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## Introduction

And when did this begin?

This morning, last year, when the lough first spawned?

The crews will answer, 'Once the season's in.'<sup>1</sup>

To think about attempting is to encounter some of the most intriguing and perplexing questions about human action. When does attempting begin? Heaney notes that often we need to look far behind if we are perplexed about beginnings. How far back we see depends on who we are, and sometimes the past seems indistinguishable from the future. Attempts have all this complexity and more. When did the attempt to write this book begin? With tentative propositions about the subject; when the author was first intrigued that our physical being is also purposeful being; or even, existentially, in the ongoing pursuit of fulfilment in life? Maybe there is more truth in the eel fishermen's pragmatic explanation. Beginnings occur just when it matters for us; perhaps with ideas expressed on a keyboard or with those yet to be expressed. No admissible answer has obvious priority over the rest. Still, there are other questions; less poetic, more technical, but sometimes, at least, answerable. What is the relationship between attempting and intentional action? Do we always attempt the possible and, if so, possible to whom? Must attempting involve action and does all action entail attempting? Is the nature of my attempt fixed by *me* or can another perspective reveal what it is? How 'much' attempting is needed for a crime; is intention needed; and can these matters be determined categorically? This book proposes solutions to these and other questions.

For whom do the solutions matter? Anyone concerned with the idea that agents should be punished only when punishment is due and to the extent due, must be prepared to take seriously the difficult philosophical

<sup>1</sup> Seamus Heaney, 'Beyond Sargasso' in *Death of a Naturalist* (London: Faber and Faber, 1966).

questions that underlie legal categories like attempting. The philosophical analysis is the task of Part I. It offers an account of attempts generally via exploration of the crucial concepts of intention, action, subjectivity and possibility. The explanation to be provided is certainly not meant as a definition of attempting, nor does it track linguistic use. The concern, rather, is to illuminate an underlying phenomenon, one that persists in human action and presents itself whenever we pursue an end of action; when we ‘set out to do’. In large part, such an explanation will focus on how the phenomenon relates to us; to our reasons, our perspectives, our epistemic limitations and our rationality. What does ‘setting out to do’ mean for a being who acts for reasons, from self-understanding, lacking access to the future and with a rational conception of the world and their relation to it?

The book can only go so far in answering these questions. Among the sacrifices involved in writing, brevity is paramount. In particular, one can never say enough about those few crucial concepts without which the subject cannot be understood at all; however important, these are not the headline act. So in Chapters 1 and 2, engagement with the idea of intentional action is both crucial and limited. To mitigate the limitations, the account of attempts is produced incrementally, starting with underpinning concepts. So, Chapter 1 sets out the understanding of intention that will pervade the book and explores the relationship between attempting and intention in a foundational sense only. Likewise, in Chapter 2, much of the analysis is a direct engagement with the philosophy of action, again crucial in directing the discussion thereafter. As the foundational issues are resolved, attempting itself appears more prominently such that by Chapter 4 on ‘possibility’, the analysis is almost wholly just about attempts. By the end of Part I the basic elements of attempts have been elucidated.

Although Part I is a philosophical discussion, it is attuned to the methods and concerns of those who form the discipline and practice of criminal law. This approach, in part, reflects the writer’s background in law; it is designed to facilitate the transition from Part I to Part II where the philosophical commitments are given their practical application. Part II considers five aspects of criminal attempts that have troubled criminal law theorists, practitioners and the courts alike: the relationship between the *actus reus* and *mens rea* of attempting; attempting the impossible; moral luck in attempts; the role of recklessness; and finally the relationship between particular crimes and inchoate-ness, using theft and rape as illustrations.

### Scheme of the text

Chapter 1 introduces the account of intentional action within which attempting is to be located. The account is inspired by Elizabeth Anscombe's work on the subject and with her crucial observation that intention is being on the way to intentional action. Central to her position is the claim that any action is intentional that is responsive to a certain kind of 'why' question; breaking eggs is intentional, say, where there is an answer to the question, 'why are you breaking eggs?' such as, 'to make pancakes'. Anscombe's position will be extended in two ways. The first extension rests in the claim that nothing is left of intention once we understand intentional action; we do not *have* intentions, in our mind or anywhere else, nor do intentions give substance to action. When we speak of the intentions that an agent has, we engage in a natural process of construction, but there is no corresponding natural phenomenon. What are the implications for attempting? The object of an attempt is not tied to the intentions we have for there is nothing to identify as such.

The second extension of Anscombe's position is found in Chapter 2. Acting needs reasons, but other human abilities are entailed in our 'doings'. Together these abilities go to making our actions intentional and, crucially, in their objects constitute those actions as such. So belief and knowledge can feature in our descriptions of intentional actions as much as reasons can, and none of our abilities (including the ability to physically move) has any necessary descriptive or ontological priority over any other. Attempts, on the other hand, are delimited precisely by our acting for a reason; by setting out to do. The emerging account of attempting is akin to Anscombe's account of intentional action more generally. It thus replaces intention with attempting at the heart of human action.

Chapter 3 makes clear that this is a subjective theory of attempting. Subjectivity could entail commitment to a number of theses about attempts. It could mean that to determine what an agent attempts is to adopt his perspective. Or it could mean that actors are responsible for their attempted actions, in virtue of what those actors actually set out to do, such that the absence of consequences does not affect the credit or blame due. It might mean that in seeking to resolve the conundrums surrounding 'attempting the impossible' we must again adopt the perspective of the actor, resolving questions of possibility from that viewpoint and asking not what is possible objectively or *ex post*, but what is possible to her. Indeed, elucidating the troublesome and

intangible relationship between impossibility and attempting is one of the most significant challenges in any theory of attempts. Chapter 4 suggests a simple solution to the challenge; it finds that possibility to the attempter is part of the anatomy of attempting and that this cannot be undone by switching to some other perspective; no other perspective is available.

These philosophical commitments allow a critical analysis of the existing law of attempts; the task of the five remaining chapters. The implications are fairly fundamental, at least in implying, as they do, that law's divisions between *actus reus* and *mens rea* are conceptually incoherent. That is the position advanced in Chapter 5. To determine when we are criminally culpable for an attempt is not to look at a set of physical movements and at how far advanced they are. Nor, even, is it to seek the significance of these movements through the 'intention' that resides in the mind of the defendant. Rather, the accused is sufficiently to blame only when she is at some point, and from her perspective (a perspective consisting in the action itself), bringing about the end set. This threshold renders unimportant the commitments she has, the extent of her indecision, her trepidation and the other sources of hesitation, that after all persist in and are normatively irrelevant to culpability for successful crimes.

Chapter 6 returns to the vexed issue of impossibility in attempting. It will claim that the various examples of apparently 'impossible attempts' (empty pockets, innocuous substances, inadequate means, etc.) are straightforward instances of 'possible' attempts. The question that remains to be considered is whether those extraordinary attempters, who set out to kill by voodoo, say, are liable in the ordinary way. The chapter will provide, without recourse to 'impossibility', a principled basis for distinguishing defendants of this sort from others.

Equalism holds it wrong to allow luck to determine one's moral status. Chapter 7 accepts this basic proposition. A defendant may fail in his attempt just because luck intervenes and such a defendant is no less blameworthy than an otherwise identical defendant who succeeds. At the same time, the chapter will claim, against equalism, that systems of criminal justice, for reasons other than blame, may properly distinguish between offenders who bring about prohibited ends and those who, by luck, fail to do so. It will be suggested that the distinction should take a rehabilitative form, one that is sensitive to the existential differences between those offenders who succeed and those who fail.

Chapter 8 considers the very complex issues involved in the relationship between attempting and recklessness. It proposes that recklessness is both a species of foresight and a dependent part of action; it is always tied to acting for a reason. I may [set out to X knowing Y] and that may be reckless depending on the nature of Y. But I cannot, independently, set out recklessly to Y (I cannot set out recklessly to cause criminal damage, say). So, there ought not to be liability for ‘reckless attempts’ just because there is no such category. The question remains whether an offence that can be committed recklessly ought also to attract an inchoate form of liability. Liability is warranted, the argument will go, any time a defendant has been reckless, to the normal legal standard, in respect of a prohibited outcome. The approach is valid because the existence of reckless action does not depend, in any case, on the materialisation of prohibited outcomes; recklessness does not reside there.

The final chapter of the text considers the offences of attempted rape and attempted theft. Theft can be committed, in its complete form, without the defendant taking property in a manner that could be considered ‘objectively wrong;’ by simply lifting goods from a supermarket shelf, say. It attracts the criticism, then, that there exists a form of action, punishable as theft, which ought merely to be regarded as attempted theft. The analysis will provide an in-principle defence of theft as currently understood. Rape has a key ‘circumstantial’ element; the prosecution must show, beyond reasonable doubt, that the victim did not consent to sexual intercourse and that the defendant lacked a reasonable belief in his or her consent. The issue of whether and how a defendant can attempt the circumstance-element of a crime is a difficult and much debated one. It will be suggested that circumstances, although often (actually) impossible to identify as such, are part of the broader ontology to attempting. So, ‘attempted rape’ can occur where the defendant attempts penetration and lacks reasonable belief in consent and *this* is what he is culpable for. But now it becomes both artificial and unnecessary to accommodate this action-description within a concept of attempting. The chapter shows what an alternative formulation of inchoate theft and rape might look like, if based on the philosophy of attempting developed throughout the text.

### Summary

Attempting is pervasive in our doing, in our concepts of doing, in our nature as responsible moral beings. We do not merely act or fail to act; our action, rather, takes the form of reasoned pursuit; we try, or set out,

or attempt to reach ends that are valuable to us through means that make the ends realisable. But, we do not act only through attempting. We act with knowledge, perhaps through movement, with beliefs, hopes and emotions. All of this and more constitutes our intentional action as such and if we describe what is done as an attempt, we take a photograph, isolating from the broader reality, just the 'setting out to do'. The picture is not an easy one to capture. Not only are actions given form by diverse objects of manifold human capacities; they are also connected historically to other such complex actions and prospectively to what we are on the way to doing. Nor, amidst all of this, do we conceive of ourselves just as 'setting out to do', and even where we describe actions as attempts we hardly care to delineate very precisely between what is attempted and the broader ontology within which it is situated. Equally, crimes place our reasons for action in their broader culpable context and it may not be clear which of their elements belongs to the context and which to ends set. And, of course, the conception of action that law makes available may not, always, match our own. The question put to a defendant, 'Did you attempt to handle stolen goods?' may not be an answerable one to her.

Despite the haziness that appears to accompany attempting and its place in action, we do act intelligently, rationally, with certainty, knowing perfectly well what we are doing and *why*. This is true when we are timorous and filled with regret in acting as much as it is true when we are strident and confident. It is true even if what I might report is precisely: 'I don't know what I am doing!' for this, too, is something we know. So, Anscombe is correct that 'why' questions are always applicable to intentional actions. But perhaps most remarkably we know what we are doing without necessarily being able to *report* clear answers to her 'why?' questions. This observation is vitally important for it suggests a mismatch. When law puts questions to a defendant designed to establish whether he set out to do a prohibited end, it requires that he reflect on the matter. Through reflection we may unearth the imprecisely delineated reasons, knowledge, beliefs, emotions and movements that enable intentional action, and, in their active interaction, constitute it as such. Still, no discrete, or composite, part of this, once divorced from action, can tell us what that action was. We ought not to be surprised if defendants find answers to law's questions difficult to give, or if evidentially, reflectively and even philosophically we cannot reach the certainty we want. Why? The kind of knowledge sought by law, by the philosopher, and even through our self-reflection is just not the practical, non-observational kind of knowledge that action gives.

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Bebhinn Donnelly-lazarov  
Excerpt  
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PART I

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The anatomy of attempting

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## Attempts and intention

To attempt to make a pancake, I must do something. Equally, it appears, to attempt to make a pancake, I must intend something. Specifically, I must surely intend to make a pancake, not to grow trees or to fail to make a pancake. Two basic propositions are indicated:

- A An attempt is the kind of action that is intended, and
- B What is attempted corresponds to what is intended in an attempt.<sup>1</sup>

The propositions are certainly not universally accepted. Most people believe that it is more difficult to make a soufflé than a pancake. Perhaps an amateur cook may be reasonably content if his attempt to make soufflés results in the ‘pancakes’ that previous efforts produced. It may seem then that one can try to make a soufflé merely hoping for such culinary excellence. Indeed there is a view, contra A, that something ‘less’ than intention, like hope or foresight, will suffice in an attempt. Neither is it just obvious that an attempt is given substance by a corresponding intention. Contra B, many philosophers believe that it is entirely possible to attempt X without intending to achieve X.<sup>2</sup> One might, for example, attempt to make a pancake substituting cheese for eggs and icing sugar for flour just to demonstrate that the same is impossible. Here, in the attempt to make a pancake, there is no intention actually to produce one.<sup>3</sup> What is attempted does not correspond to what is intended.

<sup>1</sup> This position is the usual one among criminal law theorists, notably, Duff, Yaffe, Levy and Hart. Alexander and Ferzan also subscribe to it but interestingly do not base culpability for ‘complete’ attempts on intention.

<sup>2</sup> See, for example, Carl Ginet, ‘Trying to Act’ in J. K. Campbell, M. O’Rourke and D. Shier (eds.), *Freedom and Determinism: Topics in Contemporary Philosophy* (Cambridge, MA: MIT Press, 2004) Chapter 4. The position is also often held by those who subscribe to the planning theory of intention. See Gideon Yaffe, *Attempts* (Oxford University Press, 2010) Chapter 6.

<sup>3</sup> These kinds of examples that purport to demonstrate the possibility of ‘attempting the impossible’ and attempting without intention will be addressed in Chapters 4, 6 and 8.

So, for some, intention's relationship to attempting is one of conceptual necessity. For others, an attempt does not need a corresponding intention and certainly the object of an attempt is not unmasked by the intention of the attempter. How can the same phenomenon, one that in common parlance we have little difficulty grasping, produce positions that oppose each other so markedly? Several chapters of this book implicitly or expressly address that question, gradually trying to convince the reader that the somewhat absurd divergence has at its heart certain shared misunderstandings of intention. This chapter and Chapter 2 that follows propose substantially modified versions of A and B derived from an extension of Elizabeth Anscombe's account of intentional action.<sup>4</sup> In the modified propositions, attempts are presented as a species of intentional action. The concept of intentional action to be proposed will reframe the debate such that, in later chapters, the spectres of the agent who attempts what she does not intend; of the woman whose attempt we understand through knowing a mysterious intention (usually thought to reside in her mind); of the man whose 'soufflés' are not bitterly disappointing for he acts in hope rather than with intention, cease to be troublesome.

## 1.1 Understandings of intention

### *Intention and reasons for action*

Intention is not a mysterious phenomenon; innately we 'know' it very well indeed. At the same time, we have difficulty in expressing our 'knowledge' with explanatory precision<sup>5</sup> and perhaps most interestingly,

<sup>4</sup> Elizabeth Anscombe, *Intention* (Oxford: Blackwell, 1957). If the ideas proposed are to be located in current philosophical trends, they perhaps share some ground with calculative views of action. Thompson has been described as a prominent exponent of this trend. See Michael Thompson, *Life and Action: Elementary Structures of Practice and Practical Thought* (Cambridge, MA: Harvard University Press, 2008).

<sup>5</sup> The difficulty is philosophically apparent. One can almost feel the frustration in Donald Davidson's revisions to accommodate pure intention. For Anscombe, the great weight of effort in her ground-breaking work is not entirely hidden, and certainly with Searle the process of working out, rather than the finally worked-out, is very evident. Its apparent complexity sometimes leads to catch-all explanations. See e.g., Thornton: 'Where an agent has an intention, she has a reason for acting in a certain way. Intentions are formed when we choose an action which, if our beliefs are true, will satisfy our desires, subserve our goals, express our values, and, in general, help to achieve the ends we wish to achieve.' Michael Thornton, 'Intention in Criminal Law' (1992) 5 *Canadian Journal of Law and Jurisprudence* 2, 177.