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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

MARTIE MARIE SODERBERG,

Defendant/Appellant.

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT

### 1. The facts of this case fail to prove that Martie Soderberg took a “substantial step” beyond “mere preparation” to commit the crime of attempted murder.

The State correctly cites to the Model Penal Code as the analytical framework Washington courts have used to define when a defendant may be criminally prosecuted for conduct that is designed to result in the commission of a crime, but has not achieved its culmination because there is something the defendant or another actor must do to consummate the intended crime.<sup>1</sup>

In *State v. Workman*, 90 Wash.2d 443, 451-52, 584 P.2d 382, 387 (1978), the supreme court adopted the Model Criminal Code Sections 1 and 2 of §5.01 (Proposed Official Draft 1962) which states:

#### 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

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<sup>1</sup> Appendix 1 is the entire §5.01 of the Model Penal Code and Commentaries (with Explanatory Note and Comments). Appendix 2 is an Index to MPC §5.01. The scanned copies of the MPC were obtained from the Washington State Law Library.

(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 an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct Which May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.”

MPC §5.01 at 295-96.

The drafters of §5.01 explain that Subsection 1 divides the cases into three types. Subsection (1)(a) and (1)(b) cover situations where the “actor has done all that [s]he intends to do but the crime has nevertheless not been committed.” MPC 5.01 at 299.

Subsection (1)(a) deals with the case where defendant purposely engaged in conduct that would be a crime if the attendant circumstances were as she believed them to be. An example is where the defendant takes possession of what she believes is stolen property, but it turns out the property is not technically stolen. MPC § 5.01 at 317.

Subsection (1)(b) covers the case where the defendant believes he has committed the crime, but the intended crime is not consummated because of some fortuity, such as shooting into an empty bed. MPC § 5.01 at 304-05 and 318.

“Subsection (1)(c) covers the rest of the cases -- those where the actor has not yet done all that [s]he intends to do -- by prescribing liability

in all cases where the actor has taken a substantial step in a course of conduct planned to culminate in the commission of the offense.” MPC §5.01 at 299.

Section 6 of the Commentaries details the Model Penal Code approach to the “Preparation Problem.” MPC 5.01 at 329-353. Subsection (2) elaborates what is meant by a “substantial step” in two ways. First, conduct is not a “substantial step unless “it is strongly corroborative of the actor’s criminal purpose.” And second, Subsection (2) describes seven scenarios that illustrate the point when “preparation” becomes a “substantial step.” MPC 5.01 at 329.

Subsection (1)(c) covers cases where the actor *has not* done all she intends to do but has gone far enough to cross the line between “mere preparation” and “substantial step in a course of conduct planned to culminate in the commission of a crime.” MPC §5.01 at 299.

The seven scenarios in Section 2 are a number of recurring situations intended to illustrate when a trial judge must instruct the jury that it may find a “substantial step” and must accept the jury’s verdict to that effect unless the judge finds the conduct is not strongly corroborative of the defendant’s criminal purpose. MPC 5.01 at 332.

Ms. Soderberg submits that none of her conduct measures up to any of the seven scenarios.

(a) lying in wait, searching for or following the contemplated victim of the crime;

There is no evidence in the testimony of witness or in the recorded conversations between Martie Soderberg and Martin Drake<sup>2</sup> to suggest they ever searched for, followed, or laid in wait for Russell Soderberg. Their conversations simply indicated they might do this in the future.

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

There is no evidence that anyone attempted to entice Russell Soderberg to go anywhere or that they communicated with him about anything connected with the alleged plot. Also, the planning had not progressed to the point where a place was chosen where the crime would be committed.

(c) reconnoitering the place contemplated for the commission of the crime;

Again, the supposed crime scene was never chosen nor was there any effort made to choose a crime scene.

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

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<sup>2</sup> The recordings are State's Exhibits 6 and 7. They were admitted and played to the jury at RP 139.

Same as above.

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

Marti Soderberg possessed no “materials to be used in the commission of the crime.” However, the State asserted in its closing argument that Ms. Soderberg’s attempt to possess a firearm by giving Drake \$50 for the fictitious “reverse controlled buy” of a revolver was the “substantial step” for purposes of convicting her for attempted murder:

But then the defendant took a substantial step when she drove Martin Drake to buy the revolver and she gave him the money to purchase the revolver.

RP 296.

The State’s logic appears to be that an *attempt* to take a substantial step toward the commission of a crime is the same as the “substantial step.” The MPC Commentary does not support this approach, such that, an attempt to purchase an unloaded gun or even the possession of a loaded gun does not constitute an attempt:

The general view is that the collection, possession, or preparation of materials to be employed in the commission of a crime does not go beyond the stage of preparation and does not constitute an attempt. Thus it has been said, by way of dicta, that **purchasing a gun** or poison with intent to murder, **loading the gun**, or mixing the poison with the same intent, purchasing matches or inflammables with

intent to commit arson, constructing a bomb with intent to destroy property and collecting materials with which to commit burglary **all constitute acts of preparation.**  
(emphasis added)

MPC §5.01 at 340.

The view of the Commentary is consistent with Washington case law with regard to differentiating preparations and attempts to complete the “substantial step” with conduct that does constitute the requisite “substantial step” to be convicted of attempt. These issues were examined in *State v. Lewis*, 69 Wash.2d 120, 124-25, 417 P.2d 618, 621 (1966):

Intent alone, of course, is not punishable. It must coincide with some Overt act adapted to, approximating and which, in the ordinary and likely course of events, will result in the commission of the target crime, reaching far enough toward its accomplishment to amount to the commencement of the consummation. Mere preparation is not indictable. The conduct of the accused, while it need not be the last act necessary to the consummation of the intended crime, must approach sufficiently near it to stand as a direct movement toward the commission of the offense after the preparations are made. In determining just where preparation ceases and attempt begins, we can be aided by no rigid formula. Each case hinges upon its own facts and circumstances.

Based on these authorities, giving Martin Drake \$50 for the purchase of a fictitious revolver is, as a matter of law, mere preparation, and therefore not indictable as an attempt.

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

The Commentary indicates that this scenario arises most frequently in attempted arson cases and it is similar to the reconnoitering scenario. MPC 5.01 at 343-345. However, neither the reconnoitering or this subsection are instructive for this case because no particular place was contemplated or chosen for the commission of the murder of Russell Soderberg.

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

This scenario is not applicable here because there was no innocent agent. Moreover, the situation contemplated here suggests a completely different fact pattern than the instant case. That is, where “D unlawfully tells E to set fire to a haystack and gives him a match to do it with. ... If, as D knows, E (mistakenly) believes that it is D’s stack and that the act is lawful. E is an innocent agent, and D is guilty of attempted arson. D, in instructing E, does the last thing he intends to do in order to effect his criminal purpose.” MPC 5.01 at 346.

Therefore, in sum, The American Law Institute's examination of the law of the inchoate crime of attempt, as stated above, is a very useful framework to analyze whether Martie Soderberg committed the crime of Attempted Murder in the First Degree. And, a close reading of the Definition of Criminal Attempt in MPC 5.01(1) and the fact patterns that constitute the requisite Substantial Step in MPC 5.01(2), show that Martie Soderberg's conduct had not legally progressed beyond "mere preparation."

**2. Ms. Soderberg's convictions for Attempted Murder and Criminal Solicitation are both premised on multiple acts and the jury should have been instructed they must unanimously agree which acts constituted the crimes.**

Where the prosecution presents evidence of multiple acts, any of which could form the basis for the charges, the prosecutor must either elect which act it is to base the verdict, or the court must instruct the jury that it must agree on a specific act to support the charge. *State v. Crane*, 116 Wash.2d at 315, 325, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867 (1991), (citing *State v. Kitchen*, 110 Wash2d 403, 409, 756 P.2d 105, 108 (1988)). If the jury is not so instructed by the court, and the prosecutor fails to "elect" the means by which the crime was committed,

the error is considered harmless “only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” *Crane*, 116 Wash.2d at 325.

An error regarding juror unanimity is of constitutional magnitude, and therefore, it may be raised for the first time on appeal. *Kitchen*, 110 Wash.2d at 411; RAP 2.5(a). Further, the error will be deemed to be harmless only “if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.”

In the present case, the jury received evidence that Martie Soderberg concocted a plan to kill her husband sometime prior to or during the summer of 2016 when she approached Dennis Bjerke and asked him to kill her husband. RP 160-161. They discussed this over time in more than five conversations, RP 163, while they were in “various areas around town: parks, parking lots.” RP 187. Bjerke declined and Ms. Soderberg then sought out Martin Drake in October 2016. From October 11 to 17, 2016, Ms. Soderberg and Drake met on a number of occasions and had a series of conversations and preparations for the purported murder.

The State characterized the series of acts and preparations in its closing argument:

In this case, Ms. Soderberg took several actions that were -- that were preparation for what she was planning to do. There was the -- the purchasing of the life insurance policy, approaching Martin Drake about -- or sorry, let's start, I guess, chronologically with Dennis Bjerke -- approaching Dennis Bjerke about killing Russell Soderberg.

And remember he talked about she -- you know, she mentioned it multiple times and she kept kind of badgering him to do this, but he -- he rejected that. And then eventually the defendant propositioned Martin Drake with the same plan. Those are -- those were preparation, the discussion that went into this, the underlying planning. There's planning about -- about weapons and planning about where to do it and what would be the insurance payout if it happened under certain circumstances as opposed to other ones.

The State plainly construed all of the acts over time as multiple acts, thus mandating a *Petrich* instruction regarding jury unanimity as to which specific acts constituted attempted murder or what constituted “money or another thing of value” to convict her of solicitation.<sup>3</sup>

The State now contends that this is a not a “multiple acts” case, but is a “continuous course of conduct” case and, which does not require a unanimity instruction. Respondent’s Brief at 32-34.

The State cites *State v. Handran*, 113 Wash.2d 11,17, 775 P.2d 453, 456 (1989) which instructs how to tell the difference. In *Handran*, the defendant crawled through the window of his ex-wife’s apartment and took off all of his clothes. She was sleeping and awoke when he leaned

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<sup>3</sup> See *State v. Petrich*, 101 Wash.2d 566, 569-70, 683 P.3d 173, 176-77 (1984) and the “*Petrich* Instruction” WPIC 4.25

over and kissed her. She asked him to leave but he pinned her down and punched her in the face. He was charged with second degree burglary which was amended to first degree burglary. 113 Wash.2d at 12.

On appeal Handran argued that the trial court erred by not giving a *Petrich* Instruction as to which act; the kissing or blow to the face was the “assault” to satisfy the elements of first-degree burglary. *Id* at 456-57. The *Handran* court stated, “To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. (cite omitted) For example, where the evidence involves conduct at different times and places, then the evidence tends to show “several distinct acts”. (Cites omitted). *Id*. The supreme court observed that the criminal conduct was a “course of conduct” because it occurred in one place during a brief time between the same aggressor and victim. *Id*.

The same analysis plainly results in the conclusion that our case is a “multiple acts” case because alleged criminal conduct occurred at different times and places and involved different participants.

The error is presumed to be prejudicial and this presumption cannot be overcome unless no rational juror could have a reasonable doubt as to any one of the various incidents presented in evidence. Ms. Soderberg submits it is impossible to rule out all but one possibility as to

what was the “money or other thing of value” she gave Drake, or what specific acts added up to be the “substantial step” toward the murder of Russell Soderberg.

**CONCLUSION**

For the reasons stated, this Court should reverse and dismiss the Information, or in the alternative, remand to the trial court for a new trial.

DATED this 5<sup>th</sup> day of June, 2019.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert M. Seines", written over a horizontal line.

Robert M. Seines, WSBA 16046  
Attorney for Martie M. Soderberg

## CERTIFICATE OF SERVICE

I, Robert M. Seines, do hereby certify under penalty of perjury that on June 6, 2019 I provided by e-mail service, a true and correct copy of the annexed Appellant's Opening Brief to:

scpaappeals@spokanecounty.org  
KCORNELIUS@spokanecounty.org

I also mailed Appellant's Reply Brief to:

Martie M. Maxwell  
Spokane County Detention Services  
1100 West Mallon Avenue  
Spokane, WA 99260

A handwritten signature in cursive script that reads "Robert M. Seines". The signature is written in black ink and is positioned above a horizontal line.

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s/Robert M. Seines

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## **APPENDIX 1**

# **MODEL PENAL CODE 5.01 AND COMMENTARIES**

**MODEL PENAL CODE**  
**AND**  
**COMMENTARIES**  
**(Official Draft and Revised Comments)**

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With text of Model Penal Code as adopted  
at the 1962 Annual Meeting of  
The American Law Institute  
at Washington, D.C., May 24, 1962

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**PART I**  
**GENERAL PROVISIONS**  
§§ 3.01 to 5.07

PHILADELPHIA, PA.  
THE AMERICAN LAW INSTITUTE  
1985

**ARTICLE 5. INCHOATE CRIMES**

- 5.01 Criminal Attempt
- 5.02 Criminal Solicitation
- 5.03 Criminal Conspiracy
- 5.04 Incapacity, Irresponsibility or Immunity of Party to Solicitation or Conspiracy
- 5.05 Grading of Criminal Attempt, Solicitation and Conspiracy; Mitigation in Cases of Lesser Danger; Multiple Convictions Barred
- 5.06 Possessing Instruments of Crime; Weapons
- 5.07 Prohibited Offensive Weapons

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**Introduction**

Article 5 undertakes to deal systematically with attempt, solicitation and conspiracy. These offenses have in common the fact that they deal with conduct that is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do. The offenses are inchoate in this sense.

These, to be sure, are not the only crimes so defined that their commission does not rest on proof of the occurrence of the evil that it is the object of the law to prevent; many specific, substantive offenses also have a large inchoate aspect. This is true not only with respect to crimes of risk creation, such as reckless driving, or specific crimes of preparation, such as possession with unlawful purpose. It is also true, at least in part, of crimes like larceny,<sup>1</sup> forgery, kidnapping and even arson, not to speak of burglary, where a purpose to cause greater harm than that which is implicit in the actor's conduct is an element of the offense. This reservation notwithstanding, attempt, solicitation and conspiracy have such generality of definition and of application as inchoate crimes that it is useful to bring them together in the Code and to confront the common problems they present.

Since these offenses always presuppose a purpose to commit another crime, it is doubtful that the threat of punishment for their commission can significantly add to the deterrent efficacy of the sanction—which the actor by hypothesis ignores—that is threatened for the crime that is his objective. There may be cases where this does occur, as when the actor thinks the chance of apprehension low if he should succeed but high if he should fail in his attempt, or when reflection is promoted at an early stage that otherwise would be postponed until too late, which may be

true in some conspiracies. These are, however, special situations. General deterrence is at most a minor function to be served in fashioning provisions of the penal law addressed to these inchoate crimes; that burden is discharged upon the whole by the law dealing with the substantive offenses.

Other and major functions of the penal law remain, however, to be served. They may be summarized as follows:

*First:* When a person is seriously dedicated to commission of a crime, a firm legal basis is needed for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge.

*Second:* Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides.

*Third:* Finally, and quite apart from these considerations of prevention, when the actor's failure to commit the substantive offense is due to a fortuity, as when the bullet misses in attempted murder or when the expected response to solicitation is withheld, his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice. Such a situation is unthinkable in any mature system designed to serve the proper goals of penal law.<sup>2</sup>

These are the main considerations in light of which these provisions have been prepared. Insofar as they have different weight in the three areas involved—attempt, solicitation and conspiracy—the differences are dealt with in the Comments that follow. So too, the other special values that may be unique to one or the other of the offenses—such as the fact that solicitation involves speech and that conspiracy involves group crime—remain to be discussed. The bearing of the inchoate character of these of-

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<sup>1</sup> See O. Holmes, *The Common Law* 72 (1881).

<sup>2</sup> See Section 1.02.

fenses on their proper grading for purposes of sentence is also a matter to which attention is later devoted. It should suffice for now, therefore, to summarize the major results of the Model Code provisions. They are:

(a) to extend the criminality of attempts by sweeping aside the defense of impossibility (including the distinction between so-called factual and legal impossibility) and by drawing the line between attempt and noncriminal preparation further away from the final act; the crime becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose;

(b) to establish criminal solicitation as a general offense;

(c) to limit the unity and scope of criminal conspiracy by emphasizing the primordial element of individual agreement, while preserving, so far as possible, the procedural advantage of joint prosecution of related segments of an organized criminal enterprise;

(d) to eliminate such vague determinants as "oppression," "public morals," and the like, as objectives that may make conspiracy a crime;

(e) to establish in attempt, solicitation and conspiracy a limited defense in cases of renunciation of the criminal objective; and

(f) to establish these inchoate crimes as offenses of comparable magnitude to the completed crimes that are their object.

#### 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 that would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with

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\* *History.* Presented to the Institute in Tentative Draft No. 10 and considered at the May 1960 meeting. See ALI Proceedings 130-58 (1960). Subsection (4) was reworded as a result of discussion at that meeting. The entire section was presented again to the Institute with minor verbal changes in the Proposed Official Draft and considered and approved at the May 1962 meeting. See ALI Proceedings 116-18, 226-27 (1962). For original detailed Comment, see T.D. 10 at 26 (1960). See also Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum.L.Rev. 571, 573-621 (1961), which in the main consists of the black letter and commentary of the Article 5 sections in Tentative Draft No. 10.

the belief that it will cause such result without further conduct on his part; or

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

(2) Conduct That May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) Conduct Designed to Aid Another in Commission of a Crime. A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and vol-

untary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

#### Explanatory Note

Subsection (1) sets forth the general requirements for an attempt. For analytical clarity, it divides the cases into three types: those where the actor's conduct would constitute the crime if the circumstances were as he believed them to be; those where the actor has completed conduct that he expects to cause a proscribed result; and those where the actor has not yet completed his own conduct, and the problem is to distinguish between acts of preparation and a criminal attempt. In this instance liability depends upon the actor having taken a "substantial step" in a course of conduct planned to culminate in commission of a crime. In all three situations the mens rea is purpose, with two exceptions: with respect to the circumstances under which a crime must be committed, the culpability otherwise required for commission of the crime is also applicable to the attempt; and with respect to offenses where causing a result is an element, a belief that the result will occur without further conduct on the actor's part will suffice. The impossibility defense is rejected, liability being focused upon the circumstances as the actor believes them to be rather than as they actually exist.

Subsection (2) elaborates on the preparation-attempt problem by indicating what is meant by the concept of "substantial step" contained in Subsection (1)(c). Conduct cannot be held to be a substantial step unless it is strongly corroborative of the actor's criminal purpose. A list of kinds of conduct that corresponds with patterns found in common law cases is also provided, with the requirement that the issue of guilt be submitted to the jury if one or more of them occurs and strongly corroborates the actor's criminal purpose.

Subsection (3) fills what would otherwise be a gap in complicity liability. Section 2.06 covers accomplice liability in situations

where the principal actor actually commits the offense. In cases where the principal actor does not commit an offense, however, it is provided here that the accomplice will be liable if he engaged in conduct that would have established his complicity had the crime been committed.

Subsection (4) develops the defense of renunciation, which can be claimed if the actor abandoned or otherwise prevented the commission of the offense, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The meaning of "complete and voluntary" is elucidated in the second paragraph of the provision. The defense is an affirmative defense, which under Section 1.12 means that the defendant has the burden of raising the issue and the prosecution has the burden of persuasion.

#### Comment<sup>†</sup>

1. *Problem of Definition.* The literature and the decisions dealing with the definition of a criminal attempt reflect ambivalence as to how far the governing criterion should focus on the dangerousness of the actor's conduct, measured by objective standards, and how far it should focus on the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime. Both criteria may lead, of course, to the same disposition of a concrete case. When they do not, the proper focus of attention is the actor's disposition.<sup>1</sup> The Model Code provisions are accordingly drafted with this in mind.

Needless to say, the law must be concerned with conduct, not with evil thoughts alone.<sup>2</sup> The question to be asked is thus how to delineate the conduct that, when engaged in with a purpose to commit a crime or to advance toward the attainment of a criminal objective, should suffice to constitute a criminal attempt.

In fashioning an answer to this question, one must keep in mind that in attempt, as distinguished from solicitation and conspiracy, disclosure of the criminal design to someone else is not intrinsic to the actor's conduct; nor is there any natural line that is suggested by the situation, like utterance or agreement. The law

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<sup>†</sup> With a few exceptions, research ended Jan. 1, 1979. For the key to abbreviated citations used for enacted and proposed penal codes throughout footnotes, see p. xxxi *supra*.

<sup>1</sup> See Introduction to Article 5.

<sup>2</sup> See Morris, *Punishment for Thoughts*, 49 *Monist* 342 (1965); Dworkin & Blumenfeld, *Punishment for Intentions*, 75 *Mind* 396 (1966). See also *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974), especially the discussion at 376.

must deal with the problem presented by a single individual and must address itself to conduct that may fall anywhere on a graded scale from early preparation to the final effort to commit the crime.

One should, therefore, begin by inquiring when conduct designed to effect or to advance towards the attainment of the criminal objective ought *not* to be regarded as a crime, either because it does not adequately manifest the dangerousness of the actor or on other overriding grounds of social policy. The answer the Institute reached in thinking about the problem in this manner is articulated in Subsections (1) and (2). Basically, as will be developed in more detail below, the judgment is that conduct that does not itself strongly corroborate the actor's criminal objective should be excluded from liability.

For analytical clarity, the problem is divided into three segments. Subsections (1)(a) and (1)(b) deal with situations where the actor has done all that he intends to do, but where the crime nevertheless has not been committed. Subsection (1)(a) covers cases where the offense involves engaging in particularly described conduct, but where the failure occurs because of the non-existence of a requisite circumstance. Subsection (1)(b) deals with a similar situation where the crime involves the prohibition of causing a particular result. Subsection (1)(c) covers the rest of the cases—those where the actor has not yet done all that he intends to do—by prescribing liability in all cases where the actor has taken a substantial step in a course of conduct planned to culminate in the commission of the offense. The problem here is that of determining what amounts to a “substantial step,” a problem elaborated upon in Subsection (2) and resolved, as noted, in terms of corroboration of the criminal objective that is furnished by the actor's conduct.

It should also be noted that little guidance on these matters was provided by previous legislation on the subject. The statutes fell into two categories, those that proscribed attempts to commit all or a broad class of crimes and those that dealt with attempts to commit particular crimes. The most common of the former class provided for liability if a person “attempts” to commit a crime “and in such attempt does any act toward the commission of such an offense, but fails in the perpetration, or is intercepted or prevented in the execution of the same.”<sup>3</sup> A few

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<sup>3</sup> See, e.g., Ga. Code Ann. § 27-2507 (1972) (recently amplified by Ga. §§ 26-1001 to -1005); 1929 Ill. Laws 345, § 1 (current version at Ill. ch. 38, § 8-4). Such a formulation, rare among recent revisions, is also in Fla. § 777.04. The relevant formulations at the time the Model Code was considered were collected in Statutory Appendix, MPC T.D. 10 at 76-81 (1960).

statutes defined an attempt as an "act done with intent to commit a crime, and tending but failing to accomplish it."<sup>4</sup> A larger number were simply general penalty provisions and did not elaborate upon the term "attempt."<sup>5</sup> The situation was much the same in the case of statutes that spoke only of attempts to commit particular crimes. In most instances, there was nothing more than a prohibition against an "attempt" to commit the crime and an accompanying penalty.

In applying statutes of both types, the courts, lacking meaningful legislative guidance, followed the principles of attempt liability developed at the common law.<sup>6</sup> Legislative efforts to define the scope of attempts with greater particularity are, by and large, a relatively recent development in Anglo-American law, and to a significant extent reflect the influence of the Model Code proposals, which have formed the basis for the definitions of attempt offenses in most of the recently enacted and proposed codes.<sup>7</sup>

<sup>4</sup> See, e.g., 1953 Minn. Laws ch. 361, § 1 (current version at Minn. § 609.17); Nev. § 208.070. Three recent revisions and one proposal adopt this formulation: Kan. § 21-3301; N.M. § 40A-28-1; S.D. § 22-4-1; Okla. (1975 p) § 2-101(A).

<sup>5</sup> See, e.g., Conn. Gen. Stat. § 54-198 (1958) (current version at Conn. §§ 53a-49 to -52; N.H. Rev. Stat. Ann. §§ 590:5, :6 (1955) (current version at N.H. § 629:1). This approach, which does not appear in any proposed revision, has been followed in only one recently enacted code. Va. §§ 18.2-25 to -28.

<sup>6</sup> The term "common law decisions," as used in this commentary, includes many cases that have been decided in the interpretation of such statutes.

<sup>7</sup> See Ariz. §§ 13-1001, -1005; Ark. §§ 41-701 to -704; Colo. § 18-2-101(1); Conn. §§ 53a-49 to -51; Del. tit. 11, § 531; Haw. §§ 705-500, -501; Ind. § 35-41-5-1; Ky. §§ 506.010, .020; Me. tit. 17-A, §§ 152, 154; Mo. § 564.011; Neb. § 28-201; N.H. § 629:1; N.J. § 2C:5-1; N.D. §§ 12.1-06-01, -06-05; Utah § 76-4-101; Brown Comm'n Final Report § 1001; Md. (p) §§ 110.00, .15; Tenn. (p) § 901; Vt. (p) § 2.4.2(1); W. Va. (p) §§ 61-4-1, -4-2.

Other revised codes and proposals have provided a more limited definition of attempt, incorporating the "substantial step" requirement but failing to define it. See Ga. § 26-1001; Ill. ch. 38, § 8-4(a); Minn. § 609.17(1); Ore. § 161.405; Pa. tit. 18, § 901; Wash. § 9A.28.020(1); U.S. (p) S. 1437 § 1001 (Jan. 1978); Alas. (p) § 11.31.100 (H.B. 661, Jan. 1978); Cal. (p) S.B. 27 § 6001; D.C. (1978 p) § 22-201(a); Mass. (p) ch. 263, § 45.

Five revised codes and two proposals do not incorporate the "substantial step" requirement, the definition being cast rather in terms of "any act," "overt act," "conduct," or "an act amounting to more than mere preparation" "towards the commission of the offense" or "which tends to effect the commission of such crime." See Ala. § 13A-4-2; La. § 14:27(A) & (B); Mont. § 94-4-103(1); N.Y. § 110.00; Tex. § 15.01(a); Mich. (p) S.B. 82 §§ 1001, 1005; S.C. (p) § 14.1.

Wis. § 939.32(2) is limited to attempts to commit a felony, a battery, or theft, and requires that the defendant, with intent to commit such crimes, commit "acts which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." P.R. tit. 33, § 3121 also includes an "unequivocality" requirement. Ohio § 2923.02(A) requires purposeful or knowing conduct "which, if successful, would constitute or result in the offense."

2. *Requirement of Purpose.* A closer analysis of Subsection (1) must begin with a discussion of the mens rea of attempt. As will be seen, all three of the subdivisions of Subsection (1), with two exceptions to be noted, are designed to follow the conventional pattern of limiting the crime of attempt to purposive conduct. The general principle is thus that the actor must affirmatively desire to engage in the conduct or to cause the result that will constitute the principal offense.<sup>8</sup>

The first exception relates to the circumstances under which the offense must be committed. The requirement of purpose extends to the conduct of the actor and to the results that his conduct causes, but his purpose need not encompass all of the circumstances included in the formal definition of the substantive offense.<sup>9</sup> As to them, it is sufficient that he acts with the culpability that is required for commission of the completed crime.

Several illustrations may serve to clarify the point. Assume, for example, a statute that provides that sexual intercourse with a female under a prescribed age is an offense, and that a mistake as to age will not afford a defense no matter how reasonable its foundation. The policy of the substantive offense as to age, therefore, is one of strict liability, and if the actor has sexual intercourse with a female, he is guilty or not, depending upon her age and irrespective of his views as to her age. Suppose, however, that he is arrested before he engages in the proscribed con-

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*See also infra* notes 95 & 130.

Iowa § 707.11 is limited to attempts to commit murder and contains variations of aspects of the Model Code approach.

<sup>8</sup> See Section 2.02(2)(a) for the formal definition of "purpose."

In the language of the courts, there must be "intent in fact" or "specific intent" or "specific intent to do the entire evil thing." See *Thacker v. Commonwealth*, 134 Va. 767, 770, 114 S.E. 504, 505-06 (1922); *Merritt v. Commonwealth*, 164 Va. 653, 661, 180 S.E. 395, 399 (1935).

It should be noted that the "purpose" that is required in Paragraphs (a), (b) and (c) of Subsection (1) of course does not include an awareness by the defendant of the criminality of his conduct. The defendant must have as his affirmative objective engaging in conduct that the criminal law denominates as criminal. Consistent with the general principle of Section 2.02(9), he is not required to know that the law attaches criminal consequences to his conduct, and consequently his ignorance or mistake on this point would be irrelevant.

<sup>9</sup> The "circumstances" of the offense refer to the objective situation that the law requires to exist, in addition to the defendant's act or any results that the act may cause. The elements of "nighttime" in burglary, "property of another" in theft, "female not his wife" in rape, and "dwelling" in arson are illustrations. "Conduct" refers to "breaking and entering" in burglary, "taking" in theft, "sexual intercourse" in rape and "burning" in arson. Results, of course, include "death" in homicide. While these terms are not airtight categories, they have served as a helpful analytical device in the development of the Code. See Section 2.02 and its Comment for a further elaboration.

duct, and that the charge is an attempt to commit the offense. Should he then be entitled to rely on a mistake as to age as a defense? Or should the policy of the substantive crime on this issue carry over to the attempt as well?<sup>10</sup> Or, assume a statute that makes it a federal offense to murder an FBI agent and treats the agent's status as a member of the FBI as a jurisdictional ingredient, with no culpability required in respect to that element. The question again is whether the policy of the substantive crime should control the same issue when it arises on a charge of attempt, or whether there is a special policy that the law of attempt should embrace to change the result on this point.

Under the formulation in Subsection (1)(c),<sup>11</sup> the proffered defense would not succeed in either case. In the statutory rape example, the actor must have a purpose to engage in sexual intercourse with a female<sup>12</sup> in order to be charged with the attempt, and must engage in a substantial step in a course of conduct planned to culminate in his commission of that act. With respect to the age of the victim, however, it is sufficient if he acts "with the kind of culpability otherwise required for the commission of the crime," which in the case supposed is none at all. Since, therefore, mistake as to age is irrelevant with respect to the substantive offense, it is likewise irrelevant with respect to the attempt. The same result would obtain in the murder illustration. The actor must, in the case supposed, engage in a substantial step in

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<sup>10</sup> The question here, of course, is whether a legislative judgment deliberately made should be applicable both to the substantive offense and to the attempt, not whether the legislative judgment embracing strict liability is correct. On the latter point, see Comment 6 to Section 213.1; Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 Mich.L.Rev. 105 (1965).

<sup>11</sup> Subsection (1)(a) would not apply to either illustration, because in both instances the defendant would have committed the substantive offense if he had successfully completed his conduct. If he did not complete his planned course of conduct, Subsection (1)(c) would apply. Subsection (1)(b) could apply to the FBI illustration if the actor shot at the agent with the intent to kill and missed. Then he would have done all that he intended to do, and thus would be liable to prosecution under Subsection (1)(b). If he were stopped before he pulled the trigger, Subsection (1)(c) would apply. The analysis on the point under discussion would be the same, however, whether the actor completed his proposed conduct and was prosecuted under Subsection (1)(b) or whether he did not and was prosecuted under Subsection (1)(c).

<sup>12</sup> It is assumed that the culpability standard for the "female" element of the offense is knowledge, and thus it would be the same for the attempt.

It should also be noted that the language "under the circumstances as he believes them to be," as well as its counterpart language in Subsections (1)(a) and (1)(b), does not affect the analysis of cases like the ones posed. This language is designed to deal with the so-called "impossibility" cases, where the actor believes an element of the offense to exist but where in fact it does not. In that situation, the actor is measured by "the circumstances as he believes them to be." In cases like these illustrations, the actor's mistaken belief as to the particular circumstances is made irrelevant by law.

a course of conduct planned to culminate in the death of his victim. But with respect to his awareness of the status of his victim as an FBI agent, a mistake would not be relevant since the policy of the substantive offense controls on such matters and that policy is one of strict liability.<sup>13</sup>

The judgment is thus that if the defendant manifests a purpose to engage in the type of conduct or to cause the type of result that is forbidden by the criminal law, he has sufficiently exhibited his dangerousness to justify the imposition of criminal sanctions, so long as he otherwise acts with the kind of culpability that is sufficient for the completed offense. The objective is to select out those elements of the completed crime that, if the defendant desires to bring them about, indicate with clarity that he poses the type of danger to society that the substantive offense is designed to prevent. This objective is well served by the Code's approach, followed in a number of recently enacted and proposed revisions,<sup>14</sup> of allowing the policy of the substantive offense to control with respect to circumstance elements.

The question might be asked, however, whether the policy of the substantive offense should be allowed to control other culpability questions that might arise. For example, reckless and negligent homicide are offenses under this Code,<sup>15</sup> as they are generally. Cases will arise where the defendant engaged in conduct that recklessly or negligently created a risk of death, but where the death did not result. Should the law of attempts encompass such cases?

<sup>13</sup> It should be noted that while offenses involving strict liability were chosen for clarity of illustration, the analysis would be the same for circumstance elements where the culpability level is set at recklessness or negligence. For example, if negligence as to age or the status of the FBI agent were required and sufficient for the substantive offense, the same would hold true for the attempt.

<sup>14</sup> See Ariz. § 13-1001(A); Ark. § 41-701(1); Colo. § 18-2-101(1); Conn. § 53a-49(a); Del. tit. 11, § 531; Haw. § 705-500(1); Ind. § 35-41-5-1(a); Ky. § 506.010(1); Me. tit. 17-A, § 152(1); Neb. § 28-201; N.J. § 2C:5-1; N.D. § 12.1-06-01; Utah § 76-4-101(1); U.S. (p) S. 1437 § 1001 (Jan. 1978); Brown Comm'n Final Report § 1001(1); Mass. (p) ch. 263, § 45; Tenn. (p) § 901; W. Va. (p) § 61-41-1.

Many revisions and proposals, on the other hand, require an intent to commit the crime in terms that could be interpreted to mean that the actor's purpose must extend to all of the elements of the offense irrespective of the policy of the substantive offense as to circumstance elements. See Ala. § 13A-4-2; Ga. § 26-1001; Ill. ch. 38, § 8-4(a); Kan. § 21-3301(1); La. § 14:27(A); Minn. § 609.17(1); Mo. § 564.011(1); Mont. § 94-4-103(1); N.H. § 629:1; N.M. § 40A-28-1; N.Y. § 110.00; Ohio § 2923.02(A); Ore. § 161.405; Pa. tit. 18, § 901; P.R. tit. 33, § 3121; Tex. § 15.01(a); Wash. § 9A.28.020(1); Wis. § 939.32(2); Alas. (p) § 11.31.100(a) (H.B. 661, Jan. 1978); Cal. (p) S.B. 27 § 6001; D.C. (1978 p) § 22-201(a); Md. (p) § 110.00; Mich. (p) S.B. 82 § 1001(1); Okla. (1975 p) § 2-101; S.C. (p) § 14-1; Vt. (p) § 2.4.2.

<sup>15</sup> Sections 210.3(1)(a) and 210.4(1).

The approach of the Model Code is not to treat such behavior as an attempt. Instead the Code creates a separate crime, a misdemeanor, for recklessly placing another person in danger of death or serious bodily injury.<sup>16</sup> The Institute's judgment was that the scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility. While it was believed that the reckless creation of risk of death or serious bodily harm was grave enough for general coverage, even for this behavior misdemeanor penalties seemed more apt than the severer sanctions attached to felony attempts.

When, on the other hand, a person actually believes that his behavior will produce the proscribed result, it is appropriate to treat him as attempting to cause the result, whether or not that is his purpose.

Subsection (1)(b) provides that when causing a particular result is an element of the crime, as in homicide offenses or criminally obtaining property, an actor commits an attempt when he 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. Thus, a belief that death will ensue from the actor's conduct, or that property will be obtained, will suffice, as well

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<sup>16</sup> Section 211.2. For the suggestion that all criminal attempts might be handled in this way, and that the law might be better off if it did not try to deal with attempts according to generalized principles, see Glazebrook, *Should We Have a Law of Attempted Crime?*, 85 Law Q. Rev. 28 (1969).

A recent federal proposal, passed by the Senate, does not clearly indicate whether one can be guilty of attempted manslaughter or attempted negligent homicide. It provides:

A person is guilty of an offense if, acting with the state of mind otherwise required for the commission of a crime, he intentionally engages in conduct that, in fact, constitutes a substantial step toward the commission of the crime.

U.S. (p) S. 1437 § 1001(a) (Jan. 1978). A preceding federal proposal, U.S. (p) S. 1 § 1001(a), substituted for the phrase "constitutes a substantial step toward" the phrase "amounts to more than mere preparation for, and indicates his intent to complete." The draftsmen of S. 1 explicitly stated that they did not intend that an actor may "recklessly or negligently attempt to commit a crime." Sen. Judiciary Comm. Report 171 (S. 1, 1975). This statement was carried over into the Committee Report on the November 1977 version of S. 1437, which contained an attempt provision identical to that passed by the Senate, and thus presumably the result would be the same as under S. 1, despite the change in language. Sen. Judiciary Comm. Report 153 (S. 1437, 1977).

State codes and proposals employing similar language fail to provide enlightenment as to the intent of the draftsmen. See Ind. § 35-41-5-1(a)(1); Alas. (p) § 11.31.100 (H.B. 661, Jan. 1978); Mass. (p) ch. 263, § 45(a).

It should be noted that the Model Code would not preclude a charge of attempt of a crime, such as reckless endangerment, that is aimed at the prohibition of particular reckless behavior, rather than at the prohibition of a particular result.

as would a purpose to bring about those results. If, for example, the actor's purpose were to demolish a building and, knowing that persons were in the building and that they would be killed by the explosion, he nevertheless detonated a bomb that turned out to be defective, he could be prosecuted for attempted murder even though it was no part of his purpose that the inhabitants of the building would be killed.

It is difficult to say what the decision would be under prevailing attempt principles in a case of this kind. It might be held that the actor did not specifically intend to kill the inhabitants of the building; on the other hand, the concept of "intent" has always been an ambiguous one and might be thought to include results that the actor believed to be the inevitable consequence of his conduct. In any event, the inclusion of such conduct as the basis for liability under Subsection (1)(b) is based on the conclusion that the manifestation of the actor's dangerousness is just as great—or very nearly as great—as in the case of purposive conduct. In both instances a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur. The absence of any desire that the result occur is not, under these circumstances, a sufficient basis for differentiating between the two types of conduct involved. Only a minority of recent revisions have explicitly followed the Model Code on this point.<sup>17</sup>

With the two exceptions of allowing the policy of the substantive offense to control with respect to circumstance elements and of allowing the actor's belief as to results to suffice, this section retains the common law requirement of purposive conduct as a prerequisite for attempt liability. The necessity under traditional and prevailing attempt principles of proving that the actor's

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<sup>17</sup> Haw. § 705-500(2) achieves, through different language, substantially the same conclusion as the Model Code:

When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

This explicitly extends the principle to situations where the actor has not completed his planned course of conduct, a consequence that is also reached under the Model Code by the language of Subsection (1)(c) read in conjunction with Subsection (1)(b). Two recent revisions follow the Hawaii pattern. See Ark. § 41-701; Neb. § 28-201.

In England, the Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* 8-13 (G.B. Law Comm'n No. 102) (1980), has rejected the proposal of its Working Party that a distinction be drawn between consequences and circumstances, and has recommended that "the concept of the mental element in attempt . . . be expressed as an intent to bring about each of the constituent elements of the offence attempted." *Id.* 10-11.

purpose was to commit the substantive crime has posed problems only in rare cases.<sup>18</sup> The main points of dispute have concerned charges to the jury. When an act is made criminal because it causes a certain undesirable result, for example homicide, it has been common for the judge to instruct the jury that every sane person is presumed to intend the natural and probable consequences of his acts. In an attempt case, however, such an instruction may be held defective,<sup>19</sup> although the authorities have not been in agreement on this point.<sup>20</sup> It is clear on the one hand that the jury may infer intent from the actor's conduct and the circumstances surrounding such conduct—indeed this may be the only way of proving intent in the typical case. It is equally clear that the judge may not tell the jury that a certain state of facts is sufficient to establish intent on the part of the accused.<sup>21</sup> There is always the danger that intent will be artificially imputed to conduct that is criminal only if the requisite intent is present.<sup>22</sup> The preferable approach would seem to be to instruct the jury that intent may be inferred from conduct and circumstances,<sup>23</sup> omitting any reference to legal preferences or presumptions.

Since a particular crime must actually be intended, the charge must be precise and must not permit the jury to convict the actor on one of several mental states. Thus when the charge is attempted murder or assault with intent to kill, it is error to permit

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<sup>18</sup> For a strained construction on the issue of intent, see *Rex v. McCarthy*, 41 Ont.L.R. 153, 29 Can.Crim.Cas. Ann. 448 (1917). The court upheld the jury's determination that the driver of an automobile intended to inflict grievous bodily harm when his automobile, traveling at high speed, crashed into a tree.

In interpreting the English defense regulations, it was held that, although the master would have been subject to absolute vicarious criminal liability for the acts of his servant if the substantive offense had been committed (sales at prices in excess of maximum prices), knowledge or intent was required in order for there to have been an attempt or a more remote "preparatory" act punishable under the regulations. *Gardner v. Akeroyd*, [1952] 2 Q.B. 743, 2 All E.R. 306.

<sup>19</sup> *People v. Mize*, 80 Cal. 41, 22 P. 80 (1889); cf. *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308 (1935). An early decision in accord, *State v. Roby*, 194 Iowa 1032, 188 N.W. 709 (1922), has been questioned in subsequent opinions. See *State v. Ramsdell*, 242 Iowa 62, 45 N.W.2d 503 (1951).

<sup>20</sup> To the contrary are *Hankins v. State*, 103 Ark. 28, 145 S.W. 524 (1912); *State v. Lockwood*, 24 Del. (1 Boyce) 28, 74 A. 2 (Ct. Gen. Sess. 1909); cf. *State v. Leach*, 36 Wash. 2d 641, 219 P.2d 972 (1950).

<sup>21</sup> *Morgan v. State*, 33 Ala. 413 (1859); *Thacker v. Commonwealth*, 134 Va. 767, 114 S.E. 504 (1922) (semble).

<sup>22</sup> See *State v. Leach*, 36 Wash.2d 641, 219 P.2d 972 (1950).

<sup>23</sup> See *People v. Cheatem*, 35 Ill.App.3d 414, 342 N.E. 410 (1976); *State v. Nicholson*, 77 Wash.2d 415, 463 P.2d 633 (1969); *People v. Seach*, 215 Cal.App.2d 779, 30 Cal.Rptr. 499 (1963).

conviction on a finding of reckless disregard for human life<sup>24</sup> or intent to inflict grievous bodily harm.<sup>25</sup> And since a conviction for murder can be premised on either of these mental states—as well as on intent to kill—it is improper to say that one can be convicted of attempted murder if he could have been convicted of murder had the victim died.<sup>26</sup> There must be a specific intent to kill. But under some decisions the specific intent need not be directed at the alleged victim. It has been said that the rule of “transferred intent” applies to attempts and that if the actor shoots at *A* with intent to kill *A* but endangers *B* as well, he can be held for attempting to murder both *A* and *B*.<sup>27</sup> This result is at variance with the general requirement that the actor’s conduct must be purposive; under this section the defendant would be guilty only of an attempt to murder *A*.

3. *Impossibility.* Subsection (1) is also designed to reject the defense of impossibility, which has sometimes been successful in attempt prosecutions. It does so, as is explained below, by providing that the defendant’s conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact. Before the formulation is elaborated, however, it may be helpful to review what courts have done and said about the problem.

(a) *Background.* There are decisions on the books holding that a person accepting goods that he believed to have been stolen, but that were not then “stolen” goods, was not guilty of an attempt to receive stolen goods;<sup>28</sup> that an actor who

<sup>24</sup> *People v. Mize*, 80 Cal. 41, 22 P. 80 (1889); *Thacker v. Commonwealth*, 134 Va. 767, 114 S.E. 504 (1922).

<sup>25</sup> *People v. Brown*, 21 App.Div.2d 738, 249 N.Y.S.2d 922 (1964); *Rex v. Whybrow*, 35 Crim.App. 141, 148 (1951) (dictum). *But cf. State v. Harper*, 205 La. 228, 17 So.2d 260 (1944).

<sup>26</sup> *Moore v. State*, 18 Ala. 532 (1851).

<sup>27</sup> *People v. Neal*, 97 Cal.App.2d 668, 218 P.2d 556 (1950); *People v. Rothrock*, 21 Cal.App.2d 116, 68 P.2d 364 (1937), *rev'd on other grounds*, 14 Cal.2d 34, 92 P.2d 634 (1939).

<sup>28</sup> *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906). The reasoning of this decision has been followed by the House of Lords and the New Zealand Court of Appeal. *Haughton v. Smith*, [1975] A.C. 476; *Regina v. Donneley*, [1970] N.Z.L.R. 980; see *Williams, Criminal Law—Attempting the Impossible*, 33 Camb.L.J. 31 (1974); *Bentil, Criminal Attempt*, 118 Solic.J. 710 (1974); *Brazier, Reformulation of Criminal Attempts*, 37 Mod.L.Rev. 329 (1974). The House of Lords has also held that a conspiracy that has the specific object of performing an impossibility cannot be found criminal. *D.P.P. v. Nock*, [1978] A.C. 979; see *Temkin, When Is a Conspiracy Like an Attempt—and Other Impossible Questions*, 94 Law Q.Rev. 534 (1978); *Casene, Conspiracy to Do the Impossible*, 37 Camb.L.J. 208 (1978). *But see Booth v. State*, 398 P.2d 863 (Okla. Crim. App. 1965), in which the court permitted the defense of impossibility to be asserted on the basis of an interpretation of the then Oklahoma statutes but called for an amendment of the law along the lines of MPC Section 5.01. The legislature has since adopted

offered a bribe to a person whom he believed to be a juror, but who was not a juror, could not be said to have attempted to bribe a juror;<sup>29</sup> that an official who contracted a debt that was unauthorized and a nullity, but that he believed to be valid, could not be convicted for an attempt illegally to contract a valid debt;<sup>30</sup> and that a hunter who shot a stuffed deer believing it to be alive had not attempted to take a deer out of season.<sup>31</sup>

The primary rationale of these decisions is that, judging the actor's conduct in the light of the actual facts, what he intended to do did not amount to a crime.<sup>32</sup> This approach, however, is unsound in that it seeks to evaluate a mental attitude—"intent" or "purpose"—not by looking to the actor's mental frame of reference, but to a situation wholly at variance with the

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the substance of Section 5.01(1)(a) and (1)(b). Okla. tit. 21, § 44. A more recent decision following *Jaffe* is *United States v. Hair*, 356 F.Supp. 339 (D.D.C. 1973). For decisions rejecting the *Jaffe* approach, see *People v. Rojas*, 55 Cal.2d 252, 358 P.2d 921, 10 Cal.Rptr. 465 (1961) (citing the MPC); *People v. Meyers*, 213 Cal.App.2d 518, 28 Cal.Rptr. 753 (1963); *Faustina v. Superior Court*, 174 Cal.App.2d 830, 345 P.2d 543 (1959); *State v. Vitale*, 23 Ariz.App. 37, 530 P.2d 394 (1975); *State v. Korelis*, 21 Ore.App. 813, 537 P.2d 136, *aff'd*, 273 Ore. 427, 541 P.2d 468 (1975); *cf. In re Magidson*, 32 Cal.App. 566, 163 P. 689 (1917). In *Jaffe*, the following actions were said not to constitute attempts: voting with the belief that one is under the permissible age when in fact one is not; having sexual intercourse with a female with the belief that she is under the age of consent when in fact she is not.

The holding of the *Jaffe* case was approved in *People v. Jelke*, 1 N.Y.2d 321, 329, 135 N.E.2d 213, 218, 152 N.Y.S.2d 479, 485-86 (1956), where the court likened the situation to "selling oil stock and being surprised to discover that oil was actually in the ground where the accused vendor had represented but not believed it to be." Compare *People v. Moore*, 142 App.Div. 402, 127 N.Y.S. 98, *aff'd mem.*, 201 N.Y. 570, 95 N.E. 1136 (1911). See also *People v. Rollino*, 37 Misc.2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962), in which *Jaffe* is followed but MPC Section 5.01 is regarded as a better index of the defendant's "moral guilt." The New York legislature subsequently abrogated the defense of impossibility. N.Y. § 110.10. See generally Annot., 37 A.L.R.3d 375 (1971); Marcus, *Factual Impossibility and the Attempt to Receive Stolen Property*, 51 Calif.St.B.J. 498 (1976).

<sup>29</sup> *State v. Taylor*, 345 Mo. 325, 133 S.W.2d 366 (1939); *State v. Porter*, 125 Mont. 503, 242 P.2d 984 (1952). Similarly, it has been held that attempted bribery may not be based on the offer of a bribe to an official who cannot render the requested service. *State v. Butler*, 178 Mo. 272, 77 S.W. 560 (1903). See also *State v. Lawrence*, 178 Mo. 350, 376, 77 S.W. 479, 505 (1903); *State v. Good*, 151 W.Va. 813, 156 S.E.2d 8 (1967). Compare *State v. Latiolais*, 225 La. 878, 882, 74 So.2d 148, 150 (1954), where the court rejected the contention that there could be no such crime as attempted perjury, observing that "if the board or official for some reason was not legally authorized to take testimony, or if the one administering the oath was not authorized to administer it," an attempt could be found because the completed crime "would be frustrated by extraneous circumstances."

<sup>30</sup> *Marley v. State*, 58 N.J.L. 207, 33 A. 208 (Sup. Ct. 1895). See also *Rex v. Percy Dalton (London), Ltd.*, 65 T.L.R. 326 (Crim. App. 1949).

<sup>31</sup> *State v. Guffey*, 262 S.W.2d 152 (Mo. Ct. App. 1953).

<sup>32</sup> See, e.g., *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973), in which the defendants were charged with attempting to violate 18 U.S.C. § 1791, prohibiting the

actor's beliefs. In so doing, the courts exonerate defendants in situations where attempt liability most certainly should be imposed. In all of these cases the actor's criminal purpose has been clearly demonstrated; he went as far as he could in implementing that purpose; and, as a result, his "dangerousness" is plainly manifested.

Apart from these decisions, however, the claim of impossibility has proven to be a poor shield against a charge of criminal attempt. One of the most common examples of claimed impossibility has arisen in charges of attempt to steal where there is nothing to be stolen. After a few early English decisions to the contrary,<sup>33</sup> it has uniformly been held that one is liable if he attempts to steal from an empty pocket,<sup>34</sup> an empty receptacle,<sup>35</sup> or an empty house.<sup>36</sup> The rule has been the same whether the attempt is to commit burglary,<sup>37</sup> robbery,<sup>38</sup> extortion,<sup>39</sup> obtaining by false pretenses<sup>40</sup> or ordinary larceny. It has been held that there can be an attempt to burglarize a train even though the whole train is missing,<sup>41</sup> that an attempt

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smuggling of objects into or out of a federal correctional institution. Since the evidence established that the warden had knowledge of the smuggling plan, and since his lack of knowledge was a necessary element of the offense, the defendants could not be found guilty of violating the statute. The court held that such knowledge by the warden would also preclude conviction for the attempt, since "attempting to do that which is not a crime is not attempting to commit a crime." 482 F.2d at 190.

<sup>33</sup> *Regina v. Collins*, 169 Eng.Rep. 1477 (C.C.R. 1864); *Regina v. M'Pherson*, 169 Eng.Rep. 975 (C.C.R. 1857); see also *Regina v. Taylor*, 25 L.T.R. (n.s.) 75 (Middx. Sess. 1871).

<sup>34</sup> *People v. Twiggs*, 223 Cal.App.2d 455, 35 Cal.Rptr. 859 (1963); *People v. Fiegelman*, 33 Cal.App.2d 100, 91 P.2d 156 (1939); *State v. Wilson*, 30 Conn. 500 (1862); *People v. Richardson*, 32 Ill.2d 497, 207 N.E.2d 453 (1965); *Commonwealth v. McDonald*, 59 Mass. 365 (1850); *People v. Jones*, 46 Mich. 441, 9 N.W. 486 (1881); *People v. Moran*, 123 N.Y. 254, 25 N.E. 412 (1890); *Rogers v. Commonwealth*, 5 Serg. & Rawl. 463 (Pa. 1820); *Regina v. Scott*, 45 W.W.R. (n.s.) 479 (Alta. Sup. Ct. App. Div. 1963); *Rex v. Shaid*, [1926] 3 D.L.R. 553, 46 Can.Crim.Cas. Ann. 209 (Man. Ct. App.); *The Queen v. Taylor*, [1895] 4 Quebec-Rapports Judiciaries 226 (Q.B.); *Regina v. Ring*, 66 L.T.R. (n.s.) 300 (C.C.R. 1892).

<sup>35</sup> *State v. Meisch*, 86 N.J.Super. 279, 206 A.2d 763 (App. Div. 1965); *Clark v. State*, 86 Tenn. 511, 8 S.W. 145 (1888).

<sup>36</sup> *State v. Utley*, 82 N.C. 556 (1880).

<sup>37</sup> *People v. Dogoda*, 9 Ill.2d 198, 137 N.E.2d 386 (1956); see *State v. McCarthy*, 115 Kan. 583, 224 P. 44 (1924).

<sup>38</sup> *State v. Scarlett*, 291 S.W.2d 138 (Mo. 1956); *Commonwealth v. Crow*, 303 Pa. 91, 154 A. 283 (1931); cf. *Hamilton v. State*, 36 Ind. 280 (1871) (assault with intent to rob).

<sup>39</sup> *People v. Fratianno*, 132 Cal.App.2d 610, 627, 282 P.2d 1002, 1011 (1955) (no defense that person threatened might not be able to convey the property desired by defendant).

<sup>40</sup> *People v. Arberry*, 13 Cal.App. 749, 114 P. 411 (1910).

<sup>41</sup> *State v. McCarthy*, 115 Kan. 583, 224 P. 44 (1924).

to obtain by false pretenses is committed although the check obtained is worthless,<sup>42</sup> and that one can attempt to steal a barrel of whiskey even though the barrel is filled with water.<sup>43</sup> It has been said, however, that an attempt to steal from the pocket of a stone image would not constitute an offense.<sup>44</sup> And in actions charging attempt to obtain the proceeds of an insurance policy by false pretenses, some courts have required that there be an insurance policy outstanding;<sup>45</sup> it is unlikely, however, that this was the prevailing rule.<sup>46</sup>

Similarly, it has been held that one can attempt to receive stolen property<sup>47</sup> or attempt to transport illegal whiskey<sup>48</sup> or attempt to possess narcotics<sup>49</sup> even though the commodity is not present when the offender seeks to take it into custody. There can be an attempt to corrupt a juror although the juror is not at home when the actor calls to make his proposition,<sup>50</sup> and there can be an attempt to murder though the intended victim is not where the assailant believes him to be.<sup>51</sup> Attempt liability sometimes has been rejected in instances where, instead of assailing a person not present, the actor searched or waited for a person who was never contacted,<sup>52</sup> such decisions

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<sup>42</sup> *People v. Heinrich*, 65 Cal.App. 510, 224 P. 466 (1924).

<sup>43</sup> *The King v. Montgomery*, 19 Can.Crim.Cas. Ann. 233 (Charlotte County Ct., N.B. 1912).

<sup>44</sup> *See Trent v. Commonwealth*, 155 Va. 1128, 1136, 156 S.E. 567, 569 (1931) (dictum).

<sup>45</sup> *State v. Block*, 333 Mo. 127, 62 S.W.2d 428 (1933); *cf. Nemecek v. State*, 72 Okla.Crim. 195, 114 P.2d 492 (1941); *People v. Elmore*, 128 Ill.App.2d 312, 261 N.E.2d 736, *aff'd*, 50 Ill.2d 10, 276 N.E.2d 325 (1970).

<sup>46</sup> *See State v. Wright*, 342 Mo. 58, 112 S.W.2d 571 (1937).

<sup>47</sup> *In re Magidson*, 32 Cal.App. 566, 163 P. 689 (1917). *Compare* note 28 *supra*.

<sup>48</sup> *Collins v. City of Radford*, 134 Va. 518, 113 S.E. 735 (1922).

<sup>49</sup> *People v. Siu*, 126 Cal.App.2d 41, 271 P.2d 575 (1954) (defendant obtained possession of talcum believing it to be narcotics); *United States v. Heng Awkak Roman*, 356 F.Supp. 434 (S.D.N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974) (same); *United States v. Marin*, 513 F.2d 974 (2d Cir. 1975). *But see United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976) (defendant sold procaine hydrochloride believing it to be heroin).

<sup>50</sup> *Summers v. State ex rel. Boykin*, 66 Ga.App. 648, 19 S.E.2d 28 (1942).

<sup>51</sup> *People v. Lee Kong*, 95 Cal. 666, 30 P. 800 (1892); *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902); *cf. The King v. White*, [1910] 2 K.B. 124 (Crim. App.) (intended victim died before taking poison). *See also Commonwealth v. Haines*, 147 Pa.Super. 165, 24 A.2d 85 (1942).

<sup>52</sup> *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927); *People v. Di Stefano*, 38 N.Y.2d 640, 345 N.E.2d 548, 382 N.Y.S.2d 5 (1976); *Rex v. Sharpe*, [1903] Transvaal L.R. 868 (Sup. Ct.); *Queen v. Topken*, 1 Buch.App.Ct.Cases, Cape of Good Hope 471 (1884); *Regina v. Collins*, 169 Eng.Rep. 1477, 1478 (C.C.R. 1864) (dictum). *Contra, Stokes v. State*, 94 Miss. 415, 46 So. 627 (1908); *see People v. Gormley*, 222 App.Div.

resting in part on the fact that the actor had not yet proceeded far enough toward his criminal goal.

While a missing victim is no defense in the case of an actual assault, it has been said that there is no attempt to murder if the actor shoots at a corpse<sup>53</sup> or a tree stump<sup>54</sup> believing it to be a living person. It has been argued to the contrary that it is no less an attempt to try to take life from a lifeless object than to seek money in an empty pocket.<sup>55</sup> It has been held that sexual intercourse with one who is believed to be an unconscious and unwilling female, but one who is in fact a lifeless female is attempted rape.<sup>56</sup> And in accord with the decisions concerning assaults on missing victims, the trend in attempted abortion cases was to dispense with the requirements that the female be pregnant,<sup>57</sup> a result to which special statutory formulations contributed.<sup>58</sup>

Another broad category of impossibility cases embraces instances in which the instrumentality chosen by the actor is incapable of producing the criminal result desired. Some early decisions exculpated the actor of attempted murder if the instrumentality selected was not adequate for committing the crime contemplated, but the general rule today is that one can be guilty of an attempt to murder although the gun<sup>59</sup> or poison<sup>60</sup>

256, 225 N. Y. S. 653 (1927), *aff'd mem.*, 248 N. Y. 583, 162 N. E. 533 (1928) (distinguishing *People v. Rizzo*, *supra*).

<sup>53</sup> See *State v. Taylor*, 345 Mo. 325, 333, 133 S. W. 2d 336, 341 (1939) (dictum); *State v. Guffey*, 262 S. W. 2d 152, 156 (Mo. Ct. App. 1953) (dictum).

<sup>54</sup> *Rex v. Osborn*, 84 J. P. 63 (Central Crim. Ct. 1919); *accord*, *Commonwealth v. Kennedy*, 170 Mass. 18, 20, 48 N. E. 770, 770 (1897); *Regina v. M'Pherson*, 169 Eng. Rep. 975, 976 (C. C. R. 1857) (dictum).

<sup>55</sup> See 1 W. Russell, *Crime* 187 (12th ed. J. Turner 1964).

<sup>56</sup> *United States v. Thomas*, 13 C. M. A. 278, 32 C. M. R. 278 (1962) (citing MPC Section 5.01 in support).

<sup>57</sup> *People v. Raffington*, 98 Cal. App. 2d 455, 220 P. 2d 967 (1950); *State v. Wilson*, 30 Conn. 500, 505 (1862) (dictum); *People v. Huff*, 339 Ill. 328, 171 N. E. 261 (1930); *State v. Snyder*, 188 Iowa 1150, 177 N. E. 77 (1920); *Dotye v. Commonwealth*, 239 S. W. 2d 206 (Ky. 1956); *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910 (1893); *Commonwealth v. Taylor*, 132 Mass. 261 (1882); *Regina v. Goodchild*, 175 Eng. Rep. 121 (Assizes 1846); *Rex v. Freestone*, [1913] S. Afr. L. R. 758 (Trans. P. D.); *cf. Dupuy v. State*, 204 Tenn. 624, 325 S. W. 2d 238 (1959); *People v. Berger*, 131 Cal. App. 2d 127, 280 P. 2d 136 (1955). If an abortion in the circumstances would be constitutionally protected, *see Roe v. Wade*, 410 U. S. 113 (1973), then an attempt to perform it would, of course, also be constitutionally protected.

<sup>58</sup> See, *e.g.*, Cal. § 274; Ky. Rev. Stat. § 436.020 (1970) (repealed 1974).

<sup>59</sup> *State v. Damms*, 9 Wis. 2d 183, 100 N. W. 2d 592 (1960); *Rex v. Jones*, 18 T. L. R. 156 (Assizes 1901); *Regina v. Cassidy*, 4 Bombay High Ct. R. 17 (C. C. 1867); *Queen-Empress v. Niddha*, 14 Indian L. R. Allahabad 38 (App. Crim. 1891); *cf. People v. Van Buskirk*, 113 Cal. App. 2d 789, 249 P. 2d 49 (1952). *But see In re Magidson*, 32 Cal. App.

or bomb<sup>61</sup> is incapable of producing death. When the charge is "assault with intent to kill," a different result may be required because some traditional definitions of assault require "present ability";<sup>62</sup> even here there have been convictions when the means have been inadequate.<sup>63</sup> The trend in attempted abortion cases was similar; it was usually not material that the drug or instrument was incapable of producing an abortion.<sup>64</sup> And despite statements by commentators to the contrary, recent cases have held that impotency is no defense to a charge of attempted rape.<sup>65</sup> Earlier decisions had reached the same result where the charge was assault with intent to rape.<sup>66</sup> Where an unnatural act with an animal is impossible

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566, 570, 163 P. 689, 691 (1917) (dictum); *State v. Wilson*, 30 Conn. 500, 506 (1862) (dictum); *Commonwealth v. Kennedy*, 170 Mass. 18, 21, 48 N.E. 770, 771 (1897) (dictum).

<sup>60</sup> *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N.E. 770 (1897); *State v. Glover*, 27 S.C. 602, 4 S.E. 564 (1888); *The King v. White*, [1910] 2 K.B. 124 (Crim. App.). *But see In re Magidson*, 32 Cal.App. 566, 570, 163 P. 689, 691 (1917) (dictum); *State v. Wilson*, 30 Conn. 500, 506 (1862) (dictum); *cf. State v. Clarissa*, 11 Ala. 57 (1847).

<sup>61</sup> *See People v. Grant*, 105 Cal.App.2d 347, 233 P.2d 660 (1951) (premature explosion of bomb no bar to liability for attempted murder).

<sup>62</sup> *People v. Sylva*, 143 Cal. 62, 76 P. 814 (1904); *State v. Swails*, 8 Ind. 524 (1857).

<sup>63</sup> *Mullen v. State*, 45 Ala. 43 (1871); *Smith v. State*, 8 Ala.App. 187, 62 So. 575 (1913); *Kunkle v. State*, 32 Ind. 220 (1869).

<sup>64</sup> *State v. Fitzgerald*, 49 Iowa 260 (1878); *State v. Crews*, 128 N.C. 581, 38 S.E. 293 (1901); *Rex v. Pettibone*, 31 Alta. 463, 41 D.L.R. 411 (1918); *Regina v. Brown*, 63 J.P. 790 (Central Crim. Ct. 1899); *Rex v. Austin*, 24 N.Z.L.R. 983 (Ct. App. 1905). *But cf. Rex v. Osborn*, 84 J.P. 63 (Central Crim. Ct. 1919); *Rex v. Freestone*, [1913] S.Afr.L.R. 758 (Trans. P.D.).

<sup>65</sup> *People v. Peckham*, 249 Cal.App.2d 941, 57 Cal.Rptr. 922 (1967); *People v. Stewart*, 74 Ill.App.2d 407, 221 N.E.2d 80 (1966); *Predry v. Commonwealth*, 184 Va. 765, 36 S.E.2d 549 (1946); *accord, Commonwealth v. Althoff*, 45 Del.County R. 350 (Pa. Ct. C.P. 1958) (impotency no defense to charge of attempted sodomy). *But cf. People v. Ray*, 187 Cal.App.2d 182, 189, 9 Cal.Rptr. 678, 682 (1960) (suggesting inability to engage in sexual intercourse may be evidence of lack of intent to commit rape); *People v. Thomas*, 164 Cal.App.2d 571, 331 P.2d 82 (1958) (intimating that such a defense might be allowed to a charge of attempted rape).

<sup>66</sup> *Hunt v. State*, 114 Ark. 239, 169 S.W. 773 (1914); *Territory v. Keyes*, 5 Dakota Terr. 244, 38 N.W. 440 (1888); *State v. Bartlett*, 127 Iowa 689, 104 N.W. 285 (1905); *State v. Ballamah*, 28 N.M. 212, 210 P. 391 (1922); *cf. Commonwealth v. Shaw*, 134 Mass. 221 (1883).

The foregoing decisions are to be contrasted with rulings that a boy under 14 is incapable of attempting rape because he is conclusively presumed to be incapable of committing the completed offense. *Foster v. Commonwealth*, 96 Va. 306, 31 S.E. 503 (1898); *see The Queen v. Williams*, [1893] 1 Q.B. 320, 321 (C.C.R.); *State v. Handy*, 4 Del. (4 Harr.) 566, 567 (1845) (assault with intent to rape). Although sometimes couched in terms of impotency, such decisions are explicable on the ground that the policy precluding conviction for the completed offense applied no less to conviction of an attempt. *But cf. Commonwealth v. Green*, 19 Mass. 380 (1823) (sustaining conviction of boy under 14 for assault with intent to rape).

because of the physical structure of the beast, a person may nevertheless be convicted of an attempt to commit the offense.<sup>67</sup>

An analogous line of cases concerns verbal actions that do not produce the result desired. While lack of response is generally held to prevent consummation of the crime in these cases, it does not afford immunity from an attempt charge. Thus an attempt to extort is possible although the victim is not put in fear;<sup>68</sup> an attempt to bribe may be charged although the actor's offer meets with an unsympathetic attitude;<sup>69</sup> an attempt to obtain by false pretenses may be found even though the contemplated victim is not deceived.<sup>70</sup> It has been said that the pretenses must not be so transparent as to make it a legal impossibility for anyone to be deceived.<sup>71</sup> But, with few exceptions,<sup>72</sup> this dictum has not been followed.<sup>73</sup> It is also im-

<sup>67</sup> Regina v. Brown, 24 O.B.D. 357 (C.C.R. 1889); cf. Huggins v. State, 41 Ala.App. 548, 142 So.2d 915 (1962) (holding impossibility of actual intercourse with a 6 year old girl no defense to charge of attempted rape).

<sup>68</sup> People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903 (1959); People v. Robinson, 130 Cal.App. 664, 20 P.2d 369 (1933); People v. Lavine, 115 Cal.App. 289, 1 P.2d 496 (1931), *appeal dismissed*, 286 U.S. 528 (1932); People v. Gardner, 144 N.Y. 119, 38 N.E. 1003 (1894). *But cf.* Queen Empress v. Mangesh Jivaji, 11 Indian L.R. Bombay 376 (App. Crim. 1887).

<sup>69</sup> People v. Bennett, 182 App.Div. 871, 170 N.Y. 718, *aff'd mem.*, 224 N.Y. 594, 120 N.E. 871 (1918).

<sup>70</sup> People v. Hickman, 31 Cal.App.2d 4, 87 P.2d 80 (1939); Benefield v. State, 151 So.2d 650 (Fla. Dist. Ct. App. 1963); DeKrasner v. State, 54 Ga.App. 41, 187 S.E. 402 (1936); State v. Visco, 183 Kan. 562, 331 P.2d 318 (1958); Franczkowski v. State, 239 Md. 126, 210 A.2d 504 (1965); Commonwealth v. Johnson, 312 Pa. 140, 167 A. 344 (1933); State v. Peterson, 109 Wash. 25, 186 P. 264 (1919); Regina v. Hensler, 22 L.T.R. (n.s.) 691 (C.C.R. 1870).

The contrary decisions in People v. Werner, 16 Cal.2d 216, 105 P.2d 927 (1940), and People v. Schroeder, 132 Cal.App.2d 1, 281 P.2d 297 (1955), were overruled and disapproved in People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903 (1959), which followed the rule stated in the text.

<sup>71</sup> See *In re Magidson*, 32 Cal.App. 566, 570, 163 P. 689, 691 (1917); State v. Wilson, 30 Conn. 500, 506 (1862); cf. People v. Robinson, 130 Cal.App. 664, 668, 20 P.2d 369, 370 (1933) (for attempted extortion the threat must be of such character as "might reasonably" inflict fear).

<sup>72</sup> In *Nemecek v. State*, 72 Okla.Crim. 195, 203, 114 P.2d 492, 497 (1941), it was said:

Before an accused has attempted to obtain money by false pretenses, he must have made a false statement reasonably calculated to deceive another, which statement is so designed as to induce the other to part with his property in reliance upon the false statement, and if not hindered by extraneous circumstances accused would have obtained said money from such other person, if not solely by reason of false pretenses, at least because they would have been the moving cause or a material influence through which he would have received the money.

See also State v. Lawrence, 178 Mo. 350, 77 S.W. 497 (1903); People v. Elmore, 128 Ill.App.2d 312, 261 N.E.2d 736, *aff'd*, 50 Ill.2d 10, 276 N.E.2d 325 (1970).

<sup>73</sup> See Commonwealth v. Johnson, 312 Pa. 140, 167 A. 344 (1933); People v. Spolasco, 33 Misc. 22, 67 N.Y.S. 1114 (N.Y. County Ct. Gen. Sess. 1900).

material that the actor could not succeed because he was addressing his threats, false pretenses, or bribe offers to an agent of the law enforcement authorities<sup>74</sup>—as it is immaterial with respect to any attempt that the actor's purpose could not be realized because his supposed confederate was working with the police.<sup>75</sup>

The generalizations articulated in this area are not very helpful. It is said that a crime need only be apparently possible and that impossibility is no bar as long as it is not "obvious,"<sup>76</sup> that extrinsic facts that make the crime impossible are not a defense if the conduct is intrinsically adapted to the end sought,<sup>77</sup> and that well founded means are sufficient to uphold liability even though they miscarry, but that an absurd or obviously inappropriate selection of means is not.<sup>78</sup> It is said further that the actor must be unaware of the impediments to success.<sup>79</sup> As explanations of the cases, these generalizations are inadequate,<sup>80</sup> but they do emphasize two important aspects of the

<sup>74</sup> See *People v. Heinrich*, 65 Cal.App. 510, 224 P. 466 (1924) (false pretenses); *People v. Gardner*, 144 N.Y. 119, 38 N.E. 1003 (1894) (extortion); *Commonwealth v. Payne*, 82 Montg. County L.R. 23 (Pa. Qtr. Sess. 1963) (corruption of the morals of a minor); cf. *Rex v. Light*, 84 L.J.K.B. (n.s.) 865 (1915) (false pretenses); see also *People v. Boord*, 260 App.Div. 681, 23 N.Y.S.2d 792 (1940), *aff'd mem.*, 285 N.Y. 806, 35 N.E.2d 195 (1941) (attempt to divert detectives posing as travelers).

<sup>75</sup> *State v. Mandel*, 78 Ariz. 226, 278 P.2d 413 (1954); *People v. Lanzit*, 70 Cal.App. 498, 238 P. 816 (1925); *People v. Mills*, 178 N.Y. 274, 70 N.E. 786 (1904).

<sup>76</sup> See *State v. McCarthy*, 115 Kan. 583, 589, 224 P. 44, 47 (1924); *State v. Block*, 333 Mo. 127, 131, 62 S.W.2d 423, 430 (1933); cf. Minn. Stat. § 609.17(2) (West 1969) (allowing the defense if the impossibility should be "clearly evident to a person of normal understanding").

<sup>77</sup> See *State v. Wilson*, 30 Conn. 500, 506 (1863); *Stokes v. State*, 92 Miss. 415, 427, 46 So. 627, 629 (1908); *Collins v. City of Radford*, 134 Va. 518, 536, 113 S.E. 735, 741 (1922); cf. Ill. ch. 38, § 8-4(b), Comment at 512 (indicating that "inherent impossibility" remains a defense although the statute specifically denies the defense where the offense is impossible because of a "misapprehension of the circumstances").

<sup>78</sup> See *Commonwealth v. Kennedy*, 170 Mass. 18, 21, 48 N.E. 770, 770-71 (1897).

<sup>79</sup> See *People v. Lee Kong*, 95 Cal. 666, 668, 30 P. 800, 801 (1892); *People v. Fiegelman*, 33 Cal.App.2d 100, 105, 91 P.2d 156, 159 (1939); *People v. Hickman*, 31 Cal.App.2d 4, 12, 87 P.2d 80, 83 (1939); *Kunkle v. State*, 32 Ind. 220, 232 (1869); *Commonwealth v. Jacobs*, 91 Mass. (9 Allen) 274, 275 (1864); *People v. Moran*, 123 N.Y. 254, 258, 25 N.E. 412, 413 (1890).

<sup>80</sup> Scholarly efforts to rationalize the defense of impossibility have not been fully satisfactory either. See Keedy, *Criminal Attempts at Common Law*, 102 U.Pa.L.Rev. 464, 476-89 (1954); Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L.Rev. 319, 333-38 (1955); Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U.L.Rev. 1170 (1957); Smith, *Two Problems in Criminal Attempts*, 70 Harv.L.Rev. 422 (1957). The suggestions advanced in these articles do not provide a workable means of distinguishing situations in which the defense of impossibility should be allowed and those in which it should be rejected. Nor do they relate the defense to the objectives to be served by a rational law of attempts.

impossibility problem: the relative appropriateness of means to end and the mental state of the actor.<sup>81</sup>

(b) *Policy Considerations.* Insofar as it has not rested on conceptual tangles that have been largely independent of policy considerations, the defense of impossibility seems to have been employed to serve a number of functions. First, it has been used to verify criminal purpose; if the means selected were absurd, there is good ground for doubting that the actor really planned to commit a crime.<sup>82</sup> Similarly, if the defendant's conduct, objectively viewed, is ambiguous, there may be ground for doubting the firmness of his purpose to commit a criminal offense.<sup>83</sup> A general defense of impossibility is, however, an inappropriate way of assuring that the actor has a true criminal purpose.

A second function that the defense of impossibility seems to have served in some cases is to supplement the defense of entrapment. In situations in which the technical entrapment rules do not exonerate the defendant, there is a temptation to find that the presence of traps and decoys makes the actor's endeavor impossible.<sup>84</sup> The Model Code has a separate formulation on entrapment<sup>85</sup> which is believed to state the appropriate considerations for a defense on this ground.

A third consideration that has been advanced in support of an impossibility defense is the view that the criminal law need not take notice of conduct that is innocuous, the element of impossibility preventing any dangerous proximity to the completed crime.<sup>86</sup> The law of attempts, however, should be con-

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<sup>81</sup> See generally Temkin, *Impossible Attempts—Another View*, 39 Mod.L.Rev. 55 (1976).

<sup>82</sup> See *Allen v. State*, 28 Ga. 395 (1859); *Kunkle v. State*, 32 Ind. 220, 231 (1869) (dictum). See also *Rex v. Percy Dalton (London), Ltd.*, 65 T.L.R. 326 (Crim. App. 1949).

<sup>83</sup> See generally Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 Minn.L.Rev. 665 (1969); Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U.L.Rev. 1005 (1967).

<sup>84</sup> See *Rex v. Snyder*, 34 Ont.L.R. 318, 24 Can.Crim.Cas. Ann. 101 (1915); cf. *Commonwealth v. Payne*, 82 Montg. County L.R. 23 (Pa. Qtr. Sess. 1963).

<sup>85</sup> Section 2.13.

<sup>86</sup> See *Kunkle v. State*, 32 Ind. 220 (1869); *Commonwealth v. Kennedy*, 170 Mass. 18, 21, 48 N.E. 770, 771 (1897) (dictum); *Clark v. State*, 86 Tenn. 511, 8 S.W. 145 (1888); *Queen Empress v. Mangesh Jivaji*, 11 Indian L.R. Bombay 376 (App. Crim. 1887).

In *People v. Jelke*, 1 N.Y.2d 321, 330, 135 N.E.2d 213, 219, 152 N.Y.S.2d 479, 487 (1956), the court, construing a specific attempt statute, held "that an attempt is not

cerned with manifestations of dangerous character as well as with preventive arrests; the fact that particular conduct may not create an actual risk of harmful consequences, though it would if the circumstances were as the defendant believed them to be, should not therefore be conclusive. The innocuous character of the particular conduct becomes relevant only if the futile endeavor itself indicates a harmless personality, so that immunizing the conduct from liability would not result in exposing society to a dangerous person.<sup>87</sup>

Using impossibility as a guide to dangerousness of personality presents serious difficulties.<sup>88</sup> What is needed is a guideline that can inform judgment in particular cases, so that those that involve a danger to society can be successfully prosecuted while those that do not can be dismissed. Such a vehicle is provided in Section 5.05(2), which authorizes the court to reduce the grade of the offense, or dismiss the prosecution, in situations where the conduct charged to constitute an attempt is "so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting" the normal grading of the offense as an attempt. Section 5.05(2) thus takes account of those cases where neither the offender nor his conduct presents a serious threat to the public. There is also, of course, prosecutorial discretion, which seems to have eliminated most such cases from litigation in the past.

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made to induce a woman to lead a life of prostitution if all the circumstances . . . make it apparent that nothing which a defendant has done would have tended to alter the course of her life in this respect."

<sup>87</sup> According pickpockets and confidence men immunity because their efforts met with an "impossibility" would seriously impede the apprehension of dangerous persons. See *People v. Moran*, 123 N.Y. 254, 25 N.E. 412 (1890); *Commonwealth v. Johnson*, 312 Pa. 140, 167 A. 344 (1933).

<sup>88</sup> Cases can be imagined in which it might well be accurate to say that the nature of the means selected, say black magic, substantially negates dangerousness of character. On the other hand, there are many cases as well where one who tries to commit a crime by what he later learns to be inadequate methods will recognize the futility of his course of action and seek more efficacious means. There are, in other words, many instances of dangerous character revealed by "impossible" attempts, and to develop a theory around highly exceptional situations ignores the propriety of convictions in these.

It has been suggested by some that the test of factual impossibility should be one of reasonableness: if the actor's failure is due to a reasonable mistake or miscalculation, the error should not provide a defense; but if the error is unreasonable, the actor should not be convicted. See *Minn. § 609.17(2)*, allowing the defense of impossibility when "such impossibility would have been clearly evident to a person of normal understanding." See also *Sayre, Criminal Attempts*, 41 *Harv. L. Rev.* 821, 848-55 (1928). On the other hand, it is by no means clear that those who make unreasonable mistakes will not be potentially dangerous.

The course of eliminating impossibility as a defense has commended itself to legislative efforts.<sup>89</sup> Indeed, there is very little modern authority that supports a retention of the impossibility defense as such.

(c) *Model Penal Code Formulation.* It may be helpful to consider how the Code would be applied to some of the situations noted above. Subsection (1)(a) would deal with many of the problems. The *Jaffe* case,<sup>90</sup> for example, would result in a conviction under the Code, because the defendant would have purposely engaged in conduct that would constitute the crime "if the attendant circumstances were as he believes them to be." Since the defendant believed the property to be stolen, he could be convicted even though at the time the property was technically classified as non-stolen. The same resolution would be reached in the pickpocket case,<sup>91</sup> as well as in many other situations discussed above where the attendant circumstances were different from those that the actor believed to exist.

<sup>89</sup> See the following revisions which explicitly or implicitly abolish the impossibility defense: Ala. § 13A-4-2(b); Ariz. § 13-1001(B); Ark. § 41-701; Colo. § 18-2-101(1); Conn. § 53a-49; Del. tit. 11, § 531; Fla. § 777.04(1); Ga. § 26-1002; Haw. § 705-500; Ill. ch. 38, § 8-4(b); Ind. § 35-41-5-1; Kan. § 21-3301(2); Ky. § 506.010(1); La. § 14:27(A); Me. tit. 17-A, § 152(2); Mo. § 564.011(2); Mont. § 94-4-103(2); Neb. § 28-201(1); N.H. § 629:1; N.Y. § 110.10; N.D. § 12.1-06-01(1); Ohio § 2923.02(B); Ore. § 161.425; Pa. tit. 18, § 901(b); Utah § 76-4-101(3)(b); Wash. § 9A.28.020(2); U.S. (p) S. 1437 § 1001(c)(1) (Jan. 1978); Brown Comm'n Final Report § 1001; Alas. (p) § 11.31.100(b) (H.B. 661, Jan. 1978); Cal. (p) S.B. 565 § 6002; Md. (p) § 110.10; Mass. (p) ch. 263, § 45(a); Mich. (p) S.B. 82 § 1001(2); Okla. (1975 p) § 2-101(B); S.C. (p) § 14.1; Tenn. (p) § 901(a); Vt. (p) § 2.4.2(2); W. Va. (p) § 61-4-1.

Three revisions have the effect of rejecting the impossibility defense in many but not all situations. Minn. § 609.17(2) precludes the defense "unless such impossibility would have been clearly evident to a person of normal understanding"; N.J. § 2C:5-1(a)(1) penalizes only "conduct which would constitute a crime if the circumstances were as a reasonable person would believe them to be"; Tex. § 15.01(a) is broadly worded so as to encompass many but not all impossibility situations (see *id.* Practice Commentary at 516).

The Wisconsin statute provides:

An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

Wis. § 939.32(2). In *State v. Damms*, 9 Wis.2d 183, 100 N.W.2d 592 (1960), the court sustained a conviction for attempted murder although the gun sought to be employed was not loaded. This fact was held to be an "extraneous factor." The *Damms* case is the subject of discussion in 1960 Wis.L.Rev. 516 and 70 Yale L.J. 160 (1960).

The Law Commission, *supra* note 17, at 29-54, has recommended that the impossibility defense be abolished from English Law.

<sup>90</sup> See *supra* note 28.

<sup>91</sup> See *supra* notes 33 & 34 and accompanying text.

Subsection (1)(b) leads to the same conclusion in cases where the result that the defendant seeks to cause or believes will be caused by his conduct does not occur because of some fortuity. When, for example, the defendant shoots at an empty bed, believing that his intended victim is in the bed, he engages in conduct with the purpose of causing the death of his victim without further conduct on his part, and thus is guilty of an attempted homicide under Subsection (1)(b).

Finally, there are the cases governed by Subsection (1)(c) where further conduct of the actor will be called for to commit the substantive offense. If the defendant is taking aim at the empty bed, or about to reach into an empty pocket or to receive "non-stolen" goods, he can be convicted under Subsection (1)(c) if his act constitutes a substantial step in a course of conduct that, "under the circumstances as he believes them to be," is planned to culminate in his commission of the crime.

It should also be noted that, in order to constitute an attempt under any of the subdivisions of Subsection (1), it is of course necessary that the result desired or intended by the actor constitute a crime. If, according to his beliefs as to relevant facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.<sup>92</sup> This is in accord with present authority, and follows, as Professor Williams has pointed out, from "the principle of legality; in effect [under a contrary rule] the law of attempt would be used to manufacture a new crime, when the legislature has left the situation outside of the ambit of the law."<sup>93</sup>

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<sup>92</sup> There are cases that can be explained on this rationale. See *Wilson v. State*, 85 Miss. 687, 30 So. 46 (1905); *People v. Teal*, 196 N.Y. 372, 89 N.E. 1086 (1909); cf. *People v. Thomas*, 63 Cal. 482 (1883); *Nicholson v. State*, 97 Ga. 672, 25 S.E. 360 (1896). See also *United States v. Thomas*, 13 C.M.A. 278, 291, 32 C.M.R. 278, 291 (1961) (dictum, citing the Model Penal Code).

Proper treatment of some of these cases is difficult, however. In *Teal*, for example, it was held that there was no attempt to suborn a witness if the testimony sought was immaterial and would not, if given, have constituted perjury. On one view, the defendant in *Teal* might be thought mistaken as to the criminal law, if her mistake is seen as ignorance of the noncriminality of giving the solicited testimony. On another, however, her mistake might be considered one concerning the importance of the testimony, an essentially factual question that involves a circumstance element of the offense. The defendant sought to induce false testimony that she thought was material, and materiality is a circumstance element just as "stolen" was a circumstance element in *Jaffe*.

<sup>93</sup> G. Williams, *Criminal Law: The General Part* 634 (2d ed. 1961). Professors Kadish and Paulsen put the following question, however, for consideration:

" . . . Two friends, Mr. Fact and Mr. Law, go hunting in the morning of October 15 in the fields of the state of Dakota, whose law makes it a misdemeanor to hunt

The Model Code formulation has been criticized for giving insufficient protection to conduct that is externally equivocal.<sup>94</sup> The asserted difficulty applies to Subsections (1)(a) and (1)(b). Subsection (1)(c) punishes a "substantial step" toward commission of a crime, but Subsection (2) states that conduct can be a substantial step only if "it is strongly corroborative of the actor's criminal purpose." No similar limitation applies to Subsections (1)(a) and (1)(b), so in theory actors might be convicted of attempts despite the fact that their external conduct gives no evidence of a criminal purpose. Suppose, for example, that *A* purchases a secondhand bicycle from *B*. *A*, in fact, believes that *B* has stolen the bicycle but nothing in the circumstances corroborates his criminal purpose to purchase stolen property. He could in theory be convicted under Subsection (1)(a). Or suppose that *C* shoots at an animal in the woods under circumstances that do not suggest an intent to kill a human being, but that in fact *C* meant to kill another hunter. He could be convicted under Subsection (1)(b). The possibility of such results is criticized on the ground that the dangers of mistaken convictions are too great if people can be prosecuted and convicted for behavior that does not strongly corroborate a criminal purpose.

In response, it should first be noted how unlikely it is that persons will be prosecuted on the basis of admissions alone; the person who has behaved in a wholly innocuous way is not a probable subject of criminal proceedings. So, the issue posed over Subsections (1)(a) and (1)(b) is more theoretical than prac-

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any time other than from October 1 to November 30. Both kill deer on the first day out, October 15. Mr. Fact, however, was under the erroneous belief that the date was September 15; and Mr. Law was under the erroneous belief that the hunting season was confined to the month of November, as it was the previous year. . . . [Under a formulation like the Model Penal Code's,] Mr. Fact could be convicted of an attempt to hunt out of season; but Mr. Law could not be. We fail to see how any rational system of criminal law could justify convicting one and acquitting the other on so fragile and unpersuasive a distinction that one was suffering under a mistake of fact and the other under a mistake of law. Certainly if the ultimate test is the dangerousness of the actor (i.e., readiness to violate the law) . . . no distinction is warranted—Mr. Law has indicated himself to be no less 'dangerous' than Mr. Fact."

S. Kadish & M. Paulsen, *Criminal Law and Its Processes* 367 (3d ed. 1975) (footnote omitted). See also Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U.L.Rev. 1005, 1033 (1967). The situation posed seems highly unlikely to arise, since people are not ordinarily prosecuted on the basis of their admissions alone, and neither Mr. Fact nor Mr. Law has behaved in a way that suggests criminality. In any event, it is difficult to conceive of a principle that would excuse Mr. Fact on these facts that would not also immunize actors who should be liable, such as the person who mistakenly believes he is receiving stolen property.

<sup>94</sup> See Enker, *supra* note 83; Hughes, *supra* note 83. See also S. Kadish & M. Paulsen, *supra* note 93, at 366-68.

tical. The danger of requiring that completed conduct be strongly corroborative of a criminal purpose is that the formulation might excuse persons whose contemporaneous statements plus their behavior are strongly suggestive of criminal purpose, but whose behavior alone arguably would not be strongly corroborative of that purpose. Another relevant point is the purpose that strongly corroborative conduct serves. When a person has stated an intention to commit a crime but is still preparing to do so, his willingness to engage in conduct clearly signalling a criminal purpose is evidence of the seriousness of his intent. This intent is no longer in question when he has completed his conduct; at that point the only doubt can be over what he believes about the circumstances. It may be thought that evidence from his lips—contemporaneous statements or subsequent admissions—is much more reliable on this subject, and therefore less in need of corroboration, than verbal statements about intent made at an early stage.

Some recent revisions have gone beyond the Model Code and require that conduct be corroborative of criminal purpose even when the defendant's conduct is completed.<sup>95</sup>

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<sup>95</sup> Some jurisdictions clearly extend the requirement that conduct corroborate purpose to situations covered by Subsections (1)(a) and (1)(b) of the Model Code. See Colo. § 18-2-101(1); Me. tit. 17-A, § 152(1); Mo. § 564.011; N.H. § 629:1; N.D. § 12.1-06-01; P.R. tit. 33, § 3121; Utah § 76-4-101; Wis. § 939.32(2); Brown Comm'n Final Report, § 1001; Md. (p) § 110.00; Vt. (p) § 2.4.2(1). Arkansas, Hawaii and Nebraska require, in provisions similar to Subsection (1)(b) of the Model Code, that the actor engage in conduct that constitutes a substantial step in a course of conduct intended or known to cause the prohibited result, and require that the substantial step be strongly corroborative of the actor's intent. Ark. § 41-701(2) & (3); Haw. §§ 705-500, -501; Neb. § 28-201. Three revised codes and one proposal require corroboration in many situations covered by MPC Subsection (1)(b), but reach this result by following MPC Subsections (1)(a) and (1)(c), but omitting (1)(b). See Conn. §§ 53a-49 to -51; Del. tit. 11, § 531; Ky. §§ 506.010, .020; W. Va. (p) §§ 61-4-1, -4-2.

Some revised codes and proposals use the term "substantial step" without defining it, leaving open the possibility that a court may import a requirement of corroboration into this term. See Ga. § 26-1001; Ill. ch. 38, § 8-4(a); Ind. § 35-41-5-1(a)(1); Minn. § 609.17(1); Ore. § 161.405(1); Pa. tit. 18, § 901(a); Wash. § 9A.28.020(1); U.S. (p) S. 1437 § 1001 (Jan. 1978); Alas. (p) § 11.31.100 (H.B. 661, Jan. 1978); Cal. (p) S.B. 27 § 6001; D.C. (1978 p) § 22-201(a); Mass. (p) ch. 263, § 45(a). The commentaries to the Oregon provision and the Alaska proposal indicate that corroboration is required.

For jurisdictions that clearly follow the Model Code in requiring a substantial step corroborative of the actor's intent only in situations covered by Subsection (1)(c), see note 130 *infra*.

The Delaware, Kentucky, Puerto Rico and Wisconsin statutes and the West Virginia proposal cited above actually require more than that conduct be strongly corroborative of a criminal purpose. Del.; Ky.; and W. Va. (p) require that the actor engage in a substantial step that "leaves no reasonable doubt" as to his intent to commit a crime. Wis. demands that the "actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does acts toward the commission

4. "*Last Proximate Act.*" In respect to the "conduct" components of the crime of attempt, there is general agreement that when the actor has done all that he believes to be necessary to commit the offense in question, he has committed an attempt. Sometimes called the "last proximate act," this is made the basis for liability in both Subsections (1)(a) and (1)(b). These two provisions cover the case where the defendant, as in *Jaffe*,<sup>96</sup> receives "stolen" property that turns out not to be "stolen" when received, as well as cases where the contemplated victim is fired upon but the shots miss or the victim is saved by a miraculous operation. Also covered are cases where it might be possible that further conduct by the defendant would prevent the offense from occurring, but where additional conduct is not required in order for the contemplated result to be brought about. Such a case would occur where the actor planted a bomb, timed to go off at some point in the future. Notwithstanding the actor's ability to prevent the consequences of his "last proximate act," his conduct would be included within the coverage of Subsection (1)(b).

5. *General Distinction Between Preparation and Attempt.* It is clear, however, that the liability should extend beyond the cases where the defendant has engaged in the "last proximate act." If, as is generally assumed, every act done with intent to commit a crime is not to be made criminal, it becomes necessary to establish a means of inclusion and exclusion. The formulation of a general standard for that purpose in Subsection (1)(c) presents the most difficult problem in defining criminal attempt. Before considering that formulation, it will be helpful to review the standards for accomplishing this task reflected in the case law when the Model Code was being drafted.

(a) *Physical Proximity Doctrine.* Some courts simply affirmed in general terms that the overt act required for an attempt must be proximate to the completed crime, or that the act must be one directly tending toward the completion of the crime, or that the act must amount to the commencement of the consummation.<sup>97</sup> Such opinions often admitted that each

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of the crime which demonstrate unequivocally, under all the circumstances that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." P.R. also incorporates an unequivocality requirement.

<sup>96</sup> See note 28 *supra*.

<sup>97</sup> See *Bell v. State*, 118 Ga.App. 291, 163 S.E.2d 323 (1968); *People v. Woods*, 24 Ill.2d 154, 180 N.E.2d 475, *cert. denied*, 371 U.S. 819 (1962); *State v. Boutin*, 133 Vt. 531, 346 A.2d 531 (1975); *State v. Dowd*, 28 N.C.App. 32, 220 S.E.2d 393 (1975). No jurisdiction operating within the framework of Anglo-American law has required that the last proximate act occur before an attempt can be charged. An important English

case must be decided on its own facts, and examined in detail the act's remoteness from the completed crime, emphasizing time,<sup>98</sup> distance,<sup>99</sup> and the number of necessary acts as yet undone.<sup>100</sup> Under a stringent view of the physical proximity test, the actor's conduct was considered preparation rather than attempt until the actor had the power, or at least the apparent power, to complete the crime forthwith.<sup>101</sup>

The physical proximity test is not in itself inconsistent with principles of attempt liability: other things being equal, the further the actor progresses toward completion of the offense, the greater is the dangerousness of character manifested and the need for preventive arrest.<sup>102</sup> But the standard is a vague one and emphasizes only one aspect of the actor's behavior. The physical proximity test does not provide much guidance in answering the crucial problem of how close is close enough for attempt liability.

(b) *Dangerous Proximity Doctrine.* A test that incorporated the physical proximity approach within it, but that pro-

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decision, *Regina v. Eagleton*, 6 Cox Crim.Cas. 559 (Crim. App. 1855), intimated that the last proximate act was necessary, and several American and English decisions have treated this as the law of England. See *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952); *State v. Dumas*, 118 Minn. 77, 81, 136 N.W. 311, 313 (1912); *Rex v. Punch*, 20 Crim.App. 18 (1927) (semble); *Rex v. Cope*, 38 T.L.R. 243, 16 Crim.App. 77 (1921). But this is not correct. A number of cases since *Eagleton*, including a leading decision by the same court in the same year, *Regina v. Roberts*, 7 Cox Crim.Cas. 39, 19 J.P. 789 (Crim. App. 1855), found attempts when no last proximate act had occurred. *Rex v. Laitwood*, 4 Crim.App. 248 (1910); *The King v. White*, [1910] 2 K.B. 124 (Crim. App.); *The King v. Linneker*, [1906] 2 K.B. 99 (C.C.R.); *The Queen v. Button*, [1900] 2 Q.B. 597 (C.C.R.); *The Queen v. Duckworth*, [1892] 2 Q.B. 83 (C.C.R.); see *Regina v. Cheeseman*, 9 Cox Crim.Cas. 100 (Crim. App. 1862); cf. *Rex v. Bloxham*, 29 Crim.App. 37 (1943).

An Indian case advanced the last proximate act test, *Queen-Empress v. Dhundi*, 8 Indian L.R. Allahabad 304 (Crim. Rev. 1886), but it has not been followed, *Queen-Empress v. Kalyan Singh*, 16 Indian L.R. Allahabad 409 (Crim. Rev. 1894); *In re MacCrea*, 15 Indian L.R. Allahabad 173 (App. Crim. 1893).

<sup>98</sup> See *People v. Werner*, 16 Cal.2d 216, 105 P.2d 927 (1940); *Lovett v. State*, 19 Tex. 174 (1857). But cf. *In re MacCrea*, 15 Indian L.R. Allahabad 173 (App. Crim. 1893), where the court rejected the relevance of temporal proximity on the ground that some attempts are long in reaching fruition.

<sup>99</sup> See *People v. Stites*, 75 Cal. 570, 17 P. 693 (1888); *Groves v. State*, 116 Ga. 516, 42 S.E. 755, second opinion, *id.* at 607, 42 S.E. 1014 (1902).

<sup>100</sup> See *Regina v. Cheeseman*, 9 Cox Crim.Cas. 100 (Crim. App. 1862).

<sup>101</sup> *People v. Murray*, 14 Cal. 159 (1859); *Commonwealth v. Kelley*, 162 Pa.Super. 526, 58 A.2d 375 (1948); *Regina v. Taylor*, 175 Eng.Rep. 831 (Assizes 1859); *Rex v. Sharpe*, [1903] Transvaal L.R. 863, 875-77 (Sup. Ct.) (concurring opinion).

<sup>102</sup> See *Lovett v. State*, 19 Tex. 174 (1857), where the court found completion of the intended offense so remote as to negative resolution on the part of the actor to commit the offense; it was probable that the actor would think better of his behavior and desist.

ceeded beyond it, was the doctrine given impetus by the writings and opinions of Mr. Justice Holmes.<sup>103</sup> To determine whether a given act constituted an attempt the following factors were considered: the gravity of the offense intended, the nearness of the act to completion of the crime, and the probability that the conduct would result in the offense intended. The greater the gravity and probability, and the nearer the act to the crime, the stronger the case for calling the act an attempt.<sup>104</sup> The test is based on the assumption that the purpose of punishing attempts is to deter undesirable behavior and that until the actor's conduct becomes sufficiently dangerous there is not adequate reason for deterring it.<sup>105</sup> The assumption, as it relates to the law of attempts, is not the proper foundation for liability. 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, and therefore the test, although unacceptable as a working rationale, is not entirely irrelevant.

(c) *Indispensable Element Approach.* One variation of the several proximity tests emphasized any indispensable aspect of the criminal endeavor over which the actor has not yet acquired control. Some decisions seem to stand for the proposition that if the successful completion of a crime requires the assent or action of some third person, that assent or action must be forthcoming before the actor can be guilty of an attempt. Thus, if *A* and *B* plan to defraud a life insurance company by pretending that *A*, the insured, is dead, and if *C*, the beneficiary, must file a formal claim before any proceeds can be paid, it has been held that the acts of *A* and *B* cannot amount to an attempt to defraud the insurance company until *C* files a claim

<sup>103</sup> *Hyde v. United States*, 225 U.S. 347, 388 (1912) (dissenting opinion); *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N.E. 770 (1879); *O. Holmes, The Common Law* 65-70 (1881).

<sup>104</sup> See *United States v. Moses*, 205 F.2d 358, 359 (2d Cir. 1953) (dissenting opinion); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952); *People v. Paluch*, 78 Ill.App.2d 356, 222 N.E.2d 508 (1966); *People v. Ditchik*, 288 N.Y. 95, 41 N.E.2d 905 (1942); *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925); *Commonwealth v. Poretta*, 74 Pa.Super. 463 (1920); *Rex v. Labourdette*, 13 B.C. 443 (Assizes 1908); *In re MacCrea*, 15 Indian L.R. Allahabad 173 (App. Crim. 1893). In some cases the gravity of the offense is not considered; proximity to completion is the exclusive consideration. See *United States v. Moses*, *supra*; *People v. Paluch*, *supra*.

<sup>105</sup> See *O. Holmes*, *supra* note 103.

or agrees to file a claim.<sup>106</sup> And one court has held that giving counterfeit matter to another so that he may "pass" it, does not constitute an attempt to "pass" on the giver's part until the other makes an effort to pass the counterfeit matter to an innocent third party.<sup>107</sup> Cases where the actor has sought to influence a juror by asking a third party to approach the juror have split on whether the actor has attempted to corrupt a juror.<sup>108</sup> The reasoning of those courts that have refused to find an attempt is similar to that of courts that have held that solicitation does not constitute an attempt because completion of the crime requires action by the party solicited.<sup>109</sup>

An analogous group of cases supports the view that a person cannot be guilty of an attempt if he lacks a means essential to completion of the offense. Thus it has been held that one cannot be guilty of an attempt to introduce whiskey into a forbidden territory until he acquires the whiskey;<sup>110</sup> that a person cannot attempt an assault with a dangerous weapon until he acquires the weapon;<sup>111</sup> that one cannot attempt illegally to manufacture whiskey until he acquires the necessary apparatus;<sup>112</sup> that one cannot attempt to vote illegally until he obtains a ballot.<sup>113</sup>

This approach is subject to the same general objections as the proximity tests of which it is a variation.

(d) *Probable Desistance Test*. Oriented largely toward the dangerousness of the actor's conduct but appearing to give slightly more emphasis to the actor's personality was the rule that provided that the actor's conduct constituted an attempt if, in the ordinary and natural course of events, without interruption from an outside source, it would result in the crime intended.<sup>114</sup> This test seemed to require a judgment in each

<sup>106</sup> *In re Schurman*, 40 Kan. 533, 20 P. 277 (1889); *accord*, *State v. Block*, 333 Mo. 127, 62 S.W.2d 428 (1933); *see* *People v. Wallace*, 78 Cal.App.2d 726, 741, 178 P.2d 771, 780 (1947).

<sup>107</sup> *People v. Compton*, 123 Cal. 403, 56 P. 44 (1899).

<sup>108</sup> *See* note 218 *infra*.

<sup>109</sup> *See* *People v. Hammond*, 132 Mich. 422, 93 N.W. 1084 (1903).

<sup>110</sup> *United States v. Stephens*, 12 F. 52 (C.C.D. Ore. 1882).

<sup>111</sup> *State v. Wood*, 19 S.D. 260, 103 N.W. 25 (1905).

<sup>112</sup> *State v. Addor*, 183 N.C. 687, 110 S.E. 650 (1922); *Trent v. Commonwealth*, 155 Va. 1128, 156 S.E. 567 (1931).

<sup>113</sup> *State v. Fielder*, 210 Mo. 188, 109 S.W. 580 (1908).

<sup>114</sup> *E.g.*, *United States v. Stephens*, 12 F. 52 (C.C.D. Ore. 1882); *People v. Gibson*, 94 Cal.App.2d 468, 210 P.2d 747 (1949); *State v. Schwartzbach*, 84 N.J.L. 268, 86 A.

case that the actor had reached a point where it was unlikely that he would have voluntarily desisted from his efforts to commit the crime. But in cases applying this test no inquiry was made into the personality of the particular offender before the court. Rather, the question was whether *anyone* who went so far would stop short of the final step.

The Wisconsin Criminal Code adopts a variation of this test. It classifies as an attempt "acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that [the actor formed an intent to commit the crime] . . . and would commit the crime except for the intervention of another person or some other extraneous factor."<sup>115</sup>

Accepting for the time being the underlying assumption that probability of desistance, or actual abandonment of the criminal endeavor, negatives dangerousness sufficiently to warrant immunity from attempt liability, this test still does not appear to provide a workable standard. Is there an adequate empirical basis for predicting whether desistance is probable at various points in various types of cases? The opinion has been voiced that one who has undertaken a criminal endeavor and performed an act pursuant to that purpose would not be likely to stop short of the final step.<sup>116</sup> And in actual operation the probable desistance test is linked entirely to the nearness of the actor's conduct to completion, this being the sole basis of unsubstantiated judicial appraisals of the probabilities of desistance. The test as applied appears to be little more than the physical proximity approach.

(e) *Abnormal Step Approach.* One commentator, recognizing the role of attempts in revealing dangerous personalities, defined an attempt as a step toward crime that goes beyond the point where the normal citizen would think better of his conduct and desist.<sup>117</sup> Despite its proper orientation, this approach has several serious deficiencies. First, with respect to some and probably with respect to most crimes, any step toward the crime is a departure from the conduct of the normal

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423 (Ct. Err. & App. 1913); *State v. Brown*, 95 N.C. 685 (1886); *State v. Hurley*, 79 Vt. 28, 64 A. 78 (1906). Compare *Rex v. Page*, [1933] Vict.L.R. 351 (Austl.).

<sup>115</sup> Wis. § 939.32(2). See *Le Barron v. State*, 32 Wis.2d 294, 145 N.W.2d 79 (1966); *Oakley v. State*, 22 Wis.2d 298, 125 N.W.2d 657 (1964); *Adams v. State*, 57 Wis.2d 515, 204 N.W.2d 657 (1973). See also *State v. Martinez*, 220 N.W.2d 530 (S.D. 1974).

<sup>116</sup> See *Parker v. State*, 29 Ga.App. 26, 113 S.E. 218 (1922); *State v. Roby*, 194 Iowa 1032, 188 N.W. 709 (1922); *People v. Youngs*, 122 Mich. 292, 81 N.W. 114 (1899) (dissenting opinion). But see *Lovett v. State*, 19 Tex. 174 (1857).

<sup>117</sup> See Skilton, *The Requisite Act in a Criminal Attempt*, 3 U.Pitt.L.Rev. 308 (1937).

citizen. Thus this approach would effect a major revolution in attempt liability, since under this definition of attempt almost any act undertaken for the purpose of committing a crime would constitute an attempt. Second, there may be some offenses where the normal citizen does not stop at all. To tie attempt liability to the normal citizen in this case is to raise the whole problem of unpopular laws and their enforcement. It seems untenable that normalcy in violation or near-violation should constitute a defense to an attempt charge. Finally, who is to judge where the normal citizen would stop and what kind of proof would be appropriate for such a determination? The test is oriented toward singling out dangerous personalities but is virtually impossible of application.

(f) *Res Ipsa Loquitur Test.* An entirely different approach to the preparation-attempt problem was taken by the position that an attempt is committed when the actor's conduct unequivocally manifests an intent to commit a crime.<sup>118</sup> The conduct would be considered in relation to all the circumstances exclusive of representations made by the actor about his intention, though presumably representations by the actor that negative a criminal intent would be admissible to disprove the intention imputed. The object of this approach was to subject to attempt liability conduct that unequivocally demonstrates that the actor is being guided by a criminal purpose. There are two separate lines of thought on which this view can be sustained.

The first goes to the problem of proof. Assuming that any act done for the purpose of committing a crime is an act that demonstrates dangerousness, a law that would make every such act an attempt is undesirable because it would allow prosecutions for acts that are externally equivocal and thus create a risk that innocent persons would be convicted. Accordingly, the *res ipsa loquitur* rule on preparation-attempt may be viewed entirely as a matter of procedure, as a device to prevent liability based solely on confessions and other representations of

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<sup>118</sup> See generally J. Salmond, *Jurisprudence*, 388-89 (12th ed. P. Fitzgerald 1966); Turner, *Attempts to Commit Crimes*, 5 *Camb.L.J.* 230 (1934). The Turner thesis is approved and applied in *People v. Coleman*, 350 *Mich.* 268, 86 *N.W.2d* 281 (1957).

In *Campbell & Bradley v. Ward*, [1955] *N.Z.L.R.* 471 (Sup. Ct.), the court held in construing a statute that, in order to constitute an attempt, defendant's conduct (1) must be proximate to the intended crime in the conventional sense, and (2) must itself demonstrate defendant's intent to commit that crime under a *res ipsa loquitur* approach. See also *The King v. Moore*, [1936] *N.Z.L.R.* 979 (Ct. App.); *The King v. Yelds*, [1928] *N.Z.L.R.* 18 (Ct. App. 1927); *The King v. Barker*, [1924] *N.Z.L.R.* 865 (Ct. App.). Note that the "equivocality test" of *The King v. Barker* has been abandoned in New Zealand. *N.Z. Crimes Act* § 72(3), [1961] 1 *N.Z. Stat.* 368.

purpose<sup>119</sup> because of the risks they raise when considered with the other probative weaknesses<sup>120</sup> incident to attempt liability. Whether the requirement of unequivocality is considered part of the substantive definition of attempt or as a separate rule of evidence, it can be realistically administered only by means of a procedural mechanism—by excluding from the jury, in whole or in part, the actor's incriminating representations of purpose. If problems of proof are the basis of the preparation-attempt distinction, then the *res ipsa loquitur* approach has some merit.<sup>121</sup>

There is considerable support in the cases for the proposition that the preparation-attempt distinction is the result of difficulty in proving purpose. There are cases that make explicit reference to the necessity for unequivocal behavior.<sup>122</sup> And it has been said, with some frequency, that the overt act must manifest the intent to commit the crime.<sup>123</sup> Moreover, many

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<sup>119</sup> Statements made by the actor before or during the act are not reliable because the actor may have been bluffing or he may have entertained an idea or inclination without really acting on it, the act in question being motivated by a noncriminal purpose.

<sup>120</sup> There are a number of differences between the conduct questioned in an attempt case and the conduct questioned in a case involving the completed crime. In an attempt case the conduct involved is noncausal, so at the outset there is the opportunity to charge a crime where nothing is amiss. There is no *corpus delicti* to verify the fact that somebody has caused some sort of trouble. Moreover, in the case of a completed crime the last proximate act must be proved. For an attempt conviction this is not necessary; if immunity for preparation were eliminated, almost any act would do. Thus, as to any substantive crime, the chances are that more steps will have to be proved if the completed crime is involved than if the attempt is charged. Compare Enker, *supra* note 83.

<sup>121</sup> See, however, *Regina v. China*, 8 Bombay H.C. (Crown Cas.) 164 (1871), where there was great equivocality despite the fact that the "last act" had been committed. An unwed mother had placed her newly born infant into an urn, wrapped in a manner that would suffocate it. The baby had been "rescued" by the police who claimed that the mother had intended to kill the child. From other circumstances the court concluded that the accused had merely hidden the child from an intrusion that she had believed to be hostile.

<sup>122</sup> *Lemke v. United States*, 211 F.2d 73 (9th Cir.), *cert. denied*, 347 U.S. 1013 (1954); *State v. Mandel*, 78 Ariz. 226, 278 P.2d 413 (1954); *People v. Lyles*, 156 Cal.App.2d 482, 486, 319 P.2d 745, 747 (1957) ("some act which unequivocally manifested an existing intention to go forward to completion of the crime thus initiated"); *People v. Goldstein*, 146 Cal.App.2d 268, 303 P.2d 892 (1956); *People v. Cummings*, 141 Cal.App.2d 193, 296 P.2d 610 (1956); *People v. Franquelin*, 109 Cal.App.2d 777, 241 P.2d 651 (1952); *State v. Hollingsworth*, 15 Del. (1 Marv.) 528, 41 A. 143 (Ct. Gen. Sess. 1893); *State v. Lindsey*, 202 Miss. 896, 32 So.2d 876 (1947); *Kelly v. Commonwealth*, 1 Grant 484 (Pa. 1858).

<sup>123</sup> See *United States v. Stephens*, 12 F. 52 (C.C.D. Ore. 1882); *Groves v. State*, 116 Ga. 516, 42 S.E. 755 (1902); *In re Lloyd*, 51 Kan. 501, 503, 33 P. 307, 308 (1893) (dictum); *Dill v. State*, 149 Miss. 167, 115 So. 203 (1928); *Cunningham v. State*, 49 Miss. 685 (1874); *State v. Thompson*, 31 Nev. 209, 101 P. 557 (1909) (dissenting opinion); *State v. Lung*, 21 Nev. 209, 28 P. 235 (1891); *Commonwealth v. Tadrick*, 1 Pa.Super. 555 (1896); *Rex v. Duffy*, 57 Can.Crim.Cas. Ann. 186 (N.S. Sup. Ct. 1931).

courts that have adopted a stringent view as to what constitutes an attempt reveal their actual motivation by openly expressing concern over the inadequate proof of criminal intent.<sup>124</sup> For example, in *Stokes v. State*,<sup>125</sup> the court indicated that proof of purpose was the crucial issue by observing: "[W]henever the design of a person to commit crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt, and this court will not destroy the practical and common-sense administration of the law with subtleties [*sic*] as to what constitutes preparation and what an act done toward the commission of a crime." Although the doctrine has not been consistently applied, and the acts it has brought within the sphere of attempt have not been as "slight" as the statement would seem to indicate, it has resulted in a liberalization of the line in favor of liability.<sup>126</sup>

On the other hand, there have been instances where criminal purpose was clear and the conduct nevertheless classified as preparation.<sup>127</sup> Some of these decisions can be explained on other grounds, and some of them are the result of automatically applying preparation principles drawn from cases where criminal purpose was doubtful. But there is still a substantial body of authority applying the preparation-attempt principle without reference to the problem of criminal purpose.

A second point of departure in considering the *res ipsa loquitur* test is its relation to the manifested dangerousness of the actor. If an act unequivocally demonstrates a criminal purpose, does this show something more about the dangerousness of the actor's personality than an act the criminal purpose of which must be established "independently"? The assumption underlying an affirmative answer is that there is some relationship between the actor's state of mind and the external

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<sup>124</sup> See *Philpot v. State*, 43 Ala.App. 326, 190 So.2d 293 (1966); *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308 (1935); *Gaskin v. State*, 105 Ga. 631, 31 S.E. 740 (1898); *Commonwealth v. Ellis*, 349 Pa. 402, 37 A.2d 504 (1944); *Commonwealth v. Kelley*, 162 Pa.Super. 526, 58 A.2d 375 (1948); *Lovett v. State*, 19 Tex. 174 (1857); *The Queen v. McCann*, 28 U.C.Q.B. 514 (1869).

<sup>125</sup> 92 Miss. 415, 428, 46 So. 627, 629 (1908). Compare *People v. Berger*, 131 Cal.App.2d 127, 280 P.2d 136 (1955).

<sup>126</sup> See *People v. Raffington*, 98 Cal.App.2d 455, 220 P.2d 967 (1950), *cert. denied*, 340 U.S. 912 (1951); *People v. Fiegelman*, 33 Cal.App.2d 100, 91 P.2d 156 (1939); *People v. Smith*, 71 Ill.App.2d 446, 219 N.E.2d 82 (1966), *cert. denied*, 386 U.S. 910 (1967); *Williams v. State*, 209 Miss. 902, 48 So.2d 598 (1950); *Dill v. State*, 149 Miss. 167, 170-71, 115 So. 203, 204 (1928) (*dictum*); *State v. Pepka*, 72 S.D. 503, 37 N.W.2d 189 (1949); *Lee v. Commonwealth*, 144 Va. 594, 131 S.E. 212 (1926). *But cf.* *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308 (1935).

<sup>127</sup> *E.g.*, *People v. Youngs*, 122 Mich. 292, 81 N.W. 114 (1899); *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927); *The King v. Robinson*, [1915] 2 K.B. 342 (Crim. App.).

appearance of his acts. While the actor's behavior is externally equivocal the criminal purpose in his mind is likely to be unfixed—a subjective equivocality. But once the actor must desist or perform acts that he realizes would incriminate him if all external facts were known, in all probability a firmer state of mind exists. Subjective equivocality seems inconsistent with an act that unequivocally demonstrates a criminal purpose. A hunter might buy extra supplies to facilitate an escape in the event he resolves to kill his companion, a question as yet unsettled in his mind. But when he buys poison, which has no reasonable use under the circumstances other than the murder of his companion, the chances are that the debate has been resolved and the actor's purpose is fixed on murder.

The basis for the Institute's rejection of the *res ipsa loquitur* or unequivocality test can best be explained in connection with a consideration of the test proposed by the Code.

6. *Model Penal Code Approach to Preparation Problem.* Subsections (1)(c) and (2) set forth the Code's proposed solution of the problem of framing criteria to determine when the actor has progressed sufficiently toward his criminal objective to have committed an attempt. Subsection (1)(c) provides that the actor must have engaged in conduct that constitutes "a substantial step" in a course of conduct planned to culminate in his commission of the crime. Subsection (2) elaborates what is meant by "a substantial step" in two ways. It provides that conduct shall not be held to be a substantial step unless "it is strongly corroborative of the actor's criminal purpose." It also specifies a number of situations that, without negating the sufficiency of other conduct, should not be held insufficient as a matter of law if they are strongly corroborative of the actor's criminal purpose.

(a) *Requirements of "Substantial Step" and Corroboration of Purpose.* Whether a particular act is a substantial step is obviously a matter of degree. To this extent, the Code retains the element of imprecision found in most of the other approaches to the preparation-attempt problem. There are, however, several differences to be noted:

First, this formulation shifts the emphasis from what remains to be done, the chief concern of the proximity tests, to what the actor has already done. That further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial. It is expected, in the normal case, that this approach will broaden the scope of attempt liability.

Second, although it is intended that the requirement of a substantial step will result in the imposition of attempt liability

only in those instances in which some firmness of criminal purpose is shown, no finding is required as to whether the actor would probably have desisted prior to completing the crime. Potentially the probable desistance test could reach very early steps toward crime, depending on how one assesses the probabilities of desistance; but since in practice this test follows closely the proximity approaches, rejection of a test of probable desistance will not narrow the scope of attempt liability.

Finally, the requirement of proving a substantial step generally will prove less of a hurdle for the prosecution than the *res ipsa loquitur* approach, which requires that the actor's conduct itself have manifested the criminal purpose. The basic rationale of the requirement that the actor's conduct shall strongly corroborate his purpose to commit a crime is, of course, the same as that underlying the *res ipsa loquitur* view. But framed in terms of corroboration, the present formulation does not so narrowly circumscribe the scope of attempt liability. Rigorously applied, the *res ipsa loquitur* doctrine would provide immunity in many instances in which the actor had gone far toward the commission of an offense and had strongly indicated a criminal purpose. The courts of New Zealand used to apply the *res ipsa loquitur* test to attempts (either alone or in conjunction with other tests) and one of their decisions can be given as an example.

In *Campbell & Bradley v. Ward*,<sup>128</sup> the court applied the *res ipsa loquitur* doctrine in refusing to find attempted theft in a case in which the court concluded that the conventional proximity rule had been satisfied. Defendants had parked their car while their companion, *M*, unlawfully entered the automobile of another. When the owner of this automobile approached, *M* left and returned to his own car. Defendants then fled but they were later approached and confessed that *M* had entered the other's automobile with the intention of stealing some of its contents pursuant to agreement among all of them. However, nothing in the entered car had been taken or disturbed. Excluding the confessions from consideration, the court found that the defendants' conduct (including that of *M* which had been attributed to them) was too equivocal to support a conviction.

As the *Campbell* case illustrates, and as a distinguished commentator has stressed,<sup>129</sup> an actor's conduct may be incrimi-

<sup>128</sup> [1955] N.Z.L.R. 471 (Sup. Ct.).

<sup>129</sup> See G. Williams, *supra* note 93, at 629-31; Stuart, *The Actus Reus in Attempts*, 1970 Crim.L.Rev. 505, 507-08. Professor Williams explains that when a man appears

nating in a general way without showing beyond a reasonable doubt that the actor had the purpose of committing a particular crime.

Despite their weaknesses, confessions play an important role in the apprehension and conviction of criminals. The *res ipsa loquitur* test unduly restricts their value in an attempt case. The objectives of the *res ipsa loquitur* test will be met if it is required that the actor's conduct, considered in the light of all the circumstances, adds significant evidential force to any proof of criminal purpose based solely on the actor's statements. The actor's conduct would then be "strongly corroborative" of his purpose to commit the crime.

Under the Model Code formulation, the two purposes to be served by the *res ipsa loquitur* test are, to a large extent, treated separately. Firmness of criminal purpose is intended to be shown by requiring a substantial step, while problems of proof are dealt with by the requirement of corroboration—although under the reasoning previously expressed the latter will also tend to establish firmness of purpose.

In addition to assuring firmness of purpose, the requirement of a substantial step will remove very remote preparatory acts from the ambit of attempt liability and the relatively stringent sanctions imposed for attempts. On the other hand, by broadening liability to the extent suggested, apprehension of dangerous persons will be facilitated and law enforcement officials and others will be able to stop the criminal effort at an earlier stage, thereby minimizing the risk of substantive harm, but without providing immunity for the offender.

A number of recent revisions have adopted the substantial step formula, some including the requirement that the actor's conduct strongly corroborate his criminal purpose.<sup>130</sup>

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in an enclosed yard at night wearing a mask, there may be an inference of general criminal purpose but no clear inference as to the actor's particular intent. He also points out that when a match is struck near a haystack, external appearances may be equivocal, but if arson is intended, an attempt should be found. See *Ingram v. Commonwealth*, 192 Va. 794, 66 S.E.2d 846 (1951) (where intent to rape was found under circumstances evidently manifesting an intent to commit any one of several crimes); *People v. Smith*, 71 Ill.App.2d 446, 219 N.E.2d 82 (1966), *cert. denied*, 386 U.S. 910 (1967) (where intent to murder was found under circumstances similarly indicating a general criminal purpose).

<sup>130</sup> One statute and one proposal clearly follow the Model Code in requiring a substantial step corroborative of the actor's intent only in situations covered by Subsection (1)(c). See N.J. § 2C:5-1; Tenn. (p) § 901.

Many codes and proposals contain a requirement of a substantial step corroborative of the actor's intent applicable in situations other than those covered by Subsection

(b) *Specific Enumerations.* Subsection (2) also gives some definite content to the "substantial step" requirement and should reduce contrariety of decision in a number of recurring situations, some of which have been the subject of specific legislation. In an approach not widely followed,<sup>131</sup> the subsection enumerates a number of instances in which attempts may be found if the other requirements of liability are met. If the prosecution can establish that one of the enumerated situations has occurred, the trier of fact must be permitted to determine whether the defendant has taken a substantial step in a course of conduct planned to culminate in his commission of a crime, so long, of course, as his conduct is found to be strongly corroborative of his criminal purpose. This means that if any of the stated circumstances has occurred, a judge has to instruct a jury that it may find a "substantial step" and he must accept its verdict to that effect, unless the judge determines that the conduct is not strongly corroborative of a criminal purpose. What he may not do is determine by himself that the conduct has not advanced far enough to be a "substantial step."

The instances that the Model Code indicates as sufficient for a finding of a substantial step are drawn largely from the de-

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(1)(c); others employ the term "substantial step" without defining it. See note 95 *supra*.

Some recent revisions substantially depart from the Model Code formulation. Under N.Y. § 110.00 the actor is guilty of an attempt if, with appropriate intent, he "engages in conduct which tends to effect the commission of such offense." Mich. (p) S.B. 82 § 1001 requires only "any act towards the commission of such offense." Tex. § 15.01(a) requires "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." Provisions similar to these may be found in Ala. § 13A-4-2; Ariz. § 13-1001; Kan. § 21-3301; La. § 14:27(A); Mont. § 94-4-103(1); Ohio § 2923.02(A); Okla. (1975 p) § 2-101(A); S.C. (p) § 14.1.

Some federal decisions have substantially adopted the Model Code's formulation. See, e.g., *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); *United States v. Stallworth*, 543 F.2d 1038 (2d Cir. 1976); *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974).

The Law Commission (*supra* note 17, at 18-27) in England has rejected its Working Party's recommendation to employ a "substantial step" approach, in favor of reliance on a test of proximity.

<sup>131</sup> Substantially the same list of factors, to be used for the same purpose, is found in Conn. § 53a-49(b) and Md. (p) § 110.00. The list may also be found in the commentaries to other recent revisions, which suggests that it will provide guidance in those jurisdictions adopting the "substantial step" requirement even where the list was not included in the provision as enacted. See Ark. § 41-701 Commentary at 92; Haw. § 705-500 Commentary at 285; Ore. (p) § 54 Commentary at 51 (enacted as Ore. § 161.405); Brown Comm'n Final Report § 1001; I Brown Comm'n Working Papers 359; Alas. (p) § 11.31.100 Commentary at 73-74 (T.D., Part 2). This list was included in an early proposal in New Jersey, but was deleted from the bill as introduced in and passed by the legislature. Compare New Jersey Penal Code: Final Report of the Criminal Law Revision Commission vol. I: Report and Penal Code § 2C:5-1 (Oct. 1971), with N.J. § 2C:5-1.

cisional law. Often the Code follows antecedent law in permitting a conviction for attempt; in some respects, it allows convictions on the basis of circumstances that courts have considered insufficient. The following discussion relates the position of this subsection to earlier cases and statutes.

(i) *Lying in Wait, Searching, or Following.* In *People v. Rizzo*<sup>132</sup> the actors, armed and planning to rob a payroll carrier, were searching for the contemplated victim when they were apprehended by the police. Convictions for attempted robbery were reversed by the New York Court of Appeals on the ground that the actors had never proceeded beyond the stage of preparation. Directed expressly at the result in *Rizzo*, Louisiana made it an attempt to lie in wait with a dangerous weapon or to search for the contemplated victim.<sup>133</sup>

In cases where murder or robbery were to be consummated by ambush, attempts have been premised on the arrival of the actor at the scene of the proposed ambush,<sup>134</sup> although several courts have refused to find liability when the contemplated victims were not present.<sup>135</sup>

In an English case,<sup>136</sup> two defendants admitted following a truck at night with their own van in order to steal the truck's contents when the driver left or stopped to eat. On one occasion, when the truck got stuck on an icy hill, the defendants, abhorring violence, helped the driver to start the truck moving again. The driver, suspicious of his escort, drove through the night without stopping. Defendants, after following the truck for 130 miles, abandoned their effort. It was held that the defendants' conduct merely amounted to a continuous act of preparation.

Subsection (2)(a) follows the Louisiana statute except that it eliminates the requirement of a dangerous weapon and

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<sup>132</sup> 246 N.Y. 334, 158 N.E. 888 (1927).

<sup>133</sup> La. § 14:27(B). For an application of this provision, see *State v. Murff*, 215 La. 40, 39 So.2d 817 (1949); *accord*, *State v. Wilson*, 218 Ore. 575, 346 P.2d 115 (1959).

<sup>134</sup> See *Stokes v. State*, 92 Miss. 415, 46 So. 627 (1908) (defendant armed); *People v. Gormley*, 222 App.Div. 256, 225 N.Y.S. 653 (1927), *aff'd mem.*, 248 N.Y. 583 (1928) (defendants armed).

<sup>135</sup> *People v. Volpe*, 122 N.Y.S.2d 342 (Kings County 1953) (defendants not armed); *Queen v. Töpken*, 1 Buch.App.Ct. Cases, Cape of Good Hope 471 (1884) (defendants armed); see also *State v. Christensen*, 55 Wash.2d 490, 348 P.2d 408 (1960) (citing *People v. Rizzo*, note 132 *supra*).

<sup>136</sup> *Regina v. Komaroni*, 103 L.J. 97 (Assizes 1953).

encompasses acts of "following." The thought is that acts of following, searching, or lying in wait with criminal purpose manifest, without more, sufficient dangerousness to provide a proper basis for imposing liability.

(ii) *Enticement.* In statutes prohibiting indecent liberties with minors it has sometimes been made an offense to entice or allure minors into buildings or automobiles for the purpose of committing such acts.<sup>137</sup> This basis of liability appears to be susceptible of broader application, since the act of enticement is demonstrative of a relatively firm purpose to commit the crime and clearly indicates the dangerousness of the actor.

The decisional law on this subject is difficult to evaluate because of other diverse factors present in cases where enticement is an element. In statutory rape cases, if the actor had taken indecent liberties with the female<sup>138</sup> or had caused her to expose herself indecently,<sup>139</sup> or if he had indecently exposed his own person,<sup>140</sup> and in any of these instances had the purpose then and there to complete the offense, the actor would be guilty of an attempt to rape or an assault with intent to rape. On the other hand, if the actor merely solicited cooperation in a sexual act, there apparently has been no attempt;<sup>141</sup> and it has been held that a decent laying on of hands for the purpose of detaining the female to listen to further solicitations is not a sufficient overt act.<sup>142</sup> Where

<sup>137</sup> See Tex. § 25.04; Wis. § 944.12.

<sup>138</sup> *Hutto v. State*, 169 Ala. 19, 53 So. 809 (1910); *People v. Johnson*, 131 Cal. 511, 63 P. 842 (1901); *State v. Smith*, 14 Del. (9 Houst.) 588, 33 A. 441 (Ct. Gen. Sess. 1892); *State v. Roby*, 194 Iowa 1032, 1033-45, 188 N.W. 709, 710-15 (1922) (dictum); *State v. Pepka*, 72 S.D. 503, 37 N.W.2d 189 (1949); *Glover v. Commonwealth*, 86 Va. 382, 10 S.E. 420 (1889); *State v. Tomblin*, 124 W.Va. 264, 20 S.E.2d 122 (1942).

<sup>139</sup> *State v. Sherman*, 106 Iowa 684, 77 N.W. 461 (1898); *Granberry v. Commonwealth*, 184 Va. 674, 36 S.E.2d 547 (1946).

<sup>140</sup> *Payne v. Commonwealth*, 33 Ky. 229, 110 S.W. 311 (Ct. App. 1908); *Hays v. People*, 1 Hill 351 (N.Y. 1841); cf. *Anderson v. State*, 75 Ga.App. 643, 44 S.E. 178 (1947) (attempted forcible sodomy where victim beaten); *Rex v. Delip Singh*, 26 B.C. 390 (Ct. App. 1918) (attempted sodomy).

<sup>141</sup> See *State v. Frazier*, 53 Kan. 87, 90, 36 P. 58, 59 (1894) (dictum); *In re Lloyd*, 51 Kan. 501, 502, 33 P. 307, 308 (1893) (dictum); *State v. Sullivan*, 110 Mo.App. 75, 89, 84 S.W. 105, 109 (1904) (dictum).

<sup>142</sup> *Cromeans v. State*, 59 Tex.Crim. 611, 129 S.W. 1129 (1910); see *State v. Roby*, 194 Iowa 1032, 1044, 188 N.W. 709, 714 (1922) (dictum). But a touching that is not indecent may support attempt liability if the actor's purpose is to engage presently in sexual intercourse. See *State v. Roby*, 194 Iowa 1032, 188 N.W. 709 (1922); *People v. Courier*, 79 Mich. 366, 368, 44 N.W. 571, 572 (1890) (dictum). But cf. *State v. Moore*,

the actor invited the contemplated victim to proceed to the place intended for the sexual union and offered a reward of some kind, liability has been imposed in some cases<sup>143</sup> and rejected in others.<sup>144</sup>

The concern manifested in one of the cases refusing to find liability—that innocent invitation might be misconstrued<sup>145</sup>—is dealt with in the present subsection by the requirement that the actor's conduct be strongly corroborative of his criminal purpose.

(iii) *Reconnoitering*. Convictions for attempt have generally been sustained when the actor has been apprehended during or after reconnoitering the place contemplated for the commission of the crime. The crimes involved have included murder,<sup>146</sup> larceny,<sup>147</sup> kidnapping<sup>148</sup> and burglary.<sup>149</sup> However, because other factors were present in all of these cases, such as possession of weapons or equipment,<sup>150</sup> confeder-

194 Ore. 232, 241 P.2d 455 (1952); *Mullins v. Commonwealth*, 174 Va. 477, 5 S.E.2d 491 (1939).

<sup>143</sup> *Rex v. Rump*, 51 Can.Crim.Cas. Ann. 236, [1929] 2 D.L.R. 824 (B.C. Ct. App.) (several attempts to entice); *The King v. Yelds*, [1928] N.Z.L.R. 18 (Ct. App. 1927) (two separate incidents, one involving indecent language and one an attempt to grab the intended victim's arm).

<sup>144</sup> *State v. Harney*, 101 Mo. 470, 14 S.W. 657 (1890); *Mullins v. Commonwealth*, 174 Va. 477, 5 S.E.2d 491 (1939); *The King v. Moore*, [1936] N.Z.L.R. 979 (Ct. App.); *cf. Wooldridge v. United States*, 237 F. 775 (9th Cir. 1916) (meeting arranged but no discussion of enticement); *State v. Moore*, 194 Ore. 232, 241 P.2d 455 (1952) (same).

<sup>145</sup> *See The King v. Moore*, [1936] N.Z.L.R. 979 (Ct. App.).

<sup>146</sup> *People v. Parrish*, 87 Cal.App.2d 853, 197 P.2d 804 (1948).

<sup>147</sup> *See State v. Hollingsworth*, 15 Del. (1 Marv.) 528, 41 A. 143 (Ct. Gen. Sess. 1893); *cf. People v. DeGennaro*, 206 Misc. 94, 132 N.Y.S.2d 112 (Kings County Ct. 1954).

<sup>148</sup> *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933).

<sup>149</sup> *People v. Gibson*, 94 Cal.App.2d 468, 210 P.2d 747 (1949); *People v. Lawton*, 56 Barb. 126 (N.Y. 1867); *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903) (case treated alternately as one in which actors were approaching scene of intended burglary). *But cf.* the contrary dicta in *Commonwealth v. Eagan*, 190 Pa. 10, 22-23, 42 A. 374, 377 (1899). The last two cases were prosecutions for murder under the felony-murder rule, the underlying felony being attempted burglary.

<sup>150</sup> *See People v. Gibson*, 94 Cal.App.2d 468, 210 P.2d 747 (1949); *People v. Parrish*, 87 Cal.App.2d 853, 197 P.2d 804 (1948); *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933); *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903); *People v. Lawton*, 56 Barb. 126 (N.Y. 1867).

Mention should be made of a group of cases involving firearms in which, despite conduct more advanced than reconnoitering, attempts were not found. These were prosecutions under special statutes punishing attempts "to discharge any kind of loaded arms" or "to shoot" with intent to murder where, by reason of the specification of particular conduct, more proximate behavior was required than in cases of an ordinary

ates,<sup>151</sup> or additional activities,<sup>152</sup> it is difficult to assert unqualifiedly that reconnoitering, without more, was a sufficient overt act to constitute an attempt at common law.

The decisions are also unclear on whether reconnoitering was necessary at common law or whether it was sufficient to prove that the actor had arrived at the place contemplated for the commission of the crime<sup>153</sup> or that he had arrived and had entered unlawfully upon private property.<sup>154</sup> Moreover, when other factors have been present, such as weapons, equipment or confederates,<sup>155</sup> some courts have indi-

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attempt to kill. *Mulligan v. People*, 5 Park.Crim.R. 105 (N.Y. Sup. Ct. 1861); *Ex parte Turner*, 3 Okla.Crim. 168, 104 P. 1071 (1909); *Regina v. Grogan*, 15 Vict.L.R. 340 (Austl. 1889); *Regina v. Lewis*, 173 Eng.Rep. 940 (Central Crim. Ct. 1890); *Regina v. St. George*, 173 Eng.Rep. 921 (Assizes 1840). Even under the special statutes there has been a tendency to expand the scope of liability. See *The King v. Linneker*, [1906] 2 K.B. 99 (C.C.R.) (dictum); *The Queen v. Duckworth*, [1892] 2 Q.B. 83 (C.C.R.) (disapproving and overruling *Lewis* and *St. George, supra*); *The Queen v. Brown*, 10 Q.B.D. 381, 384-87 (C.C.R. 1883) (dictum).

<sup>151</sup> See *People v. Parrish*, 87 Cal.App.2d 853, 197 P.2d 804 (1948) (complicity was feigned); *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933) (one of several was a feigned accomplice); *State v. Hollingsworth*, 15 Del. (1 Marv.) 528, 41 A. 143 (Ct. Gen. Sess. 1893); *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903); *People v. Lawton*, 56 Barb. 126 (N.Y. 1867); *People v. De Gennaro*, 206 Misc. 94, 132 N.Y.S.2d 112 (Kings County Ct. 1954). *Contra*, *State v. Christensen*, 55 Wash.2d 490, 348 P.2d 408 (1960) (feigned accomplices).

<sup>152</sup> See *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933); *People v. Collins*, 234 N.Y. 355, 137 N.E. 753 (1922).

<sup>153</sup> See *State v. McCarthy*, 115 Kan. 583, 224 P. 44 (1924) (attempted train burglary found where defendants, with equipment, contacted supposed "inside" accomplice upon arrival at premises). In other cases convictions for attempted robbery were sustained where the accused arrived armed at the chosen location: *People v. Moran*, 18 Cal.App. 209, 122 P. 969 (1912); *People v. DuVeau*, 105 App.Div. 381, 94 N.Y.S. 225 (1905) (confederates feigned); see *People v. Anderson*, 1 Cal.2d 687, 37 P.2d 67 (1934) (underlying felony in a felony-murder case). *Contra*, *The Queen v. McCann*, 28 U.C.Q.B. 514 (1869); cf. *Commonwealth v. Eagan*, 190 Pa. 10, 21-22, 42 A. 374, 377 (1899) (dictum). Arrival at the scene of intended murder does not suffice for an assault with intent to kill. *Burton v. State*, 109 Ga. 134, 34 S.E. 286 (1899).

<sup>154</sup> Attempts were found in *Dooley v. State*, 27 Ala.App. 261, 170 So. 96 (1936) (attempted burglary, accused having sacks in car to carry away intended loot; entry made into fenced-off area); *People v. Davis*, 24 Cal.App.2d 408, 75 P.2d 80 (1933) (attempted burglary); *Commonwealth v. Clark*, 10 Pa. County Ct. 444 (1891) (accused intending burglary and having burglar's tools on person); *Rex v. Page*, [1933] Vict.L.R. 351 (Austl.) (accused intending burglary and having tools, kept watch while confederate climbed on window ledge).

<sup>155</sup> *People v. Stites*, 75 Cal. 570, 17 P. 693 (1888); *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933) (reconnoitering also present, but approach characterized as the overt act); *State v. Mazzadra*, 141 Conn. 781, 109 A.2d 878 (1954); see *Stokes v. State*, 92 Miss. 415, 425-26, 46 So. 627, 628-29 (1908) (dictum); *People v. Youngs*, 122 Mich. 292, 300-01, 81 N.W. 114, 117 (1899) (dissenting opinion). *Contra*, *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308 (1935); see *People v. Anderson*, 1 Cal.2d 687, 690, 37 P.2d 67, 68 (1934); cf. *Cornwell v. Fraternal Acc. Ass'n*, 6 N.D. 201, 69 N.W. 191 (1896)

cated that it is enough if the actor merely sets out for the place where the crime was to have been committed.<sup>156</sup>

Subsection (2)(c) isolates reconnoitering as one significant overt act that may be found to constitute a substantial step toward the commission of a crime. The rationale for this is that firmness of purpose is shown when the actor proceeds to scout the scene of the contemplated crime in order to detect possible dangers and to fix on the most promising avenue of approach.

(iv) *Unlawful Entry.* Unlawful entry for a criminal purpose has in many instances been punishable under burglary statutes and related laws. Analytically, however, such conduct may also constitute an attempt, and the inclusion here of unlawful entry as a basis for finding a substantial step serves two functions. First, it covers situations not within the technical terms of burglary and related laws. Second, by eliminating the need for using the burglary laws to cover the entire area of attempts by unlawful entry, one of the significant stresses upon the definition of that offense is removed, making possible a more rational law of burglary.<sup>157</sup>

The question of the proper probative relationship between unlawful entry into a building and attempts has arisen in connection with attempted rape. It is clear that, given the requisite purpose, chasing<sup>158</sup> or laying hold<sup>159</sup> of a female constitutes an attempt to rape. In the only case found that

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(proceeding armed toward hunting territory does not constitute an attempt to kill game out of season).

<sup>156</sup> On the other hand, it has been said that merely walking toward a place with intent to commit a murder there does not amount to an attempt to kill. See *Groves v. State*, 116 Ga. 516, 517, 42 S.E. 755, 756 (dictum), second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.); *The Queen v. McCann*, 28 U.C.Q.B. 514 (1869) (by implication); cf. *Rex v. Osborn*, 84 J.P. 63 (Central Crim. Ct. 1919); *Regina v. Roberts*, 7 Cox Crim. Cas. 39, 43, 19 J.P. 789, 790 (Crim. App. 1855) (dictum). Walking toward a person with intent to inflict bodily injury does not constitute an assault. *Brown v. State*, 95 Ga. 481, 20 S.E. 495 (1894) (mem.) (semble).

The court in *Rizzo* took the position that looking for a house to burglarize or for a person to kill does not constitute an attempt, 246 N.Y. 334, 338-39, 158 N.E. 888, 889 (1927) (dictum), and held that looking for a man to rob does not constitute an attempt. There is a dictum that riding to a place with intent there to commit the misdemeanor of carnal abuse of a child does not constitute an attempt. See *Regina v. Meredith*, 173 Eng.Rep. 630, 631 (Assizes 1838).

<sup>157</sup> The problem of multiple convictions for the same conduct is considered in Section 1.08.

<sup>158</sup> *Lewis v. State*, 35 Ala. 380, 388-89 (1860) (dictum); *Burton v. State*, 8 Ala.App. 295, 62 So. 394 (1913); *Williams v. State*, 10 Okla.Crim. 336, 136 P. 599 (1913).

<sup>159</sup> *State v. Montgomery*, 63 Mo. 296, 298-99 (1876) (dictum).

litigated more remote conduct, a man hid under a woman's bed waiting for her to retire, but he was discovered and fled.<sup>160</sup> Although the court refused to find liability, the case is not authority for the proposition that these acts are not sufficient to constitute an attempt to rape. The prosecution was for assault with intent to rape, and the court emphasized lack of the assault element; moreover, it was admitted that the evidence of intent was unsatisfactory. There have been expressions that attempted rape begins when force is applied to the person of the female,<sup>161</sup> and that entering a room with intent to rape its occupant<sup>162</sup> or locking a woman in a room for the purpose of facilitating a rape<sup>163</sup> does not constitute an attempt. These authorities, however, are not conclusive. Where the assault element in attempted rape has received less emphasis—and it must be remembered that originally there was no attempt to rape except assault with intent to rape<sup>164</sup>—then unlawful entry into the room where the rape was to have been committed may well constitute an attempt to rape.

In several attempted larceny cases, convictions were sustained where the actor had unlawfully entered an enclosure for the purpose of stealing.<sup>165</sup> However, these decisions may indicate a willingness to find liability in all instances where a thief arrives at the place where the property is situated with the purpose of taking it away presently. Thus, it has been held that it is an attempt if the actor places his hand in the pocket of another for the purpose of stealing its contents.<sup>166</sup> And in a famous English case it was held that a

<sup>160</sup> *Gaskin v. State*, 105 Ga. 631, 31 S.E. 740 (1898).

<sup>161</sup> See *State v. Swan*, 131 N.J.L. 67, 69, 34 A.2d 734, 735 (Ct. Err. & App. 1943); cf. *State v. Montgomery*, 63 Mo. 296 (1876); *Kelly v. Commonwealth*, 1 Grant 483 (Pa. 1858). But cf. *People v. Welsh*, 7 Cal.2d 209, 60 P.2d 124 (1936) (no assault required for attempted rape).

<sup>162</sup> See *Kelly v. Commonwealth*, 1 Grant 483, 487 (Pa. 1858).

<sup>163</sup> See *Beaudoin v. The King*, 5 Can.Crim.R. 88, 98 (Que. K.B. 1947) (concurring opinion).

<sup>164</sup> See *Rookey v. State*, 70 Conn. 104, 108–09, 38 A. 911, 912 (1897); *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912); *Rex v. MacIntyre*, 43 Can.Crim.Cas. Ann. 356, 358 (N.S. Sup. Ct. 1925).

<sup>165</sup> *State v. Thompson*, 31 Nev. 209, 101 P. 557 (1909); *Rex v. Baker*, 28 N.Z.L.R. 536 (Ct. App. 1909); cf. *Dooley v. State*, 27 Ala.App. 261, 170 So. 96 (1936).

<sup>166</sup> See, e.g., *People v. Fiegelman*, 33 Cal.App.2d 100, 91 P.2d 156 (1939); *People v. Harris*, 70 Ill.App.2d 173, 217 N.E.2d 503 (1966); *People v. Martin*, 62 Ill.App.2d 97, 210 N.E.2d 587 (1965); *People v. Hawkins*, 54 Ill.App.2d 212, 203 N.E.2d 761 (1964).

servant attempted to steal from his master when he deceived a customer as to the quantity delivered in order to retain for himself the difference between the amount actually delivered and the amount credited to his master's account.<sup>167</sup> It was emphasized that all that remained for the servant to do was to carry away the goods standing at his side. But when the actor did not have the purpose of taking the property presently, there was no attempt even though at one time or another he was in the vicinity of the property to be stolen.<sup>168</sup>

In the case of *Campbell & Bradley v. Ward*,<sup>169</sup> a New Zealand court, relying on a *res ipsa loquitur* approach, refused to find an attempt when unlawful entry into an automobile had been made for the purpose of stealing. This conduct was clearly a substantial step manifesting a firm purpose to steal, and, under Subsection (2)(d), the result in *Campbell* would be reversed, allowing the trier of fact in such a case to find that an attempt had been committed.

Apart from burglary provisions, a number of state statutes punish the entry into or on premises with intent to commit certain crimes. Thus, a number of states punish the entry, with or without permission, on the premises of another for the purpose of committing sabotage.<sup>170</sup> One pre-Model Code statute made it attempted robbery to enter, with intent to rob, a room where a person is present.<sup>171</sup> Subsection (2)(d), though applying to all crimes, is in one respect narrower in scope than these provisions, since it does not cover either lawful presence or trespass on unenclosed property, either of which may be wholly insubstantial acts on the facts of a particular case.

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In *Regina v. Taylor*, 25 L.T.R. (n.s.) 75 (Middx. Sess. 1871), it was held that looking into and feeling pockets in order to find property to steal was merely preparation. It was said in *Commonwealth v. Clark*, 10 Pa. County Ct. 444, 447 (1891), that it was no attempt for a pickpocket to follow an intended victim.

<sup>167</sup> *Regina v. Cheeseman*, 9 Cox Crim.Cas. 100 (Crim. App. 1862). In *re Magidson*, 32 Cal.App. 566, 163 P. 689 (1917), was a case where the defendant went to a place where he believed stolen property was stored in order to take possession of it; he was held to have attempted to receive stolen property.

<sup>168</sup> *Lovett v. State*, 19 Tex. 174 (1857); *Rex v. Bloxham*, 29 Crim.App. 37 (1943).

<sup>169</sup> [1955] N.Z.L.R. 471 (Sup. Ct.).

<sup>170</sup> See Fla. § 876.40; La. § 53:202 (also covers producing, assembling, mixing, procuring, transporting, and storing materials to be used in sabotage); Md. art. 27, § 538; N.H. § 649:4; Okla. tit. 21, § 1265.4; Tenn. § 39-4410; Vt. tit. 13, § 3434.

<sup>171</sup> N.D. Cent. Code § 12-31-11 (1960) (repealed 1973).

(v) *Possession of Incriminating Materials.* The general view has been that the collection, possession, or preparation of materials to be employed in the commission of a crime does not go beyond the stage of preparation and does not constitute an attempt. Thus it has been said, by way of dicta, that purchasing a gun or poison with intent to murder,<sup>172</sup> loading the gun<sup>173</sup> or mixing the poison<sup>174</sup> with the same intent, purchasing matches or inflammables with intent to commit arson,<sup>175</sup> constructing a bomb with intent to destroy property,<sup>176</sup> and collecting materials with which to commit burglary<sup>177</sup> all constitute acts of preparation. Few cases have actually turned on issues of this kind. One decision held that it was not an attempt to rob for one to procure

<sup>172</sup> See *United States v. Stephens*, 12 F. 52, 54-55 (C.C.D. Ore. 1882); *People v. Murray*, 14 Cal. 159, 159-60 (1859) (gun); *Groves v. State*, 116 Ga. 516, 517, 42 S.E. 755, 756, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.); *People v. Coleman*, 350 Mich. 268, 276, 86 N.W.2d 281, 285 (1957); *Stokes v. State*, 92 Miss. 415, 425, 46 So. 627, 628 (1908) (gun); *Ex parte Turner*, 3 Okla.Crim. 168, 173, 104 P. 1071, 1074 (1909); *Rex v. Labourdette*, 13 B.C. 443, 444 (Assizes 1908) (poison); *Regina v. Cheeseman*, 9 Cox Crim.Cas. 100, 103 (Crim. App. 1862) (gun).

<sup>173</sup> See *People v. Murray*, 14 Cal. 160, 160 (1859); *Groves v. State*, 116 Ga. 516, 517, 42 S.E. 755, 756, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.); *Stokes v. State*, 92 Miss. 415, 425, 46 So. 627, 628 (1908) (may not be attempt); *Rex v. Labourdette*, 13 B.C. 443, 444 (Assizes 1908). In *People v. Anderson*, 1 Cal.2d 687, 690, 37 P.2d 67, 68 (1934), it was said that concealing a gun on the person preparatory to an endeavor to rob might not constitute an attempt.

<sup>174</sup> See *Rex v. Sharpe*, [1903] Transvaal L.R. 868, 873 (Sup. Ct.). Attempts to murder by poison were found in *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N.E. 770 (1897), and *The King v. White*, [1910] 2 K.B. 124 (Crim. App.). In both, the poison had been placed where the intended victim would partake of it in due course. But in the latter case the court held it was immaterial that slow poisoning might have been intended and that future doses were required to complete the homicide. The court said it was "much more likely . . . that the appellant supposed he had put sufficient poison in the glass to kill her." *Id.* at 130.

Under a charge of assault with intent to kill it is necessary that the victim actually partake of the poison. *Peebles v. State*, 101 Ga. 585, 28 S.E. 920 (1897); *Leary v. State*, 13 Ga.App. 626, 79 S.E. 534 (1913), second opinion, 14 Ga.App. 797, 82 S.E. 471 (1914); see *Johnson v. State*, 92 Ga. 36, 37, 17 S.E. 974, 975 (1893). *But cf.* *State v. Skillings*, 98 N.H. 203, 97 A.2d 202 (1953) (counts of attempted robbery and attempted assault sustained where defendant gave messenger drugged ice cream to remove person guarding the intended loot). This difficulty seems to have arisen only in jurisdictions where it was conventional to prosecute attempted homicides as assaults with intent to kill. See *Johnson v. State*, 92 Ga. 36, 38, 17 S.E. 974, 975 (1893).

<sup>175</sup> See *Groves v. State*, 116 Ga. 516, 517, 42 S.E. 755, 756, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.); *Regina v. Taylor*, 175 Eng.Rep. 831 (Assizes 1859).

<sup>176</sup> See *People v. Stites*, 75 Cal. 570, 575, 17 P. 693, 696 (1888). For a general statement on the nonculpability of procuring materials for crime, see *People v. Werblow*, 241 N.Y. 55, 71, 148 N.E. 786, 793 (1925).

<sup>177</sup> See *Rex v. Osborn*, 84 J.P. 63 (Central Crim. Ct. 1919).

disguises and a hack for such a purpose.<sup>178</sup> Another held that procuring carpet slippers, chloroform, and a gun for use in a burglary did not constitute an attempt.<sup>179</sup> One case held that procuring a key to be used in stealing from a building was an attempt to commit larceny,<sup>180</sup> but this holding has been subsequently disapproved and is no longer authoritative.<sup>181</sup> In view of decisions holding more extreme conduct to be preparation, the general dicta in this area probably indicated accurately what most courts would have held.

In some instances, however, possession of incriminating materials has been held to constitute an attempt. Possession of a still and the necessary mash might be sufficient for an attempt illegally to manufacture intoxicating beverages<sup>182</sup> even though the still is not quite ready for operation and the actors have not yet reached the site.<sup>183</sup> If the still is lacking there can be no such attempt although the use of a still is promised<sup>184</sup> or one is being built.<sup>185</sup> Whether the absence of mash would preclude an attempt is an open question. Similarly, it has been said that obtaining the incriminating apparatus would constitute an attempt to make counterfeit coins<sup>186</sup> or to produce forged documents.<sup>187</sup>

<sup>178</sup> *Groves v. State*, 116 Ga. 516, 42 S.E. 755, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.).

<sup>179</sup> *People v. Youngs*, 122 Mich. 292, 81 N.W. 114 (1899).

<sup>180</sup> *Griffin v. State*, 26 Ga. 493 (1858).

<sup>181</sup> See *Groves v. State*, 116 Ga. 516, 520, 42 S.E. 755, 757, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.).

<sup>182</sup> *State v. Thomason*, 23 Okla.Crim. 104, 212 P. 1026 (1923); see *Summerville v. State*, 77 Ga.App. 106, 109, 47 S.E.2d 830, 832 (1948).

<sup>183</sup> *Dill v. State*, 149 Miss. 167, 115 So. 203 (1928); *Anderson v. Commonwealth*, 195 Va. 258, 77 S.E.2d 846 (1953) (defendant was leaving site but intended to return); cf. *United State v. Moses*, 205 F.2d 358, 359 (2d Cir. 1953) (dissenting opinion). But cf. *State v. Quick*, 199 S.C. 256, 19 S.E.2d 101 (1942); *Hartline v. State*, 34 Ga.App. 224, 129 S.E. 123 (1925). In some instances where liability was found, greatest emphasis was placed on the fact that fermentation of the mash was under way.

<sup>184</sup> *State v. Addor*, 183 N.C. 687, 110 S.E. 650 (1922).

<sup>185</sup> *Coffee v. State*, 39 Ga.App. 664, 148 S.E. 303 (1929).

<sup>186</sup> *Regina v. Roberts*, 7 Cox Crim.Cas. 39, 19 J.P. 789 (Crim. App. 1855).

<sup>187</sup> *Cunningham v. State*, 49 Miss. 685, 702-03 (1874) (dictum). Compare *People v. Coleman*, 350 Mich. 268, 276, 86 N.W.2d 281, 285 (1957) (dictum) (purchase of fountain pen cannot amount to attempted forgery). Two Indian cases seem to stand for the proposition that part of the instrument must be forged before there can be an attempted forgery. *Queen-Empress v. Kalyan Singh*, 16 Indian L.R. Allahabad 409 (App. Crim. 1894); *In re Riasat Ali*, 7 Indian L.R. Calcutta, 352 (App. Crim. 1881).

There have also been a number of statutes that make it a crime to possess materials to be employed in a criminal endeavor.<sup>188</sup> Possession of burglar's tools with intent to commit burglary has been made criminal in many jurisdictions,<sup>189</sup> and it has been provided that possession of materials to be used in an attempt to defraud is *prima facie* evidence of guilt.<sup>190</sup> Some statutes have made the possession of weapons<sup>191</sup> or explosives<sup>192</sup> criminal if a criminal intent can be proved, while in other jurisdictions unlicensed possession of a gun or other weapon has been made *prima facie* evidence of intent in a prosecution for attempt to commit a violent offense.<sup>193</sup> It is necessary to distinguish, however, between proof that an actor possessed weapons or other instruments of crime with some unlawful purpose,<sup>194</sup> and proof that the actor intended to commit a particular crime. If proof of such specific intent is forthcoming, then such statutes might be construed as making possession of a weapon a sufficient overt act. Indeed, the statute in one state has made such possession *prima facie* evidence of "attempt."<sup>195</sup> And, in line with the case law development, one state has provided that assembling the apparatus necessary to manufacture whiskey is an attempt.<sup>196</sup> Finally, statutes in a number of states have punished the collection of materials to be used presently or at a later time in committing "sabotage."<sup>197</sup>

Thus, the authorities existing at the time the Model Code was being drafted—the case law to a slight extent and the statutory trend to a greater degree—showed a tendency to make criminal the possession of materials to be employed in

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<sup>188</sup> Not dealt with here are statutes that prohibit the unlicensed possession of specified materials absolutely, without requiring that such possession be for a criminal purpose.

<sup>189</sup> *E.g.*, Cal. § 466; N.Y. § 140.35. Some of the statutes extend to making and repairing burglar's tools, some to making and altering keys for the purpose of burglary, and some to both kinds of preliminary acts.

<sup>190</sup> Fla. § 817.13.

<sup>191</sup> Ore. Rev. Stat. § 161.220 (1969) (repealed 1971).

<sup>192</sup> Ind. Code Ann. § 35-28-4-4 (Burns 1975) (repealed 1977); 1929 Kan. Sess. Laws ch. 171, § 2 (repealed 1969).

<sup>193</sup> Ala. § 13A-11-71; Cal. § 12023; Wash. Rev. Code Ann. § 9A.1.030 (West 1977).

<sup>194</sup> This situation is dealt with in Sections 5.06 and 5.07.

<sup>195</sup> Ore. § 166.230(3).

<sup>196</sup> Tenn. § 39-2523.

<sup>197</sup> See note 170 *supra*.

the commission of a crime when the materials were distinctively suited to criminal purposes. The incriminating character of such distinctive materials would usually be apparent to the actor himself, and his possession of them would generally manifest a major commitment to the crime contemplated.

The problem of definition is not easy. If the proposed paragraph were to include only those materials not *susceptible* of lawful use, its coverage might be minimal and perhaps nonexistent, for it is difficult to imagine anything that is not susceptible of *some* lawful use. A still may be used to boil water, counterfeiting plates may be employed as paper weights, and a bomb can be used to remove tree stumps. However, the possession of such articles, under appropriate circumstances, should constitute a basis for finding a substantial step. A definition of incriminating materials, that emphasizes their distinctive qualities without unduly narrowing the scope of the provision, should encompass materials specially designed for unlawful use and those that can serve no lawful purpose of the possessor under the circumstances. Under some circumstances, to be described immediately below, possession of other less distinctively criminal materials may be the basis for finding a substantial step.

(vi) *Materials at or Near the Place of the Crime.* The problem with which Subsection (2)(f) is designed to deal has arisen most frequently in the case of attempted arson. The decisions at common law imposed liability if inflammables were spread about the premises to be burned<sup>198</sup> or if the actor arrived at the premises with inflammables,<sup>199</sup> provided that it was his purpose presently to ignite the inflammables. In the famous decision of *Commonwealth v. Peaslee* it was held that no attempt had occurred although the inflammables had been spread about the premises, because there had been no purpose to ignite them presently, the plan being that either the actor or his agent would return at a later time to complete the crime.<sup>200</sup>

<sup>198</sup> *Commonwealth v. Poretta*, 74 Pa.Super. 463 (1920); *Rex v. Brown*, [1947] 3 Can.Crim.R. 412 (Ont. Ct. App.); see *People v. Graham*, 176 App.Div. 38, 40, 162 N.Y.S. 334, 335 (1916) (dictum).

<sup>199</sup> *State v. Dumas*, 118 Minn. 77, 136 N.W. 311 (1912); *State v. Bliss*, 80 S.W.2d 162 (Mo. 1935); see *Commonwealth v. Mehales*, 284 Mass. 412, 416, 188 N.E. 261, 262 (1933).

<sup>200</sup> 177 Mass. 267, 59 N.E. 55 (1901). The decision in *Commonwealth v. Poretta*, 74 Pa.Super. 463 (1920), may be in conflict with *Peaslee*. The possibility that future

The crime of attempted arson has been the subject of extensive legislation, both in older statutes and in recent revisions. In addition to other provisions, a large number of statutes have made it an attempt<sup>201</sup> to place or distribute<sup>202</sup> explosives, inflammables, combustibles, or devices<sup>203</sup> in a structure subject to arson<sup>204</sup> in an arrangement or preparation<sup>205</sup> with intent eventually to burn<sup>206</sup> the structure or to procure another to burn it.<sup>207</sup> Under some provisions the materials need only be placed near, about, or against the structure.<sup>208</sup> Except for reversing the result in the *Peaslee* case, this legislation is consistent with the common law rule.<sup>209</sup>

Statutes dealing with "sabotage" make the collection of materials, to be used presently or at a later time in committing sabotage, an attempt.<sup>210</sup> Unlike the attempted ar-

ignition has been intended was apparently deemed immaterial in light of the danger created by spreading the inflammables. Defendant was found guilty of an attempt and *Peaslee* was distinguished on the grounds that no danger of conflagration had existed in that case and there had been a voluntary abandonment by the defendant.

<sup>201</sup> See Alas. § 11.20.060; Cal. § 451a; Idaho § 18-804; La. § 14:54; Md. art. 27, § 10; Mass. ch. 266, § 5A; Mich. § 750.77 (offense described as preparation to commit arson); Minn. § 609.57; Miss. § 97-17-9; 1936 N.Y. Laws ch. 895, at 2011-12 (current version at N.Y. §§ 110.00, 150.00 et seq.); S.C. § 16-11-200; Vt. tit. 13, § 509; W. Va. § 61-3-4(b); Wis. § 943.05; Wyo. § 6-7-104(b). For a listing of statutes in effect at the time the Model Code was promulgated, see T.D. 10 at 59 n.179 (1960).

<sup>202</sup> The statutes are cited in note 201 *supra*. "Place" only in Louisiana, Minnesota, New York, Wisconsin. In Michigan: "use, arrange, place, devise or distribute."

<sup>203</sup> The statutes are cited in note 201 *supra*. Louisiana (combustibles or explosive material), Minnesota (combustible or explosive or other destructive material or device), New York (inflammables or one of an enumeration of devices), Wisconsin (combustibles, explosives, or devices).

<sup>204</sup> The statutes are cited in note 201 *supra*. The Minnesota provision encompasses "any property." The New York provision apparently required, as to the placing of inflammables, that the building not be one where such inflammables are commonly stored.

<sup>205</sup> The statutes are cited in note 201 *supra*. "In an arrangement or preparation" is omitted in Louisiana, Michigan, Minnesota, New York, Wisconsin.

<sup>206</sup> The statutes are cited in note 201 *supra*. The Minnesota provision requires "intent to set fire to or blow up or otherwise damage such property."

<sup>207</sup> The statutes are cited in note 201 *supra*. Language pertaining to the procuring or inducing of another to burn (or similar language) is omitted in Louisiana, Minnesota, and Wisconsin.

<sup>208</sup> The statutes are cited in note 201 *supra*. California (in or about), Louisiana (in or near), Massachusetts (in or against), Michigan (in or about), Minnesota (in or near), New York (as to inflammables—in or about; as to devices—no indication of location), Wisconsin (in or near).

<sup>209</sup> See *Commonwealth v. Mehales*, 284 Mass. 412, 188 N.E. 261 (1933) (applying a specific provision on attempted arson).

<sup>210</sup> See note 170 *supra*.

son provisions they do not require that the materials be collected at or near the affected premises.

Numerous enacted and proposed revised codes make it a crime to convey various articles into prison with intent to aid an escape.<sup>211</sup> Others prohibit knowingly conveying into prison materials that in fact are contraband there, without requiring intent to aid an escape.<sup>212</sup> An early case held that there was no attempt to free a prisoner where the actor had smuggled tools into the jail for that purpose.<sup>213</sup>

Other decisions at common law that concerned the bringing of materials, such as weapons or equipment, to the scene of the contemplated crime involved reconnoitering as well and have been discussed in that connection. Attempts were found in some such cases and also in some cases in which the actor was merely approaching the scene of the contemplated crime. The question with which the Model Code had to deal was whether, absent reconnoitering, there can be an attempt when the actor arrives at the scene of the contemplated crime with materials to be used in its commission. If the would-be murderer, when he arrives at the place contemplated for the commission of the crime, has a gun, or the would-be burglar a ladder, should this be a sufficient basis for holding that the actor has taken a substantial step? What of the would-be forger who brings a pen to the bank?

The purpose of these subsections is to define circumstances that show a relatively firm commitment by the actor to commit a crime. The possession, collection, or fabrication of materials shows such a commitment under certain circumstances, the two significant variables being: (1) the nature of the materials—their distinctiveness as an instru-

<sup>211</sup> See Conn. § 53a-174(a); Iowa § 719.6; Kan. § 21-3811; Me. tit. 17-A, § 756; Minn. § 609.485(subd.2)(2); Mo. § 575.230(1); N.M. § 40A-22-12; Tex. § 38.10; Va. § 18.2-473; Wis. § 946.44(1)(b); Cal. (p) S.B. 27 §§ 15505, 15506; Mich. (p) S.B. 82 §§ 4610, 4611; Okla. (1975 p) § 2-612(3); Tenn. (p) § 2310; Vt. (p) § 2.26.6. For a listing of statutes in effect at the time the Model Code was promulgated, see MPC T.D. 10 at 60 n.188 (1960).

<sup>212</sup> See Ala. §§ 13A-10-36 to -10-38; Ariz. § 13-2505; Del. tit. 11, § 1256; Haw. §§ 710-1022, -1023; Ky. §§ 520.050, .060; Mont. § 94-7-307; Neb. § 28-913; N.H. § 642:7; N.J. § 2C:29-6; N.Y. §§ 205.20, .25; N.D. § 12.1-08-09; Ore. § 162.185; Wash. §§ 9A.76.140 to .76.160; U.S. (p) S. 1437 § 1314 (Jan. 1978); Brown Comm'n Final Report § 1309; Alas. (p) § 11.56.380 (H.B. 661, Jan. 1978); Md. (p) §§ 205.30, .35; S.C. (p) § 20.12(1); W. Va. (p) §§ 61-9-24, -9-25. Two revised codes and three proposals contain such a provision in addition to the provisions cited in note 211 *supra*. See Conn. § 53a-174(b); Wis. § 946.44(1)(c); Cal. (p) S.B. 27 § 15505; Mich. (p) S.B. 82 §§ 4615, 4616; Vt. (p) § 2.26.7.

<sup>213</sup> Patrick v. People, 132 Ill. 529, 24 N.E. 619 (1890).

mentality of the contemplated crime; and (2) the location of the materials—whether they have been brought to the scene of the contemplated crime or have merely been acquired. The principal situations are those in which:

(1) The materials are so plainly instrumentalities of crime that mere possession of them is a sufficient basis for finding a substantial step toward the crime. This situation is covered by Subsection (2)(e).

(2) The materials serve a lawful purpose of the actor under the circumstances, so that no substantial step should be found in the ordinary case even if the materials are taken to the scene of the crime. The would-be forger who takes his pen to the bank usually will not have taken a substantial step, since little resolution is required merely to carry a pen, which is an ordinary accessory and generally would serve a lawful purpose of the actor.

(3) The materials fall between the two previous classes. Here a finding that a substantial step has been taken should be permissible if the actor has arrived at the scene of the contemplated crime with materials in his possession that under the circumstances serve no lawful purpose of the actor. This would encompass, in the usual case, a would-be murderer carrying a lethal weapon or an intended burglar in possession of a ladder. The substantiality of the step taken in this situation is demonstrated by the nature of the materials and the proximity to the scene of the contemplated crime, which *in combination* show a firm criminal purpose. Thus, this situation is covered explicitly in Subsection (2)(f).

(vii) *Solicitation of Innocent Agent*. Professor Glanville Williams suggests the situation where “D unlawfully tells E to set fire to a haystack, and gives him a match to do it with. . . . If, as D knows, E (mistakenly) believes that it is D’s stack and that the act is lawful, E is an innocent agent, and D is guilty of attempted arson; D, in instructing E, does the last thing that he intends in order to effect his criminal purpose. (It would be the same if he only used words and did not give E a match.)”<sup>214</sup>

The prohibition against criminal solicitation does not apply in this case because *E* is himself not being incited to commit

<sup>214</sup> G. Williams, *supra* note 93, at 616. See *State v. Skillings*, 98 N.H. 203, 97 A.2d 202 (1953) (messenger given drugged ice cream to deliver to intended victim; attempts to assault and to rob sustained).

a crime.<sup>215</sup> For this reason *E* is not in a position, as an independent moral agent, to resist *D*'s inducements; unlike the situation in criminal solicitation, *E* is wholly unaware that commission of a crime is involved. Analytically, therefore, *D*'s conduct, in soliciting an innocent agent, is conduct constituting an element of the crime, which is properly subsumed under the attempt section; and the solicitation, irrespective of whether it happens to be the last act, should be the basis for finding a substantial step toward the commission of a crime.

(viii) *Other Patterns of Preparation and Attempt.* Subsection (2) also provides that the specific list of factors that has just been discussed does not preclude the possibility of finding an attempt in other contexts. Listed below are other situations that research has disclosed have given rise to preparation-attempt problems in the past and that can adequately be handled in future litigation by the formulations in Subsections (1)(c) and (2).

In crimes such as bribery, extortion and obtaining money by false pretenses, in which communication of a culpable message is an essential element of the offense, an attempt has generally been found when the actor's conduct is such that he believes it sufficient to convey all or part of that message to the intended victim.

Attempted extortion cases are few, but they seem to support this proposition. When the victim had been threatened, attempts were found;<sup>216</sup> when the actor had not made contact with his intended victim, his actions were construed as preparation.<sup>217</sup>

The pattern in cases of attempted bribery and of attempted corruption of jurors is more complicated. In the

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<sup>215</sup> In *Rex v. Silburn*, 24 Natal L.Rep. 527, 530 (Durban Cir. Ct. 1903), it was said that for there to be an indictable solicitation the person solicited must be aware that the conduct requested is a crime. See also 1 W. Russell, *supra* note 55, at 187.

<sup>216</sup> *People v. Fratianno*, 132 Cal.App.2d 610, 282 P.2d 1002 (1955); *People v. Franquelin*, 109 Cal.App.2d 777, 241 P.2d 651 (1952); *Commonwealth v. Neubauer*, 142 Pa.Super. 528, 16 A.2d 450 (1940); cf. *United States v. Baker*, 129 F.Supp. 684 (S.D. Cal. 1955). But see *Rex v. Landow*, 109 L.T.R. (n.s.) 48 (Crim. App. 1913) (attempt by threats to procure a person to leave the country to become an inmate of a brothel). In the *Franquelin* and *Neubauer* cases the actor had done more than communicate his threats; these further acts were emphasized in the opinions.

In *Martin v. Commonwealth*, 195 Va. 1107, 81 S.E.2d 574 (1954), exhibiting a nude woman to male prospects and soliciting money to cohabit with her were held to constitute attempted pandering.

<sup>217</sup> *State v. Lampe*, 131 Minn. 65, 154 N.W. 737 (1915).

typical case the actor has taken all the steps he deems necessary to convey his offer but has sought to operate through an intermediary. The cases have been split on whether the presence of this "independent" third party precludes an attempt.<sup>218</sup> Cases imposing liability in this situation rely upon apparently effective communication. Those refusing to find an attempt have been based on the actor's inability to commit the crime without the assistance of the third party, as discussed previously. Cases are few in which the actor does not consider his conduct sufficient to convey his bribe offer, and these have divided on whether there is an attempt to bribe.<sup>219</sup>

When the crime attempted is obtaining money by false pretenses, more extensive litigation has permitted answers that are less inconclusive. The common law requirement of communication is best illustrated by the leading English case, *The King v. Robinson*.<sup>220</sup> The actor-jeweler, planning to defraud the insurance company on his policy of theft insurance, hid his jewelry, bound himself, and called for assistance; the police released him and he represented to them that his jewelry had been stolen. But the actor's plot was discovered by the police before the actor could communicate with the insurance company. The court held that there was no attempt, but stated that if the actor had notified the insurance company of the "theft" or had filed a claim with them he would have been guilty. This approach has been followed and attempts found in a number of situations: (1) where the misrepresentation was complete and constituted the last act;<sup>221</sup> (2) where the misrepresentation was complete in the

<sup>218</sup> *Attempt liability sustained*: *Summers v. State ex rel. Boykin*, 66 Ga.App. 648, 19 S.E.2d 28 (1942) (contempt); *Brewer v. State*, 176 Miss. 803, 170 So. 540 (1936) (contempt); *cf. People v. Coleman*, 350 Mich. 268, 86 N.W.2d 281 (1957) (attempt to obstruct justice based on intercepted threat to be conveyed by intermediary).

*Attempt liability rejected*: *United States v. Carroll*, 147 F. 947 (D. Mont. 1906) (contempt); *State v. Lowrie*, 237 Minn. 240, 54 N.W.2d 265 (1952) (attempt to bribe); *In re Ellison*, 256 Mo. 378, 165 S.W. 987 (1914) (contempt); *see State v. Brown*, 95 N.C. 685, 687 (1886).

<sup>219</sup> *Compare State v. Brown*, 95 N.C. 685 (1886) (no attempt liability), *with Summers v. State ex rel. Boykin*, 66 Ga.App. 648, 19 S.E.2d 28 (1942) (attempt liability sustained).

<sup>220</sup> [1915] 2 K.B. 342 (Crim. App.); *accord, People v. Rappaport*, 207 Misc. 604, 142 N.Y.S.2d 125 (Bronx County Ct. 1955).

<sup>221</sup> *Lemke v. United States*, 211 F.2d 73 (9th Cir.), *cert. denied*, 347 U.S. 1013 (1954); *People v. Wallace*, 78 Cal.App.2d 726, 178 P.2d 771 (1947); *Regina v. Eagleton*, 6 Cox Crim.Cas. 559 (Crim. App. 1855); *Regina v. Hensler*, 22 L.T.R. (n.s.) 691 (C.C.R. 1870); *Regina v. Rigby*, 7 Cox Crim.Cas 507 (Assizes 1858).

sense that no new misrepresentations needed to be made but further acts were required;<sup>222</sup> (3) where the misrepresentation was complete and further misrepresentations were required to complete the crime.<sup>223</sup> In some such situations liability has not been found, but the results in these cases are attributable in large part to unduly strict versions of general attempt theory,<sup>224</sup> and included instances in which the court erroneously affirmed the necessity of the last act.<sup>225</sup> On the other hand, when no misrepresentations have been made, it is clear that there has been no attempt,<sup>226</sup> even if contact has been made with the contemplated victim through inquiries by the actor.<sup>227</sup>

Actual communication with the victim has not been required; all that is needed is conduct that the actor believes is sufficient to convey the misrepresentation. Thus if a misrepresentation were to be sent by mail, the attempt would be complete as soon as the letter was posted.<sup>228</sup> And when a workman's wages were to be computed on the basis of output as represented by tally cards delivered to a bookkeeper, an attempt was found where the worker inserted extra tally

<sup>222</sup> *People v. Von Hecht*, 133 Cal.App.2d 25, 283 P.2d 764 (1955); *Norris v. State*, 40 Ga.App. 232, 149 S.E. 158 (1929); *Parker v. State*, 29 Ga.App. 26, 113 S.E. 218 (1922); *Williams v. State*, 209 Miss. 902, 48 So.2d 598 (1950); *The Queen v. Button*, [1900] 2 Q.B. 597 (C.C.R.); accord, *Rex v. Wing*, 22 Can.Crim.Cas. Ann. 426 (Ont. App. Div. 1913).

<sup>223</sup> *People v. Mann*, 113 Cal. 76, 45 P. 182 (1896); *People v. Paluma*, 18 Cal.App. 131, 122 P. 431 (1912); *Rex v. Laitwood*, 4 Crim.App.R. 248 (1910); *In re MacCrea*, 15 Indian L.R. Allahabad 173 (App. Crim. 1893), cf. *H.M. Advocate v. Camerons*, 48 Scot.L.R. 804 (1911) (under such circumstances it is a jury question whether there is an attempt).

<sup>224</sup> *People v. Werner*, 16 Cal.2d 216, 105 P.2d 927 (1940); *State v. Block*, 333 Mo. 127, 62 S.W.2d 428 (1933). In both cases the court narrowed the scope of attempt liability on a number of issues. See also *Commonwealth v. Kelley*, 162 Pa.Super. 526, 58 A.2d 375 (1948), where the court refused to find liability because the actor's intentions after the initial misrepresentation were a matter of "pure conjecture."

<sup>225</sup> *Rex v. Punch*, 20 Crim.App.R. 18 (1927); *Queen-Empress v. Dhundi*, 8 Indian L.R. Allahabad 304 (Crim. Rev. 1886).

<sup>226</sup> *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925).

<sup>227</sup> *In re MacCrea*, 15 Indian L.R. Allahabad 173 (App. Crim. 1893).

<sup>228</sup> See *People v. Werblow*, 241 N.Y. 55, 64-65, 148 N.E. 786, 790 (1925); *Rex v. Waugh*, [1909] Vict. L.R. 379, 382 (Austl.); *Regina v. Hensler*, 22 L.T.R. (n.s.) 691 (C.C.R. 1870); cf. *People v. National Radio Distribs. Corp.*, 9 Misc.2d 824, 168 N.Y.S.2d 886 (Bronx County Ct. 1957) (misbranded tubes delivered to post office but not forwarded). But cf. *State v. Pollard*, 215 La. 655, 41 So.2d 465 (1949) (acts within county did not proceed beyond preparation when false estimate was mailed from county but received outside county).

cards into the record-keeping system at the point most remote from the bookkeeper;<sup>229</sup> no further acts on his part were required to convey the misrepresentation to the bookkeeper. Furthermore, the objective of the misrepresentation need not be the valuable itself, but may be the means of obtaining the valuable. Thus if the actor seeks to obtain a check or credit by his misrepresentation, he has committed an attempt.<sup>230</sup>

The regulation of the liquor trade in the United States has involved, in varying combinations, prohibitions against manufacturing, transporting, selling, or importing illegal liquor. It has been held that transporting liquor is not an attempt to sell<sup>231</sup> and that waiting for liquor to be loaded in an automobile is neither an attempt to sell nor an attempt to transport.<sup>232</sup> As to attempts to import, the few available cases have established that approaching the prescribed territory with the liquor is an attempt<sup>233</sup> while ordering or purchasing the illegal alcohol is just preparation.<sup>234</sup>

<sup>229</sup> *Regina v. Rigby*, 7 Cox Crim.Cas. 507 (Assizes 1858).

<sup>230</sup> *Parker v. State*, 29 Ga.App. 26, 113 S.E. 218 (1922); *Rex v. Parkes*, 4 Can.Crim.R. 382 (B.C. Ct. App. 1947); *Regina v. Eagleton*, 6 Cox Crim.Cas. 559 (Crim. App. 1855). *But cf. Queen-Empress v. Dhundi*, 8 Indian L.R. Allahabad 304 (Crim. Rev. 1886).

<sup>231</sup> *Moss v. State*, 6 Ga.App. 524, 65 S.E. 300 (1909).

In *Hope v. Brown*, [1954] 1 All E.R. 330 (Q.B. Div.), the charge was an attempt to sell meat at prices in excess of those fixed by law. Defendant had prepared the excessive price labels for 21 packages and had instructed an assistant to put the labels on the packages before the meat was delivered the following day. *Held*, until the labels were affixed to the packages there was no attempt. There is dicta in accord in *Gardner v. Akeroyd*, [1952] 2 Q.B. 743.

<sup>232</sup> *Andrews v. Commonwealth*, 135 Va. 451, 115 S.E. 558 (1923).

<sup>233</sup> *Gregg v. United States*, 113 F.2d 687, *rev'd on other grounds on rehearing*, 116 F.2d 609 (8th Cir. 1940).

<sup>234</sup> *United States v. Stephens*, 12 F. 52 (C.C.D. Ore. 1882). *Compare* *United States v. Robles*, 185 F.Supp. 82 (N.D. Cal. 1960) (letter soliciting information from Mexican narcotics producer held to be an attempt to unlawfully possess narcotics in the United States).

Cases concerned with the illegal manufacture of intoxicating beverages have already been discussed.

In *Commonwealth v. Underkoffler*, 32 Pa.D. & C. 183 (Q.S. Bucks County 1938), a conviction of an attempt to operate a motor vehicle while under the influence of liquor was sustained, the court holding that getting behind the wheel with the necessary intent was a sufficient overt act, and that it was unnecessary to begin to start the motor in order to constitute the offense. An indictment charging a similar offense was sustained in *State v. Jones*, 125 Me. 42, 130 A. 737 (1925), where the defendant was alleged to have turned the key and operated the self-starter. For a contrary holding, see *State v. Parker*, 123 Vt. 369, 189 A.2d 540 (1963).

Where the charge involves an attempt to marry illegally, it has been held that the parties must be standing before the magistrate ready to begin the ceremony.<sup>235</sup>

Attempts to commit abortion have been found when all was in readiness for the operation to commence,<sup>236</sup> and when parties had progressed no further than the sterilization or rinsing of instruments by the doctor.<sup>237</sup> However, making arrangements and obtaining payment for the abortion have been held insufficient, even when hospital records have been prepared and the woman was in the waiting room,<sup>238</sup> and when the woman, cooperating with police, had entered the room where the operation was to be performed and, having been told to undress, was waiting for the doctor to collect his instruments.<sup>239</sup>

The only nonsolicitation case found involving attempted adultery sustained the charge where the parties were discovered in a bedroom in the process of disrobing.<sup>240</sup>

It has been held that there is an attempt to free a prisoner if two of the three jail doors are opened<sup>241</sup> but that there is no attempt to free a prisoner if the actor merely smuggles tools into the jail for that purpose.<sup>242</sup> It has also been held

<sup>235</sup> *People v. Murray*, 14 Cal. 159 (1859); *The Queen v. Peterson*, 1 Indian L.R. Allahabad 316 (Crim. Rev. 1876); *cf. People v. MacDonald*, 24 Cal.App.2d 702, 76 P.2d 121 (1938).

<sup>236</sup> *People v. Root*, 246 Cal.App.2d 600, 55 Cal.Rptr. 89 (1966) (defendant had placed his hands upon the woman); *People v. Bowby*, 135 Cal.App.2d 519, 287 P.2d 547 (1955); *People v. Raffington*, 98 Cal.App.2d 455, 220 P.2d 967 (1950), *cert. denied*, 340 U.S. 912 (1951); *Adams v. State*, 81 Nev. 524, 407 P.2d 169 (1965) (force had been applied to the woman so that the operation might commence); *People v. Conrad*, 102 App.Div. 566, 92 N.Y.S. 606, *aff'd mem.*, 182 N.Y. 529, 74 N.E. 1122 (1905); *cf. People v. Woods*, 24 Ill.2d 154, 180 N.E.2d 475 (1962) (finding attempt liability where the woman had not yet undressed to permit the preliminary examination).

<sup>237</sup> *People v. Berger*, 131 Cal.App.2d 127, 280 P.2d 136 (1955); *People v. Reed*, 128 Cal.App.2d 499, 275 P.2d 633 (1954).

<sup>238</sup> *People v. Gallardo*, 41 Cal.2d 57, 257 P.2d 29 (1953); *People v. MacEwing*, 216 Cal.App.2d 33, 30 Cal.Rptr. 476 (1963).

<sup>239</sup> *Commonwealth v. Willard*, 179 Pa.Super. 368, 116 A.2d 751 (1955) (specific attempted abortion statute held exclusive). *See also People v. Buffum*, 40 Cal.2d 709, 256 P.2d 317 (1953) (no attempt when arrangements made for abortion and women transported outside the state for the purpose); *Dupuy v. State*, 204 Tenn. 624, 325 S.W.2d 238 (1959) (no attempt when doctor and instruments were in readiness but woman had not disrobed).

<sup>240</sup> *State v. Schwarzbach*, 84 N.J.L. 268, 86 A. 423 (Ct. Err. & App. 1913).

<sup>241</sup> *State v. Carivey*, 190 N.C. 319, 129 S.E. 802 (1925).

<sup>242</sup> *Patrick v. People*, 132 Ill. 529, 24 N.E. 619 (1890).

that there is no attempt to escape if a prisoner procures tools to be used in a later effort,<sup>243</sup> or if a prisoner conceals himself with intent to escape but in a place affording little opportunity of success.<sup>244</sup> In addition, there are a significant number of statutes dealing with the problem of the conveying of things into jail for the purpose of aiding an escape.<sup>245</sup>

(c) *Functions of Judge and Jury.* The distinction between preparation and attempt was accomplished in the past largely by judicial opinions, supplemented by various special statutes. Juries also participated in the process to some extent, since, prior to the judicial inquiry, there may have been a jury verdict of guilty pursuant to a charge requiring a finding that the defendant's conduct amounted to a "commencement of the consummation" or that his conduct complied with one of the other very generalized formulas for determining whether conduct has gone far enough to constitute an attempt.

A similar involvement arises under Subsections (1)(c) and (2), since presumably the charge to the jury will require a finding that defendant's conduct amounted to a "substantial step in a course of conduct planned to culminate in his commission of the crime" and that the conduct "is strongly corroborative of the actor's criminal purpose." While these statements, standing alone, may not be particularly enlightening to a jury, the jurors' participation can be made meaningful if it is impressed upon them that defendant's conduct must be important or significant in two senses: (1) in advancing the criminal purpose charged, and (2) in providing some verification of the existence of that purpose.

One important innovation of the Model Code is that, on the first of these issues, which is concerned with the presence of a "substantial step," a judge's authority to set aside a jury verdict of guilty is limited if the case comes within one of the situations specifically enumerated in Subsection (2). In such a case the judge can refuse to submit the issue to the jury or refuse to accept the decision of the jury only if there is insufficient evidence of criminal purpose or there is no reasonable basis for holding that the defendant's conduct was "strongly corroborative" of the criminal purpose attributed to him.

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<sup>243</sup> State v. Hurley, 79 Vt. 28, 64 A. 78 (1906).

<sup>244</sup> Rex v. Labourdette, 13 B.C. 443 (Assizes 1908).

<sup>245</sup> See *supra* notes 211 & 212 and accompanying text.

(d) *Criminality of Preparation.* Several English statutes have made criminal not only attempts, but also any act "preparatory" to the commission of the substantive offenses defined in such statutes.<sup>246</sup> A provision of the English defense regulations at one time contained similar language.<sup>247</sup> In a decision construing the latter provision, one of the justices stated that the words of the act were "intended to apply to what the law would regard as something less than an attempt" and that in proscribing "preparatory" acts the regulation might reach "acts which are only remotely connected with the commission of an offense."<sup>248</sup> The provision was criticized as "extending criminal liability beyond what exists in regard to other crimes." Thereafter, the defense regulations were amended to delete the language punishing "preparatory" acts.<sup>249</sup>

Similar provisions were involved in pre-Model Code statutes punishing attempted arson, many of which are still applicable. In addition to expressly proscribing the placing or distributing of inflammables about the premises to be burned, these statutes often have made criminal any act preliminary to or in furtherance of an attempt<sup>250</sup> or a solicitation to commit arson.<sup>251</sup> One state has enacted a statute providing that preparation to commit arson shall constitute an attempt,<sup>252</sup> and one state, prior to enacting its revised code, made punishable any act done "willfully and maliciously" that could or might result in setting afire a structure subject to arson.<sup>253</sup>

There have been other, scattered provisions to the same effect. These have punished any act preparatory to the man-

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<sup>246</sup> Dangerous Drugs Act, 14 § 15 Geo. 6, ch. 48, § 15(1)(d), at 318 (1951) (repealed 1965) (not coupled with proscription of attempt); Salmon and Freshwater Fisheries (Protection) (Scotland) Act, 14 § 15 Geo. 6, ch. 26, § 8, at 61 (1951); Official Secrets Act, 10 & 11 Geo. 5, ch. 75, § 7, at 497 (1920).

<sup>247</sup> Regulation 90(1) of the Defense (General) Regulations (1939).

<sup>248</sup> Gardner v. Akeroyd, [1952] 2 Q.B. 743, 750, 2 All E.R. 306, 311.

<sup>249</sup> [1952] 3 Statutory Instruments 3007 (No. 2091(14)).

<sup>250</sup> Alas. § 11.20.050; Cal. § 451a; Idaho § 18-804(b); Md. art. 27, § 10; Mass. ch. 266, § 5A; Miss. § 97-17-9; Nev. § 205.025(2); S.C. § 16-11-200; Tenn. § 39-503; Vt. tit. 13, § 505; W. Va. § 61-3-4(a); Wyo. § 6-7-104(b). See also Pa. tit. 18, § 4310. For a listing of statutes in effect at the time the Model Code was promulgated, see MPC T.D. 10 at 67 n.233 (1960).

<sup>251</sup> The Massachusetts provision, cited in note 250 *supra*, is not clear on whether an act preliminary to a solicitation would suffice.

<sup>252</sup> Nev. § 205.055.

<sup>253</sup> Ind. Code Ann. § 35-16-1-6 (Burns 1975) (repealed 1977).

ufacture of illegal liquor,<sup>254</sup> and any act done with intent to assist a prisoner to escape.<sup>255</sup>

These provisions are examples of legislative efforts to correct the narrow circumscribing of attempt liability and, in effect, eliminate the distinction between preparation and attempt. When the preparation-attempt distinction is made with a view toward imposing liability in a broader class of cases where dangerousness of character is plainly manifested, the need for handling some of these cases by imposing liability for preparation is eliminated and the incidence of such enactments should be reduced. In at least some states adopting the Model Code formulation, this development seems to have taken place.<sup>256</sup>

7. *Attempting to Aid.* It was clear when the Model Code provision was being drafted that one who aided and abetted,<sup>257</sup> solicited<sup>258</sup> or conspired with<sup>259</sup> another to commit an offense was liable for any attempt made by the latter. But there was little litigation concerning liability for conduct designed to aid another to commit a crime when the crime was not committed or attempted by the other person. Subsection (3) would make such action a criminal attempt.

Two cases, on their facts, involved attempted aiding and abetting. In one<sup>260</sup> a policeman, desiring to assist an illegal gambling establishment, telephoned the proprietors that the police were closing in. The police, however, were already in possession of the premises and one of the officers answered the phone. The

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<sup>254</sup> Tenn. § 39-2523.

<sup>255</sup> See, e.g., Ala. §§ 13A-10-34, -10-35.

<sup>256</sup> For example, before the revision of the penal codes in Arkansas, Connecticut, Delaware, Kentucky, Nebraska, and North Dakota, there were statutes in those states making criminal any act preliminary to or in furtherance of an attempt to commit arson. 1929 Ark. Acts § 4, No. 38 (repealed 1976); Conn. Gen. Stat. § 53-85 (1958) (repealed 1971); Del. Code Ann. tit. 11, § 353(a) (1953) (repealed 1973); Ky. Rev. Stat. § 433.040(1) (1970) (repealed 1975); Neb. Rev. Stat. § 28-504.04 (1956) (repealed 1978); N.D. Rev. Code § 12-3406 (1943) (repealed 1973). These provisions were repealed when the Model Code's substantial step formula was adopted together with the requirement that the actor's conduct strongly corroborate his criminal purpose. See Ark. § 41-701(3); Conn. § 53a-49(b); Del. tit. 11, § 532 ("substantial step" is "an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime"); Ky. § 506.010(2) (same as Delaware); Neb. § 28-201; N.D. § 12.1-06-01(1).

<sup>257</sup> *People v. Benenato*, 77 Cal.App.2d 350, 175 P.2d 296 (1946); *Regina v. Esmonde*, 26 U.C.Q.B. 152 (1866).

<sup>258</sup> *The Queen v. Goodman*, 22 U.C.C.P. 338 (1872).

<sup>259</sup> *People v. Benenato*, 77 Cal.App.2d 350, 175 P.2d 296 (1946); *State v. Wilson*, 30 Conn. 500 (1862).

<sup>260</sup> *Commonwealth v. Haines*, 147 Pa.Super. 165, 24 A.2d 85 (1942).

court held the actor guilty of malfeasance in office but predicated liability on an attempt to aid and abet the criminal operation, treating such attempt as a ground of general criminal liability. In the other case<sup>261</sup> a driver brought a truckload of supplies to within several hundred yards of an illegal still, which was then in the hands of the police. The court held that the defendant was not guilty of attempting to manufacture illegal liquor or of aiding and abetting in such manufacture, but did not consider the issue of attempted aiding and abetting.<sup>262</sup>

Another instance of conduct designed to aid in the commission of a crime is suggested by the case of *State v. Tally*,<sup>263</sup> in which a judge was impeached for aiding and abetting the murder of one Ross. The judge, knowing that armed men were pursuing Ross in order to kill him and that a telegram had been sent to Ross warning him of his danger, sent a telegram to the telegraph operator at the other end of the line, who was a friend of his, directing him not to warn Ross. Ross was not warned and was killed by his pursuers. There was no evidence of preconcert between the judge and Ross's pursuers. If the judge had been unsuccessful in his effort to prevent Ross from being warned and Ross had escaped, or if, notwithstanding the effective suppression of the warning, Ross had not been killed, the judge would have engaged in conduct designed to aid the others to murder Ross and liability would be established under Subsection (3).

Where, unlike the *Tally* case, the actor engages in conduct designed to aid another to commit a crime but does not do all that is necessary to complete his design—as, for example, where the judge writes out the telegram seeking to suppress the warning but is apprehended before he can send it—the applicable principles of liability are derived by considering both Subsection (3) and Section 2.06. Section 2.06 establishes complicity in a *completed* crime where, with the necessary criminal purpose, the actor “attempted to aid” another person to commit the crime.<sup>264</sup> Where the crime is incomplete, on the other hand, Subsection (3)

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<sup>261</sup> *West v. Commonwealth*, 156 Va. 975, 157 S.E. 538 (1931).

<sup>262</sup> In Australia, there is an offense of attempting to make oneself an accessory after the fact. *Rex v. Maloney*, 1 N.S.W. 77 (1901). And many of the statutes in the United States dealing with specific attempts at arson proscribe attempts to aid in the commission of arson. *E.g.*, Cal. § 451a; Fla. § 806.05.

<sup>263</sup> 102 Ala. 25, 15 So. 722 (1894).

<sup>264</sup> Section 2.06 does not itself contain criteria for when such an attempt occurs. It is intended, however, that the standards set forth in Section 5.01(1) and (2) will apply. Thus, one attempts to aid when he has the requisite criminal purpose and when he engages in the last act necessary for him or when he engages in a substantial step and his conduct strongly corroborates his purpose.

would lead to liability, by including any conduct that would establish complicity under Section 2.06 if the crime were completed.<sup>265</sup>

Since Section 2.06 is predicated upon the completed offense having occurred, Subsection (3) thus fills what otherwise would be a gap in coverage. The rationale for inclusion of the actor who attempts to aid is straightforward enough. Assuming satisfaction of the ordinary criteria for attempt liability, it is clear that he manifests the same dangerousness of character as the actor who himself attempts to commit the offense. Many recently enacted and proposed revised codes have comparable provisions.<sup>266</sup>

8. *Renunciation.* It was uncertain under the law prior to the drafting of the Model Code whether abandonment of a criminal effort, after the bounds of preparation had been surpassed, constituted a defense to a charge of attempt. In passing on this issue, courts have customarily distinguished between "voluntary" and "involuntary" abandonments.

An "involuntary" abandonment occurs when the actor ceases his criminal endeavor because he fears detection or apprehension, or because he decides he will wait for a better opportunity, or because his powers or instruments are inadequate for completing the crime.<sup>267</sup> There has been no doubt that such an abandonment does not exculpate the actor from attempt liability otherwise incurred.

A "voluntary" abandonment occurs when there is a change in the actor's purpose that is not influenced by outside circumstances. This may be termed repentance or change of heart.<sup>268</sup> Lack of resolution or timidity may suffice.<sup>269</sup> A reappraisal by

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<sup>265</sup> Specifically, Subsection (3) provides that any conduct that would establish complicity under Section 2.06 will suffice. Section 2.06 provides that an attempt to aid is sufficient. And, as pointed out *supra* in note 264, whether an attempt has occurred under Section 2.06 depends upon whether the criteria of Subsections (1) and (2) of 5.01 have been satisfied.

<sup>266</sup> See Ariz. § 13-1001(A)(3); Ark. § 41-702; Colo. § 18-2-101(2); Del. tit. 11, § 533; Haw. § 705-501; Ky. § 506.010(3); Me. tit. 17-A, § 152(3); N.J. § 2C:5-1(c); N.D. § 12.1-06-01(2); Brown Comm'n Final Report § 1001(2); Mass. (p) ch. 263, § 45(b); Mich. (p) S.B. 82 § 1005; Vt. (p) § 2.4.2(3); W. Va. (p) § 61-4-1(c).

<sup>267</sup> *Stewart v. State*, 85 Nev. 388, 455 P.2d 914 (1969); *People v. Carter*, 73 Cal.App. 495, 238 P. 1059 (1925); see *People v. Corkery*, 134 Cal.App. 294, 297, 25 P.2d 257, 258 (1933); cf. *State v. Mehaffey*, 132 N.C. 1062, 44 S.E. 107 (1903); *People v. Staples*, 6 Cal.App.3d 61, 85 Cal.Rptr. 589 (1970).

<sup>268</sup> *People v. Von Hecht*, 133 Cal.App.2d 25, 283 P.2d 764 (1955); *Weaver v. State*, 116 Ga. 550, 42 S.E. 745 (1902).

<sup>269</sup> Cf. *Rex v. Page*, [1933] Vict. L.R. 351 (Austl.).

the actor of the criminal sanctions applicable to his contemplated conduct would presumably be a motivation of the voluntary type as long as the actor's fear of the law is not related to a particular threat of apprehension or detection. Whether voluntary abandonments constitute a defense to an attempt charge has been far from clear, there being few decisions squarely facing the issue.

If assault cases are not considered, the prevailing view—contrary to the general conceptions of the commentators—was in favor of allowing voluntary desistance as a defense.<sup>270</sup> Supplementing these “express” statements are opinions that have implicitly accepted this view by emphasizing the fact that desistance in the particular case was involuntary<sup>271</sup> or by giving effect to voluntary desistance by classifying the actor's discontinued conduct as “preparation.”<sup>272</sup> Support for this position also was derived from the widespread statutory definition of attempt—one who “does any act toward the commission of such a crime, but fails or is prevented or intercepted in the perpetration thereof,”<sup>273</sup> which, by enumerating involuntary causes of failure could be taken to exclude voluntary desistance. A similar implication was present in the often quoted judicial doctrine that an attempt requires an act that would, if not interrupted by an intervening cause in-

<sup>270</sup> *Weaver v. State*, 116 Ga. 550, 42 S.E. 745 (1902); *Parker v. State*, 29 Ga.App. 26, 113 S.E. 218 (1922); *People v. Spruill*, 20 App.Div.2d 901, 248 N.Y.S.2d 931 (1964); *People v. Graham*, 176 App.Div. 38, 39, 162 N.Y.S. 334, 335 (1916); *Queen v. Töpken*, 1 Buch.App.Ct. Cases, Cape of Good Hope 471 (1884); see *People v. Von Hecht*, 133 Cal.App.2d 25, 36, 283 P.2d 764, 771 (1955); *People v. Montgomery*, 47 Cal.App.2d 1, 13, 117 P.2d 437, 445 (1941); *People v. Corkery*, 134 Cal.App. 294, 297, 25 P.2d 257, 258 (1933); *Griffin v. State*, 26 Ga. 493, 506 (1858) (concurring opinion); *People v. Dogoda*, 9 Ill.2d 198, 203, 137 N.E.2d 386, 389 (1956); *People v. Youngs*, 122 Mich. 292, 300, 81 N.W. 114, 117 (1899) (dissenting opinion); *State v. Gray*, 19 Nev. 212, 218-19, 8 P. 456, 459-60 (1885); *People v. Collins*, 234 N.Y. 355, 360, 137 N.E. 753, 755 (1922); *People v. Lawton*, 56 Barb. 126, 133 (N.Y. 1867); *Commonwealth v. Tadrick*, 1 Pa.Super. 555, 566 (1896); *H.M. Advocate v. Camerons*, 48 Scot.L.R. 804, 806 (1911). *Contra*, *People v. Robinson*, 180 Cal.App.2d 745, 4 Cal.Rptr. 679 (1960); *Wiley v. State*, 237 Md. 560, 207 A.2d 478 (1965); *State v. Hayes*, 78 Mo. 307, 317-18 (1883); *Mathis v. State*, 82 Nev. 402, 419 P.2d 775 (1966); *Rex v. Page*, [1933] Vict. L.R. 351 (Austl.); *Regina v. Kosh*, 49 W.W.R. (n.s.) 248 (Sask. Ct. App. 1964); see *People v. Carter*, 73 Cal.App. 495, 500, 238 P. 1059, 1060 (1925); *Commonwealth v. Neubauer*, 142 Pa.Super. 528, 533, 16 A.2d 450, 452 (1940); *In re MacCrea*, 15 Indian L.R. Allahabad 173 (Crim. App. 1893).

<sup>271</sup> *People v. Goldstein*, 84 Cal.App.2d 581, 586, 191 P.2d 102, 106 (1948); *People v. Paluma*, 18 Cal.App. 131, 122 P. 431 (1912); *The Queen v. Goodman*, 22 U.C.C.P. 338 (1872); cf. *People v. Walker*, 33 Cal.2d 250, 201 P.2d 6 (1948), *cert. denied*, 336 U.S. 940 (1949); *Commonwealth v. Purretta*, 74 Pa.Super. 463 (1920).

<sup>272</sup> *United States v. Stephens*, 12 F. 52 (C.C.D. Ore. 1882); see *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N.E. 55 (1901); *The Queen v. McCann*, 28 U.C.Q.B. 514 (1869).

<sup>273</sup> See note 3 *supra*.

dependent of the will of the actor, consummate the offense.<sup>274</sup> The bulk of the decisions squarely denying the defense involved assaults,<sup>275</sup> and these are distinguishable. Whether they are correct need not be decided here; it is enough to note that something in the way of a substantive offense had been committed and immunity was accordingly withheld.

It should be noted also that even where voluntary desistance was not a defense, abandonment by the actor may have resulted in exoneration by negating a criminal intent. When the charge has been assault with intent to rape and the evidence shows that the accused apparently had it within his power to complete the offense, proof of voluntary abandonment weighed heavily in favor of the accused.<sup>276</sup> One state made it conclusive evidence that defendant did not intend to rape.<sup>277</sup>

Subsection (4) allows abandonment as a defense only to an actor who manifests a "complete and voluntary" renunciation of his criminal purpose. The requirement that the renunciation be "complete and voluntary" involves two elements, both of which are explicitly set forth in the second paragraph of the subsection: (1) the abandonment of the criminal effort must originate with the actor, and not be influenced by external circumstances that increase the probability of detection or that make more difficult the accomplishment of the criminal purpose; and (2) the abandonment must be permanent and complete, rather than temporary or contingent—it cannot be motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim. It should be emphasized, however, that the second element stated does not impose on the defendant the impossible burden of proving that henceforth his conduct will be lawful. On the contrary, once the defendant has introduced evidence that the abandonment was

<sup>274</sup> See note 114 *supra*.

<sup>275</sup> *Lewis v. State*, 35 Ala. 380 (1860); *People v. Stewart*, 97 Cal. 238, 32 P. 8 (1893); *People v. Johnson*, 131 Cal. 511, 63 P. 842 (1901); *State v. Smith*, 14 Del. (9 Houst.) 588, 33 A. 441 (Ct. Gen. Sess. 1892); *Payne v. Commonwealth*, 133 Ky. 229, 110 S.W. 311 (1908); *State v. Williams*, 121 N.C. 628, 28 S.E. 405 (1897); *Commonwealth v. Eagan*, 190 Pa. 10, 42 A. 374 (1899); *Glover v. Commonwealth*, 86 Va. 382, 10 S.E. 420 (1889); see *People v. Courier*, 79 Mich. 366, 368, 44 N.W. 571, 572 (1890); cf. *People v. Esposti*, 82 Cal.App.2d 76, 185 P.2d 866 (1947). Compare *State v. Gill*, 101 W.Va. 242, 132 S.E. 490 (1926). Some of the foregoing cases involved assaults with intent to rape a female under the age of consent.

<sup>276</sup> See *Lewis v. State*, 35 Ala. 380 (1860); *Herrick v. Territory*, 2 Okla.Crim. 74, 99 P. 1096 (1909); *Saddler v. State*, 12 Tex.Crim. 194 (1882); *Mullins v. Commonwealth*, 174 Va. 477, 5 S.E.2d 491 (1939); *State v. Gill*, 101 W.Va. 242, 132 S.E. 490 (1926).

<sup>277</sup> *Sparkman v. State*, 84 Fla. 151, 92 So. 812 (1922).

complete and voluntary, the prosecution has the burden, as discussed below, of proving beyond a reasonable doubt that he merely decided to postpone his criminal conduct until a more advantageous time.

The basis for allowing the defense involves two related considerations.

First, renunciation of criminal purpose tends to negative dangerousness. As previously indicated, much of the effort devoted to excluding early "preparatory" conduct from criminal attempt liability has been based on the desire not to impose liability when there is an insufficient showing that the actor has a firm purpose to commit the crime contemplated. In cases where the actor has gone beyond the line drawn for defining preparation, indicating *prima facie* sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime.

This line of reasoning, however, may prove unsatisfactory when the actor has proceeded far toward the commission of the contemplated crime, or has perhaps committed the "last proximate act." It may be argued that whatever the inference to be drawn when the actor's conduct was in the area near the preparation-attempt line, in cases of further progress the inference of dangerousness from such an advanced criminal effort outweighs the countervailing inference arising from abandonment of the effort. However, it is in this latter class of cases that the second of the two policy considerations comes most strongly into play.

The second reason for allowing renunciation of criminal purpose as a defense to an attempt charge is to provide actors with a motive for desisting from their criminal designs, thereby diminishing the risk that the substantive crime will be committed. While under the proposed subsection such encouragement is held out at all stages of the criminal effort, its significance becomes greatest as the actor nears his criminal objective and the risk that the crime will be completed is correspondingly high. At the very point where abandonment least influences a judgment as to the dangerousness of the actor—where the last proximate act has been committed but the resulting crime can still be avoided—the inducement to desist stemming from the abandonment defense achieves its greatest value.

It is possible, of course, that the defense of renunciation of criminal purpose may add to the incentives to take the *first* steps toward crime. Knowledge that criminal endeavors can be undone with impunity may encourage preliminary steps that would not

be undertaken if liability inevitably attached to every abortive criminal undertaking that proceeded beyond preparation. But this is not a serious problem. First, any consolation the actor might draw from the abandonment defense would have to be tempered with the knowledge that the defense would be unavailable if the actor's purposes were frustrated by external forces before he had an opportunity to abandon his effort. Second, the encouragement this defense might lend to the actor taking preliminary steps would be a factor only where the actor was dubious of his plans and where, consequently, the probability of continuance was not great.

On balance, it is concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stage of an attempt, it significantly negatives dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort. And, because of the importance of encouraging desistance in the final stages of the attempt, the defense is allowed even when the last proximate act has occurred but the criminal result can be avoided, as for example when the fuse has been lit but can still be stamped out. If, however, the actor has put in motion forces that he is powerless to stop, then the attempt has been completed and cannot be abandoned. In accord with prior law,<sup>278</sup> the actor can gain no immunity for his completed effort, as for example when he fires at the intended victim but misses; all he can do is desist from making a second attempt. Most recently revised codes and proposals adopt a renunciation defense substantially similar to the Model Code's.<sup>279</sup>

Under Subsection (4), renunciation is made an affirmative defense; the prosecution is not required to disprove it unless and until there is evidence in its support, but then it must disprove

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<sup>278</sup> *The Queen v. Goodman*, 22 U.C.C.P. 338 (1872); see *People v. Corkery*, 134 Cal.App. 294, 297-99, 25 P.2d 257, 258-59 (1933); *State v. Gray*, 19 Nev. 212, 218-19, 8 P. 456, 459 (1885); *Howard v. Commonwealth*, 207 Va. 222, 148 S.E.2d 800 (1966) (semble).

<sup>279</sup> See Ala. § 13A-4-2(c); Ariz. § 13-1005; Ark. § 41-704; Colo. § 18-2-101(3); Conn. §§ 53a-49(c), -50; Del. tit. 11, § 541; Fla. § 777.04(5)(a); Ga. § 26-1003; Haw. § 705-530; Ky. § 506.020; Me. tit. 17-A, § 154(2); Minn. § 609.17(3); Mont. § 94-4-103(4); N.H. § 629:1(III); N.J. § 2C:5-1(d); N.Y. § 40.10(3); N.D. § 12.1-06-05(3); Ohio § 2923.02(D); Ore. § 161.430; Pa. tit. 18, § 901(c); P.R. tit. 33, § 3123; Tex. § 15.04; U.S. (p) S. 1437 § 1001(b) (Jan. 1978); Brown Comm'n Final Report § 1005(3); Alas. (p) § 11.31.100(c) (H.B. 661, Jan. 1978); D.C. (1978 p) § 22-210(b)(1); Md. (p) § 110.15; Mass. (p) ch. 263, § 49(b); Mich. (p) S.B. 82 § 1001(3); S.C. (p) § 14.2; Tenn. (p) § 904; Vt. (p) § 2.4.4(2)(b); W. Va. (p) § 61-4-2.

All of these codes and proposals differ in language from the Model Code formulation, though few of the variations create differences in substance. Of some significance is

the defense beyond a reasonable doubt.<sup>280</sup> The decided cases would seem to indicate that instances of renunciation of criminal purpose are not frequent, and that their occurrence is therefore improbable. Moreover, the facts that bear on such renunciation are most likely to be within the control of the defendant. Finally, this defense is obviously a matter allowed to be shown in mitigation, the status of which under the law prior to the Model Code was very uncertain and the allowance of which may present very difficult questions of fact.<sup>281</sup> Under these circumstances it is proper to require the defendant to come forward first with evidence in support of the defense. However, the Institute did not believe it appropriate to go further and place the burden of persuasion on the defendant, as have roughly half of the recent revisions.<sup>282</sup>

the variation adopted in statutes and proposals that explicitly provide that the actor must take further steps that prevent commission of the crime if abandonment does not by itself prevent it. For example, in the Delaware statute cited above, Subsection (b) provides:

In any prosecution for an attempt to commit a crime it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the accused avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish avoidance, by taking further and affirmative steps which prevented the commission of the crime attempted.

Substantially similar language may be found in the statutes, *supra*, of Alabama, Kentucky, Maine, New Jersey, North Dakota, Oregon, Pennsylvania and Texas, and in all of the proposals cited *supra*. Using slightly different language, Arkansas, *supra*, also clearly requires that the commission of the crime have been prevented. The Model Code has similar provisions in respect to liability for criminal solicitation and conspiracy, Sections 5.02(3) and 5.03(6), though not for attempt.

The Arizona provision, cited *supra*, makes it an affirmative defense to a prosecution for attempt that the defendant "gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the . . . result which is the object of the attempt." Similar language may be found in the statutes of Hawaii and Nebraska and the proposal of the District of Columbia, cited *supra*. Compare MPC Section 5.03(7)(c), relating to the duration of one's participation in a conspiracy.

<sup>280</sup> See Subsections (1), (2) and (3) of Section 1.12.

<sup>281</sup> See *Rex v. Page*, [1933] Vict.L.R. 351 (Austl.); cf. *People v. Johnson*, 131 Cal. 511, 63 P. 842 (1901); *Sparkman v. State*, 84 Fla. 151, 92 So. 812 (1922).

<sup>282</sup> For formulations that place the burden of persuasion on the defendant by a preponderance of the evidence, see Ark. §§ 41-704, -110(4); Conn. §§ 53a-49(c), -12; Del. tit. 11, §§ 541, 304; Haw. §§ 705-530(1), 701-115(2)(b); Me. tit. 17-A, §§ 154(2), 5(3); N.H. §§ 629:1(III), 626:7(1)(b); N.J. § 2C:5-1(d); N.Y. §§ 40.10(3), 25.00(2); N.D. §§ 12.1-06-05(3)(a), -01-03(3); Ore. §§ 161.430, .055(2); Tex. §§ 15.04(a), 2.04(d); U.S. (p) S. 1437 §§ 1001(b), 111 (Jan. 1978); Brown Comm'n Final Report §§ 1005(3), 103(3); Alas. (p) §§ 11.31.100(c), .81.900(b)(2) (H.B. 661, Jan. 1978); D.C. (1978 p) §§ 22-210(b), -103(2); Md. (p) §§ 110.15, 25.00(2); Mass. (p) ch. 263, §§ 49(b), 7(c); Tenn. (p) §§ 904, 204; Vt. (p) §§ 2.4.4(2)(B), 1.1.6(3); cf. Ky. §§ 506.020, 500.070.

For revised codes and proposals that agree with the Model Code position, see Ala. § 13A-4-2(c); Colo. §§ 18-2-101(3), -1-407; Ga. §§ 26-1003, -401(a); Ohio §§ 2923.02(D), 2901.05(A); Mich. (p) S.B. 82 § 1001(3); W. Va. (p) §§ 61-4-2, -1-4(b).

In considering the significance to be attached to abandonment of a criminal attempt, one solution that was rejected in drafting the Model Code was reduction of penalty in the event of abandonment.<sup>283</sup> Insofar as encouragement of desistance is concerned, reductions in sanction would have to be very great to have a substantial impact on those already engrossed in a criminal attempt; indeed, it is unlikely that anything short of complete immunity would suffice. And with respect to the question of dangerousness, it seems that once liability is established, sanctions should be linked to neutralizing the actor's dangerousness and determined on a broad basis with reference to the requirements of the particular offender. An automatic reduction in the case of abandonment would be inconsistent with this approach.

9. *Nature of Crime Attempted.* The general rule at common law, both in England and in the United States, has been that an attempt to commit a crime is punishable whether the offense attempted is a felony or a misdemeanor.<sup>284</sup> There was, however, a group of American decisions that supported the view that it is not criminal to attempt to commit a statutory misdemeanor that is not *malum in se*.<sup>285</sup> It is unlikely that these decisions represented the law when the Model Code section was being considered.<sup>286</sup> In any event, the exception has no justification and is not adopted by the Code.

Of the American jurisdictions that have enacted some form of general attempt provision, most make no distinction between felony and misdemeanor.<sup>287</sup> One statute is limited to attempts to commit felonies,<sup>288</sup> one is apparently limited to attempts to commit crimes punishable by imprisonment,<sup>289</sup> one is limited to attempts

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The remaining statutes and proposals cited *supra* in note 279 do not indicate placement of the burden on proof.

<sup>283</sup> All of the revised codes and proposals are in accord with the Model Code in rejecting this solution.

<sup>284</sup> *But cf.* Regina v. Moran, [1952] 1 All E.R. 803 (Crim. App.).

<sup>285</sup> United States v. Henning, 26 F.Cas. 265 (No. 15,348) (C.C.D.C. 1835); State v. Redman, 121 S.C. 139, 113 S.E. 467 (1922); Whitesides v. State, 79 Tenn. 474 (1883); See United States v. Stephens, 12 F. 52, 54 (C.C.D. Ore. 1882); Collins v. City of Radford, 134 Va. 518, 533, 113 S.E. 735, 740 (1922) (dictum); cf. Lamb v. State, 67 Md. 524, 10 A. 208 (1887).

<sup>286</sup> Corkran v. State, 203 Ala. 513, 84 So. 743 (1919); see Commonwealth v. Rodman, 34 Pa.Super. 607 (1907); United States v. Moses, 205 F.2d 358, 359 (2d Cir. 1953) (dissenting opinion).

<sup>287</sup> The statutes are cited *supra* in notes 3-5 & 7.

<sup>288</sup> N.M. § 40A-28-1.

<sup>289</sup> W. Va. § 61-11-8.

to commit felonies, batteries and thefts,<sup>290</sup> and one is limited to attempts to commit certain felonies or crimes punishable by imprisonment.<sup>291</sup> In those jurisdictions that have no common law crimes, omission of an offense from both the general and specific attempt prohibitions provides immunity for those who attempt to commit that offense.<sup>292</sup> The Model Code applies to attempts to commit all substantive crimes without limitation.<sup>293</sup>

One of the questions frequently litigated is whether there can be an attempt to attempt. As an abstract proposition of law the construction has been condemned by the majority of cases considering the issue,<sup>294</sup> and it seems as a matter of sound analysis that the construction is not necessary. An attempt to attempt can always be considered a more remote attempt to commit the same substantive crime,<sup>295</sup> provided, of course, that the conduct is sufficient to meet the basic test of liability. Thus, if an assault is an attempt to commit a battery, an attempt to assault can more properly be charged as itself an attempt to commit a battery and its sufficiency determined on that basis. In any case, convictions have been sustained for attempts to assault.<sup>296</sup>

The situation is somewhat different when the attempt is not described as such, but is defined as an act done with intent to commit some other crime. Among the traditional offenses burglary is such an attempt—a breaking and entering under certain circumstances with intent to commit a felony. But there has been

<sup>290</sup> Wis. § 939.32(1).

<sup>291</sup> Tenn. §§ 39-603, -604.

<sup>292</sup> State v. Sutherlin, 228 Ind. 587, 92 N.E.2d 923 (1950).

<sup>293</sup> None of the proposed criminal codes makes a distinction between types of substantive offenses. The proposals are cited *supra* in notes 4 & 7.

<sup>294</sup> Wilson v. State, 53 Ga. 205 (1874); State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939); State v. Davis, 112 Mo.App. 346, 87 S.W. 33 (1905); State v. Sales, 2 Nev. 268 (1866); State v. Hewett, 158 N.C. 627, 74 S.E. 356 (1912); Commonwealth v. Willard, 179 Pa.Super. 368, 116 A.2d 751 (1955); Wiseman v. Commonwealth, 143 Va. 631, 130 S.E. 249 (1925); Heubner v. State, 33 Wis.2d 505, 147 N.W.2d 646 (1967); Rex v. Snyder, 34 Ont.L.R. 318, 24 Can.Crim.Cas. Ann. 101 (1915). *Contra*, White v. State, 107 Ala. 132, 18 So. 226 (1894); People v. O'Connell, 67 N.Y.Sup.Ct. 109, 14 N.Y.S. 485 (1891); Commonwealth v. Adams, 11 Bucks County L.R. 233 (Pa. Q.S. 1961); Rex v. Boyer, 13 Can.Crim.R. 184 (Ont. Ct. App. 1951). In Rex v. Menary, 18 Ont.W.N. 379 (Ct. App. 1911), the court divided on the issue.

<sup>295</sup> See Burton v. State, 8 Ala.App. 295, 62 So. 394 (1913); Wilson v. State, 53 Ga. 205 (1874); State v. Sales, 2 Nev. 268 (1866); cf. State v. Davis, 108 N.H. 158, 229 A.2d 842 (1967).

<sup>296</sup> Allen v. State, 22 Ala.App. 74, 112 So. 177 (1927); Miller v. State, 37 Ala.App. 470, 70 So.2d 811 (1954); State v. Skillings, 98 N.H. 203, 97 A.2d 202 (1953); State v. Wilson, 218 Ore. 575, 346 P.2d 115 (1959) (including extensive documentation).

no difficulty in sustaining charges of attempted burglary. Nor has there been difficulty generally in finding attempt liability when the "substantive offense" is even more clearly an attempt: possessing burglar's tools with intent to commit burglary;<sup>297</sup> conveying tools into prison with intent to facilitate an escape;<sup>298</sup> offering a bribe;<sup>299</sup> exploding a substance with intent to cause personal injury;<sup>300</sup> employing a drug or instrument with intent to procure a miscarriage;<sup>301</sup> procuring a noxious drug with intent to supply it to another for the use in committing abortion.<sup>302</sup> For each attempt liability has been sustained. It would be possible to treat each of these acts as an attempt to commit the more remote substantive crime, but this is unduly cumbersome; the existing approach seems preferable. If a preliminary act is prominent enough to serve as the basis of substantive liability, it should also provide a sufficient foundation for attempt liability, and it can do so under this section.

#### Section 5.02. Criminal Solicitation.\*

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

<sup>297</sup> People ex rel. Blumke v. Foster, 300 N.Y. 431, 91 N.E.2d 875 (1950).

<sup>298</sup> Commonwealth v. Rodman, 34 Pa.Super. 607 (1907); see People v. Webb, 127 Mich. 29, 86 N.W. 406 (1901).

<sup>299</sup> People v. Bennett, 182 App.Div. 871, 170 N.Y.Supp. 718, *aff'd mem.*, 224 N.Y. 594, 120 N.E. 871 (1918).

<sup>300</sup> Commonwealth v. Kocher, 162 Pa.Super. 605, 60 A.2d 385 (1948).

<sup>301</sup> People v. Berger, 131 Cal.App.2d 127, 280 P.2d 136 (1955). *Contra*, Commonwealth v. Willard, 179 Pa.Super. 368, 116 A.2d 751 (1955); Commonwealth v. Adams, 11 Bucks County L.R. 233 (Pa. Q.S. 1961).

<sup>302</sup> Rex v. Thompson, [1911] N.Z.L.R. 690 (Ct. App.).

\* *History.* Presented to the Institute in Tentative Draft No. 10 and considered at the May 1960 Meeting. See ALI Proceedings 158 (1960). Subsection (3) was reworded as a result of discussion at that meeting of the parallel Subsection (4) of Section 5.01. *Id.* 151-57. Presented again to the Institute in the Proposed Official Draft and considered and approved at the May 1962 meeting. See ALI Proceedings 116-18, 226-27 (1962). For original detailed Comment, see T.D. 10 at 82 (1960). See also Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum.L.Rev. 571, 621-28 (1961), which in the main consists of the black letter and commentary of the Article 5 sections in Tentative Draft No. 10.

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## **APPENDIX 2**

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