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Why Do Criminal Attempts Fail? a New Defense (State v. Damms, Wis. 1960)

WHY DO CRIMINAL ATTEMPTS FAIL? A NEW DEFENSE*

LEGAL folklore includes the notions that the criminal process is invoked only against acts which cause demonstrable injury,[1] and that sanctions are applied in rough proportion to the actual harm inflicted upon society.[2] But concern for the safety of society often provokes use of the criminal law to protect its citizens from potentially dangerous behavior patterns.[3] Thus, when some harmful acts indicate a propensity in the actor to cause even greater harm, the criminal law frequently measures the sanction to be imposed, not merely by the actual injury done, but also by the potential injury implicit in the actor's conduct. Simple assault and assault with intent to kill may produce the same quantum of injury, but the sentence prescribed for the latter offense is more severe, probably because it includes consideration of the propensity to kill.[4] This concern for potentially dangerous behavior has led to the imposition of criminal sanctions for certain acts which result in no injury at all—so-called inchoate crimes.[5] The law of "attempts" is one category of such crimes. When a person attempts to commit a crime such as murder, but fails for some reason to achieve his intended result, he may be guilty of an attempt. Because injury is not an *essential* element of a criminal attempt,[6] the only rational function of the law of attempts must be the identification of individuals whose overt behavior manifests dangerous criminal propensities.

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*State v. Damms, 9 Wis. 2d 183, 100 N.W.2d 592 (1960).

1. See 1 BISHOP, CRIMINAL LAW §§ 38-39 (9th ed. 1892); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 11 (1947) [hereinafter cited as HALL]; HOLMES, THE COMMON LAW 49, 65-67 (1881) [hereinafter cited as HOLMES]; MILLER, CRIMINAL LAW 16, 17, 22 (1934) [hereinafter cited as MILLER]; MODEL PENAL CODE § 5.01, comment (Tent. Draft No. 10, 1960) [hereinafter cited as DRAFT MODEL PENAL CODE]; PERKINS, CRIMINAL LAW 5 (1957) [hereinafter cited as PERKINS]; WILLIAMS, CRIMINAL LAW 16 (1953) [hereinafter cited as WILLIAMS].

2. See, HALL 129; HOLMES 42; PERKINS 6, 7.

3. See HOLMES 65, 66; DRAFT MODEL PENAL CODE art. 5, introduction.

4. *Compare, e.g.*, N.Y. PEN. LAWS § 240 (assault in first degree "with intent to kill . . . punishable by imprisonment for . . . ten years"), *with* N.Y. PEN. LAWS § 244 (simple assault—"punishable by imprisonment for . . . one year"); *cf.* State v. Veysey, 21 Conn. L.J. 6 (Sept. 30, 1958) (propensity to commit sex crimes demonstrated by past record requires higher penalties). See generally DRAFT MODEL PENAL CODE § 5.05(2) comment.

5. See generally DRAFT MODEL PENAL CODE art. 5.

6. See Turner, *Attempts to Commit Crimes*, in THE MODERN APPROACH TO CRIMINAL LAW 273, 278 (1945); Beale, *Criminal Attempts*, 16 HARV. L. REV. 491 (1903) [hereinafter cited as Beale]; Turner, *Attempts to Commit Crimes*, 5 CAMB. L.J. 230, 234-35 (1934); HOLMES 67; Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789 (1940); DRAFT MODEL PENAL CODE art. 5, introduction; 1 AUSTIN, JURISPRUDENCE 523 (4th ed. 1873).

This view is contradicted by some commentators who suggest that an attempt to be classified as criminal, must in some manner be harmful to society. Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 969-71 (1930) [hereinafter cited as Strahorn]; Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464,

In applying traditional attempt statutes, however, courts have adhered to a number of distinctions [7] which obscure and often conflict with this function.[8] Underlying these distinctions is an analytical construct [9] by which all attempts are categorized as either *possible but thwarted* (a holdup prevented by police);[10] *intrinsically impossible* (shooting with a defective gun);[11] *extrinsically impossible* (shooting at a log believed to be a person);[12] or *legally impossible* (attempted rape by one too young to be convicted of rape).[13] Thwarted and intrinsically impossible attempts are always criminal;[14] extrin-

469-75 (1954); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 839 (1928) [hereinafter cited as Sayre]. Strahorn explains a multiplicity of apparently irreconcilable decisions be demonstrating that in each case of conviction a protected interest was substantially impaired, whereas in each case of acquittal no such impairment occurred. The impairments of interest which he describes, however, are, or should be, covered by some substantive provision of the code. Much of this confusion is semantic. Strahorn appears to define "injury" as "any ripple in society's serene waters," and thus, by definition, any criminal attempt involves injury. Injury, however, may be defined in a less circular and more common place way. The tort definition of injury as an objective compensable harm might serve as an example.

The argument that the law of attempts acts as an added deterrent to crime will not bear analysis. An attempter intends to accomplish a result already proscribed by substantive law and does not envisage the thwarting of his action at the "attempt" stage. Consequently, the deterrent aspect of attempt law has been minimized by modern auhorities. See DRAFT MODEL PENAL CODE art. 5, introduction.

7. These distinctions arose to rationalize conflicting common-law decisions and are still in use. See DRAFT MODEL PENAL CODE § 5.01, comment; MILLER 105; Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1960); HALL 89.

8. Needless confusion has resulted from the failure to distinguish between two distinct problems within the law of attempts: (1) At which point along the road to a completed crime, have the overt acts of the defendant gone beyond "mere preparation?" (2) which types of acts which have gone beyond "mere preparation" should the criminal law classify as "attempts?" For example, an act may be considered not an attempt because it does not exceed "mere preparation", *compare* People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927) (arrested while looking for victim), *with* Regina v. Brown, 48 L.T.R. (n.s.) 270 (Crim. App. 1883) (dictum: aiming gun exceeds mere preparation), or, an act may not be an attempt because, substantively, the completed attempt is exonerated due to its legal or extrinsic impossibility. Regina v. McPherson, Dears & B., 197, 201, 169 Eng. Rep. 975, 976 (Crim. App. 1857) (shoots at block of wood believing it to be human).

This note will deal exclusively with the second problem. For discussion of the "preparation—criminality" problem, see generally DRAFT MODEL PENAL CODE § 5.01(1), comment and sources cited.

9. Constructs other than the following have been used to analyze attempt law. See, *e.g.*, PERKINS 494 ("factual" and "legal" impossibility). The one discussed is the clearest, however, and has been given much recognition since its introduction by Strahorn in 1930.

10. See Sayre 847-48.

11. "[I]ntrinsic impossibility [arises] when the means used by the actor are ineffectual in themselves." Strahorn 962; see *id.* at 971-78 (examples).

12. "[I]mpossibility of normally effectual means achieving the desired effect." *Id.* at 962; see *id.* at 979-86 (examples).

13. See Sayre 840 (citing cases); PERKINS 487; CLARK & MARSHALL, CRIMES 160 (3d ed. 1927).

14. See Strahorn 997; DRAFT MODEL PENAL CODE § 5.01, comment at 33; WILLIAMS 487; MILLER 98.

sically impossible attempts are usually criminal;[15] and legally impossible attempts are never criminal.[16]

The categories themselves are not logically separable.[17] Consider the distinction between legal and extrinsic impossibility,[18] a necessary one in those jurisdictions which retain only legal impossibility as a defense.[19] Acts have been classified as legally impossible if the intended result would not constitute a crime,[20] and extrinsically impossible if apparently effectual means cannot achieve the desired result because of an error concerning the nature of the object acted upon.[21] These two types of impossibility must necessarily overlap.[22] The very lack of criminality which is thought to distinguish legal im-

15. See People v. Howard, 135 Cal. 266, 67 Pac. 148 (1901); Strahorn 997; MILLER 98, 99. *But see* Respublica v. Malin, 1 U.S. (1 Dall.) 33 (1778); State v. Lawrence, 178 Mo. 350, 77 S.W. 497 (1903).

16. PERKINS 486 (citing cases); see Strahorn 997; Sayre 829; WILLIAMS 491; MILLER 100; HALL 117.

17. The often determinative distinction between "possible but thwarted" attempts and "impossible" attempts is one example. An attempt is classified as "thwarted" if its consumation, although possible, has in some way been prevented; it is "impossible" if, under all the conditions operative at a given time, the intended result will not follow from a series of acts. This distinction probably rests upon sensed but unarticulated differences. For example, the act of shooting at a person but missing, People v. Van Buskirk, 113 Cal. App. 2d 789, 249 P.2d 49 (Dist. Ct. App. 1952) (thwarted), provokes a different sensory image than the act of shooting at a log mistaken for a human being, Regina v. McPherson, Dears & B. 197, 169 Eng. Rep. 975 (Crim. App. 1857) (impossible). Both acts, of course, were equally impossible in the sense that if each were indefinitely repeated under exactly the same circumstances neither could ever achieve a different result. But courts, sensing a distinction, probably base their decisions upon estimates of the relative probabilities of success, as viewed just prior to the attempt. The proposition might be stated: The chances of killing someone are infinitely greater when shooting at a person than when shooting at a log. One senses a difference, however, only because the proposition is stated in such a way that the visual error of the log case is frozen into the example, leaving no chance of success, while the visual error in the bad-aim case is left variable or ignored. If the errors of both attempters were stated as equivalents, the proposition would have to read: The chances of killing someone are *not* any greater when shooting at a person with a badly aimed gun than when shooting at a log. Or, if neither error is verbally locked into the example, the following conclusion is dictated: A person who shoots at an image which appears human, but which may or may not *be* human, is just as likely to cause harm as a poor marksman who shoots at a human being.

18. See Strahorn 965; HALL 122-23; WILLIAMS 500-01.

19. For a summary listing of attempt statutes by jurisdictions, see DRAFT MODEL PENAL CODE § 5.01, appendix.

20. See, *e.g.*, State v. Guffey, 262 S.W.2d 152 (Mo. Ct. App. 1953); People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909); HALL 122-23; PERKINS 486.

21. The term "extrinsic impossibility" was "coined" by Strahorn in 1930. Strahorn 962. The classic cases representative of this category are: Regina v. McPherson, Dears & B. 197, 201, 169 Eng. Rep. 975, 976 (Crim. App. 1857); Regina v. Gaylor, Dears & B. 288, 292, 169 Eng. Rep. 1011, 1012-13 (Crim. App. 1857).

22. One early codification contained this classic statement of legal impossibility: "It is not an attempt where if every act intended by the accused were completed, there would legally be no crime . . . ." U.S. ARMY, MANUAL FOR COURTS MARTIAL 190 (1943). It was

possibility is most often based on the same type of factual mistake which characterizes extrinsic impossibility. Thus, although some courts and commentators have classified the attempt to "murder" a corpse as legal impossibility, since the completed act would not result in the crime of murder,[23] others have classified the same act as extrinsically impossible and therefore criminal, viewing the intended victim's premature death as an extrinsic factor which renders the intended act impossible.[24] The only instance of legal impossibility not subject to this dual classification is one involving a clear "mistake of law": an attempted violation of a Sunday closing law would be legally impossible if in fact the law had been repealed or declared invalid, even though the proprietor believed that it was still in effect.[25] But this aspect of legal impossibility has no relation to the crime of attempts other than restating, in the negative, the definition of the crime itself.

The traditional categories contain an even more serious disadvantage; their use often dictates results which conflict with the function of the law of attempts. Many attempts traditionally classified as noncriminal because they are legally or extrinsically impossible manifest more dangerous criminal propensities than attempts classified as criminal.[26] Firing a gun at an apparently sleeping man who had died of natural causes moments before the shooting probably reflects more serious criminal propensities than voluntary abandonment of a criminal design just prior to the completion of the crime. Yet the latter is always punishable,[27] while the former is often not.[28] To avoid these undesirable results, some courts have disregarded traditional attempt categories in particular cases where their application was believed inappropriate.[29] Such haphazard application has proved unsatisfactory, however, because it engenders uncertainty.[30] Accordingly, some jurisdictions [31] have completely revamped their attempt statutes.

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followed, however, by this illustration: "Thus, to shoot at a log believing it to be a man would not be an attempt to murder," *ibid.*, a typical example of extrinsic impossibility, see Strahorn 979. For a similar example, see Beale 494.

23. *E.g.*, State v. Guffey, 262 S.W.2d 152 (Mo. Ct. App. 1953) (dictum); see HALL 123; Skilton, *The Mental Element in a Criminal Attempt*, 3 U. PITT. L. REV. 181, 187-88 (1937).

24. See Regina v. Gaylor, Dears & B. 288, 292, 169 Eng. Rep. 1011, 1012-13 (Crim. App. 1857) (dictum); Regina v. McPherson, Dears & B. 197, 201, 169 Eng. Rep. 975, 976 (Crim. App. 1857) (dictum); Strahorn 981-84.

25. See, *e.g.*, May v. Pennell, 101 Me. 516, 64 Atl. 885 (1906) (attempted suicide); HALL 127; DRAFT MODEL PENAL CODE § 5.01(1)(a), comment; PERKINS 486, 494.

26. See DRAFT MODEL PENAL CODE § 5.01(1)(a), comment.

27. See, *e.g.*, Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 473 (1954) (citing cases); Beale 506; Sayre 847 (citing cases).

28. See, *e.g.*, State v. Guffey, 262 S.W.2d 152, 156 (Mo. Ct. App. 1953) (dictum); WILLIAMS 501; Keedy, *supra* note 27, at 468; Curran, *Criminal and Non-Criminal Attempts*, 19 GEO. L.J. 185, 186 (1931).

29. *E.g.*, People v. Lee Kong, 95 Cal. 666, 30 Pac. 800 (1892); see State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902). Some commentators have recognized and approved the "area of vagueness" which permits such modification. See, *e.g.*, HALL 93-94.

30. HALL 89; Arnold, *supra* note 7, at 53.

31. For a list of jurisdictions, see DRAFT MODEL PENAL CODE § 5.01(1)(a), comment.

The newer attempt statutes are typified by a 1953 Wisconsin enactment. The statute classifies as attempts those acts which:

> demonstrate unequivocally under all the circumstances, that [the actor] formed [a criminal] intent and would commit the crime except for the intervention of another person or some other extraneous factor.[32]

Under this statute, the question of criminality no longer depends on the possibility-impossibility distinction, but focuses instead on whether failure was extraneously or nonextraneously caused. This difference in criteria will effect a difference in results. For example, in some jurisdictions the fact that the intended victim had died moments prior to an attempted shooting would establish the defense of "impossibility."[33] In Wisconsin the fortuitous death would probably be an "extraneous factor" requiring conviction.

The "extraneous factor" requirement, by suggesting a distinction between criminal attempts foiled or prevented by the actor and those frustrated by forces outside his control, affords a firmer basis for attempt law. A rational attempt statute must predicate conviction upon the finding of a dangerous state of mind.[34] It should therefore seek to distinguish between causes of failure which affirm the criminal propensity evidenced by the attempt and those which rebut that inference.[35] Attempts which are frustrated by a person or force outside the control of the actor generally reflect the same degree of dangerousness as the completed crime itself, for the behavior pattern of the "attempter" has been no different than that of the "completer."[36] In such a case the protection of society may require the defendant's isolation. In contrast, those acts which are foiled or prevented by the actor himself frequently manifest some exercise of internal control, such as an unwillingness to complete the act.[37] These failures reflect a lesser degree of dangerousness than the completed act,[38] and should therefore be considered in determining the type of sanction imposed. Since the law of attempts is essentially repugnant to the accepted concept of punishing acts and not mere intent,[39] it ought to isolate only those attempters who clearly manifest dangerous propensities.

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32. WIS. STAT. ANN. § 939.32(2) (1958).

33. See authorities cited note 28 *supra*.

34. "[T]he actor's mind is the best proving proving ground of his dangerousness." DRAFT MODEL PENAL CODE § 5.01(1)(a), comment.

35. "Only when we can answer the question, Why? can we hope to understand why society needs protection against some individuals and not others." GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 402 (1952). On the other hand, these failures and distortions might signify the beginning of a "personality breakdown" requiring long analysis and treatment.

36. HALL 61.

37. "[T]he failure to achieve success . . . is apt to express accurately the mathematical resultant of component wishes—conscious and unconscious—acting as vectors." MENNINGER, MAN AGAINST HIMSELF 22 (1938) [hereinafter cited as MENNINGER].

"[E]rrors . . . are not accidents; they are serious mental acts; they have their meaning; they arise through the concurrence—perhaps better, the mutual interference—of two different intentions." FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 48 (Permabook ed. 1958).

38. See text accompanying notes 50-54 *infra*.

39. See note 1 *supra*.

The success of Wisconsin statute in distinguishing dangerous from non-dangerous attempts will depend, first, upon whether courts employ all the resources at their command to investigate the cause of failure, and second, upon whether the available resources are adequate to the task. *State v. Damms*[40] presented the Supreme Court of Wisconsin with its first opportunity to give content to the new attempt statute. The defendant, while driving with his estranged wife, produced a gun which he had placed under the car seat. His conversation alternated between threats of "swift death" and plans for a possible reconciliation. When the car stopped, they became involved in an argument. The wife ran from the car; the defendant followed her, carrying the gun. He overtook his wife, placed the gun against her head, and pulled the trigger. But the gun was unloaded. The attempt took place in front of two police officers who immediately apprehended the defendant. A jury found him guilty of attempted murder, and he was sentenced to ten years imprisonment.[41] The Wisconsin Supreme Court affirmed the conviction over a vigorous dissent.

The majority held that the unloaded condition of the gun, if unknown to the defendant, was an "extraneous factor" meeting the requirement of the attempt statute.[42] The jury's finding that defendant did not know the gun was unloaded was upheld as reasonably supported by the evidence.[43] Presumably, the cause of failure would not have been considered "extraneous" if defendant had known of it. While the majority did not further attempt to explain the meaning of "extraneous," its emphasis on defendant's knowledge implies that "extraneous" was construed to mean "not apparent to the actor." The dissent, on the other hand, concluded that the cause of failure was not extraneous, because the mechanism of failure was defendant's own conduct in omitting to load the gun; whether or not he was aware of the omission was irrelevant.[44]

Neither opinion adequately utilizes the "extraneous factor" criterion to examine the potential dangerousness of the offender. The dissent, by ignoring defendant's state of mind, failed to consider the possibility that the act of omission, although directly traceable to the actor, may have been caused by a factor other than the exercise of internal control.[45] Likewise, the majority's definition, by focusing solely upon defendant's awareness at the conscious level of the omission, did not consider the possibility that failure to load the gun might have resulted from internal control at the unconscious level.[46] Admittedly, the

40. 9 Wis. 2d 183, 100 N.W.2d 592 (1960).

41. The facts are those set out by the court in its opinion. 100 N.W.2d at 592-94.

42. *Id.* at 596.

43. *Id.* at 597.

44. *Id.* at 598. The dissent also questioned the reasonableness of the jury's finding that defendant did not know the gun was unloaded. *Id.* at 599.

45. Even Freud grudgingly admits of this possibility.

> Let me once more emphasize the fact that we do not maintain . . . that every single mistake which occurs has a meaning, although I think that probable.

FREUD, *op. cit. supra* note 37, at 63.

46. "[F]orgetting . . . can in general be referred to an opposing current of feeling which is against carrying out the intention." FREUD, *op. cit. supra* note 37, at 56. Unconscious as used in this Note shall refer both to preconscious and unconscious.

court was not presented with evidence such as psychiatric testimony which might have put control by the unconscious in issue.[47] But the test it announces cannot accurately examine the defendant's dangerousness unless it allows the court to probe beneath the conscious level.

Courts and commentators have long realized that many "attempters" are different from "completers."[48] The much lower degree of punishment meted out to attempters represents, in part, an unarticulated recognition that the person who tries and fails is often less dangerous than the person who succeeds in his criminal purpose.[49] Recently these judicial hunches have been to some degree empirically verified. The past five years have witnessed a systematic and thorough study of one type of attempted crime—suicide.[50] The notion that only a fortuitous and unexpected event distinguishes the attempted suicide from the successful suicide has been replaced by the finding that the great majority of attempted suicides fail as the result of conscious or unconscious control exercised by the actor himself. These studies indicate the existence and influence of a great variety of internal control mechanisms, ranging from conscious repentance and abandonment, to deliberate but unconscious omission to perform an act necessary for success, and finally to the commencement of the attempt under circumstances where the probability of success is low.[51] On the basis of classification and followup studies of hundreds of attempted suicides, different types of attempts were graded along a scale of dangerousness. The attempter who retained and exercised complete control over the success and failure of his attempt was considered "relatively harmless." The attempter who relinquished control over the success or failure of his act to other persons or forces, believing that his attempt would probably be foiled or prevented, was considered "relatively dangerous." And the attempter whose death was prevented only by a fortuitous or unexpected event was considered "absolutely dangerous."[52] Since suicide is often an "internalization" of aggressive drives,[53]

47. The portions of the record cited in Brief for Appellant, Appendix, State v. Damms, 9 Wis. 2d 183, 100 N.W.2d 592 (1960), contain no mention of such testimony.

48. For an illustration of the implicit realization of this fact, see 1 WHARTON, CRIMINAL LAW 320-21 (12th ed. 1932).

49. *Compare* State v. Damms, 9 Wis. 2d 183, 100 N.W.2d 592 (1960) (10 yrs. imprisonment), *with* State v. Jackson, 101 N.W.2d 731 (Iowa 1960) (second degree murder —50 yrs. imprisonment).

50. See, *e.g.*, Rubenstein, Moses & Lidz, *On Attempted Suicide*, in 79 A.M.A. ARCHIVES OF NEUROLOGY AND PSYCHIATRY 103 (1958) [hereinafter cited as Rubenstein, Moses & Lidz]; Stengel, *The Social Effects of Attempted Suicide*, 74 CANADIAN M.A.J. 116 (1956) [hereinafter cited as Stengel]. See generally Schmidt, O'Neal & Robins, *Evaluation of Suicide Attempts as Guide to Therapy*, 155 J.A.M.A. 549 (1954) [hereinafter cited as Schmidt, O'Neal & Robins]; STENGEL & COOK, ATTEMPTED SUICIDE (1958) [hereinafter cited as STENGEL & COOK]; MENNINGER; DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY (translation 1951).

51. See STENGEL & COOK 84. See generally Rubenstein, Moses & Lidz 109.

52. See STENGEL & COOK 82-92; Schmidt, O'Neal & Robins 551-52. For a similar classification, see Hendin, *Attempted Suicide: A Psychiatric and Statistical Study*, 24 PSYCHIATRIC Q. 39-40 (1950).

53. Menninger defines suicide as "the wish to kill, unexpectedly robbed of certain ex-

the results of these specialized studies appear to be at least partially applicable to all types of attempted crimes.[54] They tend to substantiate the suspicion that some foiled attempts reflect internal control, and thus they supply an empirical foundation for a defense based upon internal control—at the unconscious as well as the conscious level.

The "internal control" defense, although it would be a major innovation, would require no statutory amendment in jurisdictions which have Wisconsin-type statutes. The "Wisconsin formula" requires that the frustrating factor be extraneous before an attempt is considered criminal. By application of psychiatric knowledge, "extraneous" could be defined as "not manifesting the effective exercise of internal control." Other jurisdictions, whose statutory language precludes the introduction of this defense,[55] could enact the following definition:

> Criminal attempt—An act or series of acts from which it can reasonably be predicted that, but for the intervention of some individual, force, or change of condition, outside of the direct control of the actor, the crime attempted would have been committed.

This defense could be administered in the same way that many states adminis-

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ternal occasions . . . turned back upon the person of the 'wisher' and carried into effect as suicide." MENNINGER 29. He supports this theory by demonstrating that suicide is generally directed at somebody in the same way that aggressive violence might be. "[A]n offended person kills himself for the express purpose of taking revenge upon the offender." *Id.* at 43-44. Thus, he notes that since suicide is merely an internalization of aggressive drives, "suicide and murder rates show constant inverse relationship." *Id.* at 33.

54. See Schmidt, O'Neal & Robins, *Evaluation of Suicide Attempts as Guide to Therapy*, 155 J.A.M.A. 549, 557 (1954); Moore, *Cases of Attempted Suicide in a General Hospital: A Problem in Social and Psychologic Medicine*, 217 NEW ENG. J. OF MED. 291, 302 (1937).

The applicability of these studies to attempts can be exemplified by further analysis of facts present in the *Damms* case. Two major recent studies of attempted suicide reached these conclusions:

> In most suicidal attempts . . . we can discern an appeal to other human beings. We regard the appeal character of the suicidal attempt, which is usually unconscious, as one of its essential features.

Stengel 117.

> In studying these suicide attempts, we observe a characteristic sequence of events culminating in the achievement of what we have termed their 'desired effects.' The patient was involved in a struggle with the persons important to him and sought a modification of their attitudes or a specific change in his relationship with them. After a crisis was reached in this struggle, the patient sought to effect these changes through a suicide attempt . . . . At . . . times the patient was not conscious of his seeking these changes, clearly revealed in his behavior.

Rubenstein, Moses & Lidz 109. In the *Damms* case, the defendant was involved in a struggle with his wife and sought a modification of attitudes and a specific change in their relationship. The defendant may have sought a change of relationship through an attempt, not at suicide but at murder.

55. In general these are the states which have simply codified the common-law rules. See MILLER 105 (citing cases); DRAFT MODEL PENAL CODE § 5.01, comment & appendix.

ter the defense of insanity. Just as sanity is initially presumed,[56] any attempt should be presumed to be extraneously frustrated, until some evidence is introduced to cast doubt upon this presumption.[57] When doubt is raised, the state should assume the burden of proving the material element of the offense —frustration by an "extraneous factor" or a factor "outside the direct control of the actor."

Whether or not a given attempt was foiled or prevented by the exercise of internal control will be a question of fact. Although in a great number of cases psychiatric investigation probably cannot answer this difficult question determinatively, it could, even at this stage in its development,[58] identify some failures caused by exercise of internal control which otherwise might be regarded as evidence of dangerous propensities.[59] The proposed definition of criminal attempts will assist experts in making such findings, for it concentrates on "control"[60] and abandons the psychologically meaningless criterion of "crim-

56. This is the rule in every state. For a state-by-state listing see WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 212-19 (1954).

57. For an example of the possible operation of such a standard, see WEIHOFEN, *op. cit. supra* note 56, at 210-19.

58. By not freezing into law conclusions derived from the present state of psychiatric knowledge, the proposed statute escapes the criticism frequently made of the McNaughten Rules. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 102 (1953) (quoting Mr. Justice Frankfurter).

59. See authorities cited notes 50, 54 *supra*. See also GUTTMACHER & WEIHOFEN, *op. cit. supra* note 35, at 402:

> Studies made in recent decades, such as Sheldon and Eleanor Glueck's *Five Hundred Criminal Careers* and their more recent *Unraveling Juvenile Delinquency*, have convincingly shown that criminal conduct is ordinarily a product of a complex of pressures and resistences rather than of a single mental operation of forming an 'intent.'

60. Although "internal control" has no precise psychiatric definition, it is akin to the language of the profession which refers to the totality of ego and superego controls.

> Lawyers have been traditionally concerned with external controls of human behavior. Psychoanalysts have been traditionally concerned with *internal controls* . . . . Though traditionally considered a mechanism of dyscontrol, the unconscious is essential to the operation of *internal control*. For both the ego and superego, traditionally considered mechanisms of control, are in part unconscious.

KATZ, GOLDSTEIN, J. & DONNELLY, PSYCHIATRY AND LAW ch. II, at 1 (Tent. Draft No. II 1959). (Emphasis added.)

> The conflict then is an intrapsychic one within the offender . . . . Whereas the lawabiding citizen chooses a course of action early in life designed to *control* varied anti-social impulses, the criminal never solved this problem of control . . . . His predicament is that the forces of *control* have never been under his dominion, either because unconscious urges were too strong or his conscience (super-ego) was too weak.

BROMBERG, CRIME AND THE MIND 25 (1947). (Emphasis added.)

Difficult determinations of this type should not be made on the basis of the "one hour" interview not infrequently conducted under the M'Naughten rules in preparation for testimony concerning the "cognitive or volitional sector of the personality." "Dangerousness" and "superego controls" are manifestations of the total personality and thus require a much more extensive analysis.

inal intent."[61] Moreover, the psychiatrist, trained to evaluate the entire personality, can offer a prognostic judgment concerning the offender's future dangerousness [62]—an element which should weigh heavily in the fact-finder's decision. Of course, behavioral science can do no more than indicate the attempter's degree of dangerousness. It cannot determine whether a given degree of dangerousness demands incarceration. The varying degrees of internal control revealed by the suicide studies indicate that "harmless" and "dangerous" are not separable categories, but are rather the terminal concepts of a continuum containing innumerable shades of relative dangerousness. In deciding at which point in this continuum criminal sanctions ought to be imposed, courts and juries must make a policy decision, balancing society's need for protection against the undesirability of imprisoning persons because of their possible dangerousness.[63]

Neat analytical constructs, such as the impossibility doctrine, discourage the gathering of relevant information and afford little guidance to those who must make this complex determination.

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61. See *id.* at 178. For general criticism of "intent" doctrine, see, *e.g.*, Skilton 181-90; Cook, *Act, Intention and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917); MODEL PENAL CODE § 202, comment (Tent. Draft. No. 4); Arnold, *supra* note 7, at 68-71; GUTTMACHER & WEIHOFEN, *op. cit. supra* note 35, at 402; Comment, *Intent in the Criminal Law: The Legal Tower of Babel*, 8 Catholic U.L. Rev., Jan. 1959, p. 31.

62. DAVIDSON, FORENSIC PSYCHIATRY 28 (1952); see ROCHE, THE CRIMINAL MIND 139 (1958).

63. In addition to serving the function of a law of attempts the "internal control" defense would also serve the rehabilitative ends of the criminal process. If rehabilitory facilities are limited, it would seem reasonable to limit incarceration to those who need them most. Extraneously frustrated attempters are in greater and more immediate need of rehabilitation than internally frustrated attempters. An internally frustrated attempt reflects a partially successful exercise of the actor's internal control mechanisms against his antisocial propensities. Since the critical stage in the rehabilitory process presumably involves recognition by the actor of his antisocial propensities and the marshaling of all his internal controls against these propensities, BROMBERG, *op. cit. supra* note 60, at 25, the internally foiled attempter needs only to learn to substitute less dangerous techniques of control for those manifested.