"A TREATISE ON THE LAW OF CRIMINAL ATTEMPT AS PARTICULARLY APPLIED IN CANADA AND WITH SPECIAL REFERENCE TO THE LAW IN THE COMMONWEALTH AND IN THE UNITED STATES OF AMERICA"

by

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Being a thesis submitted to the
Faculty of Graduate Studies and Research
in partial fulfillment of the requirements
for the degree of Doctor of Civil Law

Institute of Comparative Law
McGill University
Montreal
July 1983

TO MY PARENTS

AND TO ANNE,
MY WIFE AND FRIEND

ACKNOWLEDGEMENTS

The writer wishes to thank the following individuals and organizations for their assistance in the preparation of this dissertation:

Professor Alan W. Mewett, Q.C., for his judicious academic and pragmatic advice, and for his encouragement to complete this task undertaken.

The Canadian Commonwealth Scholarship for providing financial assistance to commence the initial research.

The Faculty of Law, University of Edinburgh, for their financial assistance in re-awarding the Dalgety Scholarship in Scots Law, the Lorimer Scholarship in International Law, and the Brown Scholarship.

Dean Frank Jones, Q.C., of the Faculty of Law, University of Alberta, for his support and encouragement.

Mr. R.H. Graham, Administrative Officer, Faculty of Law, University of Alberta, for his logistic assistance in the production of the manuscript.

Canadian embassies overseas and foreign embassies in Canada for information on foreign laws.

Maureen Sexsmith, Lisa Bowes and Shelley Mackenzie for their excellent typing (and often re-typing) skills.

Mark Giles and Diane Quilichini for their fine proofreading and related verification of manuscript details.

Mark 9 Wordprocessing and Western Wordprocessors, both of Edmonton, for their commendable wordprocessing.

ABSTRACT

This thesis examines the law of criminal attempt, as particularly applied in Canada, and with special reference to the law in the Commonwealth and the United States of America. Wherever relevant, the laws of other countries are reviewed and included herein. The following areas of criminal attempt are considered in turn: history, rationale, mental element, factual element, impossibility, abandonment, success and merger, evidence and procedure, and sentencing. Two appendices comprising an international compendium of general attempt provisions, and a compilation of specific attempt provisions in Canadian federal statutes and regulations, are also included. The thesis concludes with recommended draft legislation.

Cette thèse examine le droit de la tentative criminelle, selon formulé au Canada, et avec référence particulière au droit de la Commonwealth et de les Etats Unis. Où pertinent, les provisions légales de divers autres pays seront inclus et analysées. Les prochains sujets relatifs à la tentative criminelle seront considerés en succession: l'histoire, la rationale, l'élément mental, l'élément réel, l'impossibilité, l'abandonment, le succès, la preuve et les règles de procédure, et jugement. Deux appendices comprennant un abrégé international des provisions concernant l'attentat général, et une compilation de provisions particulières à l'attentat dans les statuts fédéraux et les règlements du Canada, y sont inclus. La thèse termine en soulignant des recommendations viz-à-viz la législation provisoire.

CONTENTS

	Page
CASE LIST	xviii
STATUTE LIST	lxxxvii
CHAPTER I INTRODUCTION	1
1. PREFATORY REMARKS	1
2. AN ATTEMPT TO COMMIT AN OFFENCE IS AN OFFENCE IN ITS OWN RIGHT	5
3. DEFINITIONAL ELEMENTS	7
4. INTRODUCTORY COMMENTS ON THE GENERAL ATTEMPT PROVISION IN THE CANADIAN CRIMINAL CODE	10
5. IMPORTANCE AND DIFFICULTY	15
CHAPTER II HISTORICAL ASPECTS	21
1. INTRODUCTION	21
2. ROMAN LAW	25
3. SCANDINAVIA	33
4. CONTINENTAL EUROPE	35
5. THE COMMON LAW - AND SCOTLAND	41
6. CONCLUSION	64
CHAPTER III WHY PUNISH ATTEMPT	67
1. INTRODUCTION	67
2. OBJECTIVE AND SUBJECTIVE - THE TWO MAJOR APPROACHES	74
(a) Objective - Social Danger, Functional	75
(b) Subjective - Personal Intent, Conceptual	85
3. THE CONVENTIONAL CRITERIA OF PUNISHMENT AS APPLIED TO ATTEMPTS	97
(a) Deterrence	98
(b) Retribution	103
(c) Rehabilitation	106
(d) Law Enforcement and Intervention	109
(e) Harm	114
(f) Policy	120
4. CONCLUSION	121

		Page
CHAPTER IV	**THE MENTAL REQUIREMENT - MENS REA**	124
1.	INTRODUCTION	124
2.	MENS REA PER SE IS NOT CRIMINAL	131
3.	AN EXCEPTION TO THE 'MENS REA PER SE IS NOT CRIMINAL' PRINCIPLE: TREASON	151
4.	THE TYPE OF MENS REA NEEDED FOR ATTEMPT: ONLY A 'DIRECT' INTENT WILL SUFFICE	157
5.	A CANADIAN, SCOTTISH, AND SOUTH AFRICAN EXCEPTION FOR THE MENS REA OF ATTEMPT	166
6.	FOR RECKLESSNESS AS AN ACCEPTABLE MENS REA FOR ATTEMPT	189
7.	AGAINST RECKLESSNESS AS AN ACCEPTABLE MENS REA FOR ATTEMPT	234
8.	INTENT AS TO CONSEQUENCES, RECKLESSNESS AS TO CIRCUMSTANCES?	249
9.	NEGLIGENCE THE MENS REA FOR ATTEMPT?	258
10.	STRICT LIABILITY?	266
11.	CONDITIONAL INTENT	274
12.	TRANSFERRED INTENT	289
13.	CONCLUSION	291
CHAPTER V	**THE FACTUAL REQUIREMENT - ACTUS REUS**	295
1.	INTRODUCTION	295
	(a) Prefatory Remarks	295
	(b) Functions of the Judge and Jury viz-a-viz the Actus Reus	311
	(c) 'It Depends on the Particular Facts'	319
	(d) Attempt Committed by Omission	324
2.	PROXIMITY TEST	326
3.	FIRST STAGE THEORIES	351
4.	COMMENCEMENT OF THE EXECUTION TEST	359
5.	FINAL STAGE THEORIES	367
	(a) Last Act Test	367
	(b) Penultimate Act Test	378
	(c) Possibility of Intervention Theory	383
	(d) Probability of Desistance Theory	384

		Page
6.	DANGEROUSNESS TEST	393
7.	EQUIVOCALITY TEST	409
8.	SUBSTANTIAL STEP TEST	438
9.	CONTROL APPROACH and INDISPENSIBLE ELEMENT APPROACH	457
10.	CAUSATION THEORY	460
11.	ABOLISH ATTEMPT, AND REPLACE IT WITH SPECIFIC ATTEMPTED OFFENCES OR 'PRELIMINARY' OFFENCES?	463
12.	ACTING WITH THE KIND OF CULPABILITY OTHERWISE REQUIRED FOR THE CRIME ATTEMPTED	475
13.	THE 'COMMON SENSE' TEST	476
14.	'DISCRETION OF THE COURTS' TEST	478
15.	INDETERMINATE TESTS	480
16.	GUIDELINES	482
17.	'LIKELY TO END IN CONSUMMATION' TEST	487
18.	COMMMITMENT TEST	488
19.	ABNORMAL STEP THEORY	489
20.	THE 'COMMISSION OF ANOTHER CRIME CONSTITUTES BY ITSELF AN ATTEMPT' THEORY	490
21.	PROFESSOR STUART: A SUBJECTIVE TEST, BEING ALTERNATIVELY THE PROXIMITY TEST OR PROBABILITY OF DESISTANCE THEORY	491
22.	CONCLUSION	493
CHAPTER VI	**IMPOSSIBILITY**	497
1.	INTRODUCTION	497
	(a) Preface	497
	(b) Impossibility or Statutory Interpretation?	499
	(c) The Legal Impossibility and Factual Impossibility Distinction	509
2.	CATEGORIES OF IMPOSSIBILITY	515
	(a) Non-existence of Something in the External World	516
	(i) The Empty Pocket	516
	(ii) The Vacuous Womb	525
	(iii) The Absent Ambush Victim	532

Page

(iv) The Trying Tree Stump 537
(v) The Ubiquitous Umbrella 541
(b) Lack of an Essential Quality 546
(i) The Poisoning Posers 546
(ii) The Bungling Bullet 549
(iii) Attempted Fraud and False Pretences, Extortion and Corruption 556
(iv) Lady Eldon's Lace 562
(v) Magical Mysteries 566
(c) Personal Incapacity 571
(i) Age 571
(ii) Marital Status 583
(iii) Incapable Rapist 590
(d) The Receiver, the Resetter, the Fence - Three Bags Full 592
3. ARE THERE ANY CRIMES WHICH CANNOT BE ATTEMPTED? 631
4. CONSPIRACY TO DO THE IMPOSSIBLE 647
5. MINUTE QUANTITIES OF NARCOTICS 650
6. CONDITIONAL INTENT 654
7. THREE POSSIBLE SOLUTIONS TO IMPOSSIBILITY 656
(a) Reasonable Man 656
(b) The English Law Commission and the Criminal Attempts Act 1981 662
(c) The American Model Penal Code 671
8. CONCLUSION 676

CHAPTER VII ABANDONMENT OF THE ATTEMPT 695
1. INTRODUCTION 695
2. ANGLO-CANADIAN POSITION 696
3. AUSTRALIA 704
4. SOUTH AFRICA 707
5. UNITED STATES 708
6. CONSIDERATIONS FOR AND AGAINST THE DEFENCE OF ABANDONMENT 716
(a) For 716
(b) Against 719

		Page
7.	CONCLUSION	723
CHAPTER VIII	**SUCCESSFUL ATTEMPTS and MERGER**	725
CHAPTER IX	**EVIDENTIAL AND PROCEDURAL CONSIDERATIONS**	747
1.	INTRODUCTION	747
2.	DRAFTING THE INFORMATION AND INDICTMENT	747
3.	ACCOMPLICES AND ATTEMPT	754
	(a) Aiding and Abetting; Accomplices (Section 21)	754
	(b) Counselling and Procuring (Section 22)	759
	(c) Accessory After the Fact (Section 23)	764
4.	PROVOCATION	767
5.	SELF DEFENCE	773
6.	ATTEMPTING INDICTABLE OFFENCES	774
7.	ATTEMPTING SUMMARY OFFENCES	775
8.	ATTEMPTING OPTIONABLE OFFENCES	779
9.	SIMILAR FACT EVIDENCE	782
10.	ARREST FOR ATTEMPTED OFFENCES	785
	(a) Citizen's Arrest	785
	(b) Police Officer's Arrest	787
11.	VERDICT	790
12.	EXTRA-TERRITORIAL JURISDICTION	791
13.	ATTEMPTED OFFENCES BY CORPORATIONS	798
CHAPTER X	**SENTENCING**	803
CHAPTER XI	**GENERAL ATTEMPT PROVISIONS**	816
CHAPTER XII	**SPECIFIC ATTEMPT PROVISIONS**	824
CHAPTER XIII	**CONCLUSION**	830
1.	INTRODUCTION	830
2.	HISTORICAL ASPECTS	833
3.	WHY PUNISH ATTEMPT	834
4.	THE MENTAL REQUIREMENT - MENS REA	834

		Page
5.	THE FACTUAL REOUIREMENT - ACTUS REUS	838
6.	IMPOSSIBILITY	845
7.	ABANDONMENT OF THE ATTEMPT	848
8.	SUCCESSFUL ATTEMPTS AND MERGER	849
9.	EVIDENTIAL AND PROCEDURAL CONSIDERATIONS	851
10.	SENTENCING	861
11.	GENERAL ATTEMPT PROVISIONS; SPECIFIC ATTEMPT PROVISIONS	861
12.	CONCLUSION	862
APPENDIX I	**GENERAL LEGISLATIVE ATTEMPT PROVISIONS - AN INTERNATIONAL COMPENDIUM**	870
	Afghanistan	875
	Algeria	876
	Argentina	877
	Australia	
	Australian Capital Territories	878
	New South Wales	880
	Northern Territory	881
	Queensland	883
	South Australia	884
	Tasmania	885
	Victoria	886
	Western Australia	887
	Austria	888
	Bangladesh	890
	Belgium	891
	Bermuda	892
	Bolivia	894
	Botswana	895
	British Solomon Islands Protectorate	896
	Burma	898
	Canada	899
	Chile	900
	China	901
	Colombia	902

	Page
Czechoslovakia	903
Denmark	905
Dominican Republic	906
England	907
Ethiopia	911
France	912
Gambia	913
German Democratic Republic (East Germany)	914
German Federal Republic (West Germany)	915
Ghana	919
Greece	920
Greenland	921
Guatemala	922
Guyana	923
Honduras	924
Hong Kong	925
Hungary	926
Iceland	928
India	929
Israel	930
Italy	932
Jamaica	933
Japan	934
Jordan	935
Kenya	936
Korea	937
Liberia	938
Malawi	939
Malaysia	940
Malta	941
New Zealand	942
Nigeria	944
Norway	946
Poland	947
Romania	948
Scotland	949
Singapore	950
South Africa	951

	Page
Spain	952
Sweden	953
Tanzania	954
Turkey	955
Uganda	956
U.S.S.R. (Union of Soviet Socialist Republics)	957
United States of America	
Alabama	958
Alaska	959
Arizona	960
Arkansas	961
California	963
Colorado	965
Connecticut	966
Delaware	968
District of Columbia	970
Florida	971
Georgia	972
Hawaii	974
Idaho	975
Illinois	976
Indiana	977
Iowa	978
Kansas	979
Kentucky	980
Louisiana	981
Maine	982
Maryland	983
Massachusetts	985
Michigan	986
Minnesota	987
Mississippi	988
Missouri	989
Montana	990
Nebraska	991
Nevada	992

Page

New Hampshire 993
New Jersey 994
New Mexico 996
New York 997
North Carolina 998
North Dakota 999
Ohio 1000
Oklahoma 1001
Oregon 1002
Pennsylvania 1003
Rhode Island 1004
South Carolina 1005
South Dakota 1007
Tennessee 1008
Texas 1009
Utah 1010
Vermont 1011
Virginia 1012
Washington 1013
West Virginia 1014
Wisconsin 1015
Wyoming 1016
Draft Codes: Model Penal Code 1018
Federal Criminal Code 1020

APPENDIX II **SPECIFIC ATTEMPT PROVISIONS IN CANADIAN FEDERAL STATUTES AND REGULATIONS**

Aeronautics Act, R.S.C. 1970, c. A-3, s. 5(5) 1023
Air Regulations (Aeronautics Act) Chapter 2: ss. 210, 218, 222, 400, 402, 408, 516, 531; Chapter 3: ss. 5, 8(2), 13, 19; Chapter 38: s. 3 1024
Animal Disease and Protection Act, S.C. 1974-75-76, c. A-13, ss. 19, 33, 37-38, 44 1028
Anti-Inflation Act, S.C. 1974-75-76, c. 75, s. 44 1030
Atomic Energy Control Act, R.S.C. 1970, c. A-19, s. 19 1031
Banks and Banking Law Revision Act, S.C. 1980-81, c.

Page

40, ss. 178, 313 1032

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 6, 24, 174, 204 1034

Ouebec Savings Banks Act, R.S.C. 1970, c. B-4, ss. 114, 126 1039

Bretton Woods Agreements Act, R.S.C. 1970, c. B-9, Art. V s.5, Art. XII s. 4 1040

Canada Elections Act R.S.C., c. 14 (1st. Supp.), ss. 15, 44 49, 68, 74, 76, 88, 97, Sch. A. Rules 14 1042

Canada Evidence Act, R.S.C. 1970, c. E-10, s. 4 1049

Canada Pension Plan, R.S.C. 1970, c. C-5, ss. 26, 42, 92 1050

Carriage of Goods by Water Act, R.S.C. 1970, c. C-15, Art. IV 1054

Citizenship Act, S.C. 1974-75-76, c. 108, s. 28 1056

Civil Service Insurance Regulations (Civil Service Insurance Act, R.S.C 1952, c. 49), Chapter 401, s. 11 1057

Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 38, 41 1058

Canada Corporations Act, R.S.C. 1970, c. C-32, s. 74 1061

Criminal Code, R.S.C. 1970, c. C-34, ss. 17, 24, 35, 38, 41, 46, 53, 58, 72, 75, 76, 83, 98(1)(2)(12)(13), 104, 108, 109, 112, 127, 135, 172, 178.1, 191, 195, 213, 214, 222, 239, 241, 243, 244, 250, 281.2, 283, 305, 322, 326, 352, 359, 381, 394, 421, 422, 427, 429.1, 483, 485, 512, 515, 516, 532, 587-589, 687, 727 1062

Race Track Supervision Regulations (Criminal Code), Chapter 441, s. 213 1097

Advance Payment for Crops Act, S.C. 1976-77, c. 12. s. 14 1098

Cultural Property Export and Import Act, S.C. 1974-75-76, c. 50, ss. 34, 37, 38 1099

Customs Act, R.S.C. 1970, c. C-40, ss. 118, 187, 192, 231, 232 1100

Custom-House Brokers Licensing Regulations (Customs

Page

Act), Chapter 456, s. 20 1100
Defence Production Act, R.S.C. 1970, c. D-2, s. 2 1106
Exchequer Court, R.S.C. 1970, c. E-11, s. 27 1107
Excise Act, R.S.C. 1970, c. E-12, ss 179, 259 1108
Export and Import Permits Act, R.S.C. 1970, c. E-17, ss. 13, 14 1111
Extradition Act, R.S.C. 1970, c. E-21. Schs. I, III 1112
Financial Administration Act, R.S.C. 1970, c. F-10, s. 92 1116
National Parks Domestic Animals Regulations (Financial Administration Act), Chapter 1117.7, s. 7, 9 1117
National Historic Parks Wildlife and Domestic Animals Regulations (Financial Administration Act) Chapter 1126.5, s. 15 1118
Fish Inspection Act, R.S.C. 1970, c. F-12, s. 3 1119
Fish Inspection Regulations (Fish Inspection Act), Chapter 802, ss. 6, 14, 24 1120
Fisheries Act, R.S.C. 1970, c. F-14, s. 2 1121
Beluga Protection Regulations (Fisheries Act), Chapter 809, s. 2 1122
Lobster Fishery Regulations (Fisheries Act), Chapter 817, s. 16 1123
Narwhal Protection Regulations (Fisheries Act), Chapter 820, s. 2 1124
Pacific Commercial Salmon Fishery Regulations (Fisheries Act), Chapter 823, s. 11 1125
Pacific Herring Fishery Regulations (Fisheries Act), Chapter 825, ss. 13, 15.4 1126
Pacific Shellfish Regulations (Fisheries Act), Chapter 826, s. 18 1128
Seal Protection Regulations (Fisheries Act), Chapter 833, ss. 15, 20 1129
Walrus Protection Regulations (Fisheries Act), Chapter 835, s. 2 1131
Alberta Fishery Regulations (Fisheries Act), Chapter 838, ss. 2, 4, 24, 31, 46 1132

Page

British Columbia Fishery (General) Regulations (Fisheries Act), Chapter 840, ss. 12, 32, 66 1135

British Columbia Sport Fishing Regulations (Fisheries Act), Chapter 842.5, ss. 2(1), 10, 12 1136

Manitoba Fishery Regulations (Fisheries Act), Chapter 843, ss. 2, 23 1137

New Brunswick Fishery Regulations (Fisheries Act), Chapter 844, s. 13(1)(2)(3)(3.1)(4)(5)(5.1)(6)(20) 1138

Newfoundland Fishery Regulations (Fisheries Act), Chapter 846, ss. 2(1), 10, 34, 39, 42, 45, 65, 66, 71-72, 75 1139

Nova Scotia Fishery Regulations (Fisheries Act), Chapter 848, s. 16(1)(2)(3)(12) 1142

Ontario Fishery Regulations (Fisheries Act), Chapter 849, ss. 2(1), 4(6), 5, 11, 12, 13.3, 13.4, 21, 22, 38, 43, 57-58, 64 1143

Prince Edward Island Fishery Regulations (Fisheries Act), Chapter 850, ss. 15, 20(12) 1149

Quebec Fishery Regulations (Fisheries Act), Chapter 852, ss. 2(1), 30 1150

Saskatchewan Fishery Regulations (Fisheries Act), Chapter 853, s. 6 1151

Yukon Territory Fishery Regulations (Fisheries Act), Chapter 854, ss. 2(1), 5, 9 1152

Northern Pacific Halibut Fisheries Convention Act, R.S.C. 1970, c. F-17, s. 7 1154

Foreign Investment Review Act, S.C. 1973-74, c. 46, s. 26 1155

Geneva Convention Act, R.S.C. 1970, c. G-3, Arts. 4, 12, 68, 92-93, 120-122 1156

Gold Export Act, R.S.C. 1970, c. G-5, s. 4 1161

Fraser River Harbour Commission By-laws (Harbour Commissions Act, R.S.C. 1970, c. H-1), Chapter 902, ss. 35, 57, 60-61 1162

Lakehead Harbour Commission By-laws (Harbour Commissions Act), Chapter 904, s. 140 1165

Page

Nanaimo Harbour Commission General By-Laws (Harbour Commissions Act), Chapter 907, s. 136 1166
Oshawa Harbour Commission By-laws (Harbour Commissions Act), Chapter 911, s. 125 1167
Canadian Human Rights Act S.C. 1976-77, c. 33, s. 37 1168
Immigration Act, S.C. 1976-77, c. 52, 55, ss. 46-47, 95, 98 1169
Income Tax Act, S.C. 1970-71-72, c. 63, ss. 158, 163, 231, 239 1174
Indian Band Election Regulations (Indian Act, R.S.C. 1970, c. I-6), Chapter 952, s. 15 1177
Indian Referendum Regulations (Indian Act), Chapter 957, 15, 27 1178
Indian Timber Regulations (Indian Act), Chapter 961, s. 30 1179
International Development Association Act, R.S.C. 1970, c. I-21, s. 5 1180
Juvenile Delinquents Act, R.S.C. 1970, c. J-3, ss. 25, 34 1181
Canada Labour Code, R.S.C. 1970, c. L-1, ss. 171.1 185 1182
Livestock and Livestock Products Act, R.S.C. 1970, c. L-8, s. 39 1185
Migratory Birds Regulations (Migratory Birds Convention Act R.S.C. 1970, c. M-12), Chapter 1035, ss. 2(1), 6 1186
Migratory Birds Sanctuary Regulations (Migratory Birds Convention Act) Chapter 1036, ss. 2(1), 6 1188
Motor Vehicle Safety Act, R.S.C. 1970, c. 26 (1st. Supp.), s. 9.1 1189
Motor Vehicle Safety Regulations (Motor Vehicle Safety Act), Chapter 1038, s. 1101 1191
National Defence Act, R.S.C. 1970, c. N-4, ss. 38, 62, 71, 74, 78, 90-91, 101, 104, 119, 122-123, 257 1193
Military Rules of Evidence (National Defence Act), Chapter 1049, ss. 22, 46, 74 1202
National Housing Loan Regulations (National Housing Act, R.S.C. 1970, c. N-10), Chapter 1108, s. 80 1204

Page

National Historic Parks General Regulations (National Parks Act, R.S.C. 1970, c. N-13), Chapter 1112.5, ss. 2, 36 1205

Wood Buffalo National Park Game Regulations (National Parks Act), Chapter 1113, ss. 2(1), 49 1206

National Parks Camping Regulations (National Parks Act), Chapter 1116, s. 10 1207

National Parks Fire Protection Regulations (National Parks Act), Chapter 1119, s. 4 1208

National Parks Fishing Regulations (National Parks Act), Chapter 1120, s. 2 1209

National Parks General Regulations (National Parks Act), Chapter 1124, 2. 32 1210

National Parks Wildlife Regulations (National Parks Act) Chapter 1134.5, s. 2 1211

Northern Inland Waters Regulations (Northern Inland Waters Act, R.S.C. 1970, c. 28 (1st. Supp.)), Chapter 1234, s. 12 1212

Official Secrets Act, R.S.C. 1970, c. O-3, ss. 3, 9-10 1213

Canada Oil and Gas Drilling Regulations (Oil and Gas Production and Conservation Act, R.S.C. 1970, c. O-4), Chapter 1245.5, s. 45 1215

Old Age Security Act, R.S.C. 1970, c. O-6, s. 23 1216

Patent Rules (Patent Act, R.S.C. 1970, c. P-4), Chapter 1250, s. 45 1217

Penitentiary Service Regulations (Penitentiary Act, R.S.C. 1970, c. P-6), Chapter 1251, ss. 39, 41 1218

Pension Act, R.S.C. 1970, c. P-7, ss. 44-46 1220

Pension Benefits Standards Act, R.S.C. 1970, c. P-8, s. 20 1221

Petroleum Corporations Monitoring Act, S.C. 1977-78, c. 39, s.9 1222

Petroleum and Gas Revenue Tax Act, S.C. 1980-81, c. 68, ss. 88(5), 90(2), 110 1224

Laurentian Pilotage Tariff Regulations (Pilotage Act, S.C. 1970-71-72, c. 52), Chapter 1269, s. 12 1226

Page

Canada Post Corporation Act, S.C. 1980-81, c. 54, s. 41(1) 1227
Postage Meters Regulations (Canada Post Corporation Act), Chapter 1287, s. 21 1228
Special Services and Fees Regulations (Canada Post Corporations Act), Chapter 1296, ss. 11, 49.1 1229
Privileges and Immunities (North Atlantic Treaty Organization) Act, R.S.C. 1970, c. P-23, Art. 3 1230
Prohibition of International Air Services Act, S.C. 1980-81, c. 61, s. 3 1231
Canada Mining Regulations (Public Lands Grants Act R.S.C. 1970, c. P-29), Chapter 1516, ss. 71, 88 1232
Public Service Staff Relations Act, R.S.C. 1970, c. P-35, s. 10 1233
Railway Act, R.S.C. 1970, c. R-2, ss. 82, 379 1234
Livestock Bill of Lading Regulations (Railway Act), Chapter 1213, ss. 4-5 1235
Water Carrier Free and Reduced Rate Transportation Regulations (Railway Act), Chapter 1228, s. 16 1236
Algoma Central Railway Traffic Rules and Regulations (Railway Act), Chapter 1375, s. 14 1237
By-laws Nos. 6 and 8 of Via Rail Canada Inc. (Railway Act), Chapter 1375.5, ss. 4-5 1238
Canadian National Railway Passenger Train Travel Rules and Regulations (Railway Act), Chapter 1376, ss. 5-6 1239
Canadian Pacific Railway Traffic Rules and Regulations (Railway Act), 1377, ss. 5-6 1240
Dominion Atlantic Railway Traffic Rules and Regulations (Railway Act), Chapter 1378, ss. 5-6 1241
Grand River Railway Traffic Rules and Regulations (Railway Act), Chapter 1379, ss. 5-6 1242
Lake Erie and Northern Railway Traffic Rules and Regulations (Railway Act), Chapter 1380, ss. 5-6 1243
Quebec Central Railway Traffic Rules and Regulations (Railway Act), Chapter 1381, ss. 5-6 1244
Victoria Jubilee Bridge Traffic By-law (Railway Act), Chapter 1384, s. 7 1245

Page

Royal Canadian Mounted Police Act, R.S.C. 1970 c. R-9, ss. 24-25 1246
St. Lawrence Port Operations Act, S.C. 1972, c. 22, s. 5 1248
Champlain Bridge Regulations (St. Lawrence Seaway Authority Act, R.S.C. 1970, c. S-1), Chapter 1395.3, s. 6 1249
Seaway Regulations (St. Lawrence Seaway Authority Act), Chapter 1397, s. 31 1250
Senate and House of Commons Act, R.S.C. 1970, c. S-8, s. 23 1251
Canada Shipping Act, R.S.C. 1970, c. S-9, ss. 12, 25, 86, 238, 259, 273, 398, 417, 423, 429, 434, 436, 450-451, 497, 619, 634, 756 1252
Chemical Carrier (Steamship) Regulations (Canada Shipping Act), Chapter 1415.5, s. 1 1263
Collision Regulations (Canada Shipping Act), Chapter 1416, s. 20.1 1264
Emergency Position Indicating Buoy Regulations (Canada Shipping Act), Chpater 1421, s. 5 1265
Hull Construction Regulations (Canada Shipping Act), Chapter 1431, s. 16 1266
Public Harbours Regulations (Canada Shipping Act), Chapter 1461, s. 74 1267
Rules of the Road for the Great Lakes (Canada Shipping Act), Chapter 1464, s. 30 1268
Tackle Regulations (Canada Shipping Act), Chapter 1494, s. 3 1269
Telesat Canada Act, R.S.C. 1970, c. T-4, s. 30 1270
Canada Temperence Act, R.S.C. 1970, c. T-5, ss. 71-72, 84-85, 90, 97, 99, 150-151 1271
Trading With the Enemy Act, S.C. 1947, c. 24, ss. 2-3, 63, 73 1276
Canal Regulations (Department of Transport Act, R.S.C. 1970, c. T-15), ss. 20, 23-26, 31, 62, 77.18 1279
Unemployment Insurance Act, S.C. 1970-71-72, c. 48, ss. 73, 79, 88, 112, 121 1282

Page

Veterans Insurance Regulations (Veterans Insurance Act, R.S.C. 1970, c. V-3), Chapter 1587, s. 15 1289
War Service Grants Act R.S.C. 1970, s. W-4, ss. 31, 33 1290
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Young Offenders Act, S.C. 1980-81-82, c. 110, ss. 24, 33 1292
Yukon Act, R.S.C. 1970, c. Y-2, s. 54 1296
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BIBLIOGRAPHY

1. Books 1302
2. Articles 1320
3. Notes (no author noted) 1359
4. Notes (no author or title noted) 1368
5. Law Reform Material 1369
6. Digests and Encylopedias 1372
7. Newspaper Articles 1373

CASE LIST

Notes:

1. Cases are arranged alphabetically, the appellation of the prosecuting authority ("R.", "D.P.P.", "H.M. Adv.", "State", "People", etc.) being included in the style of cause, but said appellation not being a consideration for alphabetical listing purposes.

2. Cases having the same name for alphabetical listing purposes are listed according to year.

3. The name of the relevant court is indicated in parentheses, wherever discernible from the reports.

4. Unreported cases are included, and in each case the date and relevant court noted, as well as the secondary source of the unreported case where appropriate.

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Abbot v. R., 24 April 1980 (W. Aus. S.C.). Unreported.

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People v. Adami (1974) 111 Cal. Rptr. 544 (Ca. Dist. C.A.)

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R. v. Chapeau, 7 Dec. 1978 (Man. C.A.). Unreported

Chapman v. R. (1980) 6 M.V.R. 303 (P.E.I.S.C.)

Charbonneau v. R. [1965] Que. Q.B. 528 (Que. C.A.)

R. v. Chatwin Motors Ltd. et al (1978) 7 B.C.L.R. 171 (B.C.C.A.)

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109, 112, 120, 126, 127, 135, 145, 147, 153, 154, 171, 172, 173, 175, 178.1, 191, 195, 198, 202, 203, 205, 209, 213, 214, 215, 222, 228, 230, 233, 234, 236, 241, 242, 243, 244, 245, 246, 251, 252, 260, 281.2, 283, 287, 294, 305, 306, 307, 308, 309, 310, 322, 324, 326, 334, 352, 359, 381, 387, 394, 421, 422, 423, 427, 429.1, 449, 450, 483, 485, 512, 515, 516, 532, 547, 548, 549, 550, 551, 587, 588, 589, 647, 687, 688, 689, 690, 691, 692, 693, 694, 695, 727

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GHANA
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GUATEMALA
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NIGERIA

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NORWAY

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CHAPTER I

INTRODUCTION

(1) PREFATORY REMARKS

It is a truism that mere 'criminal' intent, thinking of committing a crime, is not an offence. On the other hand, a fully completed criminal act is an offence. These two principles are straddled by the law of criminal attempt, which rests, most uneasily, on the horns of this dilemma: in the progression from mere intent, which is not punishable, to the completed target crime, which is punishable, where does the law of criminal attempt fit in? How, historically, did criminal attempt develop?[1] Why punish attempt, when, ex hypothesi, the accused has failed?[2] What kind of mental element does one require - is, for example, recklessness enough?[3] Where does one cross the imaginary line from non-criminal preparation to criminal attempt?[4] What if it is impossible to complete the target crime?[5] What if the accused voluntarily abandoned his attempt?[6] What if he is charged

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1. See infra, Chapter II, "Historical Aspects".

2. See infra, Chapter III, "Why Punish Attempt".

3. See infra, Chapter IV, "The Mental Requirement - Mens Rea".

4. See infra, Chapter V, "The Factual Requirement - Actus Reus".

5. See infra, Chapter VI, "Impossibility".

6. See infra, Chapter VII, "Abandonment".

with attempt, but can prove he in fact succeeded?[7] What special evidential and procedural considerations are there?[8] What is the appropriate sentence for an attempt relative to the target crime?[9] What is the general provision criminalizing attempt?[10] What instances are there of specifically legislated attempted offences?[11] How do other countries or states deal with this area of the law?[12] How has Canada legislated here?[13]

Pursuit of such broad questions as these leads one immediately to the role of the criminal law in society. The uneasy, and shifting, balance between the freedom of the individual and the protection of society is reflected by the law of criminal attempt. Occasionally one finds in the study of law, and legal systems generally, a particular area of the law which echoes, in a telescoped form, those issues contentious in the larger body of of law of which the smaller area of law forms a part. Such an area is the law of attempt. Its nebulous situation between intent and completed crime, and its internal reflection of the whole

7. See infra, Chapter VIII, "Successful Attempts and Merger."

8. See infra, Chapter IX, "Evidential and Procedural Considerations".

9. See infra, Chapter X, "Sentencing".

10. See infra, Chapter XI, "General Attempt Provisions".

11. See infra, Chapter XII, "Specific Attempt Provisions".

12. See infra, Appendix I, "General Legislative Attempt Provisions - An International Compendium".

13. See infra, Appendix II, "Specific Attempt Provisions in Canadian Federal Statutes and Regulations".

body of criminal law, is the basis for the intractability of attempt. These characteristics, and the role of attempt in mirroring society's never static balance between individual liberty and social protection, inhibit a definitive work on the subject. Such is its challenge.

This treatise cannot, and will not, give a single irrefutable answer to all the questions raised. On many issues there are, unfortunately and predictably, no clear answers, and no unifying or justifying principle; the degree of conceptualization occuring from variform factual situations is a necessary, and often times complicating, adjunct. This treatise is jurisprudential, and is yet pragmatic. It is not polemical. The insights and elucidation of the questions herein asked provide a more firm basis upon which to understand the law of criminal attempt, from both a theoretical and substantive viewpoint, and therefore to deal with the hard matter of the drafting of legislation in this area with more juristic, and judicious, awareness.

The treatise will conclude with recommendations, based upon the discussion herein, of what may be acceptable legislative solutions to the issues raised. This, and the depth of the treatment of the law of criminal attempt herein, may be considered a contribution to original knowledge. In this respect, it should be pointed out that in the legal field, and particularly in the practice of law, originality is

a sin.[14] Lawyers spend much of their court time and in their legal opinions showing that the ideas they present are not their own, but derivative, and based upon prior legal writings, whether judicial or professorial. Though the author presents some original ideas and concepts herein, and notes that no other book or treatise of this nature has ever been published anywhere,[15] the writer does acknowledge the existence of articles and other material exhaustively detailed in the bibliography, without the assistance of which a treatise of this nature and scope would not have been possible.

The writer has the primary aim of providing the Canadian criminal law practitioner, the Canadian judge, and the Canadian academic and student, with a discussion of that obdurate area of uncompleted criminal activity known as criminal attempt, in Canada. The significance of criminal attempt in Canada is underscored by the realization that quite apart from the general attempt provision in the Criminal Code,[16] there are 449 separate instances of specific attempt

14. E.F. Weiss, quoting M. Wooster, "The Law, Guns in the Courts", "The Atlantic", May 1983, 8, at 10.

15. With the exception of a French Ph.D. dissertation on this history of criminal attempt in Roman Law, J.-C. Genin, "La Répression des Actes de Tentative en Droit Criminel Romain", (1968, Université de Lyon, France).

16. Section 24 "(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to

provisions in the Canadian federal statutes and regulations.[17] Whenever relevant, and accessible, the law of all other countries is also discussed, with particular emphasis on the other Commonwealth countries and the United States of America.

Criminal attempt is, numerically and conceptually, at the forefront of the criminal law. It merits our attention, our study, and our constant vigilance.

(2) AN ATTEMPT TO COMMIT AN OFFENCE IS AN OFFENCE IN ITS OWN RIGHT.

Due to the existence of a general law of attempt in the Criminal Code,[18] when Parliament creates by legislation an

16. (cont.) constitute an attempt to commit the offence, is a question of law."

17. See infra, Appendix II, "Specific Attempt Provisions in Canadian Federal Statutes and Regulations".

18. Section 24, supra, note 16. Section 421: "Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences, namely,

> (a) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to be sentenced to death or to imprisonment for life, is guilty of an indictable offence and is liable to imprisonment for fourteen years;

offence, either in the Criminal Code or another federal statute,[19] the courts treat this as the creation of two offences, not only the offence itself, but the offence of attempting to commit that offence. In Australia there is even a statutory provision to such effect.[20] It is clear from the Criminal Code[21] that an attempt to commit an offence is itself

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18. (cont.)

> (b) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to imprisonment for fourteen years or less, is guilty of an indictable offence and is liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable; and
>
> (c) every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction."

19. An unreported decision of Honsberger, Co.Ct.J., R. v. McNichol, Dec. 18, 1978, Ont.Co.Ct., confirms that attempt provisions of the Criminal Code apply to other federal legislation, in this instance, the Food and Drugs Act.

20. Section 32 of the South Australia Statute Law Revision Act 1936: "A provision, passed after the passing of this Act, which constitutes an offence, shall, unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against such provision, punishable as if the offence itself had been committed." Provision noted in Hefferman v. Richardson [1946] S.A.S.R. 201, 203 (S. Aus. Sup. Ct. In Banco).

21. Section 421, supra, note 18. See further infra, Chapter IX, "Evidential and Procedural Considerations", Parts (6),(7), and (8), "Attempting Indictable Offences", "Attempting Summary Offences", and "Attempting Optionable Offences", respectively.

an offence.[22] Legally therefore an attempt is a separate and distinct offence from the completed full offence or 'target offence', though it is relational in the sense that attempt canonly exist with regard to other substantive offences.[23] Attempt does not exist in a vacuum, one is not charged with attempt per se, but with attempt to commit another offence. It is this practical and legal fact, the relational nature of attempt, by which policy considerations of the completed full offence are transferred to the attempt of that offence, which makes the study of the law of atttempt as, judicially, an offence in its own right, both so difficult and challenging.

(3) DEFINITIONAL ELEMENTS

One reads headlines in the sporting or other sections of newspapers such as "Canadian Team Attempts Everest North Face" or "Athlete Attempts High Jump Record". These attempts presuppose an intent to climb Everest and break the high jump record respectively, and also presuppose some conduct toward such objectives. There must be mens rea and actus reus. Assembling a climbing team and support crew for

22. An accused charged with the completed offence, can nevertheless be convicted of attempt, and vice versa; see infra, Chapter VIII, "Successful Attempts and Merger."

23. There would appear to be some offences which because of the way such offences are legally defined, cannot be attempted; see infra, Chapter VI, "Impossibility", Part (3) "Are There Any Crimes Which Cannot Be Attempted?"

training in the Canadian Rockies, would be considered as preparation for the assault on Everest, as would the necessary daily training program of the athlete. The question of course is where does one cross from preparation to the attempt itself, and what type of mental attitude is required before one can categorically state that the climbing team has attempted to climb Everest's northwest face, or the athlete has attempted to break the high jump record.

As made abundantly clear in the Canadian[24] as well as American[25] cases, it is quite true that mens rea and actus

24. "The law is well settled that to find the accused guilty of the attempt charged, three essential elements must be proved: (1) The intent to break and enter with intent to commit an indictable offence therein; (2) Some overt act or omission towards the commission of the offence; and (3) Non-commission of the offence (there may be circumstances where a conviction for attempt would be justified notwithstanding the commission of the offence but that situaton need not be considered here)," per Culliton, C.J.S., R. v. Kosh (1964) 49 W.W.R. 248, 250 (Sask. C.A.).

"D'aprés nous, pour qu'il y ait tentative de commettre une offense criminelle, il faut trois conditions essentielles: 1. l'intention de commettre un acte criminel; 2. l'accomplissement de certains actes tendant directement à la réalisation de cette intention; 3. la non-commission ou consommation du crime projeté," per Lacroix, J., R. v. Boivin (1926) 32 Rev. de Jur. 287, 294 (Que. Ct. of Sessions).

25. "An attempt to commit a crime consists of three elements: (1) The intent to commit the crime; (2) performance of some act toward the commission of the crime; and (3) the failure to consummate its commission," per Bricken, P.J., Broadhead v. State (1932) 24 Ala. App. 576, 139 So. 115, 117 (Ala. Ct. of Apps.).

"An attempt to commit a crime consists of the following elements: First, the intent to commit the crime; second, the performance of some act towards its commission, commonly called the commission of some overt act; third, the failure to complete or consummate the crime," per Matson, P.J., State v. Thomason (1923) 23 Olka. Cr. 104, 212 Pac. 1026, 1027 (Crim. Ct. of Apps. of Okla). See also: People v. Lardner (1921) 300 Ill. 264,

reus must exist pari passu, these being the definitional elements, as well as, debatably,[26] the additional element of non-completion of the target crime. This however begs the question and restates the essential problem rather than addressing that question and that problem. The purpose of this treatise is to consider the issues raised by Criminal Attempt, but, more than being an academic inquiry and legal research, concludes with hard pragmatic conclusions in the form of legislative answers, where possible, to the issues raised.

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25. (cont.) 133 N.E. 375 (Sup. Ct. of Ill.); Johnson v. Sheriff, Clark County (1975) 532 P. 2d 1037 (Sup. Ct. of Nev.); Russell v. State (1973) 489 S.W. 2d 535 (Ct. of Crim. App. of Tenn.); Robinson v. State (1972) 263 So. 2d 595 (Fla. Dist. C.A.); Reed v. State (1969) 253 A. 2d 774 (Ct. of Special Appeals of Md.); Kidd v. State (1969) 462 P. 2d 281 (Ct. of Crim. Apps. of Okla.); Larsen v. State (1970) 470 P. 2d 417 (Sup. Ct. of Nev.); Vincze v. Sheriff, Clark County (1970) 470 P. 2d 427 (Sup. Ct. of Nev.); Boone v. State (1967) 233 A. 2d 476 (Ct. of Special Appeals of Md.); Bucklew v. State (1968) 206 So. 2d 200 (Sup. Ct. Miss.); Johnson v. Commonwealth (1968) 163 S.E. 2d 570 (Sup. Ct. of App. of Va.); Mathis v. State (1966) 419 P. 2d 775 (Sup. Ct. of Nev.); Gervin v. State (1963) 371 S.W. 2d 449 (Sup. Ct. of Tenn.); State v. Thompson (1909) 101 P. 557, 31 Nev. 209 (Sup. Ct. of Nev.); Miller v. State (1923) 95 So. 83, 103 Miss. 730 (Sup. Ct. Miss.); State v. Davis (1928) 6 S.W. 2d 609, 319 Mo. 1222 (Sup. Ct. of Mo.): State v. Swan (1943) 34 A. 2d 734, 131 N.J.L. 67 (Ct. of Errors and Appeals of N.J.); Dunbar v. State (1942) 131 P. 2d 116, 75 Okla. 275 (Crim. Ct. of App. of Okla.); U.S. v. Baker (1955) 129 F. Supp. 684 (U.S. Dist. Ct.); De Graaf v. State (1948) 37 So. 2d 130 (Ala. C.A.); Miller v. State (1954) 70 So. 2d 811 (Ala. C.A.); State v. Bereman (1954) 276 P. 2d 364, 177 Kan. 141 (Sup. Ct. Kan.); Taylor v. State (1953) 251 P. 2d 523 (Ct. of Crim. App. of Okla.); Place v. State (1956) 300 P. 2d 666 (Crim. Ct. of App. of Okla.); Ervin v. State (1960) 351 P. 2d 401 (Ct. of Crim. App. of Okla.).

26. See infra, Chapter VII, "Successful Attempts and Merger".

(4) INTRODUCTORY COMMENTS ON THE GENERAL ATTEMPT PROVISION IN THE CANADIAN CRIMINAL CODE

Section 24 of the Canadian Criminal Code is as follows:

> "(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
> (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law."[27]

The section has provided little assistance to the courts in dealing with the problems presented by attempted offences. A high degree of consistency is difficult to achieve due to the incomplete definition of attempt. Subsection (1) refers to "intent" and to "intention" - does this mean intent in the

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27. For a potted history of the Criminal Code, see Law Reform Commission of Canada, "Criminal Law: Towards a Codification", 26 et seq. (1976, Information Canada, Ottawa). For a detailed and very readable history of the Code, see G. Parker, "The Origins of the Canadian Criminal Code", in "Essays in the History of Canadian Law", D.H. Flaherty, Ed., 249-280 (1981, University of Toronto Press, Toronto), and A.W. Mewett, Q.C., "The Criminal Law 1867-1967", (1967) 45 Can. Bar Rev. 726. One might reasonably ask how much legal history one can have in 100 years.

Section 24 is almost identical to the New Zealand provision, s. 72, subsections (1) and (2) of the Crimes Act:"(1) Everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
(2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of the offence, and too remote to constitute an attempt to commit it, is a question of law."

sense of purposive conduct (note that the section states "for the purpose of carrying out his intention"), and if so, in mens rea terms, what is "purposive conduct" - does it mean specific intent, general intent, or does the mens rea of attempt include recklessness, negligence or perhaps strict liability? And what of conditional intent? In subsection (2) appears the phrases"mere preparation" and "too remote" - what is "mere preparation", and how remote is "too remote"? Is intent relevant under subsection (2)? There is nothing to suggest that it is.[28] The section makes attempts criminal, and punishable "whether or not it was possible under the circumstances to commit the offence." Is the accused guilty if he or she has done all that he or she planned to do? But what if what has been done is not a crime (for example, importing certain types of weapons believing it to be a crime - legal impossibility)? Or is the accused guilty if for some reason it was not possible for him or her to do as they planned (for example, shooting at a dummy, believing it to be the intended victim - factual impossibility)? Or is the accused guilty in both situations, whether legally or factually impossible? These, and other questions, will be discussed herein.

Certain very basic principles can be drawn out of the section, however. As subsection (1) deals with the mens rea, and subsection (2) with the actus reus, it can be seen that the

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28. Note, "Criminal Law: Attempts (The Proximity Rule)", (1955) N.Z.L. Jo. 33, 34.

two requirements for an attempt are the required mental element of an intent to commit an offence, and the physical element of doing (or omitting to do) some act to carry out what is planned. Clearly there must be a unity of mens rea and actus reus, neither mens rea per se nor actus reus per se being criminal.

Subsection (2), by referring to "is or is not mere preparation" and "too remote", hence draws a distinction between preparatory conduct which is too remote and therefore not criminal, and other conduct which goes beyond preparatory conduct which is not too remote and therefore criminal. A distinction is therefore envisaged between non-criminal preparation and criminal attempt. But where, and how, is the line to be drawn? On what bases, in what circumstances, does one decide what is preparation and what is attempt? Subsection (1) does say "does or omits to do anything" (the New Zealand equivalent by contrast, says "does or omits an act"[29]) - does it mean anything? Is buying a railway ticket to go shoot your grandmother attempted murder? No legislative guidance is given:

> "But s. 72(2) [now 24(2)] gives no guide to determine what is 'too remote'. We are thrown back therefore upon pure reasoning and the rationale of the decision founded on the distinction which lies between what is proximate and what is too remote. In the view I must accept, the conclusion follows that the natural consequence of the statutory language is that what is not 'too remote' must be proximate, because what is 'too remote' cannot be proximate."[30]

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29. Supra, note 27.

30. Per O'Halloran, J.A., R. v. Henderson (1948) 4 C.R. 448, 457 (B.C.C.A.).

Will this make immediate practical sense to a jury? The legislature has neatly sidestepped the issue by saying that it is a question of law.[31] That is whether there is mens rea is a question of fact for the jury, and whether the acts done by the accused are sufficient to amount to an attempt is a question of law for the judge.[32] The jury decides the mens rea, and judge the actus reus. Shouldn't it be the other way around? A question of fact - whether the conduct amounts to an attempt - has been transformed into a question of law.[33] Chief Justice Cockburn opposed such a provision, in an English Draft Code, which was rejected in that country, in the following terms:

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31. "In order to establish the commission of the offence of attempted robbery charged, it was necessary for the Crown to prove that the respondents:
    (i) Intended to do that which would in law amount to the robbery specified in the indictment (mens rea), and
    (ii) Took steps in carrying out that intent which amounted to more than mere preparation (actus reus.
    By virtue of s. 24(2) of the Code, the existence of element (i) is a question of fact, but whether the steps taken are sufficient to satisfy element (ii) is a question of law," per curiam, R. v. Sorrell and Bondett (1978) 41 C.C.C. (2d) 9, 12 (Ont. C.A.).

32. Ibid. See further, and in more detail, Chapter V, "The Factual Requirement - Actus Reus", Part (1)(b), "The Functions of the Judge and Jury viz-a-viz the Actus Reus."

33. The Supreme Court of Canada has conceded that there is a question of fact in the judge's statutory role of deciding this "question of law": "The jury must, of course, decide the question of intention and consider any other defence raised on behalf of the accused, but the question of attempt or no attempt is for the judge. His function is not merely to decide in a given case that there is no evidence of an attempt and, therefore, withdraw that issue from the jury, but also to decide as a question of fact and a question of law whether what was done, if found by the jury, was an attempt," per Kerwin, C.J., R. v. Carey [1957] S.C.R. 266, 272.

> "To this I must strenuously object. The question is essentially one of fact, and ought not, because it may be one which it may be better to leave to the judge to decide than to submit it to a jury, to be, by a fiction, converted into a question of law.... The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge."[34]

What England rejects, Canada passes into law, in this instance. Much useless argument could be avoided if Cockburn, C.J.'s view were adopted. A proposition of law presupposes some theoretical basis of general application.[35] In well over a century no satisfactory or acceptable theoretical basis has been found to distinguish preparation from attempt. The question is, in reality, one of fact, not law. The Criminal Code[36] states otherwise however, and this "question of law" will no doubt keep courts of appeal - to whom one can readily appeal on a question of law - and the profession generally, gainfully employed advancing legal knowledge (by virtue of asking many questions of law) in the years ahead.

It is interesting to note that a U.S. criminal law provision,[37] significantly less vague than s. 24 of the

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34. Quoted by J. Hall, "General Principles of Criminal Law", 101, note 10 (1947, Bobbs-Merrill, Indianapolis).

35. Note, "Proximity in Criminal Attempts", (1960-66) 4 Victoria Univ. of Well. L. Rev. 106, 114.

36. Criminal Code, s. 601 ff.

37. Section 274 of the Califronia Penal Code: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two or more than five years."

Criminal Code, has been held to be unconstitutionally vague by the Supreme Court of California.[38] One is tempted to query whether what was stated recently in an Ontario case, affirmed by the Ontario Court of Appeal, might not also apply to the law of criminal attempt:

> "...it is wholly unacceptable that legislation dealing with such a vital matter as the liberty of the subject should be the platform of litigation in which utterly divergent judicial opinions may be reasonably expressed...the net effect of such ill-expressed legislation is a residue of uncertainty, ill will and asense of dubious justice which must rankle in those least able to cope with such a situation."[39]

(5) IMPORTANCE AND DIFFICULTY

The law of attempt is one of the most important branches of the criminal law, in that it, more than perhaps any other area of criminal law, determines the borderline between innocence and guilt, between freedom and incarceration. Further, that borderline contains in practice an almost irreducible element of discretion, or public policy, if you will, in the minds of the jury, or of the judge, as the case may be. Whilst the legislative provision on which a judicial decision is based may be static, that discretion, that public policy, is not. The law of attempt particularly and uniquely attests to the truism that the law must reflect the current demands, feelings, and ideas of justice in society as a whole. Justice is not immutable, it is, in reality, a fluid concept.

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38. People v. Belous (1969) 80 Cal. Rptr. 354, 458 P. 2d 194 (Sup. Ct. of Cal.).

39. Per Keith J., Re Dean and R. (1977) 35 C.C.C. (2d) 218.

Moreover, not only must needs the law of attempt be jurisprudentially up to date and mesh with current ideas, it is also capable, in its legislative provisions or as judicially interpreted, of embodying legal and social progress and reform. It is this irreducible element of discretion and public policy, and the practical consequences of this, which give the law of attempt both its importance and its challenge as a field of study. The law of attempt, as discussed elsewhere in this treatise,[40] is necessary for the protection of society, and of individuals within that society.

Whilst the law of attempt is conceptually and pragmatically one of the most important branches of the criminal law, it is concomitantly one of the most intricate and difficult, as attested by Canadian cases,[41] books,[42] articles[43]

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40. See infra, Chapter III, "Why Punish Attempt".

41. "It is often very difficult to draw the line between what is only preparation to commit an offence, and an attempt to commit it," per Meredith, C.J.O., R. v. Snyder (1915) 24 C.C.C. 101, 106 (Ont. C.A.).

42. "Difficult problems of definition arise from section 24(2)...What is 'mere preparation' and how remote is 'too remote'? Attempt cases present fascinating intellectual exercises. Enlightenment has proved elusive and there seems to be more exceptions than rules," G. Parker, "An Introduction to Criminal Law", 212 (2nd ed., 1983, Methuen, Toronto).

43. "The notion of attempting to commit any crime is vague and it is indeed doubtful whether there will ever be a precise test of general application. Attempts to commit crimes involve an infinite range of human activities whereas substantive crimes involve completed conduct which is comparatively easy to proscribe in advance," D. Stuart, "The Actus Reus in Attempts", [1970] Crim. L.R. 505, 513. Emphasis in original.

"Few areas of the criminal law have created as much divergence of opinion among jurists and academics as the law of attempt...," H.W. Silverman, "Attempted Murder", (1972) 16 C.R.N.S. 295, 295.

and law reform material,[44] by American cases,[45] books,[46] articles[47] and law reform

44. "The 1955 Criminal Code thus suffers from a lack of internal logic.... The Code, moreover, does not deal comprehensively with the general principles of criminal law," Law Reform Commission of Canada, "Towards a Codification of Canadian Criminal Law", 28 (1976, Information Canada, Ottawa).

45. "This doctrine of attempt to commit a substantive crime is one of the most important, and at the same time most intricate titles of the criminal law," per Peyton, C.J., Cunningham v. State (1874) 49 Miss. 685, 701 (Sup. Ct. Miss.).

"[T]he subject of criminal attempt, though it presses itself upon our attention wherever we walk through the fields of criminal law, is very obscure in the books, and apparently not well understood either by the text-writers or the judges. And it may be added that it is more intricate and difficult of comprehension than any other branch of the criminal law," per Lewis, P., Hicks v. Commonwealth (1889) 86 Va. 223, 226; 9 S.E. 1024, 1025 (Sup. Ct. App. of Va.).

46. "The subject of this chapter [Attempt] is alike intricate and important. The reports are full of cases upon it, yet it is but imperfectly understood by the courts," J.P. Bishop, "Criminal Law", 437 (8th ed., 1892, T.H. Flood, Chicago).

"The situation is further complicated by the fact that the acts in question may be committed in so many different ways because of the great number of offenses on which the crime of attempt may be overlaid," W.R. LaFave and A.W. Scott, "Handbook on Criminal Law", 432 (1972, West, St. Paul, Minn.).

"Some of [the criticism] results from a confusion of the distinction between preparation and attempt with the application of the distinction to the facts in the cases," J. Hall, "General Principles of Criminal Law", 579 (2nd ed., 1960, Bobbs-Merrill, Indianapolis). Emphasis in original.

47. "These problems will arise not because of any defect or neglect in draftsmanship but simply because legal and factual problems are inherent in an area of the criminal law which deals with 'anticipatory' or 'inchoate' offenses," N.R. Sobel, "The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation", (1966) 32 Brooklyn L.R. 257, 257.

"The courts and other law writers have experienced great difficulty in defining an attempt. The difficulty

material,[48] by English cases,[49]

47. (cont.) is inherent in the subject matter", W.H. Hitchler, "Criminal Attempts", (1912) 16 Dickinson L.R. 243, 243.

"Since the dividing line between preparation and the attempt itself has never been definitely located, the courts have resorted to the application of broad principles to the facts in each individual case. This has led to much confusion in borderline cases, different courts reaching different results under similar facts," J.J. Yeager, "Some Factors to be Considered in Distinguishing Preparation from the Overt Act in Criminal Attempts", (1944) 32 Kentucky L.J. 300, 300.

"The question as to what constitutes an attempt to commit a particular crime is often intricate and difficult to determine, and no general rule has been or can be laid down which may be applied as a test in all cases," R. Trim, "Criminal Attempts: Linguistic Equations and Scholastic Camps", (1970) 47 Jo. of Urban L. 841, 841.

48. "The law must deal with the problem presented by a single individual and must address itself to conduct that may fall anywhere upon a graded scale from early preparation to the final effort to commit the crime," American Law Institute, "Model Penal Code, Tentative Draft No. 10", 26 (1960, American Law Institute, Philadelphia).

49. "It is difficult, and perhaps impossible...to define what is, and what is not such an act done, in furtherance of a criminal intent, as will constitute an offence...," per Jervis, C.J., R. v. Roberts (1855) Dears. C.C. 539, 550; 169 E.R. 836, 841 (Ct. for Crown Cases Reserved).

"'The mere intention to commit misdemeanour is not criminal. Some act is required, and we do not think that all acts towards comitting a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are'. The difficulty lies in the application of that principle to the facts of the particular case," per Lord Reading, C.J., R. v. Robinson [1915] 2 K.B. 342, 348 (English C.A.).

"I do not attempt to define what is a criminal attempt," per Darling, J., R. v. Brown (1899) 64 J.P. 790 (Central Crim. Ct.).

"[J]ust where the distinction is to be drawn between preliminary acts of preparation and acts which are nearly enough related to the crime to amount to attempts to commit it is often a difficult and nice question...," per Hilbery, J., R. v. Miskell [1954] 1 W.L.R. 438, 440 (Courts-Martial App. Ct.).

books[50] and articles,[51] and elsewhere.[52]

A learned Canadian judge, Mr. Justice Laidlaw of the Ontario Court of Appeal, whilst noting that "there is no theory

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49. (cont.) "The question how far back along a chain of acts leading to the commission of a crime there comes the dividing line between those acts which are mere preparation for the commission of a crime and those which amount to an attempt to commit it is not always easy to answer," per Trevethin, C.J., R. v. Cope (1921) 38 T.L.R. 243, 244 (English Ct. of Crim. App.).

50. "The law as to what amounts to an attempt is of necessity vague. It has been said in various forms that the act must be closely connected with the actual commission of the offence, but no distinct line upon the subject has been or as I should suppose can be drawn," Sir J.F. Stephen, "A History of the Criminal Law of England", vol 2, 224 (originally published in London 1883; reprinted by Burt Franklin, New York, 1964).

"Suggested definitions by the courts and by the writers have been too vague to be of any practical use," J.W.C. Turner, ed., "Kenny's Outlines of Criminal Law", 104 (19th ed., 1966, Cambridge University Press, Cambridge).

51. "The vast literature which has grown up on both sides of the Atlantic concerning the actus reus of attempts is a reflection, not simply of the confused state of the case law, but of the very intractability of the problem which the courts have set themselves," P.R. Glazebrook, "Should We Have a Law of Attempted Crime?" (1969) 85 L.Q.R. 28, 36.

"To fix, in any particular circumstances, what is the dividing line between non-criminal preparation on the one hand, and criminal attempt on the other, can prove at times to be extremely difficult," Note, "Attempts and the Criminal Law", (1930) 170 L.T. 241, 241.

"The law of Attempt has over the years proved more confused, and therefore more controversial, than almost any other part of the criminal law...," R. Buxton, "The Working Paper on Inchoate Offences: (1) Incitement and Attempt", [1973] Crim. L. Rev. 658, 660.

"The difficulty is in its application to concrete cases, differing from each other by minute gradations of act and intent," Note, "What Is An Attempt to Commit a Crime?" (1924) 88 J.P. 521, 521.

52. Australia: "[Attempt's] inherent difficulty of application," C. Howard, "Criminal Law", 287 (4th ed., 1982, Law Book Co. Ltd., Sydney).

or test applicable in all cases, and I doubt whether a satisfactory one can be formulated," attributes the "difficulty and confusion..., in [his] humble opinion, to an insufficient understanding of the nature and gist of the crime of criminal attempt."[53] This treatise will 'attempt' to find a reasonable theory, and alleviate the difficulty and confusion referred to by the learned justice - an 'impossible attempt' perhaps, but not known to be impossible until so attempted.

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52. (cont.) South Africa: "The very multiplicity of theories and formulae create a strong impression of a quest for reconciliation of the irreconcilable and definition of the undefinable," per De Villiers, A.J., R. v. Katz (1959) 3 S. African L.R. 408, 421 (Cape Prov. Div.).
Papua New Guinea: "The main problem with the present law of attempt is its excessive vagueness. A precise definition of all preparatory conduct that ought to be penalised would cure this difficulty and is the ideal, albeit highly complex solution," M. Noone, "Preliminary Crimes: The Reform of Attempt and Conspiracy in Papua New Guinea", (1974) 2 Melanesian L.J. 66, 68.

53. R. v. Cline [1956] 4 D.L.R. 480, 487 (Ont. C.A.), per Laidlaw, J.A.

CHAPTER II

HISTORICAL ASPECTS

(1) INTRODUCTION

The law of criminal attempt, as with most forms of criminal liability, has been subject to a conceptual evolution.[1] Attempt is a crime of relatively recent origin in Anglo-Canadian law, taking its genesis from the 1784 decision of R. v. Scofield.[2] The law of attempt reflects a balance between the interests of the individual and those of society, and to some extent mirrors any shift in that individual-societal balance.[3] This balance and this shift become apparent when one considers the historical aspects and development of attempt. Were this development better appreciated, it is likely that in the courtrooms similar facts would not continue to produce differing results, or that sweeping generalizations would not be applied to variform factual situations.[4] One

1. G. Del Vecchio commented that "Every system, even apparently 'closed', has in reality its 'safety valves' and its natural means of renewal, of transformation and increase...," "Justice", 157 (A.H. Campbell, Ed., Lady Guthrie, trans., 1952, Edinburgh University Press, Edinburgh).

2. (1784) Cald. Mag. Cas. 397 (H.L.).

3. This has been treated more fully in Chapter III, "Why Punish Attempt", infra. See also Chapter VI, "Impossibility", infra.

4. "[T]he subject of criminal attempt ... is very obscure in the books, and apparently not well understood either by the text-writers or the judges," per Lewis, P. (quoting), Hicks v. Commonwealth (1889) 9 S.E. 1024, 1025 (Va. Sup. Ct.).

English judge has conceded that "people in the street, before they begin to think about it, think it is a very easy thing to say what amounts to an 'attempt', but when you come to analyse it it becomes a little difficult."[5] A survey of the historical development of the law of attempt is hence offered, to make that task of analysing the present law of attempt a little less difficult, so that a deeper insight and understanding of the present day concept of attempt be derived. Moreover, as that Scott of Scots has written, "[a] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."[6]

The genesis of attempt was that no crime had been committed when only the cogitare stage had been reached, and agere and perficere were not achieved. A criminal intention per se was not punishable when there was no external manifestation: cogitationis poenam nemo patitur.[7] Apparently this was not always so. Montesquieu notes that "Plutarque rapporte qu'un certain Marsias ayant declaré qu'il avait révé

5. Per Rowlatt, J., R. v. Osborn (1919) 84 J.P. 63 (Central Criminal Court).

6. Sir Walter Scott, "Guy Mannering; or the Astrologer", 361 (Border ed., 1905, Macmillan, London, originally published 1815). However, to borrow a phrase from Thomas Reed Powell, even a mechanic, being oblivious to legal history, may nevertheless possess a legal mind: "If you think you can think about something which is attached to something else without thinking what it is attached to, then you have what is called a legal mind" (from an unpublished manuscript).

7. D. Ulpianus, (c.220), noted by Justinian, "De Poenis", in "Digest", Bk. XLVIII, Ch. 19, s. 18.

qu'il coupait la gorge au tyran Denys de Syracuse, qu'il n'y aurait pas songé la nuit s'il n'y avait pensé le jour."[8] English law witnessed the influence of a controversial maxim, voluntas reputabitur pro facto, for a brief period: "the intention is to be taken for the deed." Though few commentators agree on the exact scope or degree of this formula's influence,[9] it is true that "The old maxim of our criminal law...voluntas reputabitur pro facto continued to prevail in the reign of Henry IV.... But this opinion now began to grow obsolete; for in 9 Edward IV we begin to find a contrary language."[10] The English came very close to criminalizing mere intent with their law of treason,[11] Professor Garton noting that the reason for the extremely strict measures taken to deal with treason was to protect the King, "whose status as the most important being on earth went unquestioned."[12]

"Attempt" in criminal law emerged late. When religion became separated from law, allowing "sin" and "legal wrong" to be differentiated, a crime was even then not a concept apart, independent of the class of "legal wrongs" generally. As

8. C. Montesquieu, "Esprit des Lois", Bk. XII, ch. 11 (1748, Barrillot et fils, Geneva).

9. Cf. infra, text at note 78 et seq.

10. J. Reeves, "History of the English Law from the Time of the Saxons to the End of the Reign of Philip and Mary", vol. 3, 413 (1787, E. Brooks, London).

11. See infra, Chapter IV, "The Mental Requirement - Mens Rea", Part (3), "An Exception to the 'Mens Rea' is Not Criminal' Principle: Treason".

12. "The Actus Reus in Criminal Attempts", (1974) 2 Queen's L.J. 183, 188.

Maine correctly pointed out, "the penal law of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of 'torts'."[13] Civil law and criminal law were assimilated and were governed by the same rules; the criminal sanction took the form of a restitutive decree in a civil action. If no damage were done, there would be no need for reparation; thus, an attempt was not proscribed as a crime; only actual harm gave rise to the reparatory criminal sanction.[14] The Leges Henrici laid down that "[i]f by mischance you fall from a tree upon me and kill me, then, if my kinsman must needs have vengeance, he may climb a tree and fall upon you."[15] The Busse and Wehrgeld of the Germanic inhabitants;[16] the Blùtrache of the

13. H. Maine, "Ancient Law: Its Connection with Early History of Society and Its Relation to Modern Ideas", 379 (1912, J. Murray, London).

14. Until the comparatively recent modernization of Chinese law, it was not considered a crime to kill the murderer of one's direct ascendant, J. Kuwabara, "Essays on Chinese Legal History", 81 (1935, bibliographic information presently unavailable).

15. F. Pollock and F.W. Maitland, "History of English Law", Vol. II, 471 (2nd. ed., 1898, Cambridge University Press, Cambridge). This melodramatic legal sanction is equalled by the punishment meted out to mischevious oxen in ancient Jewish law: "And when an ox gores a man or a woman to death, the ox shall surely be stoned..." (Exodus 21:28). The seventeenth century French jurists had taken a diametrically opposite (and presumably heathenistic) viewpoint: "Li aucun qui ont justice en lor terres, si font justice des bestes quant eles metent aucun a mort; si comme se une truie tue un enfant, il le pendent et trainent, ou un autre beste; mais c'est noient fere, car bestes mues n'ont nul entendement qu'est biens ne qu'est maus; et por ce est che justice perdue," P. de Beaumanoir, "Coutumes de Beauvoisis", para. 1944 (1690, F. Tobeau, Paris).

16. F. von Liszt, "Lehrbuch der Deutschen Strafrechts", 41-44 (E. Schmidt, Ed., 1932, W. de Gruyter & Co., Berlin).

Hebrews;[17] the three cardinal virtues of the Arabians: hospitality, valour, and vengeance;[18] the Grecian conception that the blood of a slain man cried out for vengeance until his relatives had exacted a reprisal,[19] are all examples of a principle of blood revenge, from which it seems that very early criminal law took its birth. Although the Roman "Twelve Tables" did not advocate private vengeance, crime was punished according to the actual "harm" suffered; as an attempt caused no "harm" it was not punished. It can be said of all primitive law as Edward Jenks says of early English law: "It is a law which, with rare exceptions, recognizes merely the root idea of a wrong; it does not distinguish between crime, tort, and breach of contract."[20]

(2) ROMAN LAW

Due to the legal sophistication of the historical-juristic culture[21] of the Roman law, it is beneficial to consider whether the Roman legal system had a law of attempt. Did they in fact have a distinct concept which we label "criminal law"? It is not entirely clear whether they had a law of attempt as

17. The Judaic "Eye for an eye, tooth for a tooth," and the Greek "ει κε παθοι τα κ'έρεξε δικη και θεια γένοιτο."

18. M. Meier and G. Schomann, "(Der) Attische Process", 280 (1824, Gebauerschen Buchhandlung, Halle).

19. Cicero, "Topica", (45-44 B.C.), c. 23.

20. E. Jenks, "A Short History of English Law from the Earliest Times to the End of the Year 1938", 14 (5th ed., 1938, Methuen, London).

21. The phrase "historical-juristic culture" is one used by Professor Jean Escarra, "The Aims of Comparative Law", (1932-33) 7 Temple L.Q. 297, 298.

we know it today, though certainly the Greeks did punish attempted homicide: "One [who] has a purpose and intention to slay another who is not his enemy, and whom the law does not permit him to slay, and he wounds him, but is unable to kill him...should be regarded as a murderer and be tried for murder."[22] Some Roman passages indicate that liability for attempted crimes was imposed on the basis that the accused's failure did not affect his wickedness; thus an accused who did not kill his victim, but wounded him with the intention of killing him, was convicted of homicide.[23] As Seneca comments, "A man is no less a brigand, because his sword becomes entangled in his victim's clothes, and misses its mark."[24] Similarly, in Roman-Dutch law, an attempt to commit a crime was itself punishable,[25] no distinction being made between acts close to and remote from the "target" crime, although the more proximate were the acts in question, the more severe was the punishment. Thus, the objective approach was

22. Plato, "Laws", 876-77 (B. Jowett, trans., 3rd ed., 1892, Macmillan, London). But because of "providence" and "fortune" the death penalty was commuted to exile and reparation of the injured party: an interesting example of present day practice whereby attempt is punished, yet generally less severely than the crime intended.

23. Justinian, "Digest", (533 A.D.) Bk. XLVIII, ch.8, s.1, ss. 3.

24. E. Westermarck, "Origin and Development of the Moral Ideas", Vol. I, 247 (2nd ed. 1912, Macmillan, London), quoting L. Seneca, Ad Serenum No. 7.

25. See H. Huber, "Heedensdaegse Rechtsgeleertheyt", 6, I (1768, bibliographic information presently unavailable). For a summary of the Roman-Dutch position, in South Africa, see M. Tselentis and J.H. Friedman, "Criminal Attempt: A Reappraisal", (1969) 2 Responsa Meridiana 59, 61-62.

used; evil intent per se not being punished, the mere unexecuted intent to thieve was not theft: "sola cogitatio furti faciendi non facit furem."[26] There was, however, no general theory of attempts, the attempt being punished either by some special method of procedure or under the head of some other crime.[27] The "Twelve Tables" delineated certain acts to be legal wrongs; however, it is not clear which were considered "crimes" (which could be judged and punished by a magistrate) and which were private wrongs (which were sued for by the injured party). A distinction between private and public wrongs ran throughout the whole system (the word crimen being commonly used for public offences) but as this distinction was grounded on procedure and not on substantive law, it is quite possible that it was arbitrary.[28] Mr. Strachan-Davidson comments that: "Mommsen rightly refuses to allow the differences of procedure to obscure the essential fact that such trials [i.e., for delicts] are really part of the criminal law."[29] Perduellio was always a public "crime", tried in front of the people by a magistrate, as was peculatus. The removal of crops by magic is reported by Pliny to have been tried by an

26. Justinian, supra, note 23, Bk. XLVIII, ch.2, s.1.

27. Also, the Roman concept of furtum included not only our modern-day "theft" but also embezzlement and false pretences; although receiving stolen goods was punished as a separate offence: de receptat. Ibid., Bk. XLVIII, ch.16.

28. Cf. T. Mommsen, "Romisches Strafrecht", 10 (1899, Duncker & Humbolt, Leipzig).

29. J. Strachan-Davidson, "Problems of the Roman Criminal Law", 39 (1912, Oxford University Press, Oxford).

Aedile in the second century,[30] and had no doubt always been a public "crime". The capital "crimes" of arson, corruption of a judge, and cutting a neighbour's crops at night are specified as such by the "Twelve Tables",[31] but there seems to be no record of whether they were sued for by the injured party or tried by a magistrate before the people. Even murder is not settled. The noted "si membrum rupsit, ni cum eo pacit, talio est" formula[32] seems to fit into a pattern with the provision[33] that if anyone killed a man by accident he could offer a ram to the victim's relatives at a public meeting pro capite occisi. This seems to imply that homicide was a matter to be settled between the parties concerned, whether through vendetta by the kin of the victim or by judicial process.

A case mentioned by Gaius[34] and Justinian[35] is remarkably similar to cases of comparatively recent origin.[36] Titius solicited an honest slave to steal the goods of the slave's

30. Pliny, "Natural History", (77 A.D.) Bk. XVIII, ch. 41-43; it was an offence under the "Twelve Tables", ibid., Bk. XXVIII, ch. 17-18.

31. Ibid., Bk. XVIII, ch. 12.

32. Ibid., Table VIII (i.e., if a limb is damaged, and no peace is made, the victim can inflict the same injury on the aggressor).

33. Ibid., Table VIII, 24(a).

34. Gaius, "Institutes", (130-180 A.D.) Bk. III, s. 198.

35. Justinian, "Institutes", (533 A.D.) Bk. IV, ch.1, s. 8.

36. E.g., R. v. Higgins (1801) 2 East 5, 102 E.R. 269 (K.B.). The accused was indicted for soliciting a servant to steal his master's goods, the indictment containing no charge that the defendant had committed theft or attempted theft.

master, Maevius. The slave informed Maevius, who gave instructions to hand over the property concerned to Titius, that Titius might be sued for furtum and servi corruptio. Is he guilty? Unfortunately the answer is not clear. Justinian observed that both actions should succeed, as a deterrent from such conduct. Gaius, however, gives the more satisfying answer from a technical point of view: there was no furtum, as the goods were given with the owner's permission;[37] there was no servi corruptio, as the honest slave had remained honest.[38] Either Justinian did not distinguish in principle between attempt and the completed crime because of the policy of the law, or he simply failed to differentiate them conceptually. In view of what is noted above regarding deterrence, and the fact that Justinian states that the actio servi corrupti is allowed propter vitium suum, and the actio furti allowed propter dolum suum, it therefore seems that Justinian did not attach much importance as a matter of principle to the difference between attempt and the consummated crime.

This writer has not however found sufficient material in the Roman "criminal law" material to be able to make the categorical statement that the Romans did have a specific criminal law (as we know criminal law today), or special rules governing attempt (though penal liability did not descend to an

37. Quaere: was this consent permanent and real?

38. Under American law and English law, neither would Titius have been guilty of receiving "stolen" property. See People v. Jaffe (1906) 185 N.Y. 497 (N.Y.C.A.); and Haughton v. Smith (1974) 2 W.L.R. 1 (H.L.) respectively.

heir, while contractual liability did). Even if the Romans had no precise concept of crime as such, to comment that delicts and crimes were subsumed under the anomalous phrase "legal wrongs" would have meant nothing to a practitioner in the Roman courts. The Romans themselves do not appear to have given as much attention to "criminal" law as to civil law: for example, Gaius' "Commentaries" contain little criminal law (theft is dealt with, though not from a criminal point of view), Justinian's "Institutes" have only one title, "de Judiciis Publicis", dealing with criminal law, and only Books forty-seven to forty-nine out of fifty in the "Digest" cover criminal matters, and those only in a haphazard and hasty manner. Just as modern societies have to deal with the problem of "attempt" and what modern societies term "crime", so did the Romans. But is it fair to preach in such headlines as "The Romans had no general theory of attempt" or "The Romans had no law of crime", when in fact they had the same conundrum present legal systems do, and did solve it by means of a legal process?[39] Perhaps "delict" and "crime" were so fused together under Roman law that it can be said of them, as Maitland said of the unity of history: "[A]nyone who endeavours to tell a piece of it must feel that his first sentence tears a seamless web."[40]

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39. See further: J.L. Strachan-Davidson, "Mommsen's Roman Criminal Law", (1901) 16 English Hist. Rev. 219; J.L. Strachan-Davidson, "Problems of the Roman Criminal Law", 2 vols. (1912, Oxford University Press, Oxford); W.D. Aston, "Problems of Roman Criminal Law," (1912-1913) 13 Jo. Soc. Comp. Legisl. N.S. 213; J.A.C. Thomas, "The Development of Roman Criminal Law", (1963) 79 L.Q.R. 224; J.A.C. Thomas, "Sutor Ultra Crepidam", (1962) 7 Juridical Review N.S. 127.

40. F. Maitland, "History of the English Law", vol. 1, supra.

In researching this area of what one might realistically term an 'obscure' area of criminal law - it being not contemporary, but historical, not Canadian, but Roman, and only one specific area of Roman law, and further, an area of the law which may not even have existed in Roman times - this writer reviewed seemingly endless lists of abstracts of foreign theses at the National Library in Ottawa, and to this writer's surprise, and delight, came across a doctoral dissertation abstract entitled "La Répression des Actes de Tentative en Droit Criminel Romain". This dissertation was submitted by Docteur J.-C. Genin to the Université de Lyon in 1968. The writer has just recently received a copy of this manuscript, and on perusal of same, is happy to note that Docteur J.-C. Genin, whose whole dissertation is on the law of criminal attempt in Roman law, comes to the same tentative conclusions which this writer has come to: that Roman law had no theory or practice of criminal attempt, and that though what we would term criminal attempts were dealt with by the law, they were dealt with as a part of the civil law, the law of torts, that is, upon the express suit of the injured party for damages, not upon the initiative of the state with punishment in mind. Docteur Genin writes:-

> "En droit romain classique, la théorie de la tentative n'existait pas. ...En pratique, aucun acte de tentative grave ne restait impuni, car, en règle générale, l'intention à peine exprimée

suffisait, à cette époque, à consommer les délits publics."[41]

Docteur Genin concludes and comments on his historical review of attempt in Roman law as follows, confirming the view of the present writer:

"Il ne semble donc pas que la théorie de la tentative en droit criminel romain soit allée en se clarifiant: à l'époque classique, la tentative et la consommation du crime se confondent en une conception de l'infraction qui fait la plus grande place à la volonté coupable; à l'époque de Justinien, la solution n'a pas changé, mais elle est moins nette: l'influence chrétienne a conduit à punir l'intention coupable à peine exprimée comme un fait positif, lorsqu'elle est contraire aux moeurs politiques et religieuses du temps. Enfin, à l'époque de Léon le Sage, toute répression de la tentative a disparu, ainsi que toute répression ambigue de la cogitatio. Cette suppression, qui paraît volontaire, est sans doute une réaction contre les incertitudes anterieures.

C'est donc bien à l'époque classique que la répression des actes de tentative a été le mieux construite et la plus complète: les jurisconsultes de cette époque expriment nettement que le premier acte de tentative consomme le délit lui-même et l'étude de la législation le confirme.

Les Romains ont ignoré la théorie de la tentative, telle que nous la concevons, mais ils ont fourni aux interprètes de l'Ancien Droit les matériaux à l'aide desquels cette théorie allait pouvoir être edifiée.[42]"

Libraries of literature have been written on the influence of the purely civil law of Rome on successive legal systems, and, of the "reception" of Roman law. Almost every legal system, no matter how juridically remote, claims some relation, legitimate or otherwise, to the "Corpus Juris Civilis" and succeeding commentators. Has Roman law influenced criminal

41. "La Répression des Actes de Tentative en Droit Criminel Romain", 295 (1968, unpublished doctoral dissertation manuscript, Faculté de Droit et des Sciences Economiques, Lyon, France).

42. Ibid., 301.

law? Most would deny it. However, this need not be necessarily so. George Mackenzie's "Laws and Customes [sic] of Scotland, in Matters Criminal", published in 1678,[43] cites the Roman law often, quoting such commentators as Bartolus, Gothofredus, and Matthaeus, the treatise even being subtitled: "Wherein is to be seen how the Civil Law, [i.e., Roman law] and the Laws and Customs of other Nations do agree with, and supply ours." Case reference was also made to contemporary civilian systems.[44] Thus it seems that at least in Scotland the civil law has influenced the criminal justice system, though certainly this influence has only been in certain areas, for as David Hume correctly observed:

> "In any country, the frame and character of this part of its laws [criminal law], has always had a much closer dependence on the peculiar circumstances of the people, than the details of its customs and regulations in most of the affairs of civil life."[45]

(3) SCANDINAVIA

As Roman law considered the actual damage to a victim to be worthy of a reparatory legal sanction, so did ancient Scandinavian law, which had no general provisions on attempt:

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43. G. Mackenzie, "Laws and Customes [sic] of Scotland, in Matters Criminal" (1678, George Swintoun, Edinburgh).

44. For example, "[T]he court of Savoy, did very justly condemn a thief, to be hanged, who had entered the house of one Girard to steal and murder, but was deprehended before the theft was committed," ibid., 10.

45. D. Hume, "Commentaries on the Law of Scotland Respecting Crimes", 15 (4th ed. 1844, Bell & Bradfrute, Edinburgh).

if there was no harm, there was felt to be no need for "punishment". However, there were special provisions which attached criminal liability to particularly dangerous acts. The Church Laws of Skane[46] held that a person who was prevented from striking another was as guilty as if he had fulfilled his intention and the Jydske Code[47] similarly deemed guilty an aggressor whose attempted thrust reached only his victim's cloak or horse. It is, however, important to note that the attempt was not punished unless it had progressed so far as to be an actual attack. Archbishop Andreas Suneson[48] points out that although some passages of the preface to the Jydske Code give as the rationale of applying a criminal sanction, the correction of the evil will and the intimidation of the prospective assailant, the actual provisions of the Code show a predominance of the private right of vengeance, enforced by the kin of his victim. The recurrence of this idea of vengeance lends credence to F. Pringsheim's comment that "[a] natural relationship exists at an early stage between all primitive legal systems; each system during its youth seems to pass through a similar process before the peculiarities of the

46. In force in southern Sweden, ca. 1170 A.D.

47. 1241 A.D., recognized in Denmark, Norway and Iceland.

48. Professor Hertzberg notes the writings of Archbishop Suneson (1206-15 A.D.) as one of the sources of Scandinavian law; see E. Hertzberg, "The Law-Men and the Law-Texts", in "A General Survey of Events, Sources, Persons and Movements in Continental Legal History", 545, (J. Wigmore, Ed., J. Walgren, trans., 1912, Little, Brown and Co., Boston).

nation are imposed on the judicial order."[49]

(4) CONTINENTAL EUROPE

Ancient French law did not punish an attempt but left it to the judge's discretion, so that a fluid and elastic concept was evolved.[50] Although a simple attempt was not punished, particularly dangerous acts were punished as a completed crime: treason,[51] assassination and parricide. The intractable

49. F. Pringsheim, "The Inner Relationship Between English and Roman Laws", in "Gesammelte Schriften", 76 et seq. (1961, Universitatsverlag, Heidelberg).

50. See P. Bouzat and J. Pinatel, "Traité de Droit Penal et de Criminologie", vol. I, 207 (1963, Dalloz, Paris).

51. Jousse writes that in the case of "le crime de lèse-majesté", "la seule pensée manifestée soit par temoins, soit par la déclaration de celui qui l'a eue" was punished. (D. Jousse, "Traité de la Justice Criminelle en France", vol. III, 697 (1771, Debure Pere, Paris). England is on a direct par with France in its treatment of treason being an exception to general rules on attempt. The Statute of 21 Richard II (1397) made "compassing" the death of the monarch a treasonable offence and did not mention the necessity of any overt act (note "manifestée" above). Stephen writes: "It is difficult to understand the object of this statute, unless it was to convert into treason mere words, or indeed anything whatever which could be considered to indicate in any way hostility to the king," J. Stephen, "History of the Criminal Law", vol. II, 253 (1883, Macmillan, London). The Romans, a race not noted for exceedingly high moral principles, had once punished as "lèse-majesté" the removal of one's clothes in the vicinity of a statue of the Emperor: W. Rein, "Das Criminalrecht der Romer von Romulus bis auf Justinian", 533 (1844, K.F. Kohler, Leipzig). Since the Statute of 25 Edward III (1352) an overt act was necessary as evidence of the intention (with the exception of 21 Richard II). Typical examples were: to "pray or desire that God will shorten the Queen's days" ((1554) 1 and 2 Ph. & M. c. 9); and to "violate the king's wife or the king's eldest daughter unmarried or the wife of his eldest

problem of "attempt" did attract the attention of the medieval jurists but it seems that only in Italy was it constructively and thoroughly explored. Jean Constant refers to Albert de Gaudino, a legal commentator who lived in Bologna in the thirteenth century, as "l'un des créateurs de la théorie de la tentative."[52] Gaudino had borrowed from Callistratus the formula, "in maleficiis spectatur voluntas non exitus", which was advanced to justify both the punishment of an attempt, and exemption from punishment for voluntary withdrawal. Menochius, a post-glossator (1532-1607), proposed that the punishment be

51. (cont.) son and heir..." ((1352) 25 Edward III stat. 5, c. 2) (the phraseology in this particular example might suggest some form of overt act as a manifestation of the accused's wickedness).

52. J. Constant, "Traité Elémentaire de Droit Penal - Principes Généraux du Droit Penal Positif Belge", vol. I, 250 (1965, Imprimeries Nationales, Liege). The reasons which Professor Ullmann gives for Italian jurists maintaining that attempts in general ought to be punished, can apply, directly or indirectly, to other jurisdictions: "Religious feeling and belief in the divine leadership of the world in very close contact with the social life of the time is a characteristic of the period. That religious feeling found its sources in Christianity and its external embodiment, the Church. The State and the law are creations of divine origin. The State as a moral institution procures the fulfilment of moral and religious purposes: the instrument for the fulfilment is the legal system which is a product of secular society. Therefore human law cannot and must not be opposed to the fundamental idea and principle immanent in the divine law. Law can be law only if it receives its meaning from divine law and corresponds to it. ... Christian ethos introduced a new element into the judgment of human acts by denying the subsistent and specific value of the external act, but demanded that the act should be valued as the expression of the state of mind of the man who acts - operari sequitur esse. That Christian ethos formed probably unconsciously the background of the Italian doctrine of attempt," "The Reasons For Punishing Attempted Crimes", [1951] Juridical Review 353, 359.

modified depending on how closely the acts in question approached the completed crime: conatus remotus et conatus proximus. He also distinguished a frustrated attempt from an unsuccessful attempt.

Despite this, there seemed to be no general theory of attempt. A person who planned a crime was not deemed to have committed it; an admitted intent of journeying to a person's house to kill the occupant did not amount to murder. This was because the intent to kill, without the accomplished fact,[53] was not a crime.[54] As Karl Ludwig von Bar comments:

> "[O]ne may search in vain in the Costumals of the Middle Ages for a theory of attempt; the texts of this period have no definite conception of the attempt; they dwell only on the accomplished act, without inquiring whether the offender had purposed to commit a greater offense."[55]

However, towards the end of the Middle Ages there were specific provisions on the subject of criminal attempts; for example, Article 9 of Joseph's Code of 1787,[56] Article 178 of the

53. Societe de l'Histoire de France, "Les Etablissements de Saint Louis", vol. I, c. 40 (P. Viollet, Ed., 1881, La Societe, Paris).

54. Similarly with German folk-laws; cf. W. Wilda, "Das Strafrecht der Germanen" (1842, C.A. Schwetschke und Sohn, Halle).

55. K.L. von Bar, "History of Continental Criminal Law", 157 (T.S. Bell, trans., 1916, Little, Brown and Co., Boston).

56. "Bien que la pensée et une simple projet criminel ne puissent par euxmêmes consituer une infraction, il n'est pourtant pas necessaire que l'action criminelle ait été effectivement exécutée pour qu'il y ait délit. La tentative d'une action criminelle devient punissable dès que l'individu malintentionné s'est disposé à exécuter le crime et a manifesté son dessin par quelque signe ou acte extérieur, bien que l'exécution ait été interrompue par hasard ou par la survenance d'un empêchment quelconque."

Carolina Code in 1532[57] (one of the first texts of recent origin to contain a legal definition of an attempt) and the Ordonnance de Blois in 1579.[58]

The subjective theory of attempts takes its incunabula from Canon law and ancient French law concerning the more serious crimes. It considered primarily the will of the actor and punished the evil intent as soon as it was manifested by some external act which displayed the danger of the particular individual to society.[59] The French jurist Loysel wrote that "En tout méfait, la volunté est reputée pour le fait."[60] It was probably as a reaction to this formula that the French Penal Code of 1791 refused to attach criminal liability to attempts generally, proscribing only attempted assassination and poisoning, and punishing them as the equivalent of the completed crime, thereby echoing the old law. This position

57. "Celui qui aura tenté commettre un crime par quelques actions visibles, propres à parvenir à l'exécution du dit crime, quoique par autres moyens, il ait été empêché de l'exécuter contre sa volonté, doit être puni criminellement lorsque sa volonté a été suivie de quelques effets, mais avec plus de rigeur dans un cas que dans l'autre, eu egard a la situation et à la nature de l'affaire...."

58. M. Champcommunal, "Etude Critique de Législation Comparée sur la Tentative", (1895) 24 Revue Critique de Legislation et de Jurisprudence 43-46.

59. This viewpoint was subsequently adopted by the Positivist school (notably Garofalo, Ferri, and Lambroso) and also by various Penal Codes; e.g., Czechoslovakian Penal Code 1961, Art. 8; Penal Code of Hungary 1961, Art. 9; Greek Penal Code 1950, Art. 42; Bulgarian Penal Code 1951, Art. 16.

60. G. Stefani and F. Levasseur, "Droit Penal Général et Procédure Penale", vol. I, 162 (3rd ed., 1968, Dalloz, Paris).

only served to exasperate the policing authorities and hinder their efforts. Thus on the twenty-second of prairial an IV[61] a law was passed making all attempted "crimes" illegal, and on the twenty-eighth of frimaire an VIII[62] attempts towards certain specified délits[63] were also made punishable. It was a fusion of these two enactments which was received in the provisions of the 1810 Penal Code.[64]

It was not until 1808 that Feuerbach, a German, drew attention to an impossible attempt:[65] where the defendant had completed all the acts he resolved to perform but his objective was not attained, either because the object did not exist (e.g., the empty pocket cases), or the means employed were incapable of consummating the crime (e.g., 'poisoning' with a non-toxic agent).[66] Thus le délit impossible is distinguished

61. The ninth month of the calendar of the First French Republic (fourth year).

62. Ibid., the third month (eighth year).

63. "Crimes" and "délits" in the technical sense, i.e., as apart from "contraventions".

64. Art. 2: "Toute tentative de crime qui aura été manifestée par des actes extérieurs et suivie par un commencement d'exécution, si elle n'a été suspendue ou n'a manqué son effet que par des circonstances fortuites ou indépendantes de la volonté de l'auteur, est considerée comme le crime même."
Art. 3: "Les tentatives de délits ne sont considerées comme délits que dans les case determinés par une disposition spéciale de la loi."

65. See R. Merle, "Droit Penal Général, Complementaire", 160 (1957, Collection Thémis, Paris).

66. Notice no mention is made by Feuerbach of 'pure legal impossibility' ('tentative absurde', 'tentative putatif'), e.g., committing an act of adultery believing it to be a crime, when in fact it is not criminal.

from le délit tenté. Feuerbach's rationale for not punishing un délit impossible was firstly, that no social harm had resulted, or certainly less than would have resulted from un délit tenté, and secondly, that one could not commence the execution of an act whose performance was itself an impossibility. Although this reasoning gave birth to the dire dichotomy of absolute and relative impossibility, the Norwegian jurist Orsted was not influenced and advocated the subjective theory, taken up by the Norwegian Criminal Code of 1842 and by Article 49 of the Penal Code of 1902. The impossible attempt as well as the unsuccessful attempt is punished by way of the phrase "purposively directed at completion" in Article 49.[67] An accused's conviction for attempted theft[68] was affirmed on appeal by the Norwegian Supreme Court in 1932 despite his plea of impossibility, the Court pointing out that by both the Criminal Code of 1842 and the Penal Code of 1902 "punishability does not depend on whether the act was really possible, but only whether it appeared possible to the accused."[69]

The oscillations of the law of "attempt" that have been fleetingly noted in this prolegomenon thus far not only point to the immortality of the problems of the attempt concept, but also give support to J.H. Merryman's remark that:

"A legal tradition...is not a set of rules of

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67. See J. Andenaes, "The General Part of the Criminal Law of Norway", 293 (T.P. Ogle, trans., 1965, F.B. Rothman, South Hackensack, N.J.).

68. Ibid., 294. He had unsuccessfully tried to open a cash box by striking it with a roofing tile.

69. Ibid., 293.

> law about contracts, corporations and crimes.... Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught."[70]

(5) THE COMMON LAW - AND SCOTLAND

Pollock and Maitland have stated that old English law started from the principle "that an attempt to do harm is no offence."[71] This, however, does not seem to be the case.[72] Although towards the end of the Middle Ages Brian, C.J., expressed the principle (more aspiration than principle) that "[c]ar comen erudition est q l'entent d'un home ne serr trie, car le Diable n'ad conusance de l'entent de home,"[73] it is not true to say that at all times in the history of the old common law was a completed crime a prerequisite to criminal

70. J. Merryman, "The Civil Law Tradition", 2 (1969, Stanford University Press, Stanford).

71. Pollock and Maitland, supra, note 15, 508, n. 4.

72. See supra, note 51, and infra.

73. Y.B. Pasch. (1477) 17 Edw. IV 2 (Excheq.). The phrase is generally translated as: "It is common knowledge that the thought of men shall not be tried, for the Devil himself knoweth not the thought of man." For a very interesting review of the development of mens rea, or lack thereof, in constructive murder, see P. Burns and R.S. Reid, "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?" (1977) 55 Can. Bar Rev. 75. See also F.B. Sayre, "The Present Signification of Mens Rea in the Criminal Law", in "Harvard Legal Essays", 399-417 (1934, Harvard University Press, Cambridge).

liability, for "legal principles arise not from whim or playful imagination but from need...."[74] There was a social need, in the form of the necessity of having a well-ordered and smoothly running community, to stigmatize preliminary criminal acts; the law of attempt was developed to meet this need. What E. Adamson Hoebel remarks on the development of law (in the wider sense of the term) can be applied specifically to the history of attempts:

> "There has been no straight line development in the growth of law. The evolution of law as a phase of societal evolution has been no more an undeviating lineal development than has been the evolution of life forms in the organic world....[I]t is an outmoded fallacy to suppose that the histories of all cultures shall move through identical steps or stages and that the resulting forms must be or have been close in similarity at specific points in their sequences of development."[75]

Chief Justice R. de Glanvill published his treatise "Tractatus De Legibus et Consuetudinibus Regni Angliae" circa 1187.[76] No mention is made of attempt. Approximately forty years later, however, circa 1225, a book appeared in Scotland, called from its opening words, Regiam Majestatem.[77] Although

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74. J. Hall, "Criminal Attempt - A Study of Foundations of Criminal Liability", (1940) 49 Yale L.J., 789, 811. Emphasis added.

75. E. Hoebel, "The Law of Primitive Man: A Study in Comparative Legal Dynamics", 288 (1954, Harvard University Press, Cambridge).

76. Although this work is generally ascribed to Glanvill, it was very possibly not written by him at all, but by his nephew Hubert Walter; see T. Plucknett, "Concise History of the Common Law", 256-57 (5th ed., 1956, Butterworths, London).

77. Cf. A. Duncan, "Regiam Majestatem: A Reconsideration", (1961) 6 Juridicial Rev. (N.S.) 199.

containing many references to Scottish law and practice, it was distinctly based on Glanvill's work. The point to note is that the Regiam Majestatem punished the mere intent or purpose to commit a crime, probably the first reference in Britain to the illegality of an "attempt", and a reasonably typical example of the harshness of early Scottish criminal law. There are references to the quod voluntas reputabitur pro facto[78] doctrine in the institutional writers of the common law and although nowhere is it stated that the maxim held sway at the time the commentators wrote,[79] reference is made to a previous stage in the development of the law. For example:

> "[A]nd such opinion, as seem to the contrary were maintained by that, which then was anciently holden, Quod voluntas reputabitur pro facto,"[80]

and,

> "The first general rule upon the subject with which I am acquainted was that in cases of attempts to murder the will was to be taken for the deed...,"[81]

and,

> "[T]he old maxim of the criminal law, that

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78. That is, that the intention is taken for the deed. Whilst punishing mens rea per se may be a former now historical concept, the opposite is now current, punishing actus reus per se, with the virtual tidal wave of strict liabililty offences in the last century, which impose liability without proof of any guilty intention whatsoever; see for example R. v. City of Sault Ste. Marie (1978) 40 C.C.C. (2d) 353 (S.C.C.) and cases cited therein.

79. Except for treason: "In criminal cases the law was voluntas reputabitur pro facto; but it is not so now, saving in treason only," The Postnati (1609) 2 Howell's State Tr. 559, 674-75 (H.L.), per Ellesmere, L.C.

80. E. Coke, "Third Institute", 69 (1644, M. Flesher, London). Emphasis added.

81. J. Stephen, supra, note 51, 222.

> voluntas reputabitur pro facto continued to prevail in the reign of Henry the Fourth; and it was then agreed, that if a man was indicted that il giscit depraedando, it was felony; a different doctrine began to be held; and men were no longer punished for crimes which they had only meditated, but had not actually committed,"[82]

and,

> "[I]f a thief has a mind to rob a man and is captured for this, that although he has taken nothing, yet he should be hanged."[83]

Although Bracton did not consider "attempt" to be a distinct crime,[84] a statement of his is quoted by Staunforde and Coke as representing former law: "In maleficiis spectatur voluntas et non exitus, et nihil interest utrum quis occidat, aut causam mortis praebeat."[85] Various cases can be cited which were decided acording to the voluntas reputabitur pro facto maxim, by which an attempt was itself adjudged to be a felony.[86]

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82. W. Hawkins, "A Treatise of Pleas of the Crown", 113 (8th ed., 1824, S. Sweet, London).

83. Y.B. Pasch. (1351) 25 Edw. III 33 (appeals court; court not otherwise noted)(per Schardelowe J.). See also W. Young, "A Vade Mecum" (7th ed., 1663, J. Streater, London): "But it seemeth...that he which is taken in the attempt [only] of a Burglary, shall be hanged for it, although we have not put anything in execution thoroughly...."

84. E.g., "For what harm did the attempt cause, since the injury took no effect?": H. de Bracton, "De Legibus et Consuetudinibus Angliae", 337 (T. Twiss, Ed., 1878, Longman & Co., London).

85. W. Staunforde, "Pleas of the Crown", 17 (1557, R. Tottyl, London); and Coke, supra, note 80, at 5, respectively. Coke agrees that the law of his own day was otherwise.

86. (a) "[A] woman stayed with her adulterer and they compassed the death of her husband, and assailed him as he rode towards the court of good delivery, and they fell upon him and left him lying for dead and fled. And the husband got up and cried and came to the deliverance and showed all this to the justices and they ordered their

However, by 1470 a change in the law appeared and an attempt (here to commit robbery) was no longer a felony:

> "[S]i un gist in le chimin, in agait de robber le people, & treha son espee vers un qui chiuaucha in mesme le chimin, & commanda luy a deliurer sa burse, per que cestuy que est chiuauchant: leua hue et crie sur que lauter est prise, unquore ne si felonie &c.& accordant a ceo: est le ley prise a cest iour."[87]

Although Staunforde cites this case as being "al contrary" to cases previously cited and to the formula, one cannot say the

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86. (cont.) arrest...he was hanged and she was burnt." Y.B. Pasch. 15 Edw. II 463, per Spigurnel, J.(appeals court; court not otherwise noted).

(b) A boy was arraigned because he attempted to carry off the goods "of his master, and came to his master's bed where he was asleep and cut hard at his throat so that he thought that he had cut his throat, and fled; and his master cried, the neighbours heard him and took the boy." Y.B. Pasch. 15 Edw. II 463, per Bereford, J. (appeals court; court not otherwise noted).

The case is also cited by Coke, who puts the conclusion to the sad tale: "[I]n the end he was adjudged to be hanged," supra, note 80, at 5. W. Bolland in "The Year Books - Lecutres Delivered in the University of London", (1921, Cambridge University Press, Cambridge) suggests (at 61) that Bereford J. was not at all in favour of this conclusion and was not apparently invited by his colleagues to every proceeding. Boland quotes him: "He was charged before me, but I refused to let the matter go to the jury because the master was alive, and servant was remanded to prison. And afterwards, by St. Mary! he was arraigned before my companions and was hanged on the ground that in the circumstances the will must be taken for the deed."

(c) Staunforde cited the following to show that although an intended robbery fails, a felony may still be committed: Que si home soit endite que il gisoit depredando que cest felony. Car si home vient de moy robber & ieo. suis pluis fort que luy per que ieo luy preigna, ce fel'." Staunforde, supra, note 85, 17. The case can be found at (1412) 3 H.4.

87. Staunforde, ibid., 27.

law was conflicting; it simply, between 1412 and 1470, developed. An attempt was no longer a felony. As Austin points out, "[t]he reason for requiring an attempt, is probably the danger of admitting a mere confession."[88] In view of the above observations, it does seem more than a little extreme for F.B. Sayre to state that "[n]one of the cases...proves that there was ever a time when...criminal liability could be rested upon mere intent as evidenced by an overt act...,"[89] or that "[t]here seems to be no conception that an attempt to commit a crime is as such criminal,"[90] and for Pollock and Maitland to remark, "Our old law started from the other extreme: - Factum reputabitur pro voluntate."[91]

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88. "Lectures on Jurisprudence", 121 (1861, J. Murray, London). The Duke of Somerset was one who suffered for a confessed intention, of High Treason and Felony: "Somerset therefore went to his [Dudley's] house under pretence of a visit, covered with a coat of mail under his cloaths and carrying with him a party of armed men, whom he left in the next chamber; but when he was introduced in the civilest manner to Dudley, who was naked, and lying upon his bed, the good natured man repented him, would not execute his design, and departed without striking him a stroke." The Duke was beheaded: (1551) 1 Howell's State Tr. 522 (H.L.).

89. F.B. Sayre, "Criminal Attempts", (1927) 41 Harv. L. Rev. 821, 826.

90. Ibid., 827.

91. Supra, note 15, 477, n. 5. Likewise, "Ancient law has a general rule no punishment for those who tried to do harm but have not done it", (ibid., 509).

Whether conduct was at this time considered as merely evidence of the criminal purpose or as an essential element of the offence is more academic than practical. Much of the conflict is based on the interpretation of very early jurisprudence, not all in English,[92] and some is based on recollections of judges concerning cases formerly tried before them. The salient features of this era of the criminal process are that mentes reae were considered to be essential for conviction, and when attempts were punished they were treated as if the intended crime had been completed. Conclusions beyond this border on speculation, though it can be submitted that at one stage in the development of the common law the maxim voluntas reputabitur pro facto was applied in its literal sense to "attempts",[93] where the "evil will" could in some way be proved to the court's satisfaction. It was only when the formula became obsolete that the attempt was no longer a felony, but "a high misdemeanor at common law".[94] The judiciary at this time became conscious of the concept of "attempt".

A factor inhibiting the full flowering of the concept was the existence of other methods available to the criminal

92. E.g., Staunforde wrote in law French.

93. See supra, note 80, and text accompanying notes 80, 81, 82 and 85.

94. E. East, "A Treatise of the Pleas of the Crown", 411 (1803, Butterworths, London).

justice system to prevent antisocial conduct. Frankpledge[95] and surety[96] to keep the peace might be used. The Anglo-Saxon judges also had the crime of "forstal" whereby a highway robber could be summarily punished even though he had taken nothing.[97] Possessory offences such as carrying loaded pistols, being armed, or having cross-bows in one's house, were also made criminal.[98] Yet another method of deterring incipient criminals was the law regarding riot, rout, and unlawful assembly. Had "attempt" not been developed, or not developed sufficiently, no doubt the common law would have created further fine distinctions in the criminal sphere, or further juristic notions to serve the social need, which is in contrast to the Civilian methodology: "the common-law approach is casuistic, the civil-law approach systematic."[99]

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95. An association of persons the members of which were mutually responsible for their good behaviour and for the production of any one of them in court.

96. See F. Pulton, "De Pace Regnis et Regni", 19 (1609, The Company of Stationers, London): "But if one man do threaten another to beate him, the partie threatened may have the suertie of peace against him: for that beating may tend to maiheming or killing of him, which the suertie of peace might have prevented."

97. J. Stephen, supra, note 51, 56.

98. M. Dalton, "Country Justice", 56 and 211 (1619, The Society of Stationers, London).

99. H. Hahlo and E. Kahn, "South African Legal System and Its Background", 521 (1968, Juta, Capetown). Caution is however given by Professor Hahlo (at 214) to those too readily attracted by simplistic epigrams: "Aphorisms like 'the Continent looks to principle, England to pedigree' or 'the Continental judgment binds by authority of reason, the English judgment by reason of authority' overstate the position as aphorisms are want to do."

Kenny states that "the earliest record of the official repression of attempts as an exercise of criminal policy is to be found in the measures adopted by the Star Chamber...."[1] The comments above on the development of the common law thus far would seem to indicate in a practical way the benefits of an historical inquiry, and would also appear not to support Kenny's observation. The Star Chamber "punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases,"[2] supervised the corrupt common law courts and provided remedies where others were inadequate, particularly in matters of riot, robbery, libel, forgery, perjury, attempt, and conspiracy,[3] "yea although no positive law or continued custom of common law give warrant to it."[4] Coke described it as "the most honourable court (our parliament excepted) that is in the Christian world." The Chamber dealt with many cases which today would be slotted safely under "attempt". Some were instances of non-success due to unskilfulness of an aggressor,[5] others of fortuitous

1. C. Kenny, "Outlines of Criminal Law", 101 (19th ed., J.W. Turner, Ed., 1966, Cambridge University Press, Cambridge).

2. W. Hudson, "Treatise of the Court of Star Chamber", (1791), in F. Hargrave, "Collectanea Juridica", Vol. 2, 107 (1791, E. and R. Brook, London).

3. "Infinite more were the causes usually punished in this court...," ibid., 108.

4. Ibid., 107.

5. For example, Lord Savill had brandished his sword at Sir John Jackson "and drove him into a plash of water ... thereupon divers swords were drawn, and one of my Lords men struck at Sir John Jackson with his sword, but missed him narrowlie...," Attorney-General v. Savile (1632)(Star

interruption during the acts complained of,[6] whilst others consisted simply of the motion of reaching for a weapon.[7] The term "attempt" was used loosely by the Chamber,[8] and although many of the cases decided by the courts would be termed attempts by modern law, the Chamber did not intend to, and never did, formulate a general theory of attempts, with perhaps the exception of the special crime of duelling. The Chamber was here able to develop the rule that an attempt to commit the offence of duelling was a separate and distinct crime. At common law the survivor was guilty of homicide and felony and the second parties of the felony. This, however, was shooting the bolt after the horse had itself been shot, and the Chamber,

5. (cont.) Chamber), reprinted in "Reports of Cases in the Courts of Star Chamber and High Commission", 145-146 (S. Gardiner, Ed., 1886, Camden Society, London).

6. For example, a certain Mr. Agard and some "mysruled persons began to draw their bows with arrows in them, and would have shot at your said subject if the servants of your said subject had not quietly cut the bow strings...," "Collections for a History of Staffordshire", 45(William Salt Archaeological Society, Ed., 1910, William Salt Archaeological Society, London). Perhaps the trusty servant's motto was similar to that of Charles Lamb's: "The greatest pleasure I know is to do a good action by stealth, and to have it found out by accident," "Table Talk" in "The Athenaeum" (1834); (see "The Complete Works of Charles and Mary Lamb", Vol. I, 344; E.V. Lucas, Ed., 1903, Methuen, London).

7. For example, a certain Leveson had been charged with setting "his hand upon his dagger" ("Staffordshire", ibid., 67).

8. E.g., (a) "Pledall, for attempting to cloke and colour the murder of one Headart, and attempting to discredit the proceedings of the Justices of Assize, is sent to the Tower..." (4 & 5 Ph. & M.). Emphasis added.
(b) "Attempts to coin money, to commit burglary, or poison or murder, are in ordinary example ..." (supra, note 2, at 108). Emphasis added.

wishing to nip the survivor's handiwork "in the bud", punished all the acts of preparation:

> "[W]heresoever an offence is capital, or matter of felony, though it be not acted, there the combination or practice tending to that offence is punishable in this court as high misdemeanor. So practice to impoison, though it took no effect; waylaying to murder, though it took no effect; and the like; have been adjudged heinous misdemeanors punishable in this court. Nay, inceptions and preparations in inferior crimes, that are not capital, as suborning and preparing of witnesses that were never deposed, or deposed nothing material, have likewise been censured in the court, as appeareth by the decree in Garnon's Case...."[9]

Unfortunately, nowhere in this well-conceived judgment by Bacon can a general concept of attempt be found. This creation had to await the arrival of Lord Mansfield's creativity. Despite Hudson's kind observation on the quality of the personnel,[10] the Chamber's advocation of unpopular policies, particularly in ecclesiastical matters, made it increasingly hated by Puritans and parliamentarians and as a result it was

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9. The Case of Duels (1615) 2 Howell's State Tr., 1033, 1041 (Star Chamber), per Bacon, A.-G.

10. Prospective litigants were invited to "safely repose themselves in the bosoms of those honorable lords, reverend prelates, grave judges, and worthy chancellors, as in the heady current of burgesses and meaner men, who run too often in a stream of passion after their own or some private man's affections...," Kenny, supra, note 1, at 108. One author has recently been more positive: "the holders of high judicial office, the chief justices, chief baron, justices and barons, who sat regularly in Star Chamber (there were never less than two) were both apt teachers - in the Star Chamber - and apt learners - as judges of assize and in their respective courts. What was done in one place, was extended to the other. But it was Star Chamber that was the best forum for innovation. There policy could be brought to bear on law," T.G. Barnes, "The Making of English Criminal Law", [1977] Crim. L.R. 316, 326.

abolished by an act of the Long Parliament in 1641.[11] Although the Chamber was a royally-based court (and being a law unto itself, much of its law disappeared with it), one cannot say that it "played no part in the development of the modern doctrine of criminal attempts."[12] It is true that no general principle was laid down, but the Chamber's decisions and legal policies did have a strong influence on the common law courts and did contribute considerably[13] to the concept's genesis in its modern guise by Lord Mansfield in R. v. Scofield.[14] It was not until 1784, over a century and a half after the 1615 decision in The Case of Duels, that the courts began to formulate the idea from an attempt to duel as a separate offence into the wider concept that an attempt to commit a misdemeanour is itself a misdemeanour.

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11. The Star Chamber was not abolished in 1640, as F.B. Sayre states it was (supra, note 89, 828) but on 1 August 1641. The Act was passed in 1640 but specifically states that the Court of Star Chamber would be abolished from August of the following year. See An Act for the Regulating of the Privie Councell and for taking away the Court commonly called the Star Chamber, 16 Car. I c. 10, in 5 "Statutes of the Realm", (1819) 110. The error is copied by quotation in W. Lafave and A. Scott, "Handbook on Criminal Law", 424 (1972, West, St. Paul).

12. Sayre, ibid., 858.

13. (a) Holdsworth chose too emphatic a word by the use of "doctrine" but nevertheless his meaning is clear: "The doctrine of the Court of the Star Chamber was so obviously necessary to any reasonable system of criminal law that it was adopted by the common law courts," W. Holdsworth, "History of English Law", vol. V, 201, (1945, Methuen, London).
(b) P. Brett and P. Waller attribute the contemporary conceptions of conspiracy, incitement, and solicitation to Star Chamber practice in "Cases and Materials in Criminal Law", 374 (1962, Butterworths, Melbourne).

14. (1784) Cald. Mag. Cas. 397 (H.L.).

Prior to proceeding to this cause celebre, three cases cited by Lord Mansfield will be referred to in order to indicate that perhaps Lord Mansfield already had the groundwork of the decision laid and was simply continuing a trend of legal thinking prior to R. v. Scofield in 1784. The first case is R. v. Sutton[15] which Lord Mansfield reveals as "an express authority" in R. v. Scofield.[16] The defendant was indicted and convicted of possessing two metal stamps with intent to counterfeit half-guineas. The dicta by Lee, J., is suggestive of the attempt concept:

> "It is certain that a bare intention is not punishable; and yet when joined with acts whose circumstances may be tried, it is so;[17] So an action innocent in itself, may be made punishable by an intention joined to it....All that is necessary in this case is an act charged and a criminal intention joined to that act."[18]

Although the accused in R. v. Vaughan[19] was punished for offering 5000 pounds sterling as a bribe to the Duke of

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15. (1736) Cas. T. Hard. 370, 2 Str. 1074, 93 E.R. 1040, 95 E.R. 240 (K.B.).

16. Supra, note 14, 403.

17. Reminiscent of Edmund Plowden in Hales v. Petit (1563) 1 Plowd. 253, 259a (Ct. of Common Bench, Kent): "The imagination of the mind to do wrong, without an act done, is not punishable, in our law, neither is the resolution to do that wrong which he does not, punishable, but the doing of the act is the only point which the law regards; for until the act is done it cannot be an offence to the world, and when the act is done it is punishable" (cited and translated in W. Holdsworth, "History of English Law", vol. 8, supra, note 13, 433).

18. Supra, note 15.

19. (1769) 4 Burr. 2494 (K.B.).

Grafton,[20] an officer of the King, to secure a particular office, it was not on the grounds that an attempt was per se indictable, but rather that offering a bribe to a royal servant constituted a substantive offence, even though Lord Mansfield did mention the word "attempt" in his judgment.[21] Was it coincidence? Nine years later an attorney by the name of Mr. Johnson was convicted of offering 350 pounds to induce another to come to court and declare a certain deed to be a forgery.[22] The person did not do so. The case does not suggest that Johnson was procuring perjured evidence and, more important, neither does it suggest that an attempt to procure evidence was itself an offence. The "reason" given for Johnson's act being an offence was that "[w]itnesses ought to come unbiased and not affected with money."[23]

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20. The Concise Oxford Dictionary notes "origin unknown" in its reference to "graft".

21. "Wherever it is a Crime to take, it is a Crime to give: They are reciprocal. And in many Cases, especially in Bribery at Elections to Parliament, the Attempt is a Crime: It is complete on his Side who offers it," supra, note 19, 2500. Emphasis added.

22. R. v. Johnson (1778) 2 Show. K.B. 1, 89 E.R. 753 (K.B.).

23. Law reports at this time often contained a considerable degree of non-legal material pertaining to the case. One is told by the reporter that this judgment broke his (Johnson's) heart, and he was much lamented. Such was the situation, despite Lord Reid's inestimable experience "that Her Majesty's servants are made of sterner stuff" (Home Office v. Dorset Yacht Co. Ltd. [1970] 2 All E.R. 294, 302 (H.L.)), for "he died soon after ... for everyone thought this a hard case." It was indeed, as the reporter notes that many years later the deed was proved to be a forgery. The reporter's last insight is: "Note also, that this Johnson was attorney in prosecuting Scroggs [the Chief Justice presiding in this case] for a debt whilst he

The doctrine of "attempt" as known today in the common law, certainly derives from the classic and creative judgment delivered by Lord Mansfield[24] in

23. (cont.) was a serjeant." It is perhaps this fond memory, despite Scrogg's denial of such a consideration, which heartened Scroggs to insist that the full force of the law (and his personal rhetoric) wreak vengeance on the unfortunate Johnson. The reporter notes at 2 Show. 4-5, 89 E.R. 756-57: "he [Scroggs] made a long speech to aggravate the fault, with a hint or two that he did it not out of malice, or any remembrance of past faults. An endeavour (said he) in the divine law, makes a man as guilty as the commission: perjury is a heinous crime; and was in old time punished with death; and afterwards the member that was instrumental therein was cut off from the body; but now the statutes are more tender and not so severe ...; but when we have found them out and the party convict, and no certain penalty, but left to the discretion of the Court, we ought to make them examples; for as anger does not become a Judge, so neither doth pity, for one is the mark of a foolish woman, as the other is of a passionate man." ("One man's justice is another's injustice; one man's wisdom another's folly...," R.W. Emerson, "Circles" in "Essays, First Series", (1841, J. Munroe & Co., Boston). Source: "Bartlett's Familiar Quotations", 496 (15th ed., 1980, Little, Brown and Co., Boston).)

24. An English Chief Justice, though born in Perth, Scotland in 1705 (before the Act of Union in 1707), educated at Perth Grammar School. Thus, not only did a Scot found the Bank of England (William Patterson in 1694), but a Scot also created the English law of attempt. In his youth, however, Lord Mansfield was apparently unimpressed with the judicial quality of English tomes as compared to the native variety: he preferred to study the treatises by Mackenzie and Stair because for the English Law, "he was obliged to search...in very crabbed and uncouth compositions, which often filled him with disgust and sometimes with despair," J. Campbell, "Lives of the Chief Justices", vol. 2, 253 (1851, J. Murray, London).
Being educated in Scotland, Lord Mansfield did not have access to the generous scholarships available in England:

> "Whereas divers persons convicted in this courte of fornication and adulteries have obtained their publique penance to bee by authorite of the same courte commuted and changed into money, which remaineth penes registrum to bee bestowed upon good and godlie uses...of the said money it is decreed this 23 day of June 1592 by Mr. Leigh judge of the

R. v. Scofield.[25] The accused was charged with placing a lighted candle amongst a pile of shavings in a house belonging to another person, which the defendant held in possession over a term of years. It was a straightforward case of "attempt". His defence was simply that an attempt to commit a misdemeanour was not per se a misdemeanour. The Court thought otherwise. Lord Mansfield's historic and histrionic reply was:

> "In the degrees of guilt there is a great difference in the eye of the law, but not in the description of the offence. So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."[26]

It is a "clear case, therefore, of an attempt to commit a criminal offense...the doctrine formulated by Lord Mansfield was reiterated and clothed in something very like modern dress."[27]

Although R. v. Scofield was certainly creative in the matter of English law it was not so of British law, to wit, Scots law. Scottish criminal law was at this point almost a

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24.(cont.) courte that six poundes shal bee bestowed upon three poore schollers proceedinge at the next acts or commencement at Oxford...."
R.F.B. Hodgkinson, "Extracts from the Act Books of the Archdeaconry of Nottingham" [1956-1642], [1929] "Transactions of the Thornton Society", 33. However, English criminal science has apparently progressed somewhat since those balmy days.

25. Supra, note 14.

26. Ibid., 403.

27. F. Sayre, supra, note 89, 834-35.

century ahead in terms of the formulation of a concept of attempt. George Mackenzie's "Laws and Customes of Scotland, in Matters Criminal"[28] was the first comprehensive book on the subject. Although written in the seventeenth century, the principles enunciated by Mackenzie clearly demonstrate an understanding of the attempt concept and indicate that acts short of completion of the intended crime were punished as attempts:

> [A]ll endeavour, is an offence against the Commonwealth: though nothing follow thereupon: ...simple designe is punishable in treason, and some other atrocious crimes; because in these, especially in treason, it would be too late, to provide a remedy, when the Cryme is committed.... In lesse atrocious crymes, the designe is punisht, if the committer proceeded to act that which approached nearly to the cryme it self, Si diventum fit ad actum, maleficio proximum. But this is not simplex conatus, but in effect is a lesser degree of crime, to which it approaches. ...[29]

An example given by Mackenzie is interesting, for it could be termed an "impossible" attempt: "[I]f he mix poyson, but the potion be spilt upon the ground by an accident ... [and which merits] the same punishment, with the cryme desygned."[30] A distinction is also even made between voluntary withdrawal ("that which is stopt, by the repentance of the committer"[31]) and impossibility due to a supervening cause ("an effect disappointed, by an interveening [sic] accident"[32]), which

28. Supra, note 43.

29. Ibid., 9. Emphasis added.

30. Ibid., 10.

31. Ibid.

32. Ibid.

distinction is of recent origin in many contemporary legal systems.[33] In the case of the latter "the ordinar [sic] punishment, should not be remitted."[34] He does not specifically mention the method of dealing with cases of voluntary withdrawal but, by borrowing a principle of statutory interpretation, expressio unius est exclusio alterius, one can reasonably assume that the punishment would be remitted in this case as compared with failure due to a supervening cause. His conclusion contains the rationale of the proscription of attempts: "Therefore I conclude that he who designed to commit a crime [modern spelling here used by Mackenzie], should be punished as if he had committed it; if he was only letted by accident, because the Common-wealth cannot be otherwise secure."[35] A caveat is however added, which displays a balancing approach, a compromise between society and the individual, an interest in the good of the "committer" as well as that of the "Common-wealth": "But I would here add, as a caution, that great praemeditation, should be proved before conatus be punished capitally; for that showes the confirmed malice of the designer, and is aequivalent, as to him, to successe."[36] As observed above, Lord Mansfield was familiar

33. See, for example, Algeria, China, Colombia, Hungary, Japan, Poland and Romania, in Appendix I, infra.

34. Supra, note 43, 10.

35. Ibid. Emphasis added.

36. Ibid. For a review of the nineteenth century Scottish cases on attempted theft and attempted fraud, see "Inchoate Thefts and Frauds", by "W.B.D.", (1885) 29 Journal of Jurisprudence and Scot's Law Mag. 57-69.

with the works of Mackenzie and one can reasonably assume that at least the idea that an attempted misdemeanour could itself be a misdemeanour came from Mackenzie, though one must hasten to add that there are numerous differences between English law relating to attempt and that of Scots law, both in the seventeenth and eighteenth centuries, and in modern times. Mr. Heuston has lightheartedly commented that "The terminology of Scots Law is a perpetual source of fascination to all who live south of the Tweed."[37] More veracity would be achieved by deleting "fascination" and substituting "English Law".

The rejection of Scofield in 1784[38] as the first formulation of the "attempt" concept in favour of R. v. Higgins in 1801[39] by J. Hall and W. Russell is indeed difficult to understand:

> "This [i.e., R. v. Scofield] can hardly be called the formulation of the doctrine of attempt."[40]

and,

> "Higgins...[is] the immediate origin of the modern doctrine."[41]

and,

> "It was, however, not until the case of R. v. Higgins in 1801 that there first crystallised in

37. R. Heuston, "Donoghue v. Stevenson in Retrospect", (1957) 20 Mod. L. Rev. 1

38. Supra, note 14.

39. (1801) 2 East 5, 102 E.R. 269 (K.B.).

40. J. Hall, "General Principles of Criminal Law", 571 (2nd ed., 1960, Bobbs-Merrill Co., Indianapolis).

41. Ibid., 572.

> the common law the general principle...that an attempt to commit a crime is itself a crime."[42]

Hall's reason is his dissatisfaction with the authority cited by Lord Mansfield in Scofield. Reference is made by Hall to a footnote of Sayre's,[43] which cites Sutton, Vaughan, and Johnson,[44] cases which Hall terms "exceptional" as they are an "interference with public business."[45] Where is the exceptionality? The very case which Hall terms "the immediate origin of the modern doctrine" itself concerned the solicitation of an employer. Is this not an interference with public business? Do not a great portion of criminal cases deal with antisocial acts which interfere with the normal workings of the community, in or out of court?[46] Hall's next phrase is the statement that "[a]dditional cases cited by Mansfield concerned transportation of wool, a misdemeanor by statute, keeping gunpowder, a nuisance of long standing, and words directly to breach of the peace."[47] Only by an unrealistic stretch of the imagination could these offences be considered "exceptional" and an "interference with public business": a statute prohibiting the transport of wool may be intended to

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42. "Russell on Crime", 175-176 (12th ed., J.W.C. Turner, 1964, Stevens, London).

43. Supra, note 89, 835, n. 56.

44. See supra, notes 15, 19 and 22.

45. Supra, note 40, 570.

46. "[T]he only common characteristic of all crimes is that they consist...in acts universally disapproved of by members of each society," E. Durkheim, "The Division of Labour in Society", 73 (G. Simpson, trans., 1933, The Free Press, Glencoe, Ill.).

47. Supra, note 40.

protect the wool producer (or the public generally, depending on economic circumstances), the commonwealth is not fostered by personal gunpowder stocks in each dwelling, and proscibing provocative outbursts tending to a breach of the peace is ordinary common sense. Hall next criticizes Lord Mansfield for overruling Pedley[48] on account of its "wretched reasoning".[49] Would Hall have judges prohibited from overruling a previous decision on rational grounds, or on those of public policy, for that matter? Law would be static and Swift would be vindicated:

> "It is a Maxim among...Lawyers, that whatever hath been done before, may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the Name of Precedents, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail of decreeing accordingly."[50]

The law must be allowed at least a modicum of movement to develop and formulate rules better couched to the needs of society, in order to prevent "interference with public business." In overruling Pedley and applying the last brush stroke to the now complete and recognizable tableau of "attempt", one may easily put the graphic words of O.W. Holmes into the mouth of Lord Mansfield:

> "I trust that no one will understand me to be speaking with disrespect of the law, because I

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48. (1782) Cald. Mag. Cas. 218 (Ct. of Sessions, Bristol).

49. Supra, note 14, 402.

50. J. Swift, "Gulliver's Travels", Part 4, ch. 5 (1726, B. Motke, London).

> criticise it so freely. I venerate the law.... But one may criticise even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart."[51]

Hall does, however, concede that Scofield is a "true attempt case",[52] and Higgins a solicitation case.[53] Russell does not make this distinction but appears to confuse solicitation with attempt, which in Higgins he states to be "so close as almost to amount to identification."[54] It is for this reason that Russell is of the mistaken view that it was Higgins and not Scofield which laid down "that an attempt to commit a crime is itself a crime."[55] The fact is, Higgins is not an attempt case; it deals solely and exclusively with solicitation. Higgins cannot be said to have given birth to the doctrine of attempt. It is an example of the common law crime of solicitation, and should be treated from that point of view. Russell should first of all consider the differences between the doctrine and history of attempt, that of solicitation, and of conspiracy; as was once said, "[T]he great

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51. O.W. Holmes, "The Path of the Law", (1896-97) 10 Harv. L. Rev. 457, 473-474.

52. Supra, note 40, 572; though in the same sentence he illogically states that Scofield "can hardly be said to have expressed the doctrine of criminal attempt."

53. Ibid., 573.

54. Supra, note 42, 176.

55. Ibid.

danger of research is that if you go to look for a thing you always find it."[56] Even the quotations cited by Russell[57] are contrary to his statement above:

> "[H]e...did falsely, wickedly, and unlawfully solicit and incite one J.D., the servant of J. Phillips, etc., to...steal a quantity of twist ...of the goods and chattels of his masters J.P., etc...."[58]

and:

> "It [referring to Vaughan] was a solicitation to the duke to commit a great offence against his duty.... So it is here."[59]

and:

> "[B]ut that case [Scofield]...is in truth much stronger than the present [Higgins]; for there an attempt to commit a misdemeanour was holden indictable...."[60]

Moreover, if Higgins did not sufficiently explode the "doctrine" that a solicitation was treated as an indictable attempt there is much authority in common law jurisdictions which does.[61]

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56. Quoted by F. Lawson, "A Common Lawyer Look at the Civil Law", 32 (1955, University of Michigan Law School, Ann Arbor).

57. Supra, note 42, 176.

58. Ibid. Emphasis added.

59. Ibid., citing R. v. Higgins (1801) 2 East 5, 17-18 (K.B.), per Kenyon, C.J. Emphasis added.

60. "Russell on Crimes", ibid., quoting Higgins, supra, note 59, per Grose, J., at 20.

61 R. v. Williams (1844) 1 Den. 39, 169 E.R. 141 (Exch.), soliciting another to poison a third person is not an attempt to administer poison; McDade v. People (1874) 29 Mich. 49 (Sup. Ct. Mich.), arson; Stabler v. Commonwealth

Whatever the quibble as to whether Scofield or Higgins 'discovered' attempt, attempt as a separate offence in its own right has germinated and blossomed in English common law. An attempt to commit any felony, or any misdemeanour, whether punishable at common law or by statute, was itself indictable as a misdemeanour at common law. So certain was this that in 1837 Baron Parke was able to expound this proposition without even a single reference to any prior authority.[62]

(6) CONCLUSION

"Attempt" has come of age. No longer is it punished under some other guise. Antisocial acts are punished so that society will be protected and the individual will be deterred.[63] As mentioned in the Introduction to this chapter, a balance is to be maintained between the interests of the individual and

61. (cont.) (1880) 40 Am. Rep. 653, 95 Penn. St. R. 318 (Sup. Ct. Penn.), poison; Hicks v. Commonwealth (1889) 9 S.E. 1024 (Sup. Ct. App. Va.), poison; Ex Parte Floyd (1908) 95 P.175 (Ct. App. Calif.), forgery; State v. Donovan (1914) 90 A. 220 (Ct. Gen. Sess. Del.), arson; State v. Lampe (1915) 154 N.W. (Sup. Ct. Minn.), extortion; State v. Davis (1928) 6 S.W. (2d) 609 (Sup. Ct. Mo.), murder; contra, People v. Bush (1843) 4 Hill 133 (Sup. Ct. N.Y.), which is based on a misinterpretation of the word "attempt" in Higgins.

62. R. v. Roderick (1837) 7 C. & P. 795, 796, 173 E.R. 347 (N.P.).

63. The convicted murderer was led from his cell to the gallows in the grey light of dawn. "Have you any last words before sentence is carried out?" whispered the chaplain. "Yes", he replied, "this will be a lesson to me ..."

society. That balance is not static, and not necessarily orderly. The law of criminal attempt is still developing, whether by case law[64] or by legislation.[65] That balance reflects a fundamental problem which goes to the foundations of criminal liability generally, and of criminal attempt. It may be that Lord Mansfield simply wanted to pin something on Scofield, but in doing so, he dramatically readjusted that balance. As always, a line must be drawn by the law[66] somewhere between the initial idea of crime in the mind and its final completion, which line creeps interminably towards cogitare.[67] A criminal attempt is a substantive crime in its own right, for which mens rea and actus reus are essential elements; the mens rea must not be inferred but proved beyond a reasonable doubt. Attempt must be seen in its context of the

64. For example, Haughton v. Smith [1973] All E.R. 1109 (H.L.).

65. For example, the English Criminal Attempts Act 1981. See generally, infra, Chapter IV, "The Mental Requirement - Mens Rea", Chapter V, "The Factual Requirement - Actus Reus", and Chapter VI, "Impossibility".

66. The problem is similar to that of measurement, which, though not being capable of precise definition, allows one to state affirmatively or negatively whether in a particular case the definition has been fulfilled: "One can, of course, add grains of corn together, and there must come a time when they become a heap. You can say that it is impossible to know where to draw the line; yet you can say that one case or another must plainly be on the wrong side of any line you can possibly draw," Wood v. Wood [1947] L.R.P. 103, 106 (English C.A.), per Lord Merriman.

67. "The whole drift of our law is toward the absolute prohibition of all ideas that diverge in the slightest form from the accepted platitudes...," H.L. Mencken, quoted in New York Times Magazine, 9 Aug. 1964, 60.

whole vista of the criminal law, just as the development of the law of attempt (as of any criminal concept) must be viewed as necessary to understanding the practical application of the law, for "[n]o piece of history is true when set apart to itself, divorced and isolated. It is part of an intricately various whole, and must needs be put in its place in the netted scheme of events to receive its true color and estimation."[68] Attempt serves the very useful purpose of reflecting and illustrating in the criminal law generally the continuing ebb and flow between individual liberty on the one hand, and protection of society on the other.

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68. Woodrow Wilson, "The Variety and Unity of History", (Address at the International Congress of Arts and Sciences, Universal Exposition, St. Louis (1904); "International Congress of Arts and Sciences, Universal Exposition, St. Louis [Report]", Vol. 2, 3).

CHAPTER III

WHY PUNISH ATTEMPT

(1) INTRODUCTION

If an attempt is stopped before the 'target' crime has been completed, so that the full offence is averted, why punish an attempt? It is, after all, only an 'attempt'. No harm has really resulted - or has it? Society does, most of the time, punish attempts. Most of the time, not all the time. The fuzzy logic behind punishing attempts and the resulting confused state of the cases in the area indicate a consideration of factors involved in the rationale and functions of criminal attempt.

There is, inevitably, an irreducible element in law that cannot be persuasively dissolved in logical analysis and which penal theory must somehow take into account[1] - should the punishment fit the crime or the criminal? In other words, should the interests of society be taken more into account than the interests of the individual? Fashions do exist in sentencing theories, and it may be that deterrence is now being given more weight than, for example, rehabilitation,[2] in

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1. J. Hall, "General Principles of Criminal Law", 558 (2nd ed., 1960, Bobbs-Merrill, Indianapolis).

2. For works on punishment, including attempt, see, inter alia, "Crime and Justice", Vol. II, "The Criminal in the Arms of the Law", L. Radzinowicz and M.E. Wolfgang, Eds. (1971, Basic Books Inc., New York); G.P. Fletcher, "Rethinkng Criminal Law", 408-420 (1978, Little, Brown and Company, Boston); Law Reform Commission of Canada, "Fear of Punishment" (1976, Minister of Supply and Services, Ottawa); H.L.A. Hart, "Prolegomenon to the Principles of

response to what the courts perceive as an increasing demand for crime prevention - intervening at the attempt stage and criminalizing attempt prevents crime. This is not to say that society should pursue the objective of crime prevention to the exclusion of all other interests, individual interests, or that sacrifices of individual liberty should be condoned in favour

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2. (cont.) Punishment", [1959-60] Aristotelian Society Papers 1; H. Morris, "Persons and Punishment", (1968) 52 The Monist 475; R. Garofalo, "Criminology" (1968, Patterson Smith, Montclair, N.J.; originally published 1914, Little, Brown and Co.); E. Ferri, "Criminal Sociology" (1897, D. Appleton & Co., New York); S. Glueck, "Principles of a Rational Criminal Code", (1927-8) 41 Harvard L. Rev. 453; Hon. P. Lutz, "Crime and Punishment", (1936) 41 Commerc. L. Jo. 267; J. LL. J. Edwards, "The Prevention of Crime", (1951) 18 Sol. Jo. 164; V.I. Cizanckas, "Perspectives of Crime and Crime Prevention", (1973) 1 Crime Prevention Review 1; T.F. Watkins, "Crime and Punishment", [1933] S. Car. Bar Assoc. Transactions 89; M. Privette, "Theories of Punishment", (1962) 29 Univ. of Kansas City L. Rev. 46; G.M. Gilbert, "Crime and Punishment: An Exploratory Comparison of Public, Criminal and Penological Attitudes", (1958) 42 Mental Hygiene 550; L.B. Goldberg, "An Eye for and Eye", (1932) 38 Case and Comment 2; S.W.P. Mirams, "Crime and Punishment", (1969) 3 Aust. N.Z. Jo. Psychiatry 369; R.W. Peterson, "The Changing Criminal Justice System", (1974) 47 State Government 4; L.H. Perkins, "Suggestion for a Justification of Punishment", (1970) 81 Ethics 55; A. Dershowitz, "Let the Punishment Fit the Crime", New York Times Magazine, Dec. 28, 1975, 7; L. Radzinowicz and J.F.S. King, "Concepts of Crime", Times Literary Supplement, Sept. 26, 1975, 1087; S. Jaffary, "The Criminal Law - Theory and Reality", [1964] Chitty's L. Jo. 160; I. Silver, "Crime and Punishment", (1968) 45 Commentary 68; J.S.B. Macpherson, "Common Sense and the Criminal", Maclean's Magazine, April 15, 1938, 23; B.J. Cavanaugh, "The Justification of Punishment", [1978] 15 Alta. L. Rev. 43; S. Owen-Conway, "Crime and Punishment in Modern Society", (1976) 9 Univ. of Qd. L. Jo. 266; J. B. White, "Making Sense of the Criminal Law", (1978) 50 Univ. of Colo. L. Rev. 1; G. Snow, "A Note on the Law Reform Commission of Canada's Theoretical Approach to Criminal Law Reform", (1979) 28 U.N.B. L. Jo. 225; S. Leslie, "Some Explorations in the Scaling of Penalties", (1978) 15 Jo. of Research in Crime and Delinquency 247; M.E. Wolfgang, "Rethinking Crime and Punishment", [1978] Across the Board 55.

of the public's perceived demand for crime control and crime prevention in what is now a more complex society. Yet an uneasy balance must be struck. Frequent "check stops", hidden cameras at intersections and "hotlines" to report offenders may help prevent drunk driving and various traffic offences but they also may be considered as unacceptable encroachments upon personal liberty. The same is true of much of substantive, and procedural, criminal law. The conundrum is that crime prevention in a democratic society is a function of generating a society where individual freedom can be enjoyed without undue influence from others - yet such necessarily means some restriction by the state upon the person. Crime is culturally subjective, as is society's and the court's response to persons who attempt to commit, or complete, crimes.[3] The individual, and society, must be wary of the extent of such 'necessary' restrictions, for the individual and society may end up by giving more individual freedom away than is gained by the benefit of crime prevention. There are limits to the criminal law, and there are limits to the criminal sanction.[4]

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3. M.E. Wolfgang, "Rethinking Crime and Punishment", [1978] Across the Board 55.

4. See further: H. Packer, "The Limits of the Criminal Sanction", (1968, Stanford Univ. Press, Palo Alto); A.W. Mewett, Q.C., "Morality and the Criminal Law", (1961-62) 14 Univ. of Toronto L. Jo. 213; A.W. Mewett, Q.C. "The Proper Scope and Function of the Criminal Law", (1960-61) 3 Crim. L.Q. 371; E. Cheverie, "Victimless Crime Laws", (1975) 6 N. Car. Central L. Jo. 258, 273-274; R.M. Toms, "An Ounce of Prevention", (1932) 11 Michigan State Bar Jo. 201, 204; Law Reform Commission of Canada, Working Paper 10, "Limits of Criminal Law" (1975, Information Canada, Ottawa); Law Reform Commission of Canada, Report, "Our Criminal Law" (1976, Information Canada, Ottawa); A.B. Smith and H. Pollack, "Some Sins Are Not Crimes" (1975, Franklin Watts Inc., New York); "Crime and

It is fashionable to declare our ignorance of criminal law (most speakers refraining from personal as apart from communal confessions); of crime prevention; of deterrence, rehabilitation, retribution, incapacitation, of recidivism; of the policy and purpose of the law. As Daniel P. Moynihan, a U.S. politician and U.N. Delegate is attributed to have laconically commented recently, "We don't know a damned thing about crime."[5] If this be true, much ink has been spilled in vain: "There is no subject on which so much nonsense has been written as this of crime and the criminal."[6] In truth, though,

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4. (cont.) Justice", vol. I, "The Criminal in Society", L. Radzinowicz and M.E. Wolfgang, Eds., "The Blurred Edge of Criminal Law", 48-117 (1971, Basic Books Inc., New York); J.W. Westbrook, "Crimes WithoutPlaintiffs", (1973) 25 Baylor L. Rev. 37; J. Hall, "Perennial Problems of Criminal Law", (1973) 1 Hofstra L. Rev. 23-25; W.L. Brown, "Concerning Crimes Without Victims", (1974) 47 State Government 24; C.A. White, "Crimes Without a Victim. Should an Act be a Crime if it Only Affects the Person Who Committed it?" (1973) 38 Canada and the World 22; Note, "'Victimless' Crimes", (1977) 51 Aust. L. Jo. 167; J.F. Winterscheid, "Victimless Crimes: The Threshold Question and Beyond", (1977) 52 Notre Dame Lawyer 995; J.R. Lilly and R.A. Ball, "A Critical Analysis of the Changing Concept of Criminal Responsibility", (1982) 20 Criminology 169; R. v. Basha et al (1979) 23 Nfld. & P.E.I. R. 286, 298, 301 (Nfld. C.A.).
   And see most recently the Canadian government's publication, "The Criminal Law in Canadian Society", Part (2)(b), "Proper Scope of the Criminal Law", 41-46, and Part (2)(d), "How Far Can Criminal Law Go in Pursuing its Aims?", 48-49 (1982, Government of Canada, Ottawa).

5. It was put a little more succinctly by Ramsey Clark, the former U.S. Attorney-General: "Ignorance is perhaps the greatest barrier to effective crime control. We know little; we misconceive much. Leadership unwilling to concede how little it knows - but often willing to exploit the escalation of anxiety - tortures us with our own lack of understanding," "Crime in America", p. 44 (1970, Simon and Schuster, New York).

6. Attributed to Charles Mercer, a British criminologist who wrote over fifty years ago.

despite our phenomenal sciolism, much is known concerning crime and penology. As knowledge advances, we realize the increasing boundaries of as yet unresearched horizons; yet understanding is in toto extended. It must be stressed, however, that our quest for the rationale behind criminal attempts may not always yield completely satisfying results; we are hunters, "the unspeakable in pursuit of the uneatable."[7]

One often hears it expressed by a layman that those who attempt to commit a crime but do not reach their objective should not be allowed to go free. Nevertheless, it is an injustice to fail to bring back into the community those whom it is possible to return. The object of the law ought to be the reasoned but reasonable liberty of the individual, the individual within society. Certainly no one's conduct is in harmony at all times with social order, and there are limits to the extent any society can tolerate and absorb antisocial activities. The criminal justice system, however reformed and updated, cannot consolidate a badly fractured society. Penal policy is often a choice between objectives and policies, objectives and policies which often conflict.

In this inquiry, issues of philosophy and perplexing questions of logic will be encountered. Man is as much a mystical animal as he is logical; yet no court delivers exact justice - whatever that is.[8] It is quite possible that the

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7. Oscar Wilde, "A Woman of No Importance", Act I (1894, J. Lane, London).

8. A young lawyer was once seeking admission to one of the Inns of Court in London; he was asked by the learned judges at the interview: "What is Justice?" After much

criminal justice system evolved before it had a theoretical base. It does seem that a crime is nothing more than what the courts say is a crime. Law must and should reflect the morality and customs of its people and reveal the public policy of its government. This is especially true of criminal law. Although the criminal law is generally progressive, the law-maker may be in advance of the times, or on occasions behind it.[9]

> "Crime, like law, cannot be made, but must be found. Society is not an institution created by voluntary action or mutual improvement and discipline, but is a great fact springing from the nature of man as a social animal.[10]

Vagueness and abstractions are as necessary to criminal law as judges and juries. Portions of the law are probably too abstruse and confused to be replaced. This is true of attempt. One must not have too logical or rational an endeavour in one's approach to criminal attempts, because "the law is a sort of hocus pocus science, that smiles in yeer face, while it picks yeer pocket, and the glorious uncertainty of it is of mair use to the professor than the justice of it."[11]

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8. (cont.) fidgeting and ponderous gazes, he replied: "I used to know, but I have forgotten." "What a great loss for Jurisprudence!" bemoaned the Chairman, "The first person to know and now he's forgotten."

9. Hans Mattick is attributed to have satirically pronounced that "the genius of American penology lies in the fact that we have demonstrated that eighteenth-and nineteenth-century methods can be forced to work in the middle of the twentieth century."

10. A.T. Carter, "Law: Its Origin, Growth and Function", 252 (1907, G.P. Putnam's Sons, New York and London).

11. Charles Macklin, "Love a la Mode", Act 2, sc. 1 (1759).

This inherent vagueness has been of some advantage to the law concerning attempts, and has in fact been its salvation:

> "It is child's play for this realist to show that law is not what it pretends to be and that its theories are sonorous, rather than sound; that its definitions run in circles; that applied by skilful attorneys in the forum of the courts it can only be an argumentative technique; that it constantly seeks escape from reality through alternate reliance on ceremony and verbal confusion. Yet the legal realist falls into grave error when he believes this to be a defect in the law. From any objective point of view, the escape of the law from reality constitutes not its weakness but its greatest strength. Legal institutions must constantly reconcile ideological conflicts, just as individuals reconcile them, by shoving inconsistencies back into a sort of institutional subconscious mind. If judicial institutions become too sincere, too self-analytical, they suffer from the fate of ineffectiveness which is the lot of all self-analytical people."[12]

Despite this, the law of attempt remains a challenge to intelligible judicial formulation, and a playground of self-proclaimed prophets and theorists.[13] But justice must be

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12. T.W. Arnold, "The Symbols of Government", 44 (1962, Yale University Press, New Haven; first published in 1935).

13. Kahn-Freund comments that "we academic lawyers are all too easily seduced by the lure of law as a feu d'artifice or as a jeu d'esprit, a box full of highly intellectual games played in an artificial vacuum so as to sharpen everybody's wits without being to much troubled by the realities behind it" ("Comparative Law as an Academic Subject", (1966) 82 L.Q.R. 40, 44).

seen to be done, and it must be seen to be dispensed in a non-technical and intelligent manner.[14]

(2) OBJECTIVE AND SUBJECTIVE - THE TWO MAJOR APPROACHES

There is much ambivalence reflected by the cases and literature as to how far the approach to the governing criterion should be subjective or objective. An extreme subjectivist would punish an "evil will" evidenced by even harmless conduct: thus, an attempt to murder by voodoo would be punishable; whereas an extreme objectivist has as his prime objective the prevention of harm to society, even though this danger is potential and not manifest: thus, a person who attempts to murder with salt, thinking it to be a poison, would not be punished, as no "harm", actual or constructive, has occurred. Both approaches are, however, in agreement in so far as wicked thoughts are not per se indictable. O.W. Holmes has gone some way towards a synthesis: "the aim of the law is not to punish sins, but to prevent certain external results, the act done must come pretty near to accomplishing that result

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14. As Guerry's sentiments were expressed over a century ago, "The time has gone by when we could claim to regulate society by laws established solely on metaphysical theories and a sort of ideal type which was thought to conform to absolute justice....Moral statistical analysis...does not seek to discover what ought to be; it states what is..." (see Kim Wyman, "The Dilemma of Crime Statistics in Australia - Atrophy or Growth?", (1970) 3 Aust. & N.Z.J. of Crim. 45, 45).

before that law will notice it."[15] It may be more exact to describe the subjective viewpoint as the "conceptual method", which concentrates on the use of abstract concepts and their analysis by pure logic, and the objective viewpoint the "functional method", which concentrates on the function of the law. Although the former appears more scientific and precise, it does not in fact always ensure predictability and certainty, though it is greater than that of the functional approach; it may however, fail to achieve the social aims the legislator had in mind. One must be aware that the conceptual method is not suitable for every type of problem, and that the trend in contemporary democratic western society is to allow more freedom to be permitted to the judiciary to interpret legislation according to its social purpose and policy.[16]

(a) Objective - Social Danger, Functional

The most recent and significant understatement of this approach was enunciated by Lord Widgery, C.J., on June 8, 1973: "no doubt there are social arguments which suggest that such a person should be liable to be punished as guilty of an

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15. Commonwealth v. Kennedy (1897) 48 N.E. 770 (Sup. Jud. Ct. of Mass.).

16. Thus the power of the judiciary is increased: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes; and not the person who first wrote or spoke them." (Bishop Benjamin Hoadly, Sermon, March 31, 1717.)

attempt...."[17] This is the most cogent and compelling argument in favour of punishing an attempt, though it may be conventional to pay lip service to it without any particularly constructive thought:

> "In the day-to-day job of dealing with the criminal there may be little opportunity and even less inclination to sight social objectives and to align correctional methods. It is far simpler to receive without challenge the traditional philosophies and to employ the well-established techniques. When called upon, one may speak piously of 'the protection of society' or 'individualized rehabilitation', but these are bones without flesh."[18]

The "objective" (or "functional") approach is concerned with the interests of society, whereas the "subjective" (or "conceptual") approach is concerned with the moral guilt of the individual. "Evil intent" seems out of place in the context of the interests of society taking precedence over those of the individual. There is a choice: "Whether to join Professor Hall in his pursuit of some will-o-the-wisp of a general theory of mens rea, or whether, like Ryle, to banish the ghost and be free to concentrate on the cash-value."[19] Both these choices are unrealistic extremes; here mens rea and actus reus are considered essential, though more emphasis is laid on the welfare of society than on the individual accused. This view is however too conservative for some commentators:

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17. R. v. Smith [1973] 2 W.L.R. 942, 946 (English C.A.).

18. P.W. Tappan, "Contemporary Correction", 3 (1951, McGraw-Hill, New York).

19. P. Mullock, "Professor Hall and the Ghostly Mens Rea", (1962) 13 Mercer L. Rev. 283, 293.

> "...the courts are wrong when they insist that mens rea is an ingredient of every criminal offense. It is the act that is the danger to society which is the crime. The intent is just an index to the psychological nature of the offender. The act is the basis for action leading to getting the offender before the bar of justice."[20]

If the person shows that he intends to kill somebody, society should intervene, and not be so foolish as to let him accomplish his objective. Once the offender "appears to the legal system, on the strength of the act done, already so dangerous that the law dare not wait for further proofs of his dangerous character; the incompleted act furnishes a sufficient proof."[21] Persons who try to commit acts forbidden by substantive criminal law should be open to social prevention and deterrence, as they are socially dangerous. Criminalization does not occur in order to strengthen the morals of any nation. Mens rea balances the interests of the individual against those of society by limiting liability to those with a proved intention to bring about the actus reus. The law's preventive and deterrent role is limited in the interests of freedom by requiring action on the part of the accused. The social harm does not only justify punishment for what the accused has actually brought about, but also for that which he seeks to cause in the future, unless prevented or deterred: "It is only common sense to lock the stable door once the horse has shown signs of intending to get out, and

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20. A. Levitt, "Extent and Function of the Doctrine of Mens Rea", (1922-23) 17 Ill. L. Rev. 578, 595.

21. W. Ullmann, "The Reason for Punishing Attempted Crimes", (1939) 51 Juridical Rev. 353, 363.

foolish to wait until it has gone: prevention is better than cure."[22] Garofalo had suggested that there should be no attempt where the insufficiency of the means establishes such ineptitude as to show the accused to be harmless. But the 'medicine-man' who attempts to kill by sticking pins into an effigy of his victim, may next use a spear or a hatchet. Even inept persons are a social menace, even though they are presently harmless, for there surely is a social danger in permitting a person intent on murder to circulate freely in the community. But "[i]t is only when some act is done which sufficiently manifests the existence of the social danger present in the intent that authority should intervene,"[23] as "[i]t is necessary to strike a balance in this context between individual freedoms and the countervailing interests of the community."[24] Once an overt act[25] has been carried out which

22. G.H. Gordon, "The Criminal Law of Scotland", 164 (2nd. ed. 1978, W. Green, Edinburgh).

23. The English Law Commission, Working Paper No. 50, "Inchoate Offences: Conspiracy, Attempt and Incitement", 47 (1973, H.M.S.O., London).

24. Ibid.

25. The phrase "overt act" must be used with care. There are few valid reasons for allowing a person with a declared or otherwise provable evil intent to circulate in the community. Nevertheless, those who merely think evil should not be punished, the line should not be drawn too close to the initial inception of an evil intent; an "overt act" is therefore necessary as a safety valve. There are several reasons for the use of this concept: the would-be criminal has a chance to change his mind; two further points are noted by Glanville Williams: "(1) the difficulty of distinguishing between daydream and fixed intention in the absence of behaviour tending towards the

displays a criminal intention, a threat is posed to society, which is entitled to take precautions to ensure that the potential criminal will be deterred from further attempts. The objectives of the criminal law would not be served if an accused could only be apprehended immediately before completion on the spot, as his conduct "yields an indication that the actor is disposed toward such activity, not alone on this occasion, but on others."[26] The circumstances may even show the person whose criminal scheme miscarried to be a greater continuing danger than one whose scheme succeeded. From a practical point of view, there may be more point in punishing the accused for an attempted crime, than for a completed one: "Success encourages, failure discourages, and punishment discourages still further, weakening the offender's aggressive tendencies, and so the punishment of an attempted crime promises a much more effective and endurable result than the punishment of a completed crime."[27]

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25. (cont'd) crime intended, and (2) the undesirability of spreading the criminal law so wide as to cover a mental state that the accused might be too irresolute even to begin to translate into action. There can hardly be anyone who has never thought evil. When a desire is inhibited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal," "Criminal Law", 2 (2nd ed., 1961, Stevens, London).

26. U.S. Model Penal Code, Tentative Draft No. 10, 25 (1960, American Law Institute, Philadelphia).

27. Gordon, supra, note 22, at 164.

An attempt does not depend on possibility of achievement, i.e., on proximity or notions of 'impossibility'; it seems, therefore, logically ludicrous to insist upon determining whether murder was possible before deciding about the attempt, which would confound murder and attempted murder. It is not a question of what was possible, but what was done.[28] "Attempt" should not have a different meaning in law and another in reality. One can attempt the impossible: to transform a base metal into gold, to abort a non-pregnant woman, to drain the ocean with a teacup, to steal from an empty pocket. Are each of these any less an attempt because they are impossible? Or are all attempts ab initio ex hypothesi impossible, otherwise the completed crime would be committed? It is submitted that dialectics and linguistic mechanics be forgotten, and attempt be given its ordinary everyday meaning, so that it can be said that one can attempt the impossible.[29] As O.W. Holmes points out:

> "I do not suppose that firing a pistol at a man with intent to kill him is any less an attempt to murder because the bullet misses its aim....It is just as impossible that a bullet under those circumstances should hit that man, as to pick an empty pocket. But there is no difficulty in saying that such an act under such

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28. J.W. Curran, "Criminal and Non-Criminal Attempts", (1930) 19 Geo. L.J. 185, 189.

29. "'Then you should say what you mean', the March Hare went on. 'I do,' Alice hastily replied, 'at least I - at least I mean what I say - that's the same thing you know.'
'Not the same thing a bit!' said the Hatter. 'Why you might just as well say that "I see what I eat" is the same things as "I eat what I see"!'" Lewis Carroll, "Alice in Wonderland", Chap. 7 (1865, Macmillan, London).

> circumstances is so dangerous, so far as the possibility of human foresight is concerned, that it should be punished."[30]

Again, we return to "dangerousness", where criminality depends primarily not on what may have been passing through the mind of the individual accused, but on the degree of danger to society:

> "...criminality should depend primarily, therefore, not on moral guilt but on whether or not social and public interests are unduly injured or endangered, then it follows that the question of punishment for a criminal attempt must be determined from an objective viewpoint."[31]

An implication of the objective theory is that if there is no actual or potential harm, the act will not be stigmatized. A recent English case[32] based its acquittal[33] on the principle that no harm was caused even though the defendant had not carried out every necessary step to complete his objective. Lord Denning observed:

> "Even if he had done all this, it is very doubtful whether it would have had any effect at all. The gas would have been so diluted by air that it would not have been noticeable."[34]

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30. "The Common Law", 69-70 (1881, Little, Brown and Co., Boston).

31. F.B. Sayre, "Criminal Attempts", (1927) 41 Harvard L. Rev. 821, 849. Emphasis in original.

32. Balogh v. Crown Court at St. Albans [1974] 3 All E.R. 283 (English C.A.).

33. Cf. attempt to commit contempt of court by releasing nitrous oxide (laughing gas) during judicial proceedings.

34. Supra, note 32, at 289.

Article 6 of the Criminal Code of the Russian Soviet Federated Socialist Republic proscribed a "socially dangerous act", which is defined as any act directed against the Soviet system or infringing the legal order. The phrase "socially dangerous act" substitutes the word "crime", and thus takes the R.S.F.S.P. Code to the extreme of the objectivist view. This is not, however, the only requirement of a "crime"; there must also be vina (fault, guilt), and the act must be punishable by law. Russian commentators are, however, split between the objective and subjective view. N.F. Kuznetsova[35] and I.S. Tishkevich[36] adhere to the objective approach in so far as they state that an attempt has been committed when the accused has done all that was necessary to bring about the result, or in other words, has performed all the acts required by the sostav of the particular crime. The subjective approach is followed by V.F. Kirichenko:[37] whether the accused has done everything he considered necessary to realize his criminal intentions. The element of social danger must not be over-emphasized however, as the Soviet courts will refuse to punish a person who did not have a criminal intention. As Staroselski states,

35. "Responsibility for Preparation of a Crime and Attempt to Commit a Crime", 95 (1958, Moscow State University, Moscow). Work is in Russian.

36. "Preparation and Attempt", 159 (1958, State Legal Publishing House, Moscow). Work is in Russian.

37. "The Meaning of Error", 90-91 (1952, Publishing House of Nank. SSSR, Moscow). Work is in Russian.

fault must not be looked upon only as a "crooked mirror reflecting the danger involved in the criminal act."[38]

The dichotomy between the subjective and objective approaches also exists in France. Article 2 of the French Penal Code allots the same punishment to an attempted crime as to the completed offence. This was the old French Law as well as the droit revolutionnaire and was adopted by the Code as a deterrence, and is justified by "des considerations de defense sociale."[39] This was approved by the Positivists, as the punishment was not graduated according to "la gravite materielle de l'acte" but to the "danger que represente son auteur pour la societe."[40] It was argued[41] that as Art. 2 makes a commencement of execution a necessary element, in the case of an impossible attempt, neither commencement nor execution was conceivable, so that impossible crimes should not be punished. R. Merle is quick to point out[42] that this is a specious argument, since it is neither the commencement nor the execution which are considered impossible (as the accused has

38. Quoted by B. Mankovski in "Against Anti-Marxist Theories in Criminal Law", 13 (1937, bibliographical information presently unavailable.)

39. Cf. G. Stefani and F. Levasseur, "Droit Penal General et Procedure Penale", vol 1, 165 (1964, Dalloz, Paris).

40. Ibid.

41. By P. Rossi, "Cours de droit penal", vol. II, chap. 30 (1829, A. Sautelet, Paris); and Villey, "Du delit impossible", (1877-8) 2 France Judiciare 185.

42. Cf. "Droit Penal General Complementaire", 161 (1957, Collection Themis, Paris).

by definition done all the acts which characterize the completion of a crime), but the result of the acts, the consummation of the crime. P. Bouzat and J. Pinatel state[43] that less social harm is produced by an impossible attempt than by an unsuccessul (but possible) attempt or the completed crime.[44] This approach was severly criticized by the neo-classical school,[45] which had a retributive rather than a utilitarian approach to punishment. Their "cri de guerre" was that an impossible attempt revealed "une volonte criminelle dangereuse." As E. Garcon states:

> "...lorsque une loi incrime une tentative ou un délit manqué, elle se place au point de vue subjectif; elle ne punit pas parce qu'il y a eu un prejudice social matérial, mais parce que l'intention de l'agent manifestée par des actes proches du delit prouve sa culpabilité ou sa nature dangereuse. Toutes les fois doncs que ces actes et cette intention particulière existeront, la tentative sera constituée, sans qu'il y ait lieu de rechercher si le délit était possible ou impossible."[46]

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43. "Traité de Droit Pénal et de Criminologie", vol. I, 217 (1963, Dalloz, Paris).

44. This is not necessarily so in every case; one can argue that as much social harm is produced when a victim goes unharmed because his assailant used a gun which was in fact unloaded (an impossible attempt) as when he is unharmed because the assassin aimed from a long distance with a high-powered rifle, but missed (an unsuccessful, though possible attempt).

45. And supported by R. Saleilles in "Essai sur la tentative et plus particulierement sur la tentative irrealisable", (1897) 2 Revue Penitentiarie et de Droit Penal et Etudes Criminologiques 53.

46. "Code Pénal Annoté", no. 114, art. 2 and 3 (1901, Récueil Sirey, Paris).

Although these are the two extremes, the intermediary theory is that all too familiar division between absolute and relative impossibility. There are indications that the two extreme viewpoints draw closer together in practice than they do philosophically: although the same punishment is accorded for attempt as for the completed offence, the judge has discretion to lower the stated punishment through "le benefice des circonstances attentantes;"[47] the impossibility may be so manifest as to show a mental deficiency, rendering the accused not subject to penalty: Bouzat states that such a person would escape on account of "irresponsibility", and gives as an example a person who tries to kill his enemy by casting spells or by sorcery.[48] Attempt is certainly "un bellette mot",[49] a chameleon.

(b) Subjective - Personal Intent, Conceptual

Although this approach emphasizes the moral and personal guilt of the individual, mens rea, per se, is not punished:

> "An intention to commit a crime does not by itself suffice to make a person guilty of a crime.... Although mere criminal intention is not punishable, punishment is not reserved only for cases where the intention is fulfilled. Midway between the mere intention and the completed crimes stands the inchoate crime of Attempt...."[50]

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47. Supra, note 39, at 165.

48. Supra, note 43, at 218.

49. A weasel word.

50. P.J. Fitzgerald, "Criminal Law and Punishment", 97 (1962, Clarendon Press, Oxford).

This was stated earlier by Blackstone in similar language.[51] The reason for not allowing a simple intention is given by Austin as "the danger of admitting a mere confesssion,"[52] while Blackstone reasons that "no temporal tribunal can search the heart, or fathom the intentions of the mind,...it therefore cannot punish for what it cannot know."[53] This is a beautifully hypothetical state of affairs, as in practice the accused is punished not for what he has done but for his state of mind alone. He may have done a harmless and innocuous act, but he is certainly not being punished for what is harmless or innocuous. It does therefore seem to be the case that, contrary to the general principle enunciated above, the law is in fact punishing the criminal intention, though that intention must be proved.[54] The sixteenth century case of Hales v. Petit[55] requires an act, but whether this act is an essential prerequisite of the crime or merely evidence of the intention,

51. "In all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the man is liable to punishment." ("Commentaries", Book 4, ch. 2 (1803, Edward Christian, London; reprint 1965, Dennis and Co.,Inc., Buffalo.)

52. "Lectures on Jurisprudence", 441 (1913, J. Murray, London).

53. Supra, note 51.

54. But, by merely intending to do harm one does not interfere with the liberty of others. See further, H. Morris, "Punishment for Thoughts", (1965) 49 The Monist 342.

55. (1562) 1 Plowd. 253, 75 E.R. 387 (Kent Common Bench).

one cannot say.[56]

Although the Russian Soviet Federated Socialist Republic had as its aim the protection of the State and Soviet society, and took the objective approach, it is interesting to note that the National Socialists in Germany had the same aim, yet advocated the subjective view. It seems that the theory of "Social Protection" can be served by both the objective and subjective approaches: from an objective point of view "harm"[57] can result to society from a person's acts even though there is no possibility of fulfilment, and subjectively, a

56. "[T]he act consists of three parts. The first is the imagination, which is a reflection or meditation of the mind, whether or not it is convenient for him to destroy himself,and what way it can be done. The second is the resolution, which is a determination of the mind to destroy himself, and to do it in this or that particular way. The third is the perfection, which is the execution of what the mind has resolved to do. And this perfection consists of two parts, viz. the beginning and the end. The beginning is the doing of the act which causes the death, and the end is the death, which is only a sequel to the act. And of all the parts the doing of the act is the greatest in the judgment of our law, and it is in effect the whole, and the only part that the law looks upon to be material. For the imagination of the mind to do wrong, without an act done, is not punishable in our law, neither is the resolution to do that wrong, which he does not, punishable, but the doing of the act is the only point which the law regards; for until the act is done it cannot be an offence to the world, and when the act is done it is punishable." Ibid., at 259 (emphasis added). There seems to be a direct relation between degrees of impossibility and degrees of motivation, for subconsciously the accused may not really want to succeed, but be interested only in "acting out". Although a purely psychological point, it does nevertheless appear to be a realistic and practial view. The fact that a gun appears obviously unloaded or defective to any observer such as to indicate that no bullet can possibly be emitted, may or may not be taken by the court as evidence of lack of real intention.

57. Cf. under "Harm", infra (section 3(e)).

person with socially dangerous views should not go unrestricted. The line of criminality in such states can thus be drawn very close to cogitare, objectively or subjectively. That the objective and subjective theories are capable of integration is demonstrated at a practical level by one commentator who writes that "there is no difficulty in seeing that the killer who fails because his bullet accidentally hits his victim's belt buckle is no less a social menace in the requisite sense than one who succeeds because his victim happens to be wearing suspenders"[58] - such person is objectively a danger to society, and subjectively is deserving of severe punishment. Freisler wrote that it is "not the act but the criminal will of the actor" which "is decisive for the punishability of human action."[59] He argued:

> "If criminal law is to fulfill fully its purpose of protecting the work 'peace and order' of the people, then it is necessary to fight at the very root that which may develop into a danger. We must attack the basic evil and not its consequences. The basic evil is not the consummated act but the criminal will endangering the Folk order - the will which is preparing to proceed in a manner disapproved by the people and the State."[60]

Schoetensack, however, took a stand contrary to the National Socialist movement to reform criminal law in the spirit of its

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58. L.C. Becker, "Criminal Attempt and the Theory of the Law of Crimes", (1974) 3 Phil. and Public Affairs 262, 276.

59. "Der Versuch" in "Grundzuege Eines Allgemeinen Deutschen Strafrechts", Dr. Hans Frank, Ed. (1934), 70 et seq; quoted by H. Silving, "Criminal Justice", 388 (1971, W.S. Hein, Buffalo).

60. Ibid., 388. Emphasis in original.

notorious "criminal law oriented to the will and the actor rather than to actual social harm and the act."[61]

The thesis of the subjectivist is quite simple. The degree of an individual's guilt cannot be divorced from moral and psychological considerations; guilt must depend on the mental state of the accused, as a person who has done all that he thinks necessary to achieve a criminal purpose deserves punishment, which may deter him from repeating the activity. Thus a person is deemed guilty of an attempt if he actually intended to commit a crime, and did acts sufficient from his point of view to carryout his intention, even though in fact his conduct could not achieve the objective. As stated by the drafters of the U.S. Model Penal Code, "...the primary purpose of punishing attempts is to neutralize dangerous individuals and not to deter dangerous acts. Nonetheless, the dangerousness of the actor's conduct has some relation to the dangerousness of the actor's personality, and to the need for preventive arrest.... The basic premise here is that the actor's mind is the best proving ground of his dangerousness."[62] The emphasis in recent thought and writing is to use the criminal law to identify and confine potentially dangerous offenders, and to further the good of the whole by incarcerating that dangerous person. This indicates a shift

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61. "Verbrechensversuch", in "Grundzuege Eines Allgemeinen Deutschen Strafrechts", (Hans Frank ed., 1934), quoted in H. Silving, supra, note 59, 438.

62. H. Wechsler, W.K. Jones, H.L. Korn, "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy", (1961) 61 Columbia L. Rev. 571.

from guilt to dangerousness, from subjective considerations to objective considerations.[63] This can be tied in with the "social danger" approach in so far as the intervention of the law is justified because the accused has demonstrated his criminal purpose and propensity, has carried it forward as far as he could, and has clearly shown his social undesirability and dangerousness. Those who hold an "objective" position are said to have been misled by the views, first, that even with attempt, what the accused actually did, rather than what he intended is more important, and secondly that "attempt" should be given its meaning as used in ordinary speech. It cannot, however, be a valid argument, as an "objectivist" would hold, that because of some mistake as to means employed or object in view the criminal objective could not possibly be achieved, the accused's acts should not be punishable, as the potential danger of him trying again is not reduced by the fact that unbeknown to him, it is impossible to carry out his criminal intention. A possible safeguard against convictions in inappropriate cases, may be to say that the more impossible[64] is the attempt, i.e., the further removed it is from possible

63. G.P. Fletcher, "Rethinking Criminal Law", xix (1978, Little, Brown and Company, Boston).

64. There are degrees of impossibility, such as raping a person already dead - e.g., U.S. v. Thomas, (1962) 13 U.S.C.M.A. 278 (U.S. Ct. of Military Apps.) - as compared to attempting to shoot with a blank cartridge - Mullen v. State (1871) 45 Ala. 43 (Sup. Ct. of Ala.), - though Lord Mansfield would seem to indicated otherwise as far as the description of the offence is concerned: "In the degrees of guilt there is great difference in the eve of the law, but not in the description of the offence," R. v. Scofield (1784), - Cald. Mag. Cas. 397, 402 (H.L.).

success, the more impressive would the evidence of a firm criminal intention have to be.[65]

A subjectivist would smart at a person escaping "justice" for being wicked, but lucky: "It seems wrong that a wicked man should escape punishment because he has been 'lucky' enough not to succeed in his wicked intentions".[66] Such a person has demonstrated his dangerousness, being prepared to break the law when an opportunity arises, though he knows he ought not to be doing it. "The alternative course is to let him go free, thereby giving him the benefit of a 'lucky break'. This is tantamount to saying, 'Go and sin again, but if you sin more carefully, we shall be able to deal with you'."[67] Does the media publicity of the details of certain crimes, such as bank robbery, encourage, rather than deter, crime in the sense that potential offenders are more careful and clever about avoiding apprehension in the future?

The American Model Penal Code takes the subjective viewpoint:

> "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
> (a) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be."[68]

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65. As Glanville Williams states, "The commission of the proximate act proves not merely the purpose but (in considerable degree) the firmness of the purpose." "Criminal Law", 631 (2nd ed., 1961, Stevens and Sons, London).

66. Supra, note 22, 163.

67. P. Brett, "An Inquiry into Criminal Guilt", 128 (1963, Law Book Co. of Australia, Sydney).

68. S. 5.01(1). Emphasis added.

The recent English Criminal Attempts Act 1981 is also subjective:

> "In any case where -
>
> (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
>
> (b) if the facts of the case had been as he believed them to be, his intention would be so regarded,
>
> then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence."[69]

F.B. Sayre and J.B. Elkind advocate the use of the reasonable man test with impossible attempts. It is said that if the accused administers a powder believing it to be arsenic, he will be guilty of attempted murder if a reasonable man would think it to be arsenic; conversely, if the accused administered chalk, thinking chalk to be poisonous, he is not guilty if the reasonable man would know chalk not to be toxic. It is utterly unjustifiable to introduce the reasonable man concept to criminal law. "How can a man be morally to blame for failing to have the prescience of a brighter intellect than his own?"[70] This would give judges unwarranted discretion to convict or acquit depending on whether they believed the accused lived up to their concept to the reasonable man.[71] The reasonable man

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69. Section 1(3). Emphasis added.

70. Attributed to A.A. Ehrenzweig.

71. As A.P. Herbert satirically commented: "There never has been a problem, however difficult, which her Majesty's judges have not in the end been able to resolve by asking themselves the simple question, 'Was this or was it not the conduct of a reasonable man?' and leaving that question to be decided by the jury." "Uncommon Law", 2 (1935, Methuen, London).

has been attributed "the agility of an acrobat and the foresignt of a Hebrew prophet,"[72] but never must he be permitted to send the accused headless into heaven or hell - besides which, how could the reasonable man ever act in a criminal manner, or ever have an evil thought?

It is unlikely that an extreme form of subjectivism would be adopted, since, apart from the practical point that it would make the law of attempt a full-scale method of preventive detention, there are various theoretical difficulties: the punishment of personal attitudes, of completely inept attempts, and of putative crimes. Many frivolous activities would be stigmatized and would infringe popular sentiment, and informers would find easy prey. Although this is an extreme, many legal systems display a strong subjective bias.

A variant of the subjective approach, and one which would normally be included in it, is the view that the mens rea is the same whether successful or not - that the accused is just as wicked, and should be punished as severely as if he had succeeded. This was the Roman law approach.[73] The evil intent is the same whether the accused failed to shoot his victim as a result of a poor aim, unloaded gun, sudden movement of victim, or inexistence of victim. O.W. Holmes shows that this view can be taken to a practical conclusion: "the importance of the

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72. By Lord Bramwell, cited by "Winfield on Tort", 491 note (k) (6th ed., T. Ellis Lewis Ed., 1954, Sweet and Maxwell, London).

73. Cf., Justinian, "Digest", Bk XLVIII, ch. 8, s.1.3 and supra.

intent is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequences."[74] He gives as an example of acts not likely to be followed by hurtful consequences that of a man who sets out to kill his victim, but changes his mind and returns home;[75] who is therefore not guilty. However, a Negro who pursued a white woman, but stopped before reaching her, has been held guilty of assault and battery with intent to rape.[76] Former President

74. Supra, note 30, 68.

75. What if, in driving to Y to shoot A, but before changing his mind, he recklessly runs down and kills a pedestrian, who turns out to be A. Guilty of murder?

76. State v. Neely (1876) 74 N.C. 425 (Sup. Ct. of N.C.). The accused chased a white woman, calling her to stop, and fled when she came within sight of a house. The judgment of Chief Justice Pearson, in majority, reads more like a textbook on animal behaviour than a reasoned judgment of law, leaving one bewildered in wondering what is the connection between fowl and attempted rape (in the English case of R. v. Brown (1889) 24 Q.B.D. 357 (Court of Crown Cases Res.) there was a "connection" with a fowl, or more precisely an attempted connection, of the carnal variety). Perhaps one should always read North Carolinan dissenting judgments first (see that of Rodman, J.). Pearson, C.J.: "I see a chicken cock drop his wings and take after a hen; my experience and observation assure me that his purpose is sexual intercourse, no other evidence is needed. Whether the cock supposes that the hen is running by female instinct to increase the estimate of her favour and excite passion, or whether the cock intends to carry his purpose by force and against her will, is a question about which there may be some doubt.... Upon this case of the cock and the then, can any one seriously insist that a jury has no right to call to their assistance their own experience and observation of the nature of animals and of male and female instincts," ibid., 426-8.

Rodman, J.: "the argument is, that because from certain actions of certain brute animals, a certain intent would be inferred, a like intent must be inferred against the prisoner from like acts. It seems to me that the illustrations are not in point, even if that method of reasoning be allowable at all. The chicken cock in the case supposed has no intent of violence. He expects acquiescence, and knows he could not succeed without it, and besides, he is dealing with his lawful wife," ibid., 429-30.

Nixon had stated in 1974 that:

> "Americans over the last decade were often told that the criminal was not responsible for his crimes against society; but that society was responsible. I totally disagree with this permissive philosophy. Society is guilty of crime only when we fail to bring the criminal to justice. When we fail to make the criminal pay for his crime...."[77]

A better approach than that noted by President Nixon would be some compromise between the necessity of widening the scope of the actus reus of attempt in the interests of society and crime prevention, and the conflicting need to safeguard individual rights, as the punishment of an attempt in the interests of incapacitation, prevention, deterrence, retribution and rehabilitation may constitute an undue interference with an accused's individual freedoms. Although the subjective approach necessarily emphasizes the evil intent of the individual, it is not highly desirable that criminals be hated, for "when you punish a man in terrorem, you make of him an 'example' to others, you are admittedly using him as a means to an end, someone else's end. This, in itself, would be a very wicked thing to do."[78]

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77. Quoted by B.S. Alper, "Changing Concepts of Crime and Criminal Policy", (1974) 2 Int. Jo. of Crim. and Pen. 239, 247.

78. C.S. Lewis, "The Humanitarian Theory of Punishment", (1953) 6 Res Judicatae 224; "Juridicial punishment can never be administered as a means of promoting another good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For man ought never to be dealt with merely as a means subservient to the purpose of another...," Kant, "Philosophy of Law", 195 (W. Hastie, trans., 1887, T & T. Clark, Edinburgh).

Neither should the "impossible attemptor" be treated as a sick animal.[79] It is not practical to state that the degree of impossibility is either such as to manifest insanity (such as attempting to shoot with a gun obviously unloaded due to a missing magazine), in which case the accused will be incarcerated in a mental institution, or such as to show a guilty intention, since the foolhardy scheme may in some circumstances have worked (such as attempting to poison with an insufficient dose), in which case the accused will be sent to prison; the result of this would be "insane", or "guilty", "not guilty" not being possible. If this were the position,

> "You may charge me with murder - or
> want of sense -
> (We are all of us weak at times)."[80]

The convicted "impossible attemptor" is not psychologically sick, is not an object, is not to pitied,[81] is not to be hated, is not to be shown unwitting mercy, but justice; "Mercy, detached from justice, grows unmericful."[82]

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79. "When you talk of dealing with criminals as medical cases you are treating them not as human beings but as animals." Robert Park, quoted by E.H. Sutherland, "Principles of Criminology", 358-9 (3rd ed., 1939, Lippincott Co., Chicago).

80. Lewis Carroll, "The Hunting of the Snark", Fit. IV, st. 4, (1876).

81. "Let me remember that when I find myself inclined to pity a criminal, that there is likewise a pity due to the country" (Matthew Hale, "The History of the Pleas of the Crown",(1736, Sollom Emlyn, London)). "A sign of the loss of freedom is the new compassion which extends pity not to the raped, but to the rapist" (Foulton J. Sheen, sermon at Red Mass in "Lest the Constable Blunder" by S.H. Hofstadter and S.R. Levittan, (1965) 20 The Record (Assn. Bar. N.Y.C.) 629, 637).

82. Supra, note 78.

(3) THE CONVENTIONAL CRITERIA OF PUNISHMENT AS APPLIED TO ATTEMPTS

Endeavouring to answer all questions concerning the rationale of punishing attempts by reference to a single principle will lead only to confusion. Wisdom can only be approached by distinguishing similar questions and approaching them with separate criteria. Can society claim the right to punish a person who attempts to complete his criminal objective, but fails, even if the criminal objective is impossible? To answer that he deserves to be punished does not entitle other members of society to make him suffer:

> "...the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right."[83]

This passage is invariably delivered by rote by high-sounding law reformers, but one is tantalized and bewildered simultaneously by its inexactitude, for we are not told how great the harm must be or how direct must be its impact before power can be exercised. No practical case could ever be decided on the basis of J.S. Mill's formula. Nevertheless, one point is clear, society has a basic right to protect itself from harm caused by others; this is the overall aim and purpose of the criminal law: self-protection. Kant's familiar parable would have us go beyond this, but the bounds of self-

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83. John Stuart Mill, "On Liberty", in "Utilitarianism", 135 (Mary Warnock, Ed., 1969, Collins, London).

protection must not be transgressed, even in a hypothetical state of affairs:

> "Even if a civil society resolved to dissolve itself with the consent of all its members - as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world - the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds and that the blood-guiltiness may not remain upon the people."[84]

The societal self-protection function of the criminal is emphasized by the Law Reform Commission of Canada in a basic manner, in that as a society "[W]e have...a basic right to protect ourselves from the harmful acts of others. One way of getting this protection is to use the law to forbid such acts and punish those committing them. And whether we punish to deter, to reform, to lock-up offenders where they can do no harm, or to denounce the wrongfulness of the act committed - this self- protection is in our view the overall aim and general purpose of the criminal law."[85]

(a) Deterrence

Most commentators take as a matter of penological fact that there are two branches to deterrence: the general preventive theory (or, "general deterrence") and the individual preventative theory (or, "special deterrence"). Put bluntly

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84. I. Kant, "The Science of Right", sec. 49 (W. Hastie, trans.), quoted in "Great Treasury of Western Thought", 884-885 (M. Adler and C. Van Doren, Eds., 1977, R.R. Bowker, New York).

85. Working Paper No. 2, "The Meaning of Guilt - Strict Liability", 5 (1974, Information Canada, Ottawa).

(deterrence is crude instrument of social control), the function of the former is to frighten citizens into obedience to the law, as each time "justice is seen to be done", a message is sent out to all members of society. Special deterrence, on the other hand, has as its emphasis the individual, abandoning the idea of public intimidation by harsh punishments, and pointing rather to non-institutional as well as institutional measures to keep the criminal from recidivism. In addition to the inherent grave doubts, a bigger stick is not always the answer to crime.[86] Knowledge of punishment may not actually deter from crime,[87] but may in fact increase deviancy.[88] This may be particulary true of attempt, where the 'attemptor' has not been put off by the punishment of the target crime, and having proceeded to the stage of attempt, may proceed further on the 'might as well be hung for a sheep as for a lamb' philosophy. Although there is a "dilemma posed by the societal need to achieve a general deterrent effect

86. "Men are not hanged for stealing horses, but that horses may not be stolen" (George Savile, "The Complete Works of George Savile", 229, Walter Raleigh, Ed., 1912, Clarendon Press, Oxford).

87. "Knowledge of penalites does not deter crime. Results showed that Calfornians were extremely ignorant of the penalties for crime....Even with the knowledge of penalties, the more criminal the behavior, the less likely were subjects to be deterred. Penalties appeared to be important to the criminal groups not as a deterrent, but as a bargaining tool after arrest," E. Doleschal, "The Deterrent Effect of Legal Punishment", (1968-9) 1:7 Crime and Delinquency Literature 1, 3.

88. "Punishment tends to aggravate the human responses, and the institution, by providing more frustration, dramatically increases pressure toward further deviant behavior." Doleschal, ibid., 12.

through the operations of correctional agencies while those same agencies are also committed to a goal of treating and helping offenders,"[89] there seems to be no decrease in the concept's widespread popularity: "we mean it when we threaten detriment. It is a lesson to him."[90]

"[I]n order to make discouragement be broad enough and easy to understand,"[91] O.W. Holmes would have us punish a man who shoots at a block of wood thinking it is a person, or one who attempts to steal from an empty pocket, even though "no harm can possibly ensue."[92] He is also followed by his disciple J. Hall.[93] On a superficial plane they do make social sense, but not when criminal attempts are examined closely, from a deterrence point of view. J.B. Elkind believes the law of attempt has great value as a special deterrent,[94] because society is said to benefit when the attemptor is discouraged, and the attemptor benefits because he is said to have been given his lesson before he would have incurred a more serious penalty. This is not necessarily true. The prospective

89. E.K. Nelson, head of the President's Crime Commission's task force in corrections, quoted by N. Morris and G. Hawkins, "The Honest Politician's Guide to Crime Control", 119 (1970, Univ. of Chicago Press, Chicago).

90. G.O.W. Mueller, "The Public Law of Wrongs - Its Concepts in The World of Reality", (1961) 10 Jo. Public Law 203, 211.

91. Supra, note 30, 69.

92. Ibid.

93. "The decisions in the empty pocket and unoccupied bed cases make social sense," "General Principles of Criminal Law", 129 (1947, Bobbs-Merrill, Indianapolis).

94. "Impossibility in Criminal Attempts: A Theorists's Headache", (1968) 54 Virg. L.R. 20, 30.

criminal is, by definition, attempting to commit a "target" crime, to complete his criminal intent and thereby achieve his objective. He is therefore not deterred by the serious punishment that would befall him should he consummate the crime and be detected. How can one possibly say he is deterred by the punishment for attempt, which will generally be lower than that for the completed crime.[95] "One who attempts to kill and thus expects to bring about the result punishable by the gravest penalty, is unlikely to be influenced in his behaviour by the treatment that the law provides for those who fail in such attempts; his expectation is that he is going to succeed."[96] The "deterrent" effect of attempt can only take

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95. Except in instances where the criminal has planned what he believes to be the "perfect crime", so that the possibilty of detection will be slight unless the plan miscarries. Here the threat of punishment for the attempt may serve as a deterrent.

96. U.S. Model Penal Code, Tent. Draft No. 4, 134 (comment to para. 203) (1955, American Law Institute, Philadelphia). Interestingly, there has been a case in England, R. v. Morris (1950) 34 Cr. App. R. 210 (English C.A.), where an inchoate offence, in this case conspiracy, was punished more severely than the completed offence could have been. That case was 'explained' (by Lord Goddard, C.J., who had written the judgment in Morris) two years later in R. v. Pierce (1952) 35 Cr. App. R. 149 (English C.A.); at trial in Pierce the accused was given three years borstal training for attempted theft of a motor vehicle, whereas a successful theft could only be punished up to two years; Lord Goddard, C.J., stated as follows: "if for the full offence Parliament has laid down a definite period, it is wrong that a longer sentence should be given for an attempt than could have been given for the substantial offence." Section 7(2) of the Criminal Law Act 1967 now provides: "A person convicted on indictment of an attempt to commit an offence for which a maximum term of imprisonment or a maximum fine is provided by any enactment shall not be sentenced to imprisonment for a term longer, nor to a fine larger, than that to which he could be sentenced for the completed offence."

relevance when the attempt is punished at least as severely as that of the completed crime.[97] What will deter him is swift and certain detection by the authorities, by no means even a probability in some areas: in New York City the likelihood of being punished by a felony conviction for a felony is less than one in a staggering one hundred and seventy.[98] Deterrence is thus no more than a minor function of the law of attempt,[99] which takes as strong a rationale from retribution as from

97. "The principle of deterrence would justify a practice of inflicting on an unsuccessful attempt to commit crime as grave a punishment as the actual crime. The would-be criminal who had failed to accomplish his object simply on account of mere chance - failure of the pistol fire, or age and weakness of the poison - is just as dangerous to society as the criminal who has been more successful. And just as severe a penalty is needed to deter from attempting murder as to deter from murder. Yet society would not consent to the execution of a man whose pistol had missed fire, while it would demand the execution of the same man if his brother's blood cried from the ground for vengeance. This fact goes to show that punishment is justified not by deterrence but by moral justice," R.M. McConnell, "Criminal Responsibility and Social Constraint", 70-1 (1912, J. Murray, London).

98. Cf. M.B. Abram, "The Criminal Law: Unsuited Means to Achieve Undefined Goals", (1974) 97 New Jersey L.J. 29. See further, W.L. Calahan, "Certainty of Punishment", (1973) 51 Jo. of Urban L. 163; J.Q. Wilson, "If Every Criminal Knew He Would Be Punished If Caught", New York Times, Jan. 28, 1973, 8.

99. On the concept of deterrence viz-a-viz attempt, see further, inter alia: F.E. Zimring, "Threat of Punishment as an Instrument of Crime Control", (1974) 118 Amer. Phil. Soc. Proceedings 231; G. Newman, "Theories of Punishment Reconsiered: Rationalizations for Removal", (1975) 3 I. Jo. of Crimin. and Penol. 163, 164-165; L.C. Becker, "Criminal Attempt and the Theory of the Law of Crimes", (1974) 3 Phil. and Publ. Affairs 262, 266-267; M.B. Abram, "The Criminal Law: Unsuited Means to Achieve Undefined Goals", [1974] New Jersey L. Jo. 1, 2; J.P. Gibbs, "Crime, Punishment and Deterrence", (1968) 48 Southwestern Soc. Sc. Q. 515; M. Privette, "Theories of Punishment", (1962) 29 Univ. of Kansas City L. Rev. 46, 76-77; S. Soler, "Prevention in Criminal Law", (1964-66)

theories of social defence: "The thirst for vengeance is a very real, even if it be a hideous, thing...."[100]

(b) Retribution

It is too easy to dismiss the retributive theory as a leftover of a barbarous age. The wish by society to take retribution is a common and normal response; it does not indicate moral degeneracy. It might be basic, but it must be taken into account; for example, in an address to the South Carolina Bar Assoiation, Mr. T.F. Watkins, whilst doubting the deterrent effect of punishment, went on to state that criminals who commit infanticide or rape "deserve to be dealt with just as one would deal with a mad dog. The only safe thing to do is to kill him."[101] For the executed, rehabilitation (and retribution?) must take place in a higher sphere and under more celestially zealous supervision than the present criminal

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99. (cont.) 3-4 Amer. Crim. L. Q. 196; F.D. Bean and R.H. Cushing, "Criminal Homicide, Punishment and Deterrence: Methodological and Substantive Reconsiderations", (1971) 52 Soc. Sc. Q. 277; P.J. Dietl, "On Punishing Attempts", (1970) 79 Mind 130; T.G. Chiricos and G.P. Waldo, "Punishment and Crime: An Examination of Some Empirical Evidence", (1970-71) 18 Social Problems 200; Note, "Attempts to Murder", (1857) 1 Sol. Jo. 266; M.E. Wolfgang, "Rethinking Crime and Punishment", [1978] Across the Board 55; N. Walker, "The Efficacy and Morality of Deterrents", [1979] Crim. L. Rev. 129; R.P. Davis, "General Deterrence and 'Petty Crime'", (1979) 143 J.P. 117; D.P. King, "Criminal Deterrence: Some Implications for Policy", (1981) 54 Police Jo. 73.

100. B. Cardozo, "Selected Writings", 378, (Margaret E. Hall, Ed., 1947, Fallon Publications, New York).

101. "Crime and Punishment", [1933] South Carolina Bar Assoc. Transactions 89, 96.

justice system offers. To a layman this is the most obvious factor in punishment: conduct which shocks his conscience ought to be punished, and conduct which does not should be exculpated. As Glanville Williams writes in his recent work,[102] "[e]ven the utilitarian, who himself rejects retribution as a basis for punishment, may take it into account so far as it expresses popular attitudes. In a democracy, the administration of the law must to some extent take note of public opinion."[103] A crude scale of social values is drawn up, and continues to be drawn up (for an acceptable scale of conflicting and hierarchical values is never static) in which potential danger, probable consequences, and actual harm caused, play a major role; it is this scale which will grade the crime according to its "punishability":

> "The first requirement of a sound body of law, is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion for revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."[104]

As the objective approach ("social danger") is one side of the criminal attempt rationale coin, retribution is the other. Almost all countries allot a greater punishment to the completed crime than to the attempt. This would not be so if deterrence were the aim. Society is as much in danger from a criminal who fails to achieve his object by mischance, thinking

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102. "Textbook of Criminal Law", (1978, Stevens & Sons, London).

103. Ibid., 370.

104. Holmes, supra, note 30, at 41.

he had done every act to complete his antisocial design, than from one who is successful; yet attempt is punished less severely. The reason for this is that our conscience is not so shocked, our indignation not so vehemently aroused. We are less retributive. We are less retributive towards a person who tries to poison with a hopelessly insufficient dose than one who laces coffee with a toxic amount of arsenic and succeeds in killing his victim. Punishment for attempt is largely based on revenge, though most criminologists would be ashamed of the very existence of the term. We assess punishment not only according to the subjective intent of the accused, or to the social danger he presents, but according to the quantitative damage he causes. It was the realization of society's disapproval of a criminal that led Stephen to his more extreme position:

> "I think it highly desirable that criminals should be hated, that the punishments inflicted on them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.... Love and hatred, gratitude for benefits, and the desire of vengeance for injuries, imply each other as much as concave or convex."[105]

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105. "A History of the Criminal Law of England", 82 (1883, Macmillan & Co., London). On the concept of retribution vis-a-viz attempt, see further, inter alia: P. Kerans, "Distributive and Retributive Justice in Canada", (1977) 4 Dal. L. Jo. 76; R. Wasserstrom, "Retributivism and the Concept of Punishment", [1978] Jo. of Phil. 620; T.F. Watkins, "Crime and Punishment", [1933] S. Car. Bar Assoc. Transactions 89, 90; M. Privette, "Theories of Punishment", (1962) 29 Univ. of Kansas City L. Rev. 46, 47-49, 53-56, 82-83; G. Newman, "Theories of Punishment Reconsidered: Rationalizations for Removal", (1975) 3 I. Jo. of Crimin. and Pen. 163, 175, 179; B.S. Alper, "Changing Concepts of Crime and Criminal Policy", (1974) 2 I. Jo. of Crimin. and Pen. 239, 241; J.M. Koppe, "Criminal Law - Attempts - Mistake of Fact", (1936) 16 Boston Univ.

(c) Rehabilitation

Once a person has been convicted, the proper aim of the criminal justice system should be to rehabilitate the criminal to society, and to himself. Many more "shoulds" or "oughts" could be added. Rehabilitation is the headline of the utilitarianists, and much ink has been spilled praising its wondrous effects on society.[106] Statistics are produced to prove lower recidivism among those released from prison early and put on probation - but this may simply be for the reason that only the easier cases are given less severe punishment. A distinction can be drawn between the tradition of Assyrian medicine which held that fundamentally the sick man is a sinner, and the tradition of Greek medical thought that the

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105. (cont.) L. Rev. 199, 201-202; R.M. Toms, "An Ounce of Prevention", (1932) 11 Mich. State Bar Jo. 201, 202; J.M.P. Weiler, Why Do We Punish? The Case for Retributive Justice", (1978) 12 U.B.C. L. Rev. 295; W.H. Hurlburt, "Note on the Articles: 'Why Do We Punish?' 'The Case of Retributive Justice' and 'The Justification of Punishment'", (1979) 17 Alta. L. Rev. 305; W. Berns, "For Capital Punishment, The Morality of Anger", Harper's Magazine, April 1979, 15; I. Kant, "The Metaphysical Elements of Justice" (J. Ladd, trans., 1965, Bobbs-Merril, Indianapolis); I. Kant, "Foundations of the Metaphysics of Morals" (L. Beck, trans., 1959, University of Chicago Press, Chicago); G. Hegel, "Philosophy of Right" (T. Knox, trans., 1942, The Clarendon Press, Oxford); G. Hegel, "Lecturers on the Philosophy of History" (J. Sibree, trans., 1857, Bohn's Scientific Library, H.G. Bohn, London); J. Delaney, "Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective", (1978) 6 Hofstra L. Rev. 831, 888-905.

106. M.R. Cohen, "A mixture of sentimental utilitarian motives gives this view its great vogue," "Moral Aspects of the Criminal Law", (1939-40) 49 Yale L.J. 981.

sinner was a sick man.[107] Certainly, long-term imprisonment, the bigger stick, will not rehabilitate a person who fails to foresee the non-completion of his crime due either to insufficiency of means or inexistence of object:

> "Incarceration breaks a man's constructive ties with the community, educates him in crime, deprives him of his skills and of the employment contracts needed to regain his place in society, and requires that he learn to conform to abnormal social patterns enforced by both official and inmate codes of behaviour. In such prison situations, rehabilitation programs are not likely to be effective."[108]

Nevertheless, rehabilitation (whether by non-institutional or institutional methods) may be more effective at the stage of attempt than that of the complete crime, and may be more effective with impossible attempts than with other crimes.

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107. S.W. Mirams, "Crime and Punishment", (1969) 3 Austr. and N.Z. Jo. Psychiatry 396, 373. Which theory does Western civilization hold to? See the example given by H.M. Hart, of In re Maddox (1958) 88 N.W. 2d 470 (Sup. Ct. Mich.), "where the state hospital psychiatrist insisted on assuming the truth of unproved police charges in his treatment of one who had been civilly committed as a 'sexual psychopath' and, when his victim kept protesting his innocence, had him transferred to state prison on the ground that this refusal to admit guilt made him 'an adamant patient' lacking 'the desire to get well' which was necessary to make him amenable to hospital care," "The Aims of the Criminal Law", (1958) 23 Law and Contemporary Problems 401, 408.

108. Crowther, "Crimes, Penalties and Legislatures", 151-152 (bibliographic information presently unavailable). An English County Court Judge, Mr. Justice Cyril Harvey, is attributed to have expressed a rather different, and one would hope facetious, view of crime and incarceration:

> "Crime can be interesting and exciting. It involves no daily treadmill of daily office hours and can be highly remunerative. It is absurd to say that crime does not pay. It pays magnificently and its proceeds are free of income tax. Misfortune in crime will only lead you to a custodial establishment where you will be housed and fed for a period at the public expense, and you will enjoy the company of many kindred spirits." (Attributed.)

Although the "evil intent" of the attempt will be the same, the degree of impossibility may indicate a less intense motivation or a weak intention due to passion or provocation, and the criminal,already weakened by failure, may be more easily weaned from his wicked designs, rehabilitated, and returned to society.

Be that as it may, Mr. Justice Kaufman of the United States Court of Appeals has given rehabilitation a short shrift, stating that there is "an increasing public awareness that 'rehabilitation', the great battle cry of prison reform, is one of the great myths of twentieth century penology."[109] Individualization of punishment in order to promote rehabilitation is similarly summarily dismissed by another member of the United States judiciary, Mr. Justice Frankel, who notes that sentences are individualized not according to the accused, but according to the judge,[110] a practical and perspicacious comment.

Any one sentencing factor cannot be taken into account to the exclusion of others. A good sentence from a rehabilitative point of view would be one that minimizes the chance of a given offender's repeating his crime. One would hence expect there to be disparities in sentencing - one armed robber getting five

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109. "Prison: The Judge's Dilemma", (1973) 41 Ford. L. Rev. 495, 497.

110. "[S]weeping penalty statutes allow sentences to be 'individualized', not so much in terms of defendants but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench," "Criminal Sentence: Law Without Order", 21 (1973, Hill and Wang, New York).

years imprisonment and another probation - provided that one was only considering the particular offender's prospects for rehabilitation.[111] Yet clearly this is unacceptable. Similarly sentencing with only deterrence in mind is unacceptable, and likely does not work - the picking of pockets at public hangings of pickpockets attests to that.[112]

(d) Law Enforcement and Intervention

The law of attempt permits the authorities to intervene before the crime is consummated. The English Law Commission urges extensions of the law by arguing that "one of the main reasons for a law of attempt is to allow the authorities to intervene at a sufficiently early stage to prevent a real danger of the substantive offence being committed...."[113] The distinguishing factor here, as with impossible attempts, is that no actual harm is prevented by intervention on the part of

111. J.Q. Wilson, "If Every Criminal Knew He Would Be Punished If Caught", New York Times Magazine, Jan. 28, 1973, 8.

112. On the concept of rehabilitation viz-a-viz attempt, see further, inter alia: J. Delaney, "Towards a Human Rights Theory of Criminal Law: A Humanistic Perspectve", (1978) 6 Hofstra L. Rev. 831, 873-888; M. Privette, "Theories of Punishment", (1962) 29 Univ. of Kansas City L. Rev. 46, 84-85; J.M.P. Weiler, "Why Do We Punish? The Case for Retributive Justice", (1978) 12 U.B.C. L. Rev. 297, 299-306; H. Morris, "Persons and Punishment", (1968) 52 The Monist 475, 501; B.S. Alper, "Changing Concepts of Crime and Criminal Policy", (1974) 2 I. Jo. Crimin. and Penol. 239, 241; M.B. Abram, "The Criminal Law: Unsuited Means to Achieve Undefined Goals", (1974) 97 New Jersey L. Jo. 1,2; M.E. Wolfgang, "Rethinking Crime and Punishment", [1978] Across the Board 55.

113. Working Paper No. 50, supra, note 23, 52.

the authorities, for by definition, it was impossible to achieve the harm intended. Nevertheless, potential harm can be prevented, as the person's dangerousness has been manifested - the unsuccessful poisoner who uses sugar may next hit on rat poison.

Prevention of crime is clearly better than reaction to crime. A completed murder means death for the victim. Yet a potentially long series of events can progress from the accused conceiving of killing the victim, to the trigger actually being pulled and the victim killed. The law enforcement authorities must be permitted to anticipate the completion of the crime and intervene before the victim is killed. The law of attempt permits them to do this. Protection of both the victim and society requires intervention before the completed act. One function of the criminal law is to provide a punishment for murderers, but another is to prevent murder. Attempt is not alone in this function. For example, whilst there is the offence of attempted theft, the criminal law has other offences which can be used to intervene before a thief who has entered a dwelling actually takes away the loot; there are the offences of breaking and entering,[114] and being unlawfully in a

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114. Section 306(1) of the Criminal Code of Canada:
"Every one who
(a) breaks and enters a place with intent to commit an indictable offence therein,
(b) breaks and enters a place and commits an indictable offence therein, or
(c) breaks out of a place after
(i) commiting an indictable offence therein, or
(ii) entering the place with intent to commit an indictable offence therein,
is guilty of an indictable offence...."

dwelling-house[115] (and important reverse-onus provisions[116]), as well as the offence of theft, which is committed as soon as one moves any object with the intention of stealing it.[117] At an even earlier stage there are the offences of loitering,[118]

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115. Section 307(1) of the Criminal Code of Canada:
"Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling-house with intent to commit an indictable offence therein is guilty of an indictable offence and is liable to imprisonment for ten years."

116. Section 306(2) of the Criminal Code of Canada:
"For the purposes of proceedings under this section, evidence that an accused
(a) broke and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein; or
(b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after
(i) committing an indictable offence therein, or
(ii) entering with intent to commit an indictable offence therein."
Section 307(2):
"For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence."
See also "the proof of which lies upon him" in ss. 307(1), 173, and 309(1).

117. Section 283(2) of the Criminal Code of Canada:
"A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to be become movable."

118. Section 171(1) of the Criminal Code of Canada:
"Every one who ... (c) loiters in a public place and in any way obstructs persons who are there...is guilty of an offence punishable on summary conviction."
Section 173:
"Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction."

possessing housebreaking instruments,[119] or even wearing a mask.[120] In fulfilling this function, the authorities must be permitted to intervene before a physical 'harm' has been completed. As an English Attorney-General had rationalised in a case over three and a half centuries ago, the solution is to 'nip the problem in the bud',[121] and much more contemporaneously by a Justice of the Supreme Court of Canada:

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119. Section 309(1) of the Criminal Code of Canada:
"Every one who, without lawful excuse, the proof of which lies upon him, has in his possession any instrument suitable for housebreaking, vault-breaking or safebreaking, under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for housebreaking, vault-breaking or safebreaking, is guilty of an indictable offence and is liable to imprisonment for fourteen years."

120. Section 309(2) of the Criminal Code of Canada:
"Every one who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised is guilty of an indictable offence and is liable to imprisonment for ten years."

121. Per Francis Bacon, A.-G., The Case of Duels (1615) 2 Howell's State Trials 1042, 1046 (Court of the Star Chamber). What Francis Bacon actually said was "to nip this practice and offence of Duels in the head." The problem to be nipped was that of duelling, whereby England's best military men were killing each other off. Bacon's comment is not to be taken literally, to mean that mens rea per se be punishable, but that acts leading up to the actual duel be themselves punishable. The two accused were here charged with "writing and sending a letter of challenge, together with a stick, which should be the length of the weapon: and the other... for carrying and delivering the said letter and stick unto the party challenged, and for other contemptuous and insolent behaviour used before the justices of the peace in Surry [sic] at their sessions..." (1042-1043). Bacon deplored the French practice of punishing the survivor of the duel with capital punishment, such person being "carried to the gibbet with their wounds bleeding, lest a natural death should keep them from the example of justice" (1044), whereby the country ended up with two dead duellers. 'Pistols for two, coffee for one' indeed.

> "If present laws and rules inhibit the police from adequately controlling crime...then the thing to do is to give our police forces the powers they need under proper safeguards...."[122]

The function of the law of attempt in permitting the law enforcement agencies to intervene and stop the criminal activity has been recognized in the cases. For example, in one case three accused who planned to rob a bank stole ski-masks and surgical gloves, "fixed" a shotgun, selected and reconnoitred a bank, arranged a getaway car, and upon arriving at the selected bank and having done a final reconnoitre, were arrested just after they had given the "Let's go" order. Mr. Justice Kaufman, Chief Justice of the U.S. Court of Appeals, in reply to the appellant's assertions that they could not be convicted of attempted armed robbery because they had neither entered the bank nor brandished weapons, wrote: "We reject this wooden logic. Attempt is a subtle concept that requires a rational and logically sound definition, one that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement

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121. (cont.) When Bacon became a judge, it is related that "he was about to pass sentence on a thief convicted before him, - when the prisoner, after various pleas had been overruled, asked for mercy on account of kindred. 'Prithee', said my Lord Judge, 'how comes this about?' 'Why, if it please you, my Lord, your name is Bacon, and mine is Hog, and, in all ages, Hog and Bacon have been so near kindred that they are not to be separated.' - 'Ay, but,' replied the Judge, 'you and I cannot be kindred except you be hanged, for Hog is not Bacon until it be well hanged'." J. Campbell, "Lives of the Lord Chancellors," vol. II, 111 (2nd. ed., 1846, John Murray, London). Emphasis in original.

122. The Honourable Mr. Justice E.M. Hall, "Lawyers and Canadian Criminal Law in the Seventies", (1970-71) 13 Crim. L.Q. 196, 203. See also comments by Mr. Justice J.C. McRuer, C.J.H.C., (1960-61) 3 Crim. L.Q. 391, 392.

officers to delay until innocent bystanders are imperilled."[123]

(e) Harm

Although the concept of "harm"[124] has been perhaps the least developed of all criminological concepts in common law systems, it has been stated by Albin Eser that

123. U.S. v. Stallworth et al (1976) 20 Cr. L. Rptr. 2170, 2170. (U.S.C.A.). On the concepts of law enforcement and intervention viz-a-viz attempt, see further, inter alia: G. Williams, "Police Control of Intending Criminals", [1955] Crim. L. Rev. 66; G. Williams, "Textbook of Criminal Law", 375 (1978, Stevens and Sons, London); P. Weisman and S. Graae, "Statutory Proposal on Inchoate Crimes", (1979) 22 Howard L. Jo. 217, 238-239; M. Noone, "Preliminary Crimes: The Reform of Attempt and Conspiracy in Papua New Guinea", (1974) 2 Melanesian L. Jo. 66, 71; H. Morris, "Punishment For Thoughts", (1965) 40 The Monist 342, 356; M. D. Marcus, "Factual Impossibility and the Attempt to Receive Stolen Property", (1976) 51 State Bar of California Jo. 493, 496, 547; I. Brownlie, "The Prevention of Crime Act, 1953", [1961] Crim. L. R. 19; R. v. Green [1975] 3 All E.R. 1011, 1017 (English C.A.) (per Ormrod, L.J.: "It would be sterile logic indeed if counsel for the appellent's [sic] contentions in this case were to prevail and the court were obliged to fetter the hands of those whose duty it is to enforce the law by aruling which would undoubtedly outrage common sense"); "Comment", [1959] Crim. L. Rev. 134, 136; R. v. Williams, Ex parte The Minister for Justice and Attorney-General [1965] Qd. R. 86, 101 (Qd. Ct. of Crim. App.); Note, "Attempting the Impossible", (1978) 142 J.P. 396, 396; G. Grabiner, "Control of Crime or the Crime of Control", [1976] Crime and Justice 174; R.L. Misner, "The New Attempt Laws: Unsuspected Threat to the Fourth Amendment", (1981) 33 Stanford L. Rev. 201; G.P. Fletcher, "Rethinking Criminal Law", 198, 202-205 (1978, Little, Brown and Co., Boston).

124. For want of a more precise explanatory term; no other word seems to describe and comprise what is included in the term harm. Academic formalism here seems to be an unwanted necessity, otherwise one would have to redefine and explain what is meant by the jurisprudential label "harm" whenever one is tempted to use the word. Although S.J. Schulhofer agrees with the view that no other phrase can be found for the will-o'-the-wisp "harm", in a general

> "...in one way or another the requirement of harm is almost universally recognized as a material element of criminal law. Whether the principle of harm is considered only as a factor of criminal policy (as in most non-socialist criminal theories) or whether harm in the sense of 'social dangerousness' is made the real and decisive substance of the crime (as in socialist theories), there is at least universal agreement that society and government may not justly penalize human activities as long as they are not harmful in fact."[125]

The few other legal theorists who clearly and comprehensively present a view of what is meant by "harm", being Jerome Hall, Gerhard O.W. Mueller, and Orvill C. Snyder, also believe that harm is a necessary and essential element of a criminal act. Without the effect, the harm, there can be no cause, no justification for punishment. As Jerome Hall elucidates, "[h]arm, in sum, is the fulcrum between criminal conduct and the punitive sanction."[126]

Is the punishment of criminal attempts not an exception to the principle that conduct which does no harm is not criminal? Is there harm involved in an inchoate crime? Although one could argue that we are really punishing inchoate crimes for other reasons than that they cause "harm", it would seem at

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124. (cont.) sense (see "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law", (1974) 122 U. Pa. L.R. 1497). Prof. R.B. Sklar, of the Faculty of Law, McGill University, has suggested personally to this writer the use of the phrase "Status Quo Disruption" to describe more accurately the result that flows from an unsuccessful attempt. However, as a caveat, it must be remembered that words are not capable of mathematical precision, have a penumbra of uncertainty, and as Ernest Gowers is attributed to have commented, "are an imperfect instrument for expressing complicated concepts with certainty."

125. "The Principle of 'Harm' in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests", (1965-66) 4 Duquesne L.R. 345, 363.

126. Supra, note 1, 213.

first glance that the answer to the first question would be in the affirmative, and the second negative: attempt necessarily means a failure, and a consequent inexecution of the intended harm. It does, however, appear to be that conduct labelled an impossible attempt does constitute harm. Criminal law has a dual function; not only does it punish existing wrongful conduct, but it also emphasizes that attempt, impossible or otherwise, is future oriented. It is a non-sequitur to state that simply because the injury forbidden by a substantive law has been avoided, no harm has occurred. The proscribed conduct which constitutes an attempt creates the risk that harm would be caused. This is sufficient on its own to justify punishment: "harm consummated and potential both are harm."[127] The theory of prevention here makes common sense: it would be ludicrous to wait until a person has completed his crime before intervening. As O.W. Holmes has written, albeit in the context of larceny, "[a]n act which does not fully accomplish the prohibited result may be made wrongful by evidence that but for some interference it would have been followed by other acts co-ordinated with it to produce that result."[128] The practical reason for having a law of attempt is to enable one to proceed against a criminal when one cannot charge with the completed offence. It is not only common sense, but social sense. As

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127. O.C. Snyder, "False Pretenses - Harm to Person from Whom Thing Obtained", (1957-58) 24 Brooklyn L. Rev. 34, 36.

128. "The Common Law", 105 (M. Howe, Ed., 1962, The Harvard University Press, Cambridge).

the court said in a Texas case in 1913[129](concerning an attempt to corrupt a public official):

> "...the gist of the crime is the danger and injury to the community at large...the state must guard against the tendency to corrupt as well as against actual corruption, both being alike dangerous and injurious to the community at large...."[130]

This was echoed by Strahorn seventeen years later: "An attempt ...causes a sufficient social harm to be deemed criminal."[131] An attempt increases the risk, the probability that a harm will occur, that apprehension of danger will be felt by society - it is this potentiality which is a harm. As one (South African) appellate judge has written, "[p]rovided always that his acts have reached such a stage that it can properly be inferred that his mind was finally made up to carry through his evil purpose he deserves to be punished because, from a moral point of view, the evil character of his acts and from a social point of view the potentiality of harm in them are the same, whether such interruption takes place soon thereafter or later."[132] Attempt has its legal counterpart in the criminalization of 'preventive' offences such as possessing certain types of weapons, narcotics, or housebreaking instruments. This is not the laying of moral blame, but common sense. The normal

129. Davis v. State (1913) 158 S.W. 288 (Tex. Ct. of Crim. App.)

130. Ibid., 289. Emphasis added.

131. "The Effect of Impossibility on Criminal Attempts", (1930) 78 Univ. of Penn. L. Rev. 962.

132. Per Watermeyer, C.J., R. v. Schoombie [1945] S.A.L.R. (A.D.) 541, 547 (Sup. Ct. of S. Africa).

law-abiding citizen does not normally carry a concealed weapon[133] or a loaded weapon in a vehicle,[134] only people 'up to no good' generally do - perhaps not a terribly jurisprudential statement, but it makes eminent sense. On a more jurisprudential level, H.L.A. Hart argues that an attempt and the completed offence "cannot be differentiated either in respect of the harm they are likely to cause, if unchecked, or by the strength of the temptation to commit them or their testimony to the dangerous character of the criminal."[135]

Criminal harms are not all tangible and physical. Law protects interests, perhaps even a hierarchy of interests. The majority of criminal laws are concerned with a physical existing harm, such as robbery or rape, yet carrying a loaded firearm, loitering with intent, and possessing skeleton keys are often made criminal offences; attempted sexual assault may result in no physical harm to the victim whatsoever. No physical injury has been effected, the offences are inchoate. Harm must therefore include such impalpables as protection of property, the safe passage of citizens in public places, and the inviolability of women. If attempts, even though impossible of fulfilment, were not proscribed, community life would be uncomfortable, perhaps intolerable:

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133. Criminal Code, s. 87.

134. Normally covered by provincial hunting legislation. In Alberta, see for example, s. 29(1) Wildlife Act R.S.A. 1980 c. W-9.

135. H.L.A. Hart and A.M. Honore, "Causation in the Law", 354 (1959, Clarendon Press, Oxford).

> "...the taking possession of burglar's tools or narcotics by persons who intend to use them illegally alters the previous condition of affairs. The quality of daily life is impaired by such conduct; and one need only ask whether he would want to live in a community where attempts to kill and to commit robberies and arsons were frequent, to indicate that there are harmful effects of such conduct not only in the appreciation aroused but also in the increased danger of becoming the victim of a more serious crime."[136]

Perhaps society feels insecure rather than is insecure from attempted crimes, but J. Hall's argument for the view that attempt does constitute a harm nevertheless appears strong.[137]

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136. Hall, supra, note 1, 213.

137. It is interesting to note that in China, harm is considered to be the effect of a "socially dangerous act", a crime; conduct is punished because it is harmful, because it damages the social relationships which the criminal law protects. Cf. "Lectures on the General Principles of Criminal Law in the Peoples' Republic of China", 65 (1957, translated in (1962) U.S. Government Publications No. 10317). On the concept of harm viz-a-viz attempt see further, inter alia: A.W. Mewett, Q.C., "The Proper Scope and Function of the Criminal Law", (1960-61) 3 Crim. L.Q. 371, 390-391; J.T. Mann, "Criminal Law - Attempted Perjury - the Rules of 'Legal' and 'Factual' Impossibility as Applied to the Law of Criminal Attempts", (1955) 33 N. Car. L. Rev. 641, 645, 651-652; P.K. Ryu and H. Silving, "Toward a Rational System of Criminal Law", (1963) 32 Revista Juridica de la Universidad de Peurto Rico 119, 140; H. Morris, "Punishment for Thoughts", (1965) 59 The Monist 342, 359-361; L.C. Becker, "Criminal Attempt and the Theory of the Law of Crimes", (1974) 3 Philosphy and Public Affairs 262, 267-273; R. Marlin, "Attempts and the Criminal Law: Three Problems", (1976) 8 Ottawa L. Rev. 518, 531-535; J. Hall, "Criminal Attempt - A Study of Foundations of Criminal Liability", (1940) 49 Yale L. Jo. 789, 821; D.L. Rotenberg, "Withdrawal as a Defense to Relational Crimes", [1962] Wisc. L. Rev. 596, 690-602; E.S. Binavince, "The Theory of Negligent Offenses in the Anglo-American Criminal Law", (1963) 38 Philippine L. Jo. 428, 454-458; T. Weigend, "Why Lady Eldon Should be Acquitted: The Social Harm in Attempting the Impossible", (1977) 27 De Paul L. Rev. 231, 258-265; N. Morris, "The Law Is a Busybody", [1973] World Sevice Correctional Center 1, 2.

(f) Policy

Although policy "is a high horse to mount and it is difficult to ride when you have mounted it,"[138] it is given a loose rein by criminal law, generally under some guise. Nevertheless it is there, underlying each of the above criteria, coming most to the surface in the theory of social protection. As one Australian appellate judge has written in an attempt case, "for serious crime imprisonment remains the only effective brake upon anti-social pressures and passions which may be indulged bringing fear and agony to men, women and children who are entitled to lie freely in the protection of the law."[139] A practical example of policy is given by Schaffer, J.,[140] while O.W. Holmes fits it into a tight capsule conclusion:

> Public policy...[is] at the bottom of the matter [Attempt]; the considerations being, in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."[141]

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138. Per, A.L. Smith, M.R., in Driefontein Consolidated Mines Ltd. v. Janson (1901) 17 T.L.R. 604, 605 (English C.A.). Burrough, J., also conceived of policy seventy-seven years previously as being a similar mammalian quadruped: "It is a very unruly horse, and when once you get astride it you never know where it will carry you." Richardson v. Mellish (1824) 2 Bing. 229, 252, 130 E.R. 294 (Exchеq.).

139. Per Stable, J., R. v. Williams, ex parte The Minister for Justice and Attorney General [1965] Qd. R. 86, 104-105 (Qd. Ct. of Crim. App.)

140. "If this were held to be no attempt because there was no deception, then criminals of this kind, committing this offence, which is a subtle form of larceny, could go on plying their illicit trade, until they find a dupe, and would thus have a favoured status in the law over other thieves." Commonwealth v. Johnson (1933) 167 A. 344, 347 (Sup.Ct. of Penn.).

141. Supra, note 30, 69.

(4) CONCLUSION

As the English Law Commission has written, the purposes of the substantive criminal law include "the proscription of conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual interests" and "the giving of clear warning of the nature of the conduct so proscribed."[142] A person who pursues his own personal interests to the detriment of another person, or to society in general, and risks injuring an interest protected by law, merits the intervention of the law, on the above rationales, to prevent that person from completing the target crime and to criminalize and punish that person for the conduct already performed. The offender appears to the legal system, on the strength of the conduct done, already so dangerous the law need not wait for further proof of the offender's dangerous character; the incompleted actus reus furnishes a sufficient proof.[143] Such conduct causes alarm in the community, threatens the feeling of safety of all of those who watch or hear about the offender's conduct. On a more individual level, a harm is caused by the apprehension and fear of the victim as well as the alarm of the community about the fact that someone has attempted to do serious damage to a fellow citizen and break the accepted rules of social life.[144]

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142. Working Paper No. 17, "Codification of the Criminal Law, General Principles", 5-6 (1968, H.M.S.O., London).

143. W. Ullmann, "The Reasons for Punishing Attempted Crimes", (1939) 51 Juridical Review 353, 363.

144. T. Weigend, "Why Lady Eldon Should be Acquitted: The Social Harm in Attempting the Impossible", (1977) 27 De Paul L. Rev. 231, 264. Contra: J.R. Cabatuando, "Should Impossible Crimes be Punished?", (1933) 13 Philippine L. Jo. 18, 21, 23.

Though this writer has argued that the literal meaning of "attempt" and its interpretation by the criminal law should be differentiated,[145] it can be cogently argued from a pragmatic point of view that the conduct which the law should aim to penalise be, broadly speaking, that which the layperson would regard as "attempting" to commit an offence.[146] It should be borne in mind that, as Professor Hall has written, "[p]enal harm is a complex of fact, valuation and interpersonal relations - not an observable thing or effect."[147] One need only ask oneself whether one would wish to live in a community where attempts to kill and commit robberies and arson were frequent, to show that there are harmful effects of such conduct.[148]

It is the opinion of this writer that those who overtly indicate a purpose to engage in socially dangerous or socially detrimental conduct must be prevented, must be punished. The most recent criminal law publication of the Canadian

145. See infra, Chapter IV, "The Mental Requirement - Mens Rea", Part (5) "A Canadian, Scottish and South African Exception for Mens Rea of Attempt", Part (7), "Against Recklessness", and Chapter V, "The Factual Requirement - Actus Reus", Part (1) "Introduction".

146. English Law Commission Report No. 102, "Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement", 7 (1980, H.M.S.O., London).

147. Supra, note 1, 264.

148. Ibid., 219. See further on the rationale for punishing attempt: R. Trim, "Criminal Attempts: Linguistic Equations and Scholastic Camps", (1969-70) 47 Jo. of Urban Law 841; H.M. Hart, "The Aims of the Criminal Law", (1958) 23 Law and Contemporary Problems 401; I.H. Dennis, "Preliminary Crimes and Impossibility", [1978] Cur. Legal Problems 31, 40-46.

government,[149] re-affirms as a statement of purpose and principle that "[t]he Criminal Law is necessary for the protection of the public and the establisment and maintenance of social order."[150] Admittedly, there are conflicts - individual versus society, subjective versus objective, logic versus policy, harm versus desert.[151] A choice has to be made, allocating weight to each factor, making an individual or societal value-judgment.[152] But the mens rea and actus reus requirements of attempts are sufficiently flexible to take all of this into account - a court can simply say the accused had not formed the necessary mens rea, or had not yet passed beyond preparation, and acquit. The law of attempt is necessary to construct and maintain the equilibrium between individual freedom and protection of society. Such is its function, its rationale.

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149. "The Criminal Law in Canadian Society" (1982, Government of Canada, Ottawa).

150. Ibid., 4.

151. See "How should the powers of the state be balanced with the rights and liberties of individuals?", ibid., 31-32.

152. "...the actual choice that life presents to any society is seldom a clear issue between absolute good and absolute evil but generally a choice between alternatives, all of which are imperfect embodiments of justice or of the highest good. Wisdom consists in such a balancing of rival considerations, that the total amount of evil is minimized." M.R. Cohen, "Moral Aspects of the Criminal Law", (1939-40) 40 Yale L. Jo. 981, 1015.

CHAPTER IV

THE MENTAL REQUIREMENT - MENS REA

(1) INTRODUCTION

It is often considered customary, in commencing a piece of legal writing, to quote some Latin doggerel or other, though such Latin may appear more instructive than it actually is, may not accurately summarize a complex legal thoery, nor the current law, and in attempting to be succinct, is fallacious and misleading. Nevertheless, the Latin: Actus non facit reum nisi mens sit rea.[1] As one learned author comments, it "has a stirring, if slightly incomprehensible ring."[2]

The maxim has had its critics, [3] not least among which is Sir J.F. Stephen, who has stated that "It seems confusing to call so may dissimilar states of mind by one name."[4] What of

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1. Can be translated as: an act does not make the actor guilty, unless the mind is criminal. F. Pollock and F.W. Maitland note that the original source is Augustin: Reum linguam non facit nisi mens rea ("Sermones", No. 180, c.2): "The History of English Laws", Vol. II, 476 (2nd ed., 1911, Cambridge University Press, Cambridge). Lord Kenyon, has stated:

   > "It is a principle of natural justice and of our law, that actus non facit reum nisi mens sit rea. The intent and the act must both occur to constitute the crime," Fowler v. Padget (1798) 7 T.R. 509, 514, 101 E.R. 1103, 1106 (K.B.).

2. A.W. Mewett, Q.C., "The Shifting Basis of Criminal Law", (1963-64) 6 Crim. L.Q. 468, 468. Which learned author then proceeds to point out the Latin maxim's inaccuracies.

3. A. Levitt: "A crime is an act. It is not an act plus an intent. 'In jure actus non facit reum nisi mens sit rea' is no longer true. The modern maxim should be that most ancient one: Actus facit reum," "Extent and Function of the Doctrine of Mens Rea", (1923) 17 Ill. L.R. 578, 579.

4. R. v. Tolson (1889) 23 Q.B. 168, 185 (Ct. for Crown Cas. Res.). As Sir J.F. Stephen comments in his "History of the Criminal Law of England": "The truth is that the maxim

such words or phrases as: "purpose",[5] "common purpose",[6] "wilfully",[7] "knowledge",[8] "knowledge and consent",[9] "corruptly",[10] "illicit",[11] "inveigles",[12] "wanton",[13] "negligence",[14] "fraudulently",[15] "maliciously",[16]

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4. (cont.) about 'mens rea' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element [strict liability offences excepted], varying according to the different natures of different crimes," Vol. II, 95 (1883, Macmillan, London). For more on the development of mens rea see: F. Pollock and F.W. Maitland, supra, note 1, 448-511; A. Levitt, "The Origin of the Doctrine of Mens Rea", (1922) 17 Ill. L.R. 117; F.B. Sayre, "Mens Rea", (1932) 45 Harvard L.R. 974; W. Holdsworth, "A History of English Law", Vol. II, 43-54 (3rd ed., 1923), Vol. III, 372-5 (3rd. ed., 1923), Vol. VIII, 433-46 (2nd. ed., 1937, Methuen, London). (Each volume has separate edition numbers and dates of publication; for a publishing history of "A History of English Law", see R.E. Megarry, "Holdsworth's History of English Law: A Draft Bibliography", (1945) 61 L.Q.R. 134-6, 346-8, and T.F.T. Plucknett, "The Bibliography of Holdsworth's History", (1945) 61 L.Q.R. 229-30.) See also E.R. Meehan, "The Trying Problem of Criminal Attempt - Historical Perspectives", (1979) 15 U.B.C. L. Rev. 137.

5. Criminal Code, ss. 23, 52.

6. s. 21.

7. ss. 387, 49.

8. ss. 21, 22, 58.

9. s. 3(4)(b).

10. ss. 108, 109.

11. ss. 153, 154.

12. s. 195.

13. s. 202.

14. ss. 203, 233.

15. s. 283.

16. s. 287.

and "reckless"?[17] Are all to be considered as mens rea? Exactly what do they mean?[18] Can they be defined except by illustration - can a fisherman inform of the size of a recent catch without using his hands? The U.S. National Commission

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17. s. 212.

18. It is thought that wilfulness, recklessness and negligence are separate concepts, the degree of 'purposiveness' diminishing, presumably, from wilfulness to recklessness, and from recklessness to negligence - yet, to complicate matters a little, in the Criminal Code, recklessness is a definitional element in both wilfulness and negligence:

    386."(1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event."

    202."(1) Everyone is criminally negligent who
    (a) in doing anything, or
    (b) in omitting to do anything that it is his duty to do,
    shows wanton disregard for the lives or safety of other persons.
    (2) For the purposes of this section, 'duty' means a duty imposed by law."

    Also, as pointed out by D.R. Stuart (infra, note 22): "It is patently ridiculous,...that the standard of foresight required for the three instances [ss. 386(1), 202(1), 212(a)(b)] in which recklessness is expressly stipulated by our Code should differ" (p. 184).

    s. 386(1): supra.

    s. 202(1): supra.

    s. 212. "Culpable homicide is murder
    (a) where the person who causes the death of a human being
        (i) means to cause his death, or
        (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
    (b) where a person, meaning to cause death to a human being or meaning to cause bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being."

on Reform of Federal Criminal Law has come across more than seventy-five different words for describing the appropriate mental state in federal crimes,[19] such mental states generally not being defined. Add to this the difficulties caused by terminological obfuscation, use of the same term in different senses by different judges,[20] judicial inexactitude such as

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19. National Commission on Reform of Federal Criminal Law 1 Working Papers 119-120 (1970, U.S. Gov't. Printing Office, Washington). "But the law is not, as some say, an ass [e.g. Lord Reid, Haughton v. Smith [1973] 3 All E.R. 1109, 1121 (H.L.)]. It is a collection of the wisdom of centuries," W.T. West, "Recklessness and Foresight in Arson", (1980) 124 Sol. J. 336, 338.

20. "A striking feature of English Criminal law has been the casual, erratic quality of the use of key terms in its technical language. This has been most marked in the case of important words that Parliament or the judges have used to express aspects of the mental element of crimes: words like 'malice' and 'maliciously' (examples of ancient casualness), 'wilfully' (a once-popular statutory adverb that has left a legacy of confusion), 'intention' and 'recklessness' (the most discussed of the criminal 'states of mind'). Judges in particular, but Parliament as well, have on the whole seemed to care little about achieving consensus or consistency in this department of the legal vocabulary. This indifference in the matter of language has been part of a larger indifference to criminal law analysis as a whole....The larger indifference reflects, and tends to perpetuate, the dangerous practitioner's doctrine (worth an essay in itself) that there is no law in criminal cases. There has recently arisen a judicial practice of disposing of problems in the criminal law - some would say, of escaping from them - by explicit reliance on the linguistic competence of the common man.... [A]s it might be put, 'everyone knows what the word means.'... [C]ourts have been very ready - though not consistently so -- to find that statutory words whose application is in question before them are 'ordinary words,' and have approved of trial judges' restraint in the explication of the words for their juries' assistance. This has been true of key words of general importance, [such as

using varying terms for the one concept,[21] and one is tempted to agree with the learned author who finds that

> "from [a] survey of the Code provisions and judicial decisions relating to intention, knowledge and recklessness,...the picture as to what is required for mens rea in Canada is totally confused. In particular there is no clarity as to what these terms mean, or as to the extent to which there may be an extension to indirect intention, especially as regards offences requiring a specific intent, or to recklessness."[22]

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20. (cont.) 'dishonestly', 'recklessly', 'intent', 'believing'] as well as of words special to particular subject matters."
Quoted from E. Griew, "Consistency, Communication and Codification: Reflections on Two Mens Rea Words", in "Reshaping the Criminal Law", 57, P.R. Glazebrook, Ed. (1978, Stevens an Sons, London).
For views of the inconsistent use of the word "intent", see: G. Williams, "The Mental Element in Crime". 10-54 (1965, Magnes Press, Jerusalem); Comment, "Intent in the Criminal Law: The Legal Tower of Babel", (1959) 8 Cath. U.L.R. 31; D.R. Young, "Rethinking the Specific-General Intent Doctrine in California Criminal Law", (1975) 63 Cal. L.R. 1352; A.R. White, "Intention, Purpose, Foresight and Desire", (1976) 92 L.Q.R. 569; J.H Buzzard, "Intent", [1978] Crim. L.R. 5; J.C. Smith, "Intent: A Reply", [1978] Crim. L.R. 14. For a discussion of "nine different intentional relations that one might have toward...an object or goal" [emphasis added], see R.M. Chisholm, "The Structure of Intention", (1970) 67 Jo. of Phil. 633.

21. For example, in R. v. Morris (1977) 37 C.C.C. (2d) 542, Limerick, J.A., speaking for the New Brunswick Supreme Court, Appellate Division, used the words "purpose" (as in s. 23 of the Criminal Code) and "intention" interchangeably, and in the use of "intention" appeared to mean some other concept besides foresight of consequences or desire (appealed to S.C.C.: (1979) 26 N.R. 313). See also U.S. v. U.S. Gypsum (1978) 98 Sup. Ct. Rep. 2864, 438 U.S. 422, in which the U.S. Supreme Court noted, inter alia, that the particular mental element for a criminal conspiracy (under the Sherman Antitrust Act) can vary depending on the success or otherwise of the conspiracy.

22. D.R. Stuart, "The Need to Codify Clear, Realisitic and Honest Measures of Mens Rea and Negligence", (1972-3) 15 Crim. L.Q. 160, 184.

Moreover, the actual state of mind of an accused during a crime (whether a completed crime, or the criminal attempt) will often be an indecipherable complex of different 'intentions', thoughts, and emotions.[23] One learned author comments upon

> "a tendency to disregard the mental element in crimes where the state of mind of the accused was an express part of the offense. For example, definitions of the requisite mental states began to be fictionalized; states of mind, although absent in fact, began to be implied in law. Further, the proof required to establish certain requisite mental states began to be fictionalized; conclusive presumptions and objectively phrased reasonable man tests became controlling, the actual state of mind of the accused notwithstanding."[24]

Provisions on criminal attempt often do not specify the particular mental state with clarity,[25] and even where a

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23. The attempted comprehension of which, by a jury, or a judge, is not assisted by the courts (U.S., in this case) who, "have held that ill will, spite, hatred, hostility, deliberate intention to harm, or some sinister or corrupt motive are constitutionally insufficient to establish actual malice. In fact, actual malice is not malice at all, and to satisfy the requirement laid down in [New York] Times v. Sullivan [a U.S. Supreme Court decision, reported at (1964) 84 Sup. Ct. Rep. 40, 376 U.S. 254], a plaintiff must prove either actual knowledge of falsity or a reckless disregard of whether the statements are false," [as Hamlet was want to say, "Words, words, words," Shakespeare, Hamlet Act II, scene ii], T. Goldstein, "More and More, the Courts are Called on to be Mind Readers", New York Times, Sunday, May 6, 1979, E10, col. 2.

24. G.V. Dubin, "Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility", (1966) 18 Stan. L.R. 322, 350.

25. For example:
"Any person who attempts to commit any offence against any law of the Commonwealth or of a Territory, whether passed before or after the commencement of this Act, shall be guilty of an offence and shall be punishable as if the attempted offence had been committed."
Australian Federal Commonwealth Crimes Act 1914, 1973, s. 7.

provision states "having an intent to commit an offence,"[26] one does not know whether

(a) intention as to consequences, and recklessness as to circumstances is permitted;[27]

(b) if one has "no substantial doubt" a result will occur, suffices for intention;[28]

(c) conditional intent is a valid defence in some situations,[29] etc.

A learned Scots author has stated:

> "[I]f the criminal law is to perform its function of embodying common morality it must be expressed in simple language. Any distinctions it makes between guilt and innocence, or between degrees of guilt, must be intelligible to the ordinary man, and must make sense to him. A criminal court is not a seminar room, nor is a criminal trial an exercise in academic jurisprudence. Trial judges addressing juries are not in the position of professors giving a lecture to students, and even the judgments of appellate courts should not be expressed in esoteric language in this area of the law, whatever may be appropriate in other areas such as trusts or taxation."[30]

With this caveat, and the caution that mens rea (intent,

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26. Section 24(1), Criminal Code of Canada:
"Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence."
See further, Appendix I, "General Legislative Attempt Provisions - An International Compendium."

27. See infra, Part (8), "Intent as to Consequences, Recklessness as to Circumstances".

28. See infra, Part (6), "For Recklessness As An Acceptable Mens Rea for Attempt", text following note 22.

29. See infra, Part (11), "Conditional Intent".

30. G.H. Gordon, "Subjective and Objective Mens Rea", (1974-75) 17 Crim. L.Q. 355, 375.

recklessness, negligence, etc.) incorporates a certain ambiguity - much further theoretical, as well as pragmatic, work remains to be done in this area - one now proceeds to the mens rea of criminal attempt.

(2) MENS REA PER SE IS NOT CRIMINAL

Shakespeare, through his mouthpiece Isabella in "Measure for Measure" states:

> "His act did not o'ertake his bad intent,
> And must be buried but as an intent
> That perished by the way. Thoughts are no subjects,
> Intents but merely thoughts."[1]

Shakespeare expresses a much-pronounced legal principle that there is no criminality in mere intention.[2] Some act, often

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1. Act V, scene i. Angelo, Deputy of Vienna, has condemned to death Claudio, whose sister Isabella pleads for mercy on his behalf. Angelo proposes that he will pardon Claudio if Isabella yields to his desires. Isabella agrees on the condition that they meet in some dark spot - Mariana, to whom Angelo is betrothed (in Shakespearian time betrothal was considered equivalent to marriage) is substituted. Angelo therefore thinks the object of his seductive efforts is Isabella, when it is in fact Mariana; Angelo hence cannot be guilty of fornication.

2. "So long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done," per Lord Mansfield, C.J., R. v. Scofield (1784) Cald. Mag. Cas. 397, 402 (H.L.) (quoted and affirmed in Canada by R. v. McCann and Jevons (1869) 28 U.C.Q.B. 514, 516 (Upper Canada Q.B.), and R. v. Quinton [1947] S.C.R. 234, 236 (S.C.C.) inter alia). "The bare intention does not constitute a crime and an innocent act acquires the quality of criminality only if it is coupled with an unlawful and malicious intent," per Schroeder, J.A., R. v. Ritchie [1970] 3 O.R. 416, 423 (Ont. C.A.). "I cannot see that her mere expression of a

referred to as an "overt act", is required, in pursuance of the particular intention. Cogitationis poenam nemo patitur.[3] The armchair 'criminal', with criminal thoughts, who, for example, wishes to murder, rob or rape a particular person is innocent, however much one may consider such thoughts offensive. Perhaps the most oft-quoted dictum is that of Parke, B., in R. v. Eagleton:

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2. (cont.) willingness to do so [sell certain industrial recipes] would constitute a crime or an attempt to commit crime....Her conduct in intending to sell the recipes might be morally reprehensible, but she had only spoken or written of an intention to do an act;...she had done nothing; she had only evinced an intention to do something," per MacDonald, L.J.C., H.M. Adv. v. MacKenzies 1913 S.C. (J) 107, 112 (Scottish High Ct. of Justiciary). "It is the existence of both the intent and the act in such a relationship that the former may be regarded as the cause of the latter. The intent unaccompanied by the act does not constitute a criminal offence," per Estey, J., R. v. Quinton [1947] S.C.R. 234, 235 (S.C.C.). "Criminal intention alone is insufficient to establish a criminal attempt. There must be a mens rea and also an actus reus," per Laidlaw, J.A., R. v. Cline [1956] O.R. 539, 549 (Ont. C.A.). "The law will not take notice of an intent without an act," per Coleridge, J., Dugdale v. R. (1853) 1 E. & B. 435, 118 E.R. 499, 500 (Q.B.) (where an indictment which charged possession of obscene matter with intent to sell, was held not to charge a crime. An indictment charging procurement of obscene matter with intent to sell would have been a crime: R. v. Gurmit Singh [1966] 2 Q.B. 53 (Leeds Assizes) held that the procurement of an imitation stamp of a magistrate with intent to forge documents was an offence, at common law). "[T]he mere intent to commit a crime, where such intent is undisclosed, and nothing done in pursuance of it, is not the subject of an indictment," per curiam, Commonwealth v. Randolph (1892) 23 A. 388, 389, 146 Pa. R. 83, 94 (Sup. Ct. Pa.). See also: R. v. Duffy (1931) 57 C.C.C. 186 (N.S.C.A.); R. v. Kosh [1965] 1 C.C.C. 230 (Sask. C.A.); Smith v. Blachley (1898) 188 Pa. 206 (Sup. Ct. Pa.). A U.S. statute purporting to make mere intention criminal would be unconstitutional: State v. Labato (1951) 7 N.J. 137, 80 A. 2d 617 (Sup. Ct. N.J.); Lambert v. State (1962) 374 P. 2d 783 (Okla. Ct. Crim. Apps.); Note, (1921) 30 Yale L.J. 762.

3. Ulpian, Dig., Book 48, Chapter 19, s. 18.

> "The mere intention to commit a misdemeanor is not criminal - some act is required..."[4]

There was a period in the development of Scottish and English criminal law when criminal purpose per se was punished: Quod voluntas reputabitur pro facto.[5]

Contemporary law, then, does not punish thoughts, however uncharitable. However, might one not say that when criminal attempt is punished, one is in fact punishing for thought, the criminal act which the attemptor intended to carry out ex hypothesi not being realized? Is one not punishing the unfulfilled intention? Certainly detectable intention, but nevertheless, an intention. The rationale for punishing attempt[6] is essentially that persons who threaten or intend to commit criminal acts should be prevented, and deterred, from such conduct; they are, due to their intention, dangerous, as well as dangerously criminal, persons. It is on the intention, the mens rea, that the criminal attempt focuses, not the actus reus. Modern penology, if rehabilitation be a current theme, would seem to lay more emphasis on the criminal's mens rea to determine his corrective needs, rather than what the criminal

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4. (1855) Dears. C.C. 515, 538, [1843-60] All E.R. Rep. 363, 367 (Ct. Crim. App.). And as Lord Mansfield stated in the original attempt case, R. v. Scofield, "So long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done," (1784) Cald. Mag. Cas. 397, 403 (H.L.).

5. See supra, Chapter II, "Historical Aspects", and also E.R. Meehan, "The Trying Problem of Criminal Attempt - Historical Perspectives", (1979) 14 U.B.C. L.R. 137, 138 and 148-151.

6. See supra, Chapter III, "Why Punish Attempt".

in fact did. The criminal's acts may have been quite innocuous, and he is surely not being punished for what is harmless. Reckless or negligent driving is almost universally a crime, even in the absence of actual harm,to prevent actual harm.[7]

Bracton, writing in the middle of the fourteenth century, who generally emphasized the mental element, stated: "In maleficiis autem spectatur voluntas et non exitus".[8] John

7. "[T]he aim of the law is not to punish sins, but is to prevent certain external results...," Holmes, J., Commonwealth v. Kennedy (1897) 170 Mass. 18, 18, 48 N.E. 770, 770 (Sup. Jud. Ct. Mass.). Somewhat more pragmatic: "Men are not hanged for stealing horses, but that horses may not be stolen," George Savile, "The Complete Works of George Savile", 229 (W.W. Raleigh, Ed., 1912, Clarendon Press, Oxford).

8. Which can be translated as 'In crimes the intent is regarded, not the event'. "De Legibus et Consuetudinibus Angliae", 384 (1366; reprint 1968, Harvard University Press, Cambridge). The mental element was of course emphasized by a somewhat earlier jurisprudent: "Whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart," Matthew 5:28. "In foro conscientiae a fixed design or will to do an unlawful act is almost as heinous as the commission of it," W. Blackstone, "Comentaries", v. 4, 20 (1803, Edward Christian, London; reprint 1965, Dennis & Co., Buffalo). "The men of old time had forbidden adultery, the new moral legislator forbade lust," L. Stephen, "Science of Ethics", 148 (2nd ed., 1907, G.P. Putnam's Sons, New York). One might be wary, however, of the facile maxim that 'Law is concerned with external conduct, morality with internal conduct' for as H. Morris comments: "[S]tates of mind are relevant to the law and conduct is relevant to morality. The definition of burglary and murder, to take two obvious examples, demonstrate that states of mind are relevant to the law. And conduct seems relevant to morality, for we blame people for telling lies, breaking promises, killing people, not just, or perhaps ever, for merely contemplating, desiring, or intending, to do these things," "Punishment for Thoughts", (1965) 49 The Monist 342, 243-3. With regard to the relation between Law and Morality, a Scots judge has argued that temporal laws should conform to "[t]he inherent powers of this court to

Austin, centuries later, candidly proposed that "where a criminal intention is evidenced by an attempt, the party is punished in respect of the criminal intention."[9] The proposition that the law in reality punishes intention has found both academic[10] and

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8. (cont.) repress whatever are, by the law of God, and the laws of morality, mala in se....Religion is a part of the common law of England. Morality is a part of the common foundations," per Lord Meadowbank, H.M. Adv. v. Greenhuff et al (1838) 2 Swin. 236 (H.Ct. Judiciary). Lord Shawcross has noted that: "The laws we break are merely mala prohibita. The laws others break are mala in se," "Functions of an Advocate", (1958) 13 The Record of the Bar Assoc. of N.Y. City 483, 505.

9. "Lectures on Jurisprudence", 120 (originally published 1861; reprinted 1970, Burt Franklin, New York). Glanville Williams comments: "There is much to be said for this," "Criminal Law", 485-486 (1953, Stevens & Sons Ltd., London); and wrote also that "any act done with the fixed intention of committing a crime, and by way of preparation for it, however remote it may be from the crime might well be treated as criminal," "Criminal Law" 632 (2nd ed., 1961, Stevens and Sons, London). John Austin, four lines after his statement noted above, continues: "The reason for requiring an attempt is probably the danger of admitting a mere confession. When coupled with an overt act, the confession is illustrated and supported by the latter. When not, it may proceed from insanity or may be invented by the witness to it."

10. "[W]hereas in most crimes it is actus reus, the harmful result, which the law desires to prevent, while the mens rea is only the necessary condition for the infliction of punishment on the person who has produced that harmful result, in attempt the position is reversed, and it is the mens rea which the law regards as of primary importance and desires to prevent, while a sufficient actus reus is the necessary condition for the infliction of punishment on the person who has formed that criminal intent. It may perhaps be permissible to emphasize this by saying that in most crimes the mens rea is ancillary to the actus reus, but in attempt the actus reus is ancillary to the mens rea. Possibly there may be, after all, a certain truth in the old phrase voluntas reputabitur pro facto."
Quoted from J.W.C. Turner: "Attempts to Commit Crimes", (1933-5) 5 Camb. L.J. 230, 235. "[S]ince the mischief

judicial[11] support. It is certainly true that there are many offences the mens rea for which has come to be defined in such a way that punishment is imposed without proof of mens rea as to at least some elements in the actus reus.[12] This is not to

10. (cont.) contained in an attempt depends upon the nature of the crime intended, the criminality lies much more in the intention than in the acts done. Hence the courts sought for proof of only a sufficient physical element to satisfy the maxim that mens rea alone is not a crime," "Russell on Crime", 1784 (10th ed., J.W.C. Turner, Ed., 1950, Stevens & Sons, London). "Midway between the mere intention and the completed crime stands the inchoate crime of attempt....In some instances statutes provide a lesser punishment for the attempt than for the full offence. The reason is no doubt the fact that less harm results from the former than from the latter. In fact, here the law would seem to be penalizing mere criminal intention, contrary to the general rule," P.J. Fitzgerald, "Criminal Law and Punishment", 97-98 (1962, Clarendon Press, Oxford).

11. "The indictment is founded on a criminal intent, coupled with an act immediately connected with the offence," per Jervis, C.J., R. v. Roberts (1855) Dears. C.C. 599 (Ct. for Crown Cases Res.). "[W]hereas in most crimes it is the actus reus which the law endeavours to prevent and the mens rea is only a necessary element of the offence, in a criminal attempt the mens rea is of primary importance and the actus reus is the necessary element.... There must be mens rea and also an actus reus to constitute a criminal attempt, but the criminality of misconduct lies mainly in the intention of the accused," per Laidlaw, J.A., R. v. Cline [1956] 4 D.L.R. (2d) 480, 488 (Ont. C.A.). A case lending less than dubious support to the proposition is reported at (1920) 84 J.P. 417, where a constable found a woman "looking interestingly into the Thames [River]," the woman being convicted of attempted suicide.

12. For example, s. 212 of the Criminal Code:
"Culpable homicide is murder
(a) where the person who causes the death of a human being
(i) means to cause his death, or
(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows

say however, that legally, technically, one commits a criminalattempt by merely thinking about it; it would clearly be incorrect in law to agree with Dr. Johnson, who in reply to the actor Garrick declaring that he felt like a murderer whenever he acted Richard III, retorted "Then he ought to be hanged whenever he acts it," or to agree with the statement that "one may be innocent of an act and guilty of attempt to commit it."[13] Nevertheless, the law would appear to punish a manifested intention as attempt. The English Law Commission in a 1980-released report points out "that the main justification for the retention of inchoate offences is the need to permit the law to impose criminal sanctions in certain cases where a crime has been contemplated but not in fact committed,"[14] and quotes an earlier Working Paper:

> "The mere intention in a serious case constitutes a social danger, but provided that it remains no more than an intention, no intervention is justifiable. It is only when some act is done which sufficiently manifests the existence of the social danger present in the intent that authority should intervene. It is necessary to strike a balance in this context between individual freedom

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12. (cont.) is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being."

13. Per Hammond, J., Witney v. Maryland House of Correction (1956) 120 A. 2d 200, 200, 351 U.S. 299 (Maryland C.A.).

14. Law Com. No. 102, "Criminal Law: Attempt, and Impossibility in Relation to Attempt, Incitement and Conspiracy", 6 (1980, H.M.S.O., London). (Although the Report is almost exclusively on Attempt, the spine of the Report bears the restricted title: "Criminal Law Conspiracy and Incitement.")

> and the countervailing interests of the community."[15]

The extreme tendency of attempt, in its preventive and deterrent role, to reach back in order to punish the armchair 'criminal', referred to above, to punish purely subjective 'guilt', is, in the interests of individual freedom, controlled to some degree by notions of preparation, impossibility, and abandonment.

If law in reality punishes intention, why then does the law concern itself with an act?[16] A socially dangerous person exposed by mere intention is clearly not an easily quantifiable subject, such intention only being fully known by the person who has it.[17] Intention is not reliably susceptible of evidentiary proof: "[c]ar comen erudition est q l'entent d'un home ne serr trie car le Diable n'ad conusance de l'entent de home."[18] All that can be done by the legislature and courts is

15. Ibid., 7 (Working Paper No. 50, "Inchoate Offences: Conspiracy, Attempt and Incitement", 46-47, 1973, H.M.S.O., London). Emphasis added.

16. A. Levitt argued that "in the criminal law of England and the United States there is no place now for a doctrine of intent as a necessary ingredient of crime...A crime is an act. It is not an act plus a intent. 'In jure actus non facit reum nisi mens sit rea', is no longer true. The modern maxim should be that most ancient one: Actus facit reum," "Extent and Function of the Doctrine of Mens Rea", (1917) 17 Illinois L.R. 578, 589. See also B. Wootton, "Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist" (Hamlyn Lectures; 1963, Stevens & Sons, London), and "Crime and Penal Policy, Reflections on Fifty Years' Experience", 222-226 (1978, George Allen and Unwin, London).

17. And not necessarily by that person: T. Reik, "The Compulsion to Confess" (1959, John Wiley and Sons, New York).

18. Per Bryan, C.J., (1477) Y.B. 17 Edw. IV, 2 pl. 2 (Exchequer.).

to hazard a guess with regard to the social danger of a person with a view to the degree of risk of actual harm such person may cause.[19] There are those who advocate that enquiry should be directed towards thought: "A great deal of the argument... arises...under cover of the fallacious use...of the principle that you cannot look into a man's mind...So far as saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud."[20] Guessing, however, is hardly a facility to be encouraged in an impartial criminal justice system. That one cannot easily prove thought does not account for the fact that a confessed criminal intent, believed by those confessed to be reliable, is still not sufficient; some further act is required. An act offers more reliable evidence of such intention:

> "...as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the man is liable to punishment."[21]

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19. Such guessing is not uncommon in a legal system; witness the number of crimes for which the mental states of recklessness or negligence (or absence of mental state, strict liability) are sufficient mens rea.

20. Per Bowen, L.J., Angus v. Clifford [1891] 2 Ch. 449, 471 (English C.A.).

21. Blackstone, supra, note 8, Bk. IV., Chap. II. As (again) echoed by John Austin: "The state of a man's mind can

Emphasis on the "depravity of the will" is hence present in Blackstone's writings, and it may be that the more current view would be closer to that proposed by two American judges, the former philosophically-oriented, the latter pragmatically:

> "As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it."[22]

> "What a man is up to may be clear from considering his bare acts by themselves..."[23]

Even if one had an infallible device capable of detecting intention, how would one deal with persons who might change, or had changed, their minds? When would punishment be meted out? How would one, or could one, differentiate between those who were merely 'toying with the idea' and those determined to do a certain act as soon as an opportunity arose? Civil rights objections are obvious.

The law should be precluded from punishing the armchair 'criminal'. Who would not be a criminal? "All mankind would be criminals, and most of their lives would be passed in trying and punishing each other for offences which could never be

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21. (cont.) only be known by others through his acts: through his own declarations or through other conduct of his own," supra, note 9, 106.

22. Per Holmes, J., Commonwealth v. Kennedy (1897) 170 Mass. 18, 18, 48 N.E. 770, 770 (Sup. Jud. Ct. Mass.).

23. Per Jackson, J., Cramer v. U.S. (1945) 325 U.S. 1, 33 (U.S. Sup. Ct.). As Henry D. Thoreau stated: "Some circumstantial evidence is very strong, as when you find a trout in the milk," Journal, Nov. 11, 1850, in "The Heart of Thoreau's Journals", 58 (Shepeard, Odell, Eds., 1927, Houghton Mifflin Co., Boston).

proved."[24] The law-abiding citizen is differentiated from the criminal in that it is only the latter who permits a state of mind, common to both, to proceed to action. As is cogently argued by E. Cahn:

> "[E]very man sometime or other is bound to think a forbidden thought, even one who acts righteously will have to seek remission for his sins - provided that a mere thought, linked to no overt action, can constitute a moral offence.... This the law cannot do. It cannot hold the citizenry - or even too large a minority of them - to be felons.... A responsible morals cannot be developed out of private mental states, subjective beliefs, or vaporous reveries."[25]

Were it otherwise, there would be no scope for the deterrent aspect of criminal law to inhibit the armchair 'criminal' from putting his thoughts into action - the might-as-well-be-hanged-for-a-sheep-as-for-a-lamb philosophy.

Another difficulty would be distinguishing determined intent from mere daydreaming. If one wished to distinguish them, one might feel obligated to further categorize and attach varying culpabilities,[26] "[o]r, at least, to forebear from such of those intentions, as settled, deliberate, or frequently recurring to the mind. The fear of punishment

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24. Sir J.F. Stephen, "A History of the Criminal Law of England", Vol. II, 78 (1883, Macmillan, London).

25. "The Moral Decision", 46 (1955, Indiana University Press, Bloomington).

26. "[I]f we consider the class of persons who intend, the class of those who firmly intend, the class of those who take steps to realize their intentions, and the class of those who take the last step necessary to realize their intentions, we may regard them all as more morally blameworthy than the general run of persons. But they are not equally so....In attempt it is those persons with 'firm resolve' that interest us; it is those who 'really intend', those whose purpose will be constant....[I]f all

might prevent the frequent recurrence; and might, therefore, prevent the pernicious acts or forbearances, to which intentions (when they occur frequently) certainly or probably lead."[27] It would be realistic to be aware of the limited effect of law: "The law can make you quit drinking; but it cannot make you quit being the kind that needs a law to make you quit drinking."[28] It has been perspicaciously noted that:

> "[F]antasying, wishing, desiring, wanting, intending - ...[isn't] it a rather hazy matter to know just when a person is intending rather than wishing? This...objection has two aspects, the difficulty of the authorities distinguishing between fantasying, wishing, etc., and even more importantly the difficulties the individual would have in identifying the nature of his emotional and mental set. Would we not be constantly worried about the

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26. (cont.) offences consisted in the having of a state of mind and none in the doing of certain things, the system would be irrational in not rewarding restraint from harm," H. Morris, "Punishment for Thoughts", (1965) 49 The Monist 342, 358-64.

27. John Austin, supra, note 9, 146. Austin continues:
> "I am not aware of a positive system of law, wherein an intention, without an act or forbearance, places the party in the predicament which is styled imputability. In every positive system of which I have any knowledge, a mere intention to forbear in future is innocent. And an intention to act in future is not imputed to the party, unless it be followed by an act; unless it be followed by an act which accomplishes his ultimate purpose, or by an act which is an attempt or endeavour to accomplish that ultimate purpose. In either case, the party is guilty, because the intention is coupled with an act: and with an act from which he is obliged to forbear or abstain." Emphasis is original.

28. D. Marquis, quoted in "Reform: By Order", (1958) 102 Sol. J. 832. Samuel Smiles is earlier attributed to have observed: "No laws, however stringent, can make the idle industrious, the thriftless provident, or the drunken sober."

> nature of our mental life? Am I only wishing my mother-in-law dead? Perhaps I have gone further."[29]

Besides, it may be that "[i]t is not that tools for determining truth are imprecise, but that the truth may not be ascertainable by any means in the form we seek it. What we are trying to measure may be indefinable."[30] Philosophically, it would not be possible to accord with a criminal justice system which punished mere thought.[31]

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29. G. Dworkin and D. Blumenfeld, "Punishment for Intentions", (1966) 75 Mind 296, 401. For a case in which the accused stated he had succumbed to an "inner prompting", see R. v. Marsilar, Aug. 24, 1976 (Sask. C.A.); unreported.

30. Dr. O.V. Briscoe, "...For the Devil Does not Know Man's Intentions", (1970) 44 Australian L.J. 31. Procedural restraints on the legal search for truth have alleged:

> "Let no one pretend that our system of justice is a search for truth. It is nothing of the kind. It is a contest between two sides played according to certain rules, and if the truth happens to emerge as the result of the contest, then that is pure windfall....It is not something with which the contestants are concerned. They are concerned only that the game should be played according to the rules. There are many rules and one of them is that some questions which might provide a shortcut to the truth are not allowed to be asked, and those that are asked are not allowed to be answered. The result is that verdicts are often reached haphazardly for the wrong reasons, in spite of the evidence, and may or may not coincide with the literal truth. The tragedy of our courts is that means have come to count more than ends, form more than content, appearance more than reality."

Quoted from Ludovic Kennedy, "The Trial of Stephen Ward", 251 (1964, Gollancz, London). Sir Thomas W. Taylor, Chief Justice for Manitoba in the late nineteenth century is attributed to have stated: "I am not here to dispense Justice, I am here to dispose of this case according to law. Whether this is or is not justice is a question for the legislature to determine."

31. "[I]t is a principle of a just constitution that 'each person has the equal right to the most extensive liberty compatible with a like liberty for all.'...By merely intending to do harm one does not interfere with the liberty of others. Thus, in prohibiting intentions the law would deny a person a liberty compatible with a like

It might be noted that intent plus an act need not amount to a crime. Examples where a person's actions have been held to be merely non-criminal preparation, though a criminal intention was admitted, are legion.[32] The expression of a criminal intention, even to a perceived accomplice, is insufficient,[33] as is a threat, the expression of the criminal intent.[34] Some offences are defined such that certain acts are required for the crime to have taken place; for example, breaking and entering requires both a 'breaking'[35] and some

31. (cont.) liberty for all. But a system that did this as a general rule would also...be a system that diverged from what we conceive of as a legal system," H. Morris, supra, note 26, 375-6. For the rationale behind punishing intent manifested by an act as attempt, see supra, Chapter III,"Why Punish Attempt".

32. One example might suffice presently. In Hope v. Brown [1954] 1 All E.R. 330 (Q.B.) a butcher was found not guilty of attempting to sell meat at prices above the statutory maximum, sets of tickets bearing illegal prices having been found in a drawer, and the butcher having admitted that he had instructed an employee to attach such tickets to meat already packaged before delivery. Lord Goddard, C.J., stated:

> "The only question is whether or not the respondent can be convicted of an attempt to sell meat in respect of each of these twenty-one customers to whom he intended that the meat should be delivered by the next day. Does what he has done amount to an attempt? In my opinion, it does not. The mere intention to commit an offence means that an act has been done preparatory to the commission of the offence" (331).

33. If there be agreement, conspiracy could be charged: R. v. Mulcahy (1868) 3 L.R. H.L. 306 (H.L.). See particularly Lords Willes and Chalmsford at 317 and 328 respectively. Cf. R. v. O'Brien [1954] S.C.R. 666 (S.C.C.), and commentary in M.R. Goode, "Criminal Conspiracy in Canada", 19-23 (1975, Carswell, Toronto).

34. R. v. Landow (1913) 8 Crim. App. R. 218, 23 Cox. C.C. 457 (English C.A.).

35. 'Breaking' is defined in the Criminal Code, s. 282 as

form of 'entering';[36] for attempted breaking and entering it is interesting to note that the presumption with regard to intent does not apply,[37] that the Crown has to specifically prove beyond a reasonable doubt that breaking and entering of the place was with intent to commit an indictable offence therein.[38] More emphasis is laid on the mental element with

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35. "(a) to break any part, internal of external, or
(cont.) (b) to open any thing that is used or intended to be used to close or to cover an internal or external opening."
See R. v. Dufour (1973) 14 C.C.C. (2d) 207 (Que. C.A.).

36. With regard to entering, s. 307 of Criminal Code states:
"For the purposes of sections 306 and 307,
(a) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; and
(b) a person shall be deemed to have broken and entered if
(i) he obtained entrance by a threat of artifice or by collusion with a person within, or
(ii) he entered without lawful justification or excuse, the proof of which lies upon him, by a permanent or temporary opening."

37. S. 306(2), Criminal Code of Canada:
"For the purposes of proceedings under this section, evidence that an accused
(a) broke and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein; or
(b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after
(i) committing an indictable offence therein, or
(ii) entering with intent to commit an indictable offence therein."

38. R. v. Hunchuk (1952) 15 C.R. 386, 103 C.C.C. 252 (B.C.C.A.); R. v. Johnson [1973] 3 W.W.R. 513, 520, 20 C.R.N.S. 375, 382 (B.C.C.A.); St.-Jean v. R. (1974) 28 C.R.N.S. 1, 5 (Que. C.A.). In R. v. Carey [1945] 3 W.W.R. 508 (B.C.C.A.), the appellant, Carey, and one Reynolds were coming out of an alley which led past the rear of a trucking company at 11:30 p.m., Reynolds being in possession of a screwdriver and his fingerprints having

regard to the attempt than the completed offence.

The mental element is proved in court by any evidence relevant to the issue, generally by one or more of the three following methods: firstly, a confession by the accused;[39] secondly, similar fact evidence;[40] thirdly, inferences from

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38. (cont.) been found on broken glass from a window of the trucking company building. Both were convicted of attempted breaking and entering at the trial. Both protested they had gone up the alley to relieve themselves. Bird, J.A., observed at 509, "Evidence in support of this statement was found." The appeal was successful.

39. As in R. v. Barker [1924] N.Z.L.R. 865 (N.Z.C.A.); there the accused had written two letters to a youth of 16 years arranging a tryst and mentioning that "We can have some good fun if you will." The police were informed by the youth's father, and arrested the accused after having met the boy. The accused admitted he intended to commit sodomy on the youth. However, due to the use then of the "Equivocality Theory" (now discredited, see Chapter V, "The Factual Requirement - Actus Reus", Part (7), infra), the confession was not relevant to determine if the accused's acts were unequivocally referable to the offence. Though there was no other evidence of intent, Sim, J., curiously felt qualified to rhetorically query: "For what innocent purpose can it be supposed the accused desired to take the boy into the paddock after 8 o'clock on a winter night?" (870; Salmond, J., similarly at 879-80). Only Stringer, J., had misgivings (871) concerning affirming a conviction where a confession was admitted, though not relevant to the issue (unequivocality). Nevertheless, the accused was convicted. With regard to confessions, one might take heed of the observation by Dr. O.V. Briscoe (psychiatrist):

> "It is not easy logically to distinguish intent from memory. Thus when we ask what his intention was at some time in the past, we are really asking what he remembers of his intention then. False memories, screen memories, confabulation, invention and a desire to confess from a sense of guilt or tension are not new to psychiatrists, and make recollection of intent very fallible," supra, note 30, 28.

40. "Evidence of similar acts done by the accused before the offence with which he is charged, and also afterwards, if such acts are not too remote in time, is admissible to

what the accused had done on the particular occasion:

> "In all cases where it is necessary to prove anything which depends upon the state of a man's mind, whether it is malice, whether it is intent, whether it is knowledge, whether it is suffering or conniving, which all depend upon what is in the man's mind, in any of those cases the way in which it certainly may be and generally must be proved is by inferring it from other facts."[41]

A.W. Mewett, Q.C., and M. Manning, Q.C., point out that one

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40. (cont.) establish a pattern of conduct from which the court may properly find mens rea," per Laidlaw, J.A., R. v. Cline (1956) 115 C.C.C. 18, 29 (Ont. C.A.). The similar facts here were seven other incidents in which the accused asked young boys to carry non-existent suitcases, the accused doing an indecent act with two of the boys.

41. Per Channell, J., Lee v. Taylor and Gill (1912) 77 J.P. 66, 69 (K.B.). Jerome Hall adverts to the care which must be shown in making such inferences:

> "Isolated behavior is always ambiguous so far as legal significance is concerned. A person carries a gun in his possession. Is his purpose to defend himself, to hunt or to kill a man? An individual is caught just after he has unlatched a window in a dwelling house. Is his intention to steal or to keep a rendezvous? Ambiguity is sometimes much reduced, as, for example, when a passenger in a subway train places his hand in another's pocket. Even here the act alone does not necessarily mean a criminal intent, or, at least, any particular criminal intent. The passenger may have been a creditor trying to recover his own property or its equivalent; or, if the pocket were a lady's, the purpose may have been lewd rather than larcenous."

"Criminal Attempt - A Study of Foundations of Criminal Liability", (1940) 49 Yale L. Jo. 789, 824.

And to quote from a case itself: "We cannot infer the specific intent to kill and murder from the allegation that the accused maliciously pointed the loaded pistol at Trull. From this allegation, a general evil purpose may be inferred, but not the specific design to kill....[T]he judgment of the trial court is reversed, the verdict of the jury reversed...," per Hudgins, J., Merritt v. Commonwealth (1935) 180 S.E. 395, (Va. Sup. Ct. of Apps.). It is for this very equivocality, inter alia, that the "Equivocality Test" (see Chapter V, "The Factual Requirement - Actus Reus", Part (7), infra) is unacceptable in differentiating non-criminal preparation from criminal attempt.

should distinguish the proof of mens rea by means of the former two methods, whereby "acts which can be done for no other purpose than in order to carry out the known intent...can easily be seen to be attempts," rather than from the latter, whereby "[intent] can only be formed by inference from the acts of the accused and this must be of such a sort as to amount to proof beyond a reasonable doubt."[42] With regard to the former, acts "such as buying poison, putting it in a drink, putting one's hands on one's wife's shoulders...can easily be seen to be attempts," "but not merely getting out of bed or walking into the drug store, or going with one's wife up to the top of a cliff."[43] With all due respect to the learned authors, it may be perhaps that some of the examples were inappropriately chosen,[44] as would it not seem to be the case that once intention has been proved by a confession or by similar fact evidence, is it not a fact that any act, however innocuous, is capable[45] of complementing such proved intention so as to amount to a criminal attempt? As Lord Mansfield stated in the

42. A.W. Mewett, Q.C., and M. Manning,Q.C., "Criminal Law", 148-149 (1978, Butterworths, Toronto).

43. Ibid.

44. Walking to the top of a cliff with one's wife would appear to be at least as suspicious as putting one's hands on her shoulders, if the latter "can easily be seen to be attempt," as the learned authors premise.

45. Capable of amounting to an attempt; any actus reus would have to pass the preparation test, which many otherwise objectively innocuous acts have passed: "It is not essential that the actus reus be a crime or a tort or even a moral wrong or social mischief," per Laidlaw, J.A., supra, note 40, 29.

original locus classicus of attempt: "[I]f [the act] is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."[46] Surely Mr. Cline asking a boy "what street it was" and would he want "to make a couple of dollars carrying his suitcases" is objectively an innocent statement of a factual incident, but yet was held to amount to more than mere preparation, and with the mens rea as evidenced by similar facts, to found a conviction for attempted indecent assault.[47] All of the acts referred to by the learned authors, apart from putting poison in another's drink, are all common harmless acts, until one cogently proves, whether by confession or by similar fact evidence, that each act was a result of a proved criminal intent.[48]

Doctrinally, one can debate whether the actus reus of attempt is merely evidence indicating the mens rea, or a

46. R. v. Scofield (1784) Cald. Mag. Cas. 397, 403 (H.L.). "[T]he intent may determine the criminal quality of the act," per Estey, J., R. v. Quinton [1947] S.C.R. 234, 236, 88 C.C.C. 231, 237 (S.C.C.). And also vice versa: "[I]ntent...must, of necessity, be inferred from the nature of the act done; and, if that [act] be unlawful, a wicked intent will be presumed," per Knox, J., McDermott v. People (1860) 5 Parker Cr. R. 102, 104 (U.S.S.C.). The poisoning example of Messrs. Mewett and Manning would fall into this vice versa situation; one could presume mens rea from a proved non-accidental deposit of poison in an about-to-be-drunk-from cup.

47. R. v. Cline, supra, note 40.

48. "[T]he overt act might...consist in some quite colorless act such as sending foodstuffs to Spain, provided, of course, that it be charged as having been done in furtherance of the treasonable project," per Cross, J., Re Schaefer (1918) 31 C.C.C. 22, 27 (Que. C.A.).

a separate independent definitional element in attempt, as substantial as the intent itself. Kenny would support the former:

> "[T]he criminality of the attempt lies in the intention, the mens rea, but this mens rea must be evidenced by what the accused has actually done towards the attainment of his ultimate objective";[49]

and G.H. Gordon the latter:

> "[T]he overt act is not required merely as evidence that [the accused] really was trying to commit the crime in question, as evidence of his intention; it is required in order to constitute the attempt, and there is no attempt until the requisite overt act has been committed."[50]

The division reflects differing fundamental philosophies concerning the jurisprudential foundations of a criminal justice system; the subjectivist school of thought would scrutinize the animus of the actor, and criminalize that as the nucleus of attempt; the objectivist school, on the other hand, regards the animus and geste of attempt as being separate, though connected moieties. It is not proposd here to delve into this debate,[51] whether with regard to attempt, or the

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49. "Kenny's Outlines of Criminal Law", 104 (J.W.C. Turner, Ed., 19th ed., 1966, Cambridge University Press, Cambridge); Laidlaw, J.A., in R. v. Cline, supra, note 40, 28 (Ont. C.A.) approvingly quotes J.W.C. Turner: "[I]n most crimes the mens rea is ancillary to the actus reus, but in attempt the actus reus is ancillary to mens rea." See also notes 10 and 11, supra.

50. G.H. Gordon, "The Criminal Law of Scotland", 164 (2nd ed., 1978, W. Green and Son Ltd., Edinburgh).

51. For a primer, one might read pp. 139-146 and 157-184 of an absorbing book, "Rethinking Criminal Law" by G.P. Fletcher (1978, Little, Brown and Company, Boston); and D. Bein, "The 'Completed Offence' and the Attempt - Some Problems in Criminal Law Interpretation", (1969) 4 Is. L.R. 216.

criminal justice system generally. Such debate is more academic (though not without significant merit) than pragmatic, for in the practice of the criminal law, it is universally recognized by practitioners that to successfully prosecute an attempt, one needs a mens rea and an actus reus, whether or not it be the realistic consequence that it is the mens rea which is being punished.

(3) AN EXCEPTION TO THE 'MENS REA PER SE IS NOT CRIMINAL' PRINCIPLE: TREASON

It is pronounced law that mens rea per se is not criminal. Treason is an apparent exception. Section 46(2)(d)[1] of the Criminal Code has developed from the English Treason Act of 1351 as amended.[2] The offence was the treasonous intent

1. 46(1) "Every one commits high treason, who, in Canada,
(a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
(b) levies war against Canada or does any act preparatory thereto; or
(c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are.
(2) Every one commits treason who, in Canada,
(a) uses force or violence for the purpose of overthrowing the government of Canada or a province;
...(d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act."

2. "Whereas diverse Opinions have been before this Time in what Case Treason shall be said, and what not; the King, at the Request of the Lords and of the Commons, hath made a Declaration in the Manner as hereafter followeth, that is to say; When a Man doth compass or imagine the Death of our Lord the King, or of our Lady his Queen or of their

itself,[3] the overt act being evidence "of their

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2. (cont.) eldest Son and Heir; or if a Man do violate the King's Companion, or the King's eldest Daughter unmarried, or the Wife of the King's eldest Son and Heir; or if a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere, and thereof be proveably [sic] Attainted of open Deed by the People of their Condition: And if a Man slea [sic] the Chancellor, Treasurer, or the King's Justices of the one Bench or the other, Justices in Eyre, or Justices of Assise [sic], and all other Justices assigned to hear and determine, being in their Places, doing their Offices: And it is to be understood, that in the Cases above rehearsed, that ought to be judged Treason which extends to our Lord the King, and his Royal Majesty." 25 Edw. 3 St. 5 c. 2. Statutes of the Realm, Vol. I, 319-320.

The provision which had next followed, which gave protection to an accused, was repealed by the Statute Law Revision Act 1948, s. 1, Public General Acts and Measures of 1948, Law Reports Statutes 1948 (H.M.S.O.), 1411 (according to other statutory sources, the provision was repealed not by this Act, but by the Statute Law Revision Act 1950: Statute Revised, 3rd. ed., vol. XXXII, 390 (H.M.S.O.); Halsbury's Statutes of England, 3rd ed., vol. 32, 682. Sources do not, however, indicate which is the proper repellate (?) Act; whichever, it is repealed):

> "[B]ecause that many other like Cases of Treason may happen in Time to come, which a Man cannot think nor declare at this present Time; It is accorded, That if any other Cases, supposed Treason, which is not above specified, doth happen before any Justices, the Justices shall tarry without any going to Judgment of the Treason, till the Cause be shewed and declared before the King and his Parliament, whether it ought to be judged Treason or other Felony."

The English Law Commission published a Working Paper on Treason in 1978, 627 years after the enactment of the statute (Working Paper No. 72, "Treason, Sedition and Allied Offences", 1978, H.M.S.O., London), which paper suggests reform may be afoot, including unfortunately, removal of the colourful flourish protecting the virtue of royal ladies (32), whose consent to the offence would not appear to be a defence: Anne Boleyn, Katherine Howard...The Canadian equivalent which interestingly specially made 'consensual violation' treason, was repealed in the 1955 version of the Criminal Code - Canada is indeed a land of opportunity for Britons. The previous Canadian provision (s. 74(j)) was: "Treason is... violating, whether with her consent or not, a Queen consort, or the wife of the eldest son and heir apparent, for the time being, of the King or Queen regnant."

3. "So as if a man had compassed the death of another, and

condition",[4] "the uneasiness of crowned heads [finding] little solace in a law which punished treasonable acts only if they were successful in their object."[5] Sufficient overt acts

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3. (cont.) had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the excution of his compassing. But...in the Case of the King, if a man had compassed or imagined the death of the King (who is the Head of the Common Wealth) and had declared his compassing or imagination by words or writing, this had been High Treason and a sufficient overture by the ancient Law," Coke, Third Institute 5 (5th ed., 1671, J. Streater, London).

M. Hale believed the compassing was "an act of the mind": "Compassing the death of the king is high treason, though it be not effected; but because the compassing is only an act of the mind, and cannot of itself be tried without some overt-act to evidence it, such an overt-act is requisite to make such compassing or imagination high treason," "The History of the Pleas of of the Crown", Vol. I, 108 (1736, Sollom Emlyn, London); whereas M. Foster was anatomically of a different opinion: "For the Compassing is considered as the Treason, the Overt-Act as the Means made use of to effectuate the Intention and Imaginations of the Heart," "A Report of Some Proceedings on the Commission ... and Goal [sic] Delivery for the trials of the Rebels in the Year 1746 in the County of Surrey, and of other Crown Cases", 194 (1762, Moore, Dublin). "The general principle of our penal code is to punish the act, and not the intent; with the single exception of high treason, where the traiterous [sic] intent constitutes the crime; but even there it must be manifested by some overt act," per counsel Topping, R. v. Higgins (1801) 2 East 3, 102 E.R. 269, 271 (K.B.). "The highest crime known to the law, that of high treason, is singularly enough defined as consisting in intention; so that even complete execution of the design is only evidence of the intention which constitutes the offence," F. Pollock, "First Book of Jurisprudence", 161 (4th ed., 1918, Macmillan, London).

4. As the Statute (1351) states: "and thereof be proveably [sic] Attainted of open Deed by the People of their Condition."

5. Per Crisp, J., Haas v. R. [1964] Tas. S.R. 1, 16 (Tas. Ct. Crim. App.). Besides, there appears to be a tradition that "traitors" who carry out a successful coup d'etat are not susceptible to prosecution under the treason laws of the old regime, thus encouraging early intervention - as history shows, successful "traitors" often become heads of state.

include letters,[6] published writings inciting treason,[7] and consulting with others of similar treasonous intent;[8] unpublished writings are not a sufficient overt act, though they have been admitted in evidence.[9] With regard to Section 46(2)(d), the learned authors Mewett and Manning comment that "it is the forming of the intent that is the substance of the offence. An overt act is required that manifests this intent...,"[10] citing as authority Re Schaefer.[11] Might it be suggested that because of the present wording of paragraph (d), "forms an intention...and manifests that intention by an overt act," the relation between intention and overt act is substantive rather than evidential, the offence consisting in

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6. R. v. Bleiler (1917) 35 D.L.R. 274, 277, 28 C.C.C. 9, 12 (Alta. C.A.).

7. R. v. Twyn (1663) 6 St.Tr. 514 (Old Bailey).

8. R. v. Tonge (1662) 6 St.Tr. 226 (Old Bailey).

9. R. v. Layer (1772) 16 St.Tr. 94, 280-1 (K.B.). In R. v. Hensey (1758) 19 St.Tr. 1341 (K.B.) the papers were discovered in the accused's bureau. In 1671 a French Canadian was convicted in Quebec City of Lèse Majesté (treason) for having spoken ill of a late king of England, one Charles, who had never been the French Canadian's monarch. His punishment included inter alia, having curiously, a fleur-de-lis branded on his cheek with a red hot iron: R. Riddell, "Bygone Phases of Canadian Criminal Law", (1932) 23 Jo. Crim. L. and Crim. 51, 59-60.

10. A.W. Mewett, Q.C., and M. Manning, Q.C., "Criminal Law", 380 (1978, Butterworths, Toronto), which statement is the commonly accepted position, see supra, note 4.

11. (1918) 31 C.C.C. 22 (Que. C.A.). Cross, J., notes at 26: "In general the law takes no account of mere intent. No one can be convicted of the crime for having intended to murder or to steal, unless he have [sic] done an act. It is not so in the case of treason. In contemplation of law, the intent is the treason."

the intention and the overt act, not in the intention as evidenced by the overt act? In the 1351 Treason Act, there is not as direct a connection between the intention and the overt act. That is, it may have been that the intention was the basic element in treason in the 1351 Treason Act, but the present section in Canada establishes a connective duality. It is due to the perceived proscription of "compassing or imagining" and the broadening of the boundaries of treason[12] that the U.S. Constitution provides:

> "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[13]

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12. Ex parte Bollman (1807) 8 U.S. 75 (U.S. Sup. Ct.).

13. Art. 3. It is, however, by no means a paragon of clarity; what do "Enemies", "adhering", "giving...Aid and Comfort", "levying War", "overt act", for example mean? There has been much protracted litigation over these and other ambiguities in the provision. ("Sweet are the uses of attempted assassination, if it be the means of shedding new light on one of the obscurest departments of the criminal law...," "Criminal Attempts - I", (1882) 16 Irish L.T. 573.) The U.S. Supreme Court has stated:

> "The framers' effort to compress into two sentences the law of one of the most intricate of crimes gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application. There are few subjects on which the temptation to utter abstract interpretative generalizations is greater or on which they are more to be distrusted. The little clause is packed with controversy and difficulty...," Cramer v. United States (1945) 325 U.S. 1, 46-47 (U.S. Sup. Ct.).

The 'two witnesses to one overt act' rule had been also part of English Treason Law (Treason Act 1695, s. 2), but was repealed between the arrest of Mr. W. Joyce ("Lord Haw Haw") and his trial, by the Treason Act 1945, s. 2(1). In such trial it is a fact that only one witness was

It might also be noted that treason cannot be attempted, the 'attempt' itself being treason.[14]

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13. (cont.) produced, an Inspector Hunt, who was able to identify Mr. Joyce's voice in propoganda broadcasts from Germany during World War II: J.W. Hall, "The Trial of William Joyce", 211, 224 (1946, William Hodge and Co. Ltd., London). (The book commences with a peculiar quote from Samuel Pepys' Diary, of 14 Aug. 1664: "By and by comes W. Joyce, in his silke suit, and cloake lined with velvett: staid talking with me, and I very merry at it. He supped with me; but a cunning, crafty fellow he is, and dangerous to displease, for his tongue spares nobody.") Mr. Justice Tucker, perhaps sensitive to the recent abolition of the 'two witnesses to one overt act rule', and the benefit of such to the prosecution, remarked in his summing-up to the jury: "The offence of treason is hundreds and hundreds of years old; the very Act under which he is being prosecuted is an Act nearly 600 years old - 1351. It has been amended from time to time...and it has been found to serve its purpose, so far as I know, for 600 years without difficulty, and certainly without recent amendment so far as the essentials of the offence are concerned," which, with regard to the substantive (but not the procedural) law, is technically correct. (Emphasis added.) However this provided little solace (or procedural protection) to Mr. Joyce. He was hanged (hung? - not that it matters to Mr. Joyce), on Jan. 3, 1946. The case is reported at: [1946] A.C. 347, 1 All E.R. 186 (H.L.).

See also C. Horsford, "Treason: The Dark Crime", (1982) 79 L.S. Gaz. 1364.

14. Criminal Code of Canada:

s. 46(1) "Every one commits high treason who, in Canada,

(a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;

(b) levies war against Canada or does any act preparatory thereto; or

(c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are.

(2) Every one commits treason who, in Canada,

(a) uses forces or violence for the purpose of overthrowing the government of Canada or a province;

... (d) forms an intention to do anything that is high is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; ..."

Emphasis added.

See R. v. Bleiler (1917) 28 C.C.C. 9, 11, 35 D.L.R. 274, 276 (Alta. C.A.). Though there is no offence of attempted treason, assisting an enemy, as well as assisting another person in assisting an enemy, is covered by what is now

(4) THE TYPE OF MENS REA NEEDED FOR ATTEMPT: ONLY A 'DIRECT' INTENT WILL SUFFICE

The mens rea of attempt is the 'actual', 'direct', 'specific' intent of the completed offence. If the definition of the offence requires that a consequence be achieved by the actor, the actor must have had the intention to achieve that consequence,[1] not merely have been reckless or negligent. In R. v. Whybrow, the accused had assembled an electrical apparatus whereby he could administer an electrical shock (to his wife) whilst she was in the bath. The wife did not die, Mr. Whybrow being charged with attempted murder. The trial judge, Parker, J., instructed the jury that they could convict of attempted murder if they found either that the accused had an intent to kill or an intent to do grievous bodily harm. A full court of the Court of Criminal Appeal held this direction to be erroneous; Lord Goddard, C.J.:

> "In murder...if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm... But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that if one attacks a person intending to do grievous bodily harm and death results, that is a murder, but

1. "It is...clear that [intention] means what is often referred to as 'specific intent' and can be defined as 'a decision to bring about a certain consequence' or as the 'aim'," per James, L.J., R. v. Mohan [1975] 2 All E.R. 193, 198 (English C.A.).

that if one attacks a person and only intends to do grievous harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm."[2]

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2. (1951) 35 Crim. App. R. 141, 146-147 (C.C.A.). The accused's conviction was nevertheless affirmed. It may be that an Australian gentleman, a Mr. Collingridge, had read Whybrow ("Whybrow, a married man with a family, was carrying on a liaison with another young woman. That, of course, was put forward as the motive, and, indeed, is the oldest motive in the world....[Whybrow] had had some, but no very great experience of electrical installations. He had been a labourer in the employ of the electrical department of the Southend Corporation Electricity Works.... On the night of the alleged crime the wife was taking a bath and the appellant was in an adjoining room. The wife was heard to call out, and she complained of having received an electric shock while in the bath. The next day it came to light that an apparatus had been connected with the soap dish..." (144 of the judgment)), for he (Mr. Collingridge) had selected the same method of disposing of his wife, electrocuting her in the bath; fortunately he only succeeded in treating her to a tingling sensation, and having admitted to one of the police officers that he was "trying to knock my missus off," he was charged with attempted murder. The Supreme Court of South Australia, without any mention of Whybrow, followed the ratio of that case, quoting approvingly the Australian trial judge:

> "To constitute an attempt to murder, there must be an actual intention to kill. You can only attempt to do something if you intend to do it. So it would not be sufficient, for instance, if the accused, although not intending to kill his wife, realized that what he was doing might possibly endanger her life or might even be likely to endanger her life and went ahead recklessly and not caring whether that result came about or not. That would not be enough to constitute an attempt. To attempt to murder you have to actually intend to do it."

R. v. Collingridge (1977) 16 S.A.S.R. 117 131 (S. Aus. Sup. Ct.). Mr. Whybrow's efforts in 1951 merited 10 years imprisonment, Mr. Collingridge in 1976 also received 10 years, though with hard labour.

In another case, "[during] the afternoon...P.C. Sales, in uniform, saw a motor car being driven towards him....The officer estimated the speed of the vehicle to be in excess of the permitted limit of 30 mph. He...[held] up his hand, [and] signalled the driver to stop....P.C. Sales leapt out of the way and so avoided being struck."[3] A Mr. Mohan was charged inter alia with attempting by wanton driving to cause bodily harm. This conviction was quashed on the grounds of the trial judge's jury direction which was as follows:

> "It has to be proved that he deliberately drove wantonly, realizing that such wanton driving would be likely to cause, unless interrupted by some reason, bodily harm to Sales, or that he was reckless as to whether such bodily harm would be caused by his wanton driving."[4]

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3. R. v. Mohan [1975] 2 All E.R. 193, 194 (English C.A.). The laconically reported facts are no rival to an incident in early Canadian law enforcement, as entered in a policeman's report: "On the 17th inst., I, Corporal Hogg, was called to the hotel to quiet a disturbance. I found the room full of cowboys, and one Monaghan, or 'Cowboy Jack', was carrying a gun and pointed it at me, against sections 105 and 109 of the Criminal Code. We struggled. Finally I got him handcuffed behind and put him inside. His head being in bad shape I had to engage the services of a doctor, who dressed his wound and pronounced it as nothing serious. To the doctor Monaghan said that if I hadn't grabbed his gun there'd be another death in Canadian history. All of which I have the honor to report. (Signed) C. Hogg, Corporal." Quoted by A.L. Haydon in "The Riders of the Plains: A Record of the Royal Northwest Mounted Police of Canada: 1873-1910" (1910, A. Melrose, London).

4. R. v. Mohan, ibid., 195-196. The accused's conviction for dangerous driving, for which he received 12 months' imprisonment, was not interfered with. See note, R. v. Mohun [sic] (1976) 40 J. Crim. L. 38. In Mohan, as noted in the text, the police officer saw a vehicle being driven in excess of the permitted speed limit, and stepped on the roadway, signalling the driver to stop. The driver slowed down, then ten yards away accelerated hard in the direction of the officer, perhaps so that the

The English Law Commission would affirm

4. (cont.) officer would jump out of the way (which he did), and the driver escape. Might there have been confusion between intention and motive here? Sir J.F. Stephen, in his "History of the Criminal Law", Vol. II, 110 (1883, Macmillan, London) anticipated the problem by some years, warning against "two common fallacies, namely the confusion between the motive and intention, and the tendency to deny an immediate intention, because of the existence, real or supposed, of some ulterior intention. For instance, it will often be argued that a prisoner ought to be acquitted of wounding a policeman with intent to do him grievous bodily harm, because his intention was not to hurt the policemen, but only to escape from his pursuit...if the difference between motive and intention were properly understood, it would be seen that when a man stabs a police constable in order to escape, the wish to escape lawful apprehension is the motive, and stabbing the policeman the intention, and nothing can be more illogical than to argue that a man did not entertain a given intention because he had a motive for entertaining it. The supposition that the presence of an ulterior intention takes away the primary immediate intention is a fallacy of the same sort." Mr. Mohan perhaps would rather not cause any injury to the police officer, bearing no ill-will to that particular police officer or to police officers generally. But Mohan finds his only escape route blocked by that police officer, and decides to take that route. Cannot it be reasonably stated that Mohan, confronted with the choice of being apprehended or injuring a police officer (which police officer is directly in the path of the accelerating vehicle Mohan is driving), and deciding to injure the police officer, did have the intention to cause bodily harm and therefore should have been guilty of attempt? That is, intention to cause certain acts, the result of which would appear to cause certain proscribed consequences should be equated with intent, as defined by law, so that such mental element suffices for attempt - any layman would quickly infer that if one drives a car at a police officer, one intends to injure that police officer.

A recent S.C.C. decision, R. v. Lewis (1979) 27 N.R. 451 (S.C.C.) is most significant in this regard. The following is taken from the judgment of Dickson, J., (459-65):

> "There would appear to be substantial agreement amongst textwriters that there are two possible meanings to be ascribed to the term [motive]. Glanville Williams in his 'Criminal Law, The General

Mohan

4. (cont.) Part', (2nd ed., 1961, Stevens, London) distinguishes between these meanings:

> (1) It sometimes refers to the emotion prompting an act, e.g., 'D killed P, his wife's lover, from a motive of jealousy.' (2) It sometimes means a kind of intention, e.g., 'D killed P with the motive (intention, desire) of stopping him from paying attentions to D's wife.' (48)....[I]n Hyam v. D.P.P. [1975] A.C. 55 (H.L.)...the appellant had had a relationship with a man who became engaged to another woman, B. The appellant had gone to B's house at night and set fire to the house. While B escaped [and B's son], her two daughters did not and the two died of suffocation. The appellant's defence was that she had only intended to frighten B. If one were to use the first sense of motive as emotion, the appellant's admitted motive was jealousy of B; if the second sense of motive as ulterior intention, her motive was to frighten B so that she would leave the neighbourhood. In the former sense, states Lord Hailsham, 'it is the emotion which gives rise to the intention and it is the latter, and not the former, which converts as actus reus into a criminal act.'

It is, however, important to realize that in the second sense too, motive, which in that sense is to be equated with the ultimate 'end' of a course of action, often described as its 'purpose' or 'object', although 'a kind of intention', is not co-extensive with intention, which embraces, in addition to the end, all the necessary consequences of an action including the means to the end and any consequences intended along with the end.

> ...Accepting the term 'motive' in a criminal law sense as meaning 'ulterior intention', it is possible, I think, upon the authorities, to formulate a number of propositions.
>
> (1) As evidence, motive is always relevant and hence evidence of motive is admissible.
>
> ...(2) Motive is no part of the crime and is legally irrelevant to criminal responsibility. It is not an essential element of the prosecution's case as a matter of law.
>
> ...(3) Proved absence of motive is always an important fact in favour of the accused and ordinarily worthy of note in a charge to the jury.
>
> ...(4) Conversely, proved presence of motive may be an important factual ingredient in the Crown's case, notably on the issues of identity and intention, when the evidence is purely circumstantial.
>
> ...(5) Motive is therefore always a question of fact and evidence and the necessity of referring to motive in

in legislation,[5] and states "that the concept of the mental element in attempt should be expressed as an intent to bring about each of the constituent elements of the offence attempted... [T]his may be stated as an intent to commit the offence intended."[6]

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4. (cont.) the charge to the jury falls within the general duty of the trial judge 'to not only outline the theories of the prosecution and defence but to give the jury matters of evidence essential in arriving at a just conclusion.'
(6) Each case will turn on its own unique set of circumstances. The issue of motive is always a matter of degree."

5. "Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement", 87 (Law Com. No. 102, 1980, H.M.S.O., London).

6. Ibid., 10-11. It would seem that the U.S. Model Penal Code would marginally enlarge the intent requirement to include anything done "with the belief that it will cause" the proscribed result:

> "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
> (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or
> (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime."

(See Model Penal Code, (1960) Tentative Draft No. 10, 27-28.) State legislatures, however, have drafted the mental element requirement otherwise, with opposite results, e.g. Proposed California Criminal Code (s. 700): "...a specific intent to commit the crime [attempted]" (emphasis added). One commentator has observed: "Since this language could be interpreted to require a subjective element on the part of the accused to commit the crime he is charged with attempting, it

Though it has been said that "[t]here is curiously little authority on the point,"[7] there appears to be quite considerable authority and dicta establishing the proposition that only an 'actual' 'direct' 'specific' intent will suffice for an attempt, (even though the offence attempted may only require recklessness, negligence, or indeed strict liability): in England,[8] Canada,[9]

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6. (cont.) is a potentially narrower intent requirement than under existing law," R.J. Kaplan, "Attempt, Solicitation, and Conspiracy under the Proposed California Criminal Code," (1972) 19 U.C.L.A. L.R. 603, 607-8. See also Wisconsin Stat. Ann., s. 939.32(2) (1958); New York Penal Law, s. 110.00 (McKinney, 1975); Minnesota Stat. Ann., s. 609.17, subd. 1 (West 1964); Oregon Rev. Stats., s. 116.405(1) (1977); Illinois Ann. Stat. ch. 38, s. 8-4 (Smith-Hurd 1972).

7. J.C. Smith, "Two Problems in Criminal Attempts Re-Examined - I", [1962] Crim. L.R. 135.

8. R. v. Doody (1854) 6 Cox. C.C. 463 (Oxford Circuit, Staffordshire Spring Assizes); R. v. Loughlin [1959] Crim. L.R. 518 (English C.A.); R. v. Grimwood [1962] 2 Q.B. 621 (H.Ct.J., Q.B.); R. v. Cook (1963) 48 Crim. App. R. 98, 104 (Ct. Crim. App.); R. v. Duckworth [1892] 2 Q.B. 83, 87, (Liverpool Assizes); R. v. Cruse (1838) 8 Car. & P. 541, 173 E.R. 610 (Abingdon Assizes); R. v. Boyce (1824) 1 Moody 29, 168 E.R. 1172 (Old Bailey Sessions); R. v. Donovan (1850) 4 Cox C.C. 401, 401-402 (Central Crim. Ct.) (In the last case the accused was convicted of attempted murder, graphically described "by then and there feloniously casting, throwing and forcing with both his hands the said Ann Donovan upon the front part of her head, from and out of a certain window, there, down, upon, and against the ground..."). See also J.N. Spencer, "Criminal Attempts in Relation to Murder", (1982) 146 J.P. 3.

9. R. v. Quinton [1947] S.C.R. 234, 235 (S.C.C.); R. v. McCarthy (1917) 41 O.L.R. 153, 153-154, (Ont. Sup. Ct.); R. v. Walker (1964) 2 C.C.C. 217, 219 (Que. C.A.). In a recent (unreported) case, R. v. Triller (Vanc. Isld. Co. Ct., Nanaimo, Mar. 6, 1980), involving attempted bestiality with a (male) golden labrador ("witnesses saw this occurring, both with naked eye and by looking through binoculars" ("On at least three occasions")), Cashman, J., states "As to the...question as to whether an attempt to commit an offence imports some different

Australia,[10] New Zealand,[11] the United States,[12]

9. (cont.) to the full offence I am satisfied that both in law and by common sense that it does not" (6). This general statement would not accord with the authorities cited in this section, which state that only a strict intent is sufficient for attempt, though the statement would, it is submitted, accord with common sense if recklessness is sufficient for the offence attempted (see infra). R. v. Triller is now reported at (1981) 55 C.C.C. (2d) 411 (B.C. Co. Ct.).

10. R. v. Matthews (1863) 2 S.C.R. (N.S.W.) 227 (N.S.W. S.C.); R. v. Spartels [1953] V.L.R. 194 (Vic. S.C.); R. v. Catlin [1961] Tas S.R. 191, 192 (Tas. Sup. Ct.); Haas v. R. [1964] Tas. S.R. 127 (Tas. Ct. Crim. App.); R. v. Bell [1972] Tas. S.R. 127 (Tas. Ct. Crim. App.); R. v. Collingridge [1976] S.A.S.R. 117 (S. Aus. Sup. Ct.). It is most difficult, consequently, to see how an Australian writer, without distinguishing the above authority, or citing any other authority in support, can make the bold general statement that "the requisite intention for the attempt will be the same as for the completed offence": R.S. O'Regan, "Essays on the Australian Criminal Codes", 137 (1979, Law Book Co. Ltd. of Australia, Sydney).

11. R. v. Murphy [1969] N.Z.L.R. (N.Z.C.A.).

12. People v. Frysig (1981) 29 Cr. L. Rptr. 2287 (Colo. Sup. Ct.); State v. Cass (1928) 146 Wash. 585, 264 P. 7 (Wash.S.C.); State v. Prince (1930) 75 Utah 205, 284 P. 108 (Utah S.C.); People v. Miller (1935) 2 Cal. 2d 527, 42 P. 2d 308 (Cal. S.C.); People v. Goldstein (1956) 146 Cal. App. 2d 268, 303 P. 2d 892 (Cal. Dist. C.A.); Preddy v. Commonwealth (1946) 184 Va. 765, 36 S.E. 549 (Va. S.C. of Apps.); Scott v. People (1892) 141 Ill. 195, 30 N.E. 329 (Ill. S.C.); De Krasner v. State (1936) 54 Ga. App. 41, 187 S.E. 402 (Ga. C.A.); Thacker v. Commonwealth (1922) 134 Va. 767, 770, 114 S.E. 504, 505-506 (Va. S.C. of Apps.); People v. Lanzit (1924) 70 Cal. App. 498 (Cal. Dist. C.A.); People v. Mize (1889) 80 Cal. 41 (Cal. S.C.); People v. Fleming (1892) 94 Cal. 308, 22 P. 80 (Cal. S.C.); People v. Keefer (1861) 18 Cal. 637, 29 P. 647 (Cal. S.C); Simpson v. State (1877) 59 Ala. 1, 31 Am. Rep. 1 (Ala. S.C); Moore v. State (1851) 18 Ala. 532 (Ala. S.C); State v. Hager (1901) 50 W.Va. 370, 40 S.E. 393 (W.Va. S.C. of Apps.); Hankins v. State (1912) 103 Ark. 28, 145 S.W. 524 (Ark. S.C.); State v. Lockwood (1909) 24 Del. (1 Boyce) 28, 74 A. 2 (Del. Ct. Gen. Sess.); State v. Meadows (1881) 18 W. Va. 658 (W. Va. S.C.); Heard v. State (1906) 38 Ind. App. 511, 78 N.E. 358 (Ind. App. Ct.); State v. Thompson (1909) 31 Nev. 209, 101 P. 557 (Nev. S.C); State v. Sullivan (1951) 146

and elsewhere.[13] This results in perhaps a peculiar consequence, in that where for the mens rea of a complete offence, recklessness, neligence or even no mens rea (strict liability) can suffice, for the attempt of that full offence nothing less than a full direct intent is required. It is anomalous that a more strict, more culpable, state of mind is required for attempt than for the full offence attempted. Thus, while A may commit the full offence of the murder of V, without the intention to murder V, indeed without the intent to murder anybody,[14] A cannot be convicted of attempted murder of V unless there is an actual, specific, direct, full intent to murder V.[15]

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12. (cont.) Me. 381, 82 A. 2d 629 (Me. Sup. Jud. Ct.). But cf: Messer v. State (1969) 120 Ga. App. 747, 172 S.E. 2d 194, cert. denied (1970) 400 U.S. 866, 27 L. Ed. 105, 91 Sup. Ct. 107 (U.S.S.C): Payne v. State (1946) 74 Ga. App. 646, 652, 40 S.E. 2d 759, 764 (Ga. C.A.); Zickefoose v. State (1979) 388 N.E. 2d 507, 510 (Ind. S.C.); Rhode v. State (1979) 391 N.E. 2d 666, 668 (Ind. Ct. App.); Gray v. State (1979) 403 A. 2d 853, 855 (Md. Ct. Spec. App.).

13. People v. Palou (1955) 80 P.R.R. 351 (Sup. Ct. Puerto Rico); R. v. Bauoro-Dame [1965-66] P. & N.G.L.R. 329 (Sup. Ct. Papua & New Guinea); R. v. Bena-Forepe [1965-66] P. & N.G.L.R. 329 (Sup. Ct. Papua & New Guinea).

14. The 'felony-murder' situation.

15. For example, in R. v. Bourdon (1847) 2 C. and K. 366, 172 E.R. 151 (Berkshire Assizes), the accused struck the victim on the head with a towel-roller, knocking him to the ground, Maule, J., instructing the jury that "If the prisoner had killed this man, it would have been murder whether he intended to kill him or not; but I think that there is hardly evidence here to support a charge of an intent to murder" (152). See also Merritt v. Commonwealth (1935) 164 Va. 653, 660, 180 S.E. 395, 398 (Va. Sup. Ct. Apps.); Moore v. State (1851) 18 Ala. 533, 534 (Ala. S.C.); State v. Taylor (1896) 70 Vt. 1, 9, 39 A. 447, 450 (Vt. S.C.).

(5) A CANADIAN, SCOTTISH, AND SOUTH AFRICAN EXCEPTION FOR THE MENS REA OF ATTEMPT

If an accused, A, produced a machine gun in court[1] in which persons were present, and deliberatley sprayed the court with machine-gun bullets, not intending to injure or kill anybody, though reckless, by the strict English position A could not be convicted of attempted murder. Even if his intention was to injure, not to kill, and was reckless with regard to the consequences (death of a person or persons in court), attempted murder could not be charged - unless a judge sitting alone or a jury concluded that these facts permitted an artificial imputation of intent (in the legal sense of the word), which, given the strict English position and the stated mental element, would be illogical. Such may be the legal sleight of hand[2] an English judge or jury would have to do to

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1. This example is taken from one used by Lord Guthrie in Cawthorne v. H.M.A. [1968] S.C. (J.C.) 32, S.L.T. 330, 333 (Scottish H.C. Justiciary).

2. For an example of some (confused) legal gymnastics vis-à-vis intent and recklessness, see A.-G. of Southern Rhodesia v. Chiswimbo [1961] Rhodesia and Nyasaland L.R. 637, 638-640 (Rh. Fed. S.C.); (the same case also appears at [1961] 2 South Africa L.R. 714 under the name of R. v. Chiswibo):

> "At the time when the [R]espondent hit the deceased he did not actually intend to kill, but constructive intent to kill was proved in that there was appreciation that there was risk to life in what he was doing coupled with recklessness as to whether or not that risk was fulfilled in death....Where an accused person does not actually desire to kill, and he is shown to have intent to kill by reason of appreciation of the risk to life in what he does, coupled with recklessness as to whether the risk is fulfilled in death, the proof of intent is necesarily bound up with what is done, for the appreciation is of risk in doing that act." (Per Clayden, C.J.).

convict of attempted murder, which is patently contrary to English case law,[3] though connived at in practice.[4] Of

3. For example, R. v. Whybrow (1951) 35 Cr. App. R. 141, 146-147 (English C.A.).

4. "[O]n the question whether or not the accused had the necessary intent in relation to a charge of attempt, evidence tending to establish directly, or by inference, that the accused knew or foresaw that the likely consequence, and, even more so, the highly probable consequence, of his act - unless interrupted - would be the commission of the completed offence, is relevant material for the consideration of the jury. In our judgment, evidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not, in relation to the offence of attempt, to be equated with intent. [But nevertheless intent can be found.] If the jury find such knowledge established they may and, using common sense, they probably will find intent proved, but it is not the case that they must do so."

Per James, L.J., R. v. Mohan [1975] 2 All E.R. 13, 20 (English C.A.).

"[R]eckless disregard of human life may be the equivalent of a specific intent to kill."

Per MacIntyre, J., Payne v. State (1946) 40 S.E. 2d 759, 764 (Ga. C.A.).

"One may shoot recklessly into a crowd or a railway station, or in other ways so as to manifest an apparent intention to kill, in which event his offence is murder even though there be no specific intent to cause the death of the party so killed."

Per Lattimore, J., Haynes v. State (1920) 224 S.W. 1100, 1101 (Texas C.A.).

"Where an accused does not actually desire to kill, and he is shown to have intent to kill by reason of appreciation of the risk to life in what he does, coupled with recklessness as to whether the risk is fulfilled in death, the proof of intent is necessarily bound up with what is done, for the appreciation is of risk in doing that act."

Per Clayden C.J., supra, note 2, 640 and 715-16 respectively. See also State v. Leach (1950) 36 Wash. 2d 641, 219 P. 2d 972 (Wash. C.A.). Rather than artificially impute intent (in the legal sense of the term) to dangerous conduct that is only criminal if an intent be present, why not be realistic and admit recklessness as sufficient mens rea for attempt, for that is what is happening in practice.

course, if one of A's bullets happened to kill somebody in the court room, it would be murder. On principle, when the mental element is identical vis-a-vis the completed crime and the attempt, then having the nature, quality and grade of crime depend upon an entirely fortuitous happening (whether A succeeds or not) is reasoning reductio ad absurdum. A's guilt should not depend on the adventitious possibility that the particular harm risked does or does not in fact occur - the distinction should be one of law, not chance. The common sense solution, surely, where A intentionally carries out a dangerous act, but is reckless with regard to the consequences, is that A is guilty of attempt.[5] One jurisdiction, South Africa, applies this common sense solution to attempted crimes generally;[6] two others, Scotland and Canada, to attempted murder. In the Scottish case of Cawthorne v. H.M.A.,[7] the accused

5. See J.C. Smith and B. Hogan, "Criminal Law", 247-248 (4th ed., 1978, Butterworths, London); J.C. Smith, "Two Problems in Criminal Attempts Re-examined", [1962] Crim. L. R. 135-144; D.R. Stuart "Mens Rea, Negligence and Attempts", [1968] Crim.L. R. 655-662; G. Williams: "Common sense suggests that it is legally possible to attempt a crime of recklessness", "Criminal Law: The General Part", 619 (2nd ed., 1961, Stevens & Sons, London); but see G. Williams, "Textbook of Criminal Law", 373 (1978, Stevens & Sons, London), "Even recklessness should generally be regarded as insufficient."

6. "The mens rea [of attempt] consists in intention to commit the crime that the accused is charged to have attempted"; E.M. Burchell and P.M.A. Hunt, "South African Criminal Law and Procedure", vol. 1, 378 (1970, Juta and Co., Cape Town); see the ten cases referred to in note 11 of 378, all of which are in English, apart from R. v. Botha (in Afrikaans) and possibly, S. v. Mundell (unavailable).

7. Supra, note 2.

> "had been living in a lodge on Knockie Estates with the lady known as Mrs. Cawthorne. On the evening in question there was a quarrel between them. He went outside and fired two shots from a .303 rifle, apparently with the purpose of frightening Barbara Brown. Mrs. Cawthorne, Barbara Brown and the two Frasers, who had been called to help them, went into the study, closed the shutters and barricaded the door. [The accused], knowing these four were in the study, fired at least two shots into the room, one through the shutters and one through the door. Both shots travelled across the room low enough to strike a person."[8]

The trial judge, Lord Avonside, charged the jury as follows:

> "the law holds it to be murder if a man dies as a result of another acting with utter and wicked recklessness, and that because the very nature of the attack, the utter and wickedly reckless attack, displays a criminal intention. If such an act does not result in death, none the less the criminal intention has been displayed and is of a quality and nature which results in its properly being described as an attempt to murder."[9]

The accused was convicted of attempted murder, and sentenced to nine years imprisonment. On appeal, the three judges, Lords Clyde, Guthrie and Cameron, upheld the trial judge.[10] A

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8. Ibid., 33 (facts as stated here in S.C., but not in S.L.T.).

9. Ibid., 33-34, 331 respectively.

10. Lord Justice-General Clyde:
> "But there must be in each case [attempted murder and murder] the same mens rea, and that mens rea in each case can be proved by evidence of a deliberate intention to kill or by such recklessness as to show that the accused was regardless of the consequences of his act, whatever they may have been. I can find no justification in principle or in authority for the view...that the mens rea in the case where life is actually taken can be established by evidence of a reckless disregard of the consequences of the act on the part of the accused, but that mens rea cannot be proved in that way where the charge is attempted murder. In the latter case chance or good fortune has resulted in a life being spared, but the wilful intent behind the act is just the same as if the life had in fact been forfeited."

Ibid., 36, 332 respectively.

learned Scottish author, G.H. Gordon, commenting on the case, states that "there is no doubt that the case established that the mens rea for an attempted crime is the same as that for the completed crime."[11] A close reading of the three judgments does not, with respect, appear to offer conducive support to this general conclusion, but only that recklessness is a sufficient mens rea for attempted murder, not attempted crimes generally. Such a conclusion would however be more consonant with reason and with reality, the person whose attempt failed as well as the person whose "attempt" succeeded having the same mental state - from a mens rea point of view, they are parallel in fact, and hence should be parallel in law, the only difference between them being that their act, for some reason independent of the actor's mental state,[12] did not succeed. Such differences should be reflected in charging with attempt or the completed crime, not prohibiting attempt entirely in circumstances (i.e. recklessness) in which the complete crime could be charged, were the "attempt" successsful.

The dubious Canadian case of R. v. McCarthy,[13] in which the accused was convicted of attempt to do grievous bodily harm where it would appear that the accused acted

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11. "The Criminal Law of Scotland", 265 (2nd ed., 1978, W. Green and Son Ltd., Edinburgh).

12. Unless a renunciation defence is attempted, in which case it is not, legally, an attempt.

13. (1917) 41 O.L.R. 153 (Ont. S.C.).

recklessly,[14] not intentionally, with regard to the grievous bodily harm, may have been a precursor to Lajoie[15] in that attempt without intent was found.[16] Lajoie itself resulted from a somewhat inept robbery attempt; the following facts are summarized by Nemetz, J.A., (as he then was):

> "Alexander Von Heyking was a student at the University of British Columbia. He had a part-time job as a taxi driver in the City of Vancouver. On the night of the 28th April 1970 he was flagged down by Lajoie and a female companion and directed to drive to a West End address. On arrival, Lajoie locked the driver's door and before Von Heyking had turned around, Lajoie fired a shot which missed Von Heyking. When the driver turned he saw Lajoie holding a small black hand gun and while he was shaking it Lajoie said, 'Give me your money.' Lajoie and the female alighted from the car. The driver radioed for help and then got out and ran. Lajoie ran after him. When Lajoie was some 30 feet behind him, Von Heyking felt his arm suddenly go numb. Lajoie turned and ran and the driver hailed a passing car which took him to the hospital. There was blood on the back of the driver's shirt some six inches below the shoulder and he correctly concluded that Lajoie had shot him. The following morning a surgeon extracted the bullet. It had passed about an inch below the level of the artery, about an inch from one of the lungs and about three inches from the heart. It is apparent that the victim luckily escaped death."[17]

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14. "The prisoner came down a street toward King Street at a very great speed, he driving an automobile, two women (the deceased and a companion) hanging on the rug-bar back of the front seat, while they were sitting on the rear seat and yelling loudly." Ibid., 154.

15. Lajoie v. R. (1973) 20 C.R.N.S. 360 (S.C.C.).

16. The judge, Riddell, J., was not averse to commenting upon the jury, "of course it is no part of my duty to decide whether the jury should have found as they did - I thought it was a clear case of manslaughter, but that was for the jury....so here, if a soft-hearted or soft-headed juryman stands out against finding the main offence, the jury cannot be prevented from finding an attempt only...," supra, note 13, 155.

17. (1972) 16 C.R.N.S. 180, 191 (B.C.C.A.).

The relevant sections of the Criminal Code here are s. 24(1):

> "Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence."

and s. 212(a):

> "Culpable homicide is murder
> (a) where the person who causes the death of a human being
> (i) means to cause his death, or
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not."

To commit murder therefore, within s. 212(a)(ii), one needs: (1) the death of a human being; (2) the meaning to cause bodily harm; (3) harm of the type that the accused knows is likely to cause death; (4) recklessness whether death ensues of not. If the taxi driver died, there would be no doubt that Lajoie would have satisfied (1) - (4); but the taxi driver did not, and the question therefore is, if all the elments are present, except a death, is there attempted murder? Lajoie did not have the intent to kill, and counsel argued that nothing less than this would suffice. Section 24 states, as noted,

> "Every one who, having <u>an</u> <u>intent</u> to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence...."

The nature of the intent is not however defined. Martland, J., spoke for the unanimous Supreme Court of Canada as follows:

> "If it can be established that the accused tried to cause bodily harm to another of a kind which he knew was likely to cause death, and that he was reckless

as to whether or not death would ensue, then under the wording of [s. 212], if death did not ensue, an attempt to commit murder has been proved....[W]hen s. 24(1) refers to 'an intent to commit an offence', in relation to murder it means an intention to commit that offence in any of the ways provided for in the Code, whether under [s. 212] or under [s. 213]."[18]

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18. Emphasis added. Supra, note 15, 367; i.e., "an intent to commit an offence" did not merely mean an intent to kill. (S. 213 is the constructive ('felony') murder provision:

> "Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if
>
> (a) he means to cause bodily harm for the purpose of
>
> (i) facilitating the commission of the offence, or
>
> (ii) facilitating his flight after committing or attempting to commit the offence,
>
> and the death ensues from the bodily harm;
>
> (b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;
>
> (c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
>
> (d) he uses a weapon or has it upon his person
>
> (i) during or at the time he commits or attempts to commit the offence, or
>
> (ii) during or at the time of his flight after committing or attempting to commit the offence,
>
> and the death ensues as a consequence.")

See, for example, R. v. Trinneer [1970] 3 C.C.C. 289, 11 C.R.N.S. 110 (S.C.C.). For a telling criticism of s. 213 when used in tandem with s. 24(1), see R. v. Sarginson (1977) 31 C.C.C. (2d) 492 (B.C.S.C.); and P. Burns and R.S. Reid, Note (1973) 8 U.B.C. L.R. 364, 370-4; s. 213 is indeed wide, one author recently having observed that "[t]he development of the criminal law, particularly in

Hence, for attempted murder in Canada, intent in the sense of "meaning to cause death" is not necessary.[19] The latter part of the above-noted quote has been criticized by two

18. (cont.) the last 20 years, has reflected a distaste for constructive crime," S. Prevezer, "Criminal Homicides other than Murder", [1980] Crim. L.R. 530, 532. Lajoie would therefore overrule the previous Canadian cases of R. v. Flannery [1923] 3 W.W.R. 97, 19 Alta. L.R. 613, 40 C.C.C. 263, 3 D.L.R. 689 (Alta. C.A.); R. v. Menard (1960) 33 C.R. 224, 130 C.C.C. 242 (Que. C.A.); Tousignant v. R. (1960) 33 C.R. 234, 130 C.C.C. 285 (Que. C.A.); and be directly contra the English case of R. v. Whybrow (1951) 35 Cr. App. R. 141 (English C.A.).

19. To use R. v. Lajoie and/or R. v. Ritchie [1970] 5 C.C.C. 336, 3 O.R. 417, 15 C.R.N.S. 287 (Ont. C.A.), both cases restriced to attempted murder, to support generalizations with regard to attempted crimes generally is, however desirable that consequence, not feasible:

> "[I]n Canada, any form of mens rea that would support a conviction for the substantive offence attempted will also support a conviction for an attempt,"

S.H. Berner, "Developments in Canadian Criminal Law", 7 (1973, University of B.C., Vancouver). (On p. 4 the learned author cites the case of R. v. Timar (1969) 2 O.R. 90 (Ont. Co. Ct.) for a proposition re the attempted procurement of an indecent act wih another man. This may be a surprise to Mr. Timar, who was in fact charged with fraud in connection with obtaining a heating and plumbing licence (charged with fraud, convicted of attempt). The case which the learned author would rather cite, which is not mentioned, is probably that of R. v. Bishop (1970) 3 O.R. 557 (Ont. Prov. Ct.).)

> "[T]he balance of the authority in Canada is now in favour of the proposition that the mens rea for the crime of attempt need not consist in a direct intent but may extend to recklessness, at least in a case where the completed crime can be committed recklessly,"

D.R. Stuart, "The Need to Codify Clear, Realisitic and Honest Measures of Mens Rea and Negligence", (1972-73) 15 Crim. L.Q. 160, 168. (For strong support of the above-noted desirable situation, see "Mens Rea, Negligence and Attempts", by the same author, at [1968] Crim. L.R. 647 (not [1967] Crim. L.R. as referred to in the Crim. L.Q.).)

learned authors that "[t]his logic seems confusing,"[20] though no explanation of the apparent confusion is given. The present writer would submit that it is simply straightforward statutory interpretation of s. 212(a). The authors find the conclusion to be in error, not being substantiated by any principle of criminal law nor supported by any judicial authority.[21] The present writer would in reply firstly point that it is substantiated by a plain reading of two provisions of the Criminal Code, and secondly, that it is supported by a full (and unanimous) Supreme Court of Canada - there being no higher law-makers than the legislature and the highest appellate court. The learned authors ask if "the law [is] punishing a person solely for being reckless to the occurrence of a foreseen event?"[22] The answer to this lies in s. 212 itself:

> "means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues of not"(emphasis added);

one is therefore not punished 'solely for being reckless'. The authors also criticize the view of another learned author, Professor A.W. Mewett, Q.C.,[23] because such view

> "does not take into account the conceptual theory of the law of attempts; rather, it is a rigid adherence to the requirements of the statutory provision and is a decided retreat from the doctrine of mens rea."[24]

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20. P. Burns and R.S. Reid, "Note", 8 U.B.C.L.R. 364, 370.

21. Ibid., 365.

22. Ibid., 368.

23. A.W. Mewett, Q.C., "Attempt to Murder Recklessly", (1972) 15 Crim. L.Q. 19.

25. Supra, note 20, 369.

Firstly, if it be part of the conceptual theory of the law of attempts that it be not possible to charge an accused with attempted murder if there be an identical mental element and circumstances to those necessary for the complete crime (except for a fortuitous consequence, the victim not having died), such conceptual theory is not consonant with rationality - an accused who beats a victim "to within an inch of death" should not be permitted to plead his ability to measure that inch on an attempted murder charge, where a slight miscalculation on the part of the accused (or no miscalculation, the victim having a particularly thin skull/weak heart) would ensure a murder conviction.[25] Secondly, adherence to the requirements of statutory provisions is generally desirable;[26] thirdly, it

25. "One can visualize a situation in which a defendant said, 'True, I intended to inflict really serious injury on my victim, but it is most unfortunate that he died, I did not really intend to endanger his life'," per Lord Hailsham, Hyam v. D.P.P. (1974) 59 Crim. App. R. 91, 99 (H.L.). It may be that the accused did not intend to cross the line (commit muder), but only approach very close to the line; but if he in fact crossed the line (committed murder), it is no defence for him to allege he desired to keep within it; similarly, if he was, for example, interrupted as he was approaching the line, an attempt charge should here be available. Even intention to commit grievous bodily harm plus recklessness as to the consequences is not, under the English common law, sufficient to found an attempted murder charge: R. v. Mohan [1975] 2 All E.R. 193 (English C.A.); R. v. Loughlin [1962] 2 Q.B. 621 (H.Ct.J., Q.B.).

26. Compare for example a recent instance of non-adherence: though s. 27 Companies Act R.S.A. 1970 c. 60 stated "A certificate of incorporation given by the Registrar...is conclusive proof...," the Alberta Court of Appeal held that the certificate was not conclusive: C.P.W. Valve v. Scott et al (1978) 84 D.L.R. (3d) 673, 8 A.R. 451, 3 B.L.R. 204, 5 Alta. L.R. (2d) 271; the same court, indeed

is not a retreat from the doctrine of mens rea, but further development of it in its wider sense, in that recklessness is

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26. (cont.) the same bench, on similar wording ("conclusive evidence", s. 244(4) Income Tax Act R.S.C. 1952) held that a certificate of the Minister of National Revenue was conclusive: Re Medicine Hat Greenhouses and German and the Queen (No. 3) (1979) 45 C.C.C. (2d) 27. Somewhat reminiscent of a judicial remark of Lord Hermand (a Scot): "But then we're told that there's a statute against all this. A statute! What's a statute? Words. Mere words! And am I to be tied down by words? No, my Laards [sic]; I go by the law of right reason," Sir Henry Cockburn, "Memorials of His Time", 137 (1856, Adam and Charles Black, Edinburgh).

Other passages in this book throw illuminating insight on this redoubtable judge: He was "very gregarious,...fond of the pleasures, and not least of the liquid ones, of the table; and he had acted in more of the severest scenes of old Scotch drinking than any man at last living....[H]e had a sincere respect for drinking, indeed a high moral approbation, and a serious compassion for the poor wretches who could not indulge in it; with due contempt of those who could but did not.... No carouse ever injured his health...[As counsel, his] eagerness made him froth and sputter so much in his argumentation...that when he was once pleading in the House of Lords, the Duke of Gloucester, who was about fifty feet from the bar...rose and said with pretended gravity 'I shall be much obliged to the learned gentleman if he will be so good as to refrain from spitting in my face.' ...He was very intimate at one time with Sir John Scott, afterwards Lord Eldon. They were counsel together in Eldon's first important Scotch [what Lord Hermand drank, 'Scottish' is the proper adjective] entail case in the House of Lords. Eldon was so much alarmed that he wrote his intended speech, and begged Hermand to dine with him at a tavern, where he read the paper, and asked him if he thought it would do. 'Do, Sir? It is delightful - absolutely delightful! I could listen to it for ever! It is so beautifully written! And so beautifully read! But Sir, it's the greatest nonsense! It may do very well for an English chancellor; but it would disgrace a clerk with us.' ...Many a bottle of port did he and Eldon discuss together" (134-137).

For a, by comparison, exceedingly dry exposition of judicial liberties with a statutory provision, see E.R. Meehan, "Evidential Controvertibility of Canadian Company Law 'Conclusive Proof'", (1980) 130 New L.J. 1075. See now, E.R. Meehan, "Corporate Certificates - Now Conclusive", (1983) 21 Alta. L.R. 386.

now a sufficient partial element[27] of the mens rea of attempted murder, it not being so previously, and in that a combined subjective and objective mens rea ("means to cause him bodily harm that he knows is likely to cause death, and is reckless whether death ensues or not") is apparent rather than a purely "knew or ought to have known" objective [28] mens rea. One final criticism by the learned authors is that "no purpose of the criminal law is served by punishing a person for attempting a crime of which he had no intention of committing;"[29] with respect, the learned authors tend here to write in a headline, using a semantic and colloquial argument to form a legal policy argument; "attempting" can mean 'Attempt' as it is legally defined, or 'attempt' in the English sense of 'to try', and though literally true, the sentence would suggest that the commission of crime was the farthest thing from the accused's mind, that the accused was determined to do anything but commit crime. One can 'try' to commit crime without having intention as strictly defined by law, by acting voluntarily, with a distinctive condition of cognition or mental appreciation, recklessness, as Lajoie

27. The other element being "meaning to cause bodily harm that the accused knows is likely to cause death."

28. See e.g., s. 212(c):
"Culpable homicide is murder
...(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being."

29. Supra, note 20, 370.

had. Lajoie had "no intention of committing" murder, but yet was guilty of attempted murder. Strict legal intention is clearly not the only mental state capable of attracting criminal liability. Moreover, is it not also literally true, to use the learned authors' phraseology, that 'criminal law punishes a person for committing a crime of which he had no intention of committing,' a proposition the learned authors must needs accept, it being universally accepted by criminal justice systems recognizing any culpable mental element short of specific intent?[30] How can one commit (i.e. complete) an offence one has no intention of committing? It happens all the time.[31]

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30. A cogent criticism by the learned authors of the inclusion of s. 213, which was quite alien to the disposition of the s. 212 appeal, in Martland's judgment, is at 370-374 of the learned authors' article. Criticism also hails from New Zealand in that "Lejoie" [sic] made no reference to an indigenous case, R. v. Murphy [1969] N.Z.L.R. 959 (N.Z.C.A.) (which held contrary to Lajoie), though it is graciously conceded that "it seems likely that the Canadian Court would not have been swayed by the brief oral judgment of the New Zealand Court, which fails to analyse the statutory provisions": "The Mental Element in Criminal Attempts", [1975] New Zealand L.J 286, 287. Supreme Court Justices need therefore no longer take heed of contrary brief New Zealand oral judgments which fail to analyse statutory provisions.

31. See G. Williams, "Textbook of Criminal Law", supra, note 5, 42-106; A.W. Mewett, Q.C., and M. Manning,Q.C., "Criminal Law", 85-136 (1978, Butterworths, Toronto); G.H. Gordon, "The Criminal Law of Scotland", supra, note 11, 213-295; J.C. Smith and B. Hogan, "Criminal Law", supra, note 5, 47-101; C. Howard, "Criminal Law", 38-116 (4th ed., 1982, Law Book Co. of Australia, Sydney); R.M. Perkins, and R.N. Boyce, "Criminal Law", 840-851 (3rd ed., 1982, Foundation Press, Mineola, N.Y.); W.R. LaFave and A.W. Scott, "Handbook on Criminal Law", 208-223, 572-602 (1972, West Publishing Co., St. Paul, Minn.).

If one can commmit a crime without a strict legal intention, the present writer can see no reason in logic or principle why voluntary conduct, though not with a strict legal intention, must be precluded in every case (apart from attempted murder) from being an attempt. Besides, in practice "the dividing line between intention and recklessness is barely distinguishable."[32] The law should not easily divest itself of common sense or from reality. If recklessness were a sufficient mens rea for attempt, one would not be punishing persons 'for crimes they had no intention of committing', but for having acted in a voluntary manner, though reckless in such a way as to indicate an offence may be completed by such a person; such a person should in law be capable of being guilty of attempt. The semantic fallacy of the learned authors is illuminated by the following quotation:

> "I do not question the evidence of the husband that he had no intention of being cruel to her, I hold that his intentional acts amounted to cruelty."[33]

It is a fallacy ('it doesn't sound right to attempt something unintentionally'), much in vogue,[34] which is in-

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32. Per James, L.J., R. v. Venna [1975] 3 W.L.R. 737, 743 (English C.A.).

33. Per Shearman, J., Hadden v. Hadden, Unreported; noted in The Times, Dec. 5, 1919. For an interesting argument that any voluntary act is intentional, see R.A. Samek, "The Concepts of Act and Intent and Their Treatment in Jurisprudence", (1963) 4 Australasian J. Phil., 198, 206-212. But see A. Melden, "Free Action", 95-102 (1961, Routeledge, London); G. Ryle, "The Concept of Mind", 62-69 (1949, Barnes and Noble, New York).

34. For example:
"[T]he law of attempt by its very nature requires as a

appropriately advanced as a reason for precluding recklessness from being a sufficient mens rea for attempt. Its basis is semantic, not founded on the way in fact crimes are often attempted, with a 'distinctive condition or mental appreciation' of what is being done. As one learned author states,

> "Whilst, therefore, one may agree that the criminal law would appear to serve no purpose in punishing acts which are involuntary, one does not necessarily have to agree that it serves no purpose in punishing acts with unintended consequences."[35]

There is a philological deja-vu here, which one must be wary of. The word "attempt", for the average layman, presents no particular problem. It means purposive goal-oriented

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34. (cont.) sufficient mens rea nothing less than intention," P. Burns and R.S. Reid, "Attempted Murder - Specific Intent to Kill - Recklessness - Constructive Malice: Lajoie v. The Queen", supra, note 20, 366.
"[I]mplicit in attempt is...an actual intent to commit the offence attempted," English Law Commission Report, "Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement", 12 (Law Com. No. 102, 1980, H.M.S.O., London).
"One could not very well 'attempt', or try to 'commit' an injury on the person of another if he had no intent to cause injury to such other person," per Sullivan, J., People v. Coffey (1967) 67 Cal. 2d 204, 222, 430 P. 2d 15, 17 (Sup. Ct. of Cal.).
"To speak of 'an attempt' where there is no actual intention to achieve the result said to be attempted would be to depart from any ordinary meaning of that word," J.C. Smith, "Case and Comment", [1962] Crim. L.R. 634.
See also Part (7), "Against Recklessness as an Acceptable Mens Rea for Attempt", infra, notes 7 and 9.

35. A.W. Mewett, Q.C., "The Shifting Basis of Criminal Law", (1963-64) 6 Crim. L.Q. 468, 470. The author continues:
"Indeed, there is no other rationale behind the concept of constructive murder [whereby] certain types of offenders assume liability for death...whether death is intended or not."

behaviour, to have a deliberate end of direction in which physical conduct is directed, which will ordinarily result in the goal becoming reality. To attempt to be qualified to practise as a lawyer, one enrols in law school, graduates, then obtains articles and passes a Bar Admission Course; if one does not succeed, the goal has not been reached, but nevertheless, in common parlance, one can reasonably say that one has attempted to become a lawyer, just as one can reasonably say that if one has progressed to the stage of enrolling in law school, one is attempting to become a lawyer. "Attempt", therefore, has a certain popular meaning. But "attempt" also has a technical legal signification: it is a label used as a shorthand way of referring to the demands of the actus reus, the necessary mens rea, impossibility, voluntary withdrawal, as well as the general rationale for punishing inchoate crimes.

A label, however, also has the potential, when used in theoretical legal dialogue, of misleading, of removing qualification and context. The ambiguity of "attempt" is that it is both the linguistic element (actus reus) of the crime attempt as well as the name of the crime attempt. This double function is apt to mislead.[36] Though one might, in everyday

36. The Criminal Code is itself not entirely clear, if not itself being an encouragement to the philological ambiguity. Is the following use of the word "attempts" used in the everyday sense of trying, or the technical legal sense of the crime of attempt?
s. 58: "Every one who while in or out of Canada, ...knowing that a passport is forged...causes or attempts to cause any person to use, deal with..."

language, say that one who purchased a pistol and attended practice sessions at a gun club with the end in view of disposing of one's mother-in-law, that one was endeavouring to, seeking to, attempting to murder the mother-in-law; but legally, one would not say that such activity per se is attempted murder, no more than taking a course in metallurgy is a legal attempt to manufacture counterfeit coins.

The problem is that in using the legal word "attempt", one tends to import its everyday language meaning. One is tempted to think that because to attempt is to try, one cannot attempt something without having the intention of completing whatever one is said to be attempting, that it would do violence to the English language to attempt something unintentionally, that to attempt without intent would be unthinkable. The implication is that it is a contradiction in

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36. (cont.) s. 72: "Every one who...challenges or attempts by any means to provoke another person to fight a duel..."

s. 109: "Every one who...being a justice, police commissioner, peace officer, public officer, or officer of a juvenile court, or being employed in the administration of criminal law, corruptly...attempts to obtain, for himself or any other person any money, valuable consideration, office, place or employment with intent..."

s. 191: "Every one who obtains or attempts to obtain anything from any person by playing a game...."

In s. 172, however, through the (advertant?) choice of phraseology, it is clear that what is proscribed is certain purposive conduct towards a certain end, not the crime of attempt:

s. 172: "Every one who...by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent a clergyman or minister from celebrating divine service or performing any other function in connection with his calling" (emphasis added).

terms to attempt unintentionally. It is a fallacy, and a recognised fallacy, to propose that one cannot commit a crime unintentionally - whenever the mens rea or an offence is defined in terms of recklessness, negligence, or indeed the negation of subjective thought, strict liability, the offence can be committed unintentionally; similarly it is a fallacy to propose that one cannot, in the legal sense of "attempt", attempt unintentionally. If one is interrupted a moment before an offence is completed, one's mens rea is necessarily the one and the same as where one is not interrupted. Crimes are committed with a reckless mens rea, and if such an accused does not succeed, for example, being interrupted by police, he is ipso facto (assuming a proximate act) attempting (in both the philological and legal sense) to commit a crime, and hence should be capable of being guilty of, legally, attempt, the mens rea being recklessness - a person who is reckless, who foresees that a particular criminal result may occur, has made a conscious voluntary decision to risk the causation of that result.

If there be good and acceptable reasons, as there are, for proscribing offences committed without what the law defines as intention, there are similar good and acceptable reasons proscribing activity just short of (i.e. assuming a proximate act) the complete crime where such activity is done without what the law defines as intention. It should be borne in mind that "when an attempt to murder has been made [i.e.

the crime of attempted murder committed] it is the murder which is inchoate and not the attempt."[37] The learned authors, P. Burns and R.S. Reid, would appear to have been fallacy referred to above, by stating that "no purpose of the criminal law is served by punishing a person for attempting a crime of which he had no intention of committing."[38] If the philological meaning of "attempt" is the only reason for restricting attempt to actual, sometimes called specific, intent (when the offence attempted can be committed with recklessness or negligence), then the point can be answered by simply amending the law to state that whatever mens rea will suffice for the complete offence, will also suffice for the attempt. It cannot be denied that the enquiry of the courts into the mens rea of an accused is more convenient if an actual intent is the only acceptable mens rea for attempt - but if recklessness and negligence are acceptable mens rea for the completed offence, what reason in principle is there for not accepting the one and the same mens rea, in fact, for the attempt? O.W. Holmes:

> "It may be true that in the region of attempts, as elsewhere, the law began with cases of factual intent, as those cases are the most obvious ones. But it cannot stop with them, unless it attaches more importance to the etymological meaning of the word attempt than to the general principles of punishment."[39]

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37. "Russell on Crime", 173 (12th ed., J.W.C. Turner, Ed., 1964, Stevens & Son, London). Emphasis added.

38. Supra, note 20, 370.

39. "The Common Law", 66 (1881, Little, Brown and Co., Boston). Emphasis in original.

Detached armchair theorising on mens rea apart, it would be somewhat fanciful if, after Lajoie was refused the asked-for cash by the taxi driver Von Heyking, who had jumped out of the cab and was running off, that Lajoie, in the split-second during which he was taking aim at the running Von Heyking, was contemplating: "What I am about to do, if my aim is good, will cause him bodily harm; yea verily is likely to cause death, myself being reckless whether or not death ensues." He was more likely to be thinking, if at all: "If I don't down the bugger now, he's gonna squeal on my lady friend and me, and I'll get five years in the pen for attempted armed robbery." Meditative reflection is seldom possible in crimes of split-second personal violence.[40] It might be somewhat

40. A well-known English detective, Detective Chief Inspector Wensley, commented: "Many murderers have passed through my hands; some of them have thoroughly deserved to hang, but others have really been the victim of circumstances - men or women who have killed under some sudden or overmastering passion. The great majority of murders are crimes of impulse - the people who commit them do not stop to think of the consequences." Quoted in book review of "Strictly Murder", T. Tullett, (1980) 53 Police Journal 393. This would appear to be borne out to some extent by the facts; of the homicides of male victims aged 16 and over in England and Wales, 1967-71, more than half were attributable to "Rage or quarrel", 14.3% to "Jealousy or revenge", 5% "Apparently motiveless" (re: female victims aged 16 and over, 13.3% were apparently motiveless), (Home Office Research Study No. 31 (1975), Tables 15-16). See also T. Hadden, "Offences of Violence: The Law and the Facts", [1968] Crim. L.R. 521; E. Frankel, "One Thousand Murders", (1938-39) 20 Jo. of Crim. L., Crimin. & Police Sc. 672. The U.S. National Commission on Reform of Federal Criminal Laws (Working Papers, Vol. 1, 119-20, 1970, U.S. Govt. Printing Office, Washington) listed, from contemporary law, more than 75 different terms to describe the mental element in (federal) criminal offences.

artificial to ask theoretical questions the answer to which may not in reality exist,[41] but taxi passengers should not make a practice of robbing and shooting taxi drivers,[42] though at trial it should have been asked by the Crown of Lajoie: "Don't you know that shooting at people is likely to cause death, and that when you fired at Von Heyking you were likely to cause his death, and were reckless whether you did so or not?"[43] Lajoie[44] therefore has enlarged the mens rea for

41. As one learned author queries, "Is this careful microscopic process of examining the defendant's 'state of mind' anything more than the use of a phantom microscope on an imagined subject?" L.A. Tulin, "The Role of Penalities in Criminal Law", (1928) 37 Yale L.J. 1048, 1052.

42. And if so, the charge of attempted murder should be available, even where there is no intent to kill, as here, rather than lesser charges such as causing bodily harm with intent (Criminal Code, s. 228) or assault causing bodily harm (Criminal Code, s. 245).

43. Which is of course two questions, one objective, one subjective; a 'yes' answer to the first suggesting a 'yes' to the second, which would be the answer the Crown would wish, though somewhat leading.

44. Followed in: R. v. Comeau (1974) 14 C.C.C. (2d) 472 (N.S.S.C., A.D.); R. v. Ross (Folster) [1975] 5 W.W.R. 712 (Man. C.A.); R. v. Campbell, Lanthier and Mitchell, Sept. 22, 1978, (C.C. Van., Westmore C.C.J.) unreported; R. v. Letendre, July 7, 1975, (Man. C.A.) unreported; R. v. Barber, Feb. 28, 1973, (B.C.C.A.) unreported. On a charge of attempted murder, a recent Nova Scotia Court of Appeal decision holds that it is not a misdirection for the judge to direct (himself) that "the Crown must prove beyond a reasonable doubt that the accused had the specific intent to kill or murder," as (a) "or murder" had been added, (b) it was not in a jury charge, (c) both the Crown and prosecution had referred specifically to s. 212(a)(ii) of the Code, and besides, "It is a common failing of judges and lawyers to speak of an intention to kill in referring to the offence of murder, when in fact they mean the specific intention set out in ss. 212 and 213 of the Criminal Code," R. v. Marrone (1980) 40

attempted murder beyond what is recognized in England, the U.S.A., or legal systems derived from England[45] or the U.S.A.

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44. (cont.) N.S.R. (2d) 348, per Jones, J.A., 353. Presumably a direction otherwise, to the effect that attempted murder requires a specific intention to kill, would be a misdirection.

Though R. v. Berry (1977) 37 C.C.C. (2d) 559 (B.C.S.C.) has held that s. 24 can be used to found an attempted murder conviction under s. 212(c), R. v. Hannah (1983) 44 N.B.R. (2d) 107 (N.B.C.A.) has held that s. 212(a) is inapplicable to a charge of attempted murder, and R. v. Stevens (1982) 39 N.B.R. (2d) 94 (N.B.C.A.) and R. v. Ancio (1982) 63 C.C.C. (2d) 309 (Ont.C.A.) likewise with regard to s. 212(c) and s. 213(d) respectively. The last case R. v. Ancio, has been granted leave to appeal to the Supreme Court of Canada ((1982) 63 C.C.C. (2d) 309, note), which court will hopefully use the opportunity to clarify this area of the law. See A.D. Gold, "Annual Review of Criminal Law 1982", 45 (1982, Carswell, Toronto), and also D. Stuart, "Canadian Criminal Law", 526-527 (1982, Carswell, Toronto) who favours the jury instruction with respect to s. 213(d) by Rae, J., in R. v. Sarginson (1976) 31 C.C.C. (2d) 492, 494-495 (B.C.S.C.).

45. Scotland and South Africa not being English derived. See generally D.M. Walker, "The Scottish Legal System" (5th ed., 1981, W. Green and Son Ltd., Edinburgh); G.H. Gordon,"The Criminal Law of Scotland", supra, note 11; and H.R. Hahlo and E. Khan, "The South African Legal System and Its Background" (1968, Juta, Cape Town); E.M. Burchell, P.M.A. Hunt, J.R.L. Milton, N.M. Fuller, "South African Criminal Law and Procedure" (3 vols., 1971, Juta, Cape Town).

(6) FOR RECKLESSNESS AS AN ACCEPTABLE MENS REA FOR ATTEMPTS

The law therefore, attempted murder excepted, requires a direct intention for attempt, even though recklessness,[1]

1. For a discussion of the meaning of "recklessness" and its applicability to criminal law generally, see, inter alia:
Books: Archbold, "Pleading, Evidence and Practice in Criminal Cases", 1008-1010 (41st ed., S. Mitchell and J.H. Buzzard, Eds., 1982, Sweet & Maxwell, London); English Law Commission, "Report on the Mental Element in Crime" (Law Com. No. 89, 1978, H.M.S.O., London); E. Griew, "Consistency, Communication and Codification: Reflections on Two Mens Rea Words", in "Reshaping the Criminal Law, Essays in Honour of Glanville Williams", 57 (P.R. Glazebrook, Ed., 1978, Stevens and Sons, London); English Law Commission, "The Mental Element in Crime", Working Paper No. 31 (1970, H.M.S.O. London); G. Williams, "The Mental Element in Crime", 31-35 (1965, Magnes Press, Jerusalem); J. Austin, "Lectures on Jurisprudence", Lecture XIX (Published 1861; reprint, 1970, Burt Franklin, New York);
Articles: E. Griew, "Recklessness in Offences of Assault", (1982) 146 J.P. 154. R.A. Duff, "Recklessness", [1980] Crim. L.R. 282; P. Dobson, "Recklessness", (1980) 130 New L.J. 1018; W.T. West, "Recklessness and Foresight in Arson", (1980) 124 Sol. J. 336; R.A. Duff, "Intention, Recklessness, and Probable Consequences", [1980] Crim. L.R. 404; M.D. Cohen, "Reckless Damage and the Unreasonable Man", (1980) 130 New L.J. 231; J.B. Brady, "Recklessness, Negligence, Indifference, and Awareness", (1980) 43 Mod. L.R. 381; D.J. Galligan, "Responsibility for Recklessness", (1978) 31 Current Legal Problems 55; P.H. Karlen, "Mens Rea: A New Analysis", (1978) 9 Univ. Toledo L.R. 191, 225-232; E.J. Griew, "Specifying the Mental Element in Crimes", (1978) 142 J.P. 594; D. Lanham, "Murder, Recklessness and Grievous Bodily Harm", (1978) 2 Crim. L.J. 255; A.W. Mewett, Q.C., "Rape and Drunkenness", (1976-77) 19 Crim. L.Q. 286, 287; A.R. White, "Intention, Purpose, Foresight and Desire", (1976) 92 L.Q.R. 569; M. Sornarajah, "Reckless Murder in Commonwealth Law", (1975) 24 I.C.L.Q. 350; R.J. Buxton, "The Retreat from Smith", [1966] Crim. L.R. 195; R.N. Godderson, "Criminal Law - Meaning of 'Reckless'", [1959] Camb. L.J. 19; J. Ll.J. Edwards, "The Criminal Degrees of Knowledge", (1954) 16 Mod. L.R. 294; G. Williams, "Recklessness in Criminal Law", (1953) 16 Mod. L.R. 234; D.M. Treiman, "Recklessness and the Model Penal Code", (1981) 9 Am. J. Crim. Law 281; D.W. Morkel, "On the Distinction Between Recklessness and Conscious Negligence", (1982) 30 Amer. Jo. Cve. L. 325;

negligence or strict liability will suffice for the

1. (cont.) Cases: R. v. Murphy [1980] Crim. L.R. 309, R.T.R. 145 (English C.A.); R. v. Mullins [1980] Crim. L.R. 37 (English C.A.); Flack v. Hunt [1980] Crim. L.R. 44 (English Q.B.); R. v. Caldwell (1980) 71 Cr. App. R. 237 (English C.A.), [1981] 1 All E.R. 961 (H.L.); R. v. Smith [1979] Crim. L.R. 251 (Birmingham Crown Ct.); R. v. Stephenson [1979] 3 W.L.R. 193, (1980) 44 Jo. Crim. L. 24 (English C.A.); R. v. Parker [1977] Crim. L.R. 102, W.L.R. 600, 2 All E.R. 37 (English C.A.); R. v. Briggs [1977] 1 All E.R. 475 (English C.A.); R. v. Staines (1975) 60 Cr. App. R. 160 (English C.A.); R. v. Tennant and Naccarato (1975) 31 C.R.N.S. 1 (Ont. C.A.); R. v. Blondin (1971) 2 C.C.C. (2d) 118 (B.C.C.A.). R. v. Windsor [1981] 5 Crim. L.J. 373 (Ct. of Crim. App., Melb.); R. v. Lawrence [1981] 1 All E.R. 974 (H.L.); R. v. Seymour [1983] Crim. L.R. 260 (English C.A.); R. v. Pigg [1982] 1 W.L.R. 762 (English C.A.); R. v. Lockwood [1981] 5 Crim. L.J. 173 (Qd. Ct. of Crim. App.).

For a discussion and critique of the two recent House of Lords decisions (R. v. Caldwell [1981] 1 All E.R. 961, R. v. Lawrence [1981] 1 All E.R. 974) on recklessness generally, (though not as it applies to criminal attempt specifically), see: L.H. Leigh, J. Temkin, "Recklessness Revisited", (1982) 45 Mod. L. Rev. 198; J.C. Smith, "Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England", (1981-82) 27 Villanova L.R. 1179; R.A. Duff, "Professor Williams and Conditional Subjectivism", [1982] Camb. L. Jo. 273; G. Williams, "A Reply to Mr. Duff", [1982] Camb. L. Jo. 286; H. Gamble, "Commentary", [1981] 5 Crim. L. Jo. 373; J.C. Smith, "Comment", [1983] Crim. L.R. 260; D. Cowley, "'Recklessness' in Rape", (1983) 47 Jo. of Crim. L. 24; J. Parry, "Recklessness Redefined", [1978] L.S. Gaz. 1136; E. Griew, "Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence", [1981] Crim. L.R. 743; G. Williams, "Recklessness and the House of Lords", (letter) [1981] Crim. L.R. 580; Note, (Editorial), "The Demise of Recklessness", (1981) 5 Crim. L.J. 181; T. Prime, G.P. Scanlon, "Recklessness in the Criminal Law: Another View", (1982) 126 Sol. J. 165; G. Williams, "Recklessness Redefined", [1981] Camb. L.J. 252; G. Syrota, "A Radical Change in the Law of Recklessness?" [1982] Crim. L.R. 97; A. Samuels, "Recklessness in Criminal Damage", (1981) 125 Sol. J. 632; A. Samuels, "Reckless Driving", (1981) 125 Sol. J. 598; I.D. Elliott, "Recklessness in Murder", [1981] 5 Crim. L.J. 84; N. Yell, "'Recklessness' in the Criminal Law", (1981) 145 J.P. 243; J.S. Fisher, "'Driving Recklessly' Defined", (1981) 131 New L.J. 694; R. Pugh, "Reckless Driving - A Defence to R. v. Lawrence", (1982) 146 J.P. 141; G. Williams, "Divergent Interpretations of Recklessness - I, II, III", (1982) 132 New L.J. 289, 313, 336.

completed offence.[2] If the mens rea for the completed offence has, for good reasons of policy, been determined to be recklessness, for the same good reasons of policy it should be sufficient for the attempt, where the only factual difference may be interruption or some last-minute hitch that was not planned for.[3] There may be some difficulty in formulating a fool-proof test for the actus reus to delineate a clear division between non-criminal preparation and criminal attempt, but this is no reason for stating that recklessness will suffice for the completed offence, but only direct intention if one is, for example, interrupted in one's nefarious activities. It may be that there is no difference in moral blameworthiness (though there may be a significant difference in the possibility of an actual harm occurring) between: A, who risks a certain criminal event occurring and in whose contemplation there is such appreciation; B, who foresees such event as inevitable but does not desire it; and C, who specifically has the intention and is doing all he can to effect the criminal

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2. The present writer is of the opinion that there are strong arguments for admitting recklessness as a sufficient mens rea for attempt if recklessness is admitted for the offence attempted, i.e., the completed crime. The arguments are less strong (see infra, Parts (9) and (10) for the admission of negligence or strict liability, the present writer therefore not proposing that negligence or strict liability be a sufficient mens rea for attempt, as some learned authors would assert: R. Buxton: "Incitement and Attempt", [1973] Crim. L.R. 656, 662; J.C. Smith and B. Hogan, "Criminal Law", 241 (4th ed., 1978, Butterworths, London).

3. See J.C. Smith and B. Hogan, ibid., and D. Stuart, "Mens Rea, Negligence and Attempts", [1968] Crim. L.R. 647, 657.

consequence. If there are degrees of blameworthiness they can be reflected in varying punishments:

> "Ideally, it should make no difference...whether or not the victim died, but if we wish to mark the fact of death in some special way, we can follow the example of the U.K. Parliament which provided a maximum penalty of two years' imprisonment for dangerous driving, which is increased to five years if someone happens to be killed as a result".[4]

It is a most paradoxical situation, Canada, Scotland, and South Africa excepted, that if A and B have both committed homicide, A with intent to kill, B with intent to cause grievous bodily harm and being reckless whether death occurs, both are guilty of murder; but if both be prevented from completing the offence, only A can be guilty of attempted murder.[5] Why shouldn't B be guilty of attempted murder? The rationale of the Scots judge, Lord Justice-General Clyde, is just as applicable to attempts generally as attempted murder:

> "[A]ttempted murder is just the same as murder in the eyes of our law, but for the one vital distinction, that the killing has not been brought off and the victim of the attack has escaped with his life. But there must be in each case the same mens rea, and that mens rea in each case can be proved by evidence of a deliberate intention to kill or by such recklessness as to show that the accused was regardless of the consequences of his act, whatever they may have been. I can find no justification in principle or in authority for the view...that the mens rea in the case where life is actually taken can be established by evidence of a reckless disregard of

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4. G.H. Gordon, "Subjective and Objective Mens Rea", (1974-75) 17 Crim. L.Q. 355, 387.

5. R. v. Whybrow (1951) 35 Cr. App. R. 141 (English C.A.); Thacker v. Commonwealth (1922) 134 Va. 767, 114 S.E. 504 (Va. Sup. Ct. of Apps.).

> the consequences of the act on the part of the accused, but that the mens rea cannot be proved in that way where the charge is attempted murder. In the latter case chance or good fortune has resulted in a life being spared, but the wilful intent behind the act is just the same as if a life had in fact been forfeited."[6]

If attempted murder can be committed by a reckless disregard of the consequences of one's actions, why not, in principle, other attempted crimes?[7] Why shouldn't recklessness as to the truth of a representation be sufficient for attempted false pretences?[8] "If an arsonist who is indifferent to the lives of possible occupants of a building can be convicted of murder when the occupants are killed, why should he not be convicted of attempted murder when the occupants are saved only through heroic and extraordinary efforts of firemen?"[9] "Workmen in demolishing a building may do so recklessly or carelessly, with the result that other people narrowly escape with their lives. It is not manslaughter if no one is killed; but why shouldn't it be inchoate manslaughter?"[10] The jury should ask

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6. Cawthorne v. H.M.A. [1968] S.L.T. 330, 332 (Scottish H.C. Justiciary).

7. As the following authors would assert: G. Williams, "Criminal Law", 619 (2nd ed., 1961, Stevens & Sons, London); J.C. Smith and B. Hogan, supra, note 2, 249; J.C. Smith, "The Element of Chance in Criminal Liability", [1971] Crim. L.R. 63, 72-73; D. Stuart, supra, note 3, 655-662.

8. So argued by G. Williams, "Textbook of Criminal Law", 373 (1978, Stevens and Sons, London).

9. R. Marlin, "Attempts and the Criminal Law: Three Problems", (1976) 8 Ott. L.R. 518, 527.

10. G. Williams, supra, note 8. For a discussion of whether, conceptually, attempted involuntary manslaughter would be possible, to which the answer is a uniform negative, see:

themselves, vis-à-vis attempted murder, and other attempted crimes mutatis mutandis, "If the victim(s) had died, would the accused be guilty of murder?"[11] Persons who are about to commit a crime in a reckless frame of mind are just as dangerous to society as those who specifically intend to commit a crime. It is not logical that the law requires a stricter mens rea for attempt than that required for the completed offence when the mental state of the actor is identical whether or not a police officer happens to chance upon the scene. One learned commentator writes:

> "Conduct...affords more reliable evidence than a mere admission of the state made illegal....If we punish a person...for behaving recklessly, in the absence of actual harm, we punish for his reckless conduct although our ultimate aim may be to diminish a type of harm the risk of which is increased by the reckless conduct. We must distinguish between what

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10. (cont.) A.W. Mewett, Q.C., and M. Manning,Q.C., "Criminal Law", 143- 144 (1978, Butterworths, Toronto); though the learned authors postulate the possibility of attempted involuntary manslaughter where "the defence [?] of provocation" is raised (143); but see R. v. Campbell (1977) 1 C.R. (3d) 309, 38 C.C.C. (2d) 6 (Ont. C.A.)); J.C. Smith and B. Hogan, supra, note 2, 263; G.H. Gordon, "The Criminal Law of Scotland", 267 (2nd ed., 1978, W. Green and Son Ltd., Edinburgh); P.A. Jones and R.I.E. Card, "Introduction to Criminal Law", 351, 358 (8th ed., 1976, Butterworths, London); W.R. LaFave and A.W. Scott, "Handbook on Criminal Law", 430 (1972, West, St. Paul).

11. And in a specific case, "[t]he presiding Judge ought to have asked the jury to consider first of all the conduct of the person who fired the shot that hit Constable Ouimet, to see if this person was guilty of attempted murder. To do this the jurors should, first of all, have asked themselves if the person would have been guilty of murder had Constable Ouimet died from the shot," per Tremblay, C.J., R. v. Walker (1964) 2 C.C.C. 217, 218-9 (Que. C.A.).

> it is we are punishing <u>for</u> and <u>why</u> it is that we are punishing."[12]

Several authors would argue that since attempt and the completed offence are essentially parallel (except of course that in the former the criminal consequence was not realized), then one should look to the completed offence to identify what type of <u>mens rea</u> should also suffice for the attempt.[13] A recent Saskatchewan District Court case seems to be indicating the logical direction:

> "Attempted indecent assault may be proved by 'an indirect intent' as well as a 'direct intent'. An intent to do what the law classifies or characterizes as indecent assault founds the offence of attempted indecent assault. The requisite intent is defined in relation to the definition of the completed offence."[14]

If an accused <u>intended</u> to do certain conduct which he realized is creating danger of a complete crime being committed, and was reckless whether it in fact occurred, it should be possible to charge with attempt.[15] The U.S. Model

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12. H. Morris, "Punishment For Thoughts", (1965) 49 Monist 342, 351. Emphasis in original.

13. J.C. Smith, "Two Problems in Criminal Attempts", (1957) 70 Harvard L.R 422; J.C. Smith, "Two Problems in Criminal Attempts Re-examined", [1962] Crim. L.R. 135; H. Wechsler, W.K. Jones and H.L. Korn, "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Criminal Attempt", (1961) 61 Columbia L.R. 573, 575; D.R. Stuart, <u>supra</u>, note 3, 655-662; W.R. LaFave and A.W. Scott, <u>supra</u>, note 10, 429; J. Hall, "General Principles of Criminal Law", 598 (2nd ed., 1960, Bobbs-Merrill Co., Indianapolis); C. Howard, "Criminal Law", 289 (4th ed., 1982, Law Book Co. Ltd. of Australia, Sydney).

14. <u>R.</u> v. <u>Caplette</u>, Sask. Dist. Ct., May 3, 1979, unreported. Walker, D.C.J.

15. However, it is the present English common law that

Penal Code draftsmen put the example of an accused who intends to demolish a building, and proceeds to do so realizing that there are people inside; if the building is not in fact demolished or damaged in any way, and nobody is killed or injured, due to the strict intent requirement, there would be no attempted murder. However, under the Model Penal Code, such an accused would be guilty of attempted murder:

> "(1) Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or,
>
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or
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> (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a

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15. (cont.) driving a car at a policeman, though with the intention to cause grievous bodily harm and realizing that death may occur, is not sufficient for attempted murder: R. v. Mohan [1975] 2 All E.R. 193 (English C.A.).

16. Model Penal Code s. 5.01 (Tentative Draft No. 10, 1960, American Law Institute, Philadelphia). Emphasis added. The persons primarily responsible for the Model Penal Code state:

> "The actor must have for his purpose to engage in the criminal conduct or accomplish the criminal result that is an element of the substantive crime. His purpose need not, however, encompass all the circumstances included in the formal definition of the substantive offense. As to them, it is sufficient that he acts with the culpability that is required for commission the crime. Suppose, for example, that it is a federal offense to kill or injure an FBI agent and recklessness or even negligence in failing to

> substantial step in a course of conduct planned to culminate in his commission of the crime."[16]

One should note that "[t]he definition of attempt that is proposed by the Model Penal Code is designed to follow the conventional pattern of limiting this inchoate crime to purposive conduct."[17] J.C. Smith argues similarly:

> "[I]ntention need not extend to all the elements in the actus reus on a charge of attempt....For example:
> (a) D, not knowing whether his wife (whom he left a year ago) is alive or dead, attempts to go through a form of marriage with P, but is prevented by the intervention of his wife at the altar.
> (b) D, who has strong ground to suspect that P, a police constable, is engaged in the execution of his duty, tries unsuccessfully to assault P, who is in fact engaged in the execution of his duty.
> (c) D owns an umbrella of a common pattern. He has mislaid it, but on leaving his club he sees a similar umbrella which may be his but, as he realises, most probably is not. He has put out his hand to take it when its true owner appears.
> (d) D, an executioner on the point of carrying out an execution, receives a letter which, as he well knows, may contain a pardon for the condemned man. Not troubling to open the letter, he lays his hand on the lever which operates the trap of the scaffold,

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16. (cont.) identify the victim as an agent suffices for commission of the crime. Under the present forumlation, there would be an attempt to kill or injure an FBI agent if the actor attempts to kill the agent while recklessly or negligently unaware of the victim's official position....[T]he proposed formulation imposes attempt liability in a group of cases where the normal basis of such liability is present - purposive conduct manifesting dangerousness - and allows the policy of the substantive crime, respecting recklessness or negligence as to surrounding circumstances, to be applied to the attempt to commit that crime." H. Wechsler, W.K. Jones, H.L. Korn, supra, note 13, 575-576.

17. Ibid., 575. Emphasis added. "Purposive" would include recklessness: see Part (4), "The Type of Mens Rea Needed for Attempt: Only a 'Direct' Intent Will Suffice", supra, note 6.

> but is prevented from pulling it. The letter in fact contains a pardon.
>
> There seems to be no reason why there should not be a conviction for an attempt in each of these cases. If so, it seems clear that, if there is intention with respect to the event which is the central constituent of the actus reus, recklessness as to the surrounding circumstances is enough. D intends to go through a ceremony of marriage, to commit an assault, to carry away an umbrella, to kill a man; and his recklessness is as to circumstances surrounding these events which are essential parts of the actus reus."[18]

This formulation has, however, been criticized as unduly limiting the notion of attempt by insisting on a requirement of direct intention.[19] It is submitted that at the very least, if one has an intention to do a certain act (e.g., aim and fire a gun at a person or drive a car directly towards a person) but is reckless or indifferent as to the result, attempted murder should be charged, and that such principle extend to attempted crimes generally. An 1843 Royal Commission Report would allay any concern one might have with regard to whether conviction should depend on the degree of likelihood of the criminal consequence occurring:

> "All those instances in which death results from acts done with full knowledge on the part of those offending, that they exposed the lives of others to danger, seem to be incapable of distinction in respect of various shades or degrees of risk. In illustration of what has been said, let it be supposed that a person knowing that one of two pistols is loaded, without knowing which, points one of them at the head of another person and draws the trigger, and (the loaded pistol having in fact been taken) shoots the person, the offender (consistently with the foregoing principles) ought to be deemed as

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18. J.C. Smith, "Two Problems in Criminal Attempts Re-examined", supra, note 13, 137.

19. D. Stuart, supra, note 3, 660.

> fully responsible for the consequences as he would have been had he been aware that he took the loaded pistol, the fatal result being the same, and the mens rea existing in the one case as well as the other, without any such difference as to afford any substantial distinction for legal purposes. It seems to be clear that the application of the same principles would tend to the same conclusion, if instead of taking at hazard one of two pistols, one of three or of four, or of any other definite number, were taken, one only of that number being loaded. The probability of a fatal result would be diminished as the number from which the selection was made was increased, but still there would be a wilful risking of life attended with a fatal result, and as it seems a total absence of any intelligible principle of distinction or penal purposes. The state of the offender's mind in thus exposing life to danger seems clearly to fall within the legal notion of mens rea for all purposes of plenary responsibility."[20]

That is, it is not the degree of likelihood that convicts, but the realization that the consequence is to some degree likely.

The English Law Commission's "Report on the Mental Element in Crime"[21] proposed that the new statutory test for intention should be whether an actor intended to produce a result, or whether he had no substantial doubt that his conduct would produce it.[22] This was accepted by the Working

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20. Seventh Report of the Royal Commission into Criminal Law, Parliamentary Paper (1843, H.M.S.O., London), vol. 19, 36. See further, G. Williams, "The Mental Element in Crime", 30-32 (1965, Magnes Press, Jerusalem).

21. Law Comm. No. 89 (1978, H.M.S.O., London).

22. Ibid. para. 44 and Append. A., cls. 1 and 2. This interpretation is somewhat narrower than that stated in a recent U.S. Supreme Court decision, which would appear to include recklessness within the term "intend":

> "[T]he criminal offenses defined by the Sherman [Antitrust] Act should be construed as including intent as an element...we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can

Party on Attempts.[23] The subsequent report on attempt,[24] however, rejected the adoption of the latter with regard to attempt,[25] for two reasons, neither of which is supportable. Firstly, it is said that "In the case of attempt, what is intended is not a 'result' of 'conduct' but commission of the complete offence";[26] the present writer would submit that is exactly the same as the complete offence: to use the Commission's phraseology, what may have been intended may not

22. (cont.) be a sufficient predicate for a finding of criminal liability under the antitrust laws. Several considerations fortify this conclusion. The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness. [Quoting] '...a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knew that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.'...In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment."
Per Burger, C.J., for the Court. U.S v. U.S. Gypsum Co. (1978) 98 Sup. Ct. Rep. 2864, 2876-2877. Emphasis added.

23. Working Paper No. 50, "Inchoate Offences: Conspiracy, Attempt and Incitement", 60 (1973, H.M.S.O., London).

24. "Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement" (Law Comm. No. 102, 1980, H.M.S.O., London).

25. Ibid., 12. The Commission recommends "that the concept of the mental element in attempt should be expressed as an intent to bring about each of the constituent elements of the offence attempted" (10-11).

26. Ibid., 12. Emphasis added.

have been a result of conduct, but commission of the complete offence - besides, if one can be guilty of the complete offence for having acted recklessly, why not guilty of attempt, if one, for some extraneous reason, be prevented from completing the crime? Secondly, the Commission states that "implicit in attempt is the 'decision to bring about, in so far as it lies within the accused's power, the commission of the offence'.[27] This confirms that what is required is an actual intent to commit the offence attempted."[28] No reason is given as to why it is implicit. Implicit because it just does not sound right etymologically to 'attempt' something without intention, as strictly defined by the law?[29] Completed crimes are committed unintentionally, whenever recklessness, negligence or strict liability is admitted. There is no reason adduced at all as to why, from the mens rea point of view, attempt should be treated differently from the offence attempted, particularly when it is a fact that a person, assuming his actus reus is proximate, has the same mental element whether he is prevented from completing the crime or not; if his mental element be that of recklessness, it would be ironically fortunate for the criminal to be interrupted, for he could not be charged with attempt. The

27. The Commission quotes from R. v. Mohan [1976] Q.B. 1, 11, [1975] 2 All E.R. 193, 200 (English C.A.), per James, L.J.

28. Supra, note 24, 12.

29. See text supra, Part (5), "A Canadian, Scottish, and South African Exception for the Mens Real of Attempt", following note 35.

Law Commission is opting for the easy simplistic solution, consonant neither with reality or common sense. If there be strong reasons for punishing those who commit crimes unintentionally, there are similar strong reasons for charging, with attempt, those persons who can be interrupted before the crime is completed - reasons of law enforcement (if the police intervene once the crime has been committed, society obviously has the burden of a completed crime which has not been prevented, and if they intervene even immediately before the completion of the crime, if the mental element be recklessness, there can, in law, be no conviction for attempt). Though the English Law Commission would therefore construe "intention" strictly with regard to criminal attempt, the very "ambiguity of 'intention' is often exploited for rhetorical purposes. Used in the narrow sense, it may be illegitimately invoked to disclaim responsibility. Thus an arsonist might truthfully claim that he did not 'intend' to kill occupants whose fate he foresaw, implying that he was not responsible for their deaths - a false implication."[30]

There is no discussion in the Report concerning whether 'foresight of certainty' is a sufficient mens rea for attempt,[31] or 'foresight of probable consequences'. To take

30. Supra, note 9, 525-526.

31. As the following learned authors would assert: G. Williams, supra, note 8, 372; J.C. Smith and B. Hogan, supra, note 2, 248. See also J.C. Smith [1975] Crim. L.R. 286; A.J.P. Kenny, "Intention and Mens Rea in Murder", 173 in "Law, Morality and Society" (P.M.S. Hacker and J. Raz, Eds., 1977, Clarendon Press, Oxford.)

the time-worn example of an accused, A, who places a bomb on an aircraft in order to collect insurance, the blowing up of the aircraft is certainly intended, not the death of any passengers or crew - indeed A may hope that the explosion occurs when the plane is stationary with no passengers or crew, merely to immobilize the aircraft. If passengers or crew are in fact killed, A is of course guilty of murder, but if nobody is killed or even injured would the Law Commission preclude A being charged with attempted murder? A does not strictly have, to use the Law Commission's phrase, "an actual intent to commit the offence attempted" (i.e., murder). The 'intends the natural consequences of his actions' panacea is of no assistance to the Law Commission, for it is abolished in England.[32] The Law Commission categorically states: "There is no room for the broader concept of intent which...we describe as having no substantial doubt as the results of conduct,"[33] which may be exactly the situation in this example. A may have 'no substantial doubt' that his bomb will explode in mid-air, destroy the plane and its contents (including passengers), and hence collect his insurance. Of course, one thing is certain, nothing is certain or predictable;[34] the

32. Criminal Justice Act 1967, s. 8. See infra, text at note 58.

33. Supra, note 24, 12.

34. "The line between intention and recklessness...is not fixed with complete precision; it is the line between moral certainty and strong probability," G. Williams,

bomb can fail to explode whether on or off the plane for the myriad of reasons, or could be dropped by a baggage handler who is seriously injured as a result; A may be informed that due to, for example, a strike by baggage handlers, there is no guarantee that his box (i.e., bomb) will be put on the flight intended or indeed any flight, but he wishes to take the chance anyway - is there not attempted murder here if the bomb does not explode or explodes harmlessly in a storage shed, etc.? A may realize that his plan is far from certain to materialize, he may be reckless with regard to every volitional act, even as to whether the insurance policy, under which he hopes to claim, has expired, and hence does not have, as the Commission states, "an actual intent to commit the offence attempted," and cannot, according to the Law Commission's formulation, be guilty of attempt. Such does not accord with simple justice, or the layman's perception of it.[35]

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34. (cont.) supra, note 20, 35. "Men's actions and judgments are not founded on certainty - in most cases certainty is unascertainable - but on probabilities," Lang v. Lang [1955] A.C. 402, 429 (J.C.P.C.), per Lord Porter.

35. One writer, by no means a layman, has advocated that "[n]o one can be said to attempt to bring about a result unless he desires it to happen": J.H. Buzzard (since elevated to Circuit Judge at the Old Bailey), "Intent", [1978] Crim. L.R. 5, 12. Glanville Williams accurately reversed the equation: "[I]f the consequence is desired we do not need to go into questions of certainty or probability, for a desired consequence will be taken to be intended even though the outcome was initially uncertain," supra, note 20, 35.

Also the Commission fails to consider, or even make reference to, an important dictum of Lord Hailsham in a significant House of Lords case:

> "I know of no better judicial interpretation of 'intention' or 'intent' than that given in a civil case by Asquith J. (Cunliffe v. Goodman [1950] 2 K.B. 237) when he said at 253: 'An "intention" to my mind connotes a state of affairs which the party "intending" - I will call him X - does more than merely comtemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.' If this be a good definition of 'intention' for the purposes of the criminal law or murder, and so long as it is held to include the means as well as the end and the inseparable consequences of the end as well as the means, I think it is clear that 'intention' is clearly to be distinguished alike from 'desire' and from foresight of the probable consequences."[36]

This is of particular significance due to the fact that the Commission states that "what is required is an actual intent to commit the offence attempted,"[37] quotes from the Court of

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36. Hyam v. D.P.P. (1974) 59 Cr. App. R. 91, 101 (H.L.). In Hyam the trial judge (Ackner, J.) directed the jury that for murder, death or serious bodliy harm was intended if the accused knew, when she did the act, that it was highly probable that it would cause death or serious bodily harm. (The accused had a relationship with a Mr. Jones, and became jealous of an apparent transfer of Mr. Jones' affections towards a Mrs. Booth. The accused, after ensuring that Mr. Jones was in his own home, poured one gallon of petrol (gas) through the letter box in Mrs. Booth's house, and set it alight. Mrs. Booth and her son escaped; her two daughters did not, and were killed. The accused testified that she only meant to frighten Mrs. Booth into moving away, but admitted that she realized that what she had done was tremendously dangerous to anyone living in the house.) As a result of the trial judge's direction, the accused was convicted, which conviction was upheld by the Court of Appeal and House of Lords.

37. Supra, note 24, 12.

Appeal case of R. v. Mohan ("decision to bring about, in so far as it lies within the accused's power, the commission of the offence"[38]), rejects the "no substantial doubt" alternative,[39] but yet fails to make reference to the remainder of the very sentence from which the Mohan quotation is taken, which full quotation would appear to contradict both the Commission's own position with regard to "actual intent", rejection of "no substantial doubt", and Lord Hailsham's distinction between "intentional", "desire", and "foresight of the probable consequences". The full quote in Mohan is as follows:

> "The bounds are presently set requiring proof of specific intent, a decision to bring about, insofar as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not."[40]

The Commission has facilely chosen not to address itself to the question of whether intention includes "desire", "foresight of certainty", "foresight of probable

38. Ibid.

39. Ibid.

40. R. v. Mohan [1975] 2 All E.R. 193, 200 (English C.A.), per James, L.J. Emphasis added. Borne out also in Australian dicta: "...I do not read the word 'intentional' as bearing a meaning which requires that the end must be positively desired," per Dixon, C.J.; "It is... undesirable to insist upon desire of consequence as an element of intention. There is a risk of introducing an emotional ingredient into an intellectual concept. A man may seek to produce a result while regretting the need to do so," per Windeyer, J.; Valence v. R. (1961) 108 C.L.R. 56, 61 82-83 (High Ct. of Aus.). See also A.R. White, "Intention , Purpose, Foresight and Desire", (1976) 92 L.Q.R. 569.

consequences", but yet by merely mentioning "actual intent" and rejecting "no substantial doubt", and adroitly selecting quotations out of their full context and meaning, has sidestepped fundamental issues, and consequently is apt to seriously mislead.[41] Nor is mention made of a passage (though not in the attempt section) in the English criminal lawyer's virtual Bible, Archbold:

> "'Recklessly' in certain dicta and according to some writers appears to be regarded as almost equivalent to 'intent'....The better views [sic] seems to be that whereas 'intent' requires a desire for consequences or foresight of probable consequences, 'reckless' only requires foresight of possible consequences coupled with an unreasonable willingness to risk them. The same applies to recklessness as to circumstances if it be necessary to distinguish this, which be doubtful. For example, discharging a loaded gun at someone in play, if the offender realizes it may be loaded, is reckless both as to circumstances and as to consequences."[42]

If this statement be a correct statement of the law generally (i.e., vis-à-vis both complete crimes and attempt) it is quite

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41. The aircraft bomber has 'no substantial doubt' his well-laid plans will materialize; but such 'no substantial doubt' has been rejected. Would the Commission say he has an "actual intent" to kill, or is it a factor whether he "desired" that consequence or not, or foresaw it as being a probable consequence?

42. Archbold, "Pleading, Evidence and Practice in Criminal Cases", 958 (40th ed., S. Mitchell and J.H. Buzzard, Eds., 1979, Sweet & Maxwell, London). (A similar statement appears in the 39th ed. (1976) at 808-809, though does not seem to be in the most recent 41st 1982 edition) The Seventh Report of the Royal Commission into Criminal Law thought likewise, for they "included within the predicament of wilful offenders not only such as directly intend to inflict a particular injury, but also all such as wilfully and knowingly incur the hazard of causing it" (Parliamentary Papers vol. 19, 34., 1843, H.M.S.O., London).

contrary to what the Law Commission perceives to be the law[43] or what the Commission would recommend, as it goes much further than even the rejected "no substantial doubt" alternative. The present writer would argue that recklessness should be a sufficient mens rea for attempt, and if the method to achieve such be by way of stating that mens rea or intent subsumes or includes recklessness, as is generally submitted in Archbold, such would be acceptable, though of course it would be simpler to state that an attempt can be committed either with intention or with recklessness.

One method to admit recklessnesss as a sufficient mens rea is the use of what R.M. Perkins and R.N. Boyce call "qualified intent":

> "Suppose, for example, D sees an umbrella and realizing full well that it either may or may not be his, decides to take it and keep it as his own whichever the fact may be. This is a qualified intent to steal because he says to himself, in effect: 'I realize this umbrella may not be mine and if it is not I intend permanently to deprive another of his property.' If it is in fact not his he will be guilty of larceny if he takes it and carries it away with this state of mind, and guilty of attempted larceny if he attempts to do so."[44]

Though Perkins and Boyce describe overlooking the qualified intent concept as "fantastic",[45] it is submitted here that the more correct way to analyse the factual situation presented is to state that D has an intention to take an umbrella, but is

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43. Supra, note 24, 10-11.

44. "Criminal Law", 640 (3rd ed., 1982, Foundation Press, Mineola, N.Y.).

45. Ibid., 640, note 58.

reckless whether it is his or not. Both J.C. Smith[46] and C. Howard[47] characterize it as recklessness, and strongly argue on that basis that an attempt has been committed here.[48] Though nothing is mentioned in the draft Bill of the English Law Commission with regard to whether an accused must know of the existence of circumstances defined as part of the offence attempted,[49] the Report does state that "intention will in practice be established by proof of the defendant's intention to bring about the consequences, and of his knowledge of the factual circumstances, expressly or implicitly required by the definition of the substantive offence."[50] Does that mean actual knowledge of the circumstances when the act which is alleged to be the attempt occurs, assuming it to be proximate? If so, it means the umbrella-taker does not actually know if the umbrella he is taking is his, whether it

46. J.C. Smith, "Two Problems in Criminal Attempts", supra, note 13, 431; "Two Problems in Criminal Attempts Re-examined - I", supra, note 13, 137.

47. C. Howard, supra, note 13, 289.

48. J.C. Smith, supra, note 13, 430-431 and 137 respectively. C. Howard, ibid., 289-290.

49. The provisions with regard to impossibility ("an intent to commit a relevant offence includes an intention to do something which, if the facts or circumstances of the particular case were as the accused believes them to be, would amount to an intent to commit a relevant offence" (s. 1(2), supra, note 24, 86)) are not applicable to this case as here the umbrella-taker is reckless as to whether the one he takes is his; he has no actual belief one way or the other, merely hoping that the one he takes belongs to another. Again, what reason in principle is there for not including recklessness in this provision?

50. Supra, note 24, 11.

is his or is not, and hence cannot be guilty of attempt, or does it? It is, unforunately, unclear.

Though initially appearing to be instructive, the advice in the Report, when due consideration is given, and when applied to individual cases, becomes most unworkable, tending more to confuse than to enlighten. Whatever the Report on this point can be interpreted to mean, it is a great lacuna that there is nothing on this in the English Criminal Attempts Act 1981, simply the non-defined "with intent to commit an offence" in s.1.[51] Whatever the Report can be interpreted to mean, it is nevertheless (fortunately?) travaux préparatoire, and the courts will have to look to an ambiguous phrase in a statute to decide such questions as, whether there is a requirement of knowledge of the circumstances, whether it is material that the defendant knew or did not know that the acts he planned to do would constitute the complete offence, whether only 'direct' specific intent will suffice. By necessity, what is not proscribed is permitted, and the courts will, in areas of uncertainty, avoid statutory requirements of

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51. "1.-(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

...

(3) In any case where -

(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded,

then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence."

intention unless the avoidance is specifically excluded. The Law Commission's phrase "with intent to commit a relevant offence" (rather than "with intent to commit an offence" in the Criminal Attempts Act) is superfluous, or as Glanville Williams states, "totally irrelevant, besides being pretentious and unnecessary."[52] Ignored also is the possibility that the defendant may not be the sole actor.[53] Glanville Williams concludes a brief note on the Report and Bill thus:

> "[T]he law of attempt should extend to cases of 'indirect' intention and to cases where there is recklessness as to circumstances; it is not clear whether the Commission altogether rejects these opinions or whether it is merely reluctant to provide for them in express terms in the proposed statute.... The failure of the Commission to specify the mental element with particularity means that there is no telling how the courts will interpret it."[54]

Another possible method of admitting recklessness as a sufficient mens rea for attempt is to resort to the doctrine that one is presumed to have intended the natural and probable consequences of one's acts. Applied to attempt, if the defendant's acts did not, in spite of the natural and probable consequences, produce the result which is part of the definition of the complete crime, he is nevertheless taken to have intended those natural and probable consequences. Simply put, if you push your mother-in-law out of an aircraft at

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52. "Framing the Crime of Attempt - A Reply", (1980) 130 New L.J. 968.

53. See F. Bennion, "Framing the Crime of Attempt", (1980) 130 New L.J. 725.

54. Supra, note 52, 969.

30,000 feet, it is a natural and probable assumption that she will not survive the fall; if she in fact lives to bemoan theingratitude of sons-in-law, an intent to kill is presumed or imputed. In 1960 one Mr. Smith drove away with a carload of stolen building material, with a Constable Meehan clinging on, who was shaken off only after three other cars had been hit, the constable falling in front of a fourth car, and being fatally injured: "a man intends the natural and probable consequences of his acts...provided that the presumption is applied, the accused's knowledge of the circumstances and the nature of his acts have been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility."[55] Smith was convicted of murder. Previous English cases had held the presumption to be rebuttable,[56] and others had stated that neither probability, forseeability or perhaps foresight could be equated with intention.[57] The Smith House of Lords

55. Per Viscount Kilmuir, L.C., D.P.P. v. Smith [1960] 3 All E.R. 161, 170 (H.L.). See also R. v. Philpot (1912) 7 Cr. App. R. 140, 143 (English C.A.) where the jury, who had found the defendant not guilty because they considered the defendant did not foresee the consequences of his act, was asked to reconsider their verdict on the basis that natural consequences are intended.

56. Simpson v. Simpson [1951] P. 320, 330 (Probate Div.); Jamieson v. Jamieson [1952] A.C. 525 (H.L.); Waters v. Waters [1956] P. 344 (Probate Div.); National Coal Board v. Gamble [1959] 1 Q.B. 11 (Q.B.), per Devlin, J.; Gollins v. Gollins [1964] A.C. 644 (H.L.); Hardy v. Motor Insurers' Bureau [1964] 2 Q.B. 745 (English C.A.), per Pearson, L.J., at 765; Broome v. D.P.P. [1974] A.C. 587 (H.L.), per Lord Salmon at 604.

57. R. v. Ahlers [1915] 1 K.B. 616 (English C.A.); R. v.

case has since been effectively repealed in England:

> "A court or jury in determining whether a person has committed an offence,
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences from the evidence as appear proper in the circumstances."[58]

In Canada it would amount to a misdirection for a trial judge to direct the jury that it was a presumption of law that a man intends the natural and probable consequences of his act(s),[59] even if they also be informed that the presumption can be rebutted by the evidence.[60] Juries are to be "simply told that generally it is a reasonable inference that a man intends the natural consequences of his acts."[61] However, to instruct

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57. (cont.) Steane [1947] K.B. 997 (English C.A.); R. v. Sinnasamy Selvanayagam [1951] A.C. 83 (J.C.P.C.); R. v. Lenchitsky [1954] Crim. L.R. 216 (English C.A.).

58. Criminal Justice Act 1967, s. 8. Re Australia: "Smith's case should not be used as authority in Australia at all," per Dixon, C.J., Parker v. R. (1963) 111 C.L.R. 610, 632-2 (H.C. Australia) (reversed on other grounds: (1964) 111 C.L.R. 665 (J.C.P.C.)).

59. R. v. Ortt (1970) 1 C.C.C. 223 (Ont. C.A.).

60. R. v. Giannotti [1956] O.R. 349, 362 (Ont. C.A.).

61. Supra, note 59, 225. Though one Canadian judge has gone further and illuminated a more basic, perhaps extra-legal, presumption: "[I]f a naked man and a naked woman are left alone in privacy for a period of time it can be properly inferred that overt sexual conduct of some kind will take place. In the surprising event that it does not take place then I am of the opinion that the onus is on the male and female to show, disclose or prove what defect of mind or body or, on a more inspirational level, what powers of self-discipline or saintliness they enjoyed, that prevented or inhibited sexual conduct

the jury that there is a rebuttable presumption, considered to be a rule of common sense, that the ordinary man is presumed to intend the natural and probable consequences of his voluntary act, if qualified by the instruction that the onus of proving intent beyond a reasonable doubt remains with the Crown, is permissible.[62] It is therefore no more than an inference, an objective factor to be taken into account with

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61. (cont.) between them," Per Garson, P.C.J., R. v. Ramberran et al, unreported, 1977 (Man. Prov. Ct.). One further quotation from the learned Justice puts the case into its proper context: "In summary...the evidence of the cost of massage, the remuneration of the masseuses, the nudity of the participants, the outcalls, the shower-girl routine, the nude reverse massage, the massaging of the breasts of the females, the uncontradicted likelihood and probability of other sexual contact, the customer anonymity and the nude photos leads to only one inescapable conclusion - that the accused were operating a bawdy house. In truth, this was a house of prostitution under any of the accepted legal definitions of that term, which was simply masquerading as a massage parlor."

62. R. v. Crawford (1971) 1 C.C.C. (2d) 515 (B.C.C.A.); R. v. Crawford is an attempt case, as was R. v. Jones (1840) 9 Car. &. P. 258, 173 E.R. 827 (Shrewsbury Assizes) where Patterson, J., stated:

> "It is a very important question, whether, on a count charging an intent to murder, it is essential that a jury should be satisifed that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued; however, if it is necessary that a jury should be satisfied of the intent, I have no doubt that the circumstances that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts."

See also R. v. Dilworth and Smith (1843) 2 M. & Rob. 531, 174 E.R. 372 (York Winter Assizes)).

One learned author, Don Stuart, has written:

"What is vital is that he, given his personality and situation, actually knew or foresaw the consequences or circumstances. Even on the 'presumption' that he intended the natural and probable consequences of his act, what he ought to have reasonably intended, known or foreseen is merely one of the evidentiary factors,

the other subjective evidentiary factors of the perceptions of the particular defendant in the facts and circumstances of the case before the court.

Although one has to accept the law presently that a reckless state of mind is not sufficient to constitute the mens rea for attempt, evidence of recklessness can be adduced to a jury, who would be invited to consider what (criminal) results would in the ordinary course of events occur, so that intent be imputed.[63] It is of course quite absurd to feel constrained to artificially impute intention where it does not in fact exist,[64] such being an indication that in reality

62. (cont.) generally pertinent to credibility, to be considered in determination ex post facto his subjective mens rea at the time of the act."
"The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence", (1972-73) 15 Crim. L.Q. 160, 163. Emphasis in original.

63. A practice endorsed by the English Court of Appeal:
"Thus, on the question whether or not the accused had the necessary intent in relation to a charge of attempt, evidence tending to establish directly, or by inference, that the accused knew or foresaw that the likely consequence, and, even more so, the highly probable consequence, of his act - unless interrupted - would be the commission of the completed offence, is relevant material for the consideration of the jury. In our judgment, evidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not, in relation to the offence of attempt, to be equated with intent. If the jury find such knowledge established they may and, using common sense, they probably will find intent proved, but it is not the case that they must do so."
Per James, L.J., R. v. Mohan [1975] 2 All E.R. 173, 200 (English C.A.).

64. "[S]ince a man must be taken to intend the probable consequences of his acts, the probability of the consequence is equivalent to intention. The result is to

recklessness is being found as a sufficient basis for the mens rea of attempt, though the law, in the same breath,[65] denies that it is really the same as intent. Law merits development, at least to keep it correlated to what the law is doing in reality; it does not merit stultification. A qualitative and inferential role is therefore left to the jury. The law should parallel reality, indeed the reality of the law as applied, and admit recklessness as the mens rea for attempt. Though clearly rejected as sufficient mens rea for attempt in Mohan,[66] two judges in the previous House of Lords case of Hyam[67] (not an attempt case), invite one to take the more realistic approach and consider recklessness as being included

64. (cont.) convict a man of crime on the basis not of his real intention but of an intention by contrivance of the law," G. Williams, supra, note 20, 37.

65. "[E]vidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not, in relation to attempt, to be equated with intent," supra, note 63. Emphasis added. Certainly, in many cases the jury can divine intent from the recklessness of the defendant's conduct, but when the language in a jury charge is queried, the issue arises and must be addressed.

66. "We do not find in the speeches of their Lordships in Hyam anything which binds us to hold that mens rea in the offence of attempt is proved by establishing beyond reasonable doubt that the accused knew or correctly foresaw that the consequences of his act unless interrupted would 'as a high degree of probability', or would be 'likely' to, be the commission of the complete offence. Nor do we find authority in that case for the proposition that a reckless state of mind is sufficient to constitute the mens rea in the offence of attempt," per James, L.J., supra, note 63, 200.

67. [1974] 2 All E.R. 41, 2 W.L.R. 607 (H.L.).

in intent:

> "A man may do an act with a number of intentions. If he does it deliberately and intentionally, knowing that when he does it it is highly probable that grievous bodily harm, will result, I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm."[68]
>
> "I do not desire to say more than that I agree with those of your Lordships who take the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. What is common to both these states of mind is willingness to produce the particular evil consequence: and this, in my view, is the mens rea needed to satisfy a requirement whether imposed by statute or existing at common law, that in order to constitute the offence with which the accused is charged he must have acted with 'intent' to produce a particular evil consequence or, in the ancient phrase which still survives in crimes of homicide with 'malice aforethought'."[69]

If "[t]he presumption of intention is not a proposition of law but a proposition of ordinary good sense,"[70] and such good sense in practice admits recklessness as the mens rea for attempt, why not openly recognize that fact?

A not uncommon example of recklessness in the commission of crime, and one used throughout the historical development of the criminal law, is that of projecting some form of missile into an unsuspecting gathering. Though projected

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68. Ibid., 62 and 629 respectively. Per Viscount Dilhorne.

69. Ibid., 63 and 629 respectively. Per Lord Hailsham.

70. Per Lord Denning, L.J., Hosegood v. Hosegood (1950) 66 T.L.R. 735, 738 (English C.A.).

without intention, if death resulted, murder could be found. The missiles could be stones,[71] wood[72] or arrows[73] in earlier days, more recently bullets,[74] and contemporaneously, typewriters flung out of study windows

71. "Without any evil intent. If a man knowing that many people come in the street from a Sermon, throw a stone over a wall, intending to fear them, or to give them a slight hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not death, and though he knew not the party slain. For the killing of any by misadventure, or by chance, albeit it be not felony...yet shall he forfeit his Goods and Chattels, to the intent that men should be so wary to direct their actions, as they tend not to the effusion of man's blood." E. Coke, "Institutes", 57 (6th ed., 1680, J. Streater, London). See also: E. East, "Pleas of the Crown", vol. I, 262 (1803, Butterworths, London); W. Blackstone, "Commentaries", Bk. 4, 192 (1775, The Company of Book Sellers, Dublin).

72. Hull's Case (1664) J. Kelyng 40, 84 E.R. 1072 (Old Baily [sic]).

73. F. Pulton, "De Pace Regis et Regni", 124-5 (1609, The Company of Stationers, London).

74. Smith v. Commonwealth (1882) 100 Pa. 324 (Pa. Sup. Ct); defendant fired a pistol into a railway carriage "in fun", injuring one of the passengers. He was convicted of both simple and aggravated assault:

> "In a case somewhat analogous in principle to the one before us, it was said in reference to the prisoner: 'He acted unlawfully and maliciously; not that he had any personal malice against the individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were, in fact, injured. Just as in the case of a man who fires a gun among a crowd, it is murder if one of the crowd be thereby killed.' Queen v. Martin 8 L.R. Q.B. 54." (Per curiam).

People v. Raher (1892) 92 Mich. 165, 52 N.W. 625 (Mich. S.C.): defendant fired a pistol into a crowd, injuring a person. He was convicted of assault with intent to do great bodily harm, though the defendant did not intend particularly to injure that person.

State v. Edwards (1879) 71 Mo. 312, 329 (S.C. Mo.): the defendant (while intoxicated) fired a pistol into a crowd in a park. The following jury charge was held good:

by frustrated authors.[75] The mens rea of the 'projector' is ex hypothesi exactly the same whether anybody is killed or not, and assuming a proximate act, there is no rational reason that if murder be charged if somebody is killed, attempted murder not be charged if, for some fortuitous circumstance, nobody is killed. If somebody is not killed, though injured, clearly other offences may be charged, as exemplified by the U.S. cases referred to above,[76] but nevertheless, in principle attempt should be available both where somebody is injured and where not, for if there by no direct injury, a serious charge would not appear to be available - breach of the peace is

74. (cont.) "Although the jury may believe from the evidence that the defendant, at the time he shot into the crowd of people mentioned by the witnesses in their testimony, did not intend to kill or murder any particular person, yet if they find from the testimony that the defendant...did purposely and intentionally shoot into said crowd or assemblage of people, with a certainrevolver loaded with gunpowder and leaden ball, and that...McKinley did...die, then they will find the defendant guilty of murder in the second degree."

75. "Imagine three authors, each of whom, frustrated in his work, flings his typewriter out of his study window. Alan knows quite well that his neighbour is sunbathing outside the window, and 'has no substantial doubt' that the typewriter will hit and injure him; he does not aim to hit him, but is not moved by the thought that he will injure him. Andrew knows that it is quite probable that his neighbour is there and thus quite probable that he will injure him: he hopes he is not there, but acts in the expectation that he will proabably injure him. Arnold knows there is a chance that his neighbour is there, and thus that he might injure him: but he knows he is probably indoors, and hopes and expects that he will probably not hit him. Assume that in each case it is unreasonable for the author to take the risk he takes, and that in each case the neighbour is outside the window, and is injured by the typewriter." R.A. Duff, "Recklessness", [1980] Crim. L.R. 282, 286.

76. Supra, note 74.

simply not concordant with the danger, injury and death society should deter.[77] Of course what is recklessness will depend on the particular circumstances at bar; if a workman were to shout "Stand clear" prior to throwing wood from a house he and others are building, which is thirty feet from a road, there would be no culpable homicide;[78] it would be otherwise if the incident occurred in the "Streets of London or other populous towns" despite the shouted warning.[79] If

77. In a slightly difference context, one writer has commented: "[I]f the statute, any statute including the Criminal Code, is silent, then no purpose is served by adhering to a latin maxim [mens rea] which has never meant much anyway," A.W. Mewett, Q.C., "The Shifting Basis of Criminal Law", (1963-64) 6 Crim. L.Q. 468. 487.

78. Hull's Case, supra, note 72.

79. Ibid. Sir Michael Foster would add this qualification: "If it were done early in the morning, when few or no people are stirring, and the ordinary caution is used, I think the party is excusable. But when the streets are full that will not suffice; for in the hurry and noise of a crowded street few people hear the warning or sufficiently attent to it," from "A Report of Some Proceedings on the Commission...and Goal [sic] Delivery for the Trials of the Rebels in the Year 1746 in the County of Surrey, and of other Crown Cases", 263, (2nd ed., 1791, Moore, Dublin). Edward East closely echoes this in language reminiscent of that cited supra: "On the other hand, in London and other populous towns, at a time of day when the streets are usually thronged, it would be manslaughter, notwithstanding the ordinary caution used on other occasions of giving warning; for in the hurry and noise of a crouded [sic] street few people hear the warning or sufficiently attend to it, however loud," from "Pleas of the Crown", vol. I, 263 (1803). Matthew Hale had previously noted: "If a carpenter or mason in building casually lets fall a piece of timber or stone, and kills another [it is homicide per infortunium, by misadventure]. But if he voluntarily lets it fall, whereby it kills another, if he gives not due warning to those that are under, it will be at least manslaughter," from "Pleas of the Crown", vol. I, 472 (1736, Sollom Emlyn, London).

one does what is normal and usual in any particular circumstance, there is obviously no recklessness, but if a high probability of danger to life is foreseen as a result of voluntary and willing actions, attempt should be available. The judgments of Viscount Dilhorne and Lord Hailsham in Hyam, quoted supra,[80] have strong foundations both in history and plain fact.

When one asks what was the intent of a defendant on a particular occasion, one is asking a subjective question; what, psychologically, was in that defendant's intellect. Recklessness, on the other hand, although capable of the subjective question, is generally used in the criminal law as an objective concept.[81] It is difficult (impossible?) to clinically divine a person's psychic makeup at any particular moment, which would of course militate against the subjective

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80. Supra, text at notes 68 and 69.

81. "Even under s. 212(c) [note 86 infra] the offender's liability for murder depends upon his knowledge of the surrounding circumstances which make the conduct in question dangerous to life, for example, his knowledge that a pistol which he is brandishing is loaded, or his knowledge of the presence or probable presence of persons in a house to which he sets fire: Holmes' 'Common Law', 52-7; Molleur v. The King, 6 C.R. 375, [1948] Que. K.B. 406, 93 C.C.C. 36 (C.A.).

Where liability is imposed on a subjective basis, what a reasonable man ought to have anticipated is merely evidence from which a conclusion may be drawn that the accused anticipated the same consequences. On the other hand, where the test is objective, what a reasonable man should have anticipated constitutes the basis of liability. The distinction between the imposition of liability on an objective basis rather than on a subjective basis assumes particular importance under s. 212(c) where the accused by reason of intoxication or

orientation; law is not based on psychology, and must needs, for entirely practical purposes, disregard certain psychological distinctions, not necessarily because they do not clinically exist, but because it is impractical and unrealistic to use them in court. Beside which, many crimes are committed with little or no thought.[82] Accordingly, crimes are often defined, from a mens rea point of view, objectively, or it being accepted in practice that recklessness is an acceptable mens rea for a particular crime or that a jury be permitted to construe intent from recklessness:[83]

> "In the characteristic type of substantive crime acts are rendered criminal because they are done under circumstances in which they will probably cause some harm which the law seeks to prevent.
>
> The test of criminality in such cases is the degree of danger shown by experience to attend that act under those circumstance.
>
> In such case the mens rea, or actual wickedness of the party, is wholly unnecessary, and all reference to the state of his consciousness is misleading if it means anything more than that the circumstances in connection with which the tendency of his act is judged are the circumstances known to him"[84]

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81. (cont.) even stupidity did not in fact forsee the likelihood that his conduct would cause death.

    If the accused had the capacity to form the intent necessary for the unlawful object and had knowledge of the relevant facts which made his conduct such as to be likely to cause death, he is guilty of murder if a reasonable man should have anticipated that such conduct was likely to cause death. What the accused ought to have foreseen is judged under s. 212(c) by the standard of the reasonable man." R. v. Tennant and Naccarato (1975) 31 C.R.N.S. 1, 14 (Ont. C.A.), per curiam.

82. See supra, Part (5), "A Canadian, Scottish and South African Exception for the Mens Rea of Attempt", text following note 39; and see note 40.

83. See supra, note 63.

84. O. Holmes, "The Common Law", 61 (M. Howe ed., 1962, Macmillan, London). As J.W.C. Turner has pointed out,

Were recklessness to be accepted as a sufficient mens rea for attempt, such would be a move away from what the Law Reform Commission of Canada terms the "theological approach of guilt and punishment"[85] to the more practical realization that an objective mens rea is presently, and will continue to be, worthy of criminal liability:

> "The trend in modern criminal law is towards the expansion of the concept of mens rea to include recklessness as well as intention, and that is clearly exemplified in ss. 201 [now 212][86]

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84. (cont.) "The difficulty would be particularly acute if it were necessary to distinguish between intention and recklessness...So far as liability is concerned...our law does not distinguish between the two states of mind," from "Mental Element in Crime at Common Law", 208, in "The Modern Approach Criminal Law" (L. Radzinowicz and J.W.C. Turner, Eds., 1945, Macmillan, London). And as pragmatically noted by J.P. Bishop, "There is little distinction except in degree between a will to do a wrongful thing and an indifference whether it is done or not," "Criminal Law", vol. I, 22 s. 313 (9th ed., 1923, T.H. Flood, Chicago).

85. Working Paper No. 2, "The Meaning of Guilt - Strict Liability", 8 (1974, Information Canada, Ottawa).

86. s. 212. "Culpable homicide is murder
(a) where the person who causes the death of a human being
(i) means to cause his death, or
(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being."

and 202 [now 213][87] of the Criminal Code."[88]

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87. s. 213. "Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or section 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering)or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if
(a) he means to cause bodily harm for the purpose of
(i) facilitating the commission of the offence, or
(ii) facilitating his flight after committing or attempting to commit the offence,
and the death ensues from the bodily harm;
(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;
(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
(d) he uses a weapon or has it upon his person
(i) during or at the time he commits or attempts to commit the offence, or
(ii) during or at the time of his flights after committing or attempting to commit the offence,
and death ensues as a consequence."

88. Per Schroeder, J.A., R. v. Ritchie [1970] 3 O.R. 417, 424 (Ont. C.A.) (leave to appeal to the Supreme Court of Canada denied).

D.R. Stuart: "[T]here are indications that Canadian courts, like those in England, are moving towards the extension of mens rea to include recklessness, or, more appropriately where circumstances are in issue, wilful blindness," from "The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence", supra, note 62, 167-168. See, re Canada: R. v. Blondin [1971] 2 W.W.R. 1, (1970) 2 C.C.C. (2d) 118 (B.C.C.A.), aff'd by S.C.C.: [1972] 1 W.W.R. 479, (1971) 4 C.C.C. (2d) 566; R. v. Savinkoff [1963] 41 W.W.R. 174, 3 C.C.C. 163 (B.C.C.A.); R. v. Wretham (1972) 16 C.R.N.S. 124 (Ont. C.A.); R. v. Ferrari et al (1971) 17 C.R.N.S. 45 (Ont. Prov. Ct.); and re England: R. v. Cunningham [1957] 2 Q.B. 396 (English C.A.); Sweet v. Parsley [1970] A.C. 132 (H.L.).

One can agree with the Law Reform Commission of Canada "that the law of real crimes continues to be based on and require mens rea,"[89] but add that intent, as strictly defined by law, is not appropriate by itself to regulate complex modern societies. If recklessness not be accepted as the mens rea for the complete offence, "[i]t is not easy to discern the logic which underlies the view that the mental element required for an attempt is that of a direct intention to bring about the actus reus of the crime intended."[90] This discernible modern trend,[91] as well as an increasing awareness

89. Supra, note 85, 19.

90. D.R. Stuart, supra, note 62. Professor Stuart is however presently of the view that the mens rea of attempt should only be an actual direct intent: "Our fundamental concerns to give the accused the benefit of reasonable doubt and, in general, to apply the criminal sanction with restraint should tip the scale in favour of restricting the notion of mens rea for attempt to actual intent" ("Canadian Criminal Law", 529; 1982, Carswell, Toronto).

91. A trend not merely modern:

> "These two standards, the objective and the subjective, have been our criminal law since the thirteenth century. They have existed, side by side, at times without clashing, at times in close conflict. The objective view, however, has gradually been gaining the ascendancy. At the present time I think the subjective aspect is practically eliminated as an element of any specific crime, and maintains whatever hold it has because of the idea that a crime is an act for which the offender must be punished....Modern criminology, however, while not ignoring the will to evil, is not interested in it as a metaphysical speculation or as a test for determining a future state of bliss or misery. It looks at the evil will as a psychological and sociological phenomenon."

A. Levitt, "Extent and Function of the Doctrine of Mens Rea", (1923) 17 Ill. L.R. 578, 578.

> "Indeed, the strong current of modern decisions toward

of the necessary practicality of an objective standard, will at least serve to catch those defendants who may not act with a specific direct intention, as legally defined, but whose criminal activity is carried out in a dangerous and reckless manner - taxi passengers who shoot at running taxi drivers, though not with an intention to kill, should, as any layman's sensibilities will inform, be charged with attempted murder,[92] which principle should extend to attempted crimes generally. This is not to say that the concept of mens rea should be permitted to wither away and die, and that the non-punitive treatment model be adopted in place of punishing a person for having acted, whether intentionally or recklessly, in a proscribed manner.[93] Criminal intention and criminal

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91. (cont.) applying in the criminal law an objective standard, to which all must measure up at their peril, in place of the older subjective standard, under which defendants are punishable only for failing to measure up to their own capacities, is only another manifestation of the same trend of the criminal law. Certain it is that in modern times we have moved far from the old fourteenth century conception of mens rea as a mind bent on moral wrongdoing."
F. B. Sayre, "Mens Rea", (1932) 45 Harv. L.R. 974, 1019, who continued in a subsequent article: "Nor can we close our eyes to the fact that since the middle of the nineteenth century we have been punishing numerous offenses without proof of any guilty mind whatsoever; and this movement in the direction of finding criminality in the forbidden act alone has been growing more and more pronounced," "The Present Signification of Mens Rea in the Criminal Law", in "Harvard Legal Essays in Honour of J.H. Beale and S. Williston", 399, 400 (1934, Harvard University Press, Cambridge).

92. Lajoie v. R. (1973) 10 C.C.C. (2d) 313, 20 C.R.N.S. 360 (S.C.C.).

93. See Lady Barbara Wootton, "Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist", 48-57,

recklessness should found liability both for the complete offence and the attempt; as has been observed:

> "In addition to the need to make criminal sanctions appropriate to the offender, there is the need to ensure that acts are never criminal unless the consequences are, or may be, inimical to the state."[94]

When a person is reckless with regard to his conduct, he has actual knowledge that what he or she is doing involves a high probability of harm (in the broad sense of the term, whether personal or otherwise, and also harm to the interests of society), albeit that harm is not specifically intended. However, such person has intended, as a free moral agent, to risk the occurrence of that harm. The moral question for society, therefore, is that if such a person be responsible for a complete crime if the harm results, whether such responsibility should also attach for attempt if the harm does not, fortuitously, occur. If a defendant has acted intentionally in a manner such that he or she had an appreciation of, for example, the risk of death to another person, the defence that one did not have the intention to do

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93. (cont.) 117-118 (Hamlyn Lectures; 1963, Stevens, London), and also her most recent book, "Crime and Penal Policy, Reflections on Fifty Years' Experience" (1978, George Allen and Unwin, London). Contra: H.L.A. Hart, "The Morality of the Criminal Law", 5-29 (1964, Magnes Press, Jerusalem); P. Weiler, "The Supreme Court of Canada and the Doctrines of Mens Rea", (1971) 9 Can. Bar Rev. 280, 284-290; H.L. Packer, "The Limits of the Criminal Sanction" (1968, Stanford University Press, Palo Alto).

94. A.W. Mewett, Q.C., "The Shifting Basis of Criminal Law", supra, note 77, 486.

whatever the definition of the offence proscribed, in this case, kill, should no longer be acceptable. A legal hiccup (in the sense that it is almost singularly outside the mass of jurisprudence that requires an intention to kill for an attempted murder charge) which would ascribe to this rationale of permitting recklessness for attempt is an older relatively obscure Arkansas case, Scott v. State:[95] the trial court, in holding that a specific intention to kill was necessary to convict of attempted murder, had stated: "no general malevolence, malignity of disposition or disregard of the sanctity of human life, would supply the place of such proof." (Such statement would accurately reflect the current law in England,[96] the U.S.,[97] and the Commonwealth[98] for all attempted crimes, excepting Canada[99] and Scotland [100] with regard to attempted murder only, and South Africa generally.[101]) The Arkansas appellate court however overruled the trial court, holding that the defendant would be guilty of attempted murder if "all the circumstances of the shooting

95. (1886) 49 Ark. 156, 4 S.W. 750 (Ark. Sup. Ct.).

96. See supra, Part (4), "The Type of Mens Rea Needed for Attempt: Only a 'Direct' Intent Will Suffice", note 8.

97. Ibid., note 12.

98. Ibid., notes 10 and 11.

99. Ibid., note 9, and Part (5), "A Canadian, Scottish and South African Exception for the Mens Rea of Attempt", generally.

100. Ibid., Part (5), note 7.

101. Ibid., note 6.

show an abandoned and wicked disposition and a reckless disregard of human life."[102]

The forceful advice of a Scots judge, "People who use knives and pokers and hatchets against a fellow citizen are not entitled to say 'we did not mean to kill'," [103] should have applicability not only to attempted murder, but to attempts generally. Recklessness should be accepted as a sufficient mens rea for attempt, whether morally,[104] or because recklessness and intention cannot easily be differentiated in practice,[105] or because they should be parallel in

102. Supra, note 95, 159 and 751 respectively. Emphasis added.

103. H.M.A. v. McGuinness [1937] S.C. (J.C.) 37, 40 (H. Ct. of Justiciary), per Lord Justice-Clerk Aitchison.

104. As John Austin commented:
> "We may plead that we trod on the snail inadvertently: but not on a baby - you ought to look where you're putting your great feet. Of course it was (really), if you like, inadvertence: but that word constitutes a plea, which isn't going to be allowed, because of standards. And if you try it on, you will be subscribing to such dreadful standards that your last state will be worse than your first."

"A Plea for Excuses", in "The Philosophy of Action", 1, 35 (A.R. White Ed., 1968, Oxford University Press, Oxford).

105. See supra, note 34. O.W. Holmes has expressed the view that "vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked," "The Common Law", 3 (1881, Little, Brown & Co., Boston). One writer remarked that it seemed odd that Holmes recognized this facutly in a dog, yet denied to human beings the faculty to make the same distinction: E.S. Binavince, "The Theory of Negligent Offenses in the Anglo-American Criminal Law", (1963) 38 Phillipine L.J. 428, 453.

law,[106] or for other good reasons referred to supra, for recklessness is capable of reflecting and protecting the practical and moral values inherent in law and society as the particular case demands.

As stated supra,[107] though recklessness or negligence may suffice for the completed offence, a specific intent to commit the completed crime is necessary for the attempt. Intoxication is a defence to a specific intent offence, not to

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105. (cont.) An English judge recently commenced his summing-up on the meaning of the word "reckless" with the comment that "we lawyers like to make a tremendous picnic out of the word 'reckless'", adding that "Fortunately, the House of Lords got to work on it the other day" [R. v. Lawrence [1981] 2 W.L.R. 524]. The learned judge's summing-up ended with the following less-than-illuminating, though perhaps typically English query: "imagine yourself standing on the [sidewalk] picturing what you find actually happened, and asking yourself 'Well now, is that reckless driving or is it not?' And if you say 'Good Lord, yes, it is', well there you are", R. v. Madigan (1982) 75 Cr. App. R. 145 (English C.A.). As Californians are wont to say, 'No matter where you go, there you are'.

106. Lord Devlin has written: "One inference is that a man must have applied his mind to the consequences which infact happened and to have decided that they would probably happen; in that case, for the purposes of the law, he intended them to happen, and it does not matter whether he wanted them to happen or not," "Criminal Responsibility and Punishment: Functions of Judge and Jury", [1954] Crim. L.R. 661, 666-667.

107. See supra, Part (4), "The Type of Mens Rea Needed for Attempt: Only a 'Direct' Intention Will Suffice", footnotes 8-13 and corresponding text.

a general intent offence.[108] This anomaly breeds another unacceptable anomaly, that intoxication would not be a defence to the completed offence (if it is a general intent offence, or recklessness or negligence will suffice), but intoxication would be a defence to the attempt itself. As Spencer, J., stated in a recent British Columbia case, in which the accused was charged with attempted rape,

> "[F]or completed rape, self-induced intoxication is not a defence, but if the facts remain the same except that the arrival of help a moment before penetration saves the victim, the same self-induced intoxication would become a defence. I cannot accept that result."[109]

The learned judge proceeds to state that

> "the intent referred to in Section 24, when the charge is attemped rape, is the same level of general intent to have intercourse without the woman's consent as is required for rape itself."[110]

If the learned judge were not to construe the mens rea of completed rape and attempted rape as being identical, intoxication would, in view of the authorities noted supra,[111] increasingly be a defence to attempted rape, which is both legally and socially unacceptable:

> "In this case, the threat of death and the violence offered by the accused and his pursuit of the

108. R. v. George [1960] S.C.R. 871, 128 C.C.C. 289, 34 C.R. 1 (S.C.C.); Leary v. R. (1977) 33 C.C.C. (2d) 473, 37 C.R.N.S. 60 (S.C.C.); D.P.P. v. Majewski [1976] 2 All E.R. 142 (H.L.). For critcism of Leary, "[t]his hoary fallacy", see A.W. Mewett, Q.C., and M. Manning, Q.C., "Criminal Law", supra, note 10, 64, 181-2.

109. R. v. Pagee, unreported, Feb. 20, 1980. County Court of Vancouver. Page 10 of the learned judge's judgment.

110. Ibid.

111. Supra, note 108.

> complainant into the washroom satisfy me that he would have had intercourse against her will, and his drugged or intoxicated state which caused him to pursue that behaviour under such senseless circumstances, being self-induced, cannot as a matter of law amount to a defence. I convict the accused...."[112]

The present writer would submit that in order to preclude the two above-noted anomalies, such principle, both legal and social, must extend to other offences also, that whatever mens rea or form of intent (whether general or specific) is required for the offence attempted, also be required for the attempt.

Common sense would indicate that it is possible both factually and legally to attempt a crime of recklessness,[113] particularly when recklessness is in fact being accepted as a sufficient mens rea in attempts,[114] the intent being inferred from the recklessness, though of course one has to continue the facade, for "it is not, in relation to the offence of attempt, to be equated with intent."[115] This is a sleight of hand.[116] The law should be amended, whether legislatively

112. Supra, note 109.

113. See G. Williams, supra, note 7, 619.

114. See supra, note 63.

115. Ibid., 200, per James, L.J.

116. In a case with regard to whether it amounts to murder where a defendant's conduct is highly probable to cause death or serious injury if death in fact occurs (a layman would surely reply "But of course"), Lord Kilbrandon pointedly advised: "There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning as the present case had given rise to," Hyam v. D.P.P. (1974) 59 Crim. App. R. 91, 119 (H.L.). Lord Kilbrandon's frustration might be partially

or judicially, so that the law as stated parallels its actual operation. As Professor G.H. Gordon emphasized, in another context,

> "[A]ny realistic approach to the problem must recognize that what is ultimately in issue is the community's moral judgment on the accused's behaviour, and not the satisfaction of a legal formula."[117]

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116. (cont.) explained if it is noted that Lord Kilbrandon is the only Scots judge in the House of Lords, that recklessness is accepted in Scotland as the mens rea for attempted murder [Cawthorne v. H.M.A. [1968] S.L.T. 330 (H. Ct. of Justiciary)], and that it is a great comfort to Scots, the writer included, that the final court of appeal for criminal cases is the High Court of Justiciary in Edinburgh, not the House of Lords. There is little comfort derived from Scottish civil cases that travel south to London:

> "The House of Lords is an infallible interpreter of the law. A batsman, who, as he said, had been struck on the shoulder by a ball, remonstrated against a ruling of l.b.w. [leg before wicket]; but the wicket-keeper met his protest by the remark: 'It disna' maitter if the ba' hit yer neb [nose]; if the umpire says yer oot yer oot.' Accordingly, if the House of Lords says 'this is the proper interpretation of the statute,' then it is the proper interpretation. The House of Lords has a perfect legal mind. Learned Lords may come or go, but the House of Lords never makes a mistake. That the House of Lords should make a mistake is just as unthinkable as that Colonel Bogey should be bunkered twice and take eight to the hole. Occasionally to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault."

Assessor for Aberdeen v. Collie [1932] S.C. 304, 311 (Lands Valuation App. Ct.), per Lord Sands.

117. Supra, note 4, 390 The Supreme Court of Pennsylvania observed a century ago that "all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect public policy and economy," per Paxson, J., Commonwealth v. McHale (1881) Pa. St. R. 297, 410 (Sup. Ct. Pa.)

(7) AGAINST RECKLESSNESS AS AN ACCEPTABLE MENS REA FOR ATTEMPT

Having proposed that if recklessness suffices as the mens rea for the complete offence it should also suffice for the attempt itself (the present writer would not propose such equation for negligence or strict liability[1]), it is now only fair to note the arguments on the other side.

That murder and attempted murder should require the same form of mens rea, in reference to the Lajoie case,[2] is considered a "legal sophistry" by two learned Canadian writers.[3] Lord Goddard, in the House of Lords has stated:

> "...if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm."[4]

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1. See infra, Part (9), "Negligence the Mens Rea for Attempt?", and Part (10), "Strict Liability?".

2. [1974] S.C.R. 339, 10 C.C.C. (2d) 313, 20 C.R.N.S. 360 (S.C.C.).

3. P. Burns and R.S. Reid, "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?" (1977) 55 Can. Bar Rev. 75, 98.

4. Per Lord Goddard, C.J., R. v. Whybrow (1951) 35 Cr. App. R. 141, 147 (English C.A.).

The present writer has argued in the previous section that such is indeed illogical. "Malice aforethought" is of course a misnomer; it is neither malice, nor is it aforethought.[5] "[T]he intent is the essence of the crime" - no convincing reason is adduced as to why intent is the essence. Of the essence because it "does violence to the English language to hold [a person] guilty of an attempt" without intent as defined by law?[6] Because it would sound odd to say that someone can be guilty of an attempted crime without intent, but intent as defined by law?[7] This semantic view of the law, the confusion of the linguistic meaning of "attempt" (i.e. to try) with its legal definition as a criminal offence, (the danger of which is highlighted in the following quotation,

> "One of the inadequacies of language is that sooner or later, the thing is confused with the symbol for that thing. When the mind is centered on the verbal description of something instead of the thing itself, we conclude that 'Pigs are rightly named, since they are such dirty animals'"[8])

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5. Cf. Lord Hailsham, Hyam v. D.P.P. (1974) 59 Cr. App. R. 91, 95 (H.L.).

6. W.H. Hitchler, "Criminal Attempts", (1912) 16 Dickinson L.R. 242, 249.

7. "[I]t may sound odd to speak of attempting a crime by recklessness," G. Williams, "The Government's Proposals on Criminal Attempts - III", (1981) 131 New L.J. 128, 128. "[I]t would sound odd to speak of someone unintentionally but recklessly attempting," G. Williams, "Textbook of Criminal Law", 373 (1978, Stevens and Sons, London).

8. Pope (Mr. Justice, not Alexander or John Paul), Gaines et al v. Bader (1952) 253 S.W. 2d 1014, 1015 (Texas Ct. of Apps.). This etymological muddle has been noted by Archbold (who nevertheless manages to be seduced by the false deja-vu, see note 9 below): "the courts, and some writers, have at times become confused as to the mental

is by no means uncommon in the literature.[9] One learned writer has written that "[i]t is...difficult to see why there is such magic in the popular meaning of 'attempt' but not in the words 'murder', 'assault', or 'rape', crimes for which

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8. (cont.) element in attempts to commit offences by failing to keep clearly in mind the distinction between what a man desires, with which in popular language is often equated what he intends, and what a man intends as the law understands that term...." Archbold, "Criminal Pleading, Evidence and Practice", 1004, (41st ed., 1982, Sweet & Maxwell, London). Emphasis added.

9. "[I]n ordinary language no one could be said to be attempting to do something which he did not desire to happen," Archbold, ibid., 1004. "[I]t introduces an unnecessary paradox into the criminal law [to say that] A can be guilty of attempting to do something he did not intend to do, i.e., of trying to do something he was not trying to do," G.H. Gordon, "The Criminal Law of Scotland", 265-266 (1978, 2nd ed., W. Green & Son Ltd., Edinburgh). "On the one hand, 'attempt' implies 'try', and it seems impossible to try to do something without intending to do it. On the other hand, [with which hand the present writer would agree] it seems paradoxical to say that if A inflicts a serious injury on B without intending to kill him but with sufficient recklessness to satisfy the requirements of the mens rea of murder, A is guilty of murder if B dies, but is not guilty of attempted murder if he survives," "Note" (1963) 27 Jo. Crim. L. 297. "'Attempt', as ordinarily understood, carries with it animplication of direct intention," P. Marlin, "Attempts and the Criminal Law: Three Problems", (1976) 8 Ott. L.R. 518, 527. See also note 7 supra, and Part (5) supra, note 34.

One author asserts that "one cannot be knowing, negligent or reckless concerning one's own future behaviour; it may only be intended," P.H. Karlen, "Mens Rea: A New Analysis", (1978) 9 Univ. of Toledo L.R. 191, 237. Suchstatement is patently wrong both in law and in the reality of everyday life - the mental element of many crimes is defined in terms of knowledge, negligence or recklessness, and clearly one can voluntarily and consciously do an act without the specific intention of either doing the act itself or bringing about the criminal consequence, such as firing indiscriminately into a railway carriage.

recklessness is now sufficient mens rea";[10] and another that "[t]here is in the literature and in the cases a clear sense that there is something unique about attempt that restricts its scope to cases of specific intent, but that uniqueness has yet to be explained on any other grounds than the requirement of language."[11]

Indeed, decided cases in which an accused has been charged with attempt reveal surprising adherence to the linguistic interpretation of attempt: driving around looking for a person to rob is not an attempt, but is merely preparation,[12] as is putting higher-than-permitted prices on merchandise which has not been put out for sale or been delivered;[13] but putting cyanide into a victim's drink,[14] or drawing one's revolver,[15]

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10. D. Stuart, "Mens Rea, Neligence and Attempts", [1968] Crim. L.R. 647, 656. Another learned author writes: "Concepts whether vague or precise are imperiled by the very words to which they are intrusted. Any adequate science of law awaits a science of statement. The definitions of scholars are sieves, the opinions of judges little more than a succession of mirages, even the precedents by which the course of judicial decision is determined are equally expansible and collapsible," L. Green, "The Negligence Issue", (1928) 37 Yale L.J. 1929, 1031, note 5.

11. A.N. Enker, "Mens Rea and Criminal Attempt", [1977] Amer. Bar Foundation Research Jo. 845, 850.

12. People v. Rizzo (1927) 246 N.Y 334, 158 N.E. 888 (Ct. of Appeals N.Y.). See also R. v. Komaroni and Regerson (1953) 103 L.J. 96 (Bedford Assizes). But in Canada see Henderson v. R. [1948] S.C.R. 226 (S.C.C.).

13. Gardner v. Akeroyd [1952] 2 Q.B. 743 (Q.B.D.).

14. R. v. White [1910] 2 K.B. 124, [1908-10] All E.R. Rep. 340 (Ct. of Crim. App.).

15. R. v. Linneker [1906] 2 K.B. 99, 21 Cox C.C. 196, 94 L.T. 856 (Ct. of Crown Cases Reserved).

or shooting at the victim,[16] is an attempt, which would more easily accord with "attempt" in the sense of "to try".

Closely allied to the ready assumption that legal "attempt" is to be equated with linguistic "attempt" is the assertion that it is "right in principle that the concept of the mental element in attempt should be expressed as an intent to bring about each of the constituent elements of the offence attempted."[17] No principles are however adduced by the Law Commission to support such statement. However, if it is right "in principle" that mens rea in the form of recklessness will suffice for the completed offence,is it not also right "in principle" that such mens rea also suffice for the attempt, given that the temporal difference between a successful 'attempt' and a non-successful attempt may be an extraneous or fortuitous circumstance, such as the timely or accidental arrival of a police officer? Colin Howard, however, believes such temporal distinction to be sufficiently relevant to require a more strict mens rea for attempt than for the completed offence: "It is not really so odd that an attempt should sometimes require a more blameworthy state of mind than the completed offence, for the law does not require D to have

16. Lajoie v. R., supra, note 2.

17. English Law Commission, "Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement", 10-11 (Law Com. No. 102, 1980, H.M.S.O., London). Emphasis added. See also State v. Grant (1980) 418 A. 2d 154 (Me. Sup. Jud. Ct.) and cogent criticism thereof by B.L. Poliquin, "State v. Grant: Is Intent an Essential Element of Criminal Attempt in Maine?" (1982) 34 Maine L. Rev. 479.

done so much in order to be convicted."[18] What is odd about such statement is that a temporal physical difference be reflected in a different mental element - surely the physical difference between the completed crime and the attempt is to be reflected in a different actus reus? And if the accused's mental state is ex hypothesi exactly the same whether a police officerchances upon the accused or not, it is patently absurd to assert that there should be one type of mens rea for the completed crime and another type of mens rea for the attempt. Moreover, for the English Court of Appeal to state that only intent will suffice for attempt, but that the jury can construe intent out of what is plainly recklessness[19] (that is, artificially impute intent to activity which is only criminal if the necessary intent is present), is not only illogical, but a distortion out of place in a rational and just legal system. It is of course less than likely that an accused will give careful consideration to the requirements of the mens rea of attempt, whether as proclaimed by the English Court of Appeal

18. "Criminal Law", 290, 4th ed. (1982, Law Book Company of Australia, Sydney).

19. "[E]vidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not, in relation to the offence of attempt, to be equated with intent," per James, L.J., R. v. Mohan [1975] 2 All E.R. 193, 200 (English C.A.). See also Lord Hailsham, Hyam v. D.P.P. (1974) 59 Cr. App. R. 91, 101 (H.L.): "No doubt foresight and the degree of likelihood with which consequences are foreseen are essential factors which should be placed before a jury in directing them as to whether the consequences are intended. But the true view is that put forward by Byrne, J., in D.P.P. v. Smith (1960) 44 Cr. App. R. at 265, [1961] A.C. at p. 300: 'While that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn.'"

or elsewhere, before he attempts to murder, rape or thieve, but the law should, at least, be capable of giving unabmiguous caution of what the law will do if certain acts are performed with a certain mental state. It is most unseemly for the law to declare that only intention will suffice, but parenthetically that recklessness will do - but that of course "it is not...to be equated with intent."[20]

It has been argued that "[i]ntent or its equivalent, so-called foresight of the result as a practical certainty [not recklessness], should be required in punitive attempt....For since there obtains a deficiency in the actus reus [absence of the intended result], which may be ascribable to unconscious inhibitions even where the frustrating event appears to be extraneous, insistence on a conscious desire of the result or foresight of its certain occurrence seems to be a fair condition of punitive treatment."[21] The present writer would agree with the last portion that "a conscious desire of the result or foresight of its certain occurrence seems to be a fair condition of punitive treatment," but would argue that not only intent should be included, but also recklessness, a conscious voluntary act with an appreciation that a criminal consequence can occur as a result of such act. Again, if for a particular crime intention or recklessness by law is "a fair

20. See quotations ibid.

21. H. Silving, "Constituent Elements of Crime", 119 (1967, Charles C. Thomas, Springfield Ill.).

condition of punitive treatment" of the complete crime, why not the attempt? This characterization of recklessness as a "conscious voluntary act," etc., a mental state worthy of punishment if an accused succeeds in his criminal activity (but not an attempt, legally, if the accused be interrupted), also meets the point, similar to that just quoted, of another learned author:

> "[W]hen considered from the point of view of the social purpose of the law of Attempt, it is much more justifiable to impose legal sanctions on the man who takes a substantial, but not a final, step towards committing a crime, or on a man who attempts what is in fact impossible, if, before intervening, the law has to establish that he was in the unambiguously anti-social mental state of intending to bring about the actus reus of a crime."[22]

Various policy arguments have been adduced by learned authors to support the view that only a strict specific intent is a sufficient mens rea for attempt. One learned author argues:

> "If we adopt this terminology [that attempts can be committed recklessly] we are not enabled to enquire into the social policy of the matter, or into the common understanding of the word 'attempt'; we are simply required to make an automatic equation, and are deprived of any technical language for discussing the issue in terms of social and moral values even if we wish to do so. Or, at any rate, if we wish to discuss these questions, we must make use of circumlocutions such as 'intention other than recklessness'."[23]

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22. R. Buxton, "The Working Paper on Inchoate Offence: (1) Incitement and Attempt", [1973] Crim. L.R. 656, 644.

23. G. Williams, "The Mental Element in Crime", 34 (1965, Magnes Press, Jerusalem).

The present writer would agree with the last sentence, in particular that legal "attempt" and linguistic "attempt" not be confused, but would not consider language to be an impediment that cannot be overcome; certainly the learned author is most eloquent in his treatment of criminal attempt, as with all else. The same author, Glanville Williams, elsewhere notes that

> "The law of attempt is a very large extension of legal liability. It is tolerable when confined to intention; but the jury or magistrates should not have general permission to convict on the basis of recklessness where nothing untoward has happened. If inchoate offences of recklessness are to be created it should be done by special statute."[24]

And elsewhere he asserts:

> "[O]ur legal and penal system has for a very long time been working at full stretch, and for quite a time it has been overstretched. The police rarely charge attempts except in serious cases, and they would probably not regard a case as serious in the absence of intention. A warning would be deemed

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24. "Textbook of Criminal Law", supra, note 7, 373. "[T]he policy of the law may reasonably be to impose sanctions on a narrower group of persons when no relevant harm [is harm ever irrelevant?] has in fact eventuated," "The Mental Element in Criminal Attempts" by "G.F.O." [1975] N.Z.L.J. 286, 287 (criticism is made here of the Canadian case of "Lejoie [sic] v. The Queen" for having, inter alia, distorted the words of a statute, from those who would distort the words of a citation). "[I]t is likely that the use of attempts as the vehicle for extending criminal liability to recklessly dangerous conduct would lead to still further expansion of such liability rather than its moderate restriction, for...the crime of attempt not only contains a defined actus reus but also includes conduct not itself dangerous. Given a predictive penology heavily based on the defendant's mens rea, extension of attempt to include recklessly dangerous conduct is likely to be followed by its further expansion to include conduct mistakenly believed to be dangerous. The analogy to traditional attempts is obvious, especially after the abolition of the defense of impossibility," A.M. Enker, supra, note 11, 858-859.

sufficient."[25]

Perhaps the most telling argument against admitting recklessness as a sufficient mens rea for attempt is that there may be individual cases where it is not easy to determine if recklessness was present.[26] Besides which, "recklessness" itself may be undefinable, it more often than not being "defined" by way of example or by illustration from decided cases or judicial opinions. If restricting the mens rea of attempt to strict intention does not guarantee justice, it does at least have the benefit of certainty.[27] However this argument is met by the recurring theme that if law accepts recklessness, its potential incertitude notwithstanding, for

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25. "The Government's Proposals on Criminal Attempts - III", supra, note 7, 128. Mr. I. Dennis argues that "there is no evidence of a pressing social need to punish non-intentional attempts," "The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement (1) The Elements of Attempt", [1980] Crim. L.R. 758, 762.

26. "Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. It is neither practicable nor reasonable to draw a line at extreme probability," per Lord Reid, Southern Portland Cement Ltd. v. Cooper [1974] 1 All E.R. 87, 94 (J.C.P.C.) (quoted approvingly by Lord Hailsham in Hyam v. D.P.P. (1974) 59 Cr. App. R. 91, 103 (H.L.)).
See also discussion by R.A. Duff, "Professor Williams and Conditional Subjectivism", [1982] Camb. L. Jo. 273, and G. Williams, "A Reply to Mr. Duff", [1982] Camb. L. Jo. 286.

27. Lord Denning is attributed to have noted, one suspects facetiously, "Certainty is quite rightfully of paramount importance. It does not matter so much what the law is as long as it is certain."

the complete offence, there is no reason in logic or principle for the law not also accepting recklessness for the mens rea (to state the obvious, the actus reus is physical, the mens rea mental) of attempt. "Recklessness" is however, an entirely workable, and accepted concept. The English Law Commission's Report on the Mental Element in Crime is of the view that "a person should be regarded as 'reckless' as to a result of his conduct [if] he should foresee, at the time when he pursues that conduct, that it may have that result."[28] The House of Lords accepts "highly probable" as the proper standard.[29] The Canadian Criminal Code uses the word "reckless" or "likely".[30]

If the law maintains the status quo, i.e. that only a direct intent will suffice for attempt, there is dicta from the House of Lords to the effect that some forms of recklessness are included within the legal definition of intent[31] (and therefore it would be open to a court to accept recklessness for attempt on the basis that recklessness is subsumed by intent or is in practice indistinguishable from intent):

> "Before an act can be murder it must be...an act committed with one of the following intentions, the

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28. Law Com. No. 89, 28 (1978, H.M.S.O., London). Emphasis in original.

29. Hyam v. D.P.P. (1974) 59 Cr. App. R. 91 (H.L.). The U.S. Supreme Court has recently accepted "probable", see supra, Part (6), "For Recklessness as an Acceptable Mens Rea for Attempt", note 22.

30. s. 212.

31. Which is a different and more intellectually honest method of proceeding than construing, on the facts, intention from recklessness, where by definition, intention per se does not exist. See note 19, supra.

test of which is always subjective to the actual defendant:

...

(iii) Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the defendant desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."[32]

"A man may do an act with a number of intentions. If he does it deliberately and intentionally, knowing when he does it that it is highly probable that grievous bodily harm will result, I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm"[33]

"I agree with those of your Lordships who take the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. What is common to both these states of mind is willingness to produce the particular evil consequence; and this, in my view, is the mens rea needed to satisfy a

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32. Hyam v. D.P.P. (1974) 59 C.R. 91, 105 (H.L.). Lord Hailsham cited with approval Asquith, L.J., (in Cunliffe v. Goodman [1950] 2 K.B. 237 (K.B.)) where the latter said: "An 'intention' to my mind connotes a state of affairs which the party 'intending' - I will call him X - does more than merely contemplate: It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition" (101). Emphasis added. It should however be noted that Lord Hailsham does not consider "that the fact that a state of affairs is correctly foreseen as a highly probable consequence of what is done is the same thing as the fact that the state of affairs is intended" (102).

33. Ibid., 107, per Viscount Dilhorne.

> requirement, whether imposed by statute or existing at common law, that in order to constitute the offence with which the accused is charged he must have acted with 'intent' to produce a particular evil consequence, or in the ancient phrase which still survives in crimes of homicide, with 'malice aforethought'."[34]

Also the same English Law Commission Report recommends that "a person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result."[35] However, the Commission rejects the second limb of the definition ("no substantial doubt") with regard to criminal attempts.[36] This is wrong - to say that the

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34. Ibid., 110, per Lord Diplock. Lord Cross was however ambivalent. He thought that "[i]f, for example, someone parks a car in a city street with a time bomb in it which explodes and injures a number of people...the ordinary man might well argue as follows: 'The man responsible for this outrage did not injure these people unintentionally; he injured them intentionally. So he can fairly be said to have intentionally injured them - that is to say, to have intended to injure them. The fact that he was not certain that anyone would be injured is quite irrelevant (after all, how could he possibly be certain that anyone would be injured?); and the fact that, although he foresaw that it was likely that some people would be injured, it was a matter of indifference to him whether they were injured or not (his object being simply to call attention to Irish grievances and to demonstrate the power of the I.R.A.) is equally irrelevant.'" But Lord Cross conceded that "a logician might object that the ordinary man was using the word 'intentionally' with two different shades of meaning," and he was "prepared to assume that as a matter of the correct use of language the man in question did not intend to injure those who were in fact injured by his act" (117-118).

35. Supra, note 28, at 27. Emphasis added.

36. See supra, Part (6), "For Recklessness as an Acceptable Mens Rea for Attempt", text following note 22.

the car-bomber[37] or plane-bomber[38] did not have the intention to injure people is simply contrary to common sense. Once the "no substantial test" limb is removed, in reality there is nothing left - nothing is absolutely certain,[39] it is not absolutely certain that the bomb will go off - that is, if the law states that only intention will suffice (as one must concede, that because an accused, 'A', has a particular intention, here to explode a bomb, it does not therefore mean that the result will necessarily result, here that the bomb will explode) the law must also accept in practice degrees of likelihood less than absolute certainty. The law will not, and should not, tolerate the pleas of a terrorist that he did not have the intention to explode the bomb, only "no substantial doubt" that the bomb would explode, and consequently did not have the necessary intention to commit 'attempted bombing' should the bomb be defused in time or in fact not explode. Much unnecessary legal argument and litigation will be precluded if legislation includes at least "no substantial doubt" in "intention" with regard to attempt - the present legislation in England, as with the Commission's Report, does

37. As in Lord Cross' example, supra, note 34.

38. See supra, Part (6), "For Recklessness as an Acceptable Mens Rea for Attempt", text following note 31. See also G. Williams, "The Mental Element in Crime", supra, note 23, 34-35, and "The Government's Proposals on Criminal Attempts - III", supra, note 7, 128.

39. "Men's actions and judgments are not founded upon certainty - in most cases certainty is unascertainable - but on probabilities," per Lord Porter, Lang v. Lang [1955] A.C. 423, 429 (J.C.P.C.).

not do so.[40]

An accused's lack of success, in this case the offence of attempt having been committed rather than the complete crime, is customarily reflected in sentencing. Degrees of mens rea, such as the supposed differences in degrees between recklessness and direct intention, can also be reflected in sentencing, but should not be relevant to determine liability to conviction. That attempted murder, or attempted theft merits a lower punishment than the completed offences of murder or theft does not explain why recklessness which would 'support' murder or theft is not considered to be sufficient to support attempted murder or attempted theft, if for some fortuitous or extraneous circumstance, such as the timely arrival of a police officer, the murder or theft is not completed.

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40. Criminal Attempts Act 1981:
"s.1 - (1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.
...
(3) In any case where --
(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
(b) if the facts of the case had been as he believed them to be, his intention would be so regarded,
then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence."

(8) INTENT AS TO CONSEQUENCES; RECKLESSNESS AS TO CIRCUMSTANCES?

"Around the concept 'criminal intent', as used in the criminal law, some of the most intensive battles of legalistic dialectics have been waged."[1] Though there do not appear to be any reported cases on whether intent as to consequences, but recklessness as to circumstances, will suffice for the mens rea of criminal attempt, there inevitably is academic debate on the topic. That there exists such debate per se does not merit its inclusion here, but the fact that the English Law Commission had intended to include it in the new Criminal Attempts Act, does.

The presently accepted position, seemingly sufficiently incontrovertible that there is little statement of it, is that not only must the mens rea of attempt be intent (nothing 'less', such as recklessness, negligence or strict liability), but that such intent must accompany each element of the actus reus relied upon as constituting the definition of the intent. If rape is having

(a) sexual intercourse,

(b) with a female person (who is not one's wife), and

(c) without her consent,

then to be guilty of attempted rape there must be an intent to

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1. L.A. Tulin, "The Role of Penalites in Criminal Law", (1928) 37 Yale L.J. 1048, 1048.

do each of (a), (b) and (c).[2]

However, it is thought that if there is intent as to the central element of the offence, the consequence, then that mens rea as required by the completed crime, will suffice for the attempt:

> "[A]n attempt is so essentially connected with consequences - with that event or series of events which is the principal constituent of the crime - that the only essential intention is an intention to bring about those consequences; and that if recklessness, or negligence, or blameless inadventure with respect to the remaining constituents of the crime (the pure circumstances) will suffice for the substantive crime, it will suffice also for the attempt."[3]

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2. Even though recklessness as to one or more elements of the actus reus would suffice for the complete crime. For example, in R. v. P. (1976) 32 C.C.C. (2d) 400 (Ont. High Ct. of Just.) the accused was convicted of rape where he was reckless as to (c), consent of the victim. But see D.P.P. v. Morgan [1976] A.C. 182, 61 Cr. App. R. 136 (H.L.), and Pappajohn v. R. (1980) 52 C.C.C. (2d) 481 (S.C.C).
   Attempted rape has recently been removed from the Criminal Code and replaced by other nonemclature; see Bill C-127; and Chapter VI, "Impossibility", Parts (2)(c)(ii) and (2)(c)(iii).

3. J.C. Smith, "Two Problems in Criminal Attempts", (1957) 70 Harv. L.R. 422, 434. The learned author continues: "It must be admitted that there appears to be no authority in support of these propositions, but there appears to be no authority against them and it is submitted that they achieve a common-sense result and are in accordance with principle." See also: J.C. Smith, "Two Problems in Attempts Re-Examined - I", [1962] Crim. L.R. 135, 137; G. Williams, "Textbook of Criminal Law", 373 (1978, Stevens & Sons Ltd., London); G.H. Gordon, "The Criminal Law of Scotland", 266 (2nd ed., 1978, W. Green & Son Ltd., Edinburgh); W.R. LaFave and A.W. Scott, "Handbook on Criminal Law", 431 (1972, West, St. Paul); C. Howard, "Criminal Law", 289 (4th ed., 1982, Law Book Co. of Australia, Sydney); J.C.Smith, "Criminal Law", 249 (4th ed., 1978, Butterworths, London). Given the relatively recent nativity of the consequences/circumstances dichotomy, a 1904 comment by O.W. Holmes, though focusing on the act, is curious: "But an act,

Some examples:

> "[A] person is guilty of obtaining by deception if he makes a statement that is in fact false and that he knows to be false (intention) or does not positively believe to be true (recklessness). His state of mind in the second case is one of recklessness as to the truth of the statement. Suppose that he posts a letter containing a false statement, as to the truth of which he is reckless, with intent to obtain money, but the letter is not received or not acted upon by the addressee. Why should not this be an attempt to obtain by deception? The offender intentionally tries to obtain money by a reckless misstatement. This is (it may be said) still an intentional crime (as to the consequence), even though there is only recklessness as to the circumstances."[4]

> "If, for example, recklessness as to ownership is sufficient for theft, the man who puts his hand into the pocket of someone else's coat in a cloakroom with the intention of removing the contents but reckless as to whether it is his coat or not will be guilty of attempted theft."[5]

> "[A]ttempted murder would, on the Working Party's test, require the intention to bring about the consequence specified by the offence of murder, that is, the death of another; an intent to cause grievous bodily harm would not be enough on this test, even though the offence of murder is committed if the defendant kills another with intent only to cause grievous bodily harm. On the other hand attempted theft would not necessarily require knowledge that the property which the defendant intended to appropriate belonged to another; mere recklessness would be enough, since recklessness as to this element of the offence is sufficient for theft."[6]

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3. (cont.) which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which follow it under the circumstances in which it was done," Aiken v. Wisconsin (1904) 195 U.S. 194, 205 (Wisconsin S.C.).

4. G. Williams, "Textbook of Criminal Law", ibid., 373.

5. G.H. Gordon, "Criminal Law of Scotland", supra, note 3, 266.

6. English Law Commission Report, "Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement", 8 (Law Com. No. 102, 1980, H.M.S.O., London).

The English Working Party on Inchoate Offences[7] came to the conclusion that there should be this division as to consequences and circumstances, that is, for the mens rea of attempt, intention as to consequences, and recklessness as to circumstances (if recklessness will suffice for the offence attempted).[8] The English Law Commission in its subsequent Report, however, rejected it.[9] The Criminal Attempt Bill, as introduced in the House of Commons, perhaps surprisingly,

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7. Working Paper No. 50, "Inchoate Offences, Conspiracy, Incitement and Attempt" (1973, H.M.S.O., London).

8. Ibid., 60: "We have provisionally come to the conclusion that the basic principle that should apply is that intention to bring about the consequences which form part of the elements of the offence must be established before there can be liability for an attempt to commit that offence. To state the rule in these general terms, however, conceals the complexity that flows from the fact that offences are cast in forms which, depending upon the circumstances, provide for a fault element sometimes in relation to consequences, and sometimes in relation to circumstances. It is necessary, therefore, to distinguish between the mental element in regard to consequences and the mental element in regard to circumstances which we believe may be effected by the following forumlation -
(a) As to consequences
Where a particular consequence must be brought about before the offence in question is committed, an attempt to commit that offence is committed only when the actor intends that consequence.
(b) As to circumstances
Where what a person attempts to do will not be criminal unless a certain circumstance exists, he is guilty of an attempt to commit that offence only when he has knowledge of or (where recklessness is all that the substantive offence requires) is reckless as to the existence of that circumstance.
Formulated in this way, we believe the two propositions state all the necessary requirements of the mental element."

9. Supra, note 6, 8-9.

had the consequences/circumstances dichotomy after all:

> "s.2(1) Where a person can be guilty of an offence to which s.1 above applies only if he knows that certain circumstances exist, he can be guilty of attempting to commit the offence only if he knows that those circumstances exist.
>
> (2) Where a person can be guilty of an offence to which s.1 above applies only if he knows or believes that certain circumstances exist, he can be guilty of attempting to commit the offence only if he knows or believes that those circumstances exist.
>
> (3) Where a person can be guilty of an offence to which s.1 above applies only if certain circumstances exist, he can be guilty of attempting to commit the offence only if he knows that those circumstances exist or is reckless as to whether they exist of not."

The provision did not however survive in the Act as passed.[10]

The United States Model Penal Code also recommends the consequences/circumstances division.[11]

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10. See Appendix I, "General Legislative Attempt Provisions - An International Compendium". Glanville Williams has also reversed himself: he was for the consequences and circumstances division when the Working Party was for it (supra, note 3, 373-374) (he was a member of the Working Party), but "[p]ondering over the matter" was against it when it appeared in the Criminal Attempt Bill ("The Government's Proposals on Criminal Attempts - III", (1981) 131 New L.J. 128, 128).

11. "Section 5.01 Criminal Attempt.
(1) Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or
(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a

Though the present writer is of the opinion that recklessness should suffice for the mens rea of attempt if it suffices for the complete offence, and though this division into consequences and circumstances would permit the

11. (cont.) substantial step in a course of conduct planned to culminate in his commission of the crime." American Law Institute, "Model Penal Code", Tentative Draft No. 10, 17 (1960, American Law Institute, Philadelphia).

"The definition of attempt that is proposed by the Model Penal Code is designed to follow the conventional pattern of limiting this inchoate crime to purposive conduct. The actor must have for his purpose to engage in the criminal conduct or accomplish the criminal result that is an element of the substantive crime. His purpose need not, however, encompass all the circumstances included in the formal definition of the substantive offense. As to them, it is sufficient that he acts with the culpability that is required for commission of the crime. Suppose, for example, that it is a federal offense to kill or injure an FBI agent and recklessness or even negligence in failing to identify the victim as an agent suffices for commission of the crime. Under the present formulation, there would be an attempt to kill or injure an FBI agent if the actor attempts to kill the agent while recklessly or negligently unaware of the victim's official position. Under paragraph (b) the killing or injuring would be the required purpose; the fact that the victim is an agent would be only a circumstance as to which the actor had 'the kind of culpability otherwise required for the commisson of the crime'. Thus, the proposed formulation imposes attempt liability in a group of cases where the normal basis of such liability is present - purposive conduct manifesting dangerousness - and allows the policy of the substantive crime, respecting recklessness or negligence as to surrounding circumstances, to be applied to the attempt to commit that crime." H. Wechsler, W.K. Jones and H.L. Korn, "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy", (1961) 61 Columbia L.R. 571, 575-6. See also American Law Institute, ibid., 27-30.

introduction of recklessness for the mens rea of attempt in some situations, the writer sees little merit in this division. The distinction is a crude analytic device, and though presented by the Working Party (and as manifested by the Criminal Attempt Bill) as if this distinction were in some form inherent in the definition of the actus reus of offences,[12] it has in reality no inherent validity. "[T]o ask in the case of every offence what is a circumstance and what is a consequence is...a difficult and artificial process which may sometimes lead to confusion."[13]

For example, it is contrary to s. 20 of the (English) Sexual Offences Act 1956 "for a person acting without lawful authority or excuse to take an unmarried girl under the age of 16 out of the possession of her parent or guardian against her will." As interpreted by the learned authors Smith and Hogan,[14] the "consequence" is removal of the girl from her parent's possession, the circumstances being (a) the absence of lawful authority or excuse, (b) the fact that the girl is under 16 and unmarried, and (c) that she was in the possession of the parent or guardian. However, as another learned author indicates,[15] this last-mentioned "circumstance" is also a

12. R. Buxton, "The Working Paper on Inchoate Offences: (1) Incitement and Attempt", [1973] Crim. L.R. 656, 662.

13. Supra, note 6, 8-9. See also ibid.

14. J.C. Smith and B. Hogan, "Criminal Law", 36 (4th ed., 1978, Butterworths, London).

15. Supra, note 12, 662-663 (and noted by the English Law Commission, supra, note 6, 9, note 24).

part of the "consequence", which is removing the girl out of the possession of her parent or guardian. Accordingly, according to the Working Party, it would appear that if removal from the parent's or guardian's possession is characterized as (i) a consequence, an acccused would not be guilty of attempt if he (or she) did not realize the girl may be in her parent's or guardian's possession because of his (or her) lack of intent, but if characterized as (ii) a circumstance, he (or she) would be guilty of attempt because of his (or her) recklessness as to that circumstance. One further example: if an accused is charged with attempted possession or attempted trafficking of a narcotic, is the nature of the narcotic, whether a narcotic at all,[16] or a particular type of narcotic, a consequence or a circumstance?[17]

Neither "consequences" nor "circumstances"

16. "A man who bought an ounce of horse manure from a hippie in the West End, thinking it was cannabis, was fined 5 pounds at North London court yesterday for attempting to procure cannabis," The Daily Telegraph (noted by Glanville Williams, supra, note 3, 392).

17. G. Williams, "The Government's Proposals on Criminal Attempts - III", supra, note 10, 129. Williams also notes as follows: "Clause 2(1) [of the English Criminal Attempt Bill] which requires the alleged attempter to know the circumstances, therefore requires the circumstances to exist. Does the Home Office really want to provide for the immunity of a terrorist who, trying to buy explosives, is provided with a chemical substance that, owing to the lack of a certain ingredient, will not explode? It is very unlike the Home Office to exert itself for such a purpose; nevertheless, of all the would-be offenders discussed in these articles the terrorist has the clearest case for acquittal under the provisions of the Bill. His case is by no means perfectly clear, because the argument may be advanced that the existence of explosives is not a 'circumstance'

are defined - perhaps they cannot be, which would indicate the futility of their use as legal analytical tools.[18] As one learned author has commented, "it becomes virtually a matter of taste which elements are added to the consequence, and which remain as, or serve additionally as, circumstances."[19] Also, the division offers no explanation as to why recklessness as to circumstances is the accepted minimum mens rea level of liability for attempt when negligence or even strict liability may suffice for the completed offence.[20]

The consequences/circumstances dichotomy raises more questions than solutions, whether juristic or moral, and has little to commend it. Given its inherent ambiguity and potential for confusion, were it to be enacted, we would look

17. (cont.) of the offence but part of the forbidden 'act'. But it is quite wrong that the point should be left in doubt. If the intention really is to exempt the terrorist, it is wrong both in policy and in terms of legal consistency. One may safely assume that the Home Office wishes its Bill to secure the conviction of a thief in the empty pocket case. Then surely it should provide for the conviction of a terrorist who, trying to get explosives, secures an empty bag. And if that is so for an empty bag, why should the case be different if the bag is filled with something that is not an explosive? And why should the question be affected by the fact that the completed offence requires knowledge, if our terrorist (being charged with an attempt and not the completed offence) believes that the bag contains explosives?" Ibid.

18. Ibid.

19. Supra, note 12, 663.

20. For other criticism, see supra, Glanville Williams, note 10, 128-129, and P. Brett, "An Inquiry into Criminal Guilt", 135 (1963, Law Book Co. of Australia, Sydney).

forward to much protracted litigation and convoluted academic comment, the absence of both of which one could certainly tolerate.

(9) NEGLIGENCE THE MENS REA FOR ATTEMPT?

Negligence is part way between recklessness and strict liability. It is similar to the former in that "negligence necessarily implies that one could have been more careful. ...[It] consists...in committing an act without reasonable regard for the risks involved. If the consequences which follow are within the risk, there is nothing illogical in fixing criminal liability upon the actors."[1] And it is similar to the latter in that a criminal consequence is not consciously sought. Though one writer has categorically stated that "[o]bviously there can be no attempt at

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1. A.W. Mewett, Q.C., "The Shifting Basis of Criminal Law", (1963-64) 6 Crim. L.Q. 468, 470-82. With regard to the development of negligence, P.H. Winfield has commented: "Perhaps one of the chief agencies in the growth of the idea [of negligence] is industrial machinery. Early railway trains, in particular, were notable neither for speed nor for safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted to the law," "The History of Negligence in the Law of Torts", (1926) 42 L.Q.R. 184, 195. Mr. Justice Holmes has stated that a person may be convicted of a serious crime because his criminal negligence resulted in "consequences which he neither intended nor foresaw": Commonwealth v. Pierce (1884) 138 Mass. 165, 178 (Supreme Judicial Ct. of Mass.). For the 'punishability' of criminal negligence, see: H.L.A. Hart, "Negligence, Mens Rea and Criminal Responsibility" in "Punishment and Responsibility", 136 ff. (1968, Clarendon Press, Oxford); R. Moreland, "A Rationale of Criminal

negligence, since a negligent act is by definition done without intent,"[2] and another that the "development of the criminal law, particularly in the last 20 years, has reflected...a fairly consistent tendency...to diminish the role of negligence as a basis of liability in serious crime,"[3] it is now to be considered whether negligence, if it suffices for the mens rea of the complete offence, will suffice for the attempt.

Given that there is purposeful conduct, the learned authors A.W. Mewett, Q.C., and M. Manning, Q.C., suggest that one could be guilty of the attempt of an offence for which negligence is a sufficient mens rea:

> "If one has a car sitting in one's driveway that is known to be a dangerous piece of machinery to drive which would show a wanton or reckless disregard for the lives or safety of others, and one gets into the car and proceeds to drive it down the driveway, but it is stopped just before it turns into the road, it is suggested that the offence of attempted criminally negligent driving has been committed

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1. (cont.) Negligence", (1943) 32 Ky. L.J. 1; J.W.C. Turner, "The Mental Element in Crimes at Common Law", (1936) 6 Camb. L.J. 31; J.Ll. J. Edwards, "The Criminal Degrees of Knowledge", (1954) 17 Mod. L.R. 294; G. Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis", (1971) 119 Univ. Pa. L.R 401; M.E. Cullen, "Criminal Negligence and Related Matters", [Aug. 1980] Ontario Crowns' Newsletter 1-45: J. Hall, "Negligent Behaviour Should be Excluded From Penal Liability", (1963) 63 Columbia L.R. 632.

2. J.T. Mann, "Criminal Law - Attempted Perjury - The Rules of 'Legal' and 'Factual' Impossibility as Applied to the Law of Criminal Attempts", (1955) 33 N. Carolina L.R. 641, 643. See also R.M. Perkins and R.N. Boyce, "Criminal Law" 637-639 (3rd ed., 1982, Foundation Press, Mineola, N.Y.).

3. R. Buxton, "The Fourteenth Report of the Criminal Law Revision Committee: Offences Against the Person (1) The New Murder", [1980] Crim. L.R. 521, 532.

because there is purposeful conduct - i.e., an intent to do that which the law categorizes as an offence."[4]

Some authors argue on principle that negligence should be a sufficient mens rea for the attempt, if it is sufficient for the complete offence. The argument can be based in terms of special deterrence - general deterrence having clearly failed, the person should be punished to ensure his future compliance.[5] Colin Howard makes the perspicacious comment that "[t]he proposition that an attempt cannot be committed inadvertently is not to be confused with the proposition that an offence of inadvertence cannot be attempted. Under the present law the first statement is true and the second

4. "Criminal Law", 143 (1978, Butterworths, Toronto). A conclusion with which Glanville Williams would agree: "There is no reason why a person should not be convicted of attempting to commit an intentional violation of a law prohibiting negligence," "Criminal Law, the General Part", 619 (2nd ed., 1961, Stevens, London). J.C. Smith reaches the same conclusion, though with the consequences/circumstances dichotomy: "[T]he act must be intentional with respect to the consequences and, therefore, the consequential circumstances; but, as for the pure circumstances, if negligence is all that is required for the substantive crime, it will suffice for an attempt," "Two Problems in Criminal Attempts", (1957) 70 Harvard L.R. 422, 432. See also J.C. Smith and B. Hogan, "Criminal Law", 249-250 (4th ed., 1978, Butterworths, London). E.M. Burchell and P.M.A. Hunt also suggest it is possible, if the act is intentional: "[A]n accused could be found guilty of an attempt to commit an offence of negligence, provided he intended to do an act which, if fully performed, would have amounted to the crime of negligence in question," "South African Criminal Law and Procedure", vol. 1, 380 (1970, Juta, Capetown). See also C. Howard, "Criminal Law", 290-291 (4th ed., 1982, Law Book Co. of Australia, Sydney); J.C. Smith, "Two Problems in Criminal Attempts Re-Examined - I", [1962] Crim. L.R. 135, 138.

5. A.N. Enker, "Mens Rea and Criminal Attempt", [1977] Amer. Bar Foundation Research Jo. 845, 875-876.

false."[6] J.C. Smith considers

> "[t]he question...an open one. If there is a valid policy underlying the imposition of liability for negligence and strict liability in the substantive offence, it is difficult to see why it does not apply equally to the attempt. The only difference between the man who attempts and fails and another who attempts and succeeds may be chance. There is, ex hypothesi, no difference in moral blameworthiness between them and the one may be as dangerous as the other."[7]

However, J.C. Smith also states that "a formidable case can be made, by an argument from principle, against extending liability for negligence and strict liability for attempts. It is said that liability for negligence and strict liability are the creation of statute, not of the common law. Attempt is a common law misdemeanour and should be governed by ordinary common law principles, even where the crime attempted

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6. "Criminal Law", 290 (4th ed., 1982, Law Book Co. of Australia, Sydney).

7. J.C. Smith and B. Hogan, supra, note 4, 251. L.C. Becker: "Suppose two men are driving in equally reckless ways - at night, perhaps, in cars whose brakes and steering could not pass inspection standards, and through a residential section at high speed. One is unlucky enough to hit and kill a pedestrian who unwittingly steps into the street. The other had passed by the same spot, 'uneventfully,' in the same criminally reckless manner, several moments earlier. The criminality of the acts is, it seems, equal, and the acts therefore ought to be punished equally. Yet we charge the one with only reckless driving, a relatively minor offense, and the other with negligent manslaughter. The difference in the two offenses is one of mere chance, just as is the difference between the assassin whose bullet hits the belt buckle and the one whose bullet finds its target. To be consistent with the anaylsis of criminal attempt...it seems we should equalize the penalites for both 'uneventful' and 'eventful' negligence," "Criminal Attempt and the Theory of the Law of Crimes", (1974) 3 Phil. and Pub. Affs. 262, 292. See also supra, note 5, 872, 873.

is one of strict liability."[8] Another argument on principle is that "[i]f a person has not actually brought about the legally-proscribed state of affairs, there seems to be no sufficient ground for using the criminal law to punish incipient negligence."[9] Three eminently pragmatic reasons militating against admitting negligence as a sufficient mens rea for attempt are that it is possible to be legally negligent though one is careful,[10] that the determination of

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8. J.C. Smith, "Two Problems in Criminal Attempts Re-Examined - I", supra, note 4, 142. The learned author continues:

> "Powerful analogies can be invoked to support this argument. When another common law concept, aiding and abetting, has been applied in relation to a crime of strict liability, it has been almost invariably held, and must be taken to be the rule, that there can be no conviction unless the alleged aider and abettor knew the essential facts which constitute the offence, i.e., unless he had mens rea. An alleged aider and abettor of the seller of the tainted meat could be convicted only if he knew that the meat was tainted or deliberately closed his eyes to the fact. Similarly, where it was sought to impose vicarious liability for aiding and abetting, the courts declined to apply this alleged creature of statute to a common law conception. It has already been seen that, in Gardner v. Akeroyd, the court adopted the same approach to a charge of vicarious liability for an attempt....but the principle would not preclude the conviction of attempt of one who was merely reckless and not intentional with respect to the relevant circumstances; for the common law concept of mens rea includes recklessness."

9. Glanville Williams, "Textbook of Criminal Law", 373 (1978, Stevens & Sons Ltd., London).

10. B. Cardozo:

> "Negligence as a term of legal art is, strictly speaking, a misnomer, for negligence connotes to the ordinary man the notion of lack of care, and yet one can be negligent in the view of the law though one has taken what one has supposed to be extraordinary care, and not negligent though one has taken no care at all. Moreover, one can deliberately choose to be indifferent to the greatest peril, and yet avoid the charge of negligence for all one's scorn of prudence.

negligence is perhaps not possible without reference back to an actual harm committed (i.e., no longer an attempt),[11] and the there-but-for-the-grace-of-God-go-I reluctance to convict.[12]

Though the present writer has argued that recklessness should suffice for attempt (if for the complete offence), and must concede that what one might term the 'correlation'

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10. (cont.) Two factors, both social, contribute to the paradox. The first is the conception of the 'reasonable man,' the man who conforms in conduct to the common standards of society. If the individual falls short of the standards of the group, he does so at his peril. He must then answer for his negligence though his attention never flagged. Enough that a reasonable man would have appreciated the peril which because of stupidity or ignorance may have been hidden to the actor....By and large...with whatever allowance may be made for deviation or exception, the test of liability is external and objective."
"The Paradoxes of Legal Science", 72-74 (1928, Yale University Press, New Haven). See also H.W. Edgerton, "Negligence, Inadvertance and Indifference: The Relation of Mental States to Neligence", (1926) 39 Harvard L.R. 849, 854.

11. "[There] is the difficulty of determining degrees of negligence prospectively. Just as occasionally we may use the very fact that an injury resulted from some sort of unusual conduct as evidence that the conduct was negligent, so too it may happen that we cannot determine whether an act was negligent, or how negligent it was, in the absence of some physical damage done," L.C. Becker, supra, note 7, 292-293. Emphasis in original.

12. "A juryman [and judge?] still hesitates to convict a motorist of manslaughter, even in the most flagrant cases, because he unconsciously feels there is no broad gulf between himself and the motorist in the dock. There is thus a conflict between the theory of the law and it application by juries...," G.W. Paton and D.P. Derham, "A Textbook of Jurisprudence", 386 (4th ed., 1972, Clarendon Press, Oxford). This was one of the factors for the introduction of the offences of causing death by criminal negligence (with the same punishment as for manslaughter), criminal negligence in the operation of a motor vehicle, and dangerous driving: ss. 203, 244(1), and 233(4) respectively (see below, notes 15 and 16).

argument[13] applies to both recklessness and negligence (and strict liability), it is considered that it would offend the sensibilities of the layperson to hold that an attempt can be committed negligently.[14] It would simply be going too far. There are adequate provisions in the Criminal Code of Canada to protect against the more serious forms of criminal negligence,[15] often driving

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13. That whatever mens rea suffices for the offence attempted should also suffice for the attempt.

14. As one writer has stated, in "the case of the person about to enter and drive his car, which unknown to him has burned-out rear lights or faulty brakes [assume] a hypothetical observer aware of the faulty condition. What interests would be served by the arrest and prosecution of the driver that would not be served equally well, perhaps better, by merely warning him that his brakes or his rear lights are not functioning properly?" Supra, note 5, 874. The question is how one will distinguish recklessness from negligence, if recklessness is to be a sufficient mens rea for attempt (if it is for the complete crime), but not negligence - are they not merely a difference in degree? The answer to this is two-fold: "Most differences are, when nicely analyzed," O.W. Holmes, Rideout v. Knox (1889) 19 N.E. 390, 392 (Sup. Jud. Ct. Mass.); and secondly, the law is well used to recognising what is or is not recklessness and negligence, whether actual 'harm' occurs or not, such as in the driving cases - reckless/negligent/careless driving are often proscribed as statutory offences even though they are inchoate, in the sense that no person or thing has been injured, and are really in the nature of an 'attempt'.
   Moreover, as Kenny points out, "it is a logical fallacy to suggest that recklessness is a degree of negligence," "Outlines of Criminal Law", 38 (19th ed., J.W.C. Turner, Ed., 1966, Cambridge University Press, Cambridge).

15. s. 198: "Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful acts that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing." Emphasis added.
   s. 202: "(1) Every one is criminally negligent who
      (a) in doing anything, or
      (b) in omitting to do anything that it is his duty

cases,[16] even though no injury is actually caused, as well as various miscellaneous provisions with regard to such dangers as explosives,[17] openings in ice, or excavations.[18] There would therefore not appear to be any societal need to extend criminal liability for attempts beyond that of recklessness.

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15. (cont.) to do, shows wanton or reckless disregard for the lives or safety of other persons.
(2) For the purposes of this section, 'duty' means a duty imposed by law."
s. 203: "Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life."
s. 204: "Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for ten years."

16. s. 233: "Every one who is criminally negligent in the operation of a motor vehicle is guilty of
(a) an indictable offence and is liable to imprisonment for five years, or
(b) an offence punishable on summary conviction.
...(4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of
(a) an indictable offence and is liable to imprisonment for two years, or
(b) an offence punishable on summary conviction."

17. s. 77: "Every one who has an explosive substance in his possession or under his care or control is under a legal duty to use reasonable care to prevent bodily harm or death to persons or damage to property by that explosive substance."

18. s. 242: "(1) Every one who makes or causes to be made an opening in ice that is open to or frequented by the public is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the opening exists.
(2) Every one who leaves an excavation on land that he owns or of which he has charge or supervision is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the excavation exists."

(10) STRICT LIABILITY?

Strict liability[1] is an apocryphal and dubious concept. That the Supreme Court of Canada has decided that the offence of illegally possessing lobsters does not require mens rea,[2] but that illegally possessing narcotics does,[3] and that illegally possessing drifting logs may,[4] or may not,[5] is testimony to such statement. Despite comments from Law Reform Commissions[6] indicating otherwise, strict liability is prevalent, and by no means temporary: "In a sense, [the accused] has become an insurer. Although this is most regrettable and despite the absence of any moral blameworthiness, it is more important to protect the public

1. Preferred to "absolute liability", which may inaccurately suggest there is no defence to an "absolute liability" charge. See R. v. City of Sault Ste. Marie (1978) 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, [1978] 2 S.C.R. 1299 (S.C.C.).

2. R. v. Pierce Fisheries Ltd. [1971] S.C.R. 5 (S.C.C.).

3. Beaver v. R. [1957] S.C.R. 531 (S.C.C.).

4. Watts and Gaunt v. R. [1953] 1 S.C.R. 505 (S.C.C.).

5. R. v. Shymkowich [1954] S.C.R. 606 (S.C.C.).

6. English Law Commission: "the purposes of the substantive criminal law include...the safeguarding of conduct which is without blame from condemnation as criminal," Working Paper No. 17, "Codification of the Criminal Law, General Principles: The Field of Enquiry", 6 (1968, H.M.S.O., London). Law Reform Commission of Canada: "Strict liability and a criminal law oriented towards punishment are morally incompatible. For strict liability sanctions punishment of persons innocent of fault, and punishing the innocent is never just. The working Paper [sic], therefore, recommends eliminating strict liability from our criminal law," "Studies on Strict Liability", 221 (1974, Information Canada, Ottawa).

interest."[7]

As the law does not permit negligence to be a sufficient mens rea for attempt, so also an absence of mens rea, strict liability. An attempted strict liability offence is only possible if the accused acted with an intent to bring about the proscribed actus reus.[8] In Gardner v. Akeroyd[9] a butcher was charged with having broken a strict liability statutory regulation of doing acts preparatory to selling meat above the statutory maximum. An assistant had parcelled and priced the meat in question during the butcher's absence and without his knowledge. The Court here held that though Akeroyd would have been vicariously liable for his assistant had the meat been sold, he was here charged with the statutory offence of doing a preparatory act, which required knowledge. Lord Goddard, C.J., reasoning by analogy to the law of attempt, stated:

> "Does, then, this doctrine of vicarious liability extend to an attempt, for, if it does not, it cannot apply to a mere preparatory act. That it is a necessary doctrine for the proper enforcement of much modern legislation none would deny, but it is not one to be extended. Just as in former days the term 'odious' was applied to some forms of estoppel, so

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7. R. v. V.K. Mason Construction Ltd. [1968] 1 O.R. 399, 404 (Ont. H.C.J.), per Lieff, J. With regard to the defence of due diligence, see R. v. City of Sault Ste. Marie, supra, note 1. See also B. Hogan, "The Mental Element in Crime, the Law Commission's Report No. 89, (2) Strict Liability", [1978] Crim. L.R. 593; S. White, "Strict Liability in Criminal Law: How Stands the Argument Now?", (1978) 142 J.P. 622.

8. W.R. LaFave and A.W. Scott, "Handbook on Criminal Law", 430 (1972, West, St. Paul, Minn.); Glanville Williams, "Textbook of Criminal Law", 372 (1978, Stevens and Sons, London).

9. [1952] 2 All E.R. 306 (English Div. Ct.).

> might it be to vicarious liability. It makes a person guilty of an offence actually committed by another when he may have no knowledge that it was being committed or may have done his best to prevent it. There is no case to be found in the books where it has been applied to an attempt, and, for my part,I refuse so to extend and apply it. Were it to be applied, the consequences might be startling and unjust in the highest degree. For, once a servant had done an act amounting to an attempt, his master would be vicariously liable though he had intervened and frustrated the commission of the substantive offence."[10]

Though, strictly speaking, the comments with regard to attempt were obiter, and though J.C. Smith argued that the narrow ratio is that this statutory regulation did not impose vicarious liability and further that the case does not state that an attempt of a strict liability offence is itself an offence of strict liability,[11] such comments were pivotal in the determination of the case. The New Zealand Court of Appeal has imposed strict liability with regard to the statutory offence of attempting to drive across a level crossing when there is a risk of colliding with a train[12] (not something one would think would require a statute to prevent), but the significance of the fact that the charge was that of attempt went apparently unnoticed, and was not discussed. The

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10. Ibid., 311. Both Lord Goddard and Parker, J., with both of whom Slade, J., concurred, pointed out that to direct otherwise Akeroyd would be guilty even if when he returned he prevented the meat from being delivered, which would be an absurdity.

11. "Two Problems in Criminal Attempts Re-Examined-I", [1962] Crim. L.R. 135, 141.

12. McCone v. Police [1971] N.Z.L.R. 105 (N.Z.C.A.).

briefly reported[13] case of R. v. Collier - in which the statutory defence to a charge of intercourse with a girl under 16, that the accused reasonably believed the girl was over 16, was held to be an available defence to attempt - has been interpreted as implying that, apart from such defence, strict liability applies to attempt.[14] As one learned author has commented, "this can hardly be regarded as a strong authority."[15] A recent unreported Jamaican case,[16] the only other case on point of which the writer is aware, has held that the attempt of an offence of strict liability is not itself an offence of strict liability.

The learned authors A.W. Mewett, Q.C., and M. Manning, Q.C., pose the question, though do not suggest an answer,

> "whether an attempt to commit the full offence where mens rea is not required is either possible or desirable if the accused has no intent to commit the full offence and the statute is not phrased so as to make the attempt itself an offence. For example, a non-licensed store receives a shipment of soft-drinks that actually but unknown to the store-owner are

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13. [1960] Crim. L.R. 204 (Hertfordshire Assizes).

14. J.C Smith, supra, note 11, 141; Glanville Williams, supra, note 8, 374; J.C. Smith and B. Hogan, "Criminal Law", 250 (4th ed., 1978, Butterworths, London).

15. D. Stuart, "Mens Rea, Negligence and Attempts", [1968] Crim. L.R. 647, 661. For a discussion of an Israeli case (Israel v. Simon Tov (1967) 21 (I) P.D. 340 (Israeli Sup. Ct.)) in which a statutory presumption was held not to apply to an attempt but would have applied to the complete offence, and a discussion of the applicability of such presumptions to attempts generally, see S.Z. Feller, "The Application of Presumptions to the Derivative Forms of an Offence", (1968) 3 Is. L.R. 562.

16. Lockhart, The Daily Gleaner, Dec. 6, 1977, 13. Noted at [1980] Crim. L.R. 782.

> alcoholic, but they have not yet been put on the shelves. He intends to put them on the shelves and is just about to do so when he is arrested. If he had done so, he would have been guilty of an offence, but he does not intend to sell alcoholic liquor."[17]

J.C. Smith argues on two grounds of principle that strict liability should extend to attempts; firstly, if there are valid policies for imposing strict liability on the complete offence, there are similar valid policies for attempts;[18] and secondly, on the ground of the consequences/circumstances dichotomy:

> "Provided that D is intentional with respect to the main event in the actus reus, there is no logical bar to his being held to have attempted the crime, even though he is...blamelessly inadvertent [to the circumstance]....If it is an offence for D to sell tainted meat or adulterated milk although he did not know, and had no means of knowing, that the meat was tainted or the milk adulterated, why should he not be guilty of an attempt if he tries, unsuccessfully, to sell meat or milk in similar circumstances?"[19]

Other authors argue that mens rea is needed for an attempt to commit a statutory offence even though no mens rea is required of the actual perpetrator, "since liability for attempt stems from the common law which knows no exception to the rule actus non facit reum nisi mens sit rea".[20]

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17. "Criminal Law", 145 (1978, Butterworths, Toronto).

18. J.C. Smith and B. Hogan, supra, note 14, 251.

19. Supra, note 11, 138-139. See also J.C. Smith, "Two Problems in Criminal Attempts", (1957) 70 Harvard L.R. 422, 433-434.

20. That is, an act does not make the actor guilty, unless the mind is criminal. E.M. Burchell and P.M.A. Hunt, "South African Criminal Law and Procedure", Vol. I, 379 (1970, Juta, Cape Town). Note is made however, that there is no South African authority on the point.

J.C. Smith himself notes the argument in principle against extending strict liability to attempts, that strict liability is the creation of statute, not the common law.[21] One learned author sees no policy reason to extend strict liability to attempts[22] with which another agrees.[23] The arguments noted in the previous section with regard to not admitting negligence as the mens rea for attempt apply all the more forcefully here. The English Law Commission recommends that "the concept of the mental element in attempt should be expressed as an intent to bring about each of the constituent elements of the offence attempted,"[24] which would preclude, though the Commission does not advert to such result directly, recklessness and negligence as sufficient mens rea for attempt.[25] Only strict liability is mentioned: "On any charge of attempt to commit such offences [strict liability 'regulatory' offences] it will be necessary to prove that the defendant intended to carry out the forbidden act, whether or not he knew that the act would amount to an offence."[26]

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21. See Part (9), "Negligence the Mens Rea for Attempt?" supra, note 8 and corresponding text.

22. D. Stuart, supra, note 15, 660.

23. W.R. LaFave and A.W. Scott, supra, note 8, 430.

24. "Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement", 10-11 (Law Com. No. 102, 1980, H.M.S.O., London).

25. Discussed supra, Parts (5)-(9).

26. Supra, note 24, 11. Which would alter the perceived interpretation of R. v. Collier, supra, note 13, 204: "[W]here a defendant is charged with an attempt to have intercourse with a girl under the age of thirteen, it will be necessary to show that he intended to have

As noted in the previous section on negligence, the problem, if perceived to be such, of strict liability offences being attempted without mens rea would appear to be adequately covered by the legislature. A recent Quebec Court of Appeal decision has held that the words "evades or attempts to evade" in a statute "clearly imply some positive action", and the offences created are therefore mens rea offences, not strict liability.[27] A cursory glance at the virtual explosion of statutory instruments, both provincial and federal,[28] would reassure one that the legislatures are not averse to legislating in the strict liability regulatory area, and solve, unwittingly or otherwise, the problem of whether strict liability applies to attempts if it applies to the complete offence, by drafting. For example:

> "24(1) No person shall use for bait or have in his possession in a park live fish eggs or live minnows. ...(3) No person shall use for bait or have in his possession in Forillon, Wood Buffalo or Prince Albert

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26. (cont.) intercourse with a girl under that age," English Law Commission, supra, note 24, 11. And "might well restrict the occasions upon which it would be possible to charge an attempt. For example, if the defendant was stopped when on the point of driving off in his motor car which had defective brakes, he could not be convicted of attempting to use a car which 'does not comply with regulations' unless there was proof of his intention to drive with defective brakes, although the completed offence does not require knowledge that the brakes are defective," ibid., 12.

27. Pichette v. Deputy Minister of Revenue of Quebec (1982) 29 C.R. (3d) 129, 137 (Que. C.A.), per Kaufman, J.A.

28. For example, there are 18 volumes in the Consolidated Regulations of Canada.

National Parks dead fish eggs or dead minnows."[29]

Also, many regulations are drafted using preparatory terminology such as 'advertising, offering for sale, exposing for sale'.[30] The apt comment is, however, made by J.C. Smith in concluding one of his articles "that there is as much, or as little, to be said in favour of the extension of negligence and strict liability to attempts, as there is in favour of its application to substantive crimes."[31]

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29. National Parks Fishing Regulations 1978, c. 1120. Emphasis added. Are fish in Forillon, Wood Buffalo or Prince Albert National Parks only attracted by dead fish eggs or dead minnows, in contradistinction to their colleagues in other National Parks? Presumably if one were fishing in one of the three National Parks mentioned, and one's bait expired (a question of law or a question of fact? See Law Reform Commission of Canada, Report No. 15, "Criteria for the Determination of Death" (1981): a consequence or a circumstance?), one would set off for one of the other National Parks.

30. For example, Hazardous Products (Toys) Regulations 1978, c. 931, s. 3(1): "No person shall advertise...any product included in items 12 to 19...." Emphasis added. The eighteen volume set of the Consolidated Regulations of Canada 1978 makes fascinating bedtime reading; for example, Medical Devices Regulations 1978, c. 871, pt. 1, s. 5:
"Every condom shall
...(b) have a length of not less than 16.0 centimetres;
...(f) have a bursting volume of not less than 25 litres;
...(g) have a bursting pressure of not less than 1 kilopascal."
(The figures of 16.0 centimetres, 25 litres, and 1 kilopascal are not typographical errors.)
In the event that a Canadian consumer might suspect a particular product of not possessing these characteristics, Pt. II ss. 1-2 and 5-6 of the federal Regulations detail the scientific methods one may use to measure length, bursting volume and bursting pressure. An explosion of statutory regulations indeed. Corruptissima Respublica, plurimae Leges (Tacitus).

31. Supra, note 11, 144.

(11) CONDITIONAL INTENT

How is the court to react to an accused charged with theft or attempted theft whose defence is: "I hadn't really made up my mind whether or not to steal. I was certainly extremely curious, but nevertheless, hadn't made up my mind, and therefore did not have the intention to steal"? The English courts, including the Court of Appeal, in which two Law Lords sat, have quashed convictions where such was the defence,[1] or directed that the case be withdrawn from the jury.[2]

The case to which this state of affairs, which Glanville Williams has termed a Rogues' Charter,[3] can be attributed is that of R. v. Easom:[4] Easom picked up a lady's handbag (which was attached, unfortunately for Eason, by a thread, to a policewoman's wrist) in a cinema, checked through the contents, and put it back - not having a penchant for what was in the policewoman's handbag. He was charged with theft (curiously, not attempted theft) of "one handbag, one purse, one note-book, a quantity of tissues, a quantity of cosmetics and one pen." Edmund Davies, L.J. (as he then was):

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1. R. v. Husseyn (Otherwise Hussein) (1978) 67 Cr. App. R. 131 (English C.A.) (Viscount Dilhorne, Lord Scarman and Mr. Justice Cusack).

2. R. v. Bozickovic [1978] Crim.L.R. 686 (Nottingham Crown Court). R. v. Greenhoff [1979] Crim. L.R. 108 (Huddenfield Crown Court).

3. "Three Rogues' Charters", [1980] Crim. L.R. 263.

4. [1971] 2 Q.B. 315, 2 All E.R. 945 (English C.A.).

> "In every case of theft the appropriation must be accompanied by the intention of permanently depriving the owner of his property. What may be loosely described as 'conditional' appropriation will not do. If the appropriator has it in mind merely to deprive the owner of such of his property as, on examination proves worth taking and then finding that the booty is to him valueless, leaves it ready to hand to be repossessed by the owner, he has not stolen....In the present case the jury were never invited to consider the possibility that such was the appellant's state of mind....Yet the facts are strongly indicative that this was exactly how his mind was working....For this reason we hold that conviction of the full offence of theft cannot stand."[5]

However, the English Court of Appeal, which, as mentioned, included two Law Lords on this occasion, held that the Easom rule also applied to attempted theft: R. v. Husseyn.[6] The police observed a parked van in a London street, saw H, standing in the middle of the road looking up and down, heard an alarm go off, noticed D tampering with the back door of the van, and as one of the police officers approached, D tried to close the door, then both H and D ran off, and were subsequently apprehended. The interior of the van (which was completely covered with white rabbit fur, including the dashboard) contained a holdall (bag) in which was valuable scuba-divingequipment.[7] The jury had little difficulty in

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5. Ibid., 319 and 947 respectively. For cogent criticism of Easom, see L. Koffman, "Conditional Intention to Steal", [1980] Crim. L.R. 463, 465-467. This 'conditional inention' defence has been accepted in Scotland (Herron v. Best [1976] S.L.T. 80 (Glasgow Sheriff Court)) but rejected in New Zealand (Police v. Wylie and Another [1976] 2 N.Z.L.R. (N.Z.C.A.)); neither case mentioned Easom, nor did the New Zealand case mention the previously-decided Scottish case.

6. Supra, note 1.

7. Ibid.

returning two guilty verdicts to the charges of attempted theft, having been directed by the trial judge (named, appropriate to his profession, Solomon) that the jury could infer that what the young men were about to do was to look into the holdall, and if its contents were valuable, to steal it.[8] The wisdom of Solomon was however held to be a misdirection, and was substituted by that of Lord Scarman, who quoted approvingly Edmund Davies, L.J.,[9] in Easom and stated:

> "It must be complete common sense that, granted the intention to steal, the opening of a van door immediately prior to taking a holdall which is the other side of the door [sic] falls within the external features of an attempt....The direction of the learned judge in this case is exactly the contrary [to Easom]. It must be wrong, for it cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal."[10]

Lord Scarman's observation, approved in other cases,[11] thus

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8. Ibid., 132.

9. Supra, note 5.

10. Supra, note 1, 132. Emphasis added.

11. A differently constituted Court of Appeal reached the same conclusion one month later (R. v. Hector (1978) 67 Crim. App. R. 224 (English C.A.) (the headnote in this report, in so far as it mentions "Whether Conditional Intention Enough", is incorrect)), which conclusion was approved by the House of Lords (D.P.P. v. Nock and Alsford [1978] 2 All E.R. 654, 664): "Unfortunately in R. v. Hussein the issue of intention was summed up in such a way as to suggest that theft, or attempted theft could be committed by a person who had not yet formed the intention which the statute defines as a necessary part of the offence. An intention to steal can exist even though, unknown to the accused, there is nothing to steal, but if a man be in two minds whether to steal or not, the intention required by statute is not proved," per Lord Scarman.

granted the blessing of authority on conditional intention. However, "within a few months...submissions that 'conditional intent is not enough' were being accepted by magistrates and Crown Court judges...causing frustration and perplexity to prosecuting authorities and bringing the criminal law into disrepute."[12]

Criticism was swift and sure, though perhaps a little reluctant, given the calibre of the judges in Husseyn:[13] that such accused did in fact have an intent to steal,[14] the highly

12. "Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement", 106 (Law Com. No. 102, 1980, H.M.S.O., London). In two cases, in the latter of which the accused admitted having entered a dwelling house with intent to steal money, the case was withdrawn from the jury on the basis of Husseyn: R. v. Bozickovic, [1978] Crim. L.R. 686 (Nottingham Crown Court); R. v. Greenhoff, [1978] Crim. L.R. 108 (Huddenfield Crown Court). As the Court of Appeal has subsequently commented: "A reading of [Greenoff] would make the layman wonder if the law had taken leave of its senses...," R. v. Walkington [1979] 2 All E.R. 716, 724, (English C.A.), per Geoffrey Lane, L.J.

13. Glanville Williams: "the Court of Appeal in Husseyn went wrong, and the unusual eminence of the judges who decided it has prevented anyone from saying so," supra, note 3, 268. J.C. Smith did not feel so prevented, and astutely predicted the unfortunate cases of Bozickovic and Greenhoff; see "Comment", [1978] Crim. L.R. 219.

14. "Viewed as a matter of commonsense they do have that intent notwithstanding that the consummation of their intent is conditional on their finding what they are looking for. That they may not find what they are looking for does not affect that fact that they intend - that they have made up their minds - to steal," J.C. Smith and B. Hogan, "Criminal Law", 526 (4th ed., 1978, Butterworths, London).

"Some burglars may have in mind some specific thing which they propose to steal when they enter the building but probably the great majority intend to steal whatever they may find to be valuable. Do they not have 'a present intention to steal?'" J.C. Smith, supra, note 13.

beneficial effect of this legal development upon the criminal 'profession',[15] the possible ramifications in other areas of the law,[16] the capacity for being misunderstood,[17] and that it did not deal with situations where (a) defendant has examined the contents of a container and rejected them, (b) the container is empty, and (c) defendant states he was looking for a particular item, which happens not to have been in the container.[18] The locus poenitentiae argument could also not be accepted as a valid defence.[19] Husseyn does however have a

15. "The decision is both surprising and regrettable. It is a commonplace for rogues to enter buildings or take handbags and wallets intending to appropriate only such property as may prove worth stealing; according to Husseyn these rogues do not have an intent to steal," J.C. Smith and B. Hogan, supra, note 14.
"Nearly every prospective burglar could no doubt truthfully say that he only intended to steal if he found something in the building worth stealing," per Geoffrey Lane, L.J., R. v. Walkington [1979] 2 All E.R. 716, 724 (English C.A.).

16. "If this sort of conditional intention is no 'intention' for the purposes of the law of attempts, is it a sufficient mens rea for the common law of conspiracy? There seems to be no reason why 'intention' should have a different meaning in these two offences, and, if the word bears the narrow meaning given to it by the present court in the law of conspiracy, then common law conspiracy is in no better case," J.C. Smith, supra, note 13.

17. M.D. Cohen, "Conditional Intention to Steal", (1980) 144 J.P. 107, 108.

18. Ibid., 109.

19. "It may be, of course, that the intention to commit the crime of procuring cocaine was qualified in the mind of each accused by some sort of reservation that once embarked upon the enterprises might still have to be abandoned should developing circumstances become unfavourable. But that sort of reservation would be present in the minds of most criminals who had decided

supporter.[20] The applicability of the case to crimes other than theft, burglary, and related offences is doubtful,[21] and in Canada, provisions of the Criminal Code would fortunately solve most problems.[22]

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19. (cont.) in a deliberate way to embark upon a premeditated course of criminal conduct. It would be quite artificial to hold that a necessary criminal intent had not been established merely because it was associated with a lively and common-sense recognition that some seemingly auspicious environment might present sudden perils that would need to be met by instant retreat," per Woodhouse, J., Police v. Wylie and Another [1976] 2 N.Z.L.R. 167, 169 (N.Z. C.A.).

20. J. Parry, "Conditional Intention (1) a Dissent", [1981] Crim. L.R. 6. But see L. Koffman, "Conditional Intention (2) A Reply", [1981] Crim. L.R. 14.

21. For example, "If D is seen to sneak into P's bedroom at night with an unpraised [sic] knife it can hardly avail him to claim that any intention of stabbing P was conditional on him first ascertaining that P was in bed asleep. If this plea were successful, there could be virtually no convictions for attempt at all, since defendants' actions are invariably subject to such express or implied contingencies for abandonment," I. Dennis, "The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement", [1980] Crim. L.R. 758, 765.

22. s. 283.(1) "Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,
    (a) to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it,
    (b) to pledge it or deposit it as security,
    (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or
    (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

The first indication that Husseyn would not survive was the Court of Appeal decision in Walkington:[23] the accused, shortly before closing time in a department store when the employees were cashing up their tills, was observed "to be interested primarily in the activity at the tills", went into

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22. (cont.) (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable." Emphasis added.

s. 306.(1) "Every one who
(a) breaks and enters a place with intent to commit an indictable offence therein,
(b) breaks and enters a place and commits an indictable offence therein, or
(c) breaks out of a place after
(i) committing an indictable offence therein, or
(ii) entering the place with intent to commit an indictable offence therein,
is guilty of an indictable offence and is liable
(d) to imprisonment for life, if the offence is committed in relation to a dwelling house, or
(e) to imprisonment for fourteen years, if the offence is committed in relation to a place other than a dwelling house.
(2) For the purposes of proceedings under this section, evidence that an accused
(a) broke and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein; or
(b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after
(i) committing an indictable offence therein, or
(ii) entering with intent to commit an indictable offence therein." Emphasis added.

23. Supra, note 15

a counter area, reserved for store staff, opened a partially-open till drawer, which proved to be empty, and which he then slammed shut (the accused said he was looking at dresses). Geoffrey Lane, L.J., for the Court of Appeal:

> "In this case there is no doubt that the appellant was not on the evidence in two minds as to whether to steal or not. He was intending to steal when he went to that till and it would be totally unreal to ask oneself, or for the jury to ask themselves, the question, what sort of intent did he have? Was it a conditional intention to steal only if what he found there was worth stealing? In this case it was a cash till and what plainly he was intending to steal was the contents of the till, which was cash. The mere fact that the till happened to be empty does not destroy his undoubted intention at the moment when he crossed the boundary between the legitimate part of the store and the illegitimate part of the store. ...[I]f the jury are satisfied...that the defendant has entered any building or part of a building as a trespasser, and are satisfied that at the moment of entering he intended to steal anything in the building or that part of it, the fact that there was nothing in the building worth his while to steal seems to us to be immaterial. He nevertheless had the intent to steal. As we see it, to hold otherwise would be to make a nonsense of this part of the Act and cannot have been the intention of the legislature at the time when the Theft Act 1968 was passed."[24]

The English Law Commission, "convinced that the law was developing in an illogical and unacceptable way,"[25] encouraged a reference to the Court of Appeal (who were originally

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24. Ibid., 724.

25. Fourteenth Annual Report, para. 2.13 (Law Com. No. 97, 1980, H.M.S.O., London).

responsible for the imbroglio).[26] Reference No. 1:

> "Whether a man who has entered a house as a trespasser with the intention to steal money therein is entitled to be acquitted of an offence against s. 9(1)(a), Theft Act 1968, on the grounds [sic] that his intention to steal is conditional upon his finding money in the house."

Reference No. 2:

> "Whether a man who is attempting to enter a house as a trespasser with the intention of stealing anything of value which he may find therein is entitled to be acquitted of the offence of attempt [sic] burglary on the grounds [sic] that at the time of the attempt his said intention was insufficient to amount to 'the intention to steal anything' necessary for conviction under s. 9, Theft Act 1968."[27]

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26. The Director of Public Prosecutions instituted the reference under s. 35 Criminal Justice Act 1972. The Commission also submitted a Memorandum to assist counsel and the Court. The Commission has since congratulated itself on its activity: ibid., para 2.13; and supra, note 12, 107.

27. Section 9, (English) Theft Act 1968, as amended:
"9.(1) A person is guilty of burglary if --
(a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or
(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.
(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of the building in question, of inflicting on any person therein any grievous bodily harm or raping any woman therein, and of doing unlawful damage to the building or anything therein.
(3) References in subsections (1) and (2) above to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at time when he is.
(4) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years."

As the references were essentially querying the validity of Bozickovic[28] and Greenhoff[29] respectively, the Court understandably answered both questions in the negative.[30] The intellectual darling of Lord Scarman, now referred to as "the so-called doctrine of 'conditional intention'," [31] was conceded as being relevant only to where "the accused does not know what he is going to steal but intends that he will steal whatever he finds of value or worthwhile stealing."[32] Of course, "the whole problem arises from a misunderstanding of a crucial sentence in Lord Scarman's judgment...[which should be rewritten] so that it reads 'It must be wrong, for it cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal the specific item charged'," [33] as was the case in Husseyn. The Court was not prepared to state that the sentence was wrong or that it was obiter,[34] though conceded "with the utmost deference to any statement of law by Lord Scarman" that it may have been "a little elliptical".[35] The Court stated that

28. Supra, note 2.

29. Ibid.

30. Re Attorney-General's Reference (Nos. 1 and 2 of 1979) [1979] 3 All E.R. 143 (English C.A.).

31. Ibid., 146, per Roskill, L.J. The Law Commission termed it "pseudo-philosophical" in its Memorandum, ibid., 145.

32. Ibid., 145. Quoted approvingly from the Law Commission's Memorandum.

33. Ibid., 149, per Roskill, L.J. Emphasis in original.

34. Ibid.

35. Ibid.

Walkington[36] was correct,[37] which would answer Reference No. 1. Husseyn and Easom, and conditional intent, is therefore restricted to cases where, as in those two cases, the indictment alleges an intent to steal specified items - that is, in answer to such an indictment, the defence could be that the accused, at the point of apprehension, had not yet made up his mind to steal anything. As to other situations in which the prosecution believes such intent cannot be proved, the Court stated:

> "we see no reason in principle why what was described in argument as a more imprecise method of criminal pleading should not be adopted, if the justice of the case requires it, as for example attempting to steal some or all of the contents of a car or some or all of the contents of a handbag. The indictment in Walkington[38] is in no way open to objection."[39]

A modus operandi solution therefore. The prosecution can avoid the conditional intention defence by drafting the indictment in general terms, so that even if the accused is apprehended when he had not yet made up his mind what, if anything, to remove from, for example, a lady's handbag, the accused could still (assuming a proximate act) be convicted of

36. Supra, note 12.

37. Supra, note 30, 150.

38. The Indictment read: "Statement of Offence: Burglary, contrary to section 9(1)(a) of the Theft Act 1968. Particulars of Offence: Terence Walkington on the 15th day of January 1977 entered as a trespasser part of a building known as Debenhams Store with intent to steal therein," supra, note 12, 717. (The Court of Appeal affirmed the conviction for burglary.)

39. Supra, note 30, 152-153, per Roskill, L.J.

attempted theft. Hence, if the prosecution believes it can prove intent to steal specific items, conditional intent can be argued by the defence; if there is no such intent, the indictment should be drafted in general terms - which, given Walkington, amounts to saying that the accused has an intention to steal something without an intention to steal that particular thing (what if the vehicle or other container enclosed, without the accused's knowledge, a wild (and ravenous) grizzly bear or was merely full of carbon monoxide[40] - both of which the accused could not easily steal or may have no intention of stealing?). As to the latter, the Court states the general principle with regard to the required particularity of indictments,[41] but there would appear to be situations in which such advice would not assist,[42] where

40. One can possibly steal electricity in England (Theft Act 1968, s. 13. See Boggeln v. Williams [1978] Crim. L.R. 242 (English Div. Ct.)); presumably also a gas. Computer time cannot however, in Canada, presently be stolen: R. v. McLaughlin (1981) 18 C.R. (3d) 339, [1981] 1 W.W.R. 298 (S.C.C.). For impossibility considerations, see Chapter VI, "Impossibility", infra.

41. "[T]he indictment should correctly reflect that which it is alleged that the accused did, and that the accused should know with adequate detail what he is alleged to have done," supra, note 30, 153, per Roskill, L.J.

42. "It seems surprising that so much should turn upon the terms of the indictment. In general terms the prosecution is alleging attempted theft from future unknown victims, e.g., in a 'hustling spree', or a 'handbag search spree'. But D is entitled to reasonable particulars in order that he may prepare his defence and meet the allegations. Where did the alleged attempted theft take place? Anser [sic]: In the high street and the vicinity. When? Answer: The evening of

'preparatory' offences such as loitering,[43] possession of housebreaking instruments[44] or offensive weapon(s),[45] or if there is more than one accused, conspiracy,[46] would have to be charged. Subsequent cases possess an air of normality, and indicate the much diminished influence of Husseyn: Scudder v. Barrett,[47] Miles v. Clovis and

42. (cont.) January 1. Who were the victims? Answer: Unknown. What was the subject matter of the alleged attemped theft? Answer: Unknown unspecified items. What is the proximate act alleged? Answer: A previous conditional theft or impossible theft. Will the Judge really allow the case to proceed upon such an indictment and particulars? Will the Judge really leave such a case to the jury? Will he not direct an acquittal?" A. Samuels, "Conditional Intent and Attempting the Impossible - Letting the Wicked Escape", (1979) 143 J.P. 187, 189.

43. Criminal Code of Canada, ss. 171, 173.

44. Section 309.

45. Sections 85, 86.

46. Section 423.

47. [1979] 3 W.L.R. 591, (1979) 69 Cr. App. R. 278 (Div. Ct.). The Bench was Roskill, L.J., Bristow, J., and Davies, J., the same as had sat on the Attorney-General's References. The accused was observed in a London underground station to be looking at a bag carried by a Mr. Arvedal, open the zip, take hold of an article, and without removing it from the bag, look at it, then allow it to drop back into place. The following charge was held valid: that the defendant attempted "to steal property unknown, belonging to Mr. George Arvedal." The learned Lord Justice Roskill, as if oblivious to the imbroglio he had helped create, pronounced the following: "There were reports of Husseyn...which suggested that this court had decided what seemingly they thought it had decided. But we hope we have explained in our judgement in two references that this Court did not so decide" (592 and 279 respectively).

Another,[48] R. v. Cooper and Miles,[49] R. v. Bayley and Easterbrook.[50]

The Attorney-General's References therefore "did not impugn the actual decision in Husseyn; instead, it accepted a purely procedural means of escape."[51] However, due to the

48. [1979] 3 W.L.R. 592, (1979) 69 Cr. App. R. 280 (Div. Ct.). The Bench here was also Roskill, L.J., Bristow, J., and Davies, J., the same as had sat on the Attorney-General's References. The accused, with an accomplice, tried on several occasions to put his hand into an open shopping bag on the handle of a baby's pushchair, and once appeared to touch it. They were charged with loitering with intent, and the learned Lord Justice Roskill, pausing to correct the grammar of the trial magistrates' question which Roskill, L.J., considered "not very happily worded", held: the prosecution does not have to prove that, at the time of loitering, the defendant had formed the intent to steal a specific object (594 and 281-2 respectively).

49. [1979] Crim. L.R. 42 (Leicester Crown Court). The accused were charged with attempted theft, by having used a length of copper wire to trip a microswitch in a slot machine to obtain free plays and the chance to win money. The machine, though programmed to pay out within a certain number of plays, did so entirely at random. The 'Husseyn defence', that the intention to steal money was conditional upon achieving a winning play, was rejected, on the basis that there was ample evidence before the jury that the defendants had formed the intention to steal, the fulfilment of which was conditional only upon the behaviour of the machine.

50. [1980] Crim. L.R. 503 (English C.A.). The accused were charged with jointly attempting to steal the contents of a box belonging to British Railways, which box, and contents, they had returned to British Rail (as they did not want a rail and flange lubricator, the contents of the box). The Court of Appeal held the following jury charge correct: the defendants are guilty "if they removed the box from the railway line dishonestly and with the already-formed intention of keeping its contents, whatever they might be, if of value to them." The Court also approved Scudder v. Barrett.

51. Supra, note 3, 267.

fact that neither Husseyn nor Easom have been overruled, though curiously, lesser cases[52] that followed them have,[53] it is only a partial, intermittent and temporary means of escape - for which favourable facts (as far as the prosecutor is concerned) such as a confessed intention of what the accused planned to steal,[54] and a skilled indictment-drafter, will be extremely helpful. That an accused can still plead 'conditional intent' (even if believed, the I-had-not-yet-made-up-my-mind conditional intent defence would probably not detain a jury for long) in Husseyn situations, where specific items are referred to in the indictment, is not consonant with a layperson's common sense, nor circumspective of the way potential thieves or burglars operate. What self-respecting thief or burglar would not "case the joint" first?

Glanville Williams recommends legislative reform,[55]

52. Supra, note 2.

53. Attorney-General's References, supra, note 30.

54. With regard to the admissibility of police-induced confessions, see E.R. Meehan "Candid Confessions", (1981) 59 Can. Bar Rev. 817.

55. Supra, note 3, 281. The first reform recommended would make the English Act equivalent to Canada's - Williams recommends removing "permanently" from s. 1(1) of the Theft Act 1968; Canada's s. 283(1) of the Criminal Code states "temporarily or absolutely" (supra, note 22).
s.(1) Theft Act 1968: "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly." (For further development and exposition of this view, see G. Williams, "Temporary Appropriation Should be Theft", [1981] Crim. L.R. 129.)

certainly more satisfying than "the edifying spectacle of Her Majesty's Judges performing verbal calisthenics in their endeavours to amend the utterings of their colleagues."[56] The future development, or otherwise, of the Husseyn principle and conditional intent bears attentive surveillance.[57]

(12) TRANSFERRED INTENT

Under the doctrine of transferred intent,[1] if A aims a shot at V_1 but kills V_2, A can be convicted of the murder of V_2.[2] But what if V_2 does not die? Does the doctrine of

55. (cont.) In the alternative, Williams recommends a statutory change to provide that an attempt to steal specified property is valid notwithstanding that the accused is not proved to have known the specific nature of the property that he attempted to steal (281) - there is no reason such problem (the Husseyn situation), could not arise in Canada, as s. 183 merely states "with intent" - does that include conditional intention?

56. G. Maddison, "Has Burglary With Intent Survived?", (1980) 144 J.P. 35, 36.

57. Other relevant material not previously cited includes various comments by J.C. Smith: [1978] Crim. L.R. 687, [1979] Crim. L.R. 43, [1979] Crim. L.R. 452, [1979] Crim. L.R. 452, [1979] Crim. L.R. 526, [1979] Crim. L.R. 586, [1980] Crim. L.R. 503.

1. Also referred to as 'the doctrine of transferred malice'.

2. Criminal Code s. 212(b):
"Culpable homicide is murder...
where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being."
See also A.W. Mewett, Q.C., and M. Manning, Q.C., "Criminal Law", 275-278 (1978, Butterworths, Toronto), and C. Barriere, "De la tentative criminelle et des problemes qu'elle pose", 5 Rev. Juridique Themis 293, 297 and 298.

transferred intent apply to criminal attempt, such that A can be convicted of the attempted murder of V_2? There is very little written on this point, and though the logical answer would be that A is guilty of the murder of V_2 if V_2 dies, and should therefore be guilty of the attempted murder of V_2 if V_2 does not die, two authors have asserted that though A is guilty of the murder of V_2 if V_2 dies, A should be charged with the attempted murder of V_1 if V_2 does not die.[3] Glanville Williams has stated that as in practice the

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3. Glanville Williams: "If [A] aims a murderous shot at [V_1] and wounds [V_2] he can be convicted of attempting to murder [V_1]. There is no point in charging him with attempting to murder [V_2]. If prosecuting counsel is unwise enough to indict for this, there would seem to be no reason why the individual should not be upheld under the doctrine, but the law is not clear," "Textbook of Criminal Law", 372 (1978, Stevens and Sons, London).

A.J. Ashworth: "If [A] shot at [V_1] with the intention of killing him, missed him by a considerable margin but sent the bullet perilously close to [V_2] (who had just come upon the scene), it is hard to believe that [A] would be charged with the attempted murder of [V_2] rather than the attempted murder of [v_1]," "Transferred Malice and Punishment for Unforeseen Consequences", 86 (in "Reshaping the Criminal Law: Essays in Honour of Glanville Williams", P.R. Glazebrook, Ed., 1978, Stevens and Sons, London). The same author queries whether if "the bullet which missed [V_1] actually hit [V_2] and killed him, why does that twist of fate make it more natural to charge [A] with the murder of [V_2] rather than attempted murder of [V_1]?" (Ibid.) The learned author is of the opinion that the doctrine of transferred intent should be abolished, and replaced by one of two possible alternatives: "Liability for the crime attempted (thus ignoring the actual result), [or] liability for the actual result based on recklessness" (ibid., 85-94). As is noted, "A feature of the cases on transferred malice is the frequence with which [A], in expressing his regret about injuring [V_2], admits that he intended to harm [V_1]. In such circumstances a charge of attempt in relation to [V_1] would seem so straightforward that it is hard to understand why transferred malice is so frequently invoked" (ibid., 86).

indictment would charge the attempted murder of V_1 (not V_2, who was in fact hit), whether the doctrine of transferred intent applies to criminal attempt is no more than "a theoretical question".[4]

(13) CONCLUSION

A just-received,[1] relatively obscure[2] report from South Australia,[3] a report both insightful and concisely written, with coverage over the major substantive criminal law areas, is in general agreement with what has been penned in this chapter with regard to the mens rea of criminal attempt, and succinctly summarizes the main points the present writer has endeavoured to elucidate:

> "In this context as in others, the best approach seems to us to be to bear in mind that the law of

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4. Glanville Williams, "Criminal Law: The General Part", 620 (2nd ed., 1961, Stevens and Sons, London).

1. Received after this chapter on mens rea was written.

2. Apologies to law reform personnel in the state of South Australia for this remark, but it should be noted that its obscurity (the present writer experienced more than a little difficulty in obtaining a copy, whether from other Canadian Law Libraries, or from Australia itself) is in direct contradistinction to its high quality in terms of insight and coverage. The Criminal Law and Penal Methods Reform Committee of South Australia would provide an invaluable service to the administration and reform of criminal law by ensuring a more comprehensive distribution (and perhaps also selecting a briefer appellation).

3. Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report, "The Substantive Criminal Law" (July, 1977; no publisher noted, part of the problem in obtaining a copy).

> attempted crime is an instrument of law enforcement, and should therefore not be unduly restricted in its scope by reason only of semantic arguments or reasoning which is divorced from realities. As a basic principle we can see no reason why the law of attempt should be more restricted in its operation than the law relating to the completed offence wherever there is either the requisite intention to commit the offence or recklessness as to its commission. Offences of strict responsibility and offences which can be committed through negligence and without intention...appear to us to fall into a different category. The law should not cover attempts to commit such offences in the absence of either intention or recklessness as to the commision of the offence.
>
> ...The test of the mental element in attempt should be whether the defendant has intentionally tried to bring about a state of affairs which, if it occurred, would constitute the offence charged as attempted, or alternatively has been reckless as to the high likelihood of bringing about this state of affairs. In the case of an offence of negligence or strict responsibility a person may be guilty of an attempt if he intends or is reckless as to all the conduct which constitutes the offence."[4]

Moving now from this recent Australian law commission report which refers to the mens rea of attempt, to a recent Canadian case in the area, the Supreme Court of Canada's Detering v. R.[5] The facts of this case and its actus reus and impossibility aspects are discussed below.[6] Mr. A.D. Gold had argued in this case that the mens rea required for the full substantive offence should be the same as that for the attempt of that full substantive offence.[7] The response of the

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4. Ibid., 295-296.

5. (1983) 70 C.C.C. (2d) 321, (1983) 31 C.R. 354 (S.C.C.).

6. Chapter VI, "Impossibility", Part (2)(b)(iii), "Attempted Fraud and False Pretences, Extortion and Corruption".

7. "Criminal Code s. 24(1), dealing with attempts, contains an inherent contradiction when it requires proof of an intent to commit the substantive offence", (1983) 70 C.C.C. (2d) 321, 322, (1983) 31 C.R. (3d) 354, 355.

Supreme Court of Canada to this extremely important point is put forth ambiguously in a few sentences in a two and a half page judgement:

> "[T]here is no discernible distinction [in s. 24] between intent as it goes to the substantive offence and as it goes to a mere attempt. In either case, the actus reus is essential to the particular charge."[8]

Is this to mean that the mens rea of the substantive offence and attempt are now identical, or merely the intent (i.e. excluding recklessness) is the same, or that the comment is only an editorial obiter dictum on s. 24? Unfortunately no clear answer is yielded from the very short judgement, and an opportunity is missed to clarify this area of the law. The writer therefore herein recommends draft legislation in this area.[9]

Having spent this whole chapter essentially reviewing and discussing the mens rea of attempt, the present writer is bemused by various writers' statements that "the mens rea in attempt has given rise to little conceptual difficulty";[10] one of the less controversial aspects of the law of attempt";[11]

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8. Per Laskin, C.J., (1983) 70 C.C.C. (2d) 321, 323, (1983) 31 C.R. (3d) 354, 356.

9. See Chapter XIII, "Conclusion", Part 4, "The Mental Requirement - Mens Rea".

10. N. Garton, "The Actus Reus in Criminal Attempts", (1974) 2 Queen's L.J. 183, 185. N. Garton proceeds to dispense with the mens rea of criminal attempt by stating that "it is the same mens rea that is required for an attempt as for the complete offence" (184) - a statement clearly in error, as has been demonstrated above.

11. English Law Commission, "Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement", 8 (Law Com. No. 102, 1980, H.M.S.O., London).

and "it is not difficult to define the mens rea of an attempt."[12] Oh that it were so elementary. Indeed, one is inclined to agree with Lord Kilbrandon, who recognizes, with regard to mens rea, both the complexity and its concomitant inexpediency, that "[t]here is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning."[13] If mens rea be not difficult, now on to the difficult, actus reus.

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12. Per Laidlaw, J.A., R. v. Cline [1956] O.R. 539, 549 (Ont. C.A.).

13. Hyam v. D.P.P. (1974) 59 Cr. App. R. 91, 119 (H.L.).