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A Final Assault on Attempted Assaults

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COMMENTS

A FINAL ASSAULT ON ATTEMPTED ASSAULTS

INTRODUCTION

In theory it has been recognized that the function of the courts is to provide justice through the written law, although in practice some flexibility is necessary in interpreting the written law in order for the courts to dispense substantial justice.[1] Despite the fact that the wording of statutes can rarely be sufficient to encompass all situations which might be deserving of sanction, the interpretative function of the courts, as applied in the criminal law, can be a danger to the rights of every individual if it brings the court into the realm of judicial legislation.[2]

A certain amount of judicial leeway is required if the court is to function properly within the bounds of the law, but this judicial flexibility can never extend so far as to pre-empt the legislature by judicial declaration of crimes which the state itself has not seen fit to recognize.

The California Supreme Court, when faced with the issue of whether a crime of attempted assault could be recognized and punished in this state, concluded that though the concept of such a crime might not be logically absurd, such an academic concession could not be the equivalent of declaring it to be a punishable offense under the laws of this state.[3] The court reversed the decision of the court of appeal,[4] which had upheld a conviction

1. *Nulla Crima Sine Lege*, no crime without law, is a legal principle so ancient that its origin is uncertain. However, by the time America became independent this doctrine had largely been replaced by *Nulla Poena Sine Lege*, no punishment without law. Today strict adherence to either of these principles has waned in favor of allowing more flexibility in fitting the punishment to the crime. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed., 1960). "That the abolition of *Nulla Poena Sine Lege* took place first in the treatment of juveniles is . . . significant as an index to the motivation behind the movement for individualization in democratic countries. But the hazardous possibilities of this are now all-too-apparent—the abolition of *Nulla Poena Sine Lege* may result not in the humane use of science but in harsh repression and stupidity." *Id.* at 68. *Cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1789).

2. Judicial legislation, also termed judge-made law, refers to a judicial decision which construes away the meaning of a statute, or finds meaning never contemplated by the legislature. The danger of it lies in the abridgement of the doctrine of the separation of powers.

3. *In re* James M., 9 Cal. 3d 517, 510 P.2d 33, 108 Cal. Rptr. 89 (1973).

4. Court of Appeal of the State of California, Second Appellate District, Division One (Dec. 29, 1972). Decision by Thompson, J., with Lillie, Acting

for the theretofore unknown crime of attempted assault,[5] and directed the trial court to dismiss the petition against the defendant.

This decision of the highest court of this state not only remedied the manifest fiat of the lower court which had judicially legislated an offense and punished an offender, but also pronounced the final eulogy on an area of law which has delighted law professors, dismayed law students and disrupted the lives of only a few. Because of the narrowness of this recondite topic, this comment will discuss several representative cases which have dealt specifically with the issue laid to rest by the California court; the application of these case law doctrines to the factual situation dealt with by the trial and appellate courts; and, the final *coup de grâce* which set straight a weak and wavering course of legal logic.

THESIS: THE CASE FOR ATTEMPTED ASSAULT AS A CRIME

At common law there was no such crime as attempted assault.[6] However, several jurisdictions have contributed to the development of the concept that one may attempt to commit a crime which is itself defined in terms of an attempt.

In 1892 the Montana Supreme Court, in the case of *State v. Herron*,[7] ruled that it was error to acquit a defendant of the charge of attempted assault with a deadly weapon merely because there was no proof that the gun used had, in fact, been loaded.[8]

The defendant in *Herron* had pointed a rifle towards a traveler whom he had met upon the road. After ordering the traveler

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P.J. and Clark, J. concurring. The decision was certified for publication and appeared as *In re* M., 29 Cal. App. 3d 737, 105 Cal. Rptr. 809 (1972). This decision will not appear in the official reports as it was vacated by the Supreme Court's decision pursuant to CAL. RULES OF COURT, § 976(d) (West 1972).

5. See note 6 *infra*.

6. "As an exception to the general rule that there may be an attempt to commit any crime, it is held that there can be no attempt to commit a crime which in itself is merely an attempt, that is, that there can be no attempt to commit an attempt. Thus, since embracery is an attempt to bribe a jury, there cannot be an attempt to commit embracery. As an assault is an attempt to commit a battery, there can be no attempt to commit an assault." 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 72, at 154 (Anderson ed. 1957). "[A]n attempt to commit an assault, whether simple or aggravated is not a crime." CLARK AND MARSHALL, CRIMES § 4.07, at 246 (7th ed. 1967). "Thus embracery is an attempt to bribe a jury, an assault an attempt to commit a battery, and there can be no attempt to commit these offenses." 1 BURDICK, LAW OF CRIME § 135, at 176 (1946). *Accord*, 2 BISHOP, CRIMINAL LAW § 62 (7th ed. 1882); White v. The State, 22 Tex. 608 (1858); Wilson v. State, 53 Ga. 205 (1874); Allen v. People, 485 P.2d 886 (Colo. 1971); *In re* James M., 9 Cal. 3d 517, 510 P.2d 33, 108 Cal. Rptr. 89 (1973). *Contra*, State v. Herron, 12 Mont. 230, 29 P. 819 (1892); People v. O'Connell, 60 Hun. 109, 14 N.Y.S. 485 (1891); State v. Wilson, 218 Ore. 575, 346 P.2d 115 (1959).

7. 12 Mont. 230, 29 P. 819 (1892).

8. *Id.*

to stop and turn about, he said, "if you move another step forward, I'll blow your head off."[9] At the trial neither side was able to establish whether the gun had, in fact, been loaded and therefore deadly.

The Montana court was faced with the problem of who had the burden of proving that the gun was loaded and therefore a deadly weapon, or unloaded and therefore not a deadly weapon. Although this would normally be a question of fact decided by the jury, the lower court had ruled upon the matter in both law and fact. The Montana court, on appeal, was relegated to considering the sole issue of whether the gun had, in fact, been loaded and hence able to aid the defendant in carrying out his threat.

The court solved the problem by shifting the burden of proof to the defendant. The court thereby required the defendant to prove his innocence rather than having the prosecution prove his guilt. This departure from the commonly accepted notion that one is innocent until proven guilty was justified by the court as being "the only practical view in the enforcement of the statute in reference to assaults with deadly weapons of this character."[10] The case was remanded for a new trial wherein the defendant's innocence lay in his ability to overcome the new presumption that one who presents a weapon at another does so with a capable weapon.

Nearly a year prior to *Herron*, the New York case of *People v. O'Connell*[11] recognized that an attempt to commit an assault was an indictable offense. In *O'Connell*, the defendant picked up an axe handle and approached his intended victim, who left before the defendant got close enough to inflict an injury. The defendant, in an attempt to outfox the court, pleaded guilty to attempting to commit a criminal assault and on appeal guilefully argued that there was no such offense. The court was not to be fooled and pierced the subterfuge by declaring that:

> To make the assault itself it was necessary that he should be so near as to be able to strike him, and should attempt to do so. To make an attempt to assault him required no more than that he should arm himself with the axe and endeavor to place himself in the position to use it by executing his intention to kill. There is a clear distinction between these cases. The first would be the crime itself, and the other an attempt to commit it, and that would bring the defendant within the range of the indictment, which included all attempts to commit the assault.[12]

9. *Id.*
10. *Id.* at 233, 29 P. at 821.
11. 60 Hun. 109, 14 N.Y.S. 485 (1891).
12. *Id.* at 115, 14 N.Y.S. at 486-87.

In other words, to be guilty of an assault the defendant would have had to have the present ability to reach his intended victim. If he could not so reach him, he could be found guilty of the attempt, although not the assault itself, where he armed himself and tried to reach his intended victim.

The *O'Connell* case turned upon the proximity of the assailant to the intended victim. Where all preparations and intentions were consummated by a direct, yet ineffectual act towards completion, there could lie an attempt to assault, whereas as soon as the assailant came within range of actually accomplishing his intentions the attempt became an assault.

More recently the Oregon Supreme Court, in the case of *State v. Wilson*,[13] held that an effort to commit a battery, once it had gone beyond mere preparation, though short of present ability, was punishable as an attempted assault.

In that case the defendant, after a dispute with his wife, had gone outside to his parked car to get his rifle, with every intention of ending the argument by shooting his wife. While the defendant was outside his wife locked herself in an office adjoining the laundry room of the hotel where she was working. She called the police who arrived to find the defendant, gun in hand, leaving the hotel. The officers subsequently arrested him, and at the trial he was charged and convicted of attempted assault.

Wilson was a case of first impression in Oregon. The Oregon court construed its criminal attempt statute to cover all separate criminal offenses and held that an assault was a distinct crime, rather than an inchoate battery.[14] Thus it was possible, said the court, for the defendant to have attempted an assault even though he lacked the present ability to commit the actual assault.

The Oregon Supreme Court, in sustaining Wilson's conviction, expressed its rationale in these words:

> The mere fact that assault is viewed as preceding a battery should not preclude us from drawing a line on one side of which we require the present ability to inflict corporal injury, denominating this an assault, and on the other side conduct which falls short of present ability, yet so advanced toward the assault that it is more than mere preparation and which we denominate an attempt.[15]

With this rationale in mind it is possible to reconcile the cases which have turned on proximity with those which have turned

13. 218 Ore. 575, 346 P.2d 115 (1959).

14. This was essential in order to avoid the metaphysical problems encountered by other courts in attempting to conceive of an attempt to attempt a battery.

15. 218 Ore. 575, —, 346 P.2d 115, 121 (1959).

on present ability. Viewing the intended victim as the center of a circle, we denominate anything which actually penetrates his personal sphere a battery. Concentric with the former is a larger circle of varying radii, dependent upon the weapon or instrument used—long for a rifle and short for a stick. Aggressive actions which enter this second circle, which we may denominate the present ability vis-á-vis the proximity sphere, are assaults if the culmination of the initial impulse could result in a battery. Add to these two concentric circles a third which contains all those activities which are mere preparations toward the piercing of the assault barrier. These activities may be termed attempted assaults.

Herron,[16] *O'Connell*[17] and *Wilson*[18] may be classified as cases in which the crime of assault is viewed as a separate offense, rather than as an attempt to commit a battery.[19] By treating assault as a crime in and of itself, without regard to any attempted battery, and applying the doctrine of attempt in order to punish behavior which though not sufficient to constitute an assault per se, was, nevertheless sufficiently reprehensible to be deserving of sanction, these courts have successfully imposed legal restraints on behavior which did not constitute a crime then existing in any of their statutes.[20]

A review of the cases reveals that the courts which have found attempted assault to be cognizable in their respective jurisdictions have suffered from both an infusion of the tortious assault concept, which requires an apprehension of an immediate battery on the part of the victim, and a general confusion as to what constitutes a criminal assault.

The apprehension doctrine of tortious assault finds redress in private litigation, whereas the attempted corporal injury of a criminal assault finds redress through the state's coming to the aid of the victim much the same as the King might have defended against one who threatened the peace of his kingdom. These modes of redress derive from the differing degrees of danger to the established order. It would appear that judges, unaware of the distinctions between the different doctrines of assault, could confuse and combine them so as to hold the lesser to be of equal atrocity as the greater. Chief Justice Marshall cautioned that:

16. 12 Mont. 230, 29 P. 819.
17. 60 Hun. 109, 14 N.Y.S. 485.
18. 218 Ore. 575, 346 P.2d 115.
19. *See* Annot., 79 A.L.R.2d 597 (1961).
20. There was no statutory crime of attempted assault per se in these jurisdictions at the time each was decided. Today, no jurisdiction in the United States has enacted any statute dealing with the specific crime of attempted assault.

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.[21]

Doubtless this warning was ignored in the zealous efforts of a few judges who sought to discourage people from attempting assaults against others.

ANTITHESIS: THE CASE AGAINST ATTEMPTED ASSAULT AS A CRIME

Among the early cases to consider the question of whether an attempt to assault could be a cognizable crime is the Texas case of *White v. The State*[22], involving an aggravated assault, which held that "[t]here is no such offense known to the law as an 'attempt to commit an assault, with intent to murder.' "[23]

In that case the trial judge had instructed the jury, in essence, that it could find the defendant guilty of an attempt to commit an assault with intent to murder. The jury found the defendant guilty of the offense as charged. The Texas Supreme Court, on appeal, ruled that the instruction was erroneous and the verdict unauthorized by any law.

In 1874 the Georgia Supreme Court reversed a conviction for attempted assault in the case of *Wilson v. State*[24] wherein the defendant had made a conditional offer to shoot certain persons who were attempting to enter the defendant's house and interfere with his activities. The jury had convicted the defendant of attempting to make an assault, and the Georgia Supreme Court was called upon to determine if such a verdict could legally stand. In concluding that it could not, the court said:

> As an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it, or to state the matter still more definitely, it is to do any act towards doing an act towards the commission of the offense. This is simply absurd. As soon as any act is done towards committing a violent injury on the person of another, the party doing the act is guilty of an assault, and he is not guilty until he has done the act. Yet it is claimed that he may be guilty of an attempt to make an assault, when, under the law, he must do an act before the attempt

21. U.S. v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).
22. 22 Tex. 608 (1858).
23. *Id.*
24. 53 Ga. 205 (1874).

> is complete. The refinement and metaphysical acumen that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.[25]

More recently the Colorado Supreme Court decided, in the case of *Allen v. People*,[26] that there was no such offense as attempted assault.

The defendant in *Allen* was stopped by two police officers while driving his car. One officer approached the defendant on the driver's side of the car and asked to see the defendant's driver's license. The defendant appeared to be reaching for his wallet, according to the officer's testimony, but instead pulled a gun out of his right rear pocket. Although he dropped the gun, his arm came across as if to point the gun at the officer. After twice attempting to reach for the discarded gun, the defendant was restrained at gunpoint by one of the officers.[27]

The defendant was charged and convicted of attempted assault with a deadly weapon. The Colorado Supreme Court reversed the conviction on the ground that there was no such crime.

The trial court in *Allen* had viewed assault as a criminal attempt coupled with a present ability to commit a violent injury on the person of another. In other words, an assault was an attempt, with present ability, to consummate a battery. The court explicitly pointed out that "when a person is charged with an assault . . . 'present ability' must be construed in the light of the particular situation."[28] This is significant because in California, as in Colorado, an assault is defined in terms of "present ability."[29] With this in mind we may turn our attention to the rise and fall of the concept of attempted assault as it was presented to the California courts in the case of *In re James M.*[30]

The Facts of the Case

At about 10:30 a.m. on December 7, 1971, approximately 75 to 100 juveniles gathered in a playground across the street from where two Los Angeles police officers were conducting a field interview of two juveniles who had been loitering in the vicinity. As the interview progressed, the crowd of juveniles

25. *Id.* at 206.
26. 485 P.2d 886 (Colo. 1971).
27. *Id.* at 887.
28. *Id.* at 888.
29. COLO. REV. STAT. § 40-2-33 (1963), entitled, "What is an Assault," defines assault similarly to CAL. PEN. CODE § 240 (West 1972), as an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another.
30. 9 Cal. 3d 517, 510 P.2d 33, 108 Cal. Rptr. 89 (1973).

which had formed began shouting and throwing various objects at the police.

One officer observed the defendant, James M., among the juveniles who were throwing things at him and his partner. The officer saw James climb the fence of the school-yard and throw an unidentified missile at him. Although the object struck the patrol car, the officers were unable to determine what the missile was since they did not recover it after checking the area about the patrol car.

Officer Seitz, one of the officers who was present at the field interview, testified that he believed the object thrown was a rock of some sort and judged it to have been about three inches in diameter. Officer Seitz based his testimony on his view of the scene as he stood approximately thirty-five feet from James' location.[31]

After seeing James throw the unidentified object, Officer Seitz walked across the street, climed the playground fence and arrested James for assault with a deadly weapon[32] and disturbing the peace.[33]

The Trial

The trial court held that the district attorney had failed to establish a prima facie case of assault with a deadly weapon inasmuch as the police officer at whom the object was allegedly aimed happened to be eight feet from his patrol car at the time it was struck by the missile.[34]

The charge of disturbing the peace was dismissed for lack of evidence.[35] However, the trial court did determine that the evidence presented was sufficient to sustain a conviction for attempted assault with a deadly weapon on a police officer, even though no such crime is listed in the California Penal Code.[36]

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31. Brief for Appellant at 3-4, 29 Cal. App. 3d 737, 105 Cal. Rptr. 809 (1972) (citing trial court transcript). *See also* note 4 *supra.*

32. CAL. PEN. CODE § 245(b) (West 1972). "Every person who commits an assault with a deadly weapon or instrument or by any means likely to produce great bodily injury upon the person of a peace officer or fireman . . . when . . . engaged in the performance of his duties shall be punished . . . ."

33. CAL. PEN. CODE § 415 (West 1972). "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct . . . is guilty of a misdemeanor. . . ."

34. 29 Cal. App. 3d at 739, 105 Cal. Rptr. at 810. The statement of these facts, among others, was deleted from the supreme court's summary of the facts in their decision of the case.

35. *Id.*

36. *Id.* Temporary Judge Irving Harris stated that the evidence established that appellant had committed the crime of attempted assault "because of either a

It was upon this evidence that James was found to be a person "[b]eyond the control of (his parents or authorities) . . . who (was) in danger of leading an idle, dissolute, lewd, or immoral life . . . ."[37] James was subsequently made a ward of the juvenile court.[38]

The Appeal

James' attorney appealed the case, arguing that in California there is no crime of attempted assault with a deadly weapon upon a police officer and that, in effect the trial court had convicted the defendant of a noncrime.[39]

The court of appeal[40] held that James was guilty of attempted assault because "[w]hen a battery is attempted, is unsuccessful, and where the actor lacks the present ability to consummate it," a person may properly be charged and convicted of attempted assault.[41] This result was reached by reading California's criminal attempt statute in conjunction with California's criminal as-

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poor aim or the obstruction of the top of the fence." This lack of present ability was the basis for holding that an attempted assault occurs when one attempts a battery without present ability to consummate it.

37. CAL. WELF. & INST'NS CODE § 602 (West 1972). "Any person under the age of 18 years who violates any law of this state . . . defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court." This section was amended by Cal. Stats. (1972) ch. 84, § 1, at 103, urgency, eff. May 19, 1972, to read: "Any person *who is* under the age of 18 years . . . *when he* violates any law of this state . . . defining crime or who, after having been found by the juvenile court to be a person described by Section 601. . . ." (emphasis added).

CAL. WELF. & INST'NS CODE § 601 (West 1972). "Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law of this state, or who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court."

38. CAL. WELF. & INST'NS CODE § 725(b) (West 1972). "After receiving and considering the evidence on the proper disposition of the case, the court may enter judgment as follows: . . . (b) if the court has found that the minor is a person described by Section 601 or 602, it may order and adjudge the minor to be a ward of the court."

39. This contention was corroborated by the Attorney General's office. The Attorney General's office sought to have the case remanded to the trial court for a determination as to whether or not the evidence presented had been sufficient to sustain a conviction for violation of section 245(b) as originally charged. Respondent's Brief at 4, 29 Cal. App. 3d 737, 105 Cal. Rptr. 809.

40. Decision by Thompson, Associate Justice, with Lillie, Acting P.J., and Clark, J., concurring. Justice Clark was appointed to the California Supreme Court in 1973.

41. 29 Cal. App. 3d at 741, 105 Cal. Rptr. at 812.

sault statute.[42]

A criminal attempt in California requires two elements: (a) the specific intent to commit a particular crime; and, (b) a direct ineffectual act done toward its commission.[43] The crime of assault, it should be noted, is itself defined as "[a]n unlawful attempt, coupled with a present ability to commit a violent injury on the person of another."[44] On the basis of these two statutes the court reasoned that since the elements of a *criminal attempt* were present, and though the elements of a *criminal assault* were lacking, the defendant, having actually taken a step towards committing the crime of assault, could be found guilty under the California criminal attempt statute of attempted assault.

The irony of the decision lies in the fact that the defendant's action was too ineffectual to be considered an assault, yet effectual enough to be considered an attempt to commit a crime which is itself defined in terms of an attempt. In other words, James was found guilty of attempting to attempt to commit a battery.

Professor Perkins,[45] in his analysis of attempted assault as a crime,[46] makes the statement that, "[w]here an attempt to commit a battery with present ability is the only basis on which a criminal assault may be established, an 'attempt to assault' would mean in substance an attempt to commit a battery without present ability."[47] This statement was relied upon by the court which convicted James, and the court of appeal which affirmed the conviction. However, a further perusal of this scholarly article reveals the flaw in the reasoning of both courts, for although the admission is made that an attempted assault is a possibility, it is one which ought to become manifest by legislative rather than judicial amendment.

> Under the doctrine of manifested legislative intent, an omission from a penal provision evinces a legislative purpose not to punish the omitted act. Therefore, if a statute defines criminal assault as an attempt to commit a battery by one

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42. CAL. PEN. CODE §§ 664 & 245(b) (West 1972). Section 664 in pertinent part states that: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable . . . ." For the text of section 245(b) see note 31, *supra*. Because an attempt, per se, does not require "present ability" (as does an assault), the court of appeal reasoned that one could be guilty of an attempt to assault where the "present ability" necessary for the assault was lacking.

43. 29 Cal. App. 3d at 740, 105 Cal. Rptr. at 811. *See also* 1 WITKIN, CALIFORNIA CRIMES *Elements of Crime* § 93 (1963).

44. CAL. PEN. CODE § 240 (West 1972).

45. Professor of Law, Hastings College of the Law, San Francisco.

46. Perkins, *An Analysis of Assault and Attempts to Assault*, 47 MINN. L.R. 71 (1963).

47. *Id.* at 81, *cited in, In re* M., 29 Cal. App. 3d 737, 740, 105 Cal. Rptr. 809, 811 (1972).

> having present ability and no offense known as an attempt to assault was recognized at the time the statute was adopted, then there would be a clear manifestation of legislative intent under this doctrine that an attempt to commit a battery without present ability should go unpunished. It would be wise to amend the statute by eliminating the requirement of present ability, but this should be done by the legislative body and not by 'judicial amendment'.[48]

The first California statutes defined assault in the common law sense of an attempted battery, but differed from the old common law by the addition of the requirement of present ability.[49] Therefore, the question on appeal to the California Supreme Court involved, *inter alia*, the permissible limits of statutory interpretation.

Resolution: The Attempt Fails for Lack of Present Ability

The Attorney General urged the California Supreme Court to reverse and remand the case for further proceedings in which the trial court might find the evidence sufficient to sustain a conviction for an actual assault with a deadly weapon.[50] The court's response to this suggestion was that:

> The trial court's finding that James was guilty only of *attempted* assault with a deadly weapon constituted an implied acquittal of the charged assault itself. [James] could not be tried again for an offense of which he had been acquitted. Protection against double jeopardy applies to juvenile offenders as well as to adults.[51]

Clearly, the court had to resolve two separate, but related issues: first, whether or not "attempted assault" is a crime, and, second, whether or not "attempted assault" is a crime in California.

The court briefly mentioned a few cases[52] and theories[53] for

48. Perkins, *supra* note 46, at 86.

49. Cal. Stats. (1850) ch. 99, § 49, at 234.

50. 9 Cal. 3d at 520, 510 P.2d at 35, 108 Cal. Rptr. at 90-91.

51. *Id.* (Citing U.S. Const. 5th Amend., Cal. Const., art. 11, § 13.) (Emphasis by the court.)

52. State v. Herron, 12 Mont. 230, 29 P. 819 (1892); People v. O'Connell, 60 Hun. 106, 14 N.Y.S. 485 (1891); State v. Wilson, 218 Ore. 575, 346 P.2d 115 (1959); White v. State, 22 Tex. 608 (1858); Wilson v. The State, 53 Ga. 205 (1874); Allen v. People, 485 P.2d 886 (Colo. 1971).

53. "One such theory is based on the concept of 'proximity,' i.e., that a greater degree of proximity is required to commit an assault than to commit a general criminal attempt." Perkins, *supra* note 46, at 81-82. A second theory, apparently relied on by the trial court suggests that inasmuch as an assault is defined in California as an attempt to commit a battery coupled with the present ability to do so (CAL. PEN. CODE § 240 (West 1972)), an attempted assault means, in substance, an attempt to commit a battery *without* such present ability. 9 Cal. 3d at 521, 510 P.2d at 35, 108 Cal. Rptr. at 90. *See, e.g.*, State v. Wilson, 218 Ore. 575, 346 P.2d 115 (1959).

and against the proposition that an "attempted assault" is a cognizable crime, and concluded that:

> [I]t is apparent that the abstract concept of an attempted assault is not necessarily a logical absurdity. Yet to concede, in an academic sense, the possibility that there can be an attempted assault is not the equivalent of declaring it to be a punishable offense under the laws of this state.[54]

The reasoning for this apparent discrepancy between admission and action is founded upon section 6 of the Penal Code which declares, in pertinent part, that "[n]o act or omission . . . is criminal or punishable, except as prescribed or authorized by this Code."[55]

The court noted that no offense of "attempted assault" had been known in California at the time of the adoption of the Penal Code; furthermore, criminal assault has always been defined in California in terms of "present ability."[56] Moreover, under the doctrine espoused by Professor Perkins as to manifested legislative intent, the court was at a loss to believe that the legislature had intended to punish one for attempting to commit a battery without the present ability to consummate it.[57]

The general rule of statutory construction is that particular provisions govern general provisions. The specific provisions of the criminal assault prevail over the general provisions of the criminal attempt. To construe these provisions otherwise would be to invade the province of the legislature by redefining the elements underlying the specific crime of criminal assault. Though the trial court and court of appeal had done just this, the California Supreme Court was quick to correct this error in statutory interpretation.[58]

The pragmatic difficulties of injecting an additional issue into criminal trials involving prosecution of any type of assault when one of the elements of the crime is unclear or contested would likely lead to jury confusion and unwarranted reversals. The court was clear in this regard when it stated that:

> Juries should not be required to engage in fruitless metaphysical speculation as to differing degrees of proximity between an assault and a general attempt, nor as to the logical possibility of attempting to commit any crime of assault, ei-

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54. 9 Cal. 3d at 521, 510 P.2d at 35, 108 Cal. Rptr. at 90.

55. CAL. PEN. CODE § 6 (West 1972).

56. 9 Cal. 3d at 522, 510 P.2d at 35, 108 Cal. Rptr. at 90, *citing* Cal. Stats. (1850), ch. 99, § 49, at 234, now CAL. PEN. CODE § 240 (West 1972).

57. 9 Cal. 3d at 522, 510 P.2d at 36, 108 Cal. Rptr. at 91.

58. *Id., citing In re* Lynch, 8 Cal. 3d 410, 414, 503 P.2d 921, 921, 105 Cal. Rptr. 214, 217 (1972).

ther simple or aggravated, the basic nature of which is an attempt in itself.[59]

The court concluded the controversy by announcing that "attempted assault" is not a crime in the State of California.[60]

CONCLUSION

The decision of the trial court and the reasoning of the court of appeal represent a conscientious effort to discourage those who might "attempt" to perpetrate an assault against another; however, by declaring "attempted assault" a crime in California, these courts assaulted the Constitution of the United States and that of California.[61] For although the prohibition on ex post facto laws applies exclusively to the legislature, the result is the same whenever an act or omission by a person is made punishable by unforseeable judicial construction of preexisting statutes.[62] The United States Supreme Court has considered the issue of the unforseeable judicial construction of preexisting statutes and mandated that such action be of no effect.[63]

The Supreme Court of California has reaffirmed the separation of powers doctrine[64] by reversing the lower court and thereby

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59. *Id.*

60. 9 Cal. 3d 517, 510 P.2d 33, 108 Cal. Rptr. 89 (1973).

61. By definition an inanimate object cannot be assaulted. The analogy is not absolutely true, and not entirely false. In the California Constitution of 1849, article III, it is stated that:

> The powers of the Government of the State of California shall be divided into three separate departments: the Legislative, the Executive, and Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others. . . .

62. U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." Inherent in the concept of due process is a fair warning as to what acts or omissions are punishable as crimes. This requirement is expressly found in the prohibition of ex post facto laws. U.S. CONST. art. 1, § 10; CAL. CONST. art. 1, § 16. This principle is also applicable to the judiciary. *See* Connally v. General Constr. Co., 269 U.S. 385 (1926). "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law." *Id.* at 391.

63. Bouie v. City of Columbia, 378 U.S. 347 (1964). In *Bouie* the South Carolina Supreme Court applied a judicial construction of a criminal trespass statute, announced after the incidents which gave rise to the defendant's conviction, to affirm the conviction of the petitioner. The United States Supreme Court held that this retroactive application of the judicial construction of the statute deprived the petitioner of the right to fair warning of a criminal prohibition in violation of the Due Process Clause of the fourteenth amendment. The statute in question had proscribed entry upon the lands of another after notice prohibiting such entry. The judicial construction made punishable the act of remaining on the premises of another after receiving notice to leave.

64. *See* note 56 *supra.*

reserving to the people's representatives the right to declare and forbid certain acts or omissions. But more importantly this decision of the court demonstrates the ability of the judiciary to police itself against abuses to individual liberty.

If the final end of the law is to lead men to exercise a free reason so that they might not act unfairly toward one another, nor waste their time in anger or hatred, then the law ought not to dominate men nor restrain them by arbitrary force. Obedience to force is reaction to fear. The law ought to free each so that he may live with full security and without fear. The end of the law ought to be the reasonable and reasoned liberty of the individual.[65]

The law is written by the legislature and interpreted by the court. This dynamic process is what gives our system of jurisprudence its vitality. Enthusiasm for this vital process must be tempered with dispassionate reasoning if the essential freedom of the individual is to be protected from overzealous reaction to acts or omissions which the legislature has not seen fit to proscribe. The Supreme Court of California is to be commended for exercising its power of reason and protecting the individual from the loss of liberty which might result from judicial legislation.

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65. This view of the law is similar to that of the ideal state as conceived by Baruch Spinoza. SPINOZA, B., JEWISH PHILOSOPHER 1632-1677 (1968).