Between Model Penal Code and Common Law Criminal Liability in Attempted Crimes in United States of America

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I. Introduction

A. An important issue that need to be solved

Criminal law imposes punishment for those who engage in prohibited conducts by law. In general, the conduct is mainly done to achieve desirable goal, result or outcome. Not always the result is possible for several factors not related to the actor desire and actions. This is why the doctrine of attempted criminal liability has been created, as a powerful tool to protect society from dangerous act and dangerous actors. Professor Chiesa in his textbook of Substantive Criminal Law, describes these individuals as persons who try but fail in achieving the result[2].

- *Pursuant to this general doctrine, criminal liability attaches whenever someone tries to commit an offense but fails to successfully consummate it.*

Professor Hasnas describe attempts similarly by asserting that[3]:

- *Attempts are, by definition, failures, and thus do not produce the harm of the completed crime. However, the attempts themselves have their own harmful effects on citizens' ability to lead peaceful and secure lives. Attempts to kill, injure, or steal or destroy property are extremely likely to provoke violent responses when the perpetrator is known, placing both the antagonists and innocent members of the community at risk.*

All criminal law systems in our modern and sophisticated society, have recognized that those individual who engage their mind and actions, but fail, should be punished for their conduct. It is not the aim of this paper to elaborate the different questions of how much punishment these individuals deserve, and if they deserve punishment equally to who actually has completed the offense. Anyway for the purposes of this paper it is important to acknowledge that attempts are criminalized in all legislations all over the world, and this is a basic conceptual argument that everyone, lawyer or non lawyer understands. Professor Fletcher in his book, Rethinking Criminal Law[4], argues that:

- *[T]he first is the problem of pinpointing the time in the unfolding of a criminal plan at which the actor becomes liable for an attempt. The execution of a criminal plan is thought typically to pass though several stages: conceiving the plan, acquiring the materials or the firearms necessary for the job, making one's way to the scene of the intended crime, deploying the materials, and then executing the crime. The problem is specifying the point in this process at which the actor passes the threshold of criminality.*

Professor Fletcher correctly points out that one of the most intricate problems regarding attempted crimes is the point in time and space when the acts Reus is determinative for leaving the mere preparation and being held liable for a crime. He calls this problem a "doctrinal issue in attempts"[5].

Historically in both civil law and common law countries the focus in attempted crimes was to punish the actors where the actions were close to the complete crime. Professor Chiesa argues[6]:

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[2] Luis E. Chiesa, *Substantive Criminal Law* 335 (Carolina Academic Press.eds., 1th ed. 2014).

[3] John Hasnas, *Attempt, Preparation, and Harm: The Case of the Jealous Ex-Husband*, 9 Ohio St. J. Crim. L. 761, 767 (2012) (discussing criminal attempts doctrine in general)

[4] George Fletcher, *Rethinking Criminal Law* 135-136 (Little, Brown and Company Boston/Toronto eds., 4th ed. 1978)

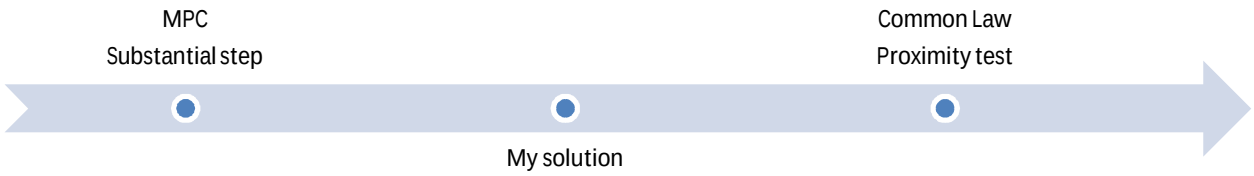
[5] *Id*

[Until the second half of the twentieth century, both common law and civil law jurisdictions distinguished unpunished acts of preparation from punishable acts of execution in very similar ways. There was generalized consensus in Anglo-American and European Continental literature and case law that attempts to commit offenses should only be punished if they come dangerously close to completion. Anglo-American courts and commentators suggested that the act must be "dangerously proximate" to completion or that the actor must engage in the "last act" prior to consummation of the offense. Similarly, continental scholars argued that only acts "immediately prior to engaging in conduct that satisfies the elements of an offense" or that "place the victim in danger" should be punished as attempts. Regardless of the specific standard invoked, however, attempts were typically punished only when the actor came very close to consummating the offense].

This trend shifted in a different way, creating substantial changes after the publication of the Model Penal Code in 1962. Professor Chiesa explains that "[d]uring the course of the twentieth century, common law countries began to focus more on the actor's subjective culpability and less on harm causation as a proxy for when punishment is warranted."[7] It is clear now that the today's reality tends to elaborate attempted crimes differently in civil law and common law countries, and this fact has a basic importance. It is the aim of the paper to modestly and indirectly try to shed light in the threshold of passing to criminality. Both common law and Model Penal Code approaches thresholds are fixed in remote timeline position from each other. It is appropriate to found a medium solid position for the threshold to criminality, which can solve problems of both previous ones. This is what I will try to explain in this article. The aim of paper is to find in the time line between no action and complete offense, a third theoretical category of actus reus/solution which will try to "solve", or at least diminish the problem of the two others.

B. Discussing about the actus reus in attempts in the current law.

- *MPC- substantial step, and*
- *Common law- proximity test.*



During the course of the paper I will try to describe why I find both solutions problematic in the fundament and why this is an issue that needs to be discussed by scholars and Courts. Criminal law faces with many questions, not all of them present a clear solution and the question above is one of them. The most important point in improving our criminal law is raising issues for debates, to find as many clear solutions as we can. Both approaches, Model Penal Code and Common, law present problems regarding the act that demonstrates that the actor can be held liable for a criminal conduct. As Professor R.A Duff points[8] out both supporters of the Common law doctrine and the MPC approach believe that either solution is widely acceptable because the line drawing is too narrow or too broad. This article will try to analyze both of them in a theoretical and practical prospective to clarify why a new proposal is needed. This issue presents not only an enrichment of the scholarly debate in the common law and civil law systems, but deals with everyday life in the practical aspect. This is basically a "when" question. When can the actor can be held liable for a criminal conduct, so that law can avoid to incarcerate innocent people and avoid letting out of prison dangerous one's, who deserve to be punished. More specifically, the "when" question can be asked for every singular actus reus from the non act to the final act required for the completion of the offense.

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[6] Luis. E Chiesa, *Comparative Criminal Law (in Markus Dubber & Tatjana Hörnle, Oxford Handbook of Criminal Law)* 21 (2015).
[7] Id
[8] R.A. Duff Criminal Attempts 57 (Oxford Monographs on Criminal Law and Justice eds., ed 1997)

Returning to Professor Fletcher's stages, many questions can be asked, when is the threshold passed, when the actor conceive the plan, when he acquire the materials or the firearms necessary for the job, when he makes his way to the scene of the intended crime, and when he deploys the materials etc. At the end this is also a question whether the threshold is crossed from a mere preparation and an actual attempted crime[9]. Which is the action that makes a person be held liable and what are the one that may not? Indirectly this article will pose a new time frame in the actus reus of the actor conduct to distinguish between his preparation in a crime and the beginning of the execution. It is also to be clarified that is beyond the aim of this article to focus specifically in the mens rea of attempts, besides the fact that both the subjective and objective element of attempted crimes cannot in anyway be discussed separately, this article will be focused more in the actus reus, the action that triggers liability in attempted crimes. Professor La Fave argues[10] that "no one can be held liable only because of his bad thoughts. In any case there must be an act and not any act will suffice liability."

The solution that I propose, tries to fit in a middle position between the two extreme approaches of substantial step proposed by the authors of the Model Penal Code, that is now-days used in more than half of the jurisdictions of United States, and the proximate act presented by the Common law approach. Both approaches tend to graphically fit[11] near the extremities of no action and complete offense, letting and enormous time between, when enumerated actions can be done. The most obvious problems are between policy considerations versus liberal legal systems theories, objectivist theories versus subjectivist theories in attempts, the renunciation of the offense etc. These issues will be discussed in the chapters below. My proposal relies in the fact that criminal liability should be imposed for what has been done but only when, what remains is foreseeable that would increase concrete danger and vicinity, to the completion of the offense.

- *"A significant act that warns with certainty the possible harm and the foresee-ability of further increasing acts in vicinity and danger to the completed crime".*

C. A short roadmap of the article

In the second chapter of this article, I will try to explain the proximate act test under common law. I will briefly discuss cases by including the traditional cases of the robbery of a bank and killing someone with a gun. The third chapter will take in examination the MPC[12] substantial step approach and the problems that emerge during the same cases that we took previously in consideration.

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[9]Charles E. Torcia *Wharton's Criminal Law* § 696 (15th ed.) He tries to enumerate specific act that may describe acts of preparation or act that constitute attempts. A defendant's act is merely one of preparation and hence not an attempt, when it consists of: looking for the intended victim; purchasing and loading a gun; loading a rifle; obtaining a weapon for use in committing the intended crime; watching the intended victim's house and procuring a rope to tie him in a contemplated robbery;"casing" a bank but making no move toward the bank; procuring a hack saw for use in jail breaking; taking a small girl into the woods and snatching a button from her clothing with intent to have sexual intercourse; inviting a young boy into an automobile with intent to commit indecencies; or making financial arrangements for the performance of an unlawful abortion. On the other hand, a defendant's act amounts to an attempt when it consists of: walking from his home carrying a bomb which he intends to put in a particular place; putting a bomb in a particular place and adjusting the time fuse; putting poison in a place where it will be consumed by other persons; putting rat poison into the drinking cup of the intended victim; standing on the third-story ledge of a city apartment building in the dead of night; breaking the exterior lights of a building in furtherance of an illegal entry into such building; reconnoitering a likely object and place of a theft; walking into a horse's stall carrying a poisoned potato intending to feed it to the horse; lying in wait for the intended victim; or making a passkey to permit entry into a warehouse for the purpose of larceny. The following is also illustrative of attempt liability: It is attempted adultery to disrobe partially; it is attempted rape to strike a woman with one's fist and take off her clothing, or to throw her to the ground and choke her; it is attempted bribery to ask a third person to bribe a particular witness where no communication was ever made to such witness; it is attempted pandering to exhibit a nude female in bed to men who were solicited to pay money to have sexual intercourse with the female; it is attempted larceny to dislodge a shirt stud which fell to the ground, or to shoot an animal with intent to steal it; it is attempted extortion to obtain money, where the threats did not induce fear; it is attempted burglary to break a window or door of a building; it is attempted robbery to strike the intended victim or to force him under the threat of a gun to reveal the location of certain property, or to reconnoiter a bank and then drive to it with loaded weapons and masks; or it is attempted murder to fire a gun at a person and miss or wound him, or to put poison in food although it was not eaten because of its bitter taste.

[10]Wayne R. LaFave, *Substantive Criminal Law*2 Subst. Crim. L. § 11.4 (2d ed.)

[11] See graphic illustrated in page 2

[12] Model Penal Code (Proposed Official Draft 1962).

Applying the same hypothetical to both approaches will clearly show the gap between them and demonstrate how far is their position conceptually speaking and how close to the extremities of non action and complete crime, both approaches are. The fourth chapter will bring attention shortly to a comparative prospective with a deeper glance in the Albanian and Italian actus reus criminal law liability in attempted crimes. I will pose the hypothetical question in the civil law jurisdictions to figure out if the continental view shows a clearer solution, or if their view struggles with almost the same traditional question about liability in attempted crimes, as the common law jurisdiction. Finally I will conclude with my solution for this issue, the pro and cons and a brief conclusion.

II. How is the actus reus common law approach.

Common law doctrines have been used by Courts for many years to impose liability in attempted crimes and it represents a very debatable issue among scholars. It has to be said that at common law, there is not a sole and independent test, but at the contrary the known tests are six, even though some of them are the mere similitude of each other, with sometimes just different focuses.

A. The Mandujano Court and the proximate act theory.

The Mandujano court[13]summarized all the tests present in the common law approach:

1. *The physical proximity doctrine- the overt act required for an attempt must be proximate to the completed crime, or directly tending toward the completion of the crime, or must amount to the commencement of the consummation.*
2. *The dangerous proximity doctrine- a test given impetus by Mr. Justice Holmes, the greater the gravity and the probability of the offense, and the nearer the act to the crime, the stronger is the case for calling the act an attempt.*
3. *The indispensable element test- a variation of the proximity tests which emphasizes any indispensable aspect of criminal endeavor over which the actor has not yet acquired control.*
4. *The probable distance test- the conduct constitutes an attempt if, in the ordinary a natural course of events, without interruption from an outside source, it will result in the crime intended.*
5. *The abnormal step approach- an attempt is a step toward crime which goes beyond the point where the normal citizen would think better of his conduct and desist.*
6. *The unequivocality test- an attempt is committed when the actor's conduct manifests the intent to commit a crime.*

All the tests described above constitute the common law approach on how the courts during the years[14] have decided criminal attempts. Due to the length of this paper I will not discuss the elements that distinguish the common law approaches with each other, and in all cases this has a secondary importance for the purpose of the paper. Anyway, I can assert that most of them are in my opinion too vague and subjective to be taken in consideration to criminalize certain conducts. Criminal law needs to avoid subjectivity to the maximum extent possible. For example who can decide that "what the normal citizen would decide better", or "what are the natural courses of events"? However, I believe the some of them deserve to be studied more in depth, to analyze theoretically and practically the benefits and the disadvantages. This attention will better clarify the real usefulness of the tests and maybe the reasons why some courts even today tend to criminalize conduct due to those approaches. This article will take into consideration the proximity doctrine. As I mentioned before, this test relies to an overt act which has to be proximate to the contemplated crime, or which is directed tending toward the completion of the crime, or must constitute the commencement of the consummation. This definition excerpted by the court in *Mandujano*[15] relies mostly on what the actor need to do to more to complete the crime. At this time many acts has been done already, but under this approach the actions to achieve the result should be near enough to the consummation of the offense.

[13]*United States v Mandujano*, 499 F.2D 370, 373 (5th Cir. 1974).

[14] Mostly before the MPC, but not only because there are some states that rely on this tests even today in criminal cases to distinguish between preparation and attempt. The practical effect of this decision is fundamental because the actor is in the threshold of no punishment and punishment.

[15]*United States v. Mandujano*, 499 F.2D 370, 373 (5th Cir. 1974).

In this case, time and place plays an important role in determining the boundary crossing between preparation and attempt. The narrowest view of the proximate doctrine is when the law requires the very last act[16] to criminalize the conduct. This view is today not applicable by the courts because of the furtherance where the line is drawn. Two hypothetical[17] cases can be useful in understanding better the question raised and to draw a solution suitable for this issue. The hypothetical that I will analyze are the standard cases discussed by many authors and that better serve to explain my opposition for the actual law in the states that are adopting common law approaches.

B. Applying two hypothetical at common law.

First case to analyze is the robbery of a bank. Let suppose that X is willing to rob a bank because he has economical problems and it seems to him that this is the easiest way how to start a new life. He thought about this frivolous solution many times in his mind, without expressing his idea to anyone. He believes that this enterprise requires more than a sole person, many tools and a strategic plan. He decides to discuss with two friends, an ex inmate (Y) and a taxi driver (Z). After they decide to rob the bank, they start discussing about their plan. They usually meet in Y basement approximately twice a week for at least one month. They purchased ski masks to cover their faces and also fabricate fake license plate for the taxi car that will be used in the robbery. The three of them have been captured by the surveillance cameras around the area where the bank is located, walking around and pointing out to buildings, streets and traffic lights. Some days before they purchase illegal guns in a local vendor shop. After robbing the bank X is planning to go in an island to live the rest of his life. So, he has booked the flight ticket and also has prepared his modest house for sale.

The D-day came and the three of them, armed and masked started the car and moved toward the main street to approach the bank. The position is only few block away. They parked the car, entered in the bank, continued moving at the teller's cage and in that moment they were surrounded by FBI and were arrested. As we can see, many actions happened during the time lap between the moment that X was initially thinking about robbing the bank, and the moment that they were arrested. Thinking about robbing a bank is an intellectual moment enclosed in the mind of the actor and no concrete actions has been taken jet. Criminal law does not punish simple ideas. Before starting to discuss this case, it is necessary to set aside the issue of conspiracy. It is impossible to argue that X, Y, and Z cannot be held liable for an attempted robbery, anyway the puzzling question is when this happened? When was the threshold of mere preparation crossed? When can the actors be held criminal liable and why? At common law the proximity test requirements for criminal liability under this hypothetical will require that the actor's overt act must be proximate, very close to the completion of the crime, or that the direction is tending to the completion of the offense. It is very difficult to imagine that the actors can be held liable when they were discussing one month before, or when they were purchasing the masks and the guns, or when they were walking in the street even though their mens rea, the intent to commit the robbery was already clear enough. X bought a flight ticket and started procedures for selling the house.

These two moments even though related to the crime are far in time and space from the proximate act requirement of this test. The issue becomes more difficult when they start driving. This movement shows that physically they were engaging in an act that raises the possibilities of consummation of the offense, but many other actions are left undone. The proximity doctrine does not criminalize this conduct yet, the distance in time and space prohibits criminal liability under this test. The actors stopped the car and entered into the bank, armed and masked. At this point liability is triggered by their actions, the proximity is close enough in time and space; every other action tends toward completion and few undisputed actions are left to be done. The actions that are left to be done define liability under this test. In this case it is almost certain that the actions left would amount to the consummation of the offense. Criminal liability under this test is triggered at the moment that they entered armed and masked in the bank and were moving toward to the teller position. What if they were arrested in the car in the parking lot near the bank, would all the actions suffice criminal liability? Under this test it is improbable that courts would criminalize such conduct because the proximity of the actions is not satisfied. This doctrine is very clear about the requirements of proximity and conceptually they tend to be near the completed offense.

[16] This view represents the narrowest view adopted by the proximity doctrine. This approach is rejected today in all the jurisdictions as too close to the completed offense.

[17] This hypothetical will be applied to the Common Law approach, The Model Penal Code approach, the comparative view and finally to my proposal. The hypothetical are imaginary, but they represent real cases discussed extensively by criminal law scholars and doctrine.

1. The Rizzo analogy

A leading case in the scholarly debate about the proximity test is *People v. Rizzo*[18]. The *Rizzo* case is similar to the hypothetical case described above and has been discussed extensively by scholars because of the problems that are raised. The court in this case adopted the proximity doctrine and held that the defendant should not be found guilty for robbery. They stated that "Rao was not found; the defendants were still looking for him; no attempt to rob him could be made, at least until he came in sight; he was not in the building at One Hundred and Eightieth Street and Morris Park Avenue. There was no man there with the pay roll for the United Lathing Company whom these defendants could rob…. So here, these defendants were not guilty of an attempt to commit robbery in the first degree when they had not found or reached the presence of the person they intended to rob."[19] Professor Pizzi argues about the case in *Rizzo* that [heaped extravagant praise on the police for "preventing the commission of a serious crime," but then reversed the conviction of attempted robbery because the acts of the defendants did not come "dangerously near" the planned robbery of a payroll. Something seemed strangely contradictory in this reasoning.][20]. Professor Pizzi is right, there is something contradictory in the reasoning and there is something problematic with the holding too.

In the subsequent Pennsylvania[21] case the court held that the distinction between overt acts from acts of mere preparation "[t]he acts of the prisoner in going to [P's] place and watching his house, and even of preparing the rope to tie him, while undoubtedly done in pursuance of the intent, did not go beyond mere preparation and had the intent been abandoned at this point, an indictment for an attempt to commit robbery or burglary could not have been sustained."I will discuss again later after taking in consideration the next hypothetical. I will now turn in an attempted murder case, killing someone with a gun. A is a poker gambler. He has a bad habit for many years now. After losing his money he borrowed a big sum from his friend B. He knows that if he does not return the money in time, something bad may happen to him because B is a hothead person. After many requests for the money, B decides to kill A. He already now the neighborhood where A lives, but to be certain he starts moving around the area for couple of weeks. He takes an old gun from his father's house and decided to buy some bullets from the gun store near his city. He printed the map surrounding the neighborhood and drew the escape plan. He also had an approximate idea of the movements of A. Two days before the killing he also rented a car from a local rental with a fake name. B decided to kill A on Sunday evening because he knew for sure that he would be home. He took the car and drove to the parking lot near the victim home. He decided to walk to reach A's home.

When he reached the house, he started watching throw the window near the bushes, but did not saw A. At that moment a police officer called by the neighbors arrested him and charged him with attempted murder of A.
This hypothetical under the proximity test doctrine, can be faced with a more complicated discussion than the previous one. If we think about the old doctrine of the last step it is probable that B will not be held liable because his actions until the moment that he was arrested, would not constitute all the necessary steps, except the final one. There was more than one step possible to be done. Moreover, analyzing the actor's actus reus in conformity with the proximity test it is arguably right to consider that the courts that are adopting this common law approach, will debate in considering this case. I am not sure if under this test, besides the last act, watching throw the windows at the bushes, some courts may impose liability to B. For the other acts besides the last one, under Rizzo holding it is almost sure that the court, relaying to the proximity test would better decide that the overt act was not close enough to the completed crime.

2. The ex-husband analogy.

Analogously this hypothesis is discussed in the scholarly debates in all jurisdictions with the ex husband case[22]. The similarities between the cases are evident.

[18]*People v. Rizzo*, 158 N.Y 888, (N.Y. 1927) The *Rizzo* case is the best holding to discuss the proximity doctrine. In that case the defendants, armed were moving around the area where the victim was supposed to take his payroll. They were watched and followed by the police. As Rizzo jumped out of the car and ran into the building all four were arrested.
[19]*People v. Rizzo*, 158 N.Y 888, 339 (N.Y. 1927).
[20]William T. Pizzi, Rethinking Attempt Under the Model Penal Code, 9 Ohio St. J. Crim. L. 761,771 (2012).
[21]E. W. Cole, *Criminal Attempts*, JAG Journal 5 (1950).
[22] John Hasnas, *Attempt, Preparation, and Harm: The Case of the Jealous Ex-Husband*, 9 Ohio St. J. Crim. L. 761, 761 (2012). An ex-husband, divorced for about a year, travels to Chicago where his ex-wife lives. He first obtains a loaded gun from the home of his deceased father, and then drives to his ex-wife's house. From the bushes next to the house, he sees her

In both cases the actors engages in actions to complete the murder, but in both the action stops or is being stopped. Stopping or being stopped has a crucial importance in attempts cases, as we will discuss later in this article. At the end, is it not the most common definition for attempts, under all jurisdictions, the fact that the completion of the crime is stopped by reasons beyond someone's desire?[23] I want to underline the fact that under our second hypothetical, the clock stopped at the moment that B was arrested, and it is unclear what would happened if the police officer was not there. Is this enough to consider him liable under this test?

C. Evaluating problems under this approach.

The proximity doctrine raises many questions, some of them very difficult to answer in a specific way. However the problematic of this test is based on the fact that the actor is too close to the completion of the offense. The time lap between the moment that this test creates liability and the completion of the crime, is too less. There are powerful reasons not to let dangerous actors that close to the result of the crime. At the first hypothetical the actors were armed and ready from the moment that they started the car many blocks away from the bank, and the intent to rob the bank was formed even before. Is this sufficient to invoke criminal law to protect society from this kind of individuals? In the second case B intent to kill was formed time ago. Is it letting someone walk around people's home, armed with intent to kill enough to satisfy criminal liability? Are this kind of conducts worth punishment even before because of the harm or danger that they present?

There are many policy considerations for not letting criminality to act until the last moments. The police have a crucial role for the prevention of crime. If their intervention will be allowed in the last moment, it would be unlikely that the efficiency of the police would be maximal. Criminality is developing new strategies every day. I agree. That is why I believe that the threshold should be crossed time before the proximity test requirements. There is something wrong in allowing those types of conducts so late in time and so close to the completion. Seems that criminal law itself is encouraging wrong behaviors, when it should be the opposite. That is way I now turn to discuss the Model Penal Code approach, which has refuted to adopt the common law tests and the way how attempted crimes are criminalized under this doctrine.

III. The Model Penal Code approach.

A. The substantial step under the Model Penal Code test.

The Model Penal Code approach is found in the great majority of the States, and even though not all of them have codified their Statutes in perfect resemblance of the Code, all of them have adopted the test proposed regarding the actus reus, defined like the substantial step. The Model Penal Code § 5.01describes attempt in the following way:

- *A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:*
  - *purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or*
  - *when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or*
  - *Purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.*

The MPC defines the actus reus necessary to be held liable, as a substantial step in a course of conduct. The substantial step has to be corroborative of the actor criminal purpose. As I have mentioned before, MPC rejected all the previous approaches, and lined a new standard, focused more on the mens rea.

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in the kitchen and the man he suspects is the ex-wife's lover giving the husband's female toddler a bath. The ex-husband turns away from the window, but is arrested the next day after the gun is discovered on him by a police officer. Assume that a neighbor of the ex-wife saw the ex-husband in the bushes and reported it to the ex-wife, who now adamantly wants charges pressed against the ex-husband.

[23] All jurisdictions around the world states that attempted crimes are crime that the result is missing for independent reasons beyond the actors will.

Also, subsection 2 of the provision describes the substantial steps under this doctrine, and tries to enumerate the most basic conducts that corresponds with patterns found in common law cases[24]. Subsection 2 describes the substantial step as follows:

- *Conduct That May Be Held Substantial Step Under Subsection (1) (c). Conduct shall not be held to constitute a substantial step under Subsection (1) (c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negative the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:*
  - *lying in wait, searching for or following the contemplated victim of the crime;*
  - *enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;*
  - *reconnoitering the place contemplated for the commission of the crime;*
  - *unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;*
  - *possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;*

It is clear that the draftsman of the MPC has enlarged the scope of criminal liability under this test, and this faces practical problems that will be discussed later in this chapter. Also is very important to emphasize two different moments in the MPC approach. First of all the provision is guided by a subjectivist theory and not by the objectivist one. There are very powerful reasons why the authors of the Code prefer to switch the focus in addressing different problems related to attempted crimes. Most of them are in response of the difficulties encountered in the previous doctrine, the proximity test. Even though is not the aim of the paper to enter in the merit of the subjectivist and objectivist discussion more in depth, due to the length of this article, it has to be said, that besides the tendency to shift the direction in the mens rea, the Code recognizes the act as necessary for criminal liability in attempts. Professor Hasnas argues that[25]:

- *[T]he Code explicitly incorporates the defendant's subjective characterization of his or her actions into its description of the acts that will support a conviction for attempt. Thus, under the Code, any action at all can serve as the actus reus of an attempt as long as the defendant believes it will further his or her criminal intention.*

Professor Fletcher arguments[26] about the subjectivist an objectivist dispute in attempted doctrine has been discussed extensively by many authors. He asserts that:

- *"The distinction between requiring a dangerous act and searching for dangerous persons goes to the heart of the dispute.…The goal is better served by shifting, as the subjectivists do, from the dangerousness of acts to the dangerousness of persons; even an act that is not dangerous in itself can reveal the actor to be dangerous."*

The second factor to be taken is consideration is the fact that the MPC provision is focused more in what the actor has done, rather than the previous approaches that takes into consideration what remains to be done. This new shift relates to the fact that as argued above, the acts that the actor has already done are in sync with his guilty mind. The mens rea requirements obscures the view of the actus reus in per se, and transversally shifts the consideration in what the actor has done rather then what remains to be done. It is necessary to concretize more this approach by applying our two hypothetical to distinguish the extreme position that this test offers in difference of the proximity test analyzed in the previous chapter.

B. Analyzing the hypothetical under Model Penal Code.

In the robbery of the bank case, the actor X intent to rob the bank was formed days before the actually act happened.

[24] The Commentary of the Model Penal Code § 5.01.
[25] John Hasnas, *Once More unto the Breach:The Inherent Liberalism of the Criminal Lawand Liability for Attempting the Impossible*,54 Hastings L.J. 1, 29 (2002).
[26] George Fletcher, *Rethinking Criminal Law*173-174 (Little, Brown and Company Boston/Toronto eds., 4th ed. 1978).

We have discussed in the previous chapter when we had analyzed the same hypothetical under the proximity test, that the three of them, after they have decided, crystallize the idea, formed the intent to rob the bank, they have started to meet with each other for at least one day a week a month before. Is this the moment when the MPC criminal liability is trigger? I believe that few courts would impose liability at this point, but it cannot be excluded that few jurisdictions may rely heavily on the subjectivist theory and impose liability in this premature stage. Anyway, certainly we can argue that liability can be imposed when the actors have bought the ski masks and fabricated the fake plates for the taxi that is going to be used to escape. The MPC § 5.01, subsection 2 (e), explicitly states that the substantial step requirements of possession of materials to be employed in the commission of the crime.

Under this approach this acts, are corroborative enough to demonstrate the commission of the crime because the firmness of the intent to rob in our case was already formed. As we have noticed from our case many action are done by the actors after the moment they purchase the masks and fabricate the fake plate. In this case at the contrary of the proximity doctrine, the time lap between no act and criminal liability is very close. The preparation time and the imposition of liability by this approach tend to be as near as it may create problematic practical issues. To impose liability, criminal law under MPC test, will require only the analysis of the action that are already done, for example, buying the masks and fabricating the taxi plate, all associated with the firmness of the intent created during the formation of the idea, the discussion of the idea with friends, the confidence in their plan etc. We will turn back to this argument after discussing the second hypothetical, but before it is interesting to view this hypothetical in the light of a real case holding.

1. The Jackson and ex-husband analogy.

The leading case is a Second Circuit case, *United States v. Jackson*[27]. The *Jackson* case by analogy discusses a robbery case[28]. The court holding in this case under MPC doctrine was that the appellate should be held liable and convicted under the reasoning that "either type of conduct, standing alone, was sufficient as a matter of law to constitute a substantial step, if it strongly corroborated with their criminal purpose."[29] As discussed in *Jackson*, the court relies in the firmness of the intent and the type of conduct, that in per se, constitutes the substantial step required by this doctrine.

The second hypothetical, regarding the killing of A from B, criminal liability under the MPC, can be imposed even in a more problematic stage, earlier in time and space, than the first hypothetical. The actor firmness in completing the crime in the latter one is well defined, and the substantial step requirement is made when the actor starts moving around the area where A lives, for couple of weeks. In this case as showed by the facts many other actions are going to happen after this first one. Model Penal Code § 5.01, subsection 2 (c), clearly stated that reconnoitering the place contemplated for the commission of the crime establish a substantial step toward the completion of the crime. Does it seem odd to punish someone with attempted murder just for moving around certain area when he does not even have a weapon or a tool to commit the crime? Do we really need criminal law to go that further?

C. Defining problems under this approach.

We can conclude that the Model Penal Code doctrine, has solved many of the problems that the court have been struggling during the years, but are we sure that this approach has not created others regarding the actus reus necessary for the threshold between preparation and attempts? Some of the critics of the broaden liability under MPC test argues that, the MPC approach for renunciation or abandonment is conceptually wrong, because as we discussed before criminal liability under the Code's test, is triggered very early in time. In both our hypothetical the actor's possibility to retreat from the offense is very difficult under this approach, due to the little time available. It can be argued that in both cases many act are left to be done and that the completion of the offense is very late in time and space. As we discussed before, the MPC does not address this problem because of the fact that the focus in this cases is in the acts that are already done by the actor, rather then what remains to be done.

[27] *United States v. Jackson*, 560 F.2d 112 (2nd Cir. 1977).

[28] In the *Jackson* case the actors were convicted for attempted robbery of a bank. The police was cooperating with one of the co-conspirators. She described all the details of the robbery. The actors took all the necessary measures to complete the crime and start moving around the bank. The parked twice and waited for 30 minutes at the parking. When they noticed the surveillance officers, they accelerated but they were stopped by FBI agents, who arrested them.

[29] *United States v. Jackson*, 560 F.2d 112, 120 (2nd Cir. 1977).

There are many authors that believe that early liability eliminates a significant incentive to desist and appears unfair to the defendant who has had a genuine change of heart[30]. Although the MPC provision for abandonment § 5.01, subsection 4 states that:

- *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.*

The Code's position in this case offers an affirmative solution by imposing the burden of proof to the defendant, to prove voluntary renunciation by the standard of preponderance of evidence[31]. The Model Penal Code Commentary justifies the defense of voluntary abandonment by explaining that that the actor lacks dangerousness. Anyway this provision does not give a solution for the conceptual problem regarding the time available for the actor to abandon the continuity of the offenses. This view it seems to me unfair because permits in theory to the actor to abandon only in the cases that he has not done any concrete action. In the first hypothetical the actor possibility to retreat from the offense would be acceptable only between the time lap between the meetings of X, Y, and Z, and before the moment that they bought the ski masks and fabricated the fake plates for the taxi that was going to be used to escape.

In the second case under the MPC provision the abandonment has to be done before the moment that the actor starts reconnoitering the place of the commitment of the crime. As we can see in both cases, due to the fact that liability is imposed very early in time the actor has no actual possibility to abandon the crime later[32]. We all can agree that from that moment, until the crime is committed, the actor chances to abandon may be infinite.

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[30]Eugene R. Milhizer, *Voluntary Abandonment as a Defense To Attempts*, 32, Department of the Army Pamphlet 27-50-213 TJAGSA Practice Notes: Criminal Law Note (1990).

[31] Luis E. Chiesa, *Substantive Criminal Law* 350 (Carolina Academic Press. eds., 1th , ed.2014).

[32]Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 4:25, The defendant, here charged with criminal attempt to commit the crime of*[description of substantive crime],* has admitted his intent, at one time, to do so, but seeks to defend and avoid conviction on the contention that he abandoned his attempt before it became such in law. This brings up the question whether such preparation as you believe he had made to commit it, from the evidence before you, had gone far enough to be an overt act which "tends to effect the commission of such crime."You must decide if what he did was such that it was directed toward the commission of the crime, if it had gone so far toward that commission that in the ordinary course he would have completed it had he not then and there terminated his acts, and if the acts he had completed were not remote but were closely connected with the intended crime. If you so find, it follows that he had passed the point of mere intent and had actually committed an attempt, even if the ultimate substantive crime was never committed. In any event, having raised the affirmative defense of abandonment, the defendant is under the burden of proving to your satisfaction by a preponderance of the evidence, the meaning of which expression I have already given you, he actually so abandoned his attempt and thus avoided the commission of the crime attempted. Before you can find, however, that he effectively abandoned his criminal purpose, you must find his renunciation was voluntary and complete, and that defendant withdrew prior to the commission thereof, and made a substantial effort to prevent its commission. If you find or believe that he abandoned or renounced, in whole or in part, because he feared the existence of circumstances increasing the probability of his apprehension or detection, or because he feared circumstances had occurred which rendered more difficult the accomplishment of his criminal purpose, you cannot consider his abandonment and renunciation voluntary and complete, and you cannot hold he has established the affirmative defense he has asserted. By the same token, if he gave up his attempt, not completely but rather to postpone its accomplishment to another time, or to transfer his criminal effort to a different victim, then, too, you must find his affirmative defense unproved. If you should determine, however, that the defendant voluntarily and completely renounced his original criminal purpose, but that merely renouncing it was not enough to avoid the commission of the crime attempted, you must, before you can acquit him of an attempt to commit the crime on the basis of such renunciation, find that he took further action. This action must have comprised affirmative steps and acts which served to prevent the commission of the crime attempted—only if he then took such steps can you find him not guilty of the criminal attempt on the basis of renunciation.

There is a group of authors that argues that the Model Penal Code approach to attempts creates a unacceptable preventative detention because allows the punishment of those who have engaged in entirely harmless conduct on the ground that they may do harm in the future. This argument points out that someone can be punished only for what he does, not for what one may do in the future. Professor Hasnas analyzes this objectivist view that criticizes the MPC approach, even though he is personally contrary, in this way:

- *The essential purpose of the actus reus requirement is to bar preventative detention by limiting the state to proceeding against those who have already engaged in conduct that has been expressly prohibited, rather than those who merely plan to do so in the future. The critics accuse the Code of defeating this purpose by interpreting the actus reus of attempt to allow for the punishment of those who have, in fact, done no harm merely because they may do so in the future.*

This view as pointed out, emphasize an evident problem of the actus reus, as presented by the substantial step of the MPC, regarding the possible inflictions of punishment to innocent actors, under the policy justification adopted by the Code to stop and prevent dangerous actors. Obviously there is another issue that need to be discussed, is the problem of the principle of legality. Many authors argue that the MPC approach to attempts and the actus reus more specifically, tends to define the acts to broadly. I agree that the current definition presented by the § 5.01 subsection 2 defines the act too broadly, and in my opinion the dangerousness evocated by this standard have to be reconsidered. The acts are not vague in per se, but their broaden scope, creates the possibility to ensnare a great number of imaginable actors. In my opinion this standard goes behind the scope of the protective principle of legality and presents the great risk of imposing liability on innocent people. There is need to construct a different theoretical approach for the actus reus in attempted crimes that will solve this problems, and better serve the citizens by protecting their fundamental constitutional rights against wrongfully incarcerations.

IV. A comparative view of continental solution.

A. Criminal liability in attempted crimes in civil law countries

It is appropriate to clarify from the beginning that this article is not comparative in per se, but this chapter aim is to help understanding the continental view of attempted crimes, the actus reus and the threshold crossing problem between preparation and attempts in continental jurisdiction, as a possible measure to solve our issue. The aim of the chapter is twofold. First, it is useful to identify if the same issues are raised as problems in civil law jurisdiction. Second to analyze the solution adopted there, if we can find a clear one, to be adopted in American Law. The language barriers, as Prof Chiesa argues[33] will constrain me to compare two continental jurisdictions. The first is my country Albania, and the second one is the Italian criminal law.

1. Albanian and Italian approach.

Albanian criminal law faces the same difficulties in defining the exact time or finding the decisive acts when the threshold is crossed. Different scholars have discussed this interesting difficult question, but the doctrine does not state even today a clear cut accepted solution. First of all, it is necessary to describe some important points of the Albanian attempted doctrine. The actual Code, ratified in 1995 by the Parliament, imposes criminal liability for crimes committed only purposely, and the crime should be categorized in an analogue American category of felony. Albanian criminal law does not impute attempt liability for less important crimes. Preparation consists in devising or arranging the means or measures necessary for the commission of the offense. Professor Kaçupi, one of the most important criminal law scholars argues that preparation "supposes a certain movement toward the commission of the crime. The advancement of the preparatory activities indicates an approximation measure to complete the crime."[34] The communist criminal Codes, imposed liability even when the actions are in the preparation stage. A way to criminalize every conduct for the regime was to impose liability even for mere thoughts or ideas. Criminal law has changed extensively after the democratic system. Professor Skender Kaçupi argues that[35]:

[33] Luis. E Chiesa, *Comparative Criminal Law (in Markus Dubber & Tatjana Hörnle, Oxford Handbook of Criminal Law)* 21(2015).
[34] Skender Kaçupi, *Attempts, a stage in the conduct of the offense* 17 (Shtepia Botuese e Librit Shkollor. Eds., 2nd ed. 2006).
[35] Skender Kaçupi, *Attempts, a stage in the conduct of the offense* 12 (Shtepia Botuese e Librit Shkollor. Eds., 2nd ed. 2006).

- *A person, to be held liable with criminal responsibility should affect or create an immediate danger to a certain social relation. Starting from this principle, although the subjective part has its importance, no liability can be imposed to persons in whose minds are born and developed mere thought for committing an offense. This is because no social report is affected and risked. Preparation for committing an offense is itself dangerous but that scale of dangerousness determines criminal measures unnecessary.*

The actual Code express indirectly a mix of the objectivist approach of proximity to the result, combined with the reasons why the offense was not concluded, to impose liability. These criteria are also used as a tool by judges to decide the right amount of punishment besides all the other subjective and objective criteria of individualization of the punishment. Attempted crimes are decided in their complexity of objective and subjective elements. The Albanian approach is far from the MPC even though, the criminal thought (purpose) is discussed as a very important part. This mixture it is also different from the proximity doctrine. In the timeline, this approach it is somewhere in between the two American approaches.

A very important moment that has to be clarified and that can be viewed has a possible solution is the fact that the Albanian criminal Code[36], provides two specific "*ad hoc"* offenses[37], arranging the means or measures necessary for the commission of the offenses of robbery and murder. These two offenses remain as relic of the previous Code, and impose liability only for these two offenses. As noticed, the offenses are the one discussed previously by our hypothetical and will be discuss further later in this chapter. It is clear that these two offenses impose liability at the moment when the actor is still under preparation.

It is part of another article to discuss the reasons of this choice by the Legislator, but it is clear that policy consideration to prevent specific dangerous conduct and actors by indirectly finding a way to punish them is the core argument here. It is clear that the actors are not held liable for attempted robbery or attempted murder, but for the offense in itself. This issue will be discussed further in the next chapter, when I will discuss my proposal solution to the problematic, raised in this article. The Italian Criminal Code[38] provision for attempts states that the requirements for attempt liability are two, a direct, suitable (necessary) act, and the unequivocality in the way that the act is performed. For suitability under the Italian doctrine means that the acts are capable to inflict harm to the legal interest[39]. This evaluation is done ex ante[40] by taking in consideration all the circumstances actually existing at the time of the commission of the offense, not just those known or knowable. The unequivocality is related to a clear criminal intent and to a substantial step done as part of the general plan of the actor. The concept of unequivocality stated by the Italian law, sound more as the Model Penal Code provision. The Italian provision, as the Albanian one are case specific, and need to be analyzed case by case for different offense, but even for the same offense.

B. Analyzing the hypothetical under the continental approach.

Let now try to apply our two hypothetical to the continental doctrine. The first case the robbery of the bank, criminal liability can be triggered sometime in between the moment that they have finished arranging all the means, measures and tools and the initiation of the execution of the crime. More specifically is in the time frame right over the preparation (discussion with other two accomplices, buying the mask, fabricating the plate, buying the guns, buying the flight tickets, trying to sell the house, moving around the bank), and the actually beginning of execution, approaching the place to commit the crime. I believe in theory under the Italian doctrine, punishment may be imposed sometimes before the Albanian one, but I am not sure that in practice this difference can matter.

In the second hypothetical the same can be inferred. The actor liability is triggered right over the actor's preparation (starts moving around the area, takes an old gun from his father's house, buy some bullets from the gun store near his city, printed the map surrounding the neighborhood and drew the escape plan, rented a car from a local rental with a fake name), and the actually beginning of execution, approaching the place to commit the crime. The cases and the doctrine show that imposing criminal liability before in time like the MPC, or after like the Common law approach is not the standard solution in civil law countries.

[36] Criminal Code of Republic of Albania, article 23 , Official Publications Centre (2014)
[37] Criminal Code of Republic of Albania, article 80, article 142 , Official Publications Centre (2014)
[38] Italian Criminal Code, article 56, Racc. Uff. 2013
[39] Legal good, as is usually stated in civil law countries to describe the scope of criminal law protection.
[40] An evaluation done after the act is performed.

The Commentary of the Italian Code expressly states[41] that putting a gun in the pocket does not express the intent to shoot and kill, moving so away from the doctrine of the MPC. The Albanian doctrine in this case is more objectivist, probably due to the German impact[42]. As mentioned before, the Code's requirements in Albania, even though the mens rea is taken in consideration, is based on, mostly on the proximity of the offense, and the reasons why the crime was not completed. It is appropriate to emphasize that in both hypothetical the actor in Albania would be held criminal liable for an" *ad ho"c* offense of arranging the means or measures necessary for the commission of the offenses of robbery and murder, time before the actual moment when criminal liability is triggered by the attempts doctrine. Can this narrow solution be adopted to create a solution in the American issue at discussion? I am not inclined to believe so, and I will explain further in the next chapter.

V. A new proposal to discuss as a better solution to the problem.

In this article, I have tried to discuss as extensively as possible the two approaches proposed by Common Law and the Model Penal Code. As we have noticed, both of them present problematic issues how to address the actus reus in attempted crimes. Both of them try to compensate each other, and by doing so they created a big gap between them[43]. The aim of this article is to fulfill that gap, by trying to find a middle solution, which will try to solve or at least diminish the problems observed in the previous approaches. My theoretical will propose a different approach related to the actus reus and indirectly to the moment when the threshold between preparation and attempts is crossed. First of all, it is appropriate to discuss one more time that some civil law countries, like Albania, criminalize certain conducts with "*ad hoc*" offenses that apparently are in the preparation stage, because of the policy consideration related to the dangerousness of the actors. The goal in per se is the same as the MPC, but the way of achieving it, is different. I find this solution to narrow to the scope of what criminal law in my opinion has the duty to address.

Creating specific offense does not solve the problem and we can only suppose that just decreases it in a certain level. This narrow solution to criminalize certain conducts when the preparation stage is relatively long and complicated, in an earlier stage, offers an indirect possibility for imposing criminal liability. The state in this case imposes liability for the offense done and not for the attempted murder or robbery, and consequently the amount of punishment is way too low compared with the attempted crime punishment. I believe this kind of solutions can raise debates more than what they are supposed to solve. How many conducts should we criminalize? Which of them and why? Where is the line drawn to include or not certain conducts? This question has been struggling jurisdictions where these offenses are codified for many years. Importing problems does not provide solutions.

As we have seen, civil law jurisdictions are facing the same problem regarding the threshold between mere preparation and attempts. I believe that this article modestly, but furthermore the discussion in criminal law seminars and conferences, will bring useful contribution for the enrichment of the doctrine to provide theoretical and practical solution to this problem. I believe my proposal provides a more fair solution for society. Shortly can be stated in the following way:

- "*A significant act that warns with certainty the possible harm and the foresee ability of further increasing acts in vicinity and danger to the completed crime"*.

My theory relies to the fact that this solution gives the possibility to create liability for what has been done but only when what remains is foreseeable that would increase concrete danger and vicinity to the completion of the offense. The actor can be held liable only when the acts that he has done create a real warning for a possible harm to the legal interest, and the furtherance of his actions are foreseeable that they would increase the danger and the closeness or vicinity to the completed crime. The *certainty of a possible harm* and the *foresee ability* are objective standards of a reasonable person. The circumstances have to show objectively that the act warning of a possible harm is certain, and that the foresee ability of increasing the vicinity and danger is objective. I believe that at this point the mens rea, the criminal intent is in a complete unity with the actus reus.

[41] Commentary of the Italian Criminal Code, La Liberaria Del Giurista, http://www.brocardi.it/codice-penale/libro-primo/titolo-iii/capo-i/art56.html.

[42] This difference of the Albanian and the Italian jurisdiction in attempts is probably due to the German influence in the codification and in the doctrine that Albanian criminal law has adopted. German criminal law tends to have a more objectivists view in attempted crimes.

[43] See timeline page 3.

A. Analyzing the hypothetical under the new proposal.

To clarify my position more in depth, I will try to apply our two guideline hypothetical discussed in the course of this article. In the first case, the bank robbery example criminal liability can be imposed only when the acts in this case warns with certainty the possible harm (buying the guns), and the circumstances show that the furtherance of his actions are foreseeable, that they would increase the danger and the closeness or vicinity to the completed crime (the capture by surveillance cameras, booking tickets for the escape, circumstances that show that they will start the car and move toward the bank etc). If the other actions are not foreseeable, no criminal liability can be imposed. In the second case similarly we can argue that criminal liability is imposed when X takes the old gun, only in the cases when the other action of increasing danger and vicinity are foreseeable, for example drawing the map, renting the car, driving to the parking lot etc.

B. Theoretical and practical benefits of this different proposal.

This approach solves many of the problems created by the other two previous approaches. First of all, the actor is held liable in a reasonable time when the actor is not that close as the proximity doctrine offers. This reasoning will lead us to the fact that the danger presented is not that close. Dangerous acts are prevented for happening before in time, so the presumable victims are not facing that great amount of danger and harm as proposed by common law. The foresee ability of the danger and harm is a solid barrier in preventing them before the actions come too close. Second, police intervention can be done earlier in time, assuring so their role of safeguard of the citizens can be real effective. Police officers do not need to struggle to intervene when the act is that proximate to the completion as the common law suggests. These effects will be very powerful in practice.

Third, this proposal solves the problems of renunciation because the actor has more time to abandon the offense. The actor abandonment is usually done when he changes his ideas or when he has doubt for further actions because he wants to retreat. My proposal of further foresees ability of increasing vicinity or danger to completion of the offense disrupts the connection of imposing liability when the future acts are not reasonably foreseen.
Fourth, regarding the preventive detention discussed by some authors highlighting some problems of the MPC, I believe that my proposal solves this issue. The actor in this case is held liable not only for what he has done, but also for the foresee ability of what remains if the actions that remain are objectively foreseeable that will increase vicinity and danger to the completion of the crime.

Fifth, regarding the problem of the principle of legality, I consider my approach less vague and more concrete in addressing the actus reus in attempts, and narrowing liability more than the MPC approach, by using a clearer standard regarding the actus reus. This proposal will need practical problems to develop and guarantee its functionality. One of the issues that this theory is lacking is the impact in practice. Applying hypothetical in theory, like in a sterilized laboratory, does not assure real successful practical impact. All theories, especially in science are first applied in laboratory, but not all of them succeed in practice. The same can be inferred for criminal law proposals their value is determined by the impact in practice at citizen's real life.

Conclusion

The Model Penal Code and Common Law offers problematic solutions for the actus reus in attempted crimes and indirectly do not address a clear cut approach for the threshold between mere preparation and attempts. This problem is faced also in civil law jurisdictions. My proposal provides the possibility to create liability for what has been done but only when what remains is foreseeable that would increase concrete danger and vicinity to the completion of the offense. The actor can be held liable only when the acts that he/she has been done creates a real warning for a possible harm to the legal interest, and the furtherance of his actions are foreseeable that they would increase the danger and the vicinity to the completed crime. The *certainty of a possible harm* and the *foresee ability* are objective standards of a reasonable person. The circumstances have to show objectively that the act warning of a possible harm is certain, and that the foresee ability of increasing the vicinity and danger is objective.