CROSSING THE LINE INTO CRIME: HOW CLOSE IS TOO CLOSE? PROXIMITY IN ATTEMPT FOLLOWING *R V HARPUR*

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A dissertation submitted in partial fulfilment of the degree of the Bachelor of Laws (Honours) at the University of Otago

October 2011

Acknowledgements

Thank you:

To my amazing supervisor Margaret Briggs for being so approachable, for all the valuable advice and guidance, and for always being up for a laugh;

To my family for always supporting me, listening to my woes, and putting things in perspective;

To my fabulous proof-readers: my sister Anna for making me laugh with her track changes comments, my mother Clare for doing such a great job even when had a million other things going on, and Sarah Farquhar, Carolyn Davies and Catherine Shipton for parroting my own words back to me in everyday conversation;

And finally, to my amazing flatmates and friends for providing me with chips and dip, chocolate, and entertainment when needed.

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I. Introduction

> Whoever has speculated on criminal attempt will agree that the problem is as fascinating as it is intricate. At every least step it intrigues and cajoles… when solution seems just within reach, it eludes the zealous pursuer, leaving him to despair ever of enjoying the sweet fruit of discovery. For criminal attempt involves the very foundations of criminal liability…[1]

Attempt law is one of the most confused and debated areas in criminal law. If a continuum of acts is imagined, with the first act coupled with the requisite intent on one end, and the act that amounts to the substantive offence on the other end, then somewhere in between a line must be drawn where conduct becomes criminal. For centuries courts have grappled over the question of "how close is too close," with legislatures and courts struggling to identify a "one size fits all" test. In New Zealand, as in many other jurisdictions, the test for the actus reus of attempt is to be found in legislation. Section 72 of the Crimes Act 1961 sets out a test of proximity, specifying that acts which are "immediately or proximately connected with the intended offence" may constitute an attempt.[2] The judiciary have given various interpretations to the statutory test, ranging from a "real or practical step" test,[3] to one requiring a "commencement of the execution" of the substantive crime.[4] However in 2010, the Court of Appeal in *R v Harpur* signalled a radical change in direction.[5]

Harpur was charged with attempting to sexually violate a 4-year-old girl. He had commenced a texting relationship with a woman, who became concerned with the sexual content of the messages and alerted the police. With guidance from the police, she told him she had 2 young relatives, and he expressed a desire to have sexual relations with them. They agreed to meet in a car park, and he was arrested while waiting in his car to meet them.

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[1] J Hall *Criminal Attempt – a Study of Foundations of Criminal Liability* (1980) 49 Yale LJ 786 at 789.
[2] Sections 72(2) and 72(3) of the Crimes Act 1961.
[3] *Police v Wylie & Another* [1976] 2 NZLR 167.
[4] *R v Wilcox* [1982] 1 NZLR 191.
[5] *R v Harpur* [2010] NZCA 319.

In imposing liability the Court disregarded the previous judicial tests, and instead used common sense to determine whether an attempt had been committed. The Court advocated a global approach where the actus reus and mens rea may be read together and held that the presence of strong evidence of intent means less actus reus is needed. *Harpur* heralds a new way of approaching attempt – one that asks us to disregard our preconceived notions about proximity. The focus of this dissertation is to consider whether the *Harpur* approach is desirable.

Part One will outline the jurisprudential and juridical notions surrounding the law of attempt. This conceptual analysis of attempt is necessary in order to sufficiently grasp the implications and challenges posed by the Court of Appeal's approach to proximity. Thus Chapter One will consider the theory and rationale that lies beneath attempt law, which will be drawn upon in later discussions. Chapter Two will then outline the various tests that had been proposed prior to *Harpur*, which *Harpur* rejected by saying that a common sense, global approach must prevail.

Against the background of Part One, Part Two will consider the issues arising from *Harpur* and possible solutions. Chapter Three will critically analyse the Court of Appeal's statements in *Harpur*. It will be seen that aspects of the judgment cause concern by contributing to an unsettling sense of uncertainty in attempt law. The problems resulting from *Harpur* will be demonstrated by considering a selection of previous New Zealand case law, as well as considering the one case on attempt post *Harpur*, *Taia v Police.*[6]

After concluding that this uncertain state of affairs cannot continue, Chapter Four will then consider options for reform. I will focus on two recent developments in the area of criminal attempt reform – the English Law Commission's suggestions of 2007,[7] and the approach taken in the American Model Penal Code,[8] which were both considered in *Harpur*.

[6] *Taia v Police* HC Napier CRI-2011-441-9, 15 June 2011.
[7] English Law Commission *Conspiracy and Attempts* (UKLC CP183, 2007).
[8] American Law Institute *Model Penal Code* (American Law Institute, Philadelphia, 1962) art 5.01.

Although *Harpur* has amplified the state of confusion in the area of attempt, the issues it has raised can be remedied. Legislative reform will be required, through the adoption of a similar approach to the Model Penal Code. This will eliminate the need for different "tests" formulated by judges, which have masked what has essentially been the default "I know it when I see it" approach, and will finally allow a successful balance between the values of personal autonomy and societal effective intervention.

PART ONE

II. Chapter One – A Conceptual Analysis of Attempt

> One cannot answer legal questions in a theoretical vacuum. To decide such cases, one needs an understanding of what underlies the rules – of the doctrines and principles which explain them – which can be drawn upon to fill in gaps, or to revise the rules in a principled rather than ad hoc way.[9]

This chapter examines the rationales that underpin the law of attempt, which will be drawn upon in later chapters when considering the tests the courts have formulated, including *Harpur*. The rationales are also important when considering possible proposals for reform, because depending on what rationale is chosen, the desirable line of liability on the continuum of acts can move.

It is generally acknowledged that in order for conduct to be criminalised, there must be a harm caused and the actor must be culpable.[10] The rationales of harm and culpability are considered below.

A. A Rationale Based on Harm?

Usually behaviour is not criminalised unless it causes harm.[11] Theorists from the objectivist school believe that attempt does cause harm, which is why attempt is punished.[12] Objectivists believe that criminality should depend on whether social and public interests are unduly injured or endangered, and thus if there is no actual or potential harm, then the act should not be stigmatised by society.[13] An objectivist viewpoint places emphasis on the welfare of society, rather than on the individual

[9] AP Simester and ATH Smith "Criminalization and the Role of Theory" in AP Simester and ATH Smith (ed) *Harm and Culpability* (Oxford Univerity Press, New York, 1996) 1 at 2.
[10] Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, New York, 2006) at 31 [*Principles of Criminal Law*].
[11] AP Simester and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002) at 8, according to an instrumentalist view point.
[12] E Meehan and JH Currie *The Law of Criminal Attempt* (2nd ed, Carswell Thomson Professional Publishing, Ontario, 2000) at 19.
[13] Ibid, at 22.

accused and their particular mindset.[14] Conduct is more than mere evidence of intent; it is an important element in itself, because it is conduct that causes harm.

Consequently, to evaluate the objectivist theory as the rationale for criminalising attempt, it must be considered what harm, if any, an attempt creates. In an attempt, typical notions of harm are not present because the substantive crime has not been committed.[15] However, attempt may be punished because it involves harm of a different nature. Objectivists typically propose three different types of harm.

First, objectivists argue that an unsuccessful attempt gives rise to a risk of harm, which jeopardizes society's right to security.[16] Whether this "risk of harm" can amount to actual harm is debatable. Cahill argues that there must be a difference between an actual harm and a risk of harm, because otherwise there would be no distinction between inchoate and substantive offences. Furthermore, unlike an actual harm, a risk of harm causes no identifiable setback to a person's interests, as a victim typically does not physically suffer from being exposed to a mere risk of harm.[17]

Some objectivists argue that the psychological harm a potential victim suffers from the fear of the substantive offence being completed can amount to a tangible suffering, unlike the mere risk of harm.[18] If this is the reason for punishing attempt, then liability should arise when the potential victim felt danger.

Objectivists also believe the harm involved in an attempt can be the resulting intolerability of community life if attempts were not punished.[19] The actions in an attempt demonstrate a disregard for law and order, which could promote lawlessness in others and thus undermine societal values.[20] If this is the harm an offence of

[14] Ibid, at 20.
[15] Although, some attempts will cause actual harm, albeit not the harm the full offence would cause. *R v Hoenderdos* (No 4) HC Christchurch T31/92, 23 October 1992 and *R v B (No 5)*, HC Christchurch, T19/01, 7 September 2001 illustrate where other offences apart from the substantive offence can be committed in the attempt .
[16] CMV Clarkson, HM Keating and SR Cunningham *Criminal Law* (7th ed, Thomson Reuters (Legal) Limited, London, 2010) at 436.
[17] Michael T Cahill "Attempt by Omission" (2009) 94.4 Iowa Law Review 46 at 1218.
[18] Cahill, above n17, at 1219.
[19] Meehan and Currie, above n12, at 39.
[20] Cahill, above n17, at 1219, quoting George P Fletcher *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) at 141-5.

attempt protects against, logically intervention is required when the actor's actions are manifestly criminal to society.[21]

The unequivocality theory that took precedence in New Zealand before the enactment of s 72 of the Crimes Act 1961 is an example of objectivism. Under this theory, only an act that unequivocally showed a criminal purpose could constitute an attempt, because such an act would create harm by causing apprehension of danger in the community.[22] Another example is the clear and present danger rule, where acts are only punished when the nearness of the danger, the greatness of the harm and the degree of apprehension the community feels as a result of the acts dictate such punishment.[23]

However, many cases have imposed liability when the conduct did not create a fear in the victim or apprehension in the community.[24] As it is debatable whether risk of harm is really "harm", and because proof of harm is not a requirement of an attempt conviction, it may be preferable to regard attempt as an exception to the harm principle.[25]

B. A Rationale Based on Culpability?

If there is no actual harm caused by an attempt, what then is the rationale for punishment? To justify punishment, usually both culpability and harm are required.[26] If there is no harm, only culpability remains, as an actor in an attempt can be said to have a similar level of culpability to an actor who succeeds in committing that crime.[27] Perhaps the presence of culpability makes the desire for punishment so strong that harm is not needed in order to punish attempt.[28]

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[21] George P Fletcher *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) at 141-5.
[22] Meehan and Currie, above n12, at 160.
[23] Suggested by Holmes, see Edward J Bloustein "Criminal Attempts and the Clear and Present Danger Theory of the First Amendment" (1988) 74 Cornell L Rev 1118 at 1122; this is similar to the more recent "dangerous proximity" test proposed by AP Simester and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002); see chapter two.
[24] See *R v Townsend* CA141/05, 30 March 2006; *Police v Wylie & Another* [1976] 2 NZLR 167; *R v Eagleton* (1855) Dears CC 515.
[25] Andrew Ashworth "Criminal Attempts and the Role of Resulting Harm under the Code, and in Common Law" (1988) 19(3) Rutgers Law Journal 725 at 734 – 5 [*Criminal Attempts*].
[26] Ashworth *Principles of Criminal Law* above n10, at 31.
[27] The culpability of an actor who has committed the substantive offence may be the same as an actor who has done all the acts possible but has not completed the substantive offence because of

The idea that attempt liability should be based on culpability accords with the subjectivist school of thought. Subjectivists believe that acts play the purely evidentiary function of showing an actor's intent,[29] and that an actor should be held criminally liable for what they intended to do, not what they actually did.[30] New Zealand has mostly adopted a subjectivist stance in many other areas of criminal law, particularly in the interpretation of recklessness.[31]

However, Cahill identifies two objectivist critiques of the subjectivist viewpoint. First, subjectivism would allow liability for instances where there is no risk of harm at all (for instance where the actor is trying to kill someone through voodoo). Secondly, subjectivism would exclude liability for non-intentional risk taking (such as recklessness), which Cahill thinks should be punished.[32]

Yet in New Zealand, Cahill's criticisms may not apply. The impossibility doctrine would govern the situation when there is no risk of harm at all.[33] The required mens rea in an attempt is intention,[34] thus, liability for non-intentional risk taking is already excluded in New Zealand. Therefore Cahill's objections alone cannot provide a sufficient basis for rejecting a culpability rationale.

One further objection of subjectivism is that if liability is based on culpability, the threshold for liability may be pushed too far back into the area of preparation,[35] because an act can play its evidentiary function of intent even if it is preparatory. It is

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impossibility – a complete attempt. This dissertation instead focuses on incomplete attempts, where the actor has not done everything possible to complete the offence, and thus the moral culpability is not exactly the same. However, this difference in culpability is compensated for by the lesser punishment of attempt pursuant to s 311(2) of the Crimes Act 1961. See Ashworth *Principles of Criminal Law*, above n10, at 462.

[28] Clarkson, Keating and Cunningham, above n16, at 433.

[29] RA Duff *Criminal Attempts* (Oxford University Press Inc., New York, 1996) at 165 [*Criminal Attempts*].

[30] RA Duff "Subjectivism, Objectivism and Criminal Attempts" in AP Simester and ATH Smith (ed) *Harm and Culpability* (Oxford University Press, New York, 1996) 19 at 19.

[31] Simester and Brookbanks, above n11, at 15.

[32] Cahill, above n17, at 1217.

[33] *R v Donnelly* [1970] NZLR 980; *Police v Jay* [1974] 2 NZLR 20.

[34] *R v Murphy* [1969] NZLR 959.

[35] Cahill, above n17, at 1217.

generally thought that mere preparation should not amount to an attempt,[36] and this view is explicitly supported by s 72 of the Crimes Act.[37]

C. The Risk of Punishing Mere Preparation

The reason preparation is not punished is if the actor is still at the stage of remote preparation, it is not certain that they would have the firmness of purpose to execute their plan,[38] and they may have desisted before the completion of the crime.[39] Williams suggests that only those who break the "psychological barrier" of crime should be punished.[40] The ability to withdraw is important because if an actor would have abandoned their criminal purpose, this means that they are not dangerous citizens and pose no risk of harm. It is widely recognised that citizens must be treated as autonomous, and given as much freedom as possible to determine their own conduct.[41] This problem is particularly apt in New Zealand as once an attempt has been committed, the fact that the actor changed their mind is not a defence. The issue is instead dealt with by the requirement of proximity; the closer an actor is to committing the full offence, the less likely they are to change their mind.[42]

Furthermore, there is a stigma that results from labelling someone as a criminal.[43] The conviction must reflect the nature and the gravity of what the actor has actually done, because the conviction represents a testimony of the precise respect in which the actor failed in their basic duties as a citizen.[44] A legal system should not allow such a stigma until it is certain the actor is past the point of withdrawal.[45]

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[36] Donald Stuart "Actus Reus In Attempts" (1970) Crim LR 505 at 518.
[37] Section 72(2) of the Crimes Act 1961.
[38] Glanville Williams *Textbook of Criminal Law* (Steven & Sons, London, 1978) at 379.
[39] Duff *Criminal Attempts*, above n29, at 37.
[40] Williams, above n38, at 380.
[41] Duff *Criminal Attempts*, above n29, at 37.
[42] Proximity is explained in full in chapter two.
[43] Pursuant to the doctrine of representative labelling, see Peter Brett *An Inquiry into Criminal Guilt* (The Law Book Co. of Australia Pty Ltd, Sydney, 1963) at 130.
[44] Jeremy Horder "Crimes of Uterior Intent" in AP Simester and ATH Smith (ed) *Harm and Culpability* (Oxford University Press, New York, 1996) 153 at 160.
[45] Brett, above n43, at 130.

D. Other Justifications for Criminalising Attempt

Attempt is also criminalised for prospective reasons. A person who attempts a crime is in need of rehabilitation and punishment for individual deterrence, otherwise they might try and commit the crime again.[46] However, deterrence is no more than a minor function of the law of attempt,[47] because attempt is not punished as severely as the completed crime. The actor still has an incentive to attempt a crime, because they know if they complete the crime they achieve their desired purpose, and if they fail they get a lesser punishment.[48]

The key rationale for the punishment of attempt is permitting the prevention of harm.[49] The police should be able to intervene before a crime is committed, to protect society and to stop attempts before they result in the causation of the harm of the substantive offence.[50] A legal system should not provide a temptation to wait until the crime is complete to ensure the actor receives punishment.

E. The Need to Strike a Balance

The question of where the line in the continuum of acts should be drawn hinges on finding a balance between individual autonomy and intervention. The police's societal role to intervene should be upheld, but it must be consistent with the public interest to be free from unjust interference that falls within the rights of individuals,[51] as well as the right of that individual to change their mind. There is a genuine tension between these demands.[52] It is a question of the appropriate role and scope of the criminal law in a modestly liberal state, where the state respects and treats its citizens as rational and reasonable.[53]

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[46] Clarkson, Keating and Cunningham, above n16, at 432.
[47] Meehan and Currie, above n12, at 31.
[48] In New Zealand, attempt is not punished as harshly as the substantive offence; see s 311(2) of the Crimes Act 1961.
[49] Ashworth *Criminal Attempts*, above n25, at 734.
[50] Ashworth *Principles of Criminal Law*, above n10, at 446.
[51] Meehan *The Law of Criminal Attempt: A Treastise* (Carswell, Alberta, 1984) at 82.
[52] Duff *Criminal Attempts*, above n29, at 392; see also Meehan, above n51, at 11.
[53] Duff *Criminal Attempts*, above n29, at 350.

With those rationales in mind, the focus will now move in Chapter Two to an examination of the tests developed by the courts to identify the appropriate threshold for attempt liability.

III. Chapter Two – Tests for the Actus Reus of Attempt

The courts have struggled for centuries to strike the right balance between individual autonomy and intervention, unsuccessfully trying to make sense of the distinction between preparation and attempt.

In New Zealand, as in other jurisdictions, attempt is covered by legislation. Section 72 of the Crimes Act 1961 provides:

> (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
> (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.
> (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

While ss 72(2) and 72(3) give some guidance on the actus reus for attempt, what is required is still somewhat vague. As said by Dawkins: "The abiding difficulty in determining the external component or actus reus of attempt is that we know a line must be drawn between 'mere preparation' and 'attempt' without knowing precisely where to draw it."[54] In applying the statute, the courts in New Zealand, as in other jurisdictions, have created various different tests to determine where the line should be drawn.

This chapter will consider judicial interpretations of attempt through the numerous different "tests" that have been applied to decide if certain actions constitute an attempt. It will be shown that no court had been able to identify the perfect

[54] Kevin Dawkins "Parties, Conspiracies and Attempts" (1990) 20(2) Victoria University Wellington Law Review 117 at 139.

formulation, leading to the conclusion that prior to *Harpur*, the state of attempt law was already in a state of confusion.

A. The Last Act Test

Under this test, the actus reus of an attempt is complete when the actor has completed the last act before the offence is committed, or has set in motion a factor which will result in an offence, without the actor having to do anything further.[55] For example, in *R v Robinson,* a jeweller who tried to fraudulently claim insurance was interrupted after faking a burglary but before he had told the insurers. Because he had not completed the last act, it was not an attempt. [56]

It is a highly objective test, as when an actor completes the last act they unleash a risk of harm they believe they can no longer control.[57] It is possible that the drafters of s 72 meant to impose this test by the inclusion of the word "immediately" in "immediately or proximately connected."[58]

The test can be criticised for being overly generous to the accused, by allowing a course of action to proceed dangerously close to the offence itself.[59] This is inappropriate because it leaves the public unprotected, since the completion of the last act is often followed by complete success.[60] In a murder by shooting, the "last act" is likely to be the pulling of the trigger. Therefore the last act test does not strike an appropriate balance between intervention and individual autonomy, with autonomy completely outweighing interventionist values. Waiting for the last act would make the task of the police to intervene too difficult. Instead, the test is a sufficient but not necessary basis for liability.[61]

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[55] AP Simester and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002) at 8.2.3; coming from *R v Eagleton* (1855) Dears CC 515. There is also the penultimate act theory, criminalising the act *before* the last act, see E Meehan and JH Currie *The Law of Criminal Attempt* (2nd ed, Carswell Thomson Professional Publishing, Ontario, 2000) at 145.
[56] *R v Robinson* [1915] 2 KB 342.
[57] Larry Alexander, Kimberly Kesler Ferzan and Stephen Morse *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009) at 197.
[58] Section 72(3) of the Crimes Act 1961. In *R v Bobos* [1993] DCR 1105 at 1110, it was said that "immediately" means "without intervening action."
[59] Simester and Brookbanks, above n55, at 8.2.3.
[60] Meehan *The Law of Criminal Attempt: A Treastise* (Carswell, Alberta, 1984) at 106.
[61] Simester and Brookbanks, above n55 at 8.2.3; *Byrant Holdings Limited v Marloborough District Council* [2008] NZHC 909 at [83].

B. The First Act Test

The converse of the last act theory is the first act theory, where liability is imposed as soon as the actor has performed an overt act with intention to commit the substantive offence.[62]

If attempt is to be punished on a subjectivist basis (where the act simply represents evidence of the intent), then the first act test is appropriate, as even the first act is prejudicial to the community through the malicious intent.[63] It is also straightforward to apply.[64]

Unfortunately, such a test would punish mere preparation. It would convict actors who would have withdrawn, and fails to treat citizens as autonomous. It would also encourage greater reliance on confessions, possibly leading to abuse by police and miscarriages of justice.[65] The test strikes the wrong balance between individual freedom and the countervailing interests of the community, as well as being untenable given s 72.[66]

C. The Unequivocality Test

Lord Salmond formulated this test in *R v Barker* where he said: "A criminal attempt is an act which shows criminal intent on the face of it."[67] Under this test, the actor's actions had to unequivocally show their criminal purpose. The test was once prevalent in New Zealand, as courts used it when interpreting s 93 of the Crimes Act 1908.[68]

This formula protected the public from the apprehensive appearance of danger created by the conduct.[69] Accordingly, it represented an objectivist point of view,[70] as the

[62] Meehan and Currie, above n55, at 130.
[63] RA Duff *Criminal Attempts* (Oxford University Press Inc., New York, 1996) at 36.
[64] Ibid, at 36.
[65] Ibid, at 36 – 7.
[66] Sections 72(2) and 72(3) of the Crimes Act 1961 do not allow preparation to be punished, and a first act will often be preparatory.
[67] *R v Barker* [1924] NZLR 865 at 874.
[68] Section 93 of the Crimes Act 1908 was the same as s 72(1) and s72(2) of the Crimes Act 1961, but did not include s 72(3).
[69] Meehan and Currie, above n55, at 160.
[70] George P Fletcher *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) at 143.

harm of apprehension in the community could only arise when an act was unequivocally criminal. It appealed practically, as it was easy to apply, and often represented the point when the police would actually intervene in the absence of other evidence.

However, the test presumes mental states can be distinguished from the physical acts which follow them. To exclude from consideration the actor's own characterisation of what they were doing is unrealistic,[71] because very few acts are unequivocal without regard to intention.[72] It also completely restricts the value of confessions.[73] There was the possibility that an act that would satisfy the "last step" test might not satisfy the unequivocality test, and thus the use of the test gave rise to verdicts that "strained common sense."[74] In *Campbell and Bradley v Ward,* the offenders were not held liable for attempted theft of a car battery, because the action of getting into the car was ambiguous as to the specific crime intended, even though the Court knew that theft was contemplated.[75] As a result, the Crimes Act of 1961 expressly abrogated the test with s 72(3).

D. Tests of Proximity

Eagleton[76] established the idea of proximity and spurred on a series of tests which focus on the closeness of the acts to the substantive crime. They come in a variety of wording, such as "crossing the Rubicon and burning one's boats."[77] Section 72 of the Crimes Act imposes such a test.[78]

For a test that has been used in a wide range of cases and jurisdictions,[79] it has attracted much criticism. Proximity tests can be circular and unclear about the

[71] Peter Brett *An Inquiry into Criminal Guilt* (The Law Book Co. of Australia Pty Ltd, Sydney, 1963) at 133.
[72] Meehan and Currie, above n55, at 166.
[73] Wayne R LaFave *Criminal Law* (4th ed, Thomson/West, St Paul, 2003) at 11.4.
[74] Meehan and Currie, above n55, at 164.
[75] *Campbell and Bradley v Ward* [1955] NZLR 471 at 477.
[76] *R v Eagleton* (1855) Dears CC 515.
[77] *DPP v Stonehouse* [1978] AC 55; see Meehan and Currie, above n55, at 68.
[78] Section 72(3) of the Crimes Act 1961 requires an act that is immediately or *proximately* connected to the full offence. Assumedly, the use of "or" means these words of "immediately" and "proximately" have different meanings – "immediately" perhaps connotes a last act test, but "proximately" gives rise to a lesser threshold. *R v Bobos* [1993] DCR 1105 at 1110 does distinguish between the meanings.
[79] Meehan and Currie, above n55, at 120.

character of the act required. Relying on the fine line drawn between attempt and preparation can be unhelpful,[80] and Stuart contends that it is too imprecise for a modern system.[81] Because proximity is such a fluid concept, it means that cases can be decided on the judge's own personal whim.[82] Further, proximity tests encourage counting the number of acts up until the substantive offence, which Fletcher contends is philosophically questionable.[83]

Duff recognises that proximity tests are confusing,[84] comparing *Button*[85] with *Robinson.*[86] In *Button,* proximity was found when the actor fraudulently obtained a handicap and won a race, but was detected before obtaining the prize. In *Robinson*, where the actor faked a robbery to the police but had not yet posted the relevant forms to fraudulently recover insurance monies, proximity was not found. This comparison demonstrates that the proximity test leads to inconsistencies, meaning the police do not know when to intervene.[87]

Nevertheless, short of spelling out illustrative cases by statute, Dawkins argues proximity is one of the least inexact ways of marking the threshold of attempt.[88] Proximity does strike a balance between prevention and individual autonomy.[89] However, proximity tests have failed to provide practical guidance, which can be seen by considering some more specific formulations of proximity.

1. Dangerous proximity

This is a version of the proximity test, which looks for an act that is directly dangerous to society or an interest protected by criminal law. The more serious the crime, the more dangerous acts will be.[90] It involves considering the nearness to completion of the intended crime or the nature of the preparatory conduct undertaken,

[80] Simester and Brookbanks, above n55, at 8.2.3; and Meehan and Currie, above n55, at 129.
[81] Michael T Cahill "Attempt by Omission" (2009) 94.4 Iowa Law Review 46 at 505.
[82] Meehan and Currie, above n55, at 127; Duff, above n63, at 42.
[83] Fletcher, above n70, at 140.
[84] Duff, above n63, at 42.
[85] *Button* [1900] 2 QB 597.
[86] *R v Robinson* [1915] 2 KB 342.
[87] Chudi Nelson Ojukwu "Attempts: The Nigerian perspective" (2002) 13(2) Criminal Law Forum 225 at 231; Meehan and Currie, above n55, at 129.
[88] Kevin Dawkins "Parties, Conspiracies and Attempts" (1990) 20(2) Victoria University Wellington Law Review 117 at 139.
[89] English Law Commission *Conspiracy and Attempts* (UKLC CP183, 2007) at 14.15.
[90] Meehan and Currie, above n55, at 150.

in terms of the actual risk presented to public health and safety.[91] Reported cases using this test are mainly American,[92] although Simester and Brookbanks suggest that such a test should be used in New Zealand.[93]

The test supposes that an act should not be punished except to prevent some harm foreseen as likely to follow that act,[94] thus it is a strongly objective formulation,[95] allowing ample time for the actor to withdraw.[96] Simester and Brookbanks apply the test to a fact variation of *Wilcox,* where the actors were charged with an attempted robbery of a bank.[97] They argue that if the actors were stopped as they pulled up in their car outside the bank, there would be dangerous proximity due to the major issue of prevention of harm that arises and the immediate and serious threat posed to anyone near the bank.[98]

Unfortunately the formulation of the test is still indefinite. How dangerous does an act have to be before it can be considered "dangerous" enough?[99] Everybody's notions of danger vary.[100] Perhaps this is why Simester and Brookbanks gave no indication of the result of the test's application to the actual fact situation in *Wilcox*, where the actors were stopped a kilometre away from the bank, but had started their journey and loaded their rifles.[101] Is being within a kilometre of a bank close to the completion of the intended crime, or a risk to health and safety that justifies police intervention? The answer is unclear. The test has a superficial plausibility, yet ignores the complexity of the factual problems encountered.[102] In cases where the danger posed is not a physical danger as in *Harpur* and *Wilcox*, but a danger such as attempted fraud, it is unclear how this test would work. Thus the test would not allow citizens to predict whether anticipated conduct would be illegal.[103]

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[91] Simester and Brookbanks, above n55, at 8.2.3.
[92] Meehan and Currie, above n55, at 153.
[93] Simeseter and Brookbanks, above n55, at 252.
[94] LaFave, above n73, at 11.4.
[95] Meehan and Currie, above n55, at 150.
[96] Duff, above n63, at 46.
[97] *R v Wilcox* [1982] 1 NZLR 191.
[98] Simester and Brookbanks, above n55, at 250-2.
[99] Meehan and Currie, above n55, at 155.
[100] Alexander, Ferzan and Morse, above n57, at 215.
[101] *R v Wilcox* [1982] 1 NZLR 191 at 192.
[102] Meehan and Currie, above n55, at 157.
[103] Ibid.

2. Commencement of execution

Liability is imposed here when the actor has, by their acts, commenced the execution of the substantive crime. It requires an act indicating the accused has started to do the very thing they had planned.[104] Before *Harpur,* this was one of the most commonly applied tests in New Zealand.[105]

This test has been criticised for a number of reasons. It is difficult to apply, as it is unclear when exactly an execution commences.[106] Meehan and Currie argue the test is out of place in a pragmatic court of law, because it means judges can decide cases on their own personal whim.[107]

Ultimately, the test fails for vagueness. *R v B* provides an example. B assembled a stalking, raping and murder kit, broke into his ex-wife's house, told her he was going to kill her, tied her up, raped her, and then changed his mind.[108] At which point has the execution of murder commenced in this situation? The Court said that prior to tying her up there was no attempt, because he was merely getting himself into the position from which he could murder his wife.[109] However, surely some would say that B commenced the execution of the crime when he entered the house. Perhaps the distinction rests on the nature of the crimes committed before the execution of the murder. Entering the house would be a burglary,[110] but tying her up would constitute an assault[111] - a crime against the person. Yet a test based on the committing of another crime must fail, as there are many attempted crimes that need not be preceded by such criminal conduct.[112] Thus, the distinction again relies on one's personal opinion.

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[104] Simester and Brookbanks, above n55, at 8.2.3.
[105] *R v Wilcox* [1982] 1 NZLR 191, where Woodhouse J quoted *Henderson* [1949] 2 DLR 121; the test has been used in *Berry v Police* [2007] DCR 471, *R v Bobos* [1993] DCR 1105 and *R v Hoenderdos* (No 4) HC Christchurch T31/92, 23 October 1992.
[106] Fletcher, above n70, at 172; Simester and Brookbanks, above n55, at 8.2.3.
[107] Meehan and Currie, above n55, at 139.
[108] *R v B (No 5)*, HC Christchurch, T19/01, 7 September 2001.
[109] Ibid, at [34].
[110] Section 231 of the Crimes Act 1961.
[111] Sections 192 – 194 of the Crimes Act 1961.
[112] Meehan and Currie, above n55, at 189.

3. The Series of Acts Test

This test asks whether the series of acts which the act formed part of would constitute the substantive crime if uninterrupted.[113] This is similar to other proximity tests and is often used by courts in combination with them.[114] The test fails to define the exact point at which a series of acts can be said to begin, rendering it arbitrary.[115] It thus lacks practical usefulness.[116]

E. A Real or Substantial/Practical Step

The requirement of a real or substantial/practical step towards the substantive crime has been used extensively in New Zealand,[117] most recently in *Taia.*[118] It shifts the focus to what the actor has already done,[119] and seems to push the threshold for liability back along the continuum of acts further than other tests.

Meehan and Currie praise this test as straightforward and understandable.[120] It was recommended by the English Working Party in 1973,[121] and is currently used in the American Model Penal Code.[122] This test has the broadest measure of support of any of the tests discussed.[123]

Yet courts have struggled with defining this test, which demonstrates the confusion in attempt law. It was first used in New Zealand in *Wylie*, where the accused's act amounted to a "real and practical step" towards the actual commission of the crime.[124]

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[113] Formulated by Stephen, Stephen *Digest of the Criminal Law* (5th ed, London, Macmillan, 1894) at art 50.
[114] *R v Robinson* [1915] 2 KB 342; Simester and Brookbanks, above n55, at 43; Duff, above n63, at 43-44, and 58-9; See *R v Hoenderdos* (No 4) HC Christchurch T31/92, 23 October 1992 where the series of acts test was used in conjunction with the commencement of execution test.
[115] Donald Stuart "Actus Reus In Attempts" (1970) Crim LR 505 at 505; Simester and Brookbanks, above n55, at 8.2.3.
[116] Meehan and Currie, above n55, at 135.
[117] In *Police v Wylie & Another [1976] 2 NZLR 167; R v Towgood* [2007] NZCA 359; *R v Drummond* (1993) 9 CRNZ 228; and *R v Peneha* (1993) 11 CRNZ 183.
[118] *Taia v Police* HC Napier CRI-2011-441-9, 15 June 2011.
[119] Duff, above n63, at 53.
[120] Meehan and Currie, above n55, at 279.
[121] English Law Commission *Incohate Offences: Conspiracy, Attempt and Incitement* (UKLC WP50, 1973) at [74] – [87].
[122] American Law Institute *Model Penal Code* (American Law Institute, Philadelphia, 1962) art 5.01.
[123] Eric Colvin *Principles of Criminal Law* (Carswell, Toronto, 1986) at 290.
[124] *Police v Wylie & Another* [1976] 2 NZLR 167 at 170.

The courts correctly applied this test,[125] until 2001 where *R v B* changed the wording to a "real and *substantial* step."[126] It is uncertain whether this was deliberate but it is possible that the American Model Penal Code, which uses this wording, influenced the Court.[127] *R v Yen* commented briefly on the inconsistency but did not provide guidance on the correct formulation to be used.[128] In *Towgood*, the Court of Appeal used the wording of a "real and substantial step," but quoted *Wylie* as support.[129] Substantial step and practical step are different thresholds. "Practical" seems to require something physical and "hands-on," where as "substantial" seems to require something more significant.

The Court in *Harpur* declined to endorse the test of a real or substantial step specifically, as it "risks simply substituting somewhat fuzzy words for equally fuzzy words in the statutory provision."[130] The fact that words with different meanings (practical and substantial) are used interchangeably supports this proposition.

On its own, requiring a real or substantial/practical step to constitute an attempt is very vague. "The unfortunate truth is that there is no definable quality that will distinguish a 'substantial step,' a 'step,' and an 'act of preparation."[131] It has not in itself provided great assistance in New Zealand and again, it is often used in conjunction with other tests.[132]

F. A Probability of Desistance, Firmness of Intent or Commitment Test

These tests all purport to look for the firmness of the actor's intent to commit the substantive crime. If there is evidence that the actor was committed to completing the crime, would not have desisted, and was only stopped because of outside intervention, then there is an attempt.

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[125] *R v Ostermann* HC Auckland T143/85, 26 February 1986; and *Drewery v Police* (1988) 3 CRNZ 499.
[126] *R v B (No 5)*, HC Christchurch, T19/01, 7 September 2001 at [33].
[127] American Law Institute *Model Penal Code* (American Law Institute, Philadelphia, 1962) art 5.01.
[128] *R v Yen* [2007] NZCA 203 at [21].
[129] *R v Towgood* [2007] NZCA 359 at [18].
[130] *R v Harpur* [2010] NZCA 319 at [48].
[131] Stuart, above n115, at 523.
[132] Such as the commencement of execution test, see *R v B (No 5)*, HC Christchurch, T19/01, 7 September 2001 at [33].

There is a concern that this test could result in punishing mere preparation, because an actor can have a firm intent even when they have not proceeded very far towards the crime. The law does not punish a guilty mind alone. Yet the reason preparation is not punished is because it is unclear if the actor would have withdrawn from the offence. If firmness of intent can be shown, then it is unlikely they would have withdrawn.[133] Accordingly, if the reason attempt is punished is because of culpability (subjectivism) as opposed to an actual harm being present, then this test can be justified.[134] Even if the rationale for attempt is objective, there is still a risk of harm if the actor is firmly committed to the substantive offence, as the likelihood that they will complete the offence is very high. Looking at the rationale for punishment of conspiracy can further support this argument.[135] An agreement (something that is surely preparatory) between two or more people is punished because it is more likely the course of conduct agreed on will be completed, as opposed to a person scheming alone.[136] The likelihood the actor will commit the offence is all-important, and this can be shown by the firmness of an actor's intent.

Therefore the rationale for such a test is sound. By only allowing intervention when the actor is firmly committed to the substantive offence, with both a risk of harm and culpability present, an effective balance between crime prevention and individual autonomy can be struck. A number of different tests have been proposed to search for this firmness of intent.

Duff formulates a test requiring actions that demonstrate that the agent would commit the crime except for the intervention.[137] Another suggestion is that courts consider proximity, the degree of planning, the expenditure of effort, and the attitude of the accused to find firmness of intent.[138] Meehan and Currie put forward a test based on the point where the actor has passed the point where most men would think better and desist, but acknowledge that any step towards a crime is a departure for "most men."[139] Meehan and Currie also propose a mixture of these different formulations,

[133] See chapter one.
[134] Colvin, above n123, at 291.
[135] Section 310 of the Crimes Act 1961.
[136] Simester and Brookbanks, above n55, at 259.
[137] Duff, above n63, at 44-5.
[138] Meehan and Currie, above n55, at 187.
[139] Ibid, at 188.

aiming to avoid the disadvantages by allowing the choice of the formulation that best suits the situation.[140]

Common to all these formulations are issues of proof, because practical problems arise when it comes to the issue of actually showing a firmness of intent, and distinguishing between a firm and an equivocal intent. Duff suggests requiring actions that unequivocally show such firmness of intent, but concedes that then the test could stray into one of unequivocality.[141] Confessions would be the clearest way to know if someone was firmly committed to the crime, yet this would aid "clever criminals" who will always deny any level of commitment. It is also true, as outlined in *Wylie,* that a qualification on intent is quite often present in the minds of most criminals,[142] although it must be remembered that a conditional or qualified intent can still be a firm intent.[143]

The idea of firmness of intent definitely has merit to it; the practicalities just need to be clarified. Even if judges could expressly acknowledge that they are searching for a firmness of intent, that would provide greater clarity than the current situation.

The tests that have been formulated all fail for either a lack of clarity and for being too discretionary, or for not striking an effective balance between intervention and autonomy. The only test that is neither inherently uncertain nor overly rigid is one based on firmness of intent. Unfortunately, this test has practical problems.

In summary, Part One has demonstrated that the judicature's attempts to formulate a test for the actus reus in attempt have failed. This is because of the conflicting theories of objectivism and subjectivism and the associated struggle to uphold an effective balance between individual autonomy and effective crime prevention. Thus the state of attempt law was already in a state of confusion before *Harpur*. The next chapter will critically analyse *Harpur* to see if the Court of Appeal's approach

[140] Ibid, at 189 - 190.
[141] Ibid. See chapter two.
[142] *Police v Wylie & Another* [1976] 2 NZLR 167 at 169.
[143] Jonathan Rogers "The Codification of Attempts and the Case for 'Preparation'" (2008) 12 Criminal LR 937 at 948.

resolves or exemplifies the confusion, or simply signifies a new stage in attempt law in New Zealand.

PART TWO

IV. Chapter Three - R v Harpur

The full Court of Appeal (**the Court**) ruled on several key points relevant to the preceding discussion. The concluded that:

A. no set test can be formulated and a common sense approach must prevail;
B. acts can be considered cumulatively;
C. the actus reus and mens rea should be considered together; and
D. strong evidence of intent means a more remote actus reus can be accepted.

In addition the Court concluded on a cryptic note by including a segment of the Model Penal Code. These propositions are considered separately below.

A. No Set Test can be Formulated

In response to Crown Counsel's submission that the "real or substantial step" test should be endorsed, the Court observed:[144]

> While we think the test has much to be said for it, we are also conscious that any attempt to introduce the words "real or substantial step" risks simply substituting somewhat fuzzy words for equally fuzzy words in the statutory provision. There is no magic formula which avoids the need for judicial evaluation.

The Court preferred instead to look at "conduct in the round"[145] and to not endorse any particular test. The Court intended to apply s 72 "flexibly and in accordance with the justice of the case,"[146] and believed that it should not be prescriptive in their approach.[147] *Harpur* has so far been considered in two cases, and in the most recent, *Shadrock,* the Court of Appeal took the propositions from *Harpur* that a court is

[144] *R v Harpur* [2010] NZCA 319 at [48].
[145] Ibid, at [31] – [37] and [49].
[146] Ibid, at [13].
[147] Ibid, at [16].

required to draw the line between attempt and preparation on a case-by-case basis, and that the proximity test is of a flexible nature.[148]

As demonstrated in Chapter Two, the courts have struggled in finding a suitable test. These different tests are often mere adaptations of each other, and draw similar criticism. The Court was correct to say that there is no "magic formula" for determining liability.

The approach of looking at conduct in the round and not using a specific test has been taken in a number of cases, with the question of whether there has been an attempt being left up to common sense.[149] The Court seems to be taking a step towards the current approach of the Canadian courts, which apply a common sense, global approach.[150] England,[151] South Africa[152] and the United States[153] have also used this approach because of the flexibility it provides.[154]

Although a common sense approach is flexible, it is also a very elusive and subjective concept, and many argue that something more definite is required.[155] Even though a judge may "know it when they see it," this stance is not satisfactory for a number of reasons. It is too vague, as everybody's notion of common sense varies.[156] The rule of law requires that rules are fixed, knowable, certain, and stated clearly and in advance. This is because citizens need clarity so they can have fair warning that their prospective actions will incur a criminal sanction. The ad hoc responses to the conduct of individuals which could result from using such a common sense approach does not align with what the rule of law requires.[157] It is clear more direction and guidance than this is needed.[158] How can an individual charged with an attempt know

[148] *Shadrock v R* [2011] NZCA 388 at [71] – [73].
[149] *Police v Wylie & Another* [1976] 2 NZLR 167; *R v Yen* [2007] NZCA 203; *R v Peneha* (1993) 11 CRNZ 183.
[150] see *Deutsch v The Queen* [1986] 2 SCR 2, and *R v Cline* (1956) 2 DLR 8.
[151] *Davey v Lee* [1968] 1 QB 366.
[152] *R v Katz* [1969] 3 SALR 408 (Prov Div) at 423.
[153] *People v Fiegelman* (1939) 91 P.2d 156 (Cal CA).
[154] E Meehan and JH Currie *The Law of Criminal Attempt* (2nd ed, Carswell Thomson Professional Publishing, Ontario, 2000) at 185.
[155] AP Simester and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002) at 8.2.3.
[156] Meehan and Currie, above n154, at 185.
[157] Simester and Brookbanks, above n155, at 2.1.3.
[158] Meehan and Currie, above n154, at 185.

whether they will be convicted or not? To be true to the rule of law's requirement of certainty, the actus reus must be clearly defined, and the threshold of liability must be clear enough to be able to ascertain beforehand what the criminal conduct and its standard is.[159] The principle of legality demands that there be some workable theory or test.[160]

The rationale of intervention could also be hindered with a common sense approach. Because liability depends on the particular judge's common sense, the police will never know when to intervene. Their common sense will likely differ from a court's common sense, as police might not be able to "know it when they see it" any more or less than a judge.

The Court should have taken a theoretical stance on why attempt is punished in New Zealand, and how far back on the continuum of acts criminal liability should extend. It should then have considered ways to uphold that stance, either by adopting a new test, or by suggesting reform via statutory intervention. By simply saying that no test will do, the Court took an approach which is too simplistic and lacks guidance.

Furthermore, even though the Court purports to have done away with formulas and tests, it has arguably proposed a new one. This is where the actus reus and mens rea must be examined together, considering conduct in the round. The actus reus can be looked at cumulatively, and strong evidence of mens rea can uphold a weaker actus reus so that the elements of attempt are satisfied. It must be considered whether such a test is acceptable.

B. Acts can be Considered Cumulatively

The Court says that the acts of the accused can be considered cumulatively, which is consistent with *Wylie.*[161] The Court intended to override *Wilcox* on this point,[162] where it was said that acts should not be looked at cumulatively because "independent acts of mere preparation cannot take on a different quality simply by adding them

[159] Alan Mewett and Morris Manning *Mewett & Manning on Criminal Law* (3rd ed, Butterworths, 1994) at 309.
[160] Don Stuart *Canadian criminal law: a treastise* (Carswell, Ontario, 1995) at 605.
[161] *R v Harpur* [2010] NZCA 319 at [33] – [36].
[162] Ibid, at [36].

together."[163] *Harpur's* approach coincides with Hammond J's view in *Burrett,* where he was uncomfortable with what he described as the current law's "insistence on identifying discrete 'acts' as reliable signposts of criminal conduct, rather than considering the character of the conduct as a whole."[164]

The Court's reasoning in *Harpur* is that although s 72 of the Crimes Act refers to "act" in the singular, s 33 of the Interpretation Act 1999 states the singular includes the plural, so "act" truly means "acts." Further, it is natural and inevitable to view separate acts cumulatively up to the point where conduct stops.[165]

Dawkins and Briggs argue that this is an uncertain path to tread, given that the quantity of the acts that the actor has done will not necessarily equate to the quality of the acts. A premeditated attempt could comprise many preliminary acts yet it would be wrong to hold that cumulatively those acts cross the proximity threshold. By contrast, a spur of the moment attempt may consist of a single act of such quality that there is no doubt as to its proximity to the full offence.[166]

There is some merit in looking at all the acts in their entirety if one is taking a common sense approach. However, there is a risk that this could lead to a "counting" of acts, which would not be desirable.[167] It needs to be made clear that although acts can be looked at together, the quality of the acts are important, not the quantity. This could be done by a post *Harpur* decision, or by statutory intervention.

C. Actus Reus and Mens Rea should be Considered Together

The Court, in considering *Wilcox,* says that if the ruling in *Wilcox* intended that the actus reus and the mens rea have to be considered completely separately, then that

[163] *R v Wilcox* [1982] 1 NZLR 191 at 194.
[164] *R v Burrett* HC Wellington T3347/02, 13 February 2003 at [22]; see also *R v Mullaney* HC Hamilton T000172, 3 May 2000 at [38].
[165] *R v Harpur* [2010] NZCA 319 at [34] – [35].
[166] Kevin Dawkins and Margaret Briggs "Criminal Law" [2010] NZLR 761 at 793.
[167] As contended by Fletcher in George P Fletcher *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) at 140; see chapter two.

aspect of the ruling was wrong.[168] The Court went on to state that any analysis of the actus reus must be viewed in conjunction with the mens rea.[169]

It is not immediately clear whether it is appropriate for New Zealand courts to consider the "big picture," instead of looking at the actus reus and mens rea separately - the traditional approach of courts in New Zealand. In fact s 72 seems to suggest such an approach, with clearly defined actus reus and mens rea elements.[170] It is important to consider the reasons for this, and whether these reasons are substantial enough to suggest the approach taken in *Harpur* should not be used.

This division of crimes into actus reus and mens rea elements comes from the long-standing maxim "actus non facit reum nisi mens sit rea" meaning "an act does not make a man guilty unless his mind be guilty."[171] Consequently, both a physical act and a required mental state must be present before an actor should be punished. Building on this proposition, the courts developed an expository device which divides the analysis of criminal offences into the components of the actus reus and the mens rea.[172] Having separate analysis meant that neither element would be omitted from consideration, or given too much weight.

The division reflects a view of human action based on the doctrine of dualism. This doctrine held that human beings consisted of two distinct elements - the physical body and the non-physical mind.[173] This division of mind and body was not beyond challenge.[174] Critics argued that an act could not be understood independently of its purpose. Intending and acting are bound together; they should not be disassociated and treated separately in the analysis of criminal liability.[175]

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[168] *R v Wilcox* [1982] 1 NZLR 191 at 193 did say that the actus reus and the mens rea had to be looked at independently.
[169] *R v Harpur* [2010] NZCA 319 at [25].
[170] Section 72 of the Crimes Act 1961.
[171] Glanville Williams *Textbook of Criminal Law* (Steven & Sons, London, 1978) at 29.
[172] David Brown and others *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (4th ed, The Federation Press, Sydney, 2006) at 1083.
[173] Developed by Descartes; see Peter Brett *An Inquiry into Criminal Guilt* (The Law Book Co. of Australia Pty Ltd, Sydney, 1963) at 46.
[174] Brett, above n173, at 48.
[175] George P Fletcher *Basic Concepts of Criminal Law* (Oxford University Press, New York, 1998) at 53.

It has been suggested that the division of crimes into actus reus and mens rea elements is not an analytical necessity,[176] and is nothing more than a "rough and ready" tool.[177] Mewett and Manning argue the idea that the actus reus can be defined apart from the mens rea is incorrect, and based on a misunderstanding of the very nature of the actus reus - it is simply impossible to divorce an act from its intent.[178] Other commentators have said that although the division has not harmed criminal theory generally, the law of attempt is one notable exception, where the division has been the source of utmost confusion.[179]

This suggests that the aspect of the Court's decision in *Harpur* which looks at both actus reus and mens rea elements together is legitimate, and perhaps a logical development in the law. The difficulties with the unequivocality test demonstrate the logic in this approach, because considering the act completely independently from the actor's intent caused the test to fail.[180] Therefore the general idea of considering the mens rea and the actus reus together is sound, so long as it is highlighted that both elements must be present.

D. Strong Evidence of Intent means a more Remote Actus Reus can be Accepted

Yet the Court in *Harpur* did not stop there. It also quoted Roach, italicising his phrase "in practise, a more remote actus reus will be accepted if the intent is clear."[181] It applied this to the facts of the case, using the strong evidence of Harpur's intent: "He described exactly what he intended to do to the four year old. As we have said, strong evidence of intent, as there is in this case, can assist in assessing the significance of acts done towards the commission of the intended offence."[182]

1. Authority for this proposition

[176] AP Simester et al *Simester and Sullivan's Criminal Law - Theory and Doctrine* (4th ed, Hart Publishing, Portland, 2010) at 68, fn2.
[177] Andrew Ashworth *Principles of Criminal Law* (3rd ed, Oxford University Press, New York, 1999) at 95.
[178] Mewett and Manning, above n159, at 321.
[179] Brett, above n173, at 124.
[180] See chapter two.
[181] *R v Harpur* [2010] NZCA 319 at [25], quoting Kent Roach *Criminal Law* (Irwin Law, Toronoto, 2000) at 102.
[182] *R v Harpur* [2010] NZCA 319, at [38].

It is important to consider where the Court found authority to support this proposition.[183] It cited Canadian authority - both *R v Boudreau*[184] and Roach.[185] *Boudreau* was decided in 2005, and more recent Canadian cases have not cited it, or repeated the proposition that a strong mens rea can support a weaker actus reus.[186] *Boudreau* did not quote any authority for the proposition apart from Roach himself, which in essence, is just a "one-liner" in a textbook - a secondary authority. The Court in *Harpur*[187] also quotes *R v Sorrell and Bondett*[188] for the proposition that acts must be viewed in conjunction with mens rea, but *Sorrell* does not extend to the reasoning that strong evidence of mens rea can give artificial significance to a weak actus reus.

Australian cases do provide support for this proposition, even though the Court in *Harpur* did not quote them. *O'Connor v Killian* convicted the accused of attempt, holding that clear evidence of intent in an admission was influential in the determination that the accused had completed an attempt.[189] The judgment said that the stronger the evidence as to the defendant's intention, the lower the threshold of criminal conduct will be,[190] quoting *People v Berger*[191] for this proposition.

That said, there is nowhere else in New Zealand criminal law where a strong mens rea is used to push a weaker actus reus to satisfaction. In fact, international commentary seems to suggest the opposite, with Williams stating: "An act does not become a proximate attempt merely because the mens rea is obvious."[192] The Court should not have made this bold claim with such minimal authority to support it.

[183] Ibid, at [25].
[184] *R v Boudreau* (2005) 193 CCC (3d) 449 (NSCA).
[185] Kent Roach *Criminal Law* (Irwin Law, Toronoto, 2000).
[186] For example, *R v Root* [2010] OJ No 3053 did not cite the case, or the proposition that a lesser actus reus is needed when a stronger mens rea is present.
[187] *R v Harpur* [2010] NZCA 319 at [19].
[188] *R v Sorrell and Bondett* (1978) 41 CCC (2d) 9 (ONCA) at 16.
[189] *O'Connor v Killian* (1984) 15 A Crim R 353.
[190] David Brown and others, above n172, at 11083-4.
[191] *People v Berger* 280 P 2d 136 (1955) at 138.
[192] Williams, above n171, at 375.

2. Theoretical implications

As outlined above, a subjectivist would support the approach the Court appears to have taken in relation to the actus reus, as the act only plays an evidentiary function and intention becomes the core element.[193] Using this reasoning, if there is already strong evidence of mens rea, a lesser actus reus is required as there is less of an evidentiary role to play. This shows a shift away from the objectivist view as an objectivist would argue that actus reus is an element in itself, and actus reus and mens rea are individual elements that are essential independently.

3. Risks

If the evidence of mens rea is so strong, will any actus reus be needed at all? Under s 72(1) of the Crimes Act 1961 it is clear that some form of actus reus is always required in the form of any act or omission.

The Court in *Harpur* does not give any limit on how far actus reus can be pushed back when using strong evidence of intent. It is thus possible that a strong mens rea could allow conduct to be punished that has typically been seen as preparation. So as not to breach s 72(2) of the Crimes Act 1961, a court would say that the strong evidence of intent colours the act and makes it non-preparatory. However, in practicality, mere preparation could now be punished. As shown above, punishing mere preparation and taking such a subjective stance risks giving an actor no time to change their mind and withdraw. Dawkins and Briggs argue that for this reason *Harpur* should not represent the law in New Zealand.[194]

Furthermore, Williams states that the confusion of the proof of intent with the proximity of the act of the attempt was the downfall of of the unequivocality test.[195] But with the approach in *Harpur*, the Court has again confused the proof of intent with the proximity of the act of the attempt. In retracting so far from the unequivocality test, the Court appears to have achieved the converse of that very test.

[193] Fletcher, above n167, at 158.
[194] Kevin Dawkins and Margaret Briggs "Criminal Law" [2010] NZLR 761 at 794-5 and Kevin Dawkins and Margaret Briggs "Criminal Law" [2003] NZLR 569 at 599, where the authors referred to to *Drewery v Police* (1988) 3 CRNZ 499 where the Court expressed a similar view to *Harpur* at 503.
[195] Williams, above n171, at 382.

It is now using mens rea to show strong actus reus, whereas under the unequivocality test, the actus reus had to show strong mens rea.

Dawkins and Briggs argue that although this would make the police's job easier, it would remove the current safeguards contained in ss 72(2) and 72(3) of the Crimes Act 1961. Both the actus reus and the mens rea must be satisfied separately, and there is no room for the stronger of the two elements to be used to upholster the weaker element. Each must be capable of standing alone, but not in the way required under the unequivocality test.[196]

There is also a danger that undesirable police practices will ensue. If any overt act will suffice as long as there is "strong evidence of intent,"[197] wrongful arrests may be more numerous, convictions would largely turn on the evidence of the defendant's intention, and the police might be tempted to exert pressure in order to obtain confessions.[198]

Furthermore, the Court has given no indication of what it actually meant by "strong evidence of intent." If the Court was looking for strong evidence of a *firm* intent, then their approach immediately becomes more theoretically sound, because as outlined above,[199] an actor who is firmly intending to commit the offence is very unlikely to change their mind. Moreover, what can constitute "strong evidence?" Obviously text messages outlining the actor's intent as in *Harpur* will, but what else? Does evidence have to be direct or circumstantial, or can even hearsay suffice?

Harpur has gone too far. Although it is true that a total separation of actus reus and mens rea is impossible, the state of affairs before *Harpur* was not such a separation. The idea that the actus reus and mens rea should be considered together cannot extend to the proposition that a strong mens rea can upholster a weak actus reus.

[196] Kevin Dawkins and Margaret Briggs "Criminal Law" [2003] NZLR 569 at 599.
[197] *R v Harpur* [2010] NZCA 319 at [38].
[198] Ashworth, above n177, at 466.
[199] See chapter one.

E. The Inclusion of the Model Penal Code Provision and Examples

At the very end of their decision, the Court in *Harpur*[200] included a segment of the American Model Penal Code (**the Code**) that sets out the United States' rules for criminal attempt. The Code includes a substantial step test, and sets out examples of conduct amounting to a substantial step. The Court concluded by observing that "trial judges may find that article of assistance in determining whether the actor's conduct amounts to an attempt"[201] and that the article was "of interest."[202] Nienmann argues that with such an approach, one can find an attempt in the early stages of actus reus,[203] and that the Code is largely acknowledged to be a subjective formulation.[204] This again shows that the Court is moving from an objective to a subjective approach, searching for the culpability of the offender.

Yet the inclusion of the Code took place after rejecting the enforcement of a substantial step test, because "there is no magic formula which avoids the need for judicial evaluation."[205] It also came after rejecting the notion of providing examples of conduct amounting to an attempt, because that would be contrary to the decision to look at conduct in the round, and would ignore the interplay between acts and intent.[206] It is difficult to reconcile these comments with the inclusion of the Code, and leaves one baffled as to the message the Court was trying to convey.

It seems that while the Court shied away from the idea of having statutory examples, or enforcing a test similar to the United States, it was encouraging judges to rely on the examples set out in the Code. This is a gateway for uncertainty. The Court of Appeal should not merely hint that trial judges should rely on these examples, instead it should make it obvious and clear what their place is in the law. This aspect of the judgment is most unhelpful and sends lower courts a very mixed and cryptic message.

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[200] *R v Harpur* [2010] NZCA 319 at [51], at the suggestion of Mrs Guy Kidd the Crown Counsel that examples would be beneficial, at [45].
[201] Ibid, at [52].
[202] Ibid, at [51].
[203] Grant Niemann "Attempts" (1991) 2(3) Criminal Law Forum 549 at 595.
[204] The Model Penal Code's attempt provisions are acknowledged as subjectivist, with a focus on the actor's disposition as opposed to the dangerousness of their acts. See Fletcher, above n193, at 166-8.
[205] *R v Harpur* [2010] NZCA 319 at [48].
[206] Ibid, at [49].

F. Statutory Interpretation

The judgment raises the question of whether the principles of statutory interpretation have been complied with. Because of legislative supremacy, the courts are bound to apply s 72 and its provisions. The Court's approach could arguably allow future cases to be decided in ways that contravene the requirements of s 72, in that acts which are not immediately or proximately connected with the full offence could still be held to constitute an attempt. The test set out in s 72 is definitely one of proximity, with clear and separate actus reus and mens rea elements, and the approach the Court has taken seems to signify a move away from that. The Court in *Harpur* has possibly set up a way of circumventing the statutory provision.[207]

One of the key rules of statutory interpretation is that of strict construction – meaning that if there is uncertainty, the benefit of such uncertainty should be given to the accused. This is to uphold the rule of law and the principle of fair warning. Ambiguity in offences should not be interpreted so as to create a situation when an actor cannot predict that an act is, in fact, an offence. Therefore, statutes should be construed against imposing liability on a defendant who reasonably thought they were within the terms of the law.[208]

There is uncertainty in s 72 concerning the question of when an act is mere preparation and too remote, and when it is immediately or proximately connected with the offence. The Court's approach appears to favour the prosecution by allowing liability to arise at an earlier stage, and so arguably the Court has not applied strict interpretation.

Conversely, Parliament has painted a broad canvas,[209] and by not being more specific it has left a lot of discretion to the courts. The uncertainty could be purposeful, as it allows the court to decide on the best approach, and thus the principle of strict

[207] However, a future court would mask this by saying it is still searching for acts which are immediately or proximately connected, and that it is just considering factors such as mens rea and the Model Penal Code examples in this search.
[208] Simester and Brookbanks, above n155, at 2.2.3.
[209] *R v Harpur* [2010] NZCA 319 at [16].

interpretation, as a default rule, may not apply in this context.[210] If Parliament did not intend to give the courts such a wide discretion, and were concerned that injustice was resulting, it could have already intervened when courts were using the commencement of execution test and the real and practical/substantial step test.

G. Practical Outcome of these Propositions

Overall, *Harpur* will lead to a state of uncertainty in the law. This can be demonstrated by applying the Court's propositions to previous New Zealand cases.

Cases where attempt has been found would still constitute attempt under such an approach. For example, in *R v B*[211] the accused had assembled a "raping kit", broke into his ex-wife's house, tied her up, raped her and told her he was going to kill her. These acts would be able to be looked at cumulatively, and considering all the circumstances, and the actus reus and the mens rea together, he would be liable for attempted murder.

In *R v Peneha,*[212] assembling materials to produce cannabis oil was found to be preparation only and not an attempt. Peneha had 13 cannabis plants and a large drum of isopropyl alcohol. He admitted that his intention was to make cannabis oil but he was unsure of the nature of the process and was hoping to find someone to instruct him. It is questionable whether this would amount to the "strong evidence of intent" referred to in *Harpur*. It certainly shows intent to eventually manufacture cannabis oil, but he did not have all the details worked out. If the Court in *Harpur* did mean evidence of firm intent, then it could be argued Peneha's intent was not firm. It is uncertain what a court would do here. If the examples included at the end of the *Harpur* judgment are supposed to be indicatory, then per examples (e) and (f),[213] Peneha could be guilty of an attempt as he possessed material to be employed in the commission of the crime, which under the circumstances (i.e. taking into account his

[210] Simester and Brookbanks, above n155, at 2.2.3.
[211] *R v B (No 5)*, HC Christchurch, T19/01, 7 September 2001.
[212] *R v Peneha* (1993) 11 CRNZ 183.
[213] See chapter four.

confession) could serve no lawful purpose. This shows that liability can now be found in the earlier stages of actus reus, as suggested by Neinmann.[214]

If the *Harpur* approach was applied to the facts in *Burrett,*[215] liability would arise. This can be said with some certainty as the Court in *Harpur* specifically considered *Burrett* to be an unsatisfactory result.[216] There, the three accused created an underground bunker to kidnap "Mr X", and had started crossing the city gardens to arrive at his house in order to kidnap him. Again the problem arises of what the Court in *Harpur* meant by strong evidence of intent. Again intent was not that "firm" as the Judge pointed out, as the defendants acknowledged the possibility of calling it off, with "equivocal" statements having been made.[217] But intent aside, by looking at the acts cumulatively these acts could now said to be immediately or proximately connected with the full offence.

The foregoing analysis highlights that the Court has left many gaps to be filled in their new approach. The Court has given no indication of when there will be strong evidence of intent, or whether the reverse can work – whether strong evidence of actus reus can compensate for a weak mens rea. What happens when an accused denies everything, so there is not "strong evidence of intent," but the accused's acts are reasonably advanced? The inclusion of the Code examples give no guidance, as it is uncertain whether or how courts are meant to use them, due to the somewhat vague instructing language of the Court.

There has been once case since *Harpur* on attempt, *Taia*.[218] The judgment shows the High Court grappling with the uncertain state of affairs *Harpur* has created. The accused was charged with attempting to drive a motor vehicle with excess blood alcohol.

The High Court took various propositions from *Harpur*. The Judge stated that the proper approach, following *Harpur,* is to consider whether there was a real and

[214] Grant Niemann "Attempts" (1991) 2(3) Criminal Law Forum 549 at 595.
[215] *R v Burrett* HC Wellington T3347/02, 13 February 2003.
[216] *R v Harpur* [2010] NZCA 319 at [35] and [41].
[217] *R v Burrett* HC Wellington T3347/02, 13 February 2003 at [23].
[218] *Taia v Police* HC Napier CRI-2011-441-9, 15 June 2011.

substantial step taken, even though this test was not endorsed in *Harpur*.[219] The Judge combined two separate paragraphs of the judgment and proposed that the Crown can rely on extrinsic evidence to establish the intent,[220] and that the conduct of the actor should be considered in its entirety for that purpose.[221] This perhaps hints that the stronger the actus reus, the less mens rea is required as conduct can be used to infer intent. If so, then the case effectively achieves the reverse effect of the conclusion reached in *Harpur* - that strong evidence of mens rea means a more remote actus reus will be accepted.

The judgment also refers to the similar drunk driving cases of *Graham*[222] and *Berry,*[223] where the conduct was held not to amount to an attempt. The prosecution submitted that under *Harpur*, these cases would both now constitute an attempt, as evidence of intent was present from the actors' actions, meaning that a real and substantial step had been taken.[224] The Judge concluded that he is not sure if that is necessarily correct, but did not find it necessary to reach a conclusion.[225] This shows a struggle with the concepts in *Harpur*, with the High Court being unsure of the effect on previous cases.

H. Overall Effect

Harpur has certainly pushed the threshold for liability back along the continuum of acts, which should make the police's task easier as they can intervene earlier. The case signifies a move from an objective theory, of an attempt doctrine based on the rationale of harm, to one of culpability with a subjectivist rationale. The case may also shed light on what some courts were already doing.

Yet if the approach in *Harpur* were to be adopted, certainty needs to be implemented somehow. Taking such a common sense approach allows for wide judicial discretion, which needs to be constrained in order to uphold the rule of law. There needs to be judicial dicta or statutory guidance regarding the minimum threshold for attempt, so

[219] *R v Harpur* [2010] NZCA 319 at [48].
[220] Ibid, at [16], referring to *R v Harpur* [2010] NZCA 319 at [15].
[221] Ibid, referring to *R v Harpur* [2010] NZCA 319 at [36].
[222] *Police v Graham* [2002] DCR 992.
[223] *Berry v Police* [2007] DCR 471.
[224] *Taia v Police* HC Napier CRI-2011-441-9, 15 June 2011 at [22].
[225] Ibid, at [23].

that courts do not push the threshold back too far into preparation. More clarity on what exactly is clear or strong evidence of intent is required. If the Court wished to shift the focus of attempt to the firmness of intent, this should have been made clear. There must be discussion as to whether the theory can work in the reverse - whether a strong actus reus can compensate for a weak mens rea. Furthermore, additional guidance needs to be given regarding the Code examples and their significance. It would have been helpful for the Court to clearly state that it was taking a subjective stance, and to consider the risk of punishing mere preparation with such a rationale. We should not have to guess what the Court of Appeal wants us to do; it should be obvious.

There needs to be a more substantial change to the law of attempt than that provided by *Harpur* in order for clarity to be achieved. Merely waiting for the next case to arise in order to refine matters will hinder the police in the meantime, as they struggle to guess when might be the right moment to intervene. The Court's approach will only confuse trial judges, rather than provide the clarity.

The Court's approach also confuses subjective and objective theories. A move to subjectivism may be desirable, but s 72 has an objectivist flavour, as proximity is based on a harm rationale.[226] This uncomfortable mix of subjectivism and objectivism will contribute to the confusion following *Harpur*. Consideration needs to be given to what the rationale for attempt law is in New Zealand, which may be a policy decision for Parliament.

[226] See chapter two.

V. Chapter Four - Options for Reform

As shown above, *Harpur* has left the law in a state of disarray and ambiguity. Taking the less invasive approach of judicial "tweaking" to fix the situation is inappropriate, as citizens and police will not know what to do in the meantime. Furthermore, the cases that have used *Harpur* have only confused the law more, as shown above. A reconsideration of the policy reasons for having the law of attempt is required. This is a legislative role rather than a judicial one.

A more positive action on behalf of the legislature is required. Disposing of the general attempt provision completely and filling the void with specific preparatory offences, or redefining individual offences to cover the scope of attempt is undesirable. Such an approach would unduly complicate the law, resulting in legislative and legal fragmentation, thus raising the possibility that some dangerous acts which should be criminalised would be overlooked.[227]

Options for reform will be considered by means of a comparative analysis with law reform developments in the United States and England. The English Law Commission's suggestions of 2007 and the American Model Penal Code will both be considered, as both were referred to in *Harpur* and are two recent examples of jurisdictions trying to solve the problem of attempt.[228] I will demonstrate that the current position could be improved by adopting a legislative provision similar to the Model Penal Code. This would provide the much needed clarity and guidance that the law is currently lacking.

A. The English Law Commission

The English Law Commission, after observing deficiencies in the area of attempt in the United Kingdom, proposed to modify the law in 2007.[229] It suggested that the current offence of attempt should be replaced with two new offences – "attempt," to

[227] E Meehan and JH Currie *The Law of Criminal Attempt* (2nd ed, Carswell Thomson Professional Publishing, Ontario, 2000) at 350 – 352.
[228] *R v Harpur* [2010] NZCA 319 at [17] – [18] and [51] respectively.
[229] Prompted by cases such as *R v Geddes* (1996) 160 JP 697 and *Campbell* (1990) 93 Cr App R 350; see English Law Commission *Conspiracy and Attempts* (UKLC CP183, 2007) at 166 [English Law Commission 2007].

catch those who were engaged in the last acts of their endeavour, and "preparation," for where the actor was still only preparing to commit the offence, but had proceeded beyond "mere preparation."[230] "Preparation" would cover when the actor was in the process of executing a plan to commit an intended offence,[231] and when the actor was "on the job."[232] The combination of the two offences was not purported to enlarge the scope of inchoate liability in any way from the current offence of attempt.[233] These two offences would have the same maximum penalty.[234]

The Law Commission proposed guideline examples of "preparation" as follows:[235]

> (1) D gains entry into a building, structure, vehicle or enclosure or (remains therein) with a view to committing the intended offence there and then or as soon as an opportunity presents itself.
> (2) D examines or interferes with a door, window, lock or alarm or puts in place a ladder or similar device with a view there and then to gaining unlawful entry into a building, structure or vehicle to commit the intended offence within.
> (3) D commits an offence or an act of distraction or deception with a view to committing the intended offence there and then.
> (4) D, with a view to committing the intended offence there and then or as soon as an opportunity presents itself:
>
> a) approaches the intended victim or the object of the intended offence, or
> b) lies in wait for an intended victim, or
> c) follows the intended victim.

[230] English Law Commission 2007, above n229, at 19.
[231] English Law Commission 2007, above n229, at [16.16].
[232] English Law Commission 2007, above n229, at [16.23].
[233] English Law Commission 2007, above n229, at [16.19]. The Law Commission argued that "preparation" should be punished because there is an inherently immoral act involved in taking steps towards causing harm, the police should be able to intervene, and prospective perpetrators should be deterred from trying.
[234] English Law Commission 2007, above n229, at [16.18].
[235] English Law Commission 2007, above n229, at [12.39]. It thought that guideline examples of conduct amounting to "preparation" should be given in a report, but not codified in statute; at [16.41-16.57].

The consultation paper was widely criticised, causing the Law Commission to withdraw its recommendations.[236] This criticism must be considered in deciding whether this would be a viable approach for New Zealand to take.

1. Criticism

Critics argued that such an approach would not remedy any of the law's previous complications. The approach would just introduce new distinctions between "attempt" and "preparation," and between "preparation" and "mere preparation."[237] However, the provision of examples of "preparation," as set out above, could help moderate this criticism and provide substance to the test.[238] As "attempt" had a narrow focus, confined to the last acts, examples were not needed.[239]

Many argued there was no purpose in having two separate offences. The auxiliary offence of "preparation" could completely replace attempt instead.[240] The Law Commission provided no evidence to support their rationale that the label of "attempt" was too important and well understood to be abandoned.[241] Furthermore, having the same penalty for "preparation" and "attempt" made the distinction look even more like a technicality without a convincing justification.[242] The Law Commission did not think there was sufficient difference in moral culpability between "attempt" and "preparation" to justify a difference in penalty.[243] But this reasoning is flawed; there must be a sufficient distinction in culpability between "attempt" and "preparation" in order to have them as separate offences. Having the same penalty would result in prosecutors never using "attempt" because "preparation" would be easier to prove,[244] and "attempt" would become inoperable. There should be different penalties otherwise there is no point in having separate offences.

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[236] English Law Commission *Conspiracy and Attempts* (UKLC R318, 2009) [English Law Commission 2009].
[237] Ian Dennis "The Law Commission and Inchoate Offences" [2008] Crim LR 1 at 2.
[238] Dennis, above n237, at 2.
[239] English Law Commission 2007, above n229, at [12.38].
[240] Jonathan Rogers "The Codification of Attempts and the Case for 'Preparation'" (2008) 12 Criminal LR 937 at 944.
[241] English Law Commission 2007, above n229, at 12.34.
[242] Dennis, above n237, at 2.
[243] English Law Commission 2007, above n229, at [16.22].
[244] Christopher MV Clarkson "Attempt: The Conduct Requirement" (2009) 29(1) Oxford Journal of Legal Studies 25 at 34.

Furthermore, critics argued that the approach resulted in "cracking a nut with a sledgehammer,"[245] as the state of the law did not require such a radical change. Because of this argument, the Law Commission eventually rejected the proposal, deciding that the law was satisfactory as it stood.[246]

In my opinion, the Law Commission's suggestions had good underlying ideas, but the final proposition was nonsensical. Creating two new offences to cover the ground of one would confuse the law even more with no applicable benefit. The idea of two separate offences does have merit, but there would be no point unless the scope of inchoate liability was increased in the offence of "preparation."

B. A Wider Offence of Preparation

Rogers suggests establishing a broader offence of "preparation" than the Law Commission proposed, with a mens rea element of settled intention.[247] "Attempt" would mirror the Law Commission's approach, restricted to last acts with a mens rea element of intention.[248] Different penalties for the offences should be imposed, with a higher penalty for "attempt" than "preparation."[249]

Such an approach does appeal theoretically, because it allows a compromise between subjective and objective rationales. An offence of "preparation" could meet the agenda of the subjectivist, by punishing lesser acts when there is evidence of the actor's settled intention, meaning those who are culpable are punished. Obviously the Court of Appeal supports a subjectivist point of view,[250] and punishing "preparation" could allow for this to be realised. An offence of "attempt" would meet the concerns of the objectivist, by preserving "attempt" for when there is a risk of harm from the actor committing the last acts.

The rationale of intervention would be upheld, as even if the actor was not guilty of "attempt," they could be guilty of "preparation." This means the police can intervene

[245] Dennis, above n237, at 2; see also Clarkson, above n244 at 34.
[246] English Law Commission 2009, above n236, at [8.67].
[247] Ibid, at 947.
[248] Ibid, at 950.
[249] As suggested by Dawkins and Briggs; see Kevin Dawkins and Margaret Briggs "Criminal Law" [2003] NZLR 569 at 601.
[250] See chapter three.

earlier, without being tempted to wait until safety is compromised in order to ensure a conviction.[251]

This approach would raise some concerns. The English Law Commission was concerned about the need for people to have the opportunity to change their mind.[252] Rogers rejects this, arguing that this concern can be dealt with by the mens rea element of a settled intention, as the actor would not have changed their mind with such a mens rea.[253]

The English Law Commission was also concerned about incentives. If an actor thinks they have already committed an offence of "preparation", they may think that they have little left to lose in proceeding further to an "attempt." The imposition of different penalties for the offences would deal with this concern, by providing an incentive to withdraw.

Dawkins and Briggs argue that New Zealand has several express provisions that punish certain possession based or precursor offences.[254] This recognizes the inherent criminality of certain forms of preparatory activity. A more general offence of conducting acts preparatory to an attempt would have a wider scope than the specific preparatory offences currently recognised, but would not be entirely inconsistent with such provisions.[255]

This idea could form the basis of a provisional proposal of reform. Examples could be provided, as suggested by the English Law Commission, to provide clarity and guidance. This approach would not attract the same criticism as the English Law Commission's proposals of "cracking a nut with a sledgehammer," as it would reflect the creation of a new offence as opposed to just restructuring the current law of attempt. An example of how the offences would be practically applied can be seen by the case of *R v Gullefer*.[256] The actor jumped onto a dog-racing track in hope of a "no race" being declared, so he could recover his money instead of losing it. This would

[251] Rogers, above n240, at 952.
[252] English Law Commission 2007, above n229, at [15.13].
[253] Rogers, above n240, at 944.
[254] Such as ss 202A(4)(b), 227, 228, 251, and 264 of the Crimes Act 1961.
[255] Dawkins and Briggs, above n249, at 601.
[256] *R v Gullefer* [1990] 3 All ER 882.

not constitute an "attempt" as he was not engaged in the last acts of theft. It would amount to a "preparation," as by jumping onto the track we can see a settled intention to commit theft.

Unfortunately there are problems with such an approach. Consideration would have to be given as to how the new offence of "preparation" would fit in with current possession based and preparatory offences. Furthermore this approach has not been implemented before in any other jurisdiction. Although this alone is not a reason to reject such an idea, other potential reforms that are "tried and tested", such as the Model Penal Code, may be more desirable. Also there would be a new distinction between "attempt" and "preparation", and courts may struggle with the revised meanings of these words.

In addition, with the element of mens rea solely being one of firmness of intent, there are problems of proof and definition, as noted above.[257] Instead of solving the problem of distinguishing between preparation and attempt, this new offence could just replace the problem with the new distinction between a firm and an equivocal intent. In the absence of a confession, there is a danger that evidence of an actor's criminal history or bad character would be relied on, which could have the result of convicting innocent people on their past mistakes. Rogers argues this problem could be remedied by tightening the rules of evidence.[258] But then how would this settled intention be shown in the absence of a confession? Other areas of law would have to be adjusted in order for the new provision to function, thus creating a "domino" effect. Evidence provisions would have to be amended, as would current specific preparatory offences. It is therefore desirable to consider other options to search for a less invasive solution.

C. The Model Penal Code

A pathway to certainty could be found by adopting the approach of the American Model Penal Code (**the Code**).[259] This attempt provision requires an act or omission constituting a substantial step in a course of conduct planned to culminate in the

[257] See chapter one.
[258] Rogers, above n240, at 944.
[259] American Law Institute *Model Penal Code* (American Law Institute, Philadelphia, 1962) art 5.01.

commission of the crime. Conduct cannot constitute a substantial step unless it is strongly corroborative of the actor's criminal purpose.[260] The conduct may be assessed in light of the defendant's statements to show this strong corroboration.[261]

The Code specifies categories of conduct, which if strongly corroborative of the actor's criminal purpose, are not to be held insufficient as a matter of law.[262] These are:

a) lying in wait, searching for or following the contemplated victim of the crime;
b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
c) reconnoitering the place contemplated for the commission of the crime;
d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
e) possession of materials to be employed in the commission of the crime, that are specifically designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; and
g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

State legislatures have generally followed the Code's definition of attempt in redrafting their criminal statutes,[263] although only Arkansas,[264] Connecticut,[265]

[260] Ibid.
[261] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 331; Wayne R LaFave *Criminal Law* (4th ed, Thomson/West, St Paul, 2003) at 11.4.
[262] American Law Institute *Model Penal Code* (American Law Institute, Philadelphia, 1962) art 5.01.
[263] Robert L Misner "The New Attempt Laws: Unsuspected Threat to the Fourth Amendment" (1981) 33(2) Stanford Law Review 201 at 212.
[264] Ark Code Ann § 5-3-201. While the examples are not included in the statute, the official commentary cites them with approval.
[265] Conn Gen Stat Ann § 53a-49.

Hawaii[266] and Oregon[267] have adopted it in full. Some states adopt it but omit the examples,[268] while others only have a requirement of a substantial step, with no requirement of corroboration.[269] The Code has proven influential with many courts.

1. Theoretical implications

The Code is one of the clearest formulations of subjectivism in the context of attempt liability. The commentary to the Code purports to impose liability when the actor has a firm criminal purpose, because a firm criminal purpose makes an actor dangerous.[270] Of importance is whether the actor has done enough for their firm purpose to be clear, in the form of a substantial step,[271] as opposed to how close the actor has come to completing the crime.[272] With such an approach, one can find an attempt in the earlier stages of actus reus.[273]

2. Firmness of intent

But is liability based on the firmness of intent desirable? As shown above, the idea does have merit.[274] In fact the search for a firmness of intent can explain much of the confusion in attempt law. The proximity tests have tried to punish actors with a firm

[266] Haw Rev Stat § 705-500. While the examples are not included in the statute, the official commentary cites them with approval.
[267] Or Rev Stat § 161.405 (2009). Oregon includes only the substantial step requirement; the accompanying commentary expressly endorses the remainder of the Model Penal Code definition.
[268] Colo Rev Stat § 18-2-101; Del Code Ann, title 11 § 531; Mo Ann Stat § 564.011; NH Rev Stat Ann § 629.1; NJ Stat Ann § 2C:5-1 (West Supp. 1980); ND Cent Code 12.1-06-01; Utah Code Ann § 76-4-101. Delaware and Kentucky include the corroboration requirement by defining substantial step as "an act or omission which leaves no reasonable doubt as to the defendant's intention." Del Code Ann title 11, § 532; KY Rev Stat Ann 506.010(2) (LexisNexis).
[269] Alaska Stat § 11.31.100; Ga Code Ann § 16-4-1; Ind Code Ann § 35-41-5-1 (Burns); Minn Stat § 609.17 (2010); Pa Stat Ann, title 18 § 901; Wash Rev Code Ann § 9A.28.020. These states apparently omitted the corroboration requirement not to establish a lower standard, but because it was unnecessary since their statutes require that the substantial step be committed with "intent to commit a crime," Minn Stat Ann § 609.17 (2010), or "intent to commit a specific crime," e.g. Ga Code Ann § 16-4-1.
[270] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 33; LaFave, above n281, at 11.4.
[271] Andrew Ashworth "Concepts of Overcriminalization" (2007) 5 Ohio State Journal of Criminal Law 407 at 414.
[272] RA Duff *Criminal Attempts* (Oxford University Press Inc., New York, 1996) at 54.
[273] Grant Niemann "Attempts" (1991) 2(3) Criminal Law Forum 549 at 595. The drafters of the Model Penal Code expressly acknowledge that they intended to broaden the scope of liability, see American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 331.
[274] See chapter one; the idea is supported by a lot of commentators, see Douglas Huask "Attempts and the Philosophical Foundations of Criminal Liability" (1997) 8(2) Criminal Law Forum 293; Gideon Yaffe *Attempts: In the Philosophy of Action and the Criminal Law* (Oxford University Press, Oxford, 2010) at 309.

intent by requiring an act close enough to the full offence. In *Harpur,* a lesser degree of actus reus was required when evidence of intent was present. As noted above,[275] perhaps this was because the stronger the evidence of intent, the more firm the intent is, thus fewer acts are needed to show that the actor was firmly committed to completing the crime. Rogers' approach as set out above had a mens rea element of a settled intention, making the search for firmness of intent even more obvious. The Code is a compromise between these approaches, searching for a firmness of intent, but focusing on the acts of the accused to demonstrate it.

It is important to note that although the commentary to the Code talks of firmness of purpose, the Code itself states the substantial step has to be strongly corroborative of "purpose," not "firmness of purpose." There may not appear to be much difference between the two, but Colorado chose to implement the latter wording explicitly in its code, by requiring a substantial step "which is *strongly corroborative of the firmness of the actor's purpose."*[276] The Court in *Lenhert*[277] highlighted the difference in the two codes, and explained that the Colorado code's lack of examples was due to the sufficient clarity achieved by the more precise definition. This more precise definition is something to consider if the Code were implemented in New Zealand.

3. Support for the general approach of the Model Penal Code

The approach taken in the Code has been well received internationally, as it is seen as clear and easy to apply relative to other tests, with supporters such as Ashworth,[278] Meehan and Currie, [279] and Williams.[280]

The availability of the commentary that accompanies the Code is desirable, as it provides an authoritative place for the courts to look for guidance,[281] and explains

[275] See chapter three.
[276] Colo Rev Stat § 18-2-101.
[277] *People v Lehnert* 163 P.3d 1111 2007.
[278] Andrew Ashworth *Principles of Criminal Law* (3rd ed, Oxford University Press, New York, 1999) at 468.
[279] Meehan and Currie, above n227, at 180.
[280] Glanville Williams "Wrong Turnings on the Law of Attempt" [1991] Crim LR 416 at 416 and 422; see also Meehan *The Law of Criminal Attempt: A Treastise* (Carswell, Alberta, 1984) at 132 – 134.
[281] "When a statute is derived from the Model Penal Code we may look to the comments from the relevant sections for insight into the meaning and application of the statute." *State v Tibor* 373 NW 2d 877 (ND 1985) at 882, n6.

underlying theory.[282] Reference to a commentary would lead to greater transparency in the law of attempt, and contribute to more consistent results.

4. Use of examples

Stuart argues the use of examples in the Code work well, with the general doctrine of attempt acting as a useful residual device for the rare situations that the examples do not cover.[283] They aid police and provide substance to the substantial step test.[284]

The English Law Commission rejected the use of statutory examples as it was uncertain how they could be used in practice because the courts had no experience with examples.[285] However Meehan argues judges do have such experience, and these reasons for rejection seem insubstantial.[286]

Duff argues that there are still some instances of uncertainty despite the examples,[287] such as *Robinson*.[288] In endeavouring to obtain money by false pretences, Robinson faked a burglary, but had not yet lodged a claim with the insurers. It is true that the examples included are based on positive actions, being concerned with the more typical instances of attempt, and may not cover the fact situation in *Robinson*. The examples are unlikely to provide clarity in areas such as fraud and white-collar crimes. However, it ought to be remembered that the examples are by no way exhaustive, and if they do not cover the fact situation, then recourse must be had to the substantial step test itself. The drafters of the Code did refer to the situation of bribery, extortion and obtaining money by false pretences, but apparently thought a specific example did not need to be provided.[289] Furthermore, the list of examples could be expanded to include the situation where a third party has to be relied upon

[282] For example, it was referred to in *United States v Jackson* 560 F.2d 112 (1977); see Sanford H Kadish and Stephen J Schullhofer *Criminal law and its processes: cases and materials* (7th ed, Aspen Publishers, New York, 2001) at 577.
[283] Donald Stuart "Actus Reus In Attempts" (1970) Crim LR 505 at 513 – 514 [*Actus Reus*].
[284] Dennis, above n237, at 2; see also Clarkson, above n244, at 40, and Meehan, above n280, at 132 – 134.
[285] English Law Commission 2009, above n236, at [8.76].
[286] Meehan, above n280, at 132 – 134.
[287] Duff, above n272, at 56; see American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 348.
[288] *R v Robinson* [1915] 2 KB 342.
[289] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 347, where the authors state that the illustrations in subsection (2) does not preclude the possibility of finding an attempt in other contexts.

for the crime to be completed. The English Law Commission Working Party proposed an example of being "preparing or acting a falsehood for the purpose of an offence or fraud or deception."[290] This example was specifically included to cover situations like *Robinson*. It could be decided as a matter of policy how broad this illustration should be, and the example could be re-worded if necessary.

5. Criticism of the general approach of the Model Penal Code

There is some criticism of the fact that the approach is a fully subjective test, with the emphasis on dangerous actors rather than dangerous acts.[291] Fletcher argues that this is a radical departure from the basic principle of liberal jurisprudence that criminal law and punishment should attach to actions, not actors.[292] This criticism stems from an objectivist critique of a subjective test, and a subjectivist could provide many arguments in response.[293] Furthermore, subjectivism is favoured by the Court in *Harpur*.[294]

The English Law Commission was also concerned that the Code would push liability too far back along the continuum of acts,[295] because actors are not offered the opportunity to change their mind. Yet the Code allows actors this opportunity, through the availability of the defence of voluntary renunciation. Therefore this criticism fails.[296] The availability of this defence also justifies the taking of a subjective stance. This stance is less justifiable in New Zealand, where a full defence of renunciation is not currently available.[297]

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[290] English Law Commission *Incohate Offences: Conspiracy, Attempt and Incitement* (UKLC WP50, 1973) at 58. However, it has been acknowledged that that specific wording of example (g) is much broader than the cases of *Robinson* and *Comer*. Temkin and Zellick argue that if the defendant in *Comer* had merely concealed his vehicle but had not yet made even the preliminary enquiry of the insurers, this would satisfy the illustration, but it is far from clear that liability should be imposed in circumstances so remote from the commission of the offence, see Jennifer Temkin and Graham Zellick "Attempts in English Criminal Law: Notes and Comments" (1973) 1 Dalhousie Law Journal 581 at 589.

[291] George P Fletcher *Basic Concepts of Criminal Law* (Oxford University Press, New York, 1998) at 180 [*Basic Concepts*].

[292] Ibid.

[293] See chapter one.

[294] See chapter three.

[295] English Law Commission *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (UKLC 102, 1980) at [2.32].

[296] Andrew Ashworth "Criminal Attempts and the Role of Resulting Harm under the Code, and in Common Law" (1988) 19(3) Rutgers Law Journal 725 at 751 [*Criminal Attempts*].

[297] Although a court can take an abandonment into account if made before a proximate act is completed, see Turner J in *R v Donnelly* [1970] NZLR 980.

Another criticism is the potential for bad police practices to occur, which might arise with any approach that pushes attempt liability further back along the continuum of acts.[298] Whenever any activity listed in the examples occurs, an officer will have probable cause to arrest the individual and may conduct a full search incident to that arrest.[299] However, if after a review of our Policing Act 2006[300] this appears to be a problem, restrictions on the police and their powers could be upgraded by improved supervision and better police accountability.[301]

There is a danger that such an approach will not receive support in New Zealand, as it is too similar to the unequivocality test.[302] Courts in New Zealand dislike the test, with *Drewery*[303] attracting criticism as it was seen as a partial revival of the theory.[304] Indeed the drafters of the Code do say the substantial step test serves the same purposes as the unequivocality test.[305] It must be remembered that unlike the unequivocality test, the Code allows reference to other evidence, for example confessions, to satisfy the corroborative requirement.[306] Accordingly, the problems and risks associated with the equivocality test will not arise.

The Code's general approach is logical and well founded, and adoption of the Code would be desirable step for New Zealand to take. But if such an approach were taken, the applicability of the renunciation defence must be considered.

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[298] See chapter one.
[299] Misner, above n263, at 213.
[300] The Policing Act 2008.
[301] Ashworth *Criminal Attempts*, above n296, at 735: through improved supervision of interrogation, introduction of tape-recording and better police accountability. Ashworth argues the extent to which criminal law is tugged away from its true purposes by problems of police or prosecutorial discretion should be kept to a minimum.
[302] See chapter two.
[303] *Drewery v Police* (1988) 3 CRNZ 499.
[304] AP Simester and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002) at 8.2.3.
[305] The commentary to the Model Penal Code says the substantial step test arises from the failings of the equivocality test. American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 329; Stuart highlights the dangers associated with the unequivocality test may arise in Stuart *Actus Reus*, above n283, at 522; see also Lawrence Crocker "Justice in Criminal Liability: Decriminalizing Harmless Attempts" (1992) 53(4) Ohio ST LJ 1057 at 1079.
[306] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 331.

6. The availability of renunciation as a defence

The defence of renunciation is set out in 5.01(4):[307]

> "When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.
>
> Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."

Not only is a similar defence used in countries such as France, Germany, the Netherlands, Belgium, Poland and Norway,[308] the provision has been one of the Code's more successful innovations. Today approximately one half of United States jurisdictions recognise the defence.[309]

The defence allows only voluntary abandonment,[310] because the renunciation must be complete, permanent and voluntary.[311] Some states that have implemented the

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[307] American Law Institute *Model Penal Code* (American Law Institute, Philadelphia, 1962) art 5.01.
[308] Don Stuart *Canadian criminal law: a treastise* (Carswell, Ontario, 1995) at 611 [*Canadian Criminal Law*]; Meehan and Currie, above n227, at 291.
[309] Paul R Hoeber "The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation" (1986) 74 California Law Review 377 at 382; Meehan, above n280, at 221.
[310] Meehan, above n280, at 221.
[311] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 358.

defence have made this requirement more obvious, with wording such as "voluntarily and in good faith,"[312] and "complete and voluntary renunciation."[313]

Although the distinction between voluntary and involuntary renunciation is not well adhered to in the common law,[314] the distinction is quite easily explained. Renunciation is not voluntary when it is motivated by circumstances that increase the probability of detection or make the full offence more difficult, or if it is motivated by a decision to postpone the criminal conduct until later, or to transfer the criminal effort to another victim or objective. Renunciation is only voluntary when it comes from a change of heart, timidity or lack of perseverance.[315]

Duff gives the example of a rapist who decides not to rape his victim because he finds out she is pregnant.[316] This would still be an attempt under the Code as it is not a voluntary renunciation. Alternatively, if that rapist decided to desist because he realised his conduct was wrong, or if he weighs up the punishment against the incentive to commit the crime, then the renunciation is voluntary.[317]

(a) Reasons for adoption

The commentary to the Code justifies a renunciation defence for two reasons. Voluntary renunciation negates the dangerousness of the actor, so they should not be liable.[318] This partners the rationale that only those who are firmly committed to the crime should be liable. This argument is the most convincing,[319] as the defence shows the actor has not crossed the psychological barrier into criminal liability.[320] The

[312] For example, Minn Stat Ann § 609.17(3) (2010) Minnesota, para 609.17(3).
[313] Such as Ohio: Ohio Rev Code Ann para 2923.02(D) (LexisNexis).
[314] Duff, above n272, at 68.
[315] Michael H Crew "Should Voluntary Abandonment Be a Defence to Attempted Crimes" (1988) 26 American Criminal Law Review 441 at 445.
[316] Duff, above n272, at 68.
[317] Ibid, at 395.
[318] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 359.
[319] Duff, above n272 at 71; Fletcher *Basic Concepts*, above n291, at 182.
[320] CMV Clarkson, HM Keating and SR Cunningham *Criminal Law* (7th ed, Thomson Reuters (Legal) Limited, London, 2010) at 496.

availability of voluntary renunciation can also act as an incentive for the actor to change their mind, especially at the last moments before the offence is completed.[321]

The availability of the defence also dispels some of the criticisms of the subjective approach which the Code takes. Using this defence, actors are given the opportunity to change their mind. Thus pushing the threshold for liability further back along the continuum of acts is not as problematic as the approach in *Harpur*, where such a defence is not available.

Furthermore, punishment of someone who has voluntarily abandoned his or her offence is unjustified. No argument of deterrence, reformation, prevention or even retribution requires punishment of someone who is truly repentant and has done no harm.[322]

(b) Reasons against adoption

Some argue that the defence goes against the rationale of encouraging intervention by the police,[323] as police will only be able to intervene if the actor has not voluntarily abandoned their crime. Yet this defence only precludes early intervention if the actor desists before the intervention, at which point police intervention is no longer necessary anyway.[324]

The availability of the defence may also encourage an actor to take preliminary steps because they know they have the option of backing out,[325] which imposes the danger of preparation and planning to society.[326] The Code commentary acknowledges this, but argues that the actor would know that if external forces intervene the defence is not available. Furthermore this issue would only arise with actors that are dubious so

[321] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 359; see also Meehan, above n280, at 224.
[322] Stuart *Canadian Criminal Law*, above n308, at 611; see also Meehan, above n280, at 224. However, if there is harm committed, for example an interference with the victim, then the defence may not be available. This will be considered below.
[323] Ibid, at 225.
[324] Duff, above n272, at 72.
[325] Meehan, above n286, at 226.
[326] Ibid at 225.

the probability of continuance is not great.[327] The value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort.[328]

Another criticism is that present virtue does not neutralize past crimes when a substantive offence is being considered, and that same reasoning should apply to attempt. Thus, once committed, an attempt in law should remain an attempt.[329] The defence is therefore illogical, because as soon as the actus reus and mens rea are present, there is an attempt.[330] But as Duff points out, we need to consider if this is the correct way to view attempts.[331] If we decide to move away from the traditional division between actus reus and mens rea, and begin to take a subjectivist stance with the act playing an evidentiary role, then this criticism fails.

Other criticisms can also fail if we enforce the distinction between voluntary and involuntary renunciation.[332] Meehan quotes *Wylie* [333] where the Judge spoke of qualified intention, to show the difficulties with the defence.[334] It is quite clear under the Code that withdrawing because of a qualified intention would be involuntary because it was motivated by extraneous circumstances.

Some critics argue that the defence would never be used in practice, as actors will never be convincing in arguing that they abandoned the offence.[335] This is not a reason to reject its use. Theoretically and principally it will provide a basis for allowing a test encompassing firmness of purpose, as actors are still given an option to change their mind.

Simester and Brookbanks say the reason that the defence is not available in New Zealand is that the actor demonstrates a disregard for the safety of others and a fixed intention to achieve their object by completing proximate acts, and it is irrelevant

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[327] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 359-60.
[328] Ibid, at 360.
[329] Meehan, above n280, at 226.
[330] Duff, above n272, at 73.
[331] Ibid, at 74.
[332] Stuart *Canadian Criminal Law*, above n308, at 612.
[333] *Police v Wylie & Another* [1976] 2 NZLR 167.
[334] Meehan, above n280, at 226.
[335] Ibid, at 223; George P Fletcher *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) at 197.

whether the actor withdrew after that point.[336] But this is incorrect; there is not a fixed intention if the actor has voluntarily abandoned the criminal purpose. Simester and Brookbanks give the example of a rapist undressing his victim, lying on top of her, but then changing his mind and argue the actor should be liable. In reality, not only will the actor be liable for indecent assault in this case,[337] but it is possible the defence of renunciation could be restricted so it would not be available in such an instance.

The defence could be unavailable when the actor has begun to commit the last acts of the crime, or interacted with the victim causing fear or apprehension.[338] This would satisfy objectivist concerns, because at this point there is a risk of harm and apprehension felt by the victim.[339] Thus in the case of the rapist, the defence of abandonment would not be available as the actor has begun the last acts of the offence and scared his victim. The case of *Campbell*[340] can be used as an illustration. The accused was stopped one yard from the door of a post office, with an imitation firearm and a threatening note. He said he had changed his mind because the crime was not worth the danger. If loitering outside was seen as the "last acts" before the offence was committed, then the defence would not apply. In New Zealand, where burglary is completed as soon as the building is entered, this would be the case.[341] Secondly, even if these were not the last acts, the prosecution would have to show beyond reasonable doubt that he did not change his mind, or that he changed his mind for involuntary reasons. The fact that he had not got disposed of the note or firearm, and was still walking outside the bank would help in discharging the prosecution's burden.

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[336] AP Simester and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002) at 8.2.4.
[337] Section 135 of the Crimes Act 1961.
[338] The Annotation to the Colorado code has provided a way to deal with some of these concerns - the defence of abandonment may apply at various stages in the commission of attempted crimes; however, the abandonment defence does not provide immunity where the actor has put in motion forces that the actor is powerless to stop, because the attempt is deemed to have been completed and cannot be abandoned. See Colo Rev Stat § 18-2-101; and *People v Gandiaga* 70 P3d 523 (Colo App, 2002). Perkins and Boyce support such a restriction; see Rollin M Perkins and Ronald N Boyce *Criminal Law* (3rd ed, The Foundation Press Inc, New York, 1982) at 656.
[339] See chapter one.
[340] *Campbell* (1990) 93 Cr App R 350.
[341] Section 231 of the Crimes Act 1961.

(c) Some procedural considerations

Renunciation should be available as a defence, as opposed to being a factor in sentencing[342] or a factor in determining whether the actus reus has been met.[343] Allowing renunciation as a defence coincides with the search for firmness of intent, as guilt is negated when intent is not firm.[344]

In the Code, renunciation is an affirmative defence, meaning the defendant has to produce evidence supporting voluntary renunciation, and then the prosecution must prove beyond reasonable doubt that the renunciation was not voluntary.[345] This would function more effectively in New Zealand than placing a probative or legal burden on the accused, as that would be contrary to the New Zealand Bill of Rights Act 1990.[346] It would also be more defendant-friendly than placing a legal burden on the accused, which could serve to offset the prosecution-friendly effect of a substantial step test.

7. A question for the judge or jury

Currently, s 72 of the Crimes Act 1961 explicitly says the question of actus reus is a question of law.[347] Under the Code, the question of whether there has been an attempt is a question for the jury.[348] As long as the jury finds that the actor's conduct is strongly corroborative of their purpose, conduct falling within the examples provided in the Code shall not be held insufficient as a matter of law. For factual situations not covered by the examples, the judge has the power to intervene and rule that the conduct is not an attempt.[349] The judge is able to give instructions to the jury.

[342] As in England; see Duff, above n272, at 66.
[343] Meehan, above n280, at 227.
[344] Duff, above n272, at 67.
[345] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 358. However, roughly half the recent revisions of codes had placed the burden of persuasion on the defendant, when the Model Penal Code commentary was written e.g. Arkansas, Connecticut and Alaska; see American Law Institute *Model Penal Code and Commentaries (*Official Draft and Revised Comments) 1985 part I, vol 2, at 361.
[346] Section 25 of the New Zealand Bill of Rights Act 1990. See *Hansen v The Queen* [2007] NZSC 7 for an application of this provision in the criminal context.
[347] Section 72(2) of the Crimes Act 1961.
[348] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at at 352.
[349] English Law Commission 2007, above n230, at 232, fn113.

It is appropriate for the question of whether the actor's conduct amounted to an attempt to remain a matter of law, even if the Code's approach is adopted. The English Law Commission considered whether the judge or jury should address this issue. It ultimately recommended that the question be one for the judge instead of the jury, as the question was inappropriate for a lay jury, who have no understanding of the key factors for punishing preparatory conduct.[350] Furthermore, there may be little practical difference between the two approaches, as under the Code the judge has the ability to intervene. Thus, making the question one for the jury would be an unnecessary change to New Zealand's attempt provision.

The defence of renunciation would be put to the jury if the judge determines the threshold question of whether there is evidence that "raises the issue."[351]

8. Practical outcomes

Such an approach would result in more favourable outcomes than would arise using *Harpur*. This can be demonstrated by applying the proposed approach to sample of pre-*Harpur* cases. For instance, the facts in *R v B*[352] would constitute an attempt, as the conduct concurs with the Code examples in a), c), d) and e). The fact that B changed his mind at the last point could not provide the grounds for the defence of renunciation, as he had engaged in the last acts by drugging and tying up his victim. This would satisfy objective and subjective concerns, and although it has the same result as under the *Harpur* rationale, reaching that result is significantly easier and clearer.[353]

The accused in *R v Peneha*[354] would have committed a substantial step, as per example e), as it can be demonstrated that the cannabis materials are distinctively suited to a criminal purpose. Although this could be a borderline case, as the firmness of Peneha's intent was unclear, it would still be considerably clearer than under the *Harpur* approach.[355] The reason for the lack of clarity of Peneha's intent is due to the

[350] Ibid at [8.174]; see also Clarkson, who agrees: Clarkson, above n244, at 41.
[351] Bruce Robertson (ed) Adams on Criminal Law (looseleaf ed, Brookers) at 20.05.
[352] *R v B (No 5)*, HC Christchurch, T19/01, 7 September 2001.
[353] See chapter three.
[354] *R v Peneha* (1993) 11 CRNZ 183.
[355] See chapter three.

slightly ambiguous facts set out in the judgment, as firmness of intent was not being explicitly sought.[356] However, if the Code were to be implemented, the prosecution would procure and produce evidence to show his firmness of intent, and if the prosecution could show beyond reasonable doubt that Peneha purposely obtained the plants and the oil in order to procure cannabis, he would be liable. Liability is imposed where it would not have been under the law before *Harpur*, yet as shown, this is desirable as long as he committed a substantial step strongly corroborative of his intent.[357] If the opposite view is taken, then this example can easily be amended so as not to impose liability in such a case.

In *Burrett*,[358] there would be an attempt. The actors' conduct falls within examples c) and f) of the Code, as they possessed a shotgun near the place of the crime, and were reconnoitring the place of the crime.[359] This is much simpler and clearer than the *Harpur* approach.[360] The fact that their intent was "qualified"[361] would not give rise to a defence of renunciation.

Finally in one of the more problematic cases of New Zealand attempt law, *Wilcox*, we can see the reasoned approach of the Code in action. Possession of the balaclavas would satisfy example e), as they are specifically designed for disguise. The combination of the closeness to the scene of the crime (one kilometre), and the criminal nature of the materials (the guns and balaclavas) would allow the conduct to satisfy example f) of the Code also.[362] The defence of renunciation possible arises, as Wilcox argued he changed his mind on the way to the robbery. However, in the case there was an "unusual extent of agreement between prosecution and defence" that Wilcox was telling the truth.[363] Under the suggested reform, Wilcox would need to produce evidence that he voluntarily abandoned the crime, such as evidence to support his claim that he tried to stop the journey by suggesting the actors go to a friend's house on the way to the bank. The prosecution would then have to prove

[356] As considered above at chapter one and three.
[357] Because a substantial step strongly corroborative of one's intent shows a firm intention.
[358] *R v Burrett* HC Wellington T3347/02, 13 February 2003.
[359] Ibid, at [5].
[360] See chapter three.
[361] *R v Burrett* HC Wellington T3347/02, 13 February 2003 at [23].
[362] American Law Institute *Model Penal Code and Commentaries* (Official Draft and Revised Comments) 1985 part I, vol 2, at 346.
[363] *R v Wilcox* [1982] 1 NZLR 191 at 193.

beyond reasonable doubt that he did not voluntarily abandon the crime. If Wilcox was being truthful, then allowing the defence would be desirable, because it demonstrated that his intent was not firm.[364]

D. Conclusion

When considering possible solutions to the current difficulties in the area of attempt law, the Model Penal Code is the best option. It retains a degree of separation between the actus reus and mens rea, with the actus reus of a substantial step and the mens rea of purpose, which avoids the risks set out above.[365] It recognises the need to "read" the two elements together, by looking for a substantial step strongly corroborative of the actor's criminal purpose. It is also recommended by a number of commentators and generally well supported, as opposed to the novel idea of an extended offence of "preparation." The approach could be implemented with a small number of modifications, such as making the search for firmness of purpose even clearer, as in the Colorado code, having a more expansive range of examples, and making the question one for the judge rather than the jury. These are issues to be worked out by policy makers when drafting the legislation.

The adoption of the approach would be a significant advance from the state of affairs following *Harpur*; clarity would be achieved, the rationale of intervention upheld more easily with the provision of examples, and a more theoretically sound basis for attempt law realised.

[364] See chapter one.
[365] See chapter three.

VI. Conclusion

Harpur signifies a new chapter in the evolution of attempt law in New Zealand. The direction this chapter takes is not desirable. Although it is apparent that the accused should have been punished in *Harpur*, the way the Court imposed liability will have drastic effects on the rest of attempt law. Not only is the Court's reasoning theoretically unsound as it runs the risk of punishing mere preparation, practically the case will, and already has, resulted in too much uncertainty in this area. The Court of Appeal has failed in providing guidance, and the rule of law is not currently upheld in attempt. Intervention is required.

This dissertation has shown that no test or formulation has succeeded yet, and this is partly because the tests confuse the theories of objectivism and subjectivism. In order to reach consistent results, courts need to know why they are punishing an actor when they impose liability. Thus a consideration of the rationale for punishing attempts is required, and I suggest that this rationale should be based on subjectivism, with liability arising because of the culpability of the actor. Not only is this the approach taken by the majority of criminal law, but it also seems to be what the Court of Appeal was hinting at in *Harpur*.

The best approach would be to adopt a new statutory provision based on art 5.01 of the Model Penal Code. This would solve the current problems arising in part from *Harpur*. The examples provided in the Model Penal Code of conduct amounting to attempt would greatly improve clarity in the area, and be a valuable aid to law enforcers. Police would know when it is appropriate to intervene, with the result that prevention and intervention - the key rationale for punishing attempt - will be upheld. The rule of law will be enforced, as citizens will be able to identify the point at which conduct becomes criminal.

This approach embodies subjectivism, and will push the threshold for liability back along the continuum of acts as a result. Criticism based on the risks of punishing mere preparation will not arise, as the defence of renunciation can be made available. This will allow an actor the chance to withdraw from the offence up until the last acts of

the attempt, imposing liability only when the actor is firmly intending and strongly committed to the full offence. Objectivist concerns are catered for, as when the actor has interacted with the victim and caused fear or apprehension, or proceeded to the last acts (where it would be more difficult for the police to intervene), the defence would not be available.

In summary, the area of attempt law is so confused that it is desirable to turn a fresh page in its history. This can be done by discarding traditional notions of proximity, and instead regarding the problem through a new lens, by asking the question - was the actor was firmly committed to the offence?

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