

## CRIMINAL ATTEMPT—A STUDY OF FOUNDATIONS OF CRIMINAL LIABILITY

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### I.

#### HISTORY

WHOEVER has speculated on criminal attempt will agree that the problem is as fascinating as it is intricate. At every least step it intrigues and cajoles; like *la belle dame sans merci*, when solution seems just within reach, it eludes the zealous pursuer, leaving him to despair ever of enjoying the sweet fruit of discovery. For criminal attempt involves the very foundations of criminal liability; before one can conclude even a preliminary analysis, an appraising eye must be cast over almost the entire penal law—the definitions, the types of crime, the nature of “the act,” the sanctions—in order to unravel any thread of reason that can be discovered in the apparently unreasoned conglomeration of case and statute law, and exhibited doctrine.

In such circumstances the searcher turns first, almost instinctively, to the past, to the great dead and to what, of like nature, confronted them. But to speak of the “history of criminal attempt” without a word of caution would mislead from the very beginning. For only in a special sense can there be such a history. The word connotes rules that are both recent and vague. They provide hardly any aid to historical investigation. We need to set up additional criteria of significance to direct our course: the various interests involved, the behavior dealt with, the factual consequences of harmful conduct as regarded by select persons in position to control and to register their attitudes in the dominant institutions. The idea of “attempt” we shall not analyze precisely until after certain events and the judgments passed upon them have been specifically described. A common core of meaning, however, need not be presumed; it exists, in fact, as far back as one can trace its use.

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*Early Law*

That criminal attempt is not mere word-juggling is indicated by the ancient history of punishment for wrongdoing that fell short of that intended. Plato speaks of "one [who] has a purpose and intention to slay another who is not his enemy, and whom the law does not permit him to slay, and he wounds him, but is unable to kill him. . . ."<sup>1</sup> Such a person was to be regarded as a murderer, even indicted for murder and tried by the same tribunal.<sup>2</sup> But from respect for "fortune and providence" and "as a thank-offering to this deity, and in order not to oppose his will," the death penalty should be remitted, and banishment for life substituted, together with payment of compensation for the injury. Thus with barely more than a stroke of his pen, the philosopher, whose insight and delicate provocation have stirred thought for nearly 2,500 years, posed a simple case and suggested a manner of solution.

The Romans distinguished ordinary from atrocious crimes; concerning the first, they punished only occasionally for the attempt, and by a smaller penalty. As regards atrocious crimes, they emphasized the intent as manifested by behavior rather than what happened;<sup>3</sup> yet it is uncertain whether they punished the attempt equally with the intended crime.<sup>4</sup> Although the texts do not provide a general theory, the interpretations do; criminal attempt was frequently punishable. But the penalty usually had to be proportioned to the gravity of the acts done; a distinction between remote and proximate acts was made: in the former there was greater room for repentance, hence less severe penalty.<sup>5</sup> These fragmentary notes of ancient law<sup>6</sup> remind us that mature judgment passed upon

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1. 4 PLATO, *LAWS* (Jowett ed. 1871) 388.

2. *Ibid.* Cf. "To him whose feelings are tempered by thought, 'a man,' as Seneca says, 'is no less a brigand, because his sword becomes entangled in his victim's clothes, and misses its mark.'" 1 WESTERMARCK, *ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS* (2d ed. 1912) 247.

3. In the case of Williams, of Essex, for Treason (1619), "Doddridge said that the rule is *in atrocioribus delictis, punitur affectus, licet non sequatur effectus.*" 2 HOWELL, *STATE TRIALS* (1816) 1087.

4. Garraud says they did. *PRÉCIS DE DROIT CRIMINEL* (1934) 192-193.

5. Champcommunal, *Étude critique de législation Comparée sur la tentative* (1895) 24 *REV. CRIT.* 43-46. Criminal intent alone not manifested by behavior was not punishable. *Id.* at 41.

6. Cf. "'The general impression,' says Dr. Richey, 'produced by the rules in the commentary is that the attempt to commit an act was treated as equivalent to its commission, unless the results of the attempt were very insignificant.'" Introduction to Book of Aicill, p. cix. Quoted by CHERRY, *LECTURES ON THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES* (1890) 32.

Cf. "If any attempt is made to deprive in any wise a man in orders, or a stranger, of either his goods or his life . . ." Edward and Guthrum; ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* (1922) 109, cap. 12. "If, where men are drinking, a man draws his weapon, but no harm is done there . . ." Hlothhere and Eadric; *id.* at 21, cap. 13.

the problem of criminal attempt many centuries ago. The nature of the problem makes it not unlikely that it appealed to the speculative temperament of mediaeval scholars as it did to the Romans and Greeks; yet von Bar's research stresses the absence of any theory—though not of penalization—for what we may at this point term abortive wrongdoing.<sup>7</sup> In the 16th century criminal attempt was included in recognized codes: the *Carolina* in 1532 and the *Ordonnance de Blois* in 1579 are notable instances.<sup>8</sup>

Criminal attempt is conspicuous for its absence in early English law.<sup>9</sup> There is not the slightest suggestion of theory or general doctrine—indeed one could hardly expect any. But there seem to have been no specific findings of liability for wrong-doing that fell short of the major crimes.<sup>10</sup> Apparently in those forthright days, a miss was as good as a mile. And this Bracton tells us in almost so many words, pointing out, in connection with accessories and conspiracy, that they are punishable only for overt behavior, "but without any act not so, like the saying: 'For what harm did the attempt cause, since the injury took no effect.'<sup>11</sup> Nor ought precept, conspiracy, precept and counsel to do harm, unless some act follows."<sup>12</sup> Bracton plainly reveals a strong bias against penalizing any conduct short of action which resulted in actual injury, and "injury" had crude, physical denotation set by the then-proscribed felonies.

7. "But one may search in vain in the Customals of the Middle Ages for a theory of attempt; the texts dwell only on the accomplished act, without inquiring whether the offender had purposed to commit a greater offense . . . With greater reason, the mere planning of a crime is held not equivalent to committing it; one who admits in court that he was going to find a man in order to kill him will not be punished for murder; for 'the intent to kill, without the accomplished fact,' is not a crime. Such, indeed, had been the principle of the Germanic folk-laws." VON BAR, *A HISTORY OF CONTINENTAL CRIMINAL LAW* (1916) 157.

8. Champcommunal, *supra* note 5, at 47, n. 3.

9. "It [the old English law] had started from the principle that an attempt to do harm is no offence." 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1898) 508, n. 4.

"Ancient law has as a general rule no punishment for those who have tried to do harm but have not done it." *Id.* at 509.

10. 2 BRACTON (Twiss ed. 1878) 465, f. 145, 1. "Exception is sometimes made against this kind of appeal by general exceptions . . . as if the appellor has not . . . shown a wound to the coroners, or has shown only a graze or a bruise, a swelling, blows with a stick and not with a sharp weapon." *Id.* at 467. There is the ambiguous remark, "Likewise if a person has employed force to the womb of a woman, in order to produce abortion, he is liable." *Id.* at 465, f. 144b, 3.

11. *Id.* at 335-337, f. 128, 13.

Westermarck states that among primitive peoples, criminal attempt is either not punished at all or is punished less severely than the accomplished act. He cites several instances. *Op. cit. supra* note 2, at 241.

12. 2 BRACTON, *op. cit. supra* note 10, at 275.

But what of *voluntas reputabitur pro facto*,<sup>13</sup> and of Maitland's assertion "that the adoption, even for one limited purpose, of this perilous saying was but a momentary aberration" stimulated by excessive leniency in "murderous assaults which did not cause death?"<sup>14</sup> Two or three cases are generally stated to evidence the maxim: the mid-thirteenth century case<sup>15</sup> where Shardlowe, J. is reported to have said, "one who is taken in the act of robbery or burglary even though he does not carry it out, will be hanged according to the law."<sup>16</sup> The other cases are those of attempted murder — one by a servant who cut his master's throat and fled with his goods, the other by a wife's paramour who attacked the husband and left him for dead. The death sentence was imposed on the ground that felonies had been committed since *voluntas reputabitur pro facto*.<sup>17</sup>

On the face of the reports, it is apparent that these cases, which provide the only available evidence, were not actually cases of *voluntas reputabitur pro facto*. They can hardly be cited even as evidence of a "momentary aberration" in the common law, which penalized intent alone.<sup>18</sup> For there were acts — very damaging ones — and the maxim served not to extend culpability to sheer intent<sup>19</sup> but rather to preserve an appearance of consistency in the application of the extreme sanction to lesser ills than those covered.<sup>20</sup> The victim did not die — yet the accused should be executed. The recognized categories and sanctions were few and rigorous. Such consequent expansion of the law, masked in reverent and authoritative Latin, though crude to a later age, was well motivated, and, in any event, certainly not atypical.

13. A capitulary of Charlemagne provided: "Qui hominem voluntarie occidere voluerit et perpetrare non potuerit homicida tamen habeatur. liv. 7, ch. 151." Quoted by Champcommunal, *supra* note 5, at 47, n. 3.

14. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 9, at 477, n.

15. 27 Ass. pl. 38 (1353); see Sayre, *Criminal Attempts* (1928) 41 HARV. L. REV. 821, 823, n. 10.

16. Brooke adds: "query for at that time a man would not be hanged except for an act committed except in treason." Ab. 1573, Corone 106. And Fitzherbert reports Stoufford as having objected: "he did not put anything into practice, merely because his intent was such." Ab. 1565, Corone 202. The case is discussed by DALTON, COUNTRY JUSTICE (1619) 363, who accepts the *voluntas* maxim as law "in former times."

Cf. "But it seemeth, Ass. 27. Pl. 38, that he which is taken in the attempt (onely) of a Burglary, shall be hanged for it, although he have not put any thing in execution thoroughly, Lamb. page 267." YOUNG, A VADE MECUM AND CORNU COPIA, AN EPITOME OF MR. STAMFORDS PLEAS OF THE CROWN (1663) 89.

17. See Sayre, *supra* note 15, at 824-825.

18. "Our old law started from the other extremes:—*Factum reputabitur pro voluntate*." 2 POLLOCK AND MAITLAND, *op. cit. supra* note 9, at 477, n.

19. See EDEN, PRINCIPLES OF PENAL LAW (1771) 77-78.

20. Dalton suggests another possible use of the *voluntas* formula. After citing cases of a man who carried his sick father from town to town in cold weather, a harlot who placed her newly born child in an orchard, and an owner of a dangerous animal

Our conclusion, as to this phase of the problem at least, is certain: *mens rea* is necessary to criminal liability,<sup>21</sup> but *mens rea* is not sufficient.<sup>22</sup> These holdings become meaningful in the context of their operation. For purposive conduct, thinking is obviously necessary. And the precise import of mediaeval English law is that it knew nothing of thinking as "sub-vocal behavior;"<sup>23</sup> it distinguished on a level of what was observable and on a common-sense grasp of damage done. Such sturdy principle had practical effect, and for reasons quite apart from the frequent unavailability of evidence of the thinking — as will be seen especially in cases of treason. With thinking placed beyond the reach of legal control, the area of potential criminality was narrowed to talk (if observable harm ensued) and to action.

Although early English law had no doctrine of criminal attempt, there were many ways to check inchoate criminality, and to prevent crimes entirely. Indeed the system of frankpledge, surety for the peace,<sup>24</sup> hue and cry, private associations, etc., in some ways gave superiority to mediaeval over modern administration, as regards crime prevention. With reference to "incipient" or inchoate criminality, there were peace bonds for troublesome characters<sup>25</sup> and the institution of the justices and magistrates who were active conservators of the peace. There were the vagrancy laws and laws dealing generally with the crime of being a nightwalker, rogue or vagabond, or simply "without a livelihood." But the closest parallel to the later attempt was the law of unlawful assembly, rout and riot. It is a rout if three or more persons assemble for an illegal purpose and act toward its accomplishment "whether they put their intended purpose in execution, or not."<sup>26</sup> It is riot if they accomplish their purpose.<sup>27</sup> And

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which killed a man, all of which were held murder, he states: "And in these three last cases, *voluntas reputabitur pro facto*, death ensuing thereupon; For it may plainly appear, that they had a wil and meaning of that harme which followed, which will in them doth amount to malice, and so maketh their offences to be Murder." THE COUNTRY JUSTICE (1619) 219.

21. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 9, at 476-477.

22. *Id.* at 474-475.

23. "The thought of man shall not be tried, for the devil himself knoweth not the thought of man:"—thus at the end of the middle ages spoke Brian, C. J. in words that might well be the motto for the early history of criminal law . . . where there is no harm done, no crime committed; an attempt to commit a crime is no crime." (citing Brunner) *Ibid.* But query as to the last statement. Do not the authors fail to distinguish the "thought of man" from overt behavior that denotes "attempt"?

24. PULTON, DE PACE REGIS ET REGNI (1609) 22b #384. Cf. DALTON, *op. cit. supra* note 16, at 141, 143, 171. "Also against such as shall lie in wait to rob, or shall be suspected to lye in wait to rob, or shall assault, or attempt to rob another . . ." *Id.* at 171.

25. "But if one man do threaten another to beate him, the partie threatened may have the suertie of peace against him: for that beating may tend to maiheming or killing of him, which the suertie of peace might have prevented." PULTON, *op. cit. supra* note 24, at 19 #72.

26. *Id.* at 25.

27. *Ibid.*

if they simply meet in such circumstances even though "they depart by their owne consent, upon some feare conceived, or other cause," it is unlawful assembly.<sup>28</sup> The significant criterion of the offenses above was requirement of three or more persons; otherwise the conceptual proximity of rout and unlawful assembly to attempt is apparent.

Finally we must note the early treatment of certain misconduct that fell short of the commission of any recognized crime. Such behavior was regarded not as inchoate but as consummated crime. Thus as to going armed, carrying "pistolls that be charged,"<sup>29</sup> keeping guns or crossbows in the house,<sup>30</sup> lying in wait, drawing a sword "to strike a justice,"<sup>31</sup> witchcraft "to hurt or distroy any person in his or her body, although the same be not effected."<sup>32</sup> As the legal system matured, reliance was upon such doctrinal development rather than upon the older administrative devices and police organization.<sup>33</sup> But it is not until well into the 16th century that the law of criminal attempt receives unmistakable and intensive stimulation from the decisions of the Court of Star Chamber.

### *Influence of Treason*

Understanding the distinctive growth of the criminal law in the Star Chamber as well as in the later common courts requires a careful taking-into-account of the law of treason. The early insistence not alone upon overt conduct but upon "consummated" major criminality must now be placed in its proper relation to the entire criminal law. Treason provides the plain frame of reference. Just as cattle-lifting suggested the foundation-idea for larceny, so did treason for criminal attempt.<sup>34</sup>

Of treason there is no beginning; it appears as far back as one can go in all recorded cultures.<sup>35</sup> What needs emphasis in our present context is that treason in English law<sup>36</sup> concerned a great variety of interests that touched the king, his family and his business; and, even more, that a great congeries of behavior falling far short of the intended goal, was treason.

28. *Ibid.* Cf. DALTON, *op. cit. supra* note 16, at 199, 200.

29. DALTON, *op. cit. supra* note 16, at 31.

30. *Id.* at 56.

31. *Id.* at 211.

32. PULTON, *op. cit. supra* note 24, at 11 #36.

33. Another important factor was legislation which, though not employing the word "attempt" or a synonym, yet made many types of inchoate wrongdoing, criminal. Interpretation here would emphasize the social harm, coupled with unconcern for doctrine or systematization. See (1328) 2 EDW. III, cap. 3, (1388) 12 RICH. II, cap. 6, (1541) 33 HEN. VIII, cap. 6, (1549) 3 and 4 EDW. VI, cap. 5, (1552) 5 and 6 EDW. VI, cap. 4.

34. Pollock and Maitland point out that treason provided the great exception in the early law by its penalization of attempts. *Op. cit. supra* note 9, at 503, 508.

35. 1 WESTERMARCK, *op. cit. supra* note 2, at 45-48.

36. The usual punishment was to be drawn, hanged, disembowelled and beheaded. See generally, PARRY, HISTORY OF TORTURE IN ENGLAND (1933).

The English law of treason prior to the middle of the 14th century is spotty and uncertain.<sup>37</sup> There were numerous Anglo-Saxon dooms against this most heinous of all wrongs.<sup>38</sup> The behavior stigmatized<sup>39</sup> was frequently much less than accomplishment of the intended evil.<sup>40</sup> Failure to reveal knowledge of a plot against the king, predicting that in the near future John would not be king, gross insults to the regal dignity, aiding the king's enemies, flight from battle, adultery with the queen, forgery of the king's seal and counterfeiting his money are met with in the feudal law<sup>41</sup> as well as killing the king or "compassing to do so."<sup>42</sup> These are among the early instances of treason that reveal both its broad scope and the inchoate character of much of the proscribed behavior.

But the fount of the English law of treason as well as the framework of its systematic development is the statute of 25 Edward III (1352),<sup>43</sup> which combined and supplemented those above. From the latter 14th century on many similar statutes were passed. The most severe was that of 21 Richard 2 (1397) which made compassing the death of the king treason even though no overt act had been committed. It was repealed two years later by an act whose preamble remarked upon the dangers to security resulting from the prior law.<sup>44</sup> The subsequent statutes are too numerous even for brief description here;<sup>45</sup> they included such a

37. 1 PIKE, A HISTORY OF CRIME IN ENGLAND (1873) 223.

38. See 1 THORPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND (1840) 203 #4, 313 #30, 325 #37, 409 #58.

39. *E.g.*, "If anyone plots against the life of the king . . ." Alfred; ATTENBOROUGH, *op. cit. supra* note 6, at 65, cap. 4.

40. "If anyone fights or draws his weapon in the Kings hall . . ." *Id.* at 69, cap. 7.

41. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 9, at 504-505, 507; 2 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 244.

42. From the *Mirror*, quoted by STEPHEN, *ibid.* "In 1238 a man who attempted the king's life was drawn, hanged, beheaded, quartered." 2 POLLOCK AND MAITLAND, *op. cit. supra* note 9, at 501, n. 1.

43. This statute made it treason "(1) to compass or imagine the death of the king, his queen or eldest son; (2) to defile the king's wife or his eldest unmarried daughter or his eldest son's wife; (3) to levy war against the king in his realm; (4) to be adherent to his enemies, giving them aid and comfort; (5) to counterfeit the king's great or privy seal or money; (6) to bring false money into the realm; (7) to slay certain officers or justices being in their places doing their offices." 2 POLLOCK AND MAITLAND, *op. cit. supra* note 9, at 502, n. 6.

44. Discussed in 2 STEPHEN, *op. cit. supra* note 41, at 253-254. "It," remarks Hale, referring to 21 Rich. II, "was too dangerous a law to put men's bare intentions upon the judgment even of parliament under so great a penalty, without some overt-act to evidence it." 1 HALE, PLEAS OF THE CROWN (1736) 111.

45. Stephen has the best historical survey. *Op. cit. supra* note 41, at c. 23. After listing several statutes of Henry VIII, Stephen states: "Each of these statutes . . . made it high treason to attempt to alter the settlement . . ." *Id.* at 258. Perhaps the extreme use was Henry's (8th) statute making it treason for a woman whom the King thought "a pure and clean maid" to marry him if she be not so, without telling. This Stephen calls "an unqualified disgrace to his memory." *Id.* at 259.

variety of inchoate behaviors as "to wish, will, or desire by words or writing any bodily harm to the King, queen, or their heirs apparent;<sup>46</sup> to riot [if twelve or more persons involved] with intent to kill or imprison any of the Privy Council;<sup>47</sup> to pray that God would shorten the Queen's life;<sup>48</sup> to absolve any person from obedience to the Queen, or to attempt to do so;<sup>49</sup> to compass, imagine, invent, devise, or intend death or destruction . . . of the person of the King;<sup>50</sup> or attempt to prevent the succession as established by Act of Settlement."<sup>51</sup> Even more than the statutes, the vocabulary of the treason trials and of the indictments was frequently that of attempt.<sup>52</sup>

We have seen that early English law did not propose to "try the thought of man," and that even in treason, the notable exception (the statute of 21 R. 2) was short-lived. The treason statutes spoke of "compassing and imagining,"<sup>53</sup> but the 25 Edw. III, and its successors, save the above instance, required an overt act as evidence of the intention.<sup>54</sup> But the overt act need not have operated in the least actually to bring about the end sought.<sup>55</sup> Thus, writing and sending treasonous letters to the post office, even though they were intercepted, constituted an overt act.<sup>56</sup> In the famous trial of Algernon Sidney it was urged that what men write "in their own closets" could not be treason unless published

46. (1514) 6 HEN. VIII, c. 13; (1534) 26 HEN. VIII, c. 13.

47. 2 STEPHEN, *op. cit. supra* note 41, at 260.

48. 1 and 2 Ph. and M., c. 9.

49. (1581) 23 ELIZ. c. 1.

50. (1662) 13 CHARLES II, c. 1.

51. (1702) 1 ANNE c. 17. See 2 STEPHEN, *op. cit. supra* note 41, at 262, n.; and FOSTER, DISCOURSE ON TREASON, IN CROWN LAW (1762) 195.

52. Thus, if an almost random selection is examined, we read that ". . . the Prisoner at the Bar stands indicted for no less than for an intention and endeavour to murder the King; For an endeavour and attempt to change the Government of the Nation, so well settled and instituted, and to bring us all to ruin and slaughter of one another, and for an endeavour to alter the Protestant Religion . . ." The Tryal of Edward Coleman, Gent. (1678) 7; the Trial of Robert Earl of Essex, and Henry Earl of Southampton for High Treason (1600), 1 HOWELL, *op. cit. supra* note 3, at 1334, 1355.

53. "These words, at this day, do not convey the proper meaning of the original 'compasser ou imaginer' . . . I believe they would be justly rendered by the words 'attempt or contrive.' Many passages contemporary with the statute, could be brought to shew that this was the meaning of the lawmakers . . . What has occurred in my reading, would lead me to derive it from 'machinari,' not from 'imaginatio.' Glanville and Bracton and M. Paris use that verb where those who came after them, writing in French, use 'ymaginer.'" Note by Luders, 7 HOWELL, *op. cit. supra* note 3, at 961-962.

54. 1 HALE, *op. cit. supra* note 44, at 107, 2.

55. The following casts doubt and reveals a varying standard. Lord Chief Justice Abbott: "I have already intimated, that any act manifesting the criminal intention, and tending towards the accomplishment of the criminal object is, in the language of the law, an *overt act*." Trial of Arthur Thistlewood, for High Treason (1820), 33 HOWELL, *op. cit. supra* note 3, at 685. (Italics supplied).

56. 14 HOWELL, *op. cit. supra* note 3, at 1376, n.

— but without success. "I have been told" said the Lord Chief Justice, "Curse not the king, not in thy thoughts, not in thy bedchamber, the birds of the air will carry it. I took it to be the duty of mankind, to observe that."<sup>57</sup> This was no doubt the exaggeration of official fervor; still there was an overt act — hence no trial for mere thinking treason.<sup>58</sup> Moreover, the overt acts intended to be proved had to be alleged in the indictment.<sup>59</sup> Thus treason, though differing most significantly from the basic principles of early common law in its penalization of attempts, nonetheless, in conformity with that law, insisted upon overt behavior as a minimum condition of culpability. Though intention was alleged to be the essence of the crime, yet "the law judgeth not of the fact by the intent, but of the intent by the fact."<sup>60</sup>

The antiquity of treason, the tradition of its pattern, and, from the 14th century, its amplification by statute and decision remove any need for speculation as to its pervasive effect on the criminal law. The penalization of "inchoate criminality" is important as exception to general doctrine. The social significance of the exceptional doctrine is equally important — we deal not with some technicality or minor interest, but with the paramount law and the very peak of mortal power. It is danger to the king, his family, and his business, and what his courts, his law and his army do about it that is involved. Attempt is criminal in treason; statutes and cases almost without end enforce and deepen the imprint of the exception.

The job of the Star Chamber and of the common law courts later on, viewed in this perspective, becomes almost routine. The Chamber needed no inventive genius to provide new legal theory. It needed only to recognize that the interests of the general public were of sufficient importance to merit a protection somewhat similar to that which had shielded the king for centuries.

### *The Court of Star Chamber*

A survey of the history of the English common law of crimes in broad outline reveals, by the thirteenth century, an ample development of the major felonies, the formulation of relatively precise categories of legal control of brute force, of crimes of violence. Theft, of mixed variety, is latterly intermingled, and in the succeeding centuries, it provided the familiar avenues for coping with non-violent criminality of serious social

57. Trial of Sidney (1683), 9 HOWELL, *op. cit. supra* note 3, at 868.

58. Cf. "An overt-fact is a Declaration of the Mind; Letters, Tokens, Speeches, Messages, and such like, be overt-facts." The Trial of Thomas Howard (1571), 1 HOWELL, *op. cit. supra* note 3, at 1003.

59. The Trial of Thomas Hardy for High Treason (1794), 24 HOWELL, *op. cit. supra* note 3, at 894. Cf. EDEN, PRINCIPLES OF PENAL LAW (1771) 109-110; FOSTER, DISCOURSE ON HIGH TREASON, IN CROWN LAW (1762) c. 1, § 1.

60. The Trial of Sir Christopher Blunt *et al.* (1600), 1 HOWELL, *op. cit. supra* note 3, at 1410.

consequence, *i.e.*, towards control of that other aspect of the Janus-like scourge, namely, fraud.<sup>61</sup> This development rises to its peak in the eighteenth and early nineteenth centuries. From the sixteenth century well on into the nineteenth extends the third major development: the growth of a bulky body of law dealing with a vast variety of lesser offenses—the misdemeanors. The development of this body of law by the Court of Star Chamber has, as yet, been almost entirely neglected by the historians of the criminal law. One small segment of that important division of the criminal law enlists our present interest.

The Star Chamber was a truly remarkable court; it emerged from the King's Council itself; used all manner of then conceivable sanctions; limited its jurisdiction only as its own spontaneous discretion suggested and inflicted many kinds of punishment save only the capital penalty.<sup>62</sup> The decisions of this court must be read, unavoidably, with knowledge of the subsequent technical character of our law; if, however, some sense of perspective is preserved, it is not surprising to find, for example, that various assaults, mayhems, batteries with intent to kill, threats, challenges and conspiracies were joined indiscriminately under the broad rubric "riot and misdemeanor." The long, informal, rambling bills frequently ran against a number of defendants charging different crimes to various individuals, but they were all more or less interrelated in one transaction or series.<sup>63</sup> A great variety of wrongs were complained of, and perhaps most of them might have been taken to the king's courts, so far as technical right applied. Sometimes the wrongdoings were denominated "misdemeanors" but more usually they were set forth without any indication of their being within any recognized criminal category. And for a long time there was apparently no limitation whatever on pleadings.<sup>64</sup>

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61. Larceny was, of course, of ancient origin; the statements above are intended to characterize the broad contours of the development of English criminal law, and to emphasize the origin within common law, of such offenses as larceny by trick, embezzlement and false pretenses.

It will be noted that this evolution is along the line of progressively refined community morals—a matter of some significance for the thesis to be maintained in the latter part of this paper.

62. COKE, FOURTH INSTITUTE 66.

63. *E.g.*, "The cause of hearing between Lady Davers, plaintiff, . . . and others, defendants, for a riot, and against one Stumpe, counsellor at law—for advising them and against one Mathewes, Coroner, for extortion and misdemeanors in his office," etc. *Danvers v. Longe and others* (1596), HAWARDE, LES REPORTES DEL CASES, IN CAMERA STELLATA, 1593 to 1609 (Baildon ed. 1894) 49.

64. "Another motion was made against the excessive length of a bill containing 125 sheets of paper close written, which Sir Francis Bacon would have excused with a purpose to avoid multiplicity of bills; but the Court did much condemn it, and thereupon the ancient order of the Court was remembered, and now confirmed, that no bill should contain above fifteen sheets of paper; and for this long bill the pl. was fined by the whole Court at 40*li.*" *Id.* at 263.

As to substantive offenses, many emerging misdemeanors are clearly recognized. But as to legal theory, the very premises that the justices proceeded upon as a special tribunal militated against the development of established doctrine. Consequently, the cases are not readily classified according to any criterion employed in the modern scheme.<sup>65</sup> Yet, however crude the complaints, all the essential elements of the later crimes are plainly present; the decisions of the Chamber reveal abundant movement towards modern criminality. The facts exhibit all stages of accomplishment of intended crimes. Threats, challenges<sup>66</sup> and words "tending to a challenge" were the most incipient wrongs held punishable. Nip potential violence in the bud—and that, without hindrance from such notions as "preparation"—is a guiding rule. For the times were plainly quarrelsome; there were many cases of "lying in wait" intending to assault, beat, murder and so on.<sup>67</sup>

Extending beyond this initial stage are cases which still fall short of assault: the defendant "set his hand upon his dagger;"<sup>68</sup> the wrongdoers are punished in the Chamber. For behavior may fall short of assault, and still be dangerous. It makes a difference when that is the chief test. Thus, in an interrogatory to defendants, it was asked "whether they

65. It is impossible to generalize regarding the nature of the majority of offences over which the Star Chamber took jurisdiction. The following are some of the offences reported in HAWARDE, *op. cit. supra* note 63: spreading slanderous news (p. 39), maintenance (p. 41), heretical words (p. 41), wearing pistols *in terrorem populi* (p. 42), slandering the sentence of the court (p. 64-5), buying and selling corn out of market (p. 76), building cottages in London contrary to the proclamation (p. 79), champerty (p. 91), procuring of perjury (p. 95), conspiracy for misprison of treason (p. 97), slander against the Lord Chief Justice (p. 99), extortion (p. 105), for making an arrest in church during services (p. 112), libel (p. 152), cozenage (p. 154), barratry (p. 176, 230), magic and conjurations (p. 251). "For these offences they were resolved they might by law impose the greatest punishment they could but death." *Id.* at 251.

66. Henry Peterche v. John and Abbone Prior (1562), BURN, THE STAR CHAMBER (1870) 61.

"Mr. Attorney shewed that this Theodore Kelly had written a letter to Sir Arthur Gorge, tending to a challenge . . ." "Soe the Court proceeded to sentence, and declared that single combattles are very odious . . . and that nothinge tendinge to such duells is to be allowed. Men are not to be their owne revengers." Attorney-General v. Kelly (1632), GARDINER, REPORTS OF CASES IN THE COURTS OF STAR CHAMBER AND HIGH COMMISSION (1886) 112, 114.

For cases of threats, see Wymark v. Fynes (Hen. VII), 16 SUSSEX RECORD SOCIETY, COURT OF STAR CHAMBER (1913) 2; Mutton v. Coke (Ph. and M.), *id.* at 88; and for "threat and menace," Saxbeers v. Spilman (Ph. and M.), *id.* at 91.

67. Complaint of George Dukkett and others, 10 COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE (Salt ed., n.s., 1907) 171. Also Feners v. Aston (1533), COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE (Salt ed. 1910) 27. "Waylaying a man to assault or beat him is an offence ever held worthy of the sentence of this court . . ." Hudson, *A Treatise on the Court of Star Chamber*, in 2 HARGRAVE, COLLECTANEA JURIDICA (1791) 88.

68. Grosvenour v. Leveson (1537), COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE (1910) 66-67.

or any of them had not purposed to slay or at least to hurt the said Richard Alkyn? and how many times have they gone as well through the said park as abo . . . in other places with bows and arrows and other unlawful weapons to the intent to have brought to pass that their ungracious purpose?"<sup>69</sup> There are also cases which include behavior which falls short of assault but constitute attempts rendered ineffective by timely intervention.<sup>70</sup> Beyond that were situations that fit snugly into modern definitions of assault. For example: "the Lord Viscount Savill strooke at Sir John with his drawn sword, and followed after him and drove him into a plush of water . . . That thereupon divers swords were drawn, and one of my Lords men struck at Sr John Jackson with his sword but missed him narowlie . . ." <sup>71</sup>

Many complaints of assault and battery, joined almost invariably to charges of riot, were almost vocal in their accusation of intentions to murder. Indeed the later standardized "assault with intent to kill" was almost completely formulated. Intent to kill, like the routine allegation of "riot," became part of a set formula for enlistment of the special court's aid.<sup>72</sup> Thus an alleged wrongdoer "did hurt and wound the Said

69. (Hen. VIII) 10 COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE (1907) 84. Cf. *Dean of Wells v. Hardwich and others* (Hen. VII) (1493-1498), PROCEEDINGS IN THE COURT OF STAR CHAMBER (Bradford ed. 1911) 56; *Cappis v. Cappis* (1548), *id.* at 265.

70. Complaint of Edw. Aston, 10 COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE (1907) 108. The complaint (*id.* at 106) illustrates the composite character of the typical charge. It alleges riot, a serious battery, assault, and the following attempt: "the defendant commanded Thomas . . . his servant who then had a bow bent and arrows ready in his hand to shoot said complainant and as said Thomas was drawing his bowe to have shot an arrow at said complainant, his bowstring was cut asunder by chance by one of defendant's servants as they were striking with their swords at the servants of complainant . . ." And it concludes that "he takes great boldness to continue the same, unless condign punishment be shortly provided by your most gracious highness"—a plea which suggests that deterrence may be something more than slim theory.

In a similar complaint strongly suggestive of the later recognized attempt, the complainant slyly asserts: "the said Ralph Agard and the other mysruled persons began to draw their bows with arrows in them, and would have shot at your said subject if the servants of your said subject had not quietly cut the bow strings of the said 'misruled persons.'" *Longford v. Bykley* (1540), COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE (1910) 45.

71. *Att'y-Gen'l v. Savile and others in the Star Chamber* (1632), GARDNER, *op. cit. supra* note 66, at 145. Cf. *Kenneth v. Gawen and others* (1606), HAWARDE, *op. cit. supra* note 63, at 264-266, and *Henry Peterche v. John and Abbone Prior* (1562), BURN, *op. cit. supra* note 66, at 61.

72. "Nearly all the cases we have before us allege riot in some form or another. In fact the bills of the plaintiffs betray a suspicion that where no riot could be alleged the defendant might claim to be removed from the jurisdiction of the Star Chamber, and hence we get a constant allegation of riot in the forefront of cases which seem otherwise to be within the scope of the common law courts." PROCEEDINGS IN THE COURT OF STAR CHAMBER (Bradford ed. 1911) 21. Cf. *Cheyney, The Court of Star Chamber* (1913) 18 AMER. HIST. REV. 727, 734.

Geoffrey and had him utterly slain if by God's help he had not been preserved and defended by the said servant . . ."<sup>73</sup> Such complaint is common.<sup>74</sup> Related to the above cases, and almost invariably charging "riot," assault and battery were complaints alleging attempted forcible ejection.<sup>75</sup> While most of the cases dealt with serious assaults, there were occasional instances where, despite formal allegation of riot, the facts were closer to some other recognized wrong than to personal injury. In a number of the cases, one surmises that the more criminal purpose of the defendant is put forth as the major ground for enlisting the court's assistance, and that the attack on the complainant was, in fact, slight. Thus it is alleged that the defendants did come "supposing that

73. *Marven v. Ford* (Ph. and M.), 16 *SUSSEX RECORD SOCIETY, COURT OF STAR CHAMBER* (1913) 87. And in *Prior of Canwell v. Men of Drayton* (1517) it was said "some badd take hym and some badd kylly hym, so that your seid orator was fayne to flee his wey on his horsebake after the moste hasty manner he cowde toward his owne house, and the seid ryotouss pursued on fote soo fast your seid oratour to have killed hym that they were almoste as soon at the house of your seid oratour as he coude be upon his horsebacke, and then they made there boste openly that if they myght have taken your seid oratour he shuld never have had tyme to complayne nother to Kyng nor to Cardinall." *COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE* (1910) 8, 9.

74. *E.g.*, "then and there assaulted your orator . . . 'myndyng to have slayn and mured hym' . . . the said riotous persons then and there . . . did forcibly break the 'head' of one George Marshall, and wounded your orator . . . striking him upon the head so 'that he of long season was like to have dyed thereof.'" *Bill of Complaint of Richard Avere, 10 COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE* (1907) 119 "riotously assembled . . . 'so beet and woundyd hym' and cruelly maimed his right hand . . . and . . . 'dayly doo lay away to murder yor said subject.'" *Bill of Complaint of Robert Austen, id.* at 120; "and then and there made assault upon William Astell, tenant of the same, to the intent to have murdered the said Astell." *Id.* at 129, 131. See also, *Complaint of Bradbury and Bromley, id.* at 135-6; *Complaint of Henry Brearton, id.* at 140; *Complaint of Ranulf Brett, id.* at 141. See also *Tonaclyffe v. Burgh* (1538), *COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE* (1910) at 43; *Harcourt v. Harcourt* (1543), *id.* at 50-51; *Stendolf v. Hensley, id.* at 52; *Geffray v. Lord Dacre, id.* at 40; *Morgan v. Morgan et al.*, (5 Car.), *Star Chamber Reports for the Years 1625, 1626, 1627, 1628*, 3 *RUSHWORTH, HISTORICAL COLLECTIONS*, app. 26. See *Cheyney, supra* note 72, at 727, 734. For an example of how from the view of later categories the various offenses are mingled, see *Brighthouse v. Poole et al.*, (4 Car.), 3 *RUSHWORTH, op. cit. supra* note 74, at app. 16.

75. *Best, a pauper v. Neale and Winter and others* (1632), *BURN, op. cit. supra* note 66, at 122. "Neale wishing to get possession of plaintiff's house, tried to starve out the plaintiff, his wife, children, and mother, and took away a woman's horse, who was going to them with food. The mother, aged 80, died." In a similar case, plaintiff's husband had permitted his tenants to use certain common land. On his death, this stopped. "The tenants conspired together to regain this enclosed common as before, and to effect this they collected a common purse, and went to . . . one Strumpe . . . who advised them . . . to go two only together [note avoidance of riot which required three or more persons] and to destroy the poles, ditches and 'quicksettes' which they did accordingly . . ." *Danvers v. Longe and others* (1596), *HAWARDE, op. cit. supra* note 63, at 51, also app. III. *Cf. Hawarde v. Whitbroke* (1608), *id.* For other cases of alleged riot and ejection to obtain land see *PROCEEDINGS IN THE COURT OF STAR CHAMBER* (Bradford ed. 1911) 61, 66, 92, 109, 111, 112, and 127; and 16 *SUSSEX RECORD SOCIETY, COURT OF STAR CHAMBER* (1913).

your orator had been there, for that intent and purpose only to have murdered and slain your orator, who at that time was absent."<sup>76</sup> Such cases suggest a basis for later distinction between attempt and aggravated assault, and give a major impetus towards penalization of attempt; the defendant's actions reveal a really great criminality of mind—hence serious injury is to be expected unless he is stopped.

In small communities, characterized by forthright methods of settling disputes, slander was a serious matter. And a court, not restricted by specific prescription,<sup>77</sup> penalized language that was less than slander. Thus, charged with writing a libelous letter, the "defendant pleaded that it was private and sealed up, and not *published*, but the court said that it contained infamous matter and might have led to bloodshed, and therefore punished the defendant."<sup>78</sup> In several connections certain talk is criminal. A defendant was punished for "falsely going about to prove one . . . to be a traitor."<sup>79</sup> Solicitation is fairly frequent,<sup>80</sup> and subornation of witnesses is common.<sup>81</sup>

76. Complaint of Richard Cruse, COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE (1907) 169. Also *Hill v. Corbette* (1597), HAWARDE, *op. cit. supra* note 63, at 69. In *Ede v. Wynson*, a husband complained that the defendants unlawfully assembled "supposing that your orator had Joan his wife then and there in his company, and intending and purporting with force and arms to have taken the said Joan from him, did riotously assault him at Southwater . . . so that he was put in great fear and danger of his life . . ." (Hen. VIII) 16 SUSSEX RECORD SOCIETY, COURT OF STAR CHAMBER (1913) 29. In a similar case, the complaint is that the defendant "came divers times into the house of your orator and forcibly would have ravished his wife." (Hen. VIII) 10 COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE (1907) 83.

77. "And the Lord keeper ordered this accordingly, saying . . . in such great cases, in which there was great mischief, and it was so necessary for the public good, a precedent was not necessary to direct them, but they could make an order according to the necessity and nature of the thing itself." HAWARDE, *op. cit. supra* note 63, at 144.

78. *Sir Wm Hall, Kt., v. Thos. Ellis* (1590?), BURN, *op. cit. supra* note 66, at 73. Cf. In a case involving false accusation of an attempt to murder, the plaintiff alleged that Wood "hathe charged the plaintiff that he should secretly intend the poisoning of the Earl of Shrewsbury, his brother, by this defendant . . . For the said Wood hath suggested that more than three years since this plaintiff wrought secretly underhand with this defendant to poison the said Earl by gloves." *Talbot v. Wood* (1595), HAWARDE, *op. cit. supra* note 63, at 13; explained in *Earl of Shrewsbury v. Talbot*, *id.* at 16. *Att'y-Gen'l ex parte Chamberlain v. Pearce and others* (1602), *id.* at 125.

79. CROMPTON, STAR CHAMBER CASES (1881) 26.

80. "Thos. Palyn and Beckenham, committed for falsely advising Cuthbert Langlen 'to raise money.'" (2 Hen. VIII) BURN, *op. cit. supra* note 66, at 41. "A woman [was] fined £500, for practising to get her husband whipped, 'and Diat the parson who under took it.'" *Dyman v. Byrkcliffe* (1562), *id.* at 61. Cf. "Henry Dingley and 2 others charged with a conspiracy to murder one baptists Bassena, an Italian, one of the Queen's musicians, by the procurement of one Jeremy Frozner (an Italian fled beyond the seas)". (4 Eliz.), *id.* at 62-63. Cf. *Praty v. Midmore* (Hen. VIII), 16 SUSSEX RECORD SOCIETY, COURT OF STAR CHAMBER (1913) 77.

81. "R. Brooke v. Wm. Fullwood et al. 'for procuring one Green that was executed for felony, to accuse plt. as accessory, for which he was arraigned and convicted upon

Quite a different type of situation is illustrated by frequent complaint of abduction of an heiress for the purpose of marrying her. The protection of the fortunes of noble families is an obvious interest; such abduction was early penalized.<sup>82</sup> So, also, in the Star Chamber, as to attempts to marry heiresses. Thus, it is complained that certain defendants "practised" to contract the marriage of an heiress under eleven; that they "made her subscribe to a writing, also obtained a license and endeavored to marry them in Greenwich Park."<sup>83</sup>

In the cases occasional use of words such as "attempt," "endeavor," or a synonym later became technical vocabulary. Familiar is Hudson's remark that "ATTEMPTS to coin money, to commit burglary, or poison or murder, are in ordinary example."<sup>84</sup> He also stated that duelling was punishable because it was "a preparation to murder," and he continued, "for if a man endeavour to murder or poison a man, that endeavour is punishable in this court, although it never came in act . . ."<sup>85</sup> In one case, after the usual allegations of riot, assault, and battery, it is asserted that the defendant "spit thrice in his [P's] face, and attempted to strike up his heels."<sup>86</sup> Again, a complaint that defendants were hunting in his park but fled when they saw the keepers stresses "the very evill example of all other which shall attempte the lyke . . ."<sup>87</sup> The loose

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their evidence, and only escaped by his Booke.' [i.e., clergy] Fleet and £50." (31 Eliz.), BURN, *op. cit. supra* note 66, at 70. Cf. malpractice against an attorney for "tamperings with his witnesses." Att'y-Gen'l v. Casen and others, GARDINER, *op. cit. supra* note 66, at 131.

"Escourt, Knight and Bart v. Carleton, Esq. Carleton, hearing that Plaintiff was charged with the murder of Mary Winkle, became a suitor to the King for the forfeiture of his estate, and having obtained a grant of it! prosecuted the plaintiff by indictments and tampering with witnesses, to convict him of the murder. Committed and fined 500 marks." (1630?), BURN, *op. cit. supra* note 66, at 107.

Conspiracy to charge Phips, of Lechlade, with a rape, subornation of perjury, etc. Committed and fined. Phips, clerk v. Eyres and others, *id.* at 109.

82. "In Trinity Term it was adjudged that the girl not being an heiress or having estates, she was not within the statutes (4 and 5 Ph. and M.)." *Bruton v. Morris et al.* (15 Jac.), BURN, *op. cit. supra* note 66, at 173.

83. Att'y-Gen'l v. Thos. Rogers, May Partridge, and others (1631), *id.* at 112. For similar case of "endeavour to marry an heiress," etc., see *Oates v. Goodhand, id.* at 142; *Tylley v. Meere* (27 Eliz.), *id.* at 67. In *Cots v. Goldburn and others* (34 Eliz.), *id.* at 71, defendant was charged with "unlawfully taking away Ann Cots, for a supposed marriage, soliciting her love to love him, and she rejecting his love, he then sought by practising, and other undue means and sorcery, and witchcraft, to attain his purpose." See also, *Woodrow v. Crispe et al.* (1625), 3 RUSHWORTH, *op. cit. supra* note 74, at 5, 6, and *Shelly v. Zinzan et al.* (1626), *id.* at 13.

84. Hudson, *op. cit. supra* note 67, at 79.

85. *Id.* at 87.

86. *Vane v. Morgan* (1626), 3 RUSHWORTH, *op. cit. supra* note 74, at app. 10.

87. *Clyfton v. Wylliams et al.* (1552-8), PROCEEDINGS IN THE COURT OF STAR CHAMBER (Bradford ed. 1911) 293.

use of the word is apparent; yet this very vagueness served a purpose — to provide a catch-all.<sup>88</sup> Occasionally the language described behavior which closely approximated the later standardized charge. Thus, after allegations of beating, and setting fire to the complainant's hedges, it is asserted specifically that the defendant "attempted to set fire to his house."<sup>89</sup> Clearly the idea of abortive wrongdoing is present; the behavior is frequently punished, and the modern terminology itself is sometimes employed.

As one surveys the gamut of complaints entertained — especially the numerous ones of assault, riot, serious attacks to kill and various breaches of the peace — all disturbing, dangerous and potentially quite serious — one sees a growing recognition of a great variety of relatively lesser wrongs that ought to be put down — especially since for one reason or another the regular courts offer no aid. The broad ramifications of the law of treason must have provided at least a more or less consciously noted point of reference, if not of precedent. Within the sphere of the wide, yet distinctive jurisdiction of the Star Chamber, anti-social conduct that fell short of the traditional categories of crimes was regularly penalized. Not rule nor legal principle, but the harmful effects of anti-social conduct provide the key for understanding the *ratio decidendi* of the cases. For the opinions are replete with common sense observations on the serious import of the circumstances, but, with one exception, they represent no theory or general doctrine of attempt.

This exception, whose significance has hitherto apparently escaped notice, is the *Case of Duels*, prosecuted in the Star Chamber in 1615 by Francis Bacon, the Attorney General.<sup>90</sup> Bacon described the prevalent evils of duelling, suggested that the wisest method of prevention was

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88. So we find it reported that "Pledall, for attempting to cloke and colour the murder of one Headart, and attempting to discredit the proceedings of the Justices of Assize, is sent to the Tower, and recognizance of 1000 marks estreated." (4 and 5 Ph. and M.), BURN, *op. cit. supra* note 66, at 56.

89. *Praty v. Midmore* (Hen. VIII), 16 SUSSEX RECORD SOCIETY, COURT OF STAR CHAMBER (1913) 76, 77. An unusually significant case of a conspiracy to ruin "an un-conformable minister" sets forth that the defendants "raised a fame, that the plaintiff had ravished, or attempted to ravish a woman of Sanford, where the plaintiff had formerly dwelt [defendants went there and persuaded a woman to testify to a rape. They gave her money] and told her the attempt of a rape would not serve to turn the plaintiff out of his living, and therefore told her, if she would testifie some Act done by him." *Phips v. Eyres et al.* (5 Car.), 3 RUSHWORTH, *op. cit. supra* note 74, at 27. Apparently attempt to rape was of relatively minor consequence as compared with attempts to poison, murder, burn a dwelling, or commit burglary.

90. 2 HOWELL, *op. cit. supra* note 3, at 1033. The court included the Archbishop of Canterbury, Lord Chancellor Ellesmere, Lord Chief Justice Edward Coke, and Hobart. It is anomalous that Coke did not make more of the case. See COKE, THIRD INSTITUTE c. 72.

"to nip the practice . . . in the head," by punishing "all the acts of preparation."<sup>91</sup> He said:

"For the Capacity of this Court I take this to be a ground inflexible: that wheresoever an offence is capital, or matter of felony, though it be not acted, there the combination or practice tending to that offence is punishable in this court as a high misdemeanor. So practice to imprison, though it took no effect; waylaying to murder, though it took no effect; and the like; have been adjudged heinous misdemeanors punishable in this court. Nay inceptions and preparations in inferior crimes, that are not capital, as suborning and preparing of witnesses that were never deposed, or deposed nothing material, have likewise been censured in this court."<sup>92</sup>

Thus, the author of *Novum Organon* anticipated the common law courts and the treatises<sup>93</sup> by almost two centuries. The Chamber adopted Bacon's analysis almost verbatim.

But the judges, whatever else their merits, were not philosophers, and, except for this product of Bacon's genius, we see no theorizing about criminal attempt, no statement of general principle. The noted penalization of a great variety of wrongs that fell short of the intended damage is important far beyond establishment of a historical continuity. It reveals a wholesome social instinct to control anti-social conduct which was generally outside the reach of existing conceptual instruments. What would have been serious abuse in a later age of mature legal systems was necessary and justifiable in the time and circumstance.

#### *Common Law*

It has been abundantly evidenced that certain abortive misbehavior, which we have come to know as criminal attempts, was penalized in the Star Chamber very frequently and in various configurations of fact. Bacon's brilliant prescience can be entirely omitted; there remains the massive structure of the doings of the Court year in and out over a period of a century and a half. Of this much there can be no doubt.<sup>94</sup>

91. Bacon describes the evils as: the private revenge of men "to be lawgivers to themselves" that [note the superb naïvete] "gives the law an affront;" the injury to families "by cutting off young men, otherwise of good hope;" the like loss to the King, and that the practice was becoming universal "even among mean persons." 2 HOWELL, *op. cit. supra* note 3, at 1033, 1044.

92. *Id.* at 1041.

93. Scottish law was far ahead of the English, as may be seen from the following excerpt from George Mackenzie. After discussing the civil law rules on attempt, he states: "I shall form these conclusions, first, that all endeavour, is an offence against the Common-wealth: though nothing follow thereupon." MACKENZIE, *THE LAWS AND CUSTOMS OF SCOTLAND IN MATTERS CRIMINAL* (2d ed. 1699) 5, 6.

94. "The law as to . . . attempts to commit crimes was there developed." 4 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1923) 273. Cf. 2 STEPHEN, *op. cit. supra* note 41, at 223. The foregoing text confirms this insight.

A related inquiry concerns the influence of the Chamber decisions upon the subsequent common courts. Such influence has been generally assumed,<sup>95</sup> and its recent rejection is untenable.<sup>96</sup> For there is explicit reference to the Chamber in a proximate common law decision.<sup>97</sup> Other cases clearly represent the treading of a well-worn path;<sup>98</sup> the very assumption by later courts of rules for which authority need not be cited is equally significant. And, finally, it may be recalled that the unpopularity of the court in its later years and its disappearance under a cloud of public disapproval would hardly encourage express citation. Though the evidence supports the view that its influence upon the common law courts was considerable, it was not for a good many years after its cessation that what can be called a doctrine of criminal attempt was fully formulated.

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Sayre apparently accepts the view, suggested by Stephen, that "the modern doctrine" of criminal attempts originated in the Star Chamber. *Criminal Attempts* (1928) 41 HARV. L. REV. 821, 828. Except for Bacon's formulation, which has not appeared in any of the historical accounts, no general doctrine was expressed in the Chamber.

95. "The doctrine of the court of Star Chamber was so obviously necessary to any reasonable system of criminal law that it was adapted by the common law courts." 5 HOLDSWORTH, *op. cit. supra* note 94, at 201. So, too, 2 STEPHEN, *op. cit. supra* note 41, at 224.

96. Sayre rejects the view that the Star Chamber doctrine was "taken over by the common law courts." Since he assumes there was a "doctrine" he is literally correct in saying "there is not a ripple in the calm surface to indicate that a new doctrine of criminal attempt has been suggested." (*supra* note 94, at 829, 831). But, if not "doctrine" but the decisions of the Chamber with reference to attempt fact-situations are regarded, the influence is clear. Sayre remarks, concerning Bacon's case (*id.* at 830), that the court referred to the old *voluntas* formula—which he regards as evidence that the old common law decisions provide the thread of continuity. But the court *rejected* the *voluntas* formula, *yet found the defendant guilty*. The dictum may have been old common law, but the decision was fully in the manner of the Star Chamber—even to avoidance of doctrine but penalization for the social wrong: "yet it is a great offense and fuable."

*Cf.* "In fact, the manner in which the common law courts adopted the Star Chamber's view as to the criminality of attempts to commit crimes, and treated these attempts as common law misdemeanors, removed the chief reason for reviving the dangerous doctrine that a mere intent to commit a crime entailed liability." 8 HOLDSWORTH, *op. cit. supra* note 94, at 434.

97. *Rex v. Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (1664); quoted by Sayre, *supra* note 94, at 829.

98. Holt, C. J. "Words that directly tend to the breach of the peace, as if one man challenge another, are indictable." *Rex v. Langley*, 2 Salk. 697 (1703). In *Rex v. Pigot*, defendant "was convicted upon a misdemeanor in attempting forcibly to carry away one Miss Hescot, a woman of great fortune." "Holt C. J. Sure this concerns all the people in England that would dispose of their children well." 90 Eng. Rep. 1317 (1707).

In a Reporters Note to *Rex v. Crunden*, 2 Camp. 89 (1809), it was said: "It seems an established principle, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law." This was after *Rex v. Higgins* discussed *infra* p. 809.

*Cf.* the earlier Star Chamber decisions *supra* p. 797 *et seq.*

Mansfield's opinion in *Rex v. Scofield* has been said to be the origin of the modern doctrine.<sup>99</sup> But much as one is tempted to honor the "just and intrepid" judge with yet another wreath, this view is questionable. Scofield was indicted for having placed a candle and matches in a house in his possession as tenant with intent to set fire to it; the house did not burn. Scofield's counsel admitted that if the purpose had been accomplished, the offence would have been a misdemeanor. He admitted that an attempt to commit a felony was criminal — which suggests that the rule had already been established in part even though not articulated by the common courts<sup>100</sup> — but he insisted that "an attempt to commit a misdemeanor [was] not a misdemeanor."<sup>101</sup> The defendant was convicted.<sup>102</sup>

As a specimen of judicial dialectic the decision was superb. The cases cited by the prosecution, and relied upon by Mansfield included: an attempt to suborn,<sup>103</sup> giving a bribe for a vote, an attempt to bribe an official to secure an office, and an attempt by an attorney to bribe a witness. But such bribery and subornation meant interference with public business — long regarded as exceptional. Additional cases cited by Mansfield concerned transportation of wool — a misdemeanor by statute, keeping gunpowder — a nuisance of long standing, and words tending directly to breach of the peace. The step necessary to be taken for conviction of Scofield may not seem very large. But *Rex v. Pedley*,<sup>104</sup> decided but two years previously by the identical bench, stood directly in the way. Indeed,

99. Sayre, *supra* note 94, at 834, 835. See his discussion of the case at 834-836.

100. As far back as 1696 it was stated in *King v. Cowper*, "It is no argument to say, that because the defendant is not guilty of the highest offense, therefore he is guilty of none, for there are gradations in law which vary the offenses of men, and proportion their punishments to their crimes." 5 Mod. 207, Skinn. 637 (1696).

In *Rex v. Ingleton* it was assumed that "an attempt to commit a felony" was criminal. 95 Eng. Rep. 537 (1746).

*Cf.* "Thomas Sylvester was indicted for a Misdemeanor, in attempting to commit the unnatural Sin of Sodomy." *Rex v. Thomas Sylvester*, Old Bailey Sessions, No. 51, at 171 (1732). *Rex v. Harris*, Old Bailey Trials, No. 513, at 643-644 (1784).

101. *Cald. Mag. Rep.* (1782) 399. This is the only use of the word "attempt" in the case.

102. The influence of treason on Mansfield's contribution to attempt can be directly shown in a decision by him: "If a man endeavours to do an act of treason, and that act of treason fails through some intervening accident or occurrence, the party so endeavouring and acting to the best of his ability and power is deemed to be guilty of an overt-act, as though he had done the thing he had proposed and intended. Thus, in cases of murder as well as treason, suppose a man firing off a gun, or a pistol, with a premeditated design to kill another, and by some accident or event, either the gun or pistol do not go off, or the party shot at evades the blow, the party shooting is guilty of an overt-act, and is liable to be indicted as guilty of a capital offence." *The Trial of Florence Hensley*, M.D. for High Treason (1758), 19 HOWELL, *op. cit. supra* note 3, at 1372.

103. This and the succeeding cases are cited by Sayre, *supra* note 94, at 835, n. 56.

104. *Cald. Mag. Rep.* (1782) 218.

Pedley's conduct was more blameworthy than Scofield's, for he was charged with setting fire to the house in his possession with intent to burn the adjoining house; the fire did spread to it and caused damage. Yet Pedley was held not guilty of any crime. Mansfield acknowledged that the law was "settled by authority not to be shaken; that it is not a felony either at common law or by the statute in a tenant for a year, a month, or a day, to set fire to a house of which he is in possession." When, a bare two years later, Scofield's counsel stated that the *Pedley* case had established that "to set fire to one's own house is not a felony," Mansfield retorted, "But on wretched reasoning." *Sic non quieta movere!* Mansfield now recites the above series of more or less remotely related cases and stresses *Holmes'* case,<sup>105</sup> decided in 1635, which had been successfully relied upon by the defendant in the *Pedley* case.<sup>106</sup> It is hardly less significant that Mansfield had to reach back 150 years to find in the *Holmes* case a conviction which to some extent supported his predilection.<sup>107</sup>

In *Scofield's* case Mansfield's closest approximation to a general doctrine of attempt was his refutation of defense counsel partly in the latter's language: "It was objected that an attempt to commit a misdemeanor was no offence: but no authority for that is cited, and there are many on the other side. Nor is the completion of an act, criminal in itself, necessary to constitute criminality."<sup>108</sup> This can hardly be called the

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105. In this case the charge, like Pedley's, included an "intent to burn the houses of others adjoining." Holmes was found not guilty of felony since he burnt a house in his possession, but he was found guilty of "an exorbitant offense," fined £500, imprisoned, pilloried and put under bond.

106. East places the decision on the danger to the adjoining houses. 2 EAST, PLEAS OF THE CROWN (1803) 1027.

107. It will be recalled that the Gordon mob burned his house, library and papers in 1780. In *Gordon's* case Mansfield had charged the jury that: "an attempt, by intimidation and violence, to force the repeal of a law, was . . . high treason." 21 HOWELL, *op. cit. supra* note 3, at 485, 649.

Numerous statutes were enacted in the eighteenth century punishing such behavior as: attempting to kill or unlawfully attempting to strike or wound any member of the privy counsel (1710), 9 ANNE, cap. 16; shooting at any person while having face blacked, or being otherwise disguised (1722), 9 GEO. I, cap. 22; ripping, cutting or breaking with intent to steal any lead, iron bar or iron-gate (1731), 4 GEO. II, cap. 32; going from door to door attempting to gather alms (1744), 17 GEO. II, cap. 5 § 1; attempting to rescue or set at liberty any person, etc. (1752), 25 GEO. II, cap. 37 § 9; attempting to take, kill, or destroy any fish, etc. (1765) 5 GEO. III, cap. 14 § 3; and attempting to kill, wound or destroy any red or fallow deer (1776), 15 GEO. III, cap. 30. Although these statutes were in complete indifference to legal doctrine, they must none the less be assumed to have influenced judicial decision.

108. Cald. Mag. Rep. (1782) 402, 400. Presumably Mansfield was familiar with MacKenzie and other Scottish treatises which, as pointed out *supra* note 93, were far in advance of English writing.

formulation of a new doctrine.<sup>109</sup> Obviously the criminality of an attempt to commit a felony was assumed. Doctrine there was, to be sure, but confined to misdemeanors, and it was articulated in a case involving arson.<sup>110</sup>

The modern doctrine was not fully formulated in the common law courts until 1801 when *King v. Higgins* was decided.<sup>111</sup> Here was indictment for a misdemeanor charging that the defendant did "solicit and incite" a servant to steal a quantity of twist from his master. The servant did nothing. The defense was that under such circumstances "a bare solicitation . . . is not indictable;" an imposing array of authority was cited.<sup>112</sup> The defendant was found guilty and the modern law of solicitation was established. It is the treatment of the offense as a criminal attempt and the language employed that is most significant:

109. In the writer's view it was Lawrence, J. rather than Mansfield who deserves credit for the formulation of the common law modern doctrine of criminal attempt. Lawrence had prosecuted both Pedley and Scofield. Later, as judge, he decided the *Higgins* case (discussed *infra* p. 809). East dedicated his treatise to him.

110. In that same year and just prior to the *Scofield* case, Thomas Petch was found not guilty of arson in a trial at the Old Bailey. The court said: "but I would not have him discharged by any means, if you will undertake to indict him for a high misdemeanor at common law, in burning his own house." Old Bailey Trials, Jan. 1784, No. 573. Quoted in ADDINGTON, ABRIDGEMENT OF PENAL STATUTES (1775) 11.

111. 2 East 5, 102 Eng. Rep. 269 (1801).

That no new doctrine was recognized until after the *Higgins* case is shown by the fact that East (1803), almost 20 years after the *Scofield* decision, has no discussion of Criminal Attempt. *Farrell's* case, a clear case of attempted robbery, was decided in 1787, but East made no comment whatever on the attempt phase. 2 East 557. *Cf. id.* at 411. He treats the *Scofield* case as a phase of Arson, and does not even use the word "attempt" in connection with it. *Id.* at 1029-1030. Apparently he had written his treatise before the *Higgins* case was decided; at least he does not refer to that decision. It is in Russell that the first recognition of a new doctrine is found, and discussed. 1 RUSSELL, CRIMES AND MISDEMEANORS (1st ed. 1819) 61.

For a summary of the treatises and a tabulation of cases, see Curran, *Criminal and Non-Criminal Attempts* (1931) 19 Geo. L. J. 185. And see: COKE, THIRD INSTITUTE 5, 11, 14, 16, 66, 67, 80, 140, 158, 160, 161, 176, 177; 1 HALE, *op. cit. supra* note 44, at 97, 108, n. b, 378, 425, 426, 487, 493, 532, 551, 568; 1 HAWKINS, PLEAS OF THE CROWN (1st ed. 1716, 8th ed. 1824) 47, 60, 68, 96, 102, 105, 106, 112, 133, 137, 168, 187, 234, 259; 4 BL. at \*78-80, 81 f, 99, 100, 126, 130, 131, 140, 180, 188, 196, 207, 216, 217, 221, 231, 233, 235, 243. EAST, *op. cit. supra* note 106, at 58, 64, 91, 92, 116, 117, 119, 123, 127, 167, 169, 187, 303, 382, 396, 411, 416, 451, 461, 486, 523, 714, 823-5, 946, 1036, 1046, 1115, 1122.

112. The defense argued: "In none of the books is there any case or precedent to be found of an indictment for a bare solicitation to commit an offence without an act done in pursuance of it: and the silence of all the writers on the Crown law on this subject is of itself a strong argument that no such offence is known to the law. The general principle of our penal code is to punish the act, and not the intent; with the single exception of high treason, where the traitorous intent constitutes the crime; but even there it must be manifested by some overt act." *King v. Higgins*, 2 East 5, 102 Eng. Rep. 269, 271 (1801). To which, Lawrence, J. replied: "The whole argument for the defendant turns upon a fallacy in assuming that no act is charged to have been done by him; for a solicitation is an act." *King v. Higgins*, *supra* at 19, 102 Eng. Rep. at 275.

"On the part of the Crown it was contended, that every attempt to commit a crime, whether felony or misdemeanor, is itself a misdemeanor and indictable."<sup>113</sup> And Grose, J. said: "it must be admitted that an attempt to commit a felony is in many cases at least a misdemeanor; to instance the common cases of an attempt to rob or to ravish, which are indictable offences in every day's practice. But further, an attempt to commit even a misdemeanor has been shewn in many cases to be itself a misdemeanor."<sup>114</sup> *Rex v. Scofield*, a true attempt case, did not enunciate the full doctrine. *King v. Higgins*, a solicitation case, relied directly upon *Rex v. Scofield*, and formulated the modern doctrine of criminal attempt, in language which generalized as to both situations.<sup>115</sup>

### Summary

The invention and form of specific instrumentalities for control of serious wrongdoing are determined in conjunction with moral attitudes, social forces, and legal doctrine. We have noted the early reliance on frankpledge, suretyship, justices, unlawful assembly, rout and the like.<sup>110</sup> Such existing doctrines and institutions may be deemed to have retarded the law of criminal attempt. Most important of all formal influences in delaying the appearance of criminal attempt was aggravated assault. Assault, be it noted, can be regarded as a species of attempt. That is the clearest relationship of the two; the treatise writers defined assault

113. *King v. Higgins*, 2 East Rep. 5, 11, 102 Eng. Rep. 269, 272 (1801).

114. *Id.* at 274-275. Subsequently the formula was frequently reiterated almost identically. Thus, in 1837, on a charge of attempt unlawfully to know a child under 12, Parke, B. said: "There are many cases in which an attempt to commit a misdemeanor has been held to be a misdemeanor; and an attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute, or was an offense at common law." *Rex v. Roderick*, 7 Car. and P. 795 (1837). So, too, *Regina v. Eagleton*, 1 Deards 515 (1885).

115. The following historical sequence may be observed: 1. Talk unless the behavior urged and which is effected is not criminal. 2. But as regards the King, treason makes no such discrimination. Here talk alone is enough to merit torture and execution. 3. Next, as to bribery of officials, subornation of witnesses and the like, talk is criminal. But here the talk is thought of independently, and not as with solicitation, related to *other* criminality. So also conspiracy is regarded exceptionally. *E.g.*, *The Poulterers' Case*, 77 Eng. Rep. 813 (1610), and *Regina v. Best*, 92 Eng. Rep. 272 (1705). Also, the interests involved concern public justice—hence, in principle, the King. In *Bacon's Case* (1664) 1 Sid. 230, the solicitation was to murder the Master of the Rolls. In *Rex v. Vaughan* (1769), Mansfield said: "In many cases, especially in bribery at elections to Parliament, the attempt is a crime." 4 Burr. at 2500. 4. Then in *Scofield's case* (1784) overt behavior is held a criminal attempt though purely individual interests are involved. 5. Finally, *King v. Higgins* dealing with like interests established the criminality—not of overt behavior—but of talk—solicitation, here subsumed under attempt. *Cf.* Holt, J.: "Advising one to rob or kill, without something be done thereupon, is not indictable . . . a conspiracy to . . . is indictable." *Regina v. Daniell*, 6 Mod. 99, 87 Eng. Rep. 856 (1703).

116. See note 24 *supra*. See also the statutes penalizing certain inchoate wrongdoing, note 33 *supra*.

as an attempt to do bodily injury. Yet for obvious psychological reasons, assault was apparently from the outset regarded as consummated criminality: an arrow or a rock half an inch from one's skull needed no reference to the intended goal to be criminal. It was a crime of itself. What needs emphasis here is the enormous development of aggravated assaults, and their accelerated growth in the period just prior to that of attempt. Blackstone's discussion of such assault is brief, but in East, his important successor, the subject is for the first time (1803) fully treated. Here we find such offenses as assault on privy counsellors, members of Parliament, revenue officers, persons wrecked, woolcombers, in churches, with intent to murder, with intent to rob, with intent to spoil cloth, and so on. The like development of the even greater variety of aggravated larcenies suggests the common method employed in the criminal law as elsewhere: utilize the concept at hand, build upon it, retain the familiar word, and extend the new rule to all fact-situations where the common-denominator, *i.e.*, the minimum cognate offense, is present. That was the technique, and it made sense. What then of attempt? Why did it appear despite all of the above conceptual apparatus and organization?

From the point of view of doctrinal development (*i.e.*, quite apart from social import) it is noteworthy that the *Scofield* case was attempted arson and *King v. Higgins* was solicitation to steal certain goods. Both fact situations are significant in providing a main clue to the *necessity* for the development of the law of criminal attempts — the standard technique of assault plus special aggravation would not do. The implied hypothesis concerning the evolution of law is evident. For legal principles arise not from whim or playful imagination but from need; we may assume at certain crucial points in the administration of the criminal law, available sanctions were deemed inadequate. Tension sets in, which makes for legal change. The period ushered in by Edward IV and the Tudors faced the disorder, the anarchy of drawn-out wars and oppressive nobles. The Star Chamber was the major instrumentality of control, and it was unfettered as it was potent. Its decisions are the best of all evidence of the nature of the social problems dealt with, of the attitudes that, in part, caused nobles' conduct to be regarded as oppressive, as constituting "problems." Hence such behavior was penalized regardless of its being outside existing proscriptions. The Chamber had abundant power; it had no need to strain to recreate existing tools; it could legislate in the open. Further expansion of existing concepts by the common law courts from the end of the eighteenth century on, was technically difficult especially as regard wrongs that did not approximate personal injury of some sort. But formulation of principle, which was of course mere restatement of *rationes decidendi* of long existence, was possible, indeed quite the proper thing to do. That the significance of the decisions

for legal doctrine was not perceived until some years after they were rendered, is the index of a highly developed judicial art.

## II.

### RATIONALE

In the study of legal problems, solutions are sought in terms of relatively simple propositions which vary in number, generality and content. Some of them seem to be more fundamental than others because they provide a focus for coherence of a group of propositions, or because they are presupposed by them, or because they open new or deeper veins of insight into the problems dealt with. When we have pushed inquiry to such a point, we are apt to stop on the assumption that we have come to the foundations of a discipline and can proceed no farther meaningfully.<sup>117</sup> In an ancient discipline like the criminal law, which persists despite all governmental change, such ventures are hazardous as they are appealing. The principles of liability are surely ultimate problems; and attempt stands at the very threshold of criminal liability.<sup>118</sup> It provides a subject where recurring study may be expected to yield progressively increasing insight into the foundations of the criminal law.

Our first distinction, important in this, as in many legal inquiries, must be that between "law" and "fact." Each of these terms has myriad facets as old as jurisprudence itself; and there is no intention to argue any general validity of the distinctions drawn, beyond the needs of the present problem. By way of specific instance: to a physicist in his professional interest, it is a matter of indifference whether one puts a hand into one's own pocket or into another's. Matter, friction and velocity are involved; theories of physico-mechanical change proceed on a level that is not social, individual or legal. To a wise layman, the pointing of a gun or the impact of a bullet may not be as significant as the social environment of the doer, or his childhood or the effects on the deceased's family. To present the contrast between law and fact sharply, we may note the marginal case at the outset, namely, that in law it is possible to be solely in a world of "meanings," in the sense that legal norms sometimes attach significances that bring results in conduct and conditions, in the absence of any behavior whatever; likewise as to certain "talk," *e.g.*, sedition — especially noteworthy because of its presuppositions as to communication. Moreover, in law we are never solely in the world

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117. "They [ultimate notions] are incapable of analysis in terms of factors more far-reaching than themselves." WHITEHEAD, *MODES OF THOUGHT* (1938) 1.

118. Criminal attempt "is more intricate and difficult of comprehension than any other branch of the criminal law." *Hicks v. Commonwealth*, 86 Va. 226, 9 S. E. 1024, 1025 (1889).

of physical action.<sup>119</sup> The possession of guns, the removal of goods, the injury or death of human creatures are not *criminal* unless there are terms and ideas that so characterize them. When this is done by a legal system, physico-mechanical change is raised to a sphere of legal significance. Thus the following generalizations mark out broad distinctions that are relevant and important in this context: fact can be sensed; law is conceived. Law is normative; fact is existential. Fact is "neutral;" law gives meanings to facts, behavior, situations. Hence the legal system is a scheme of significances communicable to and understandable by rational beings.

The major utility of such differentiation between law and fact resides in its aid to analysis of legal problems, and we shall shortly note its application to the doctrine of "legal impossibility." But firstly as regards analysis of terminology. If there is any instance where an utterly simple phrase, perhaps because of its sheer simplicity, has given rise to more confusion than exists in the law of criminal attempt, this writer has not encountered it. In its broadest dictionary meaning, "attempt" means an effort to reach a desired goal. Thinking is surely effort; yet no legal sanction, at least, is applied to it. "Attempt" implies failure of attainment; but failure is characteristic of life. Obviously the courts have not functioned on any such speculative basis. The law, representing ordinary reflection, has viewed some actions and their rather immediate consequences as the consummation of ends; it penalizes some such accomplishment as criminal. If we ask why certain specified consequences are penalized as "consummated" crimes, we confront a tremendously difficult problem that has rarely been explored by legal writers. Hardly less vexatious is the rationale of the law concerning the commencement of criminal behavior—the reach of the law in the direction of the very beginnings of the behavior penalized. The latter issue is plainly part of the problem of criminal attempt.

In any event, it must be noted that even in a much narrower context, the common phrase "attempt to commit a crime" is misleading and results in confusion that illuminates only the variegated dress that adorns a single symbol. "Not a crime," suggests the formula, but an "*attempt* to commit a crime." We then fall into the habit of speaking of behavior that "tends to" or is "likely to become" criminal. And the clear implication is that if it simply "tends to" or "probably will become" criminal, then it is not now criminal. But directly, quite unconscious of any logical difficulties, we are apt to add, "such an attempt is criminal." Only if we unravel the skein in accordance with the above distinctions between law and fact, may we reduce our thinking to some degree of order. If we say "an attempt to commit a crime is a crime," we speak ambiguously because we use the word "crime" to mean both behavior that is signified

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119. On the other hand, legal norms are by no means "unreal." In their origin, application and effects, legal rules are part of a reality that is known to exist by its effects.

to be criminal and the significance ("criminal") that is given to such behavior. Strictly (*i.e.*, legally) speaking, it is impossible to attempt to commit a crime, just as it is impossible to commit a crime. We can and do behave in certain ways in certain situations. The legal rules qualify this behavior in terms of their significances. So as to attempts; we may fail to accomplish an intended objective, and in certain instances, law labels our doing a "criminal attempt."

*Appraisal of Harms by the Legal Structure*

If we examine the criminal law of Anglo-American jurisdictions, we may consider each crime as independent of all others: murder, robbery, arson, and so on. But even for purely practical purposes it is frequently necessary to rely upon a number of interrelations, as, *e.g.*, between murder in the first and second degrees, manslaughter, various aggravated assaults and simple assault; or, robbery with a gun, robbery, grand and petty larceny. Such relationship is utilized procedurally under the doctrine of charging cognate offenses. The extent of applicability of this doctrine is quite limited, however, because psychological factors have determined the subject-matter of the various crimes. It ought to be possible to invent a series of categories which would be formally interrelated much more frequently; but there is no assurance that such a system would have greater utility.<sup>120</sup>

From a social viewpoint, perhaps the most obvious fact noted in connection with the substance of the criminal law is that various interests are concerned: life, limb, person, property (habitation, real, personal) public health, morals, justice, peace. Analysis of criminal law is accordingly concerned with exploration of the various interests, and the construction of a hierarchy of interests — which, in our present legal system, corresponds generally to the penalties imposed. Insofar as this approach is meaningful, it must retain the individuality of the interests concerned, *i.e.*, the unique distinctions between life, property, etc. Accordingly, there are natural limits imposed upon generalizations formulated on a basis of such concrete representation.<sup>121</sup>

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120. If we start with a major crime against the person, it would be possible to work out, in descending order, a group of cognate offences, *e.g.*, batteries, assaults, attempts, solicitations. Quite apart from any results which might be utilized in a criminal code, such an analysis throughout the criminal law would surely enlighten us as to sanctions, pleading and system.

121. For certain other purposes it is possible to generalize very broadly on an empirical basis; there is use of words (spoken or written) and there is *action* in the purely physical sense of motion of matter in space. A persuasive hypothesis is that in probing for the bases of criminal liability one should initially, at least, confine research to germane phenomena: defamation, advocating overthrow of government by force, conspiracy, solicitation, and false pretenses should provide certain common characteristics; yet such hypothesis would not necessarily lead to fruitful results.

If we wish to achieve broader generalization, we must formulate propositions which refer to the rules irrespective of such specific content. Thus it may be noted that most crimes are stated in terms of "ultimate" *harms produced*: a human being dies, a dwelling burns, property is lost to its possessor. But consider such offenses as possession of counterfeit dies,<sup>122</sup> or counterfeit money, or burglar's tools, carrying or possessing a gun, and the recent legislation forbidding association with known gangsters.<sup>123</sup> These offenses are inchoate or anterior in the sense that they do not exhibit injury effected; but it is practicable to penalize their occurrence since (except perhaps in the gangster case) there are readily available, observable data to evidence the situation proscribed. Not so clearly inchoate are forgery and counterfeiting, but on reflection, it will be seen that these offenses likewise do not exhibit harms effected (the obtaining of property by uttering counterfeit money or forged documents, and consequent commercial disorder) but rather an undesirable anterior situation that is clearly anti-social.<sup>124</sup> Our difficulty in viewing these latter offenses as "inchoate" arises from prevalent moral attitudes concerning such situations, which took origin hundreds of years ago: these offenses were no less than treason even farther back than the 25 Edw. III.<sup>125</sup> This group may accordingly be regarded as an intermediate or mixed type.<sup>126</sup> Finally, what of assault? Here, too, the battery (or worse) is the "ultimate" harm, and the assault may accordingly be described as "inchoate;" indeed the classical definition of assault as an "attempt to commit a battery" implies a relational crime. Yet here we draw the line, and insist that assault is criminal in itself, that harm has been *effected*

122. For the early rules, see COKE, THIRD INSTITUTE 18.

123. Also the following: driving an automobile while intoxicated, possession of obscene pictures or books with intent to sell them, mailing indecent matter, use of mails with intent to defraud, various acts concerning narcotics and advertising lotteries.

124. It will be noted that all of these offenses are statutory, which suggests that the common law system, being a relatively spontaneous growth, was purely "objective" in the sense of requiring actual harm, whereas legislation being relatively unhampered, could create instruments that were rational and non-traditional, in design, at least, *i.e.*, based on knowledge of conditions of crime and consequent insight into crime prevention, on dictates of convenience, and so on.

125. As for treason, itself, see p. 794 *supra*. Cf. "It is now high-treason, to have in possession any instrument, or tool, 'not of common use in any trade,' but proper only for Coining. With equal propriety might it be called homicide to be in possession of a Pistol." EDEN, PRINCIPLES OF PENAL LAW (1771) 127.

For forgery, *cf.* 2 BRACTON (Twiss ed. 1878) 259, 267.

"A. counterfeits the King's money, but never vents it: this is a counterfeiting and treason within this statute, and so it hath been ruled *Co. P. C.* p. 16." 1 HALE, *op. cit.* *supra* note 44, at 215.

But counterfeiting so poorly that coin would not pass, held "the crime was incomplete." *King v. Varley*, 1 Leach 76, 168 Eng. Rep. 140 (1771).

126. Many cases of nuisance at common law are apropos, *e.g.*, "Keeping great quantities of gunpowder." *Rex v. Taylor*, 2 Strange 1167, 93 Eng. Rep. 1104 (1741).

so as to make any relating to major wrongs appear artificial; so one distinguishes assault from, for example, possession of burglar's tools.<sup>127</sup>

It is apparent that one cannot insist upon completely operative distinctions concerning the relational aspect of all of the offenses above, except in a purely formal sense. But it is equally apparent that the distinction is clear as to some of them. Certain harmful consequences do not appear in the inchoate crimes, but it is plain that the existence of the anti-social situation greatly increases the probability of their occurring. Inchoate crimes are not a lesser *degree* of the relevant major harms: possession of burglar's tools is not a lesser degree of burglary. Nor is the relationship causal; it depends rather upon insight into social phenomena. If we know the harm which it is sought to effect, we recognize the inchoate crime as representing the necessary, preliminary pattern of behavior; hence we segregate such specific fact-clusters and penalize the doer. Such an anti-social situation regardless of how it may be distinguished sociologically from "ultimate" harmful consequences is, of course, independently criminal, legally.

Major (ultimate) harms, cognate offenses and the inchoate (anterior) crimes do not complete the structure of the criminal law. These categories include or focus on the major harms; for, as noted, the cognate offenses and the inchoate crimes may be regarded as "in the direction" of the major wrongs. These lesser categories are, however, limited in their applicability, the first, by virtue of the specific historical origins of the major wrongs, the second, because of certain practical impediments including lack of legislative inventiveness and the frequent unavailability of data deemed necessary for sufficient proof.

But we do have certain concepts which do not suffer from the particularity of these special categories. Most important of these are solicitation, conspiracy and attempt. Each serves different ends; all are common in that *they parallel a great extent of the criminal law* and, theoretically at least, make possible a degree of refinement in control, otherwise unattainable.<sup>128</sup> All three are relational<sup>129</sup> in the sense that they are appraised

127. This thought may be extended farther, as with reference to larceny concerning which Holmes long ago pointed out that it differed from most offenses in that the trespass and asportation were sufficient to constitute the crime despite the fact that the ultimate harm was *permanent* loss of the property. In common law burglary as in larceny, there is sufficient identification of the self with the dwelling and the chattel to establish consummated crimes despite the fact that prevention of still major harms are the ultimate ends: in the one case, a crime against the person, in the other, permanent loss of the goods. This sort of analysis could be extended generally: all crimes which relate to or might directly become crimes against the person might be arranged in a series which led ultimately to murder.

128. We have noted the relatively recent origin of solicitation, except as to public business. See note 115 *supra*. Conspiracy, being a combination, has an ancient history; and in times, *e.g.*, when courts were refusing to extend penal sanctions to false pretenses because one man should not be punished "for making a fool of another," they were eager

by reference to other harms (major crimes) sought to be effected. Conspiracy, though limited by the requirement of joint conduct, has proved to have amazingly wide ramifications. Solicitation serves a like purpose as regards individual conduct, being therefore intermediate between conspiracy and attempt. And for the normal operation of the legal apparatus, criminal attempt, implementing a vast area of the substantive law, is a device that should have abundant utility. These devices serve a purpose somewhat similar to that of the cognate and inchoate offenses, but they have been much more deliberately designed to check criminal behavior in its initial stages, and their range is far greater. Somewhat similar in function are the concepts "principal" and "accessory." These differentiations have largely been abandoned in the substantive law, but their purpose is plain: given a particular harm effected, to determine degrees of participation (and hence of blameworthiness) in bringing it about.

The rationale of the structure of the common law of crimes comes then to this: it is an elaborate method to determine as objectively and precisely as possible (1) the extent of harm done (which is a function of (a) the value involved and (b) the degree of injury to it) and (2) the blameworthiness of the doer.<sup>130</sup>

#### *Preparation, Attempt and Determination of Harms*

What is the relationship of the rules concerning the necessity of an "act" to these foundations of the criminal law? First to be noted is the

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to punish if more than one person were involved. No doubt treason played an important role here: almost invariably a group of persons was involved. If successful, rebellion becomes revolution, and legal.

129. For reasons set forth in the latter portion of this paper, it is deemed preferable to designate attempt as "relational" and to reserve "inchoate" (or anterior) for certain criminal situations, *e.g.*, possession of burglar's tools.

130. This may be visualized as follows: (1) If we arrange a hierarchy of groups of values beginning with life, honor (or autonomy) of women, and thence, habitation, limb and so on, descending to the least values (call these  $V^1$ ,  $V^2$ ,  $V^3$ , etc.); (2) and if the extent of harm is arbitrarily taken to consist of three degrees ( $D^1$ ,  $D^2$ ,  $D^3$ ), the maximum being complete destruction of the value, the intermediate being substantial harm, and the third, only slight harm; (3) and if the third element (blameworthiness) is also confined to three degrees:  $B^1$  = intention or recklessness,  $B^2$  = negligence, and  $B^3$  = absolute liability, despite no negligence (usually statutory); (this simplification of the elements entering into judgments as to blameworthiness is designed to clarify the essential nature of the third basic foundation of criminal liability. Such matters as mistake, ignorance, insanity, intoxication, self-defense, entrapment, and so on, all affect liability by reason of their relation to blameworthiness.) (4) then any crime can be symbolized by a combination of the above symbols. Thus, murder =  $V^1 D^1 B^1$ ; robbery =  $V^2 D^1 B^1$ ; attempt to commit grand larceny =  $V^2 D^3 B^1$ , and so on.

The symbols could be used only to designate *groups* of offenses. Even then, at various, perhaps many, points such symbolization would be arbitrary. The effort at objectification, nonetheless, reveals the basic import of common law as a scheme of significances whose immediate purposes are chiefly the precise determination of extent of damage done by any wrong act, and deliberate judgment as to blame.

connection between "act" and judgments as to blameworthiness. The connecting link between these two references consists of ideas of causation — unless the accused has acted, he could not have produced harmful effects. Thus, in first instance, blameworthiness depends on opinions of physico-mechanical change.<sup>131</sup> Secondly, it is a matter of proof, *i.e.*, of efficiency; even assuming that "thinking can make it happen," how *prove* that any particular person was guilty of the thinking? And, lastly, is the paramount consideration that every legal principle is a norm, *i.e.*, it rests upon some policy, though, to be sure, this may not always be directly discernible. The broader the rule the more general and farther-reaching is the policy. With reference to a principle of such great generality as, "every crime must include an act," we must expect a correspondingly broad policy. Such a policy in the criminal law is clearly the necessity and desire for prevention of oppression by officials in position to wield the maximum community force. The extent of insistence upon action as well as the motive for such insistence is evidenced by retention of the requirement even in treason. For insistence upon an "act" is simply a specific device for implementing the principle that men shall not be tried for their thoughts. The usual formula concerning "act" is not, to be sure, valid as to all crimes;<sup>132</sup> nor is it invariably a helpful instrument for investigation. The concept serves chiefly as a primary rule of *exclusion*: if no observable behavior, then no crime. The essence of its function consists in its narrowing the area of criminality. For these reasons, determination of action by the accused is normally preliminary to any possible blame, and consequently, preliminary, also, to any inquiry as to the extent of harm effected.

But "act" is as broad and vague conceptually as the expression of the term is short empirically. We must give it some precise denotation relevant to our problem, and we must locate criminal attempt in the context. Austin distinguished internal from external acts, the latter being observable. These he defined as "such motions of the body as are consequent upon determinations of the will."<sup>133</sup> The former he "repudiated." Now, as Terry and others have pointed out, it is only in connection with certain proscribed consequences, that acts are illegal. This has led to a varied usage; in usual parlance, "act" includes the consequences: the defendant,

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131. Cf. the bases of older forms of trial, *e.g.*, the ordeal.

132. If the principle as to "act" is viewed as a moral principle, we shall not feel perturbed when we are unable to apply it to crimes where there is no possibility of abuse of the type sought to be guarded against, generally, as where a duty to act affirmatively is imposed by law. This latter type of liability moves in an entirely different sphere of motivation. Not only is an act (in the narrow sense of specific, muscular movement) *not* an essential element in every crime, but, also, as will be shortly pointed out, such an act, alone, can never be a crime.

133. Holmes' definition will be recalled. For Terry's and Corbin's, see HALL, READINGS IN JURISPRUDENCE (1938) 457, 472.

it is said, robbed or killed a man. But the inclusion of such consequences complicates analysis. Hence we shall initially limit the word to Austin's use, namely voluntary, observable, bodily movement. This may be nothing more than motion of the lips in uttering certain words, but some bodily movement there must be.

Next, it is necessary, and especially so for analysis of criminal attempt, that such bodily movement be distinguished not only from consequences produced, but, also, from instrumentality or means employed. The simplest instances are objective devices: a gun, blackjack, knife, rock. The hand serves likewise, and since we may regard it as an instrument (anthropologists have long held it to be one of the two or three chief reasons for man's ascendancy) it seems not difficult to distinguish that part of the anatomy from directed movement of it in space. The instrument or means is one thing; the motion is something else. So, too, as to pen, ink, and paper employed to produce certain consequences, held criminal. Finally, in slander, solicitation, false pretenses, perjury and the like, we can distinguish the bodily movement from the words employed, the instrumentality for communication of the thought.<sup>134</sup>

The third and last essential element of the offender's "act," significant for criminal law, consists of the consequences effected. These presuppose external conditions in addition to act and means employed. As noted, the drawing of any line to terminate social phenomena is arbitrary, and from many lay viewpoints the termini specified in legal rules are irrelevant. But in law, analysis is limited to certain effects designated as "the consequences." These selected and circumscribed consequences of a person's bodily movement in the use of means to attain harmful objectives form the core of most legal rules concerned with general (non-contractual) liability. The legal apparatus is put into operation by occurrence of such consequences, and legal analysis, for the most part, emphasizes them.

We have noted the requirement as to overt behavior and its relation to the foundations of criminal liability (*i.e.*, extent of harm and blameworthiness). But at no time, except as noted in treason, was "an act" held equivalent to "any act;" on the contrary, there may be an act and yet no crime, though the *mens rea* is present. The behavior must have proceeded to "a certain point" before culpability attaches, and it is in definition of this requirement that criminal attempt is especially important. It seems probable, on the basis of the historical investigation above, that the additional requirements were determined not by logic but by social and psychological factors. There had to be, not any act, but an act that was harmful, that caused resentment, that ought to be put down, pre-

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134. This last borders on problems metaphysical, and we have no wish to push the distinction farther. By and large, it seems valid, and applicable to the vast majority of offenses to distinguish the act (in its narrowest sense of voluntary physical movement) from the means employed.

vented. Thus when we found that early law did not penalize overt attempts to commit major harms, except in treason, we could draw certain inferences as to concomitant moral attitudes concerning such conduct, and the propriety and practice of self-help.

Since the notion of attempt is not confined to any particular type of misbehavior but, on the contrary, is sufficiently general to bear upon all forms of serious criminal behavior,<sup>135</sup> it is a category which most significantly raises the problem common to all, namely, to what degree of fulfillment of a criminal objective must conduct have reached before it constitutes the behavior-circumstance element of criminal laws? Clearly, we can understand the value judgments passed upon conduct so scrutinized only in light of an analysis of the general situation in which the particular conduct occurred.

The inarticulated premise in the formulation above (apart from the assumption that it states a real problem) is teleological in nature; for like all deliberate conduct, attempt is purposive. The situation that calls for analysis is therefore one characterized by conscious manipulation of means to achieve definite ends. If we consider this process of adaptive conduct involved in attainment of a chosen objective, we may distinguish the following stages:<sup>136</sup> (1) the conceiving of the idea, (2) deliberation, (3) resolution (intention), (4) preparation, (5) attempt stopped before the intended action was completed, (6) completion of execution of the intended action, which may or may not have resulted in the consequences sought (the consummated crime).<sup>137</sup> We may dismiss the first three

135. Perjury is one crime concerning which it would seem inherently impossible to have an attempt. The incomplete utterance is incomprehensible; the instant of completion provides the consummated offense. Stephen adds treason, riot, libel, offering bad money and assault. 2 STEPHEN, *op. cit. supra* note 41, at 227.

136. The substitution of more modern psychological terms in the following will not modify the legal significance. Thus if we speak of "vocal behavior" and physical changes in "neural structures" or other cellular movements, we still need to conclude, as did Austin, that such "internal" action is not taken cognizance of in law. It is not suggested, of course, that the above stages represent even typical psychological processes as they, in fact, occur.

137. These are the stages substantially set forth<sup>o</sup> by Vidal, building on Carrara. See VIDAL, *COUR DE DROIT CRIMINEL* (1916) 128. The French differentiate attempts as indicated in stages 5 and 6, 5 being *tentative*, while 6 is *délit manqué* (rather than *délit consommé*).

*Cf.* "To intend to commit a crime is one thing; to get ready to commit it is another; to try to commit it is a third." SALMOND, *JURISPRUDENCE* (7th ed. 1924) 402. And note the date in connection with the common contemporary assertions which imply that psychology was born with William James. In a case of *felo de se*: "And Walsh [for defendant] said, that the Act consists of three parts. The first is the imagination, which is a reflection or meditation of the mind, whether or no it is convenient for him to destroy himself, and what way it can be done. The second is the resolution, which is a determination of the mind to destroy himself, and to do it in this or that particular way. The third is the perfection, which is the execution of what the mind has resolved to do. And

stages out of hand: the first is frequently amoral since we cannot completely control our thoughts; the second, and especially the third, pertain to ethics, not to law.<sup>138</sup> The final stage may also be dismissed if it has succeeded in its purpose, as beyond the present problem. This leaves, as relevant for our purpose, preparation and attempt, the latter including interrupted behavior that has passed beyond preparation, and also completion of the intended action but failure of accomplishment of the end sought. It will be necessary to inquire as to the justification for distinguishing preparation from attempt, and both, from the consummated crime. But in first instance let us ask whether these distinctions are valid. That between attempt and consummated crime is certainly sound, not only formally but also empirically: a given harm (designated "consummated crime") can be distinguished from consequences that do not constitute that harm but something else — here, a lesser evil. The ancient and traditional recognition of attempts as other than "consummated" crimes, in civilized as well as in primitive societies — even though no variation may have existed in penalties — is evidence of the universal acceptance of the distinction. Almost all foreign codes specifically distinguish the attempt from the consummated crime.<sup>139</sup>

On the other hand, to distinguish preparation from attempt empirically is difficult if not impossible. It is between the extremes, non-action,<sup>140</sup> on the one hand, and given, consummated, criminal consequences, on the other, that our problem lies. The problem results from distinctions

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this perfection consists of two parts, viz., the beginning and the end. The beginning is the doing of the act which causes the death, and the end is the death, which is only a sequel to the act. And of all the parts the doing of the act is the greatest in the judgment of our law, and it is in effect the whole, and the only part that the law looks upon to be material. For the imagination of the mind to do wrong, without an act done, is not punishable in our law, neither is the resolution to do that wrong, which he does not, punishable, but the doing of the act is the only point which the law regards; for until the act is done it cannot be an offence to the world, and when the act is done it is punishable." *Hales v. Petit*, 1 Plow. 253, 259, 259a, 75 Eng. Rep. 387, 397 (1562).

138. The statute of 21 Rich. II is the rare instance of penalization of the thought of man. See note 44 *supra*.

Even if an intention to commit a crime is admitted, no crime has been committed though peace bond may be proper. But resolution does not mean action—hence on prevalent theories, there is no crime. But if such an intention is communicated to the victim, we have this communication in addition to the intention, and this conduct may constitute a criminal threat. Such communication constitutes a social fact. Extortion is a common instance. So, too, conspiracy constitutes more than an expression of intention among accomplices. It represents, also, an agreement, likewise a social fact.

139. See VIDAL, *op. cit. supra* note 137, at 133. These observations do not refer to problems of proof or persuasion but rather to the "law of identity" and to the actual identification of things.

140. The mechanist's assertion that thinking is sub-vocal "behavior" is not relevant in this context. There is always the problem of proof, but the above are at least practically valid with reference to the core of concept and fact. The problem at the periphery comes close to that considered in the text.

drawn between preparation and attempt; in effect, between various types of "attempt" since, if the term be stretched sufficiently, it includes preparatory conduct. If this distinction were not made, if *all* conduct "in the direction" of certain harms were penalized, this difficulty would, perhaps, be avoided. Such a procedure is warmly advocated by an influential school of thought. Anglo-American law, however, quite characteristically requires that the distinction be made; it is necessary to explore it.

The commission of every intentional crime involves a complex behavior pattern on the part of the offender, and, except for the simplest crimes against the person, a large number of stages, which have been stated rather arbitrarily for purposes of analysis. A situation is presented which consists of a motivating stimulus and a response thereto, whose efficiency depends, in part, on the coordination of multiple sensory and motor mechanisms. The external conditions are not normally precisely situated ("sufficient") to facilitate accomplishment of the intended act; instruments must frequently be looked after long in advance. As regards many offenses, there are innumerable ways in which each can be committed. The rules of law purport to supply the necessary concepts: for example, the generalized descriptions of the various crimes. But attempt concerns practically all crimes; when joined to any particular consummated crime, difficulties arise which make it apparent that typical definition cannot suffice. Hence it is not surprising in light of the various difficulties, that the one point of agreement among writers on criminal attempt is that no clear line can be drawn at any point of fact between attempt and preparation, which is generally applicable. "Each case," we are informed, "must be determined upon its own facts"<sup>141</sup> — which amounts to assertion that there is no applicable generalization of any utility. Yet courts "instruct" juries; appellate courts reverse convictions, and alas! they must give reasons why the conduct constituted "mere preparation." We are told that in order to have attempt, there must be an act "moving directly towards the commission of the offense,"<sup>142</sup> or "the commencement of consummation;"<sup>143</sup> the words "direct movement,

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141. *State v. McCarthy*, 115 Kan. 583, 224 Pac. 44 (1924), 24 COL. L. REV. 790.

142. *Milner v. State*, 18 Ala. App. 157, 89 So. 306 (1921). Quoted by MILLER, CRIMINAL LAW (1934) 103, n. 49.

143. *Lee v. Commonwealth*, 144 Va. 594, 131 S. E. 212 (1926); MILLER, *op. cit. supra* note 142; *Andrews v. Commonwealth*, 135 Va. 451, 115 S. E. 558 (1923).

This approximates the requirement of the French Code Pénal, Art. 2: the 1934 *Projet* for revision of the Code Pénal requires the beginning of the execution or acts tending directly towards the beginning. VIDAL, *op. cit. supra* note 137, at 138. For excellent illustrations of decisions of the Cour de Cassation, see *id.* at 137. Cf. GARRAUD AND LABORDE-LACOSTE, PRÉCIS' ÉLÉMENTAIRE DE DROIT PÉNAL (12th ed. 1936) 45.

For examples of American cases, see MILLER, *op. cit. supra* note 142, at 101-102; Beale, *Criminal Attempts* (1903) 16 HARV. L. REV. 491, 504 *et seq.*; MAY, LAW OF CRIMES (4th ed. 1938) 185-188; Sayre, *Criminal Attempts* (1928) 41 HARV. L. REV. 821.

tending immediately," and "proximately"<sup>144</sup> are common.<sup>145</sup> Holmes has written that "the act must come pretty near to accomplishing that result,"<sup>146</sup> and again, "very near to the accomplishment of the act."<sup>147</sup> He showed considerable insight into the difficulties, at least, when, after stating the usual formula, that "every question of proximity must be determined by its own circumstances," he concluded that "analogy is too imperfect to give much help."<sup>148</sup>

It is apparent that the approach above, almost the only one represented in our law, is empirical in nature — it has reference to factual differences between preparation and attempt, more or less vaguely apprehended, but, in any event, assumed to exist. But the "rules" above amount to little more than warning as to what cannot be asserted empirically. The underlying reasons for such present inadequacy are lack of analysis of the nature of the problem dealt with, as well as of the objectives sought, and, per consequence, of the methods employed, conceptual and procedural, to attain them. It will help us to approach these basic inquiries if we consider, first, certain other expositions which purport to distinguish preparation from attempt.

It is sometimes suggested that when the offender has proceeded to the point that his conduct constitutes some crime (not, of course, the intended one) he has also committed a criminal attempt. While this might have some persuasive effect, there is no necessary connection nor any such requirement established in the cases. A somewhat similar explanation is that the greater the intended offense, the less "immediate" need conduct be to constitute criminal attempt. This hypothesis has a superficial plausibility; but it ignores the complexity of the factual problems encountered; nor have any of the writers who put it forward, made a thorough test of it in the cases.<sup>149</sup> Still another theory, which bears a close relation to Baron Parke's "last act" dictum,<sup>150</sup> is that attempt begins when the

144. KENNY, *OUTLINES OF CRIMINAL LAW* (15th ed. 1936) 92.

145. MILLER, *op. cit. supra* note 142, at 101-102 for citations. "There must in other words be an act done which more or less directly tends to the commission of the crime." 1 BISHOP, *CRIMINAL LAW* (9th ed. 1923) 519, § 729(2); *State v. Dumas*, 118 Minn. 77, 136 N. W. 311 (1912); *People v. Lanzit*, 70 Cal. App. 498, 233 Pac. 816 (1925); *People v. Rizzo*, 246 N. Y. 334, 158 N. E. 888 (1927).

146. *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770 (1897).

147. *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N. E. 55 (1901). *Cf.* "it must come dangerously near to success." Beale, *supra* note 143, at 492.

148. *Commonwealth v. Kennedy*, *supra* note 146.

149. Sayre, *supra* note 94, at 845. Skilton, *The Requisite Act in a Criminal Attempt* (1937) 3 U. OF PITTS. L. REV. 308, 313.

150. In *Regina v. Eagleton*, Dears. 515, 538, 169 Eng. Rep. 826, 835 (1855), on a charge of attempting to obtain money from guardians of the poor by false representation, etc., Parke, B. said: ". . . we do not think that all acts towards committing a misdemeanor are indictable . . . Acts immediately connected with it are [attempts]; . . . no other act on the part of the defendant would have been required. It was the last act, *de-*

offender no longer controls the agency he has set in motion, when it has become a matter of physics and not volition. But again, this view finds little support in the cases; liability attaches though the offender is still in charge and needs to perform additional acts before his intended harm can result.

More significant than any of the above is the "unequivocality theory" announced originally by Carrara, which rejects any empirical distinctions between preparation and attempt, and postulates its basis on the problem of proof. As stated by Salmond: "An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done. A criminal attempt bears criminal intent upon its face. *Res ipsa loquitur*. An act, on the other hand, which is in itself and on the face of it innocent, is not a criminal attempt, and cannot be made punishable by evidence *aliunde* as to the purpose with which it is done. . . . the ground of the distinction between preparation and attempt is evidential merely."<sup>151</sup> This explanation shows insight into the nature of the difficulty. It recognizes the limitations of existing empirical generalizations. Indeed it would seem probable that given any particular criminal objective, the closer to consummation, the more available would be evidence required to prove the criminal intent. It must have been some such consideration which led Salmond to his conclusion that the distinction is "evidential merely."<sup>152</sup> But this explanation, though it has the merit of appraising one aspect of the problem of persuasion, is fallacious.

Isolated behavior is always ambiguous so far as legal significance is concerned. A person carries a gun in his possession. Is his purpose to defend himself, to hunt or to kill a man? An individual is caught just after he has unlatched a window in a dwelling house. Is his intention to steal or to keep a rendezvous? Ambiguity is sometimes much reduced, as, for example, when a passenger in a subway train places his hand in another's pocket. Even here the act alone does not necessarily mean a criminal intent, or, at least, any particular criminal intent. The passenger may have been a creditor trying to recover his own property or its equivalent; or, if the pocket were a lady's, the purpose may have been lewd

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*pending on himself*, towards the payment of the money, and therefore it ought to be considered as an attempt." (Italics supplied). But shortly thereafter in *Regina v. Taylor*, 1 F. & F. 511, 512, 175 Eng. Rep. 831 (1859), where the defendant struck a match near a stack of corn, then blew it out, Pollock, C. B. stated: "The act must be one immediately and directly tending to the execution of the principal crime."

151. Salmond, *op. cit. supra* note 137, at 404.

152. In *Regina v. Roberts*, Dears. C. C. 539, 551, 169 Eng. Rep. 836, 841 (1855), the defendant had got dies but not sufficient tools to do the counterfeiting. The jury found the criminal intention. Parke, B. said: "I do not see for what lawful purpose the dies . . . can be used . . . or for what purpose they could have been procured except to use them for coining." As regards this case, Stephen wrote: "Some decisions have gone a long way towards treating preparation to commit a crime as an attempt." 2 STEPHEN, *op. cit. supra* note 41, at 224.

rather than larcenous. We cannot say until we know the relevant facts and circumstances.<sup>153</sup> The unequivocal test is, accordingly, invalid because it arbitrarily confines judgment as to intention to a narrowly circumscribed "act." This is not done, and it would be unwise to judge on such rigorously restricted evidence. As a consequence, it would, as seen, impose liability for non-criminal acts, and, on the other hand, it would too long defer liability. Hence the assertion that "an act which is in itself and on the face of it innocent, is not a criminal attempt" is untenable. It has long been held that an act might be quite innocent in itself, but found to express a criminal intention on knowledge of surrounding circumstances.<sup>154</sup>

Any valid judgment on the issue, criminal attempt or mere preparation, must take into consideration not only the defendant's "act," but also the surrounding conditions, and beyond that, various preceding circumstances, the relation of the parties, and all other matters *allowing reconstruction of the total social situation*.<sup>155</sup> In this process the defendant's immediate act, of course, plays an important part. Once the total social situation is envisaged, it is possible to come to a conclusion concerning intention. This means establishment of the denotation of "intention" — knowledge of the specific objective sought. Only then is it possible to appraise the proximity of the act to attainment of intended criminal effects.<sup>156</sup> But despite certainty as to criminal intention, the defendant must nonetheless be acquitted if he has not committed a substantial harm. This requirement, the unequivocal test ignores.<sup>157</sup>

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153. If Salmond's language is interpreted to mean no more than that the defendant's total conduct must be made the basis for decision, then his theory amounts to no more than that judgment must rest on fact. Even this assertion is questionable as a behavioristic basis for determination of intention. To the extent that it is valid, it is true of all judgments as to crimes. I have therefore chosen to give Salmond's remarks a meaning which seems helpful and relevant to the particular problem of attempt, *i.e.*, to circumscribe rigorously his use of the word "act" in the statement "an attempt is an act of such a nature," etc.

154. "Lading wool is lawful, but if it be done with an intent to transport it, that makes it an offense." *Rex v. Sutton*, 2 Strange 1074, 93 Eng. Rep. 1040 (1736). *Cf.* The case of Henry Sampson Woodfall (1770), 20 HOWELL, *op. cit. supra* note 3, at 914, 919, and Ellenborough's remarks in *The King v. Philipps*, 6 East 464, 471, 102 Eng. Rep. 1365, 1368 (1805).

155. This becomes clear when one considers cases of factual impossibility, *e.g.*, shooting into an empty bed. If decision were rigorously confined to the defendant's act in the above situation, it would be impossible to pass any judgment on his conduct. This, of course, does not mean that intention is to be determined except from facts.

156. This does not purport to represent the actual psychology of decision, but instead, to articulate the necessary elements and steps in decision. Once there is sufficient knowledge of the offender's conduct to establish his intention, it is possible to evaluate the conduct (as "proximate," etc.) in light of the goal sought.

157. Does the "unequivocal test" really eliminate empirical distinctions; is it "merely evidential"? That is the claim it makes; still it requires evidence of "the criminal

The analysis above suggests the following hypotheses:

1. That objective social harms exist and it is possible to appraise them qualitatively with sufficient precision for the purposes in hand.
2. That the rules defining preparation and attempt do not themselves lay down empirical distinctions but constitute, instead, a *method for determining these empirical distinctions* by implementing the formation of judgments concerning social harms.

Before considering these hypotheses, it should be noted that there is an alternative view, namely, that the entire question is insoluble, even meaningless. The rules simply pass the issue to the triers. Such "explanation" is simple enough. It needs only to proceed on the basis that, assuming that a judgment must be made, the problem is to provide a method that satisfies rather indiscriminate group opinion. It becomes a question, then, of what sort of person should be punished. These are not the premises upon which the common law is constructed.

To evaluate the rationale of the law in that regard, the notion "social situation" must be considered somewhat more explicitly. Heretofore, for the most part, behavior has been treated as "neutral;" the existing rules have been accepted as given, and their behavior-circumstance elements have been described in terms so general as to ignore any qualitative aspect of the contents of the rule. But for some purposes a more fruitful interpretation is the ethical import of the norm. This significance may be epitomized by the proposition that the (legally) criminal situation is also a social situation. In its broadest connotation, this assertion parallels substantively the formal generalization that every legal situation represents a jural relation. The first step in analysis of the significance of criminal behavior has been described above: act must not be divorced from consequences; act, instrumentality and consequences provide a situation that, together with relevant knowledge of prior circumstances and conditions, forms the subject-matter of analysis. This situation, in its totality, is social; it represents a cluster of meaning, a socio-legal complex whose significance results from its position in a manifold where the relevant indicators are the social and legal institutions (a culture complex), the apprehension of particular ends sought, the appreciation of attainment or immediacy of attainment of the objective, as well as the meaning of words and of relevant ethical and legal principles.<sup>158</sup>

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intent." But criminal intention is one over-riding limitation of attempt. The usual formulas in terms of "direct" and "immediate" conduct and "commencement of the execution" of a specific harm, implicitly require a judgment as to the existence of a specific criminal intention. But it allows the judgment to be made on the basis of all the relevant evidence (unless exceptionally excluded); and it insists upon a requirement in addition to criminal intention: an objective harm.

158. Among the more suggestive formulas are: "to get ready" and "to try to commit it;" SALMOND, *op. cit. supra* note 137, at 402; "collecting forces" and "setting forces

Accordingly, the present problem concerns differentiation of social situations (rather than of defendant's acts) in terms relevant to the variety of existent sanctions. If this inquiry is pursued primarily with reference to the criminal law, it is apparent that we directly consider punishment, and that the problem then becomes: what are the conditions under which punishment is legally administered? The relevant generalizations do not now exist. This, however, stipulates only the absence of a forensic sociology, not the invalidity of judgments as to social harm in their various specific contexts. Such validity, presumably, rises as the triers increase in number, intelligence and representativeness. The only available test would be the re-creation of the social situations before carefully selected audiences, and notation as to degree of consensus. In the absence of such testing there is no reason to impugn common sense reliance on thoughtfully derived intuitions into the existence and extent of social harms.

The relationship of individual judgments to the substantive law becomes evident. The legal system presents a hierarchy of harms, corresponding generally to the penalties imposed. This is the work of the legislature. The code does the initial job of describing and grading harms. It ranks criminal attempts in accordance with a general appraisal in relation to other harms. But it does not define or describe criminal attempt in empirical terms. If we compare rules concerning attempts with most other rules of criminal law (murder, arson, rape), we note a striking difference. Most rules, though general propositions, do represent behavior-circumstances; they provide a concept of certain empirical phenomena; they compose an outline which fits each specific factual instance. There are no such rules concerning criminal attempt or the difference between it and preparation. What we are told is that preparation means "getting ready," that it is "remote," "indirect" and so on, whereas attempt is "immediate," "direct," a "discharge of forces," "the commencement of execution," and so on. None of these assertions are reflections, images or representations of any particular behavior-circumstances. The assertions are applicable to behavior-circumstances but they do not represent them. They are guides to decision; they narrow the area of relevant phenomena and focus attention on certain values; but they do not portray any actual phenomena.

Does this mean that the triers of the issue (preparation or attempt) have *carte blanche*?<sup>159</sup> The assumption underlying the criminal law and

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into operation;" ROUX, TRAITÉ ÉLÉMENTAIRE DE DROIT PÉNAL (2d ed. 1927) 119. In some ways the most significant of all such statements is Professor Roux' suggestion that we have attempt when the offender's conduct penetrates "the sphere of legally protected interests of another person." *Id.* at 105-106.

159. "In the elaborate and carefully prepared codification of the criminal law, which has long been pending in the British Parliament, we are told, of 'attempts to commit offences,' that 'the question whether an act done or omitted with intent to commit an offence is or is not only preparation . . . and too remote to constitute an attempt . . . is a ques-

procedure is that there are valid standards of judgment. Either there are such standards, as has been suggested, or it is a question of power, of having the last word concerning pure whimsicality. In any event, it must be recognized that we have no presently available knowledge as to the results obtained. The nuances are so delicate, the influences so many, and, in part, emotional, that the results do not lend themselves to ready criticism. We can only set up the best possible methods for guidance of judgment in such affairs, and can limit such procedure by substantive law and appeal against irrational verdicts.

To summarize the rationale of the criminal law in this aspect of attempt:

1. It is assumed in the criminal law that there are objective harms and that it is possible to determine their existence and to measure their extent with sufficient precision for the purposes of the legal order.

2. The substantive law represents an appraisal of criminal attempts in relation to the various other harms (crimes). This has become almost entirely a matter of legislation.

3. Subject to the limits set by law, we have a delegation to judge and jury to determine whether given configurations of fact constitute criminal attempts.

4. Finally it is supposed that it will aid the correct formation of judgments to be guided by certain formulas which, though not descriptions of any specific behavior, are applicable thereto and suggest criteria of evaluation.

#### *The Common Law Theory of Punishment*

If we ask, why does our law concern itself with such distinctions as intent, preparation, attempt and consummated crime, attention is directed to the objectives of such endeavor, namely: to determine whether or not

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tion of law.' [REPORT OF CRIMINAL CODE BILL COMMISSION (1879) Draft Code, § 75]. In a valuable letter of Chief Justice Cockburn, addressed to the Attorney-General, and commenting on the Draft Code, he justly criticised this passage: 'To this I must strenuously object. The question is essentially one of fact, and ought not, because it may be one which it may be better to leave to the judge to decide than to submit it to a jury, to be, by a fiction, converted into a question of law . . . The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge.' THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) 202. Cf. CLARK, AN ANALYSIS OF CRIMINAL LIABILITY (1880) 17.

Garraud points out that the question whether the distinction between preparation and attempt is one of law or fact has been variously decided by the Cour de Cassation, the last view being that it is a question of law. Whether the defendant did such and such is a question of fact; whether such conduct constitutes a criminal attempt is a question of law. Nonetheless under French procedure the jury really decides both questions and the courts cannot control the results. See 1 GARRAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT PÉNAL (3d ed. 1935) 488-489, 494, 501.

a social harm exists and to determine its extent. But determination of the gravity of harm committed, though an ultimate consideration within an inclusive legal system, may be regarded also as auxiliary to the underlying purposes of the criminal law and to theories of punishment which implement these purposes. Certainly, one basic premise of the common law of crimes upon which these purposes are constructed is that it is right that punishment be proportioned to the extent of harm done. The indiscriminate characterization of this is that much of the criminal law is based upon *the* retributive theory of justice. Retributive theories of punishment have been so misinterpreted in recent years that an extensive discussion would be required even to see the problem in decent perspective.<sup>160</sup> Moreover, it is apparent that our criminal law in its present form rests upon utilitarian considerations fully as much as upon retribution.

But it is necessary to notice the impact of subjectivist or positivist criminology upon the criminal law in terms of the attempt problem. If the subjectivist view is taken to mean that intention rather than harm done is the significant datum as regards "treatment," then it follows that the distinctions drawn between preparation, attempt and consummated crime are unsound, or at best, are only subordinate as evidentiary. Harm produced may represent intention; so equally as regards certain behavior without consequent harm; "talk" alone is sufficient to establish intention in many cases; and the notion "dangerousness," freely interpreted, opens the door to unlimited determinations in this regard.<sup>161</sup> On the other hand, if objective harm is insisted upon in the law, in addition to intention, then the distinctions drawn between preparation, attempt and consummated crime have ample significance, and presumably, utility.<sup>162</sup> A large

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160. In the following pages "retribution" has reference to intentional harm done rather than to intention. It might be termed a legal theory of punishment based on "objective moral wrong." Cf. "Moral guilt must be added to injury in order to justify punishment." 1 LIVINGSTON, COMPLETE WORKS ON CRIMINAL JURISPRUDENCE (1873) 235.

161. In addition to the question of protection from official abuse, suggested by the above, other problems are involved. That concerning "impossibility" will be noted *infra*. Here we may raise the general question, if intention is to be the basis for treatment, will no difference in treatment be applied (a) if the offender has only intended; (b) if he has acted upon his intention; (c) if he has committed the harm he intended? As to the next step, almost all countries have sharply different sanctions for attempt and the completed crime. France is one of the few whose Code provides the same penalty for both. But all French writers agree that in actual administration, sharp differences are observed. See GARRAUD, PRECIS DE DROIT CRIMINEL (15th ed. 1934) 220-221; ROUX, *op. cit. supra* note 158, at 114; GARRAUD AND LABORDE-LACOSTE, *op. cit. supra* note 143, at 70. For an anthropological analysis of the problem, see 1 WESTERMARCK, ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS (1912) 199, 245-246.

162. A very nice problem is presented by the French law which does not punish attempt at all if the offender has repented before his objective has been attained and if this volitional action by him was the cause for non-attainment of the original objective. This view was recommended by Wharton and is opposed by Skilton [*op. cit. supra* note 149, at 310, n.]. The French law seems to this writer to rest on considerable psychological in-

literature, especially on the Continent, has accumulated concerning these issues; it is significant not only as reflections of certain social and reform movements, but also as dialectical and ideological exercises. We need not re-thresh the grain.<sup>163</sup> What needs emphasis here is, first, certain great divergencies in consequences, suggested above,<sup>164</sup> which would result from adoption of sweeping proposed subjectivist reforms, and second, the like effect on *administration* of existing laws of both positions where moderate positivists agree that behavior be carefully taken into account. Here controversy tends to disappear — except terminologically. For it is plain that whether “sufficient” behavior and consequences are insisted upon to fix intention or whether they are required for moral reasons (posited on the doing of a substantial harm), there would be close approximation in administration of divergently phrased rules. Thus if the positivist holds that preparation is not sufficient to manifest intent, he reaches the same result as the legal objectivist who asserts that preparation is not any harm effected. Unfortunately, positivists seem rarely to seek, much less demand, safeguards against abuse.

In much of the current criticism of retribution, the issues are incorrectly formulated by precluding, at the outset, the possible relationship of retribution to “the general good.” If there is any sense in asking whether penalization is right or just, or in speaking of innocence and guilt, then there can be no doubt as to priority in case of conflict; if punishment is unjust, it matters not how “useful” it may be.<sup>165</sup> Indeed, it may be seriously questioned whether any “ultimate good” can result from unjust punishment; even if it could, only omniscience could understand and condone it. The utilitarian argument, as sometimes advanced, seems little short of savagery — “punish the innocent so that the guilty may prosper!” The common law approaches the problem from the other end. Is punishment just? If not, reject it, come what may. It is frequently assumed that one must take a stand at one pole or the other, that punishment must be either retributive or utilitarian; that it cannot

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sight into motivation for in addition to the sanction of the consummated crime, it holds up the prospect of complete freedom from liability as an additional incentive to desist. Garraud states that the law of all countries except England attaches no penalty to attempt if the offender has voluntarily suspended completion of the intended crime. 1 GARRAUD, *op. cit. supra* note 159, at 497. If, however, the defendant, though suspending his original intention, has already committed a lesser crime, he is punished for that. *Id.* at 204. Cf. AMOS, SCIENCE OF LAW (1888) 254.

163. One of the major factors generally overlooked is that we cannot significantly debate theories of punishment apart from consideration of the legal system of which sanctions are a part. It is possible to argue the utility of having any legal system whatever. If a legal system is assumed to exist, however, certain results necessarily follow as to punishment regardless of general utility.

164. See note 161 *supra*.

165. “When you talk of dealing with criminals as medical cases you are treating them not as human beings but as animals.” Robert Park, quoted by SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (3d ed. 1939) 358-359.

be both. But this is an arbitrary and over-simplified view of a very complex matter. Punishment should be inflicted because it is right to do so. But punishment may also have useful effects; it may effect reformation by bringing a wrongdoer to a realization of the ethical significance of his behavior; it may also deter.<sup>166</sup> So long as the proponents of utility agree that punishment should not be inflicted on the innocent, they also espouse retributive justice. So far as it is agreed that rehabilitation and deterrence should be sought, utility is admitted.

Defense of the common law theory of punishment insofar as it rests on retribution comes to this: all human living is experience of values, of goodness, truth and beauty. This ultimate end of maximum value-experience transcends all others. As a result, even when it is impossible to establish any deterrent or reformatory effect of punishment, one may still insist upon appropriate treatment, that correctly reflecting the value involved. Such treatment may be defended not only intrinsically but also from a utilitarian viewpoint — as providing benefits resulting from instruction in the hierarchy of values. For such instruction seeps through a manifold of experience and comprehension; its effects should be equally varied and far-reaching. In any event, sanctions, treatment of offenders and objectives to be pursued are varied, complex and interlocking; little is achieved by over-simplification of the problem.<sup>167</sup> In the particular context of criminal attempt, it may be emphasized that one essential significance of the criminal law as a system designed to stimulate rational faculties and to uphold social values should not be ignored. The test of the underlying punitive principles of the common law and its administration is not logical manipulation of propositions to try the consistency of theories; it resides rather in careful observation of the functioning of the system at its best.

### *The Problem of Impossibility*

Of the various problems in the law of criminal attempt, "impossibility" is in some respects the most intricate. First insight towards solu-

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166. For purely logical manipulation it is of course possible to postulate the inconsistency of so-called retribution and utility. As a matter of fact and of policy-formation the more persuasive theory is that normally, punishment that is just (*i.e.*, right without any reference to utility) is also useful.

167. Admittedly it is a difficult problem to reconcile various objectives and develop a consistent theory that may usefully be applied to determine the various sanctions. French writers sometimes distinguish culpability as regards *delit manqué* (where the offender has done all he intended but missed the objective) from the *tentative* (where the offender has been interrupted prior to completion of his intended acts). They regard the first as the more serious harm and the more culpable.

Our statutes show complete lack of careful analysis of this problem. The following might provide an initial basis for one phase of relevant consideration: Divide attempts into three classes: with reference to capitally punishable offenses, other felonies, and misdemeanors involving moral turpitude.

tion results from recognition that *all attempts are impossible*. This is simply a necessary implication of the definition of attempt. As Beale stated, "it must not succeed."<sup>168</sup> To assert that an intended harm was not effected is equivalent to the assertion that, under the given facts, the intended harm could not have been effected. This is no more than a statement of mechanics. The situation is viewed after its occurrence without speculation as to what "might have happened." If we shift the point of judgment from the completed action to its beginning, we may regard the situation on precisely the same premises employed above, in which case we ascertain no difference in results or legal consequences. Or we may assume that the action need not have failed of accomplishment either because the doer had the capacity to do better (judging from his conduct elsewhere) or that some fortuitous circumstance prevented its accomplishment. This latter element will be discussed shortly. Here we need to point out that lack of skill on the part of the doer is not considered any aspect of "impossibility." We regard deliberate conduct as within the control of the doer and accordingly, hardly imagine that failure on this score might form any basis (excepting mental disease) for exculpation. These premises are not those that a psychologist might employ; they come naturally in law. When the *only* reason for failure is inefficient action (*maladresse*), impossibility as a legal issue does not exist. It follows that impossibility as a legal doctrine does not extend beyond means employed and external conditions.<sup>169</sup>

The second major obstruction to analysis results from the use of the term "legal impossibility." By reference to the distinctions drawn above between law and fact, it is necessary to assert that the phrase cannot mean what it seems to imply, for there is no such thing as "legal impossibility." The point is not that *any* behavior-circumstance can be made criminal—though this theoretically, at least, is true. What is involved is the distinction between behavior-circumstances that are designated "criminal" and those that are "legal," not in violation of any criminal law. To state that certain facts are "legally possible" adds nothing to the statement that they are "legal" and the like is true of the opposite. Of course it is essential to know the circumference of legal rules; to denote the area of "liberty." If we can keep our terminology clear, and perceive, also, that any doctrine of "impossibility" as to attempt must operate, if at all, subject to the premise that failure to accomplish intended harms is presupposed, we shall have some initial basis for criticism of special doctrines.

The dialectics of the literature on impossibility in this country but especially abroad are illuminating exhibitions of logical ingenuity. But the problems raised are more than logical ones. Beyond that are shifting

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168. Beale, *supra* note 143, at 492.

169. See p. 821 *supra*.

categories and phenomena that can be so variously appraised that they defy any rigorous classification. Some insight into the particular nature of these difficulties may be had if one considers the "empty pocket" cases decided by the English courts. *Regina v. Collins*, many a troubled judge must regard as his *bête noire*, and Bramwell, its evil *raisonneur*. A simple case it was. Collins tried to pick a woman's pocket. It turned out to be empty; worse luck yet, Collins was arrested and charged with attempt to commit a felony. But his fortune soon changed for the better. For instead of being tried by a Mansfield or a Lawrence, he fell into the hands of a logician. At first it appeared "plausible" to Baron Bramwell "that a man putting his hand into an empty pocket might be convicted of attempting to steal." Then, alas, the Baron, having reached a sensible result, began to speculate, and in the course of so doing he suggested two hypothetical cases which should forever have enshrined him in the heart of any law professor. "You may put this case: suppose a man takes away an umbrella from a stand with intent to steal it, believing it not to be his own, but it turns out to be his own, could he be convicted for attempting to steal?"<sup>170</sup> And he recalled that in the *McPherson* case he had asked: "Supposing a man believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?"<sup>171</sup> The prosecutor's insistence that he had proved both intention and an act well designed to carry it into effect were unavailing against the weight of sheer logic. All the judges were convinced that the conviction (note the jury's attitude) was wrong. "We are all of opinion," said Cockburn, C. J., "that this conviction cannot be sustained . . . This case is governed by that of *Regina v. McPherson*, and we think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged."<sup>172</sup> He said it was like going into an empty room to steal. "No attempt to commit larceny could be committed."<sup>173</sup> There was slight authority to support the earlier decision, upon which this remark was based.<sup>174</sup>

170. *Regina v. Collins*, 9 Cox C. C. 497, 498, 169 Eng. Rep. 1477, 1478 (1865).

171. *Regina v. McPherson*, 7 Cox C. C. 281, 169 Eng. Rep. 975 (1857).

172. *Regina v. Collins*, 9 Cox C. C. 497, 498, 169 Eng. Rep. 1477 (1865).

173. *Id.* at 499, 169 Eng. Rep. at 1477.

174. *Rex v. Scudder*, 3 Car. & P. 605, 606, 172 Eng. Rep. 565, 566 (1828), was a prosecution on a statute, for administering a drug to procure an abortion. It appeared that there was no pregnancy. The twelve judges reversed the conviction because "it was necessary that the woman should be with child." Anonymous, 3 Campb. 73, 170 Eng. Reg. 1310 (1811), where a harmless draught had been given under the belief that it could procure an abortion. Lawrence, J. (who, it will be recalled, contributed most to the law of criminal attempt, see note 109 *supra*) then charged: "It is immaterial whether . . . it was capable of procuring abortion, or even whether the woman was actually with

The *Collins* case was rejected by the Criminal Code Commission of 1879;<sup>175</sup> by judicial implication in 1889,<sup>176</sup> despite Stephen's criticism of the Draft Code;<sup>177</sup> and expressly so in 1892.<sup>178</sup> The French courts came to a like conclusion after a similar history of acquittal in such cases.<sup>179</sup> Our present problem concerning impossibility is the direct result of these decisions establishing liability in such cases where facts other than the offender's act accounted for the failure.

The difficulties arose because side by side with these decisions other conflicting principles persisted. In some — attempts to procure abortions or to poison — there were statutes interpreted to require sufficient conditions (pregnancy, poisonous substance). The general attempt provision in the French Code<sup>180</sup> was interpreted, like the *Collins* case to require the possible commission of the various harms described in the law. We encounter, in fact, the most basic postulate of criminal jurisprudence, that the commission of objective harms proscribed by law be punished, but not intention or conduct which fell short of such harms. French theory first sought to reconcile the empty pocket decision and like cases with this principle by distinguishing "absolute" from "relative" impossibility, the latter, only, being punishable. This was an intermediate position which rejected not only subjectivist views that would hold all attemptors liable because of their intent, but also, the older objectivist principle that would never punish "impossible" attempts, because, following the Code, "they do not constitute the beginning of a crime."<sup>181</sup> The intermediate view held that there might be absolute impossibility either as to means (an unloaded gun) or as to object (the intended victim is dead; this "corpse case" has become the French counterpart of Bramwell's block of wood). Likewise as to relative impossibility: the intended victim is alive but is not in the expected place (he did not

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child. If the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute." Counsel argued that "it was an innocent draught and the woman had threatened suicide to hide her shame." Not guilty.

See also *Rex v. Empson*, Old Bailey Trials, April 25, 1781, at 240; stated by East P. C. 412.

There was no reference to *Regina v. St. George*, 9 Car. & P. 483, 173 Eng. Rep. 921 (1839), where the defendant was found guilty of an assault though his gun was not properly cocked and could not be discharged.

175. Section 74, DRAFT CODE OF THE ROYAL COMMISSION ON THE LAW RELATING TO INDICTABLE OFFENSES (1879). Cf. LEWIS, A DRAFT CODE OF CRIMINAL LAW AND PROCEDURE (1879) 251, §§ 474 and 252, n.

176. *Regina v. Brown*, 24 Q. B. 357 (1889).

177. 2 STEPHEN, *op. cit. supra* note 41, at 225.

178. *Regina v. Ring*, 17 Cox C. C. 66 L. T. (N.S.) 300 (1892).

179. D. 1896 1. 21; S. 1895. 1. 108.

180. CODE PÉNAL, Art. 2.

181. GARRAUD AND LABORDE-LACOSTE, *op. cit. supra* note 143, at 49-50.

sleep in his usual bed that night),<sup>182</sup> the gun was properly loaded but the doer's aim was deflected.

The argument that some attempts were absolutely impossible while others were only relatively so was vigorously attacked. If a larceny could not be effected because a pocket was empty, accomplishment was just as impossible as it was to kill with an unloaded gun. Shooting into an empty bed was just as impossible to effect murder as procurement of abortion on a woman, not enceinte. There are no degrees of impossibility; one is as "absolutely" impossible of accomplishment as the other.<sup>183</sup> The court decisions went far to support this criticism.<sup>184</sup> With much insight into the psychology of decision, the protagonists of absolute impossibility were driven to the last remaining position — reliance no longer on inadequate means but solely upon such insufficient external conditions as to make the intended crime "legally impossible." At this point absolute impossibility fuses with legal impossibility, and, in effect, becomes supplanted by it. French jurisprudence on this question now parallels American criminal law<sup>185</sup> — the issue is "legal impossibility."

182. After some differences in French decisions, the Cour de Cassation held this criminal attempt. D. 78.1.35; S. 77.2.329 (Apr. 12, 1877).

183. Besson, *Le Delit Impossible* (1929) REV. CRIM. 353-354.

184. In 1928 the Cour de Cassation upheld a conviction for attempt to procure an abortion by use of eau de cologne, an "absolutely" impossible means. D. 1929.97 (Nov. 9, 1928). An excellent discussion of the various theories by Prof. A. Henry is appended, *id.* 97-99.

Where the means employed have been inadequate, there has been a general tendency to impose liability on the ground that they were in the doer's control, that the consequent impossibility should not therefore aid him. And one writer, proceeding upon this thesis seeks to distinguish intrinsic from extrinsic factors on the basis of control. Strahorn, *The Effect of Impossibility on Criminal Attempts* (1930) 78 U. OF PA. L. REV. 962-3. But it is apparent that capacity to control will not account for liability in such cases as the harmless powder mistaken for arsenic, and of an unloaded gun; on the other hand, impotency, which is designated as "intrinsic" is the antithesis of control. The fundamental difficulty arises from the meaning of the term "control." We are dealing with intentional conduct. If the wrongdoer "controls" administration of harmless powder which through no fault of his as layman, was substituted for arsenic, no reason appears why he does not "control" the external circumstances by selecting them correctly, *i. e.*, by seeing to it that they are "sufficient" when he discharges his forces.

185. Where poison was administered, but not in sufficient quantity to kill, conviction was sustained. *State v. Glover*, 27 S. C. 602, 4 S. E. 564 (1888). Held, likewise, where the intended victim did not take any of the poison. No allegation that the dose was large enough to kill was required. *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770 (1897). There are occasional decisions holding that if the substance administered was not poisonous at all, though the defendant believed so, there was no criminal intent. These are early decisions that hark back to the era when unsuccessful pickpockets were held not guilty. *Maudsley's Case*, 1 Lewin 51, 168 Eng. Rep. 955 (1830); *State v. Clarissa*, 11 Ala. 57 (1847); *Anthony v. State*, 29 Ala. 27 (1856). Upholding conviction for attempted rape though the defendant was impotent are *Hunt v. State*, 114 Ark. 239, 169 S. W. 773 (1914); *State v. Ballamak*, 28 N. M. 212, 210 Pac. 391 (1922).

The argument in terms of "legal impossibility" asserts its operation when a material element prescribed by law is missing: murder presupposes a human being, larceny, another's property, and criminal receiving, stolen property. But this view has no greater validity than that which centered on "absolute" impossibility. For the logic of conceding liability in the empty pocket and unoccupied bed cases is equally inexorable as regards "legal impossibility." In the empty pocket case, the presence of a chattel is certainly a "material" element in the law defining larceny; so, too, in the empty bed case, the absence of a human being eliminates an essential element of the homicide prescription. There is no difference between the proposition: murder is the killing of a human being, X is a corpse or a tree stump, therefore it is "legally impossible" to commit murder, and the proposition: larceny is the taking and asportation of another's chattel; X is not a chattel (but is nothing), therefore it is "legally impossible" to commit larceny. The crucial error that underlies "legal impossibility" is the failure to observe that material elements depend on the crime charged; it is the consummated crime only which presupposes the elements defined in the rules establishing those crimes. These elements are not material for other crimes; and in attempt, the overriding generalization, posited by failure of accomplishment, means precisely that one or more material elements are absent. Once it is granted that in some cases there is liability though failure resulted from absence of a material element, "legal impossibility," as doctrine, becomes untenable. It remains simply as cumbersome speech, a clouded assertion that certain behavior-circumstances are not in violation of law.

But is there not some validity to decisions that distinguish the tree stump from the empty pocket case? If "legal impossibility" is logically indefensible, need not psychological bases for such decision be examined as well as the fact-situations that created them? For it is not infrequent that decisions unsupportable on doctrine or logic are persuasive to common sense nonetheless. As regards shooting the tree stump or corpse, and the case of "stealing" one's own goods, Professor Garraud asks, "Whose right or sphere of interest has been violated?"<sup>186</sup> And Professor Roux, one of the most acute writers on this problem, asserts that in such cases no right whatever has been menaced but only "phantoms of rights."<sup>187</sup> Certainly it is important to articulate the common sense attitude that distinguishes between rifling an empty pocket and shooting a corpse or tree stump. For whatever be the quality of logic that has sought to distinguish absolute from relative, and legal from factual impossibilities, there was sound instinct at work seeking to retain requirements of objective harms determined, in part, by law, as the basis for

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186. 1 GARRAUD, *op. cit. supra* note 159, at 516-518.

187. "But penal sanctions are too real to serve for the protection of phantoms." ROUX, *op. cit. supra* note 158, at 118-119.

liability, and to avoid drifting on an open sea, uncharted as to spheres of law and morals, with no restraint on the punitive apparatus.

We may start with the assertion that in the pickpocket case, the emptiness of the pocket was fortuitous; usually it contained things. So, too, as regards the wrongdoer who wanted to murder his fellow boarder and shot into the bed where the intended victim usually slept.<sup>188</sup> One might say it was sheer accident that he slept elsewhere on the particular occasion. Now to state that failure was occasioned by fortuitous circumstances is to assert that viewing the situation prior to completion of action, the *probabilities* of success were high; that this was true with reference to that type of external condition generally. From the viewpoint of potential, intended victims, and with reference to the harms sought to be avoided, the principle that emerges is this: if the risk is great in such situations generally, there is liability for attempt, regardless of insufficient conditions in any particular case. Risk is a function of the relevant probabilities, hence only slightly affected by any specific situation. The problem is: when will courts, in effect, substitute an absent essential element for its present lack, as was done in the empty pocket and unoccupied bed cases?

As regards such hypothetical cases as those stated by Bramwell, it is clear that the writers who rely upon them have assumed that no risk to any person or value<sup>189</sup> was involved. But risk depends upon the relevant probabilities. If we proceed to determine the probabilities concerning such risk, it should be necessary to ask: given the totality of sense-data in those cases, what is the likelihood of the envisaged, corresponding reality being present? If we assume normal perception the answer would be almost 100 per cent — deduction being made for error under excitement. For if we have sense-data that signify a human being to normal perception (this is the relevancy of the "reasonable" man test), certainly the likelihood of correspondence is very great.<sup>190</sup> If, given sense-data which normally mean "a pocket containing things," we are willing, in effect, to substitute the missing reality and so find criminal attempt in such a case, there is no reason so far as objective risk is concerned, why we should not proceed likewise in the hypothetical cases.

The intriguing difficulty of Bramwell's illustrations resides in the very fact that they are cases from Never-Never Land. They arose in the volatile imagination of a judge; or, if they ever did actually occur, the

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188. *State v. Mitchell*, 170 Mo. 633, 71 S. W. 175 (1902).

189. Clearly the rhetorical inquiry, "whose right or interest was menaced?" would not be directly relevant to such crimes as treason, bribery of an officer, and countless misdemeanors.

190. In light of the prevailing viewpoint in French jurisprudence, it is significant that the 1934 *projet* provided that: "Attempt is punishable even though the end sought could not be attained because of a circumstance of fact unknown to the actor." VIDAL, *op. cit. supra* note 137, at 147-148.

fact remained unknown, certainly unreported. They are cited for only one reason — to support some desired termination of actual controversies. But the fact that these hypothetical cases do not happen must not be confused with necessary analysis of them should they some day confront a court. A first impulse might be to examine into the sanity of a person who shot a tree stump, thinking it was a human being, or who furtively went about “stealing” his own property. But if it should appear that the defendant was normal and sober, then it would be necessary to deal with him on general principles of liability. In this situation, the facts must have been such as, under their specific conditions, led the defendant reasonably to conclude that the sense-data he saw represented a human being, perhaps, *e.g.*, that somewhere an arboreal sculptor had transformed his garden into a menagerie, not entirely of quadrupeds. In such a case what would a court do? Should there be a difference, *as regards criminal attempt*, between shooting a bullet into an unoccupied bed and doing the like with one of Madame Tussand’s effigies, the intent being to murder in both instances? Quite conceivably a court might regard the latter case as so rare as to feel little compulsion to punish. If this is approved of, then perhaps in such instances logic gives way to common sense. Yet not only on the analogy of the case of shooting into the empty bed, but also as a matter of fact, determinable on reconstruction of the social situation, a harm has been committed — although clearly we are here at the criminal periphery. If this seems tenuous, it is because our thoughts recur to particular extraordinary situations where serious damage cannot be done, and because we are apt to think of harm only as material.

One or two additional clues to the psychology of the decisions may be suggested. In the case of boys under certain ages, who by statute, cannot be convicted of rape, we find the weight of authority that such boys cannot be guilty of attempt to rape — the alleged reason being “legal impossibility.”<sup>191</sup> Such decision exhibits the common error of assuming that because lack of a material element makes commission of the consummated crime impossible, there can be no attempt. It involves, also, confusion between “law” and “fact.” But rape must be distinguished from forced intercourse. The one normally applies to the other, but there are exceptional limitations, one of which is extreme youth. Its application to attempt cannot be justified on the ground of “legal impossibility” because the charge is not rape. But we can understand application of the identical policy to attempt in such a case, although its wisdom has been doubted.<sup>192</sup> No clarification results from basing the decision on “legal impossibility;” the simple holding that in this particular instance, age is also one material element of the *attempt* suffices.

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191. *Rex v. Eldershaw*, 3 Car. & P. 396, 172 Eng. Rep. 472 (1829); *State v. Sam*, 1 Winst. 300 (N. C. 1864); *Foster v. Commonwealth*, 96 Va. 306, 31 S. E. 503 (1898).

192. *Commonwealth v. Green*, 2 Pick. 380 (Mass. 1824).

Canons of statutory construction provide the bases for such determination. Another significant instance is provided by the *Jaffe* case,<sup>193</sup> which held that the defendant could not be guilty of attempt to receive because the goods had been recovered and were, therefore, no longer "stolen." The confusion between what the defendant did and his intention need not occupy us. We have examined the argument as to the absence of a material element advanced by proponents of "legal impossibility," and this applies to the court's effort to distinguish its decision from the empty pocket case. The one element that differentiates this case from others is that the attribute "stolen" is a legal conclusion, though for many purposes it is treated as fact. As a purely physical entity there was no change in essence or in appearance of the goods through addition or subtraction of the attribute "stolen." Nonetheless certain, operative facts determine legal judgments concerning ownership and the like. Hence the fact that the material element in the case was the creation, in part, of a legal conclusion did not justify exceptional decision. The attribute "stolen" should have been treated as purely factual; the absence of a material element would make receiving impossible, but should not affect the attempt. Yet, where the nature of the external conditions or "facts" are determined partly by application of legal rules, as in this case, the transfer of attitudes of regard which prevail generally, might in some measure account for the decision reached.

The complete untenability of the doctrine of "legal impossibility" does not require abandonment of the common law principle concerning objective harm, or the adoption of another basis for liability. The question to be determined in each case where an intended crime failed of accomplishment is whether or not a substantial harm was committed. The crucial fallacy of the doctrine of "legal impossibility" has been the assumption that because the intended harm could not be accomplished, none occurred. In assault, the error of such reasoning is obvious; it has become apparent in the empty pocket, the unoccupied bed and other cases. The same principle applies generally. Thus the logical difficulty posed by adherence not only to the requirement of objective harm interpreted to mean *only the intended harm*, but also to departures from these premises in certain attempt cases (*e.g.*, empty pocket) where the intended harm could not possibly be accomplished, is resolved by the suggested principle. It insists upon a substantial, objective harm; it asserts that there is such harm in attempts to commit major wrongs despite necessary failure because of inadequate means or insufficient conditions. The incorporeality of the phenomena we are called upon to evaluate is encountered elsewhere in generally admitted crimes. But the most particular evidence of adherence to common law principles is that punishment is not predi-

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193. *People v. Jaffe*, 185 N. Y. 497, 78 N. E. 169 (1906).

cated on intention. The doer is tried, not for what he intended to do, but for what he did do. The sanction follows the harm, not the intention.

#### CONCLUSION

A modern legal system is burdened with weighty, complex doctrine. The growth of the system over centuries under the influence of standardized techniques results, partly, in an autonomous development not infrequently remote from the vital problems the rules were designed to cope with. It becomes necessary to penetrate the accumulation of formulas, to analyze them and to clarify or discard them as the need may be. Historical investigation provides the initial method of advance; we may recreate the past in order to lay bare the life situations, the actual problems that immediately stimulated thoughtful persons to build new law. The early history of attempt, and especially the work of the Star Chamber, revealed the central objective—the control of lesser harms. The consequent multiplication of offenses, far from being indicative of mere repression or increased criminality, may, in fact, indicate that new values and a higher sense of morality have been achieved. The criminal law, instead of remaining a crude substitute for expression of primitive passions, becomes a much more delicate and precise instrument of control. The focus shifts from undifferentiated severity to much more rational employment of varied legal agencies. In consequence, legal science becomes correspondingly complex. There is no more fruitful field for investigation in all of these concerns than that of criminal attempt and the problems it raises. No theory which grapples with such fundamental issues will endure very long, but the deeper insight into and the fuller understanding of our institutions thus achieved may surely encourage us to hope for recurrent studies of these problems.