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Casenotes: Criminal Law — Maryland Adopts the Model Penal Code's Substantial Step Test for Criminal Attempt. Young v. State, 303 Md. 298, 493 A.2d 352 (1985)

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CRIMINAL LAW — MARYLAND ADOPTS THE MODEL PENAL CODE'S SUBSTANTIAL STEP TEST FOR CRIMINAL ATTEMPT. *Young v. State*, 303 Md. 298, 493 A.2d 352 (1985).

After several banks in the same vicinity were robbed, the police set up a surveillance of the banks in that area.[1] The police observed the defendant examine the premises of several banks, then park his car at the rear of one of the banks. The defendant got out of his car wearing an eyepatch, sunglasses, a knit cap, white surgical gloves, and a turned up collar. When he approached the bank, the defendant had his right hand in his jacket pocket, which contained a revolver, and his left hand held in front of his face.[2] He attempted to open the bank door, but discovered it was locked. The defendant returned to his car and hastily departed from the premises, but was apprehended shortly thereafter. A jury sitting in the Circuit Court of Maryland for Prince George's County convicted the defendant of attempted armed robbery.[3] The Court of Special Appeals of Maryland rejected the defendant's contention that the evidence was insufficient to sustain the verdict and affirmed the conviction.[4] On certiorari, the Court of Appeals of Maryland adopted the Model Penal Code's "substantial step" test for criminal attempts to determine whether the defendant's conduct constituted attempted armed robbery.[5] A unanimous court held that the defendant's actions satisfied the substantial step test and affirmed the conviction.[6]

Defining criminal attempt has been called a "task more intricate and difficult of comprehension than any other branch of criminal law."[7] Although nonexistent at early common law, the doctrine of criminal attempt evolved from the English law of treason[8] and the Court of Star Chamber.[9] Criminal attempt embodies conduct that is designed, but fails

1. Young v. State, 303 Md. 298, 305, 493 A.2d 352, 355 (1985). The Special Operations Division of the Prince George's County Police Department had set up the surveillance.
2. *Id.* at 306, 493 A.2d at 356.
3. *Id.* at 304, 493 A.2d at 355. The defendant also was convicted for transporting a handgun. He was sentenced to 20 years on the attempt conviction and a consecutive three years on the handgun conviction. *Id.*
4. Young v. State, No. 84-1429, slip. op. (Md. Ct. Spec. App. Aug. 14, 1984), *aff'd*, 303 Md. 298, 493 A.2d 352 (1985) (per curiam).
5. *Young*, 303 Md. at 311, 493 A.2d at 358. The court adopted the State of Maryland Commission on Criminal Law Proposed Criminal Code § 110.00 (1972) which followed the Model Penal Code § 5.01 (Proposed Official Draft 1962 & Supp. 1985), the originator of the substantial step test. *Id.* at 311-12, 493 A.2d at 359.
6. *Id.* at 311, 493 A.2d at 358.
7. Hicks v. Commonwealth, 86 Va. 222, 223, 9 S.E. 1024, 1025 (1889).
8. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 563-65 (2d ed. 1960). Early English statutes provided that it was treason to wish, will, desire by words or writing, or attempt harm to the King or his family. *Id.*
9. *Id.* at 565. The Court of Star Chamber was formed to correct the shortcomings of the common law courts and deal with many cases that today would be considered criminal attempts. *See* W. LAFAVE & A. SCOTT JR., CRIMINAL LAW 496 (2d ed. 1986) [hereinafter LAFAVE & SCOTT].

to result in the completion of a substantive offense.[10] Under common law,[11] still followed by a minority of jurisdictions,[12] a criminal attempt conviction requires proof of three elements: (1) the intent to do a criminal act, (2) an overt act in furtherance of that intent, and (3) the failure of that overt act to result in the completion of a substantive offense.[13] Accordingly, if there is reasonable doubt concerning whether a crime was completely committed, the defendant is not guilty of either a substantive offense or a criminal attempt.[14] Thus, under the minority view, the accused can be too guilty to be convicted of a criminal attempt.[15]

Under the majority view the overt act need not fail to result in the completion of a substantive offense.[16] Nevertheless, the defendant must have the intent to do a criminal act[17] and act in furtherance of that intent.[18] Traditionally, the intent element is satisfied when the underlying substantive crime includes specific intent as an element and the accused possesses that intent;[19] proof that the accused possesses a general intent to engage in criminal activity is insufficient.[20] To determine whether the

10. For the history and rationale of attempt liability, see LAFAVE & SCOTT, *supra* note 9, at 495-500; J. HALL, *supra* note 8, at 558-74.
11. *See* Note, *Supreme Court of Rhode Island Adopts Model Penal Code Definition of Criminal Attempt*, 17 Suffolk U.L. Rev. 339, 340-41 (1983) [hereinafter Note, *Supreme Court of Rhode Island*]; *see also* United States v. Stallworth, 543 F.2d 1038, 1040 (2d Cir. 1976); United States v. American Airlines, Inc., 570 F. Supp. 654, 660 (N.D. Tex.), *rev'd*, 743 F.2d 1114, *cert. dismissed*, 106 S. Ct. 420 (1983).
12. *See* Lightfoot v. State, 278 Md. 231, 233-34, 360 A.2d 426, 427-28 (1976); *see also* Moffet v. State, 96 Nev. 822, 824, 618 P.2d 1223, 1224 (1980); State v. Jones, 227 N.C. 402, 405, 42 S.E.2d 465, 467 (1944); Poteat v. State, 672 P.2d 45, 47 (Okla. Crim. App. 1983).
13. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 612-17 (3d ed. 1982). Because attempt at common law was a misdemeanor, the assumption that the failure of the crime was required may have been derived from the old common law rule of merger, whereby if the act resulted in both a felony (completed crime) and a misdemeanor (attempted crime), the misdemeanor merged into the felony. *Id.* at 614. *See also* Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L. Rev. 319, 320-25 (1954-1955) (discussing the impact on attempt liability caused by the failure to consummate the crime).
14. United States v. York, 578 F.2d 1036, 1039 (5th Cir.), *cert. denied*, 439 U.S. 1005 (1978).
15. United States v. Fleming, 215 A.2d 839, 840-41 (D.C. 1966) (the defendant could go free not because he was innocent but because he was too guilty).
16. Lightfoot v. State, 278 Md. 231, 233-34, 360 A.2d 426, 427-28 (1976).
17. *E.g.*, United States v. Rivera-Sola, 713 F.2d 866, 869 (1st Cir. 1983); State v. McElroy, 128 Ariz. 315, 317, 625 P.2d 904, 906 (1981); People v. Patskan, 387 Mich. 701, 714, 199 N.W.2d 458, 463 (1972).
18. *E.g.*, Lemke v. United States, 211 F.2d 73, 75 (9th Cir.), *cert. denied*, 347 U.S. 1013 (1954); People v. Elmore, 50 Ill. 2d 10, 12, 276 N.E.2d 325, 326 (1971); State v. Moretti, 52 N.J. 182, 187, 244 A.2d 499, 502, *cert. denied*, 343 U.S. 952 (1968).
19. *E.g.*, People v. Weeks, 86 Ill. App. 2d 480, 485, 230 N.E.2d 12, 14 (1967); Scott v. Scott, 274 Ind. 687, 689, 413 N.E.2d 902, 904 (1980); People v. Brown, 21 A.D.2d 738, 739, 249 N.Y.S.2d 922, 923 (1964).
20. The defendant cannot be convicted of attempt if the underlying substantive offense does not include specific intent as an element. *See, e.g.*, State v. Almeda, 189 Conn. 303, 309, 455 A.2d 1326, 1329 (1983) (involuntary manslaughter); Rhode v. State, 181 Ind. App. 265, 268-69, 391 N.E.2d 666, 669 (1979) (reckless homicide); State v.

defendant's conduct is in furtherance of that intent, the trier of fact must engage in a more difficult analysis.[21] Courts have employed several different tests to aid the trier of fact in determining whether the defendant's conduct is in furtherance of a specific intent to commit a substantive crime: (1) the "proximity" test, (2) the "equivocality" test, and (3) the "probable desistence" test.[22]

These tests, however, are inadequate because they either fail to focus on the dangerousness of the defendant or provide insufficient guidelines to determine attempt liability. For example, under the proximity test the conduct must be proximate or directly tending toward the completion of the crime.[23] The more proximate the act is to the completed crime, the more likely it is in furtherance of that crime.[24] The test is criticized for focusing on dangerous conduct rather than identifying dangerous individuals.[25]

Grant, 418 A.2d 154, 156-57 (Me. 1980) (fourth or fifth degree homicide). *Contra* Model Penal Code § 5.01(1)(b) comments at 305 (Proposed Official Draft 1962 & Supp. 1985); Haw. Rev. Stat. § 705-500(2) (1976); Ark. Stat. Ann. § 41-701 (1977); Neb. Rev. Stat. § 28-201 (1979).

21. *See, e.g.*, United States v. Manley, 632 F.2d 978, 988 (2d Cir. 1980) (determination is so dependent on the particular factual context of each case that there can be no litmus test to guide the courts), *cert. denied*, 449 U.S. 1112 (1981); United States v. Busic, 549 F.2d 252, 257 n.9 (2d Cir. 1977) (judicial inquiry into whether defendant is chargeable with attempt is necessarily predictive); United States v. Noreikis, 481 F.2d 1173, 1181 (7th Cir.) (distinction between preparation and attempt is incapable of being formulated into a hard and fast rule), *vacated*, 415 U.S. 904, *cert. denied*, 415 U.S. 904 (1973).
22. *See* Model Penal Code § 5.01 comments at 321-29 (Proposed Official Draft 1962 & Supp. 1985). *See generally* LAFAVE & SCOTT, *supra* note 9, at 503-09 (discussing various tests used to evaluate the defendant's conduct); J. HALL, *supra* note 8, at 579-86 (outlining competing theories); Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation & Conspiracy*, 61 COLUM. L. REV. 571, 586-92 (1961) (discussing the general distinction between preparation and attempt) [hereinafter Wechsler].
23. *See* Model Penal Code § 5.01 comments at 321-23 (Proposed Official Draft 1962 & Supp. 1985); Wechsler, *supra* note 21, at 586-87.
24. Courts have applied several versions of this test. One English court defined proximity in terms of the "last proximate act" before the completion of the intended crime. Regina v. Eagleton, 6 Cox Crim. Cas. 559, 571 (Crim. App. 1885); *see also* Wechsler, *supra* note 21, at 586 n.88. Later English cases rejected this view. Regina v. Roberts, 7 Cox Crim. Cas. 39 (Crim. App. 1885). American courts have never recognized the "last proximate act" as a viable test. *See, e.g.*, Lett v. State, 150 Ga. App. 132, 133, 257 S.E.2d 37, 38 (1979); People v. White, 84 Ill. App. 3d 1044, 1047, 406 N.E.2d 7, 9 (1980); State v. Olds, 603 S.W.2d 501, 508 (Mo. 1980). American courts, however, have applied a "physical proximity" test. *See, e.g.*, Giles v. United States, 157 F.2d 588, 590 (9th Cir. 1946), *cert. denied*, 331 U.S. 813 (1947); Gilley v. Commonwealth, 280 Ky. 306, 316, 133 S.W.2d 67, 73 (1939); State v. Stewart, 537 S.W.2d 579, 582 (Mo. 1976). Several courts have found liability when the defendant has achieved a "dangerous proximity to success." *See, e.g.*, People v. Paluch, 78 Ill. App. 2d 356, 359, 222 N.E.2d 508, 510 (1966); People v. Bracey, 41 N.Y.2d 296, 300, 360 N.E.2d 1094, 1097 (1977); People v. Leary, 64 A.D.2d 825, 825, 407 N.Y.S.2d 313, 314 (1978).
25. *See* United States v. Jackson, 560 F.2d 112, 119 (2d Cir.), *cert. denied*, 434 U.S. 941 (1977); LAFAVE & SCOTT, *supra* note 9, at 504-06.

Under the equivocality test[26] the conduct unequivocally must manifest an intent to commit a crime.[27] The test deemphasizes the defendant's subjective state of mind by focusing on the dangerousness of the conduct,[28] but is criticized for assuming a positive relationship between the defendant's state of mind and the external appearance of his conduct.[29]

Under the probable desistence test the conduct must advance beyond a point where the defendant would voluntarily, without interruption from an outside source, cease efforts to complete the intended crime.[30] The test is intended to focus on the dangerousness of the defendant by emphazing the defendant's personality,[31] but is criticized because application results in an objective rather than subjective review of the defendant's conduct.[32] Other tests have been proposed, but for similar reasons also have proven inadequate.[33]

No bright line test has emerged to determine when the defendant's conduct warrants liability for criminal attempt. Nevertheless, the trend among jurisdictions is toward adopting the substantial step test espoused by the American Law Institute's Model Penal Code (Code).[34] Under the substantial step test a defendant's conduct must represent a substantial step toward the commission of the intended crime and be strongly corroborated by a wrongful purpose.[35]

By focusing on the dangerousness of the defendant rather than the dangerousness of the defendant's conduct, the substantial step test overcomes the shortcomings of the prior tests.[36] The substantial step test

26. The equivocality test is also referred to as the "res ipsa loquitur" test. *See* Model Penal Code § 5.01 comments at 326 (Proposed Official Draft 1962 & Supp. 1985).
27. *Id.* comments at 326-29.
28. *E.g.*, Fryer v. Nix, 775 F.2d 979, 993 (8th Cir. 1985) (act must be unequivocal in nature); State v. Verive, 128 Ariz. 570, 581, 627 P.2d 721, 732 (1981) (crime of attempt focuses directly upon unequivocal steps taken toward consummating the intended crime); State v. Fender, 358 N.W.2d 248, 252 (S.D. 1984) (defendant's intent is irrelevant because intent may be shown by acts); Hamiel v. State, 92 Wis. 2d 656, 667, 285 N.W.2d 639, 645 (1979) (taking into consideration all facts and circumstances, a defendant's conduct constitutes criminal attempt if there is no other reasonable conclusion but that he intended to attain a result which would constitute a crime).
29. *See* United States v. Jackson, 560 F.2d 112, 119 (2d Cir.), *cert. denied*, 434 U.S. 941 (1971). J. HALL, *supra* note 8, at 580-83; LAFAVE & SCOTT, *supra* note 10, at 508.
30. *See, e.g.*, Mims v. United States, 375 F.2d 135, 148 n.40 (5th Cir. 1967); People v. Buffum, 40 Cal. 2d 709, 718, 256 P.2d 317, 321 (1953); State v. Lewis, 69 Wash. 2d 120, 124-25, 417 P.2d 618, 621 (1966).
31. *See* Model Penal Code § 5.01 comments at 325 (Proposed Official Draft 1962 & Supp. 1985).
32. *See United States v. Jackson*, 560 F.2d at 119; LAFAVE & SCOTT, *supra* note 10, at 506-07.
33. *See* Model Penal Code § 5.01 comments at 323-26 (Proposed Official Draft 1962 & Supp. 1985) (identifying the "indispensible element" and "abnormal step" tests).
34. Model Penal Code § 5.01 (Proposed Official Draft 1962 & Supp. 1985).
35. *Id*; *see also* Wechsler, *supra* note 22, at 593.
36. *See* Model Penal Code § 5.01 comments at 298 (Proposed Official Draft 1962 & Supp. 1985); *see also* Haw. Rev. Stat. § 705-500 comments at 286 (1976).

identifies a person who has demonstrated a firm disposition to commit a substantive crime.[37] This is achieved by emphasizing what the defendant has done rather than what conduct is necessary to consummate the substantive offense.[38] Consequently, the substantial step test permits a finding of attempt liability based on steps already performed, even though the defendant may be far from completing the substantive crime.[39]

The Code's approach to affirmative defenses for criminal attempt is also consistent with its focus on the defendant's dangerousness. First, the Code recognizes the abandonment defense.[40] Abandonment is an affirmative defense whereby the defendant manifests a complete and voluntary renunciation of his criminal purpose.[41] This defense is based upon the rationale that renunciation of the criminal purpose tends to negate an actor's dangerousness,[42] and the ability to abandon an attempt without liability provides an actor with the motivation to desist from his criminal effort.[43]

Second, the Code eliminates impossibility as an affirmative defense.[44] The impossibility defense arises when the defendant has done everything in his power to accomplish the result desired, but because of external circumstances, he fails to commit a substantive crime.[45] Two variations of the defense exist — factual and legal impossibility. Factual impossibility exists when the substantive offense cannot be completed because of some physical impossibility unknown to the accused at the time of his misdeed.[46] Legal impossibility exists when the substantive offense cannot be completed because of the absence of an essential element of the substantive crime.[47] By providing that the defendant's conduct should

37. Model Penal Code § 5.01 comments at 298 (Proposed Official Draft 1962 & Supp. 1985).
38. *See, e.g., United States v. Jackson*, 560 F.2d at 119; State v. Green, 194 Conn. 258, 277, 480 A.2d 526, 537, *cert. denied*, 469 U.S. 1191 (1984); Howell v. State, 157 Ga. App. 451, 456, 278 S.E.2d 43, 47 (1981).
39. *See United States v. Jackson*, 560 F.2d at 119.
40. *See* Model Penal Code § 5.01(4) (Proposed Official Draft 1962 & Supp. 1985).
41. *Id.* The abandonment must originate with the actor and must not be influenced by external circumstances that increase the probability of detection or make it more difficult to complete the crime. Also, the abandonment must be permanent rather than temporary or contingent. *Id.* comments at 358. If, however, the actor has put in motion forces that he is powerless to stop, the attempt has been completed and cannot be abandoned. *Id.* comments at 360.
42. *Id.* comments at 359.
43. *Id.*
44. *See* Model Penal Code § 5.01(1)(a)-(c) comments at 307-21 (Proposed Official Draft 1962 & Supp. 1985).
45. *See generally* LAFAVE & SCOTT, *supra* note 9, at 438-40, 442-45 (discussing the defense of impossibility); Wechsler, *supra* note 22, at 578-85.
46. If the defendant was not mistaken about an issue of fact, he would have known that his attempt had no possibility of success. *See In re* Appeal No. 568, Term 1974, 25 Md. App. 218, 333 A.2d 649, *cert. denied*, 275 Md. 751 (1975).
47. There are two types of "legal impossibility" defenses: (1) "true legal impossibility" arises where the completed crime could not have been committed even if the circumstances were as the accused supposed because the legislature had not elected to punish the supposed conduct, *see* Wilson v. State, 85 Miss. 687, 38 So. 46 (1905);

be measured according to the circumstances as he believed them to be,[48] the Code's rejection of the impossibility defense reflects the shift in focus toward the dangerousness of the defendant.[49]

The substantial step test also overcomes the shortcomings of the prior tests by establishing practical guidelines. To accomplish this, the Code enumerates seven examples of conduct that define a relatively firm commitment to complete a crime: (1) lying in wait, searching for or following the contemplated victim of the crime, (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for the commission of the crime, (3) reconnoitering the place contemplated for its commission, (4) unlawful entry of a structure, vehicle, or enclosure in which it is contemplated that the crime will be committed, (5) possession of materials to be employed in the commission of the crime which are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances, (6) possession, collection, or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection, or fabrication serves no lawful purpose of the actor under the circumstances, and (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.[50]

Although other jurisdictions have enacted a broad attempt statute,[51] Maryland's criminal code provisions either define a particular attempt as a statutory crime or proscribe punishment for particular attempts.[52] Consequently, Maryland courts have relied on developing common law to identify the scope of criminal attempt.[53] In *Wiley v. State*,[54] the Court of Appeals of Maryland followed early common law and the minority of

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(2) "mistake of fact relating to a legal relationship" arises where the defendant understands the law, but mistakenly believes that the facts bring his situation within the law, *see* People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906).

48. *See* Model Penal Code § 5.01 (1)(a)-(c) (Proposed Official Draft 1962 & Supp. 1985).

49. *Id.* comments at 315-17; *see also* Haw. Rev. Stat. § 705-500 comments at 286 (1976).

50. *See* Model Penal Code § 5.01(2) comments at 332-47 (Proposed Official Draft 1962 & Supp. 1985).

51. Other states have enacted broad attempt statutes defining the substantive crime of attempt. *E.g.*, Del. Code Ann. tit. 11, § 531 (1979); Me. Rev. Stat. Ann. tit. 17-A, § 152 (1983); N.J. Stat. Ann. § 2C:5-1 (West 1982).

52. *See* Young v. State, 303 Md. 298, 301 n.1, 493 A.2d 352, 353 n.1 (1985).

53. In one of the earliest reported criminal attempt cases, the Court of Appeals of Maryland, without commenting on the elements of the crime, stated that one may "obviously" be innocent of a criminal act, but guilty of an attempt to commit the act. Whitley v. Warden of Maryland House of Corrections, 209 Md. 629, 630, 120 A.2d 200, 200, *appeal denied and cert. dismissed*, 351 U.S. 929 (1956).

54. 237 Md. 560, 561, 207 A.2d 478, 478 (1965) (the defendant was convicted of attempting to break into a real estate office with the intent to steal goods and money therein and of being a rogue and a vagabond); *see also* Franczkowski v. State, 239 Md. 126, 210 A.2d 504 (1965) (following the elements for criminal attempt stated in *Wiley*).

jurisdictions by defining the elements of criminal attempt as (1) an intent to commit a crime, (2) conduct in furtherance of that intent, and (3) a failure to complete the crime.[55] Failure to complete the underlying crime remained an element of criminal attempt for more than a decade[56] until the court of appeals decided *Lightfoot v. State*.[57] In *Lightfoot*, the defendant was convicted of attempted armed robbery with a deadly weapon, despite evidence indicating that the robbery was completed.[58] The court joined the majority of jurisdictions[59] by holding that the failure to consummate the attempt was not an indispensible element of criminal attempt.[60]

Notwithstanding, Maryland's approach to criminal attempt remained inadequate because it failed to focus on the dangerousness of the defendant. To determine whether the defendant's conduct was in furtherance of an intent to complete a substantive offense, early Maryland case law implicitly applied the proximity test.[61] These cases required that the defendant have the apparent ability to commit the intended crime[62] and one case required that the defendant take some act toward the completion of the intended crime.[63]

In 1972, the Maryland Commission on Criminal Law proposed a comprehensive criminal code that included a provision adopting the substantial step test,[64] but the proposal was never enacted. Consequently, the focus taken by Maryland courts in determining whether the defendant's conduct warranted liability for criminal attempt remained inconsis-

55. Wiley v. State, 237 Md. 560, 561, 207 A.2d 478, 478 (1965).
56. *See* Maloney v. State, 17 Md. App. 609, 304 A.2d 260 (1973); McDuffie v. State, 12 Md. App. 264, 278 A.2d 307 (1971); Wiggins v. State, 8 Md. App. 598, 261 A.2d 503 (1970); Reed v. State, 7 Md. App. 200, 253 A.2d 774 (1969); Price v. State, 3 Md. App. 155, 238 A.2d 275 (1968); Tender v. State, 2 Md. App. 692, 237 A.2d 65 (1968); Boone v. State, 2 Md. App. 80, 233 A.2d 476 (1967). Although quoted with approval, *Wiley* was not strictly adhered to by courts deciding cases involving completed crimes. *E.g.*, McDuffie v. State, 12 Md. App. 264, 278 A.2d 307 (1971). In *McDuffie*, the defendant was convicted of both robbery and attempted robbery. *Id.* at 266, 278 A.2d at 307. Under *Wiley*, the attempted robbery conviction was erroneous because the defendant completed the crime as evidenced by the robbery conviction. The appellate court reversed the guilty verdict on the attempt charge and left the consummated offense verdict unaltered. *Id.* at 271, 278 A.2d at 310; *see also* Tender v. State, 2 Md. App. 692, 237 A.2d 65 (1965); Price v. State, 3 Md. App. 155, 238 A.2d 275 (1968).
57. 278 Md. 231, 360 A.2d 426 (1976). On certiorari, the court of appeals limited its review to whether failure to complete the crime was an element of criminal attempt. *Id.* at 233, 360 A.2d at 427.
58. Lightfoot v. State, 278 Md. 231, 233, 360 A.2d 426, 427 (1976).
59. *See supra* text accompanying note 16.
60. *Lightfoot*, 278 Md. at 237-38, 360 A.2d at 430.
61. *See* cases cited *infra* notes 62-63.
62. *See* Maloney v. State, 17 Md. App. 609, 304 A.2d 260 (1973); Wiggins v. State, 8 Md. App. 598, 261 A.2d 503 (1970); Farley v. State, 3 Md. App. 584, 240 A.2d 296 (1968).
63. *See* Reed v. State, 7 Md. App. 200, 253 A.2d 774 (1969).
64. *See* State of Maryland Commission on Criminal Law § 110.00 (Proposed Criminal Code 1972).

tent with that taken by the Code. Maryland also did not allow abandonment as an affirmative defense to criminal attempt.[65] The courts reasoned that once the overt act is committed by the defendant, it is too late to renounce what already has become a punishable offense.[66] Furthermore, Maryland allowed legal impossibility as an affirmative defense where the impossibility arises by operation of the law.[67]

Contrary to the Code, Maryland's approach to criminal attempt also provided insufficient guidelines to determine attempt liability. Although several earlier decisions defined the conduct in terms of going beyond mere preparation, they provided little assistance to the trier of fact in determining whether the defendant completed the attempt.[68] Hence, the application of the law to the facts remained a difficult task.

In *Young v. State*,[69] the Court of Appeals of Maryland adopted the substantial step test to determine whether a defendant's conduct constituted an overt act which went beyond mere preparation in furtherence of the commission of the intended crime.[70] The court characterized prior decisions that placed great weight on whether there was evidence of preparation as merely restating the problem of determining whether an attempt was consummated.[71] The court perceived that stopping, deterring, and reforming a person who has attempted to commit a crime is as important as the concern for the person who already has completed the offense.[72]

The court determined that the initiation for police action required a balancing of society's interests with those of the defendant.[73] After balancing the opposing interests, the court favored the substantial step test over the proximity test, the probable desistence test, and the equivocality test because the substantial step test enables police to intervene at an earlier stage[74] and is easier to apply to the numerous factual situations that may occur.[75]

After applying the substantial step test, the court concluded that the evidence supported the finding that the defendant had committed the

65. *See* Wiley v. State, 237 Md. 659, 207 A.2d 478 (1965).
66. *See* Young v. State, 303 Md. 298, 307, 493 A.2d 352, 357 (1985).
67. *See In re* Appeal No. 568, Term 1974, 25 Md. App. 218, 333 A.2d 649, *cert. denied*, 275 Md. 751 (1975); Waters v. State, 2 Md. App. 216, 234 A.2d 147 (1967), *cert. denied*, 259 Md. 737 (1970).
68. *See* Frye v. State, 62 Md. App. 310, 489 A.2d 71 (1985); Gray v. State, 43 Md. App. 238, 403 A.2d 853 (1979).
69. 303 Md. 298, 493 A.2d 352 (1985).
70. Young v. State, 303 Md. 298, 311, 493 A.2d 352, 358-59 (1985).
71. *Id.* at 303, 493 A.2d at 354. The court acknowledged that, although the offense of criminal attempt is deeply inbedded as part of the criminal law of Maryland, only a limited number of rulings had construed the offense. *Id.* at 301-04, 493 A.2d at 353-55.
72. *Id.* at 300-01, 493 A.2d at 353 (citing Stuart, *The Actus Reus in Attempts*, CRIM. L. REV. 505, 511 (1970)).
73. *Id.* at 308, 493 A.2d at 357.
74. *Id.* at 309, 493 A.2d at 357.
75. *Id.* at 311, 493 A.2d at 358-59.

crime of attempted armed robbery.[76] The court ruled that the defendant's actions were not typical of law-abiding citizens and his unsuccessful attempt to open the bank door constituted a substantial step toward the commission of the intended crime.[77]

Although focusing primarily on the overt act, the court summarily addressed the defenses of abandonment and impossibility.[78] The court reaffirmed Maryland's view that the abandonment defense is unavailable once an overt act is performed[79] and noted that legal and not factual impossibility is permitted in Maryland.[80]

Young demonstrates a willingness by the Maryland judiciary to act where the legislature has refused to act. Although only one other jurisdiction has adopted the substantial step test by judicial fiat,[81] Maryland joins the growing number of jurisdicitons that follow the Code's guidelines for determining liability for criminal attempt.[82]

The adoption of the substantial step test will have a positive effect on the law of criminal attempt in Maryland. Assuming that a defendant's criminal conduct continues from preparation to completion, the guidelines set forth in the substantial step test permit the police to intervene at an earlier stage[83] than Maryland's prior test for criminal attempt, which resembled the proximity test.[84] Society is better protected because criminals attempting a substantive crime will be arrested earlier in the attempt. Although broadening the scope of attempt liability,[85] the substantial step test may not result in a significant increase in the number of attempt convictions because the test merely identifies at an earlier point individuals who are already predisposed to committing a criminal act.[86]

The substantial step test also provides the trier of fact with practical guidelines to identify criminal attempt conduct. Under prior case law, the trier of fact was left with little assistance in determining when the

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76. *Id.* at 314, 493 A.2d at 360.
77. *Id.*
78. *Id.* at 304, 493 A.2d at 355. The *Young* court stated that the court of appeals has not approved or disapproved of the views expressed by the court of special appeals. *Id.*
79. *Id.* at 307, 493 A.2d at 356-57.
80. *Id.* at 308 n.6, 493 A.2d at 357 n.6.
81. *See* State v. Latraverse, 443 A.2d 890 (R.I. 1982); *see also* Note, *Supreme Court of Rhode Island*, *supra* note 11.
82. *See Young*, 303 Md. at 315-17, 493 A.2d at 360-61.
83. *Id.* at 314, 493 A.2d at 360; *see also* Note, *Supreme Court of Rhode Island*, *supra* note 11, at 346-47. *Compare* United States v. Busic, 549 F.2d 252, 257 (2d Cir. 1977) (the determination of whether a person is chargeable with criminal attempt will focus on the point where the conduct of the accused has progressed sufficiently to minimize the risk of an unfair conviction) *with* People v. Terrall, 99 Ill. 2d 427, 435, 459 N.E.2d 1337, 1341 (1984) (it should not be necessary to subject the victim to a face to face confrontation with a lethal weapon in order to make a positive finding of the essential element of a substantial step).
84. *See supra* text accompanying note 61.
85. *See* United States v. Jackson, 560 F.2d 112, 119 (2d Cir.), *cert. denied*, 434 U.S. 941 (1971).
86. *Id.*

defendant completed the attempt. By replacing "mere preparation"[87] with seven examples of conduct that define a relatively firm commitment to complete a crime,[88] the substantial step test permits the trier of fact to apply objectively the law to a given situation. The absence of such clear examples of attempt historically has plagued Maryland courts.[89]

Nevertheless, the *Young* court's failure to allow abandonment and reject legal impossibility as defenses to criminal attempt reveals an inconsistent focus in the area of criminal attempt. By rejecting the minority tests and adopting the substantial step test, the court has shifted the focus in determining criminal attempt liability from the defendant's proximity to the completed crime to the defendant's dangerousness. Conversely, without the abandonment defense an actor, who has completed an overt act, is deprived of an opportunity to avoid criminal liability even though he subsequently may desist from further criminal conduct. Allowing legal impossibility as a defense is an additional inconsistency because it permits an actor who has demonstrated a propensity to commit a dangerous act to avoid criminal liability. For a consistent and logical focus on the defendant's dangerousness in the area of criminal attempt, either the Court of Appeals of Maryland or the Maryland legislature should follow the Code by permitting abandonment and denying legal impossibility as defenses to criminal attempt.

In a demonstration of judicial activisim, the Court of Appeals of Maryland has improved the law of criminal attempt by adopting the substantial step test. By permitting the police to stop criminal activity at an earlier stage, the substantial step test will provide better protection for society without jeopardizing the rights of individuals. In addition, the law of attempt will be applied more consistently to various factual situations because the substantial step test provides more objective criteria than earlier Maryland case law. Nevertheless, the *Young* court also should have permitted abandonment and rejected legal impossibility as defenses to criminal attempt. For the law of criminal attempt in Maryland to be consistent, the focus in determining criminal attempt liability should be on the dangerousness of the defendant.

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87. *See Young*, 303 Md. at 308, 493 A.2d at 357.
88. *See supra* text accompanying note 50.
89. *See Young*, 303 Md. at 303, 493 A.2d at 354.