished, like attempt or conspiracy."); but see Guy *supra* note 9, at 1011 ("Stalking . . . is not an inchoate offense.").

104. See generally Guy, *supra* note 9, at 1010.

105. See *id.* at 1010-11.

106. See *id.* at 1011.

107. See McAnaney, *supra* note 89, at 888-89 ("[S]talking conduct is not thought of as a 'substantial step.' Because stalking acts take place over a period of time, the acts are not proximate enough to the substantive offense. Stalking does not happen in a single day, and by definition cannot be a single occurrence. Stalking scenarios involve a series of individual acts . . . that build on one another. In contrast, most criminal attempt cases involve a same day occurrence.").

persistent, unwanted communications with the person such as phone calls and letters.<sup>108</sup> This type of conduct however, is not part of the commission of a murder. Finally, it is argued that stalking laws require manifest harm, usually fear of some sort, whereas harm is not required with inchoate crimes.<sup>109</sup>

#### C. STALKING AS A COMPLEX INCHOATE CRIME

These arguments assume that a crime can only be choate or inchoate and perhaps do not take into consideration the different classifications of inchoate crimes – simple and complex. Certainly, stalking is not a complex inchoate crime. Stalking is never applied to another crime to create a third crime. Furthermore, as mentioned above there is no object offense for stalking. A stalker's conduct does not dictate whether he or she will murder, rape, or batter his or her victim. Because stalking does not fall into the category of a complex inchoate crime, it is either a simple inchoate crime or a complete crime.

#### D. STALKING AS A SIMPLE INCHOATE CRIME

As to whether stalking is a complete crime or a simple inchoate crime, the analysis begins by determining what the ultimate harm is which antistalking laws are trying to protect against. Placing a victim in "fear" is often one of the *prima facie* elements of stalking. If fear is the harm which legislators are trying to protect against, then every time a person is convicted of stalking they have caused the ultimate harm, fear. A crime which results in the ultimate harm every time it is committed is a complete crime<sup>110</sup> and, therefore, stalking would no doubt be a complete crime. If, on the other hand, stalking laws are an attempt to prevent the murders and other crimes which are often the culmination of stalking behavior – as well as the reason usually given by legislators for the laws – then stalking is a simple inchoate crime.

Though it is not uncommon for a legislature to enact legislation that would protect a person from reasonable fear,<sup>111</sup> the goal of antistalking legislation is not to prevent this harm. The clearest evidence that fear is not the harm that legislators are trying to protect against is that not all stalking statutes require the victim to actually be in fear.<sup>112</sup> For example, some statutes

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108. See Patton, *supra* note 103, at 466.

109. See Guy, *supra* note 9, at 1010.

110. See Husak, *Nature and Justifiability*, *supra* note 16, at 158.

111. In many jurisdictions for instance, the definition of assault includes a tort type of definition whereby an assault is committed when a person does an act which causes reasonable apprehension of immediate bodily harm, and intended to cause that apprehension. See LAFAYE & SCOTT, *supra* note 12, at 693.

112. See, e.g., ALA. CODE § 13A-6-90 (1995) (emphasis added) which states in part:



require the stalker to intend to place the victim in fear of death or bodily harm, but whether or not the victim is actually in fear is irrelevant for the purpose of conviction.<sup>113</sup> In states with statutes that do not require the victim to actually be in fear, a person could theoretically be arrested for stalking without the victim ever knowing the stalking occurred. Although most of the states require the victims to actually fear for themselves or their family, the fact that many states do not require such fear indicates that the ultimate harm that antistalking laws seek to prevent is not the fear to the victims, but instead the consummation of some other crime.

In summary, the crime of stalking is not a complex inchoate crime since it does not require a target or object offense. On the other hand, stalking is not a complete crime since the ultimate harm that legislatures are trying to protect victims from is not the stalking conduct itself, but is instead the murder, rape or battery that the stalking conduct could ultimately produce. Because stalking seeks to prevent a certain harm – murder, rape, etc. – and because a stalker commits the crime of stalking whether or not he or she accomplishes the ultimate harm,<sup>114</sup> stalking is a simple inchoate crime. As a simple inchoate crime, stalking could be used with a complex inchoate, most likely attempt, to create the double inchoate crime of attempted stalking.

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A person is guilty of the crime of stalking who:

- (1) intentionally and repeatedly follows or harasses another person; and
- (2) who makes a credible threat, either express or implied;
- (3) *with the intent to place that person in reasonable fear of death or serious bodily*

*harm.*

113. Compare *id.* with ARIZ. REV. STAT. § 13-2923 (West Supp. 1997) (emphasis added) which states in part:

A person is guilty of stalking who:

(1) intentionally or knowingly engages in a course of conduct that is directed toward another person;

(2) if that conduct either,

(a) would cause a reasonable person to fear for that person's safety or the safety of that person's immediate family *and that person in fact fears imminent physical injury or death to that person's immediate family;* or

(b) would cause a reasonable person to fear imminent physical injury or death to that person or that person's immediate family *and that person in fact fears imminent physical injury or death to that person or that person's immediate family.*

114. See, e.g., *People v. Sowewimo*, 657 N.E.2d 1047,1049 (Ill. App. Ct. 1995) (affirming convictions of aggravated sexual assault, aggravated unlawful restraint, stalking, aggravated stalking, attempted first degree murder, and aggravated discharge of a weapon).

### III. DOUBLE INCHOATE CRIMES

Double inchoate crimes can arise in two possible ways. First, a complex inchoate crime can have as its object another complex inchoate crime.<sup>115</sup> For instance, an attempt can have as its object a conspiracy that in turn has as its object another crime. Or, a conspiracy can have as its object an attempt that in turn has as its object another crime. These two situations, an attempt to conspire and conspiracy to attempt, are the most common complex-complex constructions,<sup>116</sup> although theoretically, there are nine possible double inchoate crimes involving the three complex inchoate crimes.<sup>117</sup> The second way a double inchoate construction can arise is if the object of a complex inchoate offense is a simple inchoate crime.<sup>118</sup> Examples of this include attempted assault, attempted possession of burglary tools, and attempted larceny. A brief examination of these two double inchoate constructions is important for understanding why attempted stalking is a double inchoate offense and the reasoning behind how the crime is challenged legally.

#### A. COMPLEX-COMPLEX CONSTRUCTION

As mentioned previously, the two most common complex-complex inchoate constructions are attempted conspiracy and conspiracy to attempt.<sup>119</sup> Attempted conspiracy usually occurs when a person attempts to engage in a conspiracy with another person, and the second person feigns agreement.<sup>120</sup> Attempted conspiracy has arisen almost exclusively in state courts.<sup>121</sup> Nearly all state courts that have "considered the existence of attempted conspiracy have rejected it."<sup>122</sup> Attempted conspiracy was rejected by these courts for various reasons including, but not limited to: 1) the courts not being able to convict for crimes not defined by the legislature, 2) the state conspiracy statute

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115. For the purpose of this Comment, a complex inchoate crime whose object is another complex inchoate crime will be referred to as a complex-complex construction.

116. See generally Robbins, *supra* note 2, at 6.

117. The nine possible constructions of double inchoate crimes using only the complex inchoate crimes are attempts to attempt, attempts to conspire, attempts to solicit, conspiracies to attempt, conspiracies to conspire, conspiracies to solicit, solicitations to attempt, solicitations to conspire, and solicitations to solicit. *Id.* at 36.

118. For the purpose of this Comment, a complex inchoate crime whose object is a simple inchoate crime will be referred to as a complex-simple construction.

119. See generally Robbins, *supra* note 2, at 6. Additionally, the Model Penal Code allows not only for conspiracy to attempt, but also for conspiracy to solicit. See MODEL PENAL CODE § 5.03 (1985) (providing that a person is guilty of conspiracy if that person agrees to engage in conduct that constitutes an attempt or solicitation of a crime, or agrees to aid another person in the attempt or solicitation of a crime).

120. See Robbins, *supra* note 2, at 56.

121. *Id.* at 55.

122. *Id.*

requires an agreement by two people, and 3) the state conspiracy statute requires only a unilateral agreement, and so attempted conspiracy is unnecessary.<sup>123</sup> On the other hand, conspiracy to attempt has arisen almost exclusively in the federal courts<sup>124</sup> because of the way the federal criminal code's conspiracy statute is worded,<sup>125</sup> and because of the wording of some of the federal substantive crimes. The federal criminal code will often prohibit the substantive crime and the attempt at the substantive crime.<sup>126</sup> Notably, the federal courts have accepted the validity of this construction.<sup>127</sup>

#### B. COMPLEX-SIMPLE CONSTRUCTION

The concept of double inchoate crimes where a simple inchoate crime is the object of a complex inchoate crime is not a new proposition. In fact, for the past 125 years prosecutors have brought charges accusing defendants of complex inchoate crimes whose objects are simple inchoate crimes whose ultimate objects are completed crimes.<sup>128</sup> The most common complex-simple construction is that of attempted assault.<sup>129</sup> "[N]o jurisdiction recognizes the crime of attempted simple assault,"<sup>130</sup> but many courts do allow a defendant to be convicted for attempted aggravated assault.<sup>131</sup> Other complex-simple constructions that have been legally challenged include attempted burglary and attempted possession.<sup>132</sup> A conviction of attempted burglary has never been overturned on the grounds that it is an attempt-to-attempt,<sup>133</sup> and the only court to have looked at attempted possession rejected that construction.<sup>134</sup>

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123. *Id.* at 55 n.272.

124. *Id.* at 58.

125. 18 U.S.C. § 371 (1982) states in part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years or both.

126. *See generally* Robbins, *supra* note 2, at 60 n.295.

127. *Id.* at 62.

128. *Id.*

129. *Id.* at 38-39.

130. *Id.* at 39; for a definition of simple assault, *see supra* note 66.

131. *Id.* at 39. An aggravated assault is an assault that is more severe than a simple assault. *See* LAFAYE & SCOTT, *supra* note 12, at 695. Examples include "assault with intent to murder" and "assault with a deadly weapon." *Id.*

132. *See generally* Robbins, *supra* note 2, at 47-50.

133. *Id.* at 47.

134. *Id.* at 49.

### C. ATTEMPTED STALKING

Any crime created by legislators in a jurisdiction with a general attempt statute implicitly creates an attempt of the same crime.<sup>135</sup> Therefore, when stalking was created, the legislators implicitly created attempted stalking. Presently, every state has a general attempt statute, and none of these states has excluded stalking from coverage under the attempt statute. Because stalking is relatively new, and because of the fact that attempted stalking is often a misdemeanor whereas stalking itself is a felony in many jurisdictions,<sup>136</sup> most of the attempted stalking convictions are likely the result of a plea.<sup>137</sup>

To date, only one attempted stalking case has reached the appellate level or higher.<sup>138</sup> The fact that the case exists and that the defendant was charged with attempted stalking by indictment<sup>139</sup> indicates that attempted stalking is being prosecuted.

### IV. CHALLENGES TO DOUBLE INCHOATE CONSTRUCTIONS

The validity of having an inchoate crime as the object of another inchoate crime has led courts to question their authority to judicially create crimes as well as the logic of indicting a person for these crimes. Although its viability has been questioned,<sup>140</sup> the most often used argument the courts

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135. See *supra* text accompanying note 12.

136. See Garland, *supra* note 83.

137. See, e.g., Charles Mount, *Stalking Case Settled With Reduced Charges*, CHI. TRIB., July 2, 1993, at 8 (describing police officer who pleaded guilty to attempted stalking); *For The Record*, SALT LAKE TRIB., Feb. 21, 1996, at B2 (describing a woman who was obsessed with her female therapist and pleaded guilty to attempted stalking); *Two Who Died in Crash Had Crime Records/Passengers Linked to Biker Clubs; Pilot's Record Clean*, MORNING NEWS TRIB., Dec. 5, 1997, at B5 (indicating victim of a plane crash had previously pleaded guilty to attempted stalking); David Cobb Craig, *Passages*, PEOPLE MAG., Aug. 24, 1998, at 89 (detailing a homeless man who after getting caught menacing Linda Ronstadt, pleaded guilty to attempted stalking); *Political Insider*, ARIZ. REPUBLIC, Sept. 18, 1998, at B1 (describing a political candidate who spent a year in prison after pleading guilty to attempted stalking); *Official Records*, SPOKESMAN-REV., Feb. 10, 1999, at C6 (documenting a defendant pleading guilty to attempted stalking); However, the fact that attempted stalking was accepted in a guilty plea does not mean the crime cannot be challenged on appeal. *C.f.* *People v. O'Connell*, 67 N.Y. Sup. Ct. 109, 14 N.Y.S. 485 (1891) (allowing defendant to challenge his conviction for attempted assault on the ground that no such crime existed even though he had pled guilty to the crime).

138. *Rooks v. State*, 458 S.E.2d 667 (Ga. Ct. App. 1995), *rev'd*, 468 S.E.2d 354 (Ga. 1996). See *infra* Part IV.D.

139. *Id.* at 668.

140. The logical absurdity argument has been attacked on several grounds. First, critics say that the argument is inconsistently applied because courts sometimes apply it to attempted assault, but will not usually apply it to an attempted aggravated assault. Second, critics argue that courts have focused too much on the semantics of an attempt of a crime in the nature of an attempt and not enough on the policy issues that a double inchoate construction seeks to

make against double inchoate constructions is the logical absurdity argument.<sup>141</sup> Specifically, the logical absurdity argument questions whether the concept of double inchoate crimes gives courts ultimate discretion to punish acts which are much further removed from the crime than could normally be punished if only one inchoate crime were applied.<sup>142</sup> A double inchoate construction can also be challenged under the principle of legality. Legality essentially forces a legislature to write its statutes specific enough to put citizens on notice of what the enactment is prohibiting. Even if a double inchoate construction survives these two challenges, some courts cannot uphold a conviction for a double inchoate crime because the legislature in that jurisdiction prohibits the judicial discretion required to create a double inchoate crime. Other courts whose legislatures have not prohibited the judicial creation of double inchoate crimes nonetheless feel that it is not within their capacity to create a double inchoate crime without manifest legislative intent that they do so.<sup>143</sup> An examination of the logical absurdity and legality challenges is important to understanding which challenge would be most effective in terms of attempted stalking.

#### A. LOGICAL ABSURDITY

Probably the strongest argument against double inchoate crimes was formulated in the 1874 Georgia Supreme Court case of *Wilson v. State*.<sup>144</sup> That argument essentially is that double inchoate crimes are a logical absurdity. Generally, the logical absurdity argument is based on two premises: first, that double inchoate constructions gives "courts unlimited discretion to punish acts further removed from a completed offense than an attempt statute does,"<sup>145</sup> and second, that individuals do not attempt-to-attempt a crime, attempt-to-conspire to commit a crime, or attempt-to-solicit a crime, but instead attempt to commit a completed offense.<sup>146</sup>

Since *Wilson v. State*, the logical absurdity argument has been used excessively in cases to invalidate double inchoate constructions.<sup>147</sup> However, the use of the logical absurdity argument has become a dogma. Courts dealing

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promulgate. See generally Robbins, *supra* note 2, at 67-68. For a discussion of the policy issues double inchoate crimes seek to promulgate, see *infra* Part V-A.

141. See Robbins, *supra* note 2, at 62.

142. See *id.*

143. See generally *id.* at 74.

144. 53 Ga. 205 (1874); see *supra* text accompanying note 1; see also Robbins, *supra* note 2, at 66 n.331 (citing other decisions contemporaneous to *Wilson v. State*, that dealt with attempted assaults, and found that the crime did not exist).

145. See Robbins, *supra* note 2, at 64.

146. See *id.* at 65.

147. See *id.* at 71 nn.359-60.

with a double inchoate construction will simply conclude, without any explanation, that a crime is a logical absurdity.<sup>148</sup>

## B. LEGALITY

The legality principle provides that a person should be given notice of what is and what is not criminal so that he or she will have an opportunity to choose between lawful and unlawful conduct.<sup>149</sup> This principle is one of the most fundamental in American jurisprudence.<sup>150</sup> A statute challenged under the legality principle can be challenged two ways. First, the statute can be challenged as faulty because it is not understandable to a reasonable law-abiding person,<sup>151</sup> and second, that the statute is faulty because it is drafted in such a way that basic policy matters are delegated to policemen and judges and juries for resolution on a case-by-case subjective basis.<sup>152</sup>

The first doctrine included in the principle of legality is the concept of vagueness. This means that a criminal statute should not be so vague that an ordinary person would have to guess at its meaning.<sup>153</sup> A statute is not vague just because a reasonable person may not understand a statute, it only becomes vague if that person cannot find out what the statute means by any other means. For instance, a statute is not vague if an attorney can look to case law and see how courts have interpreted a certain portion of the statute.<sup>154</sup> When applying the concept of vagueness, courts will apply a strict standard if the statute infringes upon or could infringe upon First Amendment rights or other fundamental rights.<sup>155</sup> If the statute does not touch upon a fundamental right,

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148. See generally *id.* at 63.

149. See DRESSLER, *supra* note 13, § 5.01[B], at 30.

150. See *id.* § 5.01[A], at 29.

151. See *id.*

152. See *id.* § 5.03, at 30.

153. See *id.* § 5.02, at 31-32.

154. See *id.* at 33.

155. See *id.* at 32. When stalking is challenged constitutionally, the fundamental rights that defendants claim are violated include the right to expressive conduct, and the right to interstate travel. See David, *supra* note 10, at 213, 222. Illinois cured some of the constitutional infirmities of its stalking statute with regard to these fundamental rights by including the following subsections within its statute. See 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 1993 & Supp. 1998) which states in part:

(c) Exemption. This section does not apply to picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute, or any exercise of the right of free speech or assembly that is otherwise lawful.

(e) For the purpose of this Section, "follows another person" means (i) to move in relative proximity to a person as that person moves from place to place or (ii) to remain in relative proximity to a person who is stationary or whose movements are confined to a small area. "Follows another person" does not include a following within the residence of the

courts are less likely to find that the statute is unconstitutionally vague.<sup>156</sup>

The second doctrine prohibits a statute that allows arbitrary or discriminatory enforcement by law enforcement.<sup>157</sup> This is because when "the legislature fails to provide . . . minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."<sup>158</sup>

### C. CHALLENGES TO ATTEMPTED STALKING

#### 1. *Logical absurdity*

Given stalking is a simple inchoate crime, then attempted stalking would be subject to analysis under the aforementioned doctrines. The only case of attempted stalking to reach the appellate level or higher addressed the crime under the doctrine of logical absurdity only.<sup>159</sup> Nearly 125 years after it first established the doctrine of logical absurdity, the Georgia Supreme Court dealt with it again, only this time in the context of attempted stalking. In *State v. Rooks*,<sup>160</sup> the defendant placed harassing phone calls to his ex-wife on multiple occasions.<sup>161</sup> He was subsequently charged by indictment<sup>162</sup> with making harassing telephone calls, impersonating a public officer or employee,<sup>163</sup> and criminal attempt to commit aggravated stalking.<sup>164</sup> In a jury trial, the

defendant.

156. See DRESSLER, *supra* note 13, § 5.02, at 32.

157. See *id.* § 5.03, at 33.

158. *Id.* (citing Kolendar v. Lawson, 461 U.S. 352, 358 (1983)).

159. *Rooks v. State*, 458 S.E.2d 667 (Ga. Ct. App. 1995), *rev'd*, 468 S.E.2d 354 (Ga. 1996).

160. 468 S.E.2d 354.

161. The defendant made many phone calls ranging from hang-up calls where he said nothing to calls in which he asked his ex-wife if she was the one with the "double chin and pointed nose," and if her daughter was pregnant. See 458 S.E.2d at 668.

162. Presumably the reason why Rooks was indicted for attempted stalking as opposed to stalking was because some of his threats were communicated to third parties, and not directly to the victim herself. See 468 S.E.2d at 356 (Sears, J., concurring).

163. On one occasion the defendant called his ex-wife's place of employment and told one of her co-workers he was the district attorney and proceeded to ask the co-worker personal questions about his ex-wife. See 468 S.E.2d at 355.

164. 458 S.E.2d at 668. The Georgia stalking statute, GA. CODE ANN. § 16-5-90 (1995) states in part:

A person commits the offense of stalking when he or she:

1) follows, places under surveillance, or contacts another person at or about a place or places;

2) without the consent of the other person;

3) for the purpose of harassing and intimidating the other person.

Additionally, GA. CODE ANN. 16-5-91(a) (1995) provides that the crime of stalking is enhanced to aggravated stalking if the offender commits the crime of stalking and is in violation of a peace bond, temporary restraining order, preliminary injunction, permanent injunction, condition of

defendant was acquitted of impersonating a public officer, but was ultimately found guilty of making harassing telephone calls and of criminal attempt to commit aggravated stalking.<sup>165</sup> The defendant appealed the attempted stalking conviction claiming that the evidence was insufficient.<sup>166</sup> The Georgia Court of Appeals agreed that the defendant's attempted stalking conviction should be reversed. However, the court came to its decision without looking to the sufficiency of the evidence.<sup>167</sup> Instead, the court held that attempted stalking is a legal impossibility.<sup>168</sup> In doing so, the court looked at Georgia's stalking statute<sup>169</sup> and determined that because the statute requires placing a person in reasonable fear of death or bodily harm, it is in essence a common law assault, which by definition "is nothing more than an attempted battery."<sup>170</sup> The court then stated that it knows "of no law authorizing the conviction for an attempt to commit a crime which itself is a particular type of attempt to commit a crime."<sup>171</sup> Finally, the court bolstered its holding by quoting *Wilson v. State*.<sup>172</sup>

The State appealed and the Georgia Supreme Court granted certiorari, and reversed.<sup>173</sup> The supreme court agreed with the lower court, that in Georgia there is no such crime as attempted assault, however the court then explained why stalking was not an assault.<sup>174</sup> First, the court stated that stalking is committed when a person "follows, places under surveillance, or contacts another person."<sup>175</sup> Then the court stated that because these acts do not call for "a demonstration of violence and a present ability to inflict injury," they do not constitute an assault.<sup>176</sup> Further, the court compared the intent element of both stalking and assault and determined that they differ in that intent for assault requires immediacy whereas intent for stalking does not,

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pretrial release, condition of probation, or condition of parole.

165. 458 S.E.2d at 668.

166. In addition the defendant appealed the denial of his motions to quash the indictment on the ground that the district attorney had a personal stake in the outcome since the district attorney was the public official that the defendant was charged with impersonating. *See id.* The court found this issue moot because the defendant was acquitted of the charge of impersonating a public officer. *See id.*

167. *See id.* at 668-69.

168. *See id.*

169. *See supra* text accompanying note 164.

170. 458 S.E.2d at 668 (quoting *Scott v. State*, 234 S.E.2d 685, 687 (Ga. Ct. App. 1977)); *see also* GA. CODE ANN. § 16-5-20(a)(2) (1995).

171. *Id.* at 668-69 (quoting *Porter v. State*, 183 S.E.2d 631 (Ga. Ct. App. 1971)).

172. *See id.*; *see also supra* text accompanying note 1.

173. 468 S.E.2d 354-55.

174. *See id.* at 355.

175. *Id.*; *see also supra* text accompanying note 164 (quoting GA. CODE ANN. § 16-5-90 (1995)).

176. 468 S.E.2d at 355.



and the harm for assault must be perceived by the victim whereas for stalking the victim can perceive the harm intended for their family.<sup>177</sup> Finally, the court concluded that attempting to stalk is not “to do an act towards doing an act towards the commission of the offense” as *Wilson* stated was the case with assault,<sup>178</sup> but rather attempting to stalk is “to attempt to follow, place under surveillance or contact another person.”<sup>179</sup>

However, both the Georgia Court of Appeals and the Georgia Supreme Court were mistaken in their application of the logical absurdity analysis. First, the Court of Appeals was correct in determining that attempted stalking was a logical absurdity. Unfortunately, its reasoning was incorrect in stating that stalking is a common law assault. For the reasons the Georgia Supreme Court stated – the immediacy of the harm and proof that the victim perceived the harm – stalking is not an assault. Even if the Georgia Court of Appeals had been more broad in its holding and stated that stalking was a form of attempt and as an attempt-to-attempt stalking is a logical absurdity, it would have been incorrect. Stalking is not a form of attempt because there is no target offense, and it involves a course of conduct rather than a substantial step.<sup>180</sup>

However, the logical absurdity argument is applicable to crimes other than attempts and assaults. The logical absurdity argument is applicable to all double inchoate constructions and is therefore applicable to attempted stalking. In fact, attempted stalking seems to beckon the use of the logical absurdity argument more than other double inchoate constructions because stalking is further from a substantive crime than is an attempt.<sup>181</sup> The main argument against an attempt-to-attempt crime is that it would give courts unlimited discretion to punish acts further removed from a contemplated offense than an attempt statute does. Attempted stalking does just this. As it is, the stalking statutes proscribe acts that are innocuous, and sometimes the legal is indistinguishable from the illegal.<sup>182</sup> Attempted stalking gives courts unlimited discretion to punish acts even further removed from an ultimate harm than an attempt-to-attempt would. An ideal stalking conviction would

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177. *See id.* at 355-56.

178. *See id.* at 356 (quoting *Wilson v. State*, 53 Ga. 205, 206 (1874)); *see also supra* text accompanying note 1.

179. 468 S.E.2d at 356; *see also supra* text accompanying note 164. Justice Sears in a concurring opinion stated that in his opinion the evidence against Rooks was sufficient for an indictment of stalking. Indicting Rooks for attempted stalking he believed defeated the purpose of the stalking statute. 468 S.E.2d at 356 (Sears, J., concurring).

180. *See supra* Part II.

181. *See DRESSLER, supra* note 13, § 27.02[F], at 351 (classifying stalking as an inchoate crime “in disguise” because it prohibits “conduct less proximate to completion than is required for a criminal attempt”).

182. *See supra* text accompanying note 9.

involve a person who would have killed, raped, or caused some other ultimate harm to another, but was stopped from doing so, or failed in the process. If they are stopped from creating the ultimate harm, they should only be stopped after their conduct reaches the level of stalking. If the police can step in any sooner, then they have the power to arbitrarily step in at anytime, whether they have a prima facie case of stalking or not.

If the "would be stalker" fails to achieve the ultimate harm, then the second logical-absurdity argument becomes an issue, namely that just as individuals do not attempt-to-attempt a crime,<sup>183</sup> individuals do not attempt-to-almost-attempt a crime. Under attempted stalking, the individual who failed at his or her attempt to become a stalker will essentially be charged with attempting-to-fail-to-achieve the ultimate harm. Under this analysis, attempted stalking is certainly a logical absurdity, because people do not attempt to fail.

## 2. Legality

Because *State v. Rooks* dealt with attempted stalking only in the realm of logical absurdity, it is mere speculation to consider whether attempted stalking would survive under the principle of legality. An analysis under this principle is important nonetheless.

Many antistalking statutes have been challenged for vagueness with mixed results. At this point however, most have been cured of any constitutional infirmities.<sup>184</sup> Additionally, the attempt statutes have also been challenged as vague, and have been ruled constitutional.<sup>185</sup> The question then becomes if the two parts are not vague, does that necessarily mean that the combination of both is also not vague? This is a question that has not been dealt with in case law or otherwise. However, it is easy to imagine situations

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183. See generally Robbins, *supra* note 2, at 65.

184. Twenty-four of the twenty-seven antistalking laws that have been challenged on the grounds of constitutionality have been ruled constitutional. These laws were challenged on the grounds of vagueness and overbreadth. See Brian L. McMahon, *Constitutional Law – Unreasonable Ambiguity: Minnesota's Amended Stalking Statute Is Unconstitutionally Vague*, 24 WM. MITCHELL L. REV. 189, 192 (1998).

185. See, e.g., *State v. Soddors*, 304 N.W.2d 62 (Neb. 1981). Nebraska's attempt statute was challenged on the grounds that it was so complex that it failed to provide adequate notice of what conduct was proscribed. *Id.* at 64. The statute (NEB. REV. STAT. § 28-201 (1979)) provided that a person was guilty of an attempt at a crime if he or she intentionally engaged in conduct that would constitute a crime if the attendant circumstances were as he or she believed them to be; or conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of the crime. *Id.* at 64-65. The court held that although part of the statute is "inartfully drafted and unduly complex," the unclear language nonetheless did not amount to unconstitutional ambiguity. *Id.* at 65.

where the combination of the two statutes would create a crime that would not put a person on notice as to what is lawful or unlawful.

Take, for example, Illinois' antistalking law.<sup>186</sup> It provides in essence that a person commits stalking when he or she follows another person, or places another person under surveillance on at least two separate occasions and transmits a threat to that person or places that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement or restraint.<sup>187</sup> The Illinois attempt statute<sup>188</sup> provides in essence that a person commits an attempt at a crime when he or she does any act constituting a substantial step toward the commission of that crime.<sup>189</sup> Stated more definitely, attempted stalking in Illinois essentially calls for a substantial step toward two acts plus fear. This brings up obvious questions that a reasonable person would have: Is one act plus fear a substantial step toward stalking? Are two acts and no fear enough? When these statutes are combined, a reasonable person would not know what is lawful or unlawful and would not be able to choose between acting legally or illegally. A person who does not know what is lawful and unlawful will not have an opportunity to conform his or her conduct to the law.<sup>190</sup> Furthermore, for the purpose of vagueness, it does not matter that the conduct is something that should be punished. The principle of legality "applies even though its application may result in a dangerous and morally culpable person escaping punishment."<sup>191</sup>

Additionally, Illinois' crime of attempted stalking further provides an example of when the police, prosecution, or jury will have too much discretion. The police may have too much discretion if, for example, they determine that two acts of following or surveillance are enough to constitute attempted stalking. In that case, the police would be able to arrest a person who on two occasions drove by another person's home or followed another

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186. 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 1993 & Supp. 1998).

187. 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 1993 & Supp. 1998) states in part:

(a) A person commits stalking when he or she, knowingly and without lawful justification on at least 2 separate occasions follows another person or places the person under surveillance or any combination thereof and:

(1) at any time transmits a threat to that person of immediate or future bodily harm, sexual assault, confinement or restraint; or

(2) places that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement or restraint.

188. 720 ILL. COMP. STAT. ANN. 5/8-4 (West 1993 & Supp. 1998).

189. 720 ILL. COMP. STAT. ANN. 5/8-4 (West 1993 & Supp. 1998) states in part:

(a) Elements of the Offense.

A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

190. See DRESSLER, *supra* note 13, § 5.01[B], at 30.

191. *Id.* at 5.01[A], at 29.

person, even though there was no harm to the person, in effect, they were not in any sort of fear. Likewise, a prosecutor would be acting within his or her discretion by bringing charges against this same actor. Furthermore, anytime a person is charged with stalking, a jury would have the discretion to convict the accused of attempted stalking, and the interpretation of what constitutes attempted stalking would ultimately be up to the jury.

## V. JUSTIFICATIONS AND CRITICISMS

With the enactment of new "inchoate" crimes, the use of double inchoate constructions will continue to generate controversy. The controversy will likely center around whether the benefits of a double inchoate crime outweigh the detrimental effects they have on the criminal law.<sup>192</sup>

### A. JUSTIFICATIONS

There are many valid reasons that buttress a court's decision to create a double inchoate crime and that support a prosecutor's decision to bring a charge against a defendant for a double inchoate crime. The reasons range from judicial efficiency to public policy. The justifications for accepting double inchoate crimes will be taken in turn.

The most obvious benefit of double inchoate crimes to both prosecutors and courts is judicial efficiency. Judicial efficiency is often taken into consideration when a court determines whether or not to accept a given procedure in a criminal case. In other words, when a court considers whether to create a double inchoate construction it weighs heavily the ramifications that that decision will have on the efficiency of that particular court. Judicial efficiency becomes a factor with double inchoate crimes because a prosecutor with a double inchoate crime such as attempted stalking in his or her arsenal has another tool for effective plea-bargaining.<sup>193</sup> As mentioned, most attempt statutes will reduce the level of the offense committed.<sup>194</sup> For instance,

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192. See generally Robbins, *supra* note 2, at 116 (indicating that although there are times when double inchoate constructions are necessary, it is ultimately up to courts to determine if the need for crime prevention supports the use of a double inchoate construction).

193. A plea bargain, or plea agreement is essentially a contract between the defendant and the prosecution. Generally, the defendant pleads guilty to an offense in exchange for some consideration on the part of the prosecution. In exchange the prosecution can reduce the charge against the defendant, dismiss other charges, make a non-binding sentencing recommendation to the court, agree not to oppose the defendant's request for a particular sentence, or agree that a specific sentence is appropriate for that case. See Michele E. Beasley, *Guilty Pleas*, 79 GEO. L.J. 879, 879-880 (1991). Often because of an overload of cases, prosecutors will accept guilty pleas to the lesser charge of an attempt at the crime. See generally Arthur Burnett, *Prison Effect On The African-American Community*, 34 HOW. L.J. 528, 528 (1991).

194. See *supra* Part I.A and text accompanying note 58.

stalking in Illinois is a Class 4 felony<sup>195</sup> – the lowest felony. Under Illinois' attempt statute, an attempt at a Class 4 felony is a Class A misdemeanor.<sup>196</sup> Therefore, if Illinois courts create and accept the crime of attempted stalking, a defendant accused of stalking would have the choice of foregoing trial and pleading from the Class 4 felony of stalking to the Class A misdemeanor of attempted stalking.<sup>197</sup> Not only would attempted stalking be a valuable tool for prosecutors, courts would also see it as a valuable way to clear up the trial docket. On the other hand, though a plea of guilty may be effective in terms of judicial economy at the trial level, it could in turn create additional work for the judiciary since double inchoate crimes are often challenged on appeal.<sup>198</sup>

Prosecutors benefit from a double inchoate construction for another reason, namely that it is easier to convict someone of an attempt at a crime than for the crime itself. More specifically, it is easier for a person to be found guilty of making a substantial step toward stalking than it is to find them guilty of stalking. The higher likelihood of conviction may have a deterring effect on would-be stalkers. In addition, an initial conviction for attempted stalking may decrease recidivism particularly in a jurisdiction that punishes a second conviction of stalking under an increased sentence level.<sup>199</sup>

In addition to providing a prosecutor with a tool for plea-bargaining, a double inchoate construction can serve as a tool for the court in decision making. When faced with a factual situation where a defendant has clearly done an act that is morally reprehensible, and yet is possible of evading review because of a gap in the law, a court has two options. First, it can create the double inchoate crime, and thus punish a person using an abstraction, or second, it can stretch the criminal law to fill in the gap.<sup>200</sup> The court in these

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195. 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 1993 & Supp. 1998) states in part:  
(b) Sentence. Stalking is a Class 4 felony. A second or subsequent conviction for stalking is a Class 3 felony.

196. See *supra* text accompanying note 57.

197. The defendant would only have the choice to plead this way if the prosecution was in agreement. There is no constitutional right to plea bargain. See Beasley, *supra* note 193, at 879.

198. See generally Robbins, *supra* note 2, at 89. It should be noted that an appellate court is not as likely to review the validity of a double inchoate crime that resulted from a plea, but some courts have done so in the past. See *supra* text accompanying note 137.

199. See, e.g., *supra* text accompanying note 196.

200. If the court does not choose to exercise either of these options, it would be required to dismiss all charges against the defendant. See, e.g., Robbins, *supra* note 2, at 91-92. Robbins cites *State v. Sexton*, 657 P.2d 43 (Kan. 1983) where the defendant contracted with two police officers to have them kill his wife. The defendant offered a price for the murder and outlined the plan. The defendant was charged with attempt to conspire to commit murder. The prosecutor was forced to bring this charge because the factual situation did not fall under the Kansas' attempt or conspiracy statutes. The trial court dismissed the charge because the

cases will take into consideration the public policy and weigh that against the problems caused by creating a double inchoate construction. Ultimately, the court may, in the interest of public policy, create the double inchoate crime.

## B. CRITICISMS

The interest in judicial efficiency, public policy, and the deterrent value of double inchoate crimes must be weighed against the criticisms of double inchoate crimes. Beyond the blanket statements that double inchoate crimes are unnecessary and cumbersome,<sup>201</sup> the most viable criticism of double inchoate crimes is that they extend the moral limits of the criminal law too far. Extending the moral limits of the criminal law, i.e., making acts criminal that are far removed from the ultimate harm, creates several problems. First, overcriminalization of conduct that was previously governed by civil law erodes respect for the criminal law and takes away some of the stigma attached to criminal sanctions.<sup>202</sup> Second, the increase in crimes may lead to a decrease in the deterrent value of the criminal law. In other words, legislators may be spreading the police force too thin.<sup>203</sup> To ensure that complex and simple inchoate crimes do not punish acts which should be placed beyond the reach of criminal sanction, five principles have been developed.<sup>204</sup> The five principles analyze the ultimate criminal harm, whether the crime requires high culpability, whether there is a causal connection between the crime and the ultimate harm, whether the crime is close enough in proximity to the ultimate harm, and whether the actor's specific conduct is likely to cause the ultimate harm.<sup>205</sup> An application of these principles to attempted stalking should be determinative of whether attempted stalking goes

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defendant's actions did not constitute a crime, and the Kansas Supreme Court affirmed. *Id.*

201. *See* Robbins, *supra* note 2, at 62.

202. *See* Husak, *Nature and Justifiability*, *supra* note 16, at 152-53. Husak states the most common reasons theorists provide for protesting the "ever-expanding use of the criminal sanction." In addition to the two reasons mentioned, others include "the potential for corruption and discrimination when the criminal law exceeds its limits," and the "inevitable creation of a 'crime tariff.'" *Id.*

203. *Id.* at 153.

204. *See id.* at 174. Prior to Husak's article, the five principles had only been applied to complex inchoate offenses. This is because his article established the complex-simple distinction. Husak attempts in his article to apply the five principles to simple inchoate offenses. *Id.*

205. *Id.* The fifth principle is referred to by Husak as the persistence requirement, presumably because the conduct should only be punishable if the actor is persistent in achieving the ultimate harm that is proscribed. Further, the persistence requirement should allow an actor the opportunity to prove that his or her conduct did not increase the risk that the ultimate harm would occur. *Id.* at 178.

beyond the reach of criminal sanction and is an unjustified exercise of state authority.

The first principle is to determine what the ultimate harm is which attempted stalking is meant to prevent and then to determine if a state is justified in trying to prevent that harm. A state is justified in trying to prevent that harm through the use of a double inchoate construction if it could prevent an intentional infliction of that harm and be justified in doing so.<sup>206</sup> As determined, the ultimate harm stalking seeks to prevent is the murder, rape, or other offense that is often the result of stalking conduct.<sup>207</sup> Presumably, attempted stalking seeks to prevent the same harm. States are justified in preventing murders, rapes, and other crimes so, under the first principle, attempted stalking would not exceed the limits of the criminal law.

The second principle, high culpability, means that acts that risk causing the ultimate harm are permissible unless the acts are performed with a high degree of culpability.<sup>208</sup> The degree of culpability required for an attempt is generally the same degree as for the offense.<sup>209</sup> As the level of culpability required for stalking is high – knowingly in most states<sup>210</sup> – attempted stalking falls within the ambit of criminal sanction.

The third principle calls for empirical data to determine if there is a causal connection between the act proscribed and the ultimate harm.<sup>211</sup> As mentioned above, data shows that about ninety percent of all women who are murdered were stalked.<sup>212</sup> However, this data would be inconclusive for the purpose of analyzing attempted stalking for two reasons. First, the statistics do not show that stalking causes or significantly increases the probability of murder, instead it simply shows that murder victims are stalked.<sup>213</sup> Second, these statistics speak to stalking and not to attempted stalking. Without

206. *See id.* at 175.

207. *See supra* Part II.

208. Husak, *Nature and Justifiability*, *supra* note 16, at 175. Generally, there are four levels of culpability. In descending order they are: purposely, knowingly, recklessly, and negligently. *See* MODEL PENAL CODE § 2.02 which states in part:

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

209. *See, e.g.*, MODEL PENAL CODE § 5.01 (emphasis added) (providing that "a person is guilty of an attempt to commit a crime if, *acting with the kind of culpability otherwise required for commission of the crime, he . . .*").

210. *See* Garland, *supra* note 83, at 2 (stating that a stalker's conduct must be willful, purposeful, intentional, or knowing).

211. *See* Husak, *Nature and Justifiability*, *supra* note 16, at 176.

212. *See supra* text accompanying note 10.

213. Stated more simply, the statistics show that ninety percent of female murder victims were stalked, however it cannot be inferred from this statistic that a majority of stalkers commit murder. *See generally id.*

empirical data, attempted stalking cannot be analyzed under the third principle.

The fourth principle is proximity. Under the proximity principle, an offense is justified if the proscribed conduct is not too remote from the ultimate harm.<sup>214</sup> One way for determining whether the proscribed conduct is too far removed from the ultimate harm is to consider whether the actor is capable of taking steps to minimize the risk of the ultimate harm.<sup>215</sup> There are any number of steps a person could take between the time they have displayed the first act of potential stalking behavior until the time when the ultimate harm occurs. For example, a person may make a substantial step toward stalking (and thus fall within the reach of an attempted stalking law), but before they have committed the crime of stalking they may, for whatever reason, cease their conduct. If all persons who had taken the substantial step toward stalking were punished at this point, the responsible persons who ceased the stalking conduct would be subject to the same criminal liability as the persons who would have went on to stalk and maybe on to murder or rape. To punish those who would have taken the responsible steps to curb their behavior would not be justified and therefore falls outside "the moral limits of the criminal law in creating and enforcing" laws.<sup>216</sup>

The last principle, the persistence principle, allows an actor to prove that his or her conduct would not have increased the risk of harm.<sup>217</sup> In order for attempted stalking to be outside the limits of what the law can sanction, a person accused of attempted stalking should be allowed to show that their conduct would not have increased the risk of murder, rape, or other harm. A crime that violates any of the five principles, as attempted stalking likely does, goes beyond the moral limits of what the criminal law can punish.<sup>218</sup>

### CONCLUSION

The criminal law has always attempted to strike a balance between prohibiting wrongful acts and preserving individual freedom.<sup>219</sup> Society can

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214. See Husak, *Nature and Justifiability*, *supra* note 16, at 177.

215. *Id.* ("An act-type  $a_1$  is too distant from a consummate harm  $a_2$  if persons who perform tokens of  $a_1$  might take any number of intermediate steps to minimize the risk of the consummate harm.")

216. *Id.* at 178.

217. See *id.* at 178. As an example of the persistence principle, a person would not be guilty of possessing an illegal weapon if his or her intent with the weapon was to destroy it, or to deliver it to the proper authority. *Id.*

218. See *id.* at 174.

219. At various times in our nation's history individual freedoms have been expanded. For example, the emancipation of Blacks from slavery and the fight to win women the right to vote were monumental accomplishments in terms of individual freedoms for a huge sector of



take away some individual freedoms to punish wrongful acts because it is ultimately in the society's best interest. After all, in the criminal realm, the wrongful act violates a collective rather than an individual interest.<sup>220</sup> Most citizens are willing to give up some of their freedoms for the overall good of society.<sup>221</sup> However, times have changed and the balance has been sinking on the side of wrongful acts as lawmakers pile up more and more crimes<sup>222</sup> and in turn take away more and more freedoms. Undoubtedly, as our society continues to change, regulations will continue to adapt and grow and citizens will face an impossible task of distinguishing the legal from the illegal. Attempted stalking, and double inchoate crimes in general are examples of the pervasive legislation that threatens to take away yet more individual freedom.

NICK ZIMMERMAN

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the United States' population. Further, citizens of the United States have adopted a feeling of "expressive individualism," and the country has become more *self* oriented. This exaltation of the self has brought about an "explosion" of violent crimes that requires new forms of punishment. See generally FRIEDMAN, *supra* note 5, at 13-15 (emphasis in original).

220. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1806 (1992).

221. See Husak, *Nature and Justifiability*, *supra* note 16, at 154 (citing public opinion polls which state that citizens are willing to sacrifice rights in order to help reduce crime).

222. *Id.* at 151 (stating that as of 1995 there were over 300,000 federal regulations that could be enforced criminally, despite that fact that the states bring a majority of the prosecutions).