THE EFFECT OF IMPOSSIBILITY ON CRIMINAL ATTEMPTS*
JOHN S. STRAHORN, JR.

INTRODUCTION

When a person, bent on crime, does an act which he believes will effectuate his end, three legal situations are possible. The desired result may happen, in which case the defendant is guilty of the complete crime and is punished accordingly. On the other hand, the attempt may not be successful and yet so much of it may happen that the defendant is guilty of a criminal attempt,¹ whereupon a lesser punishment is imposed upon him than for the complete crime. Again, the circumstances may be such that only a non-criminal attempt has resulted, and the defendant will not be punished at all.

A much-mooted problem is whether the attempt is a criminal one when the complete crime attempted has failed because of the utter impossibility of its being achieved under the circumstances. The present discussion will inquire into the effect of this impossibility on the criminality of the attempt.

Three kinds of impossibility have always been distinguished. The first is an intrinsic impossibility, arising when the means used by the actor are ineffectual in themselves. An example of this would be an attempt to kill with a pistol which, unknown to the assailant, was loaded with a blank cartridge. The second kind is an extrinsic impossibility, or an impossibility of normally effectual means achieving the desired effect. An example of this would be a case of one's shooting a ball cartridge at a stump under the mistaken belief that the stump was one's intended victim who actually was not in the vicinity. The terms extrinsic and intrinsic are here used with reference to the capacity of the actor to


¹It seems advisable to consider "attempts" as including both criminal and non-criminal ones. To use "attempt" only in the sense of "criminal attempt" leaves wanting a ready phrase for what is here understood by "non-criminal attempt."
control the involved circumstances. The third kind is a legal impossibility arising because of the non-criminality of the result desired by the actor. An example of this would be an attempt at rape by a boy under fourteen in a jurisdiction which refuses to convict such a child of that crime.

This tri-partite division of impossibility into intrinsic, extrinsic, and legal, while covering the field entirely, is more a theoretical than a practical one. One of the reasons for seeking a single statement of doctrine to cover the whole field rather than three separate ones respectively is that it is frequently hard to classify the impossibility situations and to place them accurately in such an analysis. Two examples demonstrate this. In People v. Jaffee the defendant was accused of an attempt to receive stolen goods. The goods in question were in the hands of a decoy and were actually not stolen although defendant believed they were. Should this situation be classified as legal impossibility or extrinsic impossibility? One writer seemingly treats it as a matter of extrinsic impossibility. It could as well be placed under legal impossibility, in that the desired result would not have been criminal. The other example is that of the assassin who fires a pistol, capable of killing up to a distance of fifty yards, at a victim who is within normal pistol range but beyond the fifty yards. Is this the use of ineffectual means or the impossibility of effectual means taking effect?

Two types of criminal attempts must be sharply distinguished. The first, relative attempts, comprehends attempts at practically all crimes,5 punished as misdemeanors by virtue of a general common law doctrine, or possibly differently as a result of a similar statutory policy. With this class belong almost all of the so-called aggravated assaults which, in general, are the same as the

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2 See 8 R. C. L. 280, 281, distinguishing between inherent and extraneous impossibility, although using these terms in a somewhat different sense than is here understood by the difference between extrinsic and intrinsic impossibility. See CLARK, CRIMINAL LAW (Mikell's ed. 1915) § 55, distinguishing between inadequacy of means and absence of essential object.

3 185 N. Y. 497, 78 N. E. 169 (1906) ; NOTE (1907) 9 L. R. A. (N. S.) 263.

4 Sayre, Criminal Attempts (1928) 41 HARV. L. REV. 821, 853.

5 “Practically all” is used advisedly, for it must be remembered that a few jurisdictions do not punish attempts at misdemeanors mala prohibita. See CLARK AND MARSHALL, CRIMES (3d ed. 1912) § 121; BISHOP, CRIMINAL LAW (9th ed. 1923) § 772 (4); WHARTON, CRIMINAL LAW (10th ed. 1896) § 177.
common law attempts to effect the involved offenses. In this type the prohibition of the attempt is based on a general doctrine and is related to the prohibition against the crime attempted. Thus, because of the very general nature of the prohibition against attempts, recourse to the principles involved in the major crimes is necessary in order to apply the prohibition against the particular attempt.

The other type, direct attempts, includes the specific prohibition of activity in the nature of an attempt at crime, but which, because of the detailed wording of the particular prohibition, does not involve recourse to the principles concerned in the crime attempted in order to apply the prohibition. These attempts are prohibited directly and not by relation to the major crime attempted. Examples of these would include the prohibitions against burglary, treason, and perjury, and possibly some of the aggravated assaults which in form depart too far from the relative attempts to commit the involved crimes.

The present article proposes to inquire into the possibility of a single statement of principle concerning the effect which any or all of the three kinds of impossibility will have on the criminality of relative attempts, which, because of their general nature, are more capable of generalization than are the direct attempts. Much of the confusion existing in opinions and writings on this subject of impossibility has arisen because of the mistaken use of cases involving direct attempts in discussions of and generalizations for the quite different relative attempts. However, cases involving direct attempts will be here used to the extent that such use is valid for purposes of contrast and criticism.

Remembering that one and the same act of the defendant may cause either complete crime and greater punishment, criminal attempt and lesser punishment, or non-criminal attempt and no punishment, it is the function of the present article to discuss

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6 Inasmuch as common assault itself is but a relative attempt to commit battery, the aggravated assaults, such as assault with intent to kill, rape, or rob, are herein considered as relative attempts.

7 "The crime is a mere shadow of the attempted offense, deriving its criminal nature entirely from the substantive offense to which it is subsidiary. It has, nevertheless, the qualities and characteristics of other crimes." Beale, Criminal Attempts (1903) 16 Harv. L. Rev. 491.
the difference between criminal and non-criminal attempts as affected by the factor of impossibility, using as a basis the valid standards of difference between complete crimes and criminal attempts.

**Orthodox Theory**

While it is conceded that three separate valid statements are possible for the three different kinds of impossibility respectively, yet the difficulty of classifying impossibility situations accurately under the three-way analysis diminishes the utility of the three different statements and makes a single one more desirable. But even a single statement, if one be possible, must conform to the more detailed statements calculated for a single kind of impossibility alone. Thus an examination of the orthodox statements of theory designed for one or more of the kinds of impossibility is in order.

It is as to legal impossibility that the best conventional statement is available. This is that of Professor Sayre,\(^8\) who states that there must be an intent to effect a consequence which is prohibited, and that if the consequence intended is not criminal, there is no attempt because there is not the requisite intent.

There are several valid statements available for the effect of intrinsic impossibility. One, adopted by several writers,\(^9\) is that there must be an **apparent adaptation** of means to the criminal result in order to have a criminal attempt. A somewhat similar one is that there must be an **apparent possibility** of committing the intended crime.\(^10\) An unfortunate confusion has resulted from an effort to apply these theories to extrinsic impossibility.

A recent and carefully formulated statement of doctrine about intrinsic impossibility is that of Professor Sayre,\(^11\) who

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\(^8\) "There can be no criminal liability for an attempt without proof of a specific intent to effect the particular criminal consequence which constitutes the crime attempted." Sayre, *op. cit. supra* note 4, at 858.

\(^9\) *Bishop, op. cit. supra* note 5, § 749; *Wharton, op. cit. supra* note 5, § 182; *Beale, op. cit. supra* note 7, at 496.

\(^10\) *Clark and Marshall, op. cit. supra* note 5, §§ 127-128; *Clark, loc. cit. supra* note 2.

\(^11\) "The defendant may usually be convicted if a reasonable man in the same circumstances as the defendant might expect the intended criminal consequence to result from the defendant's acts." Sayre, *op cit. supra* note 4, at 859.
suggests that that act is a criminal attempt which a reasonable man in the same circumstances as the defendant might expect to cause the intended criminal consequence. He groups both intrinsic and extrinsic impossibility under the single head of "mistake of fact" and suggests the "reasonable man" test as a solution of both problems. One of the older text books states a form of the reasonable man test, i.e., "the means must to the apprehension of a reasonable man be calculated to effect the purpose," 12 but it also admits the invalidity of applying this terminology to extrinsic impossibility. Mr. Justice Holmes, in his opinion in Commonwealth v. Kennedy, 13 reflects the reasonable man test.

It seems to the present writer that if the tests listed above were applied to all instances of extrinsic impossibility, a criminal result would ensue in a greater number of situations than actually does under the reported cases. Although we admit their validity for purpose of intrinsic impossibility, yet they are not susceptible of being extended to the extrinsic problem in toto.

Inasmuch as almost all writers have attempted to include extrinsic impossibility under the same rules as intrinsic, the generalizations available for the solution of extrinsic problems alone are scanty. A typical one is that of Judge May's to the effect that "there must be some real object at which the act is aimed." 14

FROM THE VIEWPOINT OF CRIMINOLOGY

In solving the instant problem recourse to the theories of criminology is advisable. 15 Thus, if the object of punishment be to reform the offender or to punish him according to his guilty

12 May, Crimes (3d ed. 1905) § 184.
13 170 Mass. 18, 21, 48 N. E. 770, 771 (1897): "Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough unless the expectation is very absurd."
14 May, loc. cit. supra note 12.
15 One can find in Professor Glueck's article, Principles of a Rational Penal Code (1928) 41 Harv. L. Rev. 453, 480, a suggestion that the legal distinctions between complete crimes and attempts are not consistent with modern theories of criminology. "The minute splitting up of offenses into degrees and the distinguishing of attempts from complete criminal acts, with the meticulous setting down of the supposedly appropriate dosages of punishment, belongs to an era when punishment based upon degrees of 'vicious will' as reflected in types of crime was thought to be the only or best means of coping with anti-social behavior."
will, then these theories are inconsistent with the basic assumption of one and the same act and intent possibly causing three separate legal results of greater punishment, lesser punishment, and no punishment. The defendant who has the specific intent to kill and acts upon it is equally guilty and equally in need of reformation whether his bullet hits the mark or not, or whether his victim is in the vicinity or not. If either of these theories applies to the instant problem, the same punishment would be given in all three situations; but as this is not the case, the application of such theories here must be denied.

If the object of punishment be to deter the offender from repetition of his act or to deter others from imitation of him, there is then a little more argument for the application of such theories to the problem. Professor Sayre, in arguing for a theoretical basis for the reasonable man test, suggests that it is safe to permit the one who attempts to kill with magic to continue that activity, while it is unsafe to permit a gunman to continue shooting because the latter will profit by his mistake, lay his plans more carefully the next time, and thus ultimately gain success. But if it is assumed that each possess the necessary intent to kill it seems to the present writer that the user of magic would improve his methods as soon as the user of a blank cartridge, and that each is as dangerous to society.

If we consider it more from the angle of discouraging imitation, were the deterrent theory actually applicable, the same punishment would be given for all three of the possible results of the act and intent. Punishing the mere intent to kill would certainly discourage others from possessing such an intent and

18 Sayre, op. cit. supra note 4, at 849, 850.
17 "The principle of deterrence would justify a practice of inflicting on an unsuccessful attempt to commit crime as grave a punishment as the actual crime. The would-be criminal who has failed to accomplish his object simply on account of mere chance—failure of the pistol fire, or age and weakness of the poison—is just as dangerous to society as the criminal who has been more successful. And just as severe a penalty is needed to deter from attempting murder as to deter from murder. Yet society would not consent to the execution of a man whose pistol had missed fire, while it would demand the execution of the same man if his brother's blood cried from the ground for vengeance. This fact goes to show that punishment is justified not by deterrence but by moral justice." McConnell, Criminal Responsibility and Social Constraint (1912) 70.
acting on it. Yet we do not punish mere intent, punish criminal attempts but slightly, and then less than the complete crime, so the deterrent theory does not explain the involved phenomena.

By looking at it from the mental standpoint of the instant criminal, we find that he is not deterred by the serious punishment hanging over the result he hopes for, and it is hard to see how an increase in the number of criminal attempts would deter him after he has elected to proceed in the face of the more serious penalty. It can be argued that he has chosen the serious penalty as being worth his desired result and takes a chance on failure and some unknown circumstance leaving him non-criminal if his attempt fails. But he proceeds in the face of serious punishment for complete crime or of a less serious one for criminal attempt, with his only hope of escaping a slight chance unknown to him. He would hardly be deterred more by making such a slight unknown possibility punishable merely as another criminal attempt.

There is left the retributive theory which assesses punishment according to what the agencies of society have considered, correctly or not, the quantitative damage occasioned by the defendant’s act. It is submitted that this theory, or its modern remnants, is the only one which actually underlies and explains the difference in punishment of complete crime, criminal attempt and non-criminal attempt.18

The only reason for punishing murder more than attempted murder is that society considers it more damaging to have the life of an individual completely snuffed out than to have it partially snuffed out. The purely accidental phenomenon of the victim’s being hardy enough to survive the bullet, or the equally accidental one of the assassin’s aim being poor makes the difference between the supreme penalty and a few years imprisonment. The difference between complete crimes and criminal attempts

18 "Further, the retributive object is clearly shown by the fact that we regard it proper to punish the accomplished crime more severely than the attempt that has failed. If deterrence were the aim, the same amount of suffering would be needed to restrain from the attempt as to restrain from the actual offense. And society is equally endangered by the successful and the unsuccessful criminal, when the lack of success is due solely to mere chance. The reason for the difference in punishment is because our indignation is not so deeply stirred, and we do not see as just cause for retribution in the case of an ineffectual attempt as in the case of an accomplished crime." Ibid. 38, 39.
has always been a matter of result, accidental or not. It is submitted that in so far as a difference in result is discernible, the difference between criminal attempts and non-criminal attempts should be established on the same basis.

The problem of the instant discussion thus becomes one of determining whether a valid differentiation between criminal and non-criminal attempts can be made on a basis of the differing anti-social results following therefrom respectively.

THE ELEMENTS OF THE CRIME

A demonstration that the distinction between criminal and non-criminal attempts must be based on a difference in result can be found by resolving the criminal attempt into its elements. For this purpose it is convenient to use the conventional analysis of crimes in general. A completed crime has three elements, viz., the intent, the act, which together must cause the third element, variously called the corpus delicti or the anti-social result or objective crime.

By applying this same division to criminal attempts it is observed that the intent there is a specific intent to accomplish a forbidden result, as possibly, though not necessarily, distinguished from the more general intent which may support the complete

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19 "As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it." Holmes, J., in Commonwealth v. Kennedy, supra note 13, at 20, 48 N. E. at 771.

20 See Bishop, op. cit. supra note 5, § 726, analyzing attempts in terms of act and intent; 3 AM. & ENG. ENCYC. (2d ed. 1905) 254, doing the same thing; and 16 C. J. 113, suggesting both this and the three-way analysis.

Professor Sayre, in laying a basis for his treatment of the requisite intent, uses a similar three-way analysis. "... every attempt involves three factors: (1) some act on the part of the defendant, (2) the particular consequence which the defendant intended or which formed the object of his act, and (3) the actual consequence which in fact ensued." Sayre, supra note 4, at 838. Cf. Professor Cook's analysis of crimes into: (1) the act or acts, (2) the concomitant circumstances, (3) the consequences, (4) the actor's state of mind at the time he acts with reference to those circumstances or consequences. Cook, Act, Intention and Motive in the Criminal Law (1917) 26 YALE L. J. 645, 647. Remembering that the concomitant circumstances have a dual function, (a) to show causation between act and result, and (b) to show intent, the statement used here seems to conform to Professor Cook's analysis in substance if not in form. "The true legal reason for the conclusion reached is that the defendant, with criminal intent has performed an act tending to disturb the public repose." (Italics ours) Clark v. State, 86 Tenn. 511, 518, 8 S. W. 145, 147 (1888).
crime. The act is some definite step toward the complete crime normally capable of being an essential element in it, in some cases the same, in some not the same act which is found in the complete crime. Since for some crimes the act and the intent may be exactly the same for both attempt and complete crime, an analysis of the difference between attempts and complete crimes, and hence between criminal attempts and non-criminal attempts cannot be founded on any feature of act and intent. Such a difference can be found only in connection with the third element of crimes and attempts, that of the corpus delicti or anti-social result. When in the complete crime the corpus delicti involves the occurrence of the complete anti-social result, such as a violent death for murder, or the asportation of property for larceny, in the attempt at these the corpus delicti is always something less and different from death or asporation.

The corpus delicti of a complete crime might be stated as a complete infringement of some interest protected by the particular prohibition, such as a complete infringement of the interest in the prolongation of human life by the termination of a life, or a complete infringement of the interest in private property by having it taken from the owner. By using this as a basis the corpus delicti of a criminal attempt might be stated as a substantial but incomplete impairment of some interest protected by the particular prohibition against the complete crime or an impairment of some related but lesser interest protected by the prohibition against such an attempt.

By carrying this further, it is observed that the difference between criminal and non-criminal attempts is the difference between a substantial impairment of some such interest and a non-substantial or non-existent impairment of any such one. Thus,

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an attempt at a particular crime, to be punishable as a relative criminal attempt, must create a substantial impairment of some interest protected by the involved prohibitions against the crime or its related attempt. This is but another way of expressing what has been stated as an "appreciable fragment of the crime," and as of "sufficient magnitude to be within the law's notice," and as sufficient "to create the alarm against which the law of attempt protects us."

To establish a criminal attempt three elements must concur, the intent, the act, and the impairment of interest. If any one of these be lacking, there is no criminal attempt. Many cases find no criminality because of the lack of either act or intent. The present discussion is not particularly concerned with any problem of what constitutes this requisite act and intent. It assumes the presence of a sufficient act and intent to establish a criminal attempt but for the element of impossibility. The problem is solely one of the effect of that impossibility on an otherwise perfect criminal attempt. This problem, in other terms, is whether the impossibility negates the requisite impairment of the interest, which is protected by the involved prohibition.

**Intrinsic Impossibility**

The three typical situations of intrinsic impossibility which, with their ramifications, will be discussed here include that of an attempt at rape by a man who is impotent, that of an attempted homicide with firearms which are mechanically incapable of causing death, and that of an attempt at poisoning by the administration of a substance actually not poisonous.

*The Impotency Cases*

When a defendant, with rape in mind and with the expectation of accomplishing penetration seizes his female victim in the customary manner in order to achieve his purpose and finds penetration impossible because of impotency, the authorities agree...
that he is guilty of a relative criminal attempt at rape, and that his impotency has no bearing on the case except as possibly negating the specific intent to accomplish penetration. None can doubt that these cases reach a correct result. They are in accord with the statement of the principle adopted above. There is, in such a case, a substantial impairment of some interest protected by the prohibition. The object of the prohibition against rape is to prevent the greater injury to the woman's feelings resulting from the enforcement of her person, and the object of the prohibition against attempted rape is to prevent the lesser injury to her feelings resulting from her being put in fear of the enforcement of her person. This latter injury happens when she is attacked in such a manner as to indicate the purpose of her assailant to rape her, and thus there is occasioned a substantial impairment of her interest to be free from the fear of rape regardless of the nature of her assailant's sexual powers.

Had the assailant been a woman dressed as a man, doing the same things as detailed above, the victim would have been put in as much fear and her interest would have been impaired just as much although no criminality would follow, because another element of the crime, the specific intent to accomplish penetration, would have been lacking. This is, of course, the situation when the assailant realizes his impotency. Had the same thing occurred between two actors, posing for a motion picture, there would then be no criminality, because there would be lacking both the intent and the impairment of interest, inasmuch as both the attacker and victim realized that no anti-social result was impending.

The same reasoning as for the crime of forcible rape is applicable to an attempt at voluntary intercourse between an impotent man and a girl below the age of consent when the man is prosecuted for attempted carnal abuse. There is criminality


28 "The essence of the crime is the outrage of the person and feelings of the female. The feelings of a woman may be outraged by the force and brutality of a man who is impotent, as well as of a man who is not." McConnell, J., in Territory v. Keyes, 5 Dak. Ter. 244, 252, 38 N. W. 440, 442 (1888).
here also. The object of forbidding intercourse below the age of consent is to protect immature girls from being led astray. The object of prohibiting attempts at it is to protect girls from being placed in the mental condition where they are willing to be led astray. This is a lesser, but nevertheless, an anti-social result. This result is reached even though the intercourse does not take place when the preliminary activity has gone far enough to amount to an attempt but for the lack of sexual power by the defendant. Then a social interest has been impaired.

A sharp distinction must here be made between the actual impotency now being discussed and the juridical incapacity which prevents, in many jurisdictions, a boy under fourteen from being convicted of rape or attempted rape. The latter matter will be discussed under the head of legal impossibility.

**The Shooting Cases**

This topic has to do with the use of firearms which, because of the absence of a cartridge, or the presence of a blank cartridge, or because of wet powder or mechanical defect, cannot eject a bullet from the barrel when the trigger is snapped. The cases fall into two classes, first, where the assailant knows of the defect, and, second, where he does not, but expects the bullet to be propelled in the normal manner. A real impossibility situation arises only in the latter instance, for in the former the questions are purely whether the assailant possesses the necessary intent, and what is the necessary intent. Those cases holding that there is an assault or attempt by one who knowing the gun to be empty, points it at another, can be explained on the ground that

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29 State v. Ballamah, 28 N. M. 212, 210 Pac. 391 (1922), 26 A. L. R. 769 (1923), annotated at 772; Territory v. Keyes, supra note 28; Note ANN. CAS. 1916 D, 535. A somewhat similar proposition about intrinsic impossibility is laid down in Commonwealth v. Shaw, 134 Mass. 221 (1883), holding it no defense to a charge of attempted carnal abuse that the defendant could not have achieved intercourse in the position in which he attempted it with the child. Here, too, society's interest in not having the natural barriers of morality and chastity broken down had been impaired.

the only intent required is an intent to put the victim in fear.\textsuperscript{31} Those holding that no assault follows in such an event \textsuperscript{32} can be justified by assuming a necessary intent to accomplish actual shooting of the victim, which is lacking when the assailant knows this to be impossible. Such cases, however, have no bearing on the instant discussion and are mentioned only to avoid confusion.

The real impossibility situation arises when the assassin believes the defective or empty gun capable of killing and thus possesses the necessary intent and acts in such a manner as to frighten his victim. When this is the situation, the greater number of cases holds that an assault or attempted murder has been committed.\textsuperscript{33} This accords with the substantial impairment theory. There is, in such instances, act, intent, and a substantial impairment of interest to be free from fear or danger of bodily harm. This is the interest relative to that protected by the prohibition against murder. The object of the prohibition against assault is to protect the victim against fear of violence and the object of the prohibition against attempted murder is to protect him against this as well as against the actual contact with the bullet which may wound, but not kill him. When a blank cartridge explodes or a gun is snapped in the victim's face, there is hardly less of an impairment of interest than when the bullet whizzes past his head as is the case with a perfect criminal attempt. The same anti-

\textsuperscript{31} This distinction is suggested by State v. Sears, 86 Mo. 169, 174 (1885): "But we think that the weight of authority supports the view that an intention, on the part of the accused, to do the other party some bodily harm, is essential to constitute an assault. It may be that if one points a gun at another, supposing it to be loaded, with the intent to shoot him, it would be a criminal assault, but knowing that the gun had no charge in it, he could not possibly have intended to injure the other party by shooting him. The fact that the other party supposed the gun loaded would afford a good excuse for his resort to defensive means, but could not make it a criminal assault when, notwithstanding the appearance, there was no intention to harm him. It is difficult to conceive one guilty of a crime which he did not intend to commit." This view does not accord with Hawkins' definition of an assault as "an attempt or offer with force and violence, to do a corporal hurt to another." I Hawk. P. C. (8th ed. 1824) 110. If offer means anything beside attempt it would seem that an intent to frighten another is sufficient for an assault and that the cases cited supra note 30 are correct. There is no inconsistency in considering an assault as both an attempted battery and something else. See Tulin, The Role of Penalties in the Criminal Law (1928) 37 Yale L. J. 1048, 1052, 1053, 1061.

\textsuperscript{32} State v. Sears, supra note 31; McKay v. State, 44 Tex. 43 (1875) (in which the statute was construed as requiring actual ability).

\textsuperscript{33} Mullen v. State, 45 Ala. 43 (1871); Mayfield v. State, 44 Tex. 59 (1875).
social result follows. In either case the victim is put in that fear of death or harm, which, when accompanied by defendant's act and intent, creates a relative attempt to murder.

But if the victim knew that the pistol had only a blank cartridge in it, a different result follows and hence no criminal attempt exists because then he is not put in fear and there is no impairment of interest.\textsuperscript{34} If we apply this still further, there should be no criminality if the victim were completely ignorant of the attack on him. Such was the situation in \textit{State v. Barry}\textsuperscript{35} where the defendant aimed an empty rifle at his victim, who did not become aware of the impending attack until a third person had disarmed the defendant. After a directed verdict that defendant was not guilty of assault, the state appealed and argued against the defendant's two contentions, first that the lack of proof of the gun's being loaded, and second, the fact that the victim was unaware of the attack, prevented criminality. The court held for the state on the first argument and carefully expounded the orthodox view that merely an apparent adaptation of means was required, but held that the victim's being unaware of the attack at any time while it might have been effected precluded an assault. This was put on the ground that there was neither actual nor apparent ability to commit injury to the intended victim. One justice dissented\textsuperscript{36} on the ground that the possibility of injury was apparent to the third person and he was authorized to take steps thereby, and thus a breach of the peace was created.

The majority opinion reflects the theory requiring a substantial impairment of some particular interest protected, \textit{i.e.,} that of the intended victim. He was neither put in danger nor in fear

\textsuperscript{34} \textit{Wharton, op. cit. supra} note 5, §§182, 642, citing Crumbly v. State, 61 Ga. 582 (1878), in which defendant, knowing his gun to be loaded with powder alone, fired it at a locomotive engineer, who observed the shot and was put in fear. The court, in affirming a conviction for assault, said: "It is not pretended that he [the engineer] knew with what the gun was charged, or for what purpose it was presented at him and fired. Those who shoot at their friends for amusement ought to warn them first that it is mere sport and that there is no danger." This case hardly supports a definite conclusion that knowledge on the part of the victim of the lack of danger prevents the criminality of the attempt, but by its language it does reflect the principle that there can be no attempt without an impairment of interest.

\textsuperscript{35} 45 Mont. 598, 124 Pac. 775 (1912), \textit{Note} (1912) 11 Mich. L. Rev. 65.

\textsuperscript{36} \textit{Ibid.} at 605, 124 Pac. at 777.
of injury. One can gather from the opinion that had the gun been loaded an assault would have occurred regardless of the victim's knowledge. This could probably be supported on the theory that he was put in danger to an extent forbidden by the law. The majority opinion repudiated a *dictum* in a Michigan case which had indicated that there could be an assault without the victim's knowledge.\textsuperscript{37}

**The Poisoning Cases**

The third situation of intrinsic impossibility to be discussed here is that of the would-be poisoner who, believing it to be poisonous, places a harmless substance in his victim's food. For present purposes it must be assumed that the food and substance contained therein are consumed by the victim, for if the substance is not consumed, the problem then becomes one of extrinsic impossibility and will be discussed under that heading both as to the use of harmless substances and harmful substances.

Such an act was held criminal in *State v. Glover*\textsuperscript{38} although a contrary result was reached in *State v. Clarissa*.\textsuperscript{39} The former result, that of criminality, seems to be preferable if we construe one of the interests protected by the prohibition against attempted

\textsuperscript{37} People v. Lilley, 43 Mich. 521, 5 N. W. 982 (1880).

\textsuperscript{38} 27 S. C. 602, 4 S. E. 564 (1888). The applicability of this case and of *State v. Clarissa*, infra note 39, is perhaps diminished by the fact that the mistake was not as to the named character of the substance but as to its poisonous character. In each case the defendant placed a substance believing it to be of poisonous nature in such a quantity, when actually it was not. In principle, however, this cannot be distinguished from placing sugar, believing it to be arsenic. The possibility of drawing such fine lines of difference goes to indicate that the situations are not solvable on fine discriminations as to intent, but rather according to the anti-social result.

\textsuperscript{39} 11 Ala. 57, 60, 61 (1847): "The offense consists in the attempt to do an act, which if consummated, would have caused death, and cannot be committed but by the actual attempt to administer a poisonous drug, or substance, calculated to produce death. An unexecuted determination to poison . . . or the actual administration of a substance not poisonous, or calculated to cause death, though believed to be so by the person administering it, will not be an attempt to poison, within the meaning of the statute." Anthony v. State, 29 Ala. 37 (1856). See 2 Stephen, *History of the Criminal Law of England* (1883) 225. He cites for this, however, only the since repudiated case of Reg. v. Collins, 9 Cox. C. C. 497 (1864), holding there could be no criminal attempt to pick an empty pocket. Cf. Garnet v. State, 1 Tex. App. 605 (1877), holding an attempt to kill by real poison not an assault to kill on the ground that another statute covered such an offense. *Contra:* *State v. Glover*, supra note 38.
homicide by poison to be an interest to be free from any contact with an agency intended to cause death. When the victim swallows the harmless substance, a battery has occurred. No more has happened when he swallows too little of a real poison to kill him. This is the situation in the case of an admittedly perfect criminal attempt to poison. If an attempted poisoning is ever more than a mere battery, it is as much a relative criminal attempt when a harmless substance actually achieves contact as when a small dose of real poison does. The attempt by real poison, to be criminal, does not require that the victim suffer pain. If an attempt with real arsenic which does not cause any discomfort could be a criminal attempt, so should be an attempt with sugar, believed to be arsenic, or with chalk thought to be poisonous, on the theory that all the result required is a contact between the substance administered and the victim.

A more practical argument for criminality in such a case lies in the fact that there is no agreement on what is a poisonous substance. In sufficient quantity table salt might kill, in little quantity, arsenic might not. If a mistake as to the poisonous nature of the substance were a defense, it could be argued that a mistake as to the right amount would also be a defense. For purposes of enforcement the rule reaching criminality is the better.

The rule of \textit{State v. Glover}\textsuperscript{40} can be justified either under the reasonable man test or the theory of impairment of interest. Oddly enough, that case by its language goes farther than the reasonable man test and adopts a theory of the belief in the mind of the defendant being the determining factor.

Certainly when one consumes a foreign substance intended to poison, there is act, intent, and a substantial impairment of one's interest to be free from contact between foreign substances and one's body, punished as a criminal attempt to kill when accompanied by such an intent, or as a battery otherwise.\textsuperscript{41} \textit{State v. Clarissa}, however, can be justified on the argument that no such impairment occurs until the victim is actually made sick and put

\textsuperscript{40} \textit{Supra} note 38, at 607, 4 S. E. at 566.

\textsuperscript{41} Commonweal\textit{th v. Shatton, 114 Mass. 303 (1873), held it to be an assault and battery to administer "love powders" in food.}
in fear or danger of his life. In reply it may be said that it is difficult to draw the line between substances not making one ill and substances putting one in fear of death. The hard and fast rule of State v. Glover seems the better since there is an arguable impairment of interest. Such a conclusion seems to accord with the doctrine requiring such an impairment for a relative criminal attempt.

The orthodox statements of theory which take care of intrinsic impossibility explain the above situations in the same manner. The "apparent adaptation" or "apparent possibility" of committing the crime means apparent both to the actor and his victim. If the possibility is not apparent to the actor, he probably lacks the necessary intent. If it is not apparent to the victim, he is not put in that fear of death, bodily harm, or violation of person, which respectively constitutes the corpus delicti of an attempt at homicide, battery and rape. The impotent man, the one shooting with a blank cartridge, and the one putting the harmless substance believed to be poison into food that is eaten, all have the apparent ability, and their ability is or should be apparent to their victims respectively.

The reasonable man test reaches the same conclusion. Doing what a reasonable man, in the same situation as the defendant, might expect to effectuate the end, will impair the interest of the victim in the three cases mentioned above, because such activity will either put the victim in fear or accomplish a forbidden contact. Both the reasonable man and apparent adaptation tests work well enough for intrinsic impossibility. But even then they must be translated into more specific terms.

For the category of intrinsic impossibility it might be said that impossibility will not prevent criminality unless it has the effect of preventing the existence of a substantial impairment of some interest protected by the involved prohibition. When there is no substantial impairment of any such interest, there is no relative criminal attempt.42

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42 The effect of intrinsic impossibility on violations of the war-time espionage acts is treated in (1919) 32 HARV. L. REV. 417, 434 and Note (1920) 33 HARV. L. REV. 442.
Extrinsic Impossibility

The typical situations to be used here are those of an attempt to pick an empty pocket, an attempted abortion on a woman who is not pregnant, an attempt to shoot one who is not in the spot aimed at, and an attempted poisoning by placing poison which is not consumed by the intended victim.

The Pickpocket Cases

Practically all of the American cases and the more recent English ones hold that one may be guilty of a relative criminal attempt to commit larceny by pocket-picking even though there is nothing of value in the pocket into which the hand is thrust. The theory of the substantial impairment of a protected interest is supported by these cases. The object of the prohibition against attempted larceny is to punish the trespass incident to an attempt theretof and to protect the property owner from the fear aroused thereby. This trespass and fear occur when the thief's hand is thrust into the owner's pocket regardless of the presence of property. There is hardly more of a discernible impairment of interest when there is property present which is not stolen. Although there may be more fear when there is money in the pocket, there can be enough, however, when the pocket is empty to constitute that minimum necessary for an impairment of a protected interest.

The same result follows when the attempt is to steal from an empty cash drawer. In either case there is guilt of attempted larceny because of the impairment of some individual's interest to be free from such anti-social activity. This same interest is recognized by the prohibition against the direct attempt of burglary.

The Abortion Cases

While almost all discussions of the instant problem cite the cases holding it to be a criminal attempt at abortion to attempt

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44 Clark v. State, supra note 21; cf. Hamilton v. State, 36 Ind. 280 (1871) (one can be guilty of assault and battery with intent to rob one who has no money.)
abortion on a non-pregnant woman, the fact is that almost all of these cases have no bearing on the effect of impossibility on relative attempts. Many of these cases arise under prohibitions against the direct attempt of administering a substance or an instrument with the intent of procuring an abortion on any woman. Under this view both the successful and the unsuccessful attempts are punished by the same direct prohibition. This is not the case where a relative attempt is punished under the general prohibition against all attempts and by relation to the major crime, the elements of which are not quite the same as for the attempt. For the direct attempts both the pregnancy and the success of the abortion are immaterial. From the wording of the prohibition against these direct attempts we deduce that there the protected interest is society's desire that women shall not submit themselves unnecessarily to operations and treatments which might endanger their health. This interest is impaired since the woman submits herself to danger regardless of pregnancy and regardless of the success or possibility of the abortion.

The only cases which are relevant to the instant discussion are those of attempted abortions which are prosecuted as relative attempts to commit the common law crime of procuring an abortion on a woman quick with child, or to violate one of the modern statutory counterparts of it, almost all of which require the woman to be either quick or pregnant. When the prosecution is in this form, the cases hold that there is not a relative attempt when the woman is not quick or pregnant, as the statute may require.

These cases repudiate the reasonable man test. In almost all of them it could probably be shown that the defendant "reasonably" believed the woman to be quick or pregnant and yet the

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45 Eggart v. State, 40 Fla. 527, 25 So. 144 (1898); State v. Fitzgerald, 49 Iowa 290 (1878) (statute required, however, that the woman be pregnant); State v. Snyder, 188 Iowa 1150, 177 N. W. 77 (1920), 10 A. L. R. 309 (1921); Commonwealth v. Taylor, 132 Mass. 261 (1882); Commonwealth v. Tibbetts, 157 Mass. 519, 32 N. E. 910 (1893).

46 People v. Richardson, 161 Cal. 552, 120 Pac. 20 (1911) (a direct attempt case); Commonwealth v. Parker, 9 Metc. 263 (Mass. 1845); State v. Cooper, 22 N. J. L. 52 (1849); Rex v. Scudder, 3 C. & P. 605 (Eng. 1828). See also Rex v. Fernando, Ceylon, (1925), 27 New L. Rep. 181, Note (1926) 26 Col. L. Rev. 1027.
courts find no criminality in the attempt. Why? Because in these cases there has been no impairment of any protected interest by the activity of the defendant. What interest is protected by the common law prohibition against abortion? Primarily it is the interest of the foetus in continued existence. Blackstone considered this prohibition a recognition of the personality of the foetus. In its inception the prohibition seems to have been recognized as a forbidding of a species of homicide. Then if the only protected interest be that of the foetus, such interest cannot have been even partially impaired when no foetus exists as is the case when the woman is not pregnant. If some other interest is present, it may be society's interest in preserving and perpetuating the species. But has this been even partially endangered when society would have been no better off had the act not been committed? Society is no more in danger of losing a potential member than if the abortifacient had been administered to a guinea pig. No interest of any quick or conceived child can be impaired unless a quick or conceived child exists, and society's interests cannot be impaired unless a potential member was at least put in danger. Neither of these things happens when abortifacients are administered to a non-pregnant woman.

The attempt occurs, under such prohibitions, when the substances are administered to one quick or pregnant as may be required, for even though not successful, yet the child-to-be may be weakened, or there is a dangerous proximity to a complete impairment of a social interest, either of which will create an impairment of the protected interest involved.

**The Shooting Cases**

As has already been seen, the prohibition against relative attempts at homicide is based on a recognition of an individual interest to be free from fear and danger of death or bodily harm. This fear or danger has been shown to exist in certain cases of intrinsic impossibility. It also exists in some, though not all, cases of extrinsic impossibility.

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47 I Bl. Comm. 129.
When the assassin's bullet either misses the victim because of poor aim, or merely grazes him or hits a non-vital spot, a relative criminal attempt has happened, particularly if the victim is put in fear of his life. This is a clear case of a relative criminal attempt at homicide by firearms.

One step removed from this situation is that of *People v. Lee Kong* where the assassin shot at one spot on a roof, believing his victim to be there, while the victim was actually in another spot on the same roof. This was held a criminal attempt and such a conclusion satisfies the theory now being discussed. The victim there was certainly put in fear of death or bodily harm when, as a policeman on duty searching for criminals, he heard a shot and a bullet actually passed in his vicinity, even though not in his specific direction. There was a substantial impairment of his interest to be free from the fear of death.

In *State v. Mitchell* the assassin shot into the victim's bed, but the victim was in another part of the house at the time and not in the same room. This was held a criminal attempt and such conclusion, too, fits in with the theory of substantial impairment. Even aside from the fact that the victim, being in the same house, was possibly actually put in fear by hearing the shot, as in the *Lee Kong* case, can it not be argued that a criminal attempt would have ensued had he not been in the vicinity at all? Would not the mere shooting into the personal habitation of the victim, regardless of his nearness, amount to a substantial impairment of some interest protected by the prohibition against murder? Is not one result of the prohibition against attempted murder an interest to have one's habitation free from having the instrumentalities of violence directed against it?

48 5 Cal. 666, 30 Pac. 800 (1892).
49 170 Mo. 633, 71 S. W. 175 (1902). See also Lott v. State, 83 Miss. 609, 36 So. 11 (1904) (no assault with intent to kill and murder when defendant shot at another who was on far side of a house from defendant at time); Rex v. Lovel, 2 Moo. & R. 39 (Eng. 1837) (defendant shot into the room of another mistakenly believing him to be present, and intending to kill him. Held, not guilty of statutory offense of shooting at another with intent to kill.).
50 "... if the shooting be at an empty carriage, the offender supposing it to be occupied, then the attempt is made out, on the ground that it is a misdemeanor to shoot into any place usually frequented by human beings." *Wharton, op. cit. supra* note 5, § 186.
Even further removed from the perfect criminal attempt is the moot situation of the assassin who, believing he is shooting at his victim, is actually shooting at a stump or bush while the victim is nowhere in the vicinity. The conclusion of the writers on this point is that no criminal attempt has occurred. 51 This is correct under the substantial impairment theory. Here there has been no impairment of any interest at all. The intended victim has been put neither in fear nor danger. His habitation has not been violated, nor has the space in his immediate vicinity. Regardless of the belief that a reasonable man might have, there should be no criminality because there has been no impairment of interest. 52

A situation analogous to that of the shooting at the stump would be that of an attempt to rape a dummy or a man dressed as a woman. No criminal attempt would exist in such a case 53 because no woman would have been put in fear of having her person enforced, and consequently there would be no impairment of any protected interest. The dummy would have no interest at all to be protected and the man dressed as a woman would not have the kind of interest protected by the prohibition against attempted rape. This interest is to be free from fear of violation of person, and then such a violation would be impossible. The man thus attacked would have his interest to be free from phys-
cal violence impaired and to this extent there could be punishment of the attacker for assault and battery, but that is quite a different thing from attempted rape.

*People v. Rizzo* presented a similar situation with respect to another crime and its analogous impossibility. There the defendants, intending to rob a paymaster, drove to a building where they erroneously supposed him to be and were there arrested. This was held not to be an attempt to rob. This seems to be an example of extrinsic impossibility excusing the criminality of the attempt, even though it can be argued that the case is really decided on the lack of proximity of the act to the complete crime.

**The Poisoning Cases**

There has already been a discussion of the intrinsic poisoning cases with the conclusion that it should be a relative criminal attempt to cause one's victim to consume a harmless substance believed by one to be deadly. Here will be discussed the converse extrinsic problem of the placing of a substance, harmless or otherwise, in food which is not consumed by the victim, with the intent that the victim shall eat it and die.

Several cases hold that such facts do not create an assault with intent to kill.56 *Commonwealth v. Kennedy*, on the other hand, rules that there may be an attempt to murder by the mere placing of poison in the victim's cup, and that the indictment need not allege its consumption. In viewing the situation by analogy to that of shooting at a stump, we could say that the former cases are right. If we conceive the interest protected by the prohibitions against murder by poison and the relative attempts thereat as, respectively, interests to be free from violent death by poison and from contact with foreign substances not resulting in death, then there is no more impairment of interest by the placing of poison in food or receptacles which are not consumed or used

56 Supra note 13.
than in the mere purchase of it by the defendant, which, surely, would not amount to an attempt.

The question thus resolves itself into a matter of determining what interests are protected by the prohibition against relative attempts at murder by poison. Whether it be an interest to be free from actual physical contact with substances intended to kill, or to be free from having one's food and receptacles trespassed upon by such substances is an arguable matter. It seems to the present writer that the cases holding no criminality in such event are to be preferred to Commonwealth v. Kennedy, and that the interest to have one's food and belongings free from foreign substances is not as vital a one as the interest possibly recognized in State v. Mitchell of having one's habitation free from the intrusion of bullets.

Although Commonwealth v. Kennedy did hold such an act a relative criminal attempt, the indictment there also included another count for the direct attempt of mingling poison with food. There can be no argument that the activity averred did violate this prohibition. It seems that such activity should be punished under such direct prohibitions, which squarely recognize the interest in having one's food free from foreign substances, and thus recognize other interests than that which alone should be recognized by the relative attempt, that of having one's person free from contact.

It can be argued that an analogy should be drawn to the shooting cases which hold it as much of an attempt to miss the victim who is present as to hit him with non-fatal results. If we apply this, the poison cases should not require the poison to "hit" him any more than do the pistol cases. But, when a bullet whizzes by one's head, one is put in such a fright that the law recognizes an interest to be free from this sort of result and dubs it anti-social. But when the poison "misses" the victim, at most it is because he suspects something wrong, and usually it is because of his mere failure to consume or use the food or the contents of the receptacle. Even if he suspects the poison and does not eat it, his fright is not so great as that creating the impairment of interest in the shooting cases and consequently is hardly enough
to be recognized by a criminal punishment of the offender as merely for a relative attempt.

As applied to the situations of the attempt to pick an empty pocket, the direct attempt to commit abortion on a non-pregnant woman, and the attempts to shoot of the kind involved in the Lee Kong and Mitchell cases, the reasonable man test and the apparent possibility tests work sufficiently well. But they fail when applied to the situations of attempted abortion on a non-pregnant woman under the common law type of prohibition, of the cases of shooting at a stump, and of those of attempted rape on a dummy or a man dressed as a woman. Thus these tests are not of general validity for extrinsic impossibility. It is suggested that the requirement of some substantial impairment of interest does explain the criminality involved in the former group and the non-criminality to be found in the latter. It might be said, to summarize this portion of the discussion that extrinsic impossibility will keep an attempt from being criminal only if it prevents entirely there being any impairment of an interest protected by the prohibition. If there is some impairment, and a substantial one, the attempt is criminal.

**Legal Impossibility**

Can one be guilty of an attempt at a crime under circumstances which would prevent his being convicted of the complete crime had his attempt been successful? The logical answer is that he cannot and this conclusion is amply supported by the cases. The typical situation of this kind is that of an attempt at sexual intercourse under circumstances which would keep the offender from being guilty of rape did his attempt succeed.

In a jurisdiction which refuses to convict a boy under fourteen of rape, such a child who attempts forcible intercourse is correctly held not guilty of attempted rape, since there is then no

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67 Regina v. Phillips, 8 Car. & P. 736 (1839); Rex. v. Eldershaw, 3 Car. & P. 396 (1828); State v. Sam, 1 Winst. L. 300 (N. C. 1864). Contra: Commonwealth v. Green, 2 Pick. 380 (Mass. 1823). Massachusetts seems to be the only jurisdiction holding that an infant under fourteen can be convicted of attempted rape but not of complete rape. Many American jurisdictions have broken down the English rule by allowing the presumption of incapacity to be rebutted both for complete and attempted rape. The cases are collected in (1897) 36 L. R. A. 204-6; (1923 26 A. L. R. 778-80; 11 A. & E. A. C. 1063-1065 (1909).
substantial impairment of any interest protected by the particular prohibition, because in such a jurisdiction women are not protected against attacks by children by punishing the offending child for rape. If there is no interest to be free from actual forcible penetration by such an offender, it is hard to see how there can be a lesser interest to be free from the fear and fright caused by such an attempt. To have a substantial impairment of some interest, which is requisite to an attempt made guilty by relation, to the intended major crime there must be some interest to be protected against the intended consequence, and, if not, the attempt at the consequence will not be criminal. Of course, a boy under fourteen who attempts rape would be guilty of common assault, and to that extent to which the law does protect the interests of females against boys, she will be protected and he will be punished. The interest to be free from bodily harm or the fear thereof must be distinguished from the interest to be free from the forcible capture of sexual favors and the fear thereof. In many cases there is no interest of the latter nature, while that of the former exists.

This is so in the case of an attempt at forcible intercourse by a husband on his wife. Inasmuch as the achieved intercourse would not be rape, the attempt is not attempted rape, and yet the attempt or consummation should be assault and battery respectively. By analogy to the rule regarding boys under fourteen she should be protected against the bodily harm although the impairment of her interest protected by the prohibition against rape does not exist when it is her husband who forces her, or tries to force her to submit. She is not outraged in the same manner by her husband's act as by that of a stranger. Intercourse with her husband is not unusual or violent to her mental state where forced intercourse with a stranger is.

The same reasoning can be applied to the archaic doctrine that the obtaining of non-forcible intercourse by impersonation of the woman's husband or by other fraud or by drugs was not rape.

58 Regina v. Phillips; Rex v. Eldershaw, both supra note 57; State v. Pugh, 7 Jones L. 61 (N. C. 1859).
Where this be so, an attempt to do any of these things would not be attempted rape.\textsuperscript{60} If the woman's interest against non-willed intercourse is protected only against positive violence, and not against the \textit{ex post facto} shame resulting from her later realization of the situation, there is consequently no protection against the attempts at these. If there is no protection against the greater, there should be none against the lesser. Here again the offender can be convicted of an assault or battery respectively,\textsuperscript{61} for the interests protected by those prohibitions have been impaired while those protected by the prohibitions against rape and attempted rape have not been.

An interesting controversy as to legal impossibility is presented by the two New York cases of \textit{People v. Gardner}\textsuperscript{62} and \textit{People v. Jaffee.}\textsuperscript{63} In the \textit{Gardner} case the defendant was convicted in the trial court of attempting to extort money by fear. This conviction was reversed by the Appellate Division on the ground that as the one from whom the money was demanded was a decoy and actually not in fear of the threatened criminal prosecution, there was lacking a necessary element of the crime. This decision was placed on the orthodox ground that as there could be no conviction for the completed crime without the element of actual fear, there could, therefore, be no criminal attempt, inasmuch as the attempt was legally impossible. The Court of Appeals reversed the Appellate Division and affirmed the conviction. This opinion in the Court of Appeals has since been much cited by those who argue for the reasonable man test as laying down the correct principle to decide cases of extrinsic and legal impossibility.

\textsuperscript{60} \textit{People v. Quin}, 50 Barb. 128 (N. Y. 1867) (use of liquor); \textit{People v. Brown}, 47 Cal. 447 (1874) (no intent to accomplish intercourse by force); \textit{Johnson v. State}, 63 Ga. 355 (1879) (same); \textit{State v. Lung}, 21 Nev. 209, 28 Pac. 235 (1891) (drugs); \textit{State v. Brooks}, 76 N. C. 1 (1877) (impersonating husband); \textit{Rhodes v. State}, 41 Tenn. 351 (1860) (improper to indict for assault with intent to rape when crime, if completed, would have been carnal abuse).

\textsuperscript{61} \textit{Clark and Marshall}, \textit{op. cit. supra} note 5, § 220.

\textsuperscript{62} \textit{I44 N. Y. 119}, 38 N. E. 1003 (1894). Same case in Appellate Division, \textit{supra} note 53.

\textsuperscript{63} \textit{Supra} note 3.
It seems to the present writer that such a conclusion from this case can be denied for two reasons, first, that the *Gardner* case does not decide that there can be a conviction for an attempt when the complete crime is legally impossible, and second, that if it does so decide, this result has been repudiated by the later case of *People v. Jaffe*. In discussing the first point it must be observed that New York is one of the states which has departed from the common law rule that the attempt is merged in the completed crime. Where in most states a conviction for an attempt means that the crime was not completed, in New York and similar jurisdictions, there can be a conviction for an attempt even if the crime has been consummated.

Thus, from the mere fact of conviction for an attempt in the *Gardner* case we cannot deduce that the complete crime did not happen. This conclusion might be reached in a common law jurisdiction. In the *Gardner* case the money was actually obtained, so that there would be a complete crime but for the lack of fear which might render the crime legally impossible. From the opinion itself do we find that the case holds there can be an attempt when the completed crime is legally impossible, or does it merely uphold the conviction for the attempt as an alternative proceeding in place of prosecution for the completed crime? Can it not be argued that the defendant could have been convicted for the completed crime, and under the New York practice for the attempt in the alternative? Does not the Court of Appeals' opinion indicate that the lack of actual fear in the victim does not prevent a prosecution either for the attempt or consummation?

If we construe the Court of Appeals' opinion as specifically rejecting the reasoning of the Appellate Division, then it does decide that there can be a criminal attempt when the complete crime is legally impossible. But, standing alone, can it not be construed to be a decision of the case from another angle, ignoring the reasoning of the intermediate court? Can we not say that the Court of Appeals construed "fear" as being that fear which such a demand would create in the normal person, regardless of the actual fear produced? The language gives but a little hint one way or

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*4 N. Y. PEN. CODE* (Gilbert 1929) § 260.
the other. It is merely a speculative argument, but it seems to the present writer that in view of the possibility of choosing either the attempt or the completed crime in New York that such cases do not offer as clear results as would follow in a common law jurisdiction holding that the completed crime merges the attempt.

If the Gardner case does decide that there can be a criminal attempt in the face of legal impossibility, this rule seems a mistake. It seems bad policy to use the doctrines involving relative attempts to remedy technical defects in the criminal law. The only reason for punishing relative attempts at all is to protect related interests and if there be no major interest to be protected, there should be no related one protected by the general doctrine. A relative attempt is not a different, slighter, crime but rather a part of the same crime as the involved major one.

To the extent to which the Gardner case does decide that there can be a criminal attempt which is legally impossible, it is overruled by the Jaffee case, a later one in the same court. In that case the defendant attempted to receive stolen goods, but the goods in question were in the hands of a decoy and were actually not in a stolen condition at the time of the defendant's act. The Court of Appeals reversed a conviction for an attempt to receive stolen goods, on the ground that as the actual receiving of them would not have been criminal, the attempt thereat was also non-criminal. The court, in its opinion, said it was not reversing the Gardner case. One wonders whether this language supports the above interpretation of that case. It seems that the Gardner case can be interpreted only in two ways, the first as not deciding that there can be a criminal attempt in the face of legal impossibility, and the second as being in conflict with the later Jaffee case.

65 The following language from the Court of Appeals' opinion seems to support the conclusion that the defendant could have been tried for the complete crime: "This crime [extortion?] as defined in the statute depends upon the mind and intent of the wrongdoer and not on the effect or result on the person sought to be coerced." Earl, J., 144 N. Y. 119, 38 N. E. 1003 (1894).

66 185 N. Y. 608, 78 N. E. 170 (1906): "The language used . . . in People v. Moran . . . quoted with approval . . . in People v. Gardner . . . has no application to a case like this, where, if the accused had completed the act which he intended to do, he would not be guilty of a criminal offense." Willard Bartlett, J.
In either event, it is but scant authority for the adherents of the wide application of the reasonable man test.

In the *Jaffee* case there was no protected interest in the owner of the property to have that property kept out of the hands of strangers, and consequently there was no interest to be protected against the fear or danger of such a consequence. In the *Gardner* case, by the present interpretation, there was an interest to be protected against having to pay over money under threat, whether the fear existed or not, and consequently an interest to be protected against the threat even if the money was not paid over.

It might be said, to summarize the discussion of legal impossibility, that such impossibility will excuse the criminality of the attempt when it has the effect of negating the existence of any interest to be protected by the major prohibition against the consequence desired by the defendant.

**DIRECT ATTEMPTS**

It has already been suggested that an acute distinction must be drawn between relative attempts and direct attempts, and that it is erroneous to use cases involving the latter as a basis for generalizations about the former. At this point it is appropriate to give consideration to certain cases of direct attempt, some because they are erroneously so cited, and others because they are valuable for purposes of contrast or criticism, or because they accidentally reflect the correct principles involved in relative attempts, even though confusedly decided under direct ones.

In relative attempts the interest protected by the prohibition against the attempt must relate to the interest protected by the major prohibition itself. From no other source can it be found. The only wording of the prohibition against the attempt is the very general one applicable to all crimes, and so the interest must be found by a process of interpretation. In direct attempts the attempt is expressly forbidden by specific terminology applicable to the particular attempt alone, and the interest protected can be divined without relation to the major crime attempted. Also, as a rule, a different interest will be found to be protected in the case of a relative attempt at the same crime. It need hardly be argued
that cases involving the protection of one interest are of little value in deciding the applicability of a prohibition protecting another and different interest, yet this is what has been done by some writers.

The most outstanding example of this misapplication of authorities is *Commonwealth v. Jacobs.* There Jacobs was convicted of violating the Massachusetts statute of 1863 which made it criminal for anyone "to entice or solicit any person to leave the Commonwealth for the purpose of entering upon . . . military service elsewhere." Jacobs' defense was that the person whom he solicited thus to leave was actually unfit for military service and would and could not have been so accepted. The court held this no defense, using this much-quoted language:

"Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with the intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." 68

Two criticisms can be made of the use of this case as an authority on relative attempts. In the first place, this is not an attempt case at all, but one of solicitation. This language is but *dictum* for attempts. In the second place, the *dictum* involves a direct attempt rather than a relative one. There is no question here of applying the general prohibition against attempts to this attempt at some other major crime. There is no other major crime involved. The case rightly decided that Jacobs had impaired the interest protected by the prohibition. He had violated the statute, as he had "solicited and incited" another to leave the Commonwealth for the purpose of entering military service. That is all sought in the case. Criminality here hinges no more on the possibility of the solicited person's being accepted than does criminality in the case of burglary hinge on the existence of asportable

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67 9 Allen 274 (Mass. 1864), cited in Bishop, op. cit. supra note 5, § 752; Clark, op. cit. supra note 5, § 56.
property within the burglarized premises. The activity amounting to the crime is specifically laid down, and such activity has occurred here, and that settles it.

Another example of this misapplication is *Stokes v. State.* There the defendants were indicted under a statute which punished anyone who should form an intent to kill and who should do any overt act in furtherance of this intent. They planned to kill one, lay in wait for him by a path, and were apprehended before he appeared. The case has been cited to the effect that they were guilty of a criminal attempt to kill notwithstanding the absence from the vicinity of the intended victim of their acts. Thus it seems to be *contra* to the conclusions of various writers on the point of the shooting at a stump. But this case will not support such a conclusion in connection with relative attempts. It is an instance of a direct attempt. The activity punished requires only the formation of an intent and the doing of any overt act in pursuance of it. It is possible to secure conviction under such a statute for activity which never would amount to a relative attempt. Such was the case here, for merely lying in wait has never been considered a relative attempt to kill. This statute practically punishes bare intent, while the prohibition against relative criminal attempts requires more activity and an impairment of some interest protected by the major crime. The defendants there had violated the statute in that case, but had not committed a relative attempt at murder. Thus the case is no authority for relative attempts.

The statute violated in that case probably approaches more closely the ideals of theoretical criminology than does the prohibition against the relative attempts at murder. Such a statute does deter one who tries and fails from repetition and would probably be better than the mere prohibition against relative attempts, which, as has been seen, protects individual interests more than social interests, at least in the case of crimes against the person or against the property or habitation of persons.

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69 92 Miss. 415, 46 So. 627 (1908).
70 Sayre, *op. cit. supra* note 4, 852. People v. Rizzo, *supra* note 54, was a case involving a relative attempt which held there to be no criminality when the intended victim was not in the vicinity of the defendant's acts.
While intent as such has never been punished, yet it would seem quite proper to punish intent when evidenced by an overt act. This is practically what the proponents of the reasonable man test seek although by a strained interpretation of the prohibition against relative attempts. Rather it should be done by statutory change, as was the case in Mississippi. An overt act is quite less than the necessary act and result thereof which will support a conviction for a relative attempt. As a rule it can be much farther removed from success than the farthest act which will be a relative attempt.

Certain groups of cases involving direct attempts reflect the principles which would apply to relative attempts at the same ultimate offenses. Two types reach the conclusion of criminality despite the impossibility. One of these is the instance of the prohibition against burglary. One is liable for burglary even though there is no money in the house into which one breaks and enters with the intention of stealing. The interest protected by the prohibitions against both burglary and attempted larceny has been infringed when someone enters the premises intending to steal. Mention has already been made of the other type of cases, those involving direct attempts to cause abortions for which both the pregnancy of the woman and the success of the abortion are immaterial.

Two other types of cases reach the result of no criminality in the face of impossibility and also reflect the same principle which would apply had they been cases of relative attempts. In *Respublica v. Malin* the defendant was indicted for treason in that he deserted his body of troops and approached another body of troops, believing them to be the enemy and intending to join them. They were actually of the American side. This was held not criminal. If we treat treason as a direct attempt to cause

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71 Sayre, op. cit. supra note 4, 821-837. Professor Sayre, after proving that the common law never punished intent alone, proceeds, by his support of the full extent of the reasonable man test, to give support to a doctrine which tends to punish intent alone.

72 Harvick v. State, 49 Ark. 514, 6 S. W. 19 (1887).

73 Supra note 45.

74 i Dall. 33 (U. S. 1778).
the defeat of one's own side, this attempt failed because of the extrinsic impossibility. There never was even a danger of his giving assistance to the enemy and so there was no treason.

The doctrine that the crime of perjury is committed only by the giving of material testimony reflects also the effect of legal impossibility. If we consider perjury as a direct attempt to influence litigation, and if it is legally impossible for the defendant's act to influence the litigation, there is then no interest to be protected against the activity desired by the defendant—that the testimony might be believed by the jury.

**General Considerations**

Further proof of the validity of the principle that a criminal attempt involves a substantial impairment of some interest protected by the prohibition is to be found when certain general propositions are given consideration for purposes of comparison.

The first of these is the orthodox proposition that there cannot be a criminal attempt at a crime itself in the nature of an attempt. While this proposition is probably not completely valid, yet, assuming its validity, we find it to exist because the law has recognized the least interest worthy of its protection by criminal prosecution in the prohibition against the attempt-crime attempted. Any lesser interest by way of a relative attempt at this is too slight for recognition by the law. As there is no substantial infringement of any interest protected from crime, there is thus no relative attempt at an attempt-crime.

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75 People v. Teal, 196 N. Y. 372, 89 N. E. 1086 (1909), 25 L. R. A. (n. s.) 120 (1910) (which case, although involving an attempt to suborn perjury, presented, together with the annotation, a treatment of the question of the materiality of the testimony).

76 See also People v. Peabody, 25 Wend. 472 (N. Y. 1841) (where charge is counterfeiting with intent to defraud the bank whose notes were counterfeited, the bank must be shown to be a real body, capable of being defrauded).

77 CLARK AND MARSHALL, op. cit. supra note 5, § 120. This doctrine could be better worded to the effect that there can be no criminal attempt to commit a relative criminal attempt. It seems to be understood that there can be a relative attempt at a crime of the nature of a direct attempt. See People v. Young, 122 Mich. 292, 81 N. W. 114 (1899) (burglary); People v. Teal, supra note 75 (perjury).
The same argument could be used for the next proposition, followed in some jurisdictions, that there cannot be a relative attempt at misdemeanors *mala prohibita*. There, the prohibition of the act, merely *malum prohibitum*, involves a recognition of the least criminally recognizable interest. Anything less than this, such as a relative attempt thereat, is too small for such recognition.

Then too, the proposition is further demonstrated by the rule applicable to attempts of violence—that the indictment must aver an intent to injure, and the use of force against one and the same person. Were only social interests involved, it would be quite permissible to charge a shooting at X with intent to injure Y. Since this is not the case, we deduce therefrom that it is an individual interest being protected.

The substantial impairment terminology, as applicable to problems of extrinsic impossibility, is but an enlargement of the doctrine that there must be a dangerous proximity to result in order to have a criminal attempt. If one shoots at a stump, or tries to rape a dummy, or tries to abort a non-pregnant woman, there is in none of these cases any dangerous proximity to result, therefore there is not any substantial impairment of interest.

**SUMMARY**

One and the same act and intent are capable of causing three separate legal consequences. Which one ensues is determined by the extent to which there exists an anti-social result. This is ascertained by inquiring whether there has been an impairment of the particular interest protected by the prohibitions against the complete crime and its relative attempt respectively. If neither, only a non-criminal attempt exists.

The only criminological theory applicable to the involved legal phenomena is the retributive one which determines criminality according to the degree of the anti-social result. That this is a proper basis is indicated when, analyzing the crime into its ele-

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78 Supra note 5.
79 Rex v. Holt, 7 C. & P. 518 (1836).
ments of intent, act, and result, we find that for the latter alone there is always a difference between a complete crime and an attempt. Since the difference between complete crime and attempt is based on a difference in the result, the same basis of difference should be adopted for distinguishing between criminal attempts and non-criminal ones.

In applying this principle to problematic situations we find that intrinsic impossibility seldom excuses the criminality of the attempt, for seldom does it prevent the impairment of the interest protected by virtue of the prohibition against the particular attempt. Thus an attempted rape by an impotent man causes as much fright to the woman attacked as the same act by one not impotent and is just as criminal. Intrinsic impossibility excuses but rarely, because to be a defense it must prevent a substantial impairment of interest.

Extrinsic impossibility, on the other hand, can excuse criminality more often, for it can prevent this impairment in a greater number of cases. It excuses in the case of shooting at a stump, where the interest of no one was impaired, but fails to excuse in the pickpocket cases because there the interest to be free from the trespass to person or property involved in attempted larceny was impaired.

Legal impossibility always excuses so long as it prevents there being any interest at all to be protected against the planned activity of the defendant. Thus the boy under fourteen cannot criminally attempt rape, nor can one criminally attempt to receive stolen goods unless they be stolen.

Intrinsic impossibility excuses only when it prevents a substantial impairment of interest, extrinsic when it prevents any impairment and legal when it negatives the existence of the interest set up.

Two criticisms can be made of existing doctrine, the first, that the cases involving relative and direct attempts can not necessarily be used interchangeably and, second, that the principle of "apparent adaptation" or the "reasonable man" test, while sufficient for intrinsic impossibility, cannot be validly extended to extrinsic or legal impossibility.
Were the reasonable man test actually applicable to all impossibility situations, perhaps society would be better off. It would help to achieve the ideals of modern theoretical criminology. As a measure to be considered by the legislator, it is quite desirable. But it does not summarize accurately the existing authority on the subject of the effect of impossibility on criminal attempts except, incidentally, in connection with only one of the three kinds of impossibility. The strongest support for the full extent of the reasonable man test comes from certain New York and Massachusetts cases. But, on examining these we find that the strong language of People v. Moran and People v. Gardner in that direction has been repudiated by People v. Jaffee, that Commonwealth v. Green in result stands alone, that Commonwealth v. Jacobs can be distinguished as involving a direct attempt and that Commonwealth v. Kennedy uses language as much against the reasonable man test as in favor of it.

The true reason why we punish the gunman who shoots with an impossible blank cartridge and do not punish the user of the impossible magic is that the former has created an anti-social result and the latter has not. Thus it can be said that a relative criminal attempt at a particular crime consists of a specific intent to effectuate a result forbidden by that prohibition concurring with an act normally capable of being an essential part of the activity causing such result and creating a substantial impairment of some particular interest protected by the prohibition against such crime or its related attempt.