

Impossibility Attempts: A Speculative Thesis

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Courts and commentators have struggled for years to identify rules to explain and justify certain widely-shared intuitions about impossibility attempts, and they have proposed rules variously based upon (1) what mistakes actors make, (2) what intentions actors possess, and (3) what conduct actors perform. None of the proposals fully succeeds, however, and none is able to explain the widely-shared intuition, which underlies Sandy Kadish's inventive hypothetical regarding "Mr. Law" and "Mr. Fact," that some attempts based upon mistakes of law are just as blameworthy as attempts based upon mistakes of fact. I propose an alternative rule that, I believe, not only explains where and why people possess widely-shared intuitions regarding impossibility attempts (including regarding Mr. Law and Mr. Fact), but also explains where and why people have conflicting intuitions. I argue that widely-shared intuitions of blameworthiness and non-blameworthiness regarding impossibility attempts are a function, respectively, of whether informed citizens of the jurisdiction that enacted the statutory offense that the defendant allegedly attempted to commit widely believe or disbelieve that he would have been a threat to interests that the statute seeks to protect—a determination, in turn, that is a function of whether they widely believe or disbelieve that he would have committed the offense under counterfactual circumstances that they fear could have obtained.

Perhaps no aspect of the criminal law is more confusing and confused than the common law of impossible attempts.¹

I. INTRODUCTION

I have had the pleasure, for twenty-five years, of teaching from Sandy Kadish and Steve Schulhofer's celebrated casebook, and I have learned something new from it every year. Considering that impossibility in criminal attempts has been one of Sandy's favorite subjects, I shall use this occasion to ruminate about the nature of impossibility and its implications for criminal responsibility generally.

Sandy and Steve's casebook illustrates the puzzle that haunts impossibility attempts, as well as an irony regarding the attention that scholars devote to it. The

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¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 432 (4th ed. 2006).

puzzle, of course, is to identify a principle that explains and justifies the widely-held intuition that, although certain actors who commit impossibility attempts should be convicted, certain others deserve a defense of “impossibility.”² The irony is that scholars devote attention to a few problematic cases that are so lacking in practical importance³ that scholars are obliged to invent fanciful hypotheticals to discuss them.⁴

Sandy illustrates the tenacity of the puzzle by trying twice to solve it; first through the vehicle of “The Case of Lady Eldon’s French Lace,”⁵ and, then, through a “Comment” in a “Hypothetical Law Review”⁶ in which he questions his original solution and advances a superseding solution. Sandy also illustrates the irony by devoting sixteen dense pages of his casebook to an issue that he discusses by reference to an imagined Lady Eldon, who attempts but fails to smuggle lace in the mistaken belief that the law declares lace of that kind to be contraband,⁷ and to an inventive hypothetical regarding “Mr. Fact” and “Mr. Law,” who both attempt but fail to hunt out of season.⁸

I shall explore a thesis that, I believe, resolves the puzzle and, in doing so, vindicates scholars like Sandy who regard it as a window into criminal responsibility generally.⁹ Specifically, I shall argue that the resolution of

² Although I disagree with Antony Duff about how to resolve impossibility attempts, see *infra* note 29, Duff’s magisterial *CRIMINAL ATTEMPTS* (1996) is the most scholarly and penetrating philosophical and legal analysis that we possess to date regarding criminal attempts.

³ See Neil P. Cohen, *Teaching Criminal Law: Curing the Disconnect*, 48 ST. LOUIS U. L.J. 1195, 1197–98 (2004) (footnote omitted):

I have taught the first-year Criminal Law course for many years . . . [and addressed] the traditional subjects, including such esoterica as impossible attempts A few years ago, I was afforded the chance to leave teaching for a short period and become an assistant district attorney prosecuting state cases in a medium-sized county. . . . During my relatively brief tenure as a prosecutor, I came to realize that many important issues routinely faced by lawyers in criminal law are simply ignored or given short shrift in the basic Criminal Law course For example, I did not encounter any impossible attempt cases, but I did see a significant number of assault-related incidents.

⁴ See, e.g., Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 249 (1996) (hypothesizing an actor who gives a target a dose of two aspirin, mistakenly believing that two aspirin will kill); Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Balyes*, 12 LAW & PHIL. 33, 51 (1993) (hypothesizing a “Mr. A” who engages in adultery mistakenly believing adultery is an offense).

⁵ SANFORD KADISH & STEPHEN SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 594–98 (7th ed. 2001).

⁶ *Id.* at 598–601.

⁷ *Id.* at 597.

⁸ *Id.* at 599.

⁹ See, e.g., Graham Hughes, *On Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1005 (1967):

[I]mpossibility . . . has for some time been a subject of sharp dispute among jurists of the criminal law That teachers of criminal law and writers in the field should devote

impossibility attempts presupposes a “stealth requirement” of criminal responsibility that has hitherto gone largely undetected—a requirement of criminal responsibility that the vast majority of criminal cases so readily satisfy that we scarcely notice its existence, but that rarefied impossibility attempts force us to confront.

Nevertheless, while the thesis arguably illuminates impossibility, it also has the consequence of raising troubling questions regarding criminal attempts generally. The thesis implies that when we punish persons for attempt and for crimes of ulterior intent, we are fundamentally punishing them not—or, at least, not only—for what they have done, but for what we believe they *would have done* under counterfactual circumstances that we fear could have obtained.

I shall proceed by (1) defining the scope and terms of the inquiry, (2) canvassing existing proposals for solving the puzzle, (3) proposing a thesis to explain and justify widely-shared intuitions about impossibility attempts, and (4) discussing the distinctive challenge of punishing attempts based upon mistakes of law. I will conclude by arguing that the thesis helps explain why people disagree about impossibility attempts, and why juries rather than judges should be the final arbiters of the stealth requirement of criminal responsibility that underlies impossibility attempts.

II. THE SCOPE AND TERMS OF THE INQUIRY

My specific aim regarding impossibility is common to many scholars who explore issues of criminal responsibility in general: (1) to explain, predict, and justify whatever settled and widely-held intuitions of justice people may possess regarding certain subjects, and (2) to account for any sharply conflicting intuitions of justice they possess in the same field.

Interestingly—at least if my students are representative—people seem to possess conflicting intuitions about impossibility cases as often as they possess shared intuitions. Thus, while my students broadly agree that an actor who intentionally shoots to kill a person whom he knows is no threat, but misses, is guilty of attempted homicide, they disagree about whether a person who buys sharply-discounted property from a street vendor in the mistaken belief that it is stolen is guilty of attempted receipt of stolen property. Considering these disagreements, I shall first try to reduce their scope by distinguishing disagreements that derive, not from conflicting intuitions regarding impossibility itself, but from conflicting intuitions about attempts generally. Then, having defined the class of attempts I shall be addressing, I shall define the subset that consists of “impossibility” attempts.

time and energy to this question is perfectly proper, for . . . [it] is a splendid set-piece which exhibits in a short space some of the most difficult issues of criminal law analysis.

A. Criminal Attempts Generally

Over the years I have polled students about how they would resolve certain real and hypothetical impossibility cases. Based on the polls, I believe that some of their differences of opinion are due to disagreements not about what is unique to impossibility attempts, but about how broadly the underlying crime of “attempt” itself ought to be defined. Specifically, I believe that many of their disagreements are about (1) whether actors with certain *mens rea* ought to be punished for attempt at all, (2) whether attempts to commit *minor* offenses ought to be punished at all, and (3) *how severe* penalties for attempts ought to be.

1. The Mens Rea of Attempt

Everyone agrees that with respect to a charge of attempting to commit offense X, it ought to suffice that an actor possess “purpose” regarding the elements of offense X. Students tend to disagree, however, about whether purpose is *necessary*. Some take the view that it is, indeed, necessary—that regardless of the mental states that are otherwise required for offense X, no one ought to be punished for *any* attempt to commit offense X, including an impossibility attempt, unless the person acted with purpose regarding the material elements of offense X. Others believe it also suffices that he possess mental states of knowledge or belief regarding circumstance and result elements of offense X, at least with respect to serious crimes, and regardless of whether it is an impossibility attempt. Still others take the view that it suffices that actors possess the mens rea that offense X requires regarding circumstance elements, even if the mens reas consists of mere recklessness or negligence, and regardless of whether it is an impossibility attempt. As a consequence, when these students disagree about whether actors with the latter states of mind ought to be punished for impossibility attempts, their disagreement is not about impossibility as such, but about something that is extraneous to impossibility, namely, about whether persons with such mens rea ought to be punished at all for attempt.

2. Attempts to Commit Minor Offenses

Everyone agrees that with respect to the classes of completed crimes for which attempt liability obtains it ought to suffice that offense X is a serious offense. Students tend to disagree, however, regarding whether it is *necessary* that offense X be a serious offense. Thus, some take the view that it is, indeed, necessary—that no one ought to be punished for *any* attempt to commit offense X, including an impossibility attempt, unless offense X is itself a serious offense. In contrast, others take the view that liability ought to exist for attempts to commit minor offenses, such as receiving stolen property, regardless of whether they are impossibility attempts. As a consequence, when these students disagree about whether actors ought to be punished for impossibility attempts to commit minor

offenses, their disagreement is not about impossibility as such, but about something that is extraneous to impossibility, namely, about whether the crime of attempt ought to extend at all to such offenses.

3. The Severity of Penalties for Attempt

Everyone agrees that with respect to penalties for attempt, incarceration can be appropriate for attempts to commit the most heinous offenses like murder. Students tend to be uncertain, however, about the penalties for attempt; and they further disagree about whether any incarceration—and, if so, how much incarceration—is appropriate for attempts to commit less serious offenses. As a consequence, when students disagree about whether actors ought to be punished for impossibility attempts to commit less-than-serious offenses, they may be expressing uncertainty and disagreement, not about impossibility as such, but about something that is extraneous to impossibility, namely, about the appropriateness of certain real or imagined terms of incarceration for such attempts.

In order to exclude these extraneous considerations, I shall confine the scope of my inquiry. Rather than seek a principle that explains and justifies people's intuitions of just punishment across the range of what counts as a criminal attempt in Anglo-American law, I shall confine myself to criminal attempts and punishments of certain kinds. By an "attempt," I mean an act or omission by an actor who, while possessing purpose or belief regarding circumstance and result elements of a crime, purposely does or omits to do anything which, under the conditions that he believes exist at the time, is a substantial step in a course of conduct planned to culminate in a crime. By "punishment" for attempt, I mean the public act of officially declaring an actor to be "guilty" of the attempt and making it part of his criminal record, regardless of any additional term of incarceration.

These stipulations significantly reduce the areas in which my students disagree about impossibility attempts. Nevertheless, as we shall see, areas of disagreement remain to which I shall return in the Conclusion.

B. "Impossibility" Attempts

"Impossibility" is one of two overlapping ways in which an actor who intentionally undertakes to commit an offense (and who does not voluntarily abandon the undertaking) can nevertheless fail to complete it, thereby leaving himself guilty of attempt. The two overlapping ways are (1) through interruption, and (2) by means of impossibility.¹⁰

¹⁰ Larry Alexander argues that all attempts are "impossibility" attempts without distinction. See Alexander, *supra* note 4, at 45. As a result, Alexander is implicitly obliged to take the position that an actor who tries but fails to kill a target by burning down the target's home is guilty of an "impossibility" attempt when, after he sets the fire and departs the scene, firemen arrive and narrowly rescue the victim.

Criminal undertakings fail because of “interruption” when events operate to frustrate actors from, in any sense, carrying out all that they intend to do. Thus, an actor fails because of interruption when he is unexpectedly arrested at the entry of a bank before he can make a threatening demand, when his pistol accidentally slips from his hand before he can pull the trigger, when he suffers a debilitating heart attack just before grabbing an intended kidnap victim, and when his intended rape victim successfully fights him off. The hallmark of interruption attempts is that because the actor is interrupted before he can do all that he intends, it is always possible, even if it is unlikely, that he would voluntarily repent before effectuating the offense.

Criminal undertakings fail because of “impossibility” when actors make mistakes of a certain kind regarding their ability to commit the offenses they intend. The mistakes, in turn, are about conditions that actors believe exist at the time they act. Actors may mistakenly believe that *circumstance elements* of an offense exist,¹¹ e.g., that sexual intercourse with a woman is “without her consent.” They may mistakenly believe that *means* or *bases* exist for fulfilling conduct or result elements of an offense,¹² e.g., that a gun is loaded or that an intended homicide victim is alive. They may mistakenly believe that *criminal prohibitions* exist, e.g., that adultery is an offense. In any event, a criminal undertaking fails because of “impossibility” when, though the actor would be committing a crime if he did everything he intends under the conditions that he believes exist at the time, what he actually does—or what he would do if he fully acted on his intent—is not the offense he intends to commit, because the conditions are *not* what he believes them to be.¹³

Impossibility attempts, in turn, fall into two categories depending upon whether the attempts are interrupted.¹⁴ An actor commits an *uninterrupted* impossibility attempt when, in committing an impossibility attempt, he, in some sense, does everything he intends. Thus, an actor commits an uninterrupted impossibility attempt when he purposefully shoots to kill a person whom he believes is alive, only to discover his intended victim is already dead; when he

¹¹ J.C. Smith refers to these conditions as “pure” circumstances because, when present, they always have the effect of satisfying a circumstance element of an offense. See J.C. Smith, *Two Problems In Criminal Attempts*, 70 HARV. L. REV. 422, 424 (1975).

¹² J.C. Smith refers to these as “consequential circumstances” because, rather than being a required circumstance element of an offense, they can have the consequence of enabling an actor to commit a conduct element or achieve a result element. See *id.* at 425.

¹³ For a different definition of “impossibility,” see George Fletcher, *Constructing a Theory of Impossible Attempts*, 5 CRIM. JUST. ETHICS 53, 57–59 (1986), classifying the act of shooting and missing as *not* being an instance of impossibility.

¹⁴ By the same token, interruption attempts also fall into two categories, depending upon whether they are also impossibility attempts. An actor commits an interruption attempt that is *not* also an impossibility attempt when, though he would be committing a crime if he does everything he intends under facts and law as he correctly believes them to be, events operate to prevent him from, in any sense, doing all he intends to do.

purposefully shoots but misses a person whom he believes is in his line of fire, only to discover that his intended victim was not in the line of fire; or when he purposefully absconds with property that he believes he is taking without the owner's consent, only to discover that the owner consented. An actor commits an *interrupted* impossibility attempt when, in the course of his committing an impossibility attempt, events operate to frustrate him from, in any sense, carrying out all he intends to do. Thus, an actor commits an interrupted impossibility attempt when the police arrest him just as he is about to pull the trigger of a gun he believes to be loaded but is actually empty; or when, for the purpose of stealing, he breaks into a locked safe that he believes may contain money but that turns out to contain no money at all.

III. EXISTING PROPOSALS TO SOLVE THE IMPOSSIBILITY PUZZLE

The three leading tests for solving the impossibility puzzle focus respectively on (A) what an actor *intends* to do, (B) what kind of *mistake* he makes, and (C) what kind of *act* he performs. Unfortunately, all three tests fail to explain some widely-shared intuitions. In addition, the first two tests tend to be hijacked by bogus tests that masquerade under similar names, while the third is a rule of law that seeks to do what is better done by a rule of evidence.

A. What an Actor Intends to Do

Some courts and commentators seek to solve the impossibility puzzle by asking of an actor, "What did he intend to do?" As we shall see, this test is capable of being applied in a manner that is instrumental and moderately useful. Unfortunately, the intent test can also be hijacked by a bogus test that renders it either random or conclusory.

One of Sandy's featured cases, *People v. Jaffe*,¹⁵ illustrates the bogus manner in which the intent test can be hijacked. The *Jaffe* court purported to resolve the impossibility puzzle by (1) identifying what act the actor at issue intended to perform, and (2) determining whether the act was criminal or non-criminal.¹⁶ An actor is guilty of attempt, the *Jaffe* court said, if the act he intended to perform is a crime.¹⁷ Otherwise the actor is innocent. Thus, *Jaffe* said, an actor who takes possession of property in a sting operation, mistakenly thinking that it is being tendered without the owner's consent, is not guilty of attempted larceny because the act he intends to perform (i.e., the act he actually effectuates of taking possession of particular property and intentionally carrying it away) is not a crime given that the property is being tendered to him with the owner's consent.¹⁸ In

¹⁵ 78 N.E. 169 (N.Y. 1906).

¹⁶ *Id.* at 170.

¹⁷ *Id.*

¹⁸ *Id.*

contrast, *Jaffe* said, an actor who reaches into a pocket for the purpose of picking it only to discover the pocket is empty, is guilty of attempted pick pocketing because the act he intends to perform (i.e., the act of picking a pocket of valuables) is a crime.¹⁹

As Sandy himself points out,²⁰ the flaw in the *Jaffe* test is that, although it purports to inquire into the *one* act that an actor in an impossibility case intends to perform, it defines “intent” in such a novel way that an actor invariably intends to perform *two* acts:

Act #1: the act that a person in an impossibility case *actually* performs and that is *never* a crime, e.g., the act of taking and carrying away property with the consent of the owner; and

Act #2: the act that a person in an impossibility case mistakenly *believes* he is performing and that is *always* a crime, e.g., the act of picking a pocket.

Because *Jaffe* seeks a single intended act where two intended acts exist, an actor’s liability for attempt ultimately depends not upon which act he really intends—given that he really intends both—but rather upon which act a court happens to highlight after the fact.

The defect in *Jaffe*’s approach, therefore, is not that it dictates unjust results, but that it dictates no results at all. *Jaffe* is a non-test that provides no instrumental guidance—no set of instructions—for a court that wishes to know whether to acquit or convict. It can be applied, willy-nilly, either to acquit or convict a defendant in an impossibility case, depending upon whether the court emphasizes act #1 or act #2. Thus, by emphasizing act #2, a court can convict an actor like Mr. *Jaffe* by asserting that he intended to do what he mistakenly thought he was doing, i.e., to take and carry away property without the owner’s consent. By emphasizing act #1, a court can acquit a failed pickpocket by asserting that he intended to perform the act that he actually performed, i.e., to put his hand in a pocket that was empty. This means that *Jaffe*’s approach is either conclusory or random, depending upon whether a court has already decided whether a given actor should be acquitted or convicted. For a court that has consciously or unconsciously decided to acquit or convict, *Jaffe* is a set of conclusory labels that the court invokes after the fact to rationalize a decision it has previously reached on unstated grounds. For a court that has not already decided, *Jaffe* randomly triggers either acquittal or conviction, depending upon which of the two acts happen to captivate the court.

Now this is *not* to say that an actor’s intent is always a non-test. George Fletcher propounds a version of the intent test that is instrumental rather than

¹⁹ *Id.* at 169–70.

²⁰ KADISH & SCHULHOFER, *supra* note 5, at 594–96.

conclusory. Fletcher recognizes that in impossibility cases, an actor can be regarded as intending *both* act #1 and act #2 (rather than *either* act #1 or act #2).²¹ Whether the actor possesses a defense of impossibility, Fletcher argues, depends upon which is the actor's "motivating" intent.²² The measure of motivating intent, in turn, is which of the two acts—act #1 or act #2—he would perform if he were disabused of his mistake in time to take corrective action. As Fletcher puts it:

[P]eople attempt to achieve only those ends that affect their motivation in acting. Their mistaken beliefs constitute part of the attempted act only so far as being disabused of their mistakes would alter their course of conduct. This is an argument . . . that is rooted in the ordinary understanding of what it is, in daily life, to try to achieve a particular goal.²³

Accordingly, an actor is not guilty of attempt who is so motivated that, if he were disabused of his mistake, he would continue unfazed to perform a harmless act of the kind he actually performed. In contrast, an actor is guilty of an attempt who is so motivated that, if he were disabused of his mistake, he would change course and try to perform the criminal act he thought he was performing.

Fletcher's test has the advantage of being able to explain many widely-shared intuitions. Thus, the test explains why an actor is guilty who reaches into another person's pocket in the mistaken belief that it contains valuables, and why an adulterer who engages in adultery in the mistaken belief that adultery is a crime is not guilty. The former is guilty because, if he were disabused of his mistake in time to take corrective action, he would find and pick a pocket that contained valuables. The latter is not guilty because, were he disabused of his mistake, he would perform the same innocuous act he actually performed, i.e., adultery, while this time relieved that he was not committing a crime.

Unfortunately, Fletcher's test counterintuitively acquits actors whom most observers would convict. Thus, consider a person who, wishing a romantic rival dead, shoots to kill in the mistaken belief that his rival is asleep, only to learn that his rival had already died of heart disease a few hours earlier. If my students are a measure, most people would convict such an actor. Yet Fletcher would acquit him because if the actor were apprised of his mistake in time to correct his course of action, the actor would do something that is even more innocuous than he

²¹ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 179 (1978).

²² Fletcher argued in *Rethinking Criminal Law* that, although the motivational test is the sole test of liability in impossibility cases, it is confined to a certain subset of impossibility cases, namely, attempts to commit crimes *other than* crimes, such as murder, that involve the central harms that the criminal law seeks to prevent. *Id.* at 155–66, 184. For the latter crimes, Fletcher advocated a "manifest-criminality" test. *See id.* at 146–55, 184. More recently, however, Fletcher has argued that the motivational test is a necessary part of a two-part test that together applies to all impossibility cases, the other part being the manifest-criminality test. *See Fletcher, supra* note 13, at 64.

²³ FLETCHER, *supra* note 21, at 181–82.

originally did: he would quietly leave the scene in good conscience, knowing that his rival was about to die from natural causes.²⁴

B. *What Kind of Mistake an Actor Makes*

Another leading test, including Model Penal Code [MPC] section 5.01, is based upon whether an actor makes a mistake of fact or a mistake of law. The clearest version of the law/fact test—which Sandy himself initially expounds in “The Case of Lady Eldon’s Lace”²⁵—explicitly invokes the terms “law” and “fact,” by providing a defense to actors who make mistakes of law and not to those who make mistakes of fact.²⁶

A less clear, but nevertheless equivalent, version of the law/fact test is the Model Penal Code test.²⁷ MPC section 5.01(1) contains two elements that together functionally duplicate the law/fact test: (1) the first element bases an actor’s liability upon what he “believes” the “circumstances”²⁸ to be, even if he is mistaken in his belief; (2) the second element conditions an actor’s liability for attempt to commit offense X upon his possessing the mens rea that offense X itself

²⁴ For another normative critique of Fletcher’s motivational view of intent, see Kenneth Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 470–71 (1990).

Larry Alexander criticizes Fletcher’s test on the ground that it is premised on counterfactual determinations that, in fact, are indeterminate. See Alexander, *supra* note 4, at 63–64. Alexander illustrates this critique by pointing out that Fletcher and Myke Bayles come to different conclusions about whether the defendant in *Jaffe*, 78 N.E. 169 (N.Y. 1906), would have altered his conduct if he had been disabused of his mistake in time to take corrective action. I am skeptical of Alexander’s critique. The counterfactual determination that Fletcher’s test dictates is clear and simple, for it requires that one reconceptualize the past by changing only *one thing* about it. It requires that one conceptualize what an actor would do if he were made aware of his mistake in time to take correction action. Fletcher disagrees with Bayles because in applying his test, Fletcher makes the mistake of also changing something *else*. Unlike Bayles, who reconceptualizes the past by imagining what Mr. Jaffe would do if he were apprised of the sting before acting, Fletcher also changes the property owner’s *reason* for consenting—changing it from a desire to entrap the defendant and his accomplice in a sting, to a desire to confer a veritable gift on the defendant and his accomplice.

²⁵ KADISH & SCHULHOFER, *supra* note 5, at 597–98.

²⁶ See ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 406 (3d ed. 1999) (discussing modern English doctrine).

²⁷ *But see* MODEL PENAL CODE COMMENTARY § 5.01 pt.I, at 381 n.92 (1985) (muddying the waters as to whether it tracks the “fact/law” distinction despite the way Model Penal Code § 5.01(1) clearly functions); *see also* Alexander, *supra* note 4, at 49 n.41.

²⁸ Model Penal Code § 5.01(1)’s usage of the term “circumstances” is equivalent to my term “condition,” and neither should be confused with Model Penal Code § 1.13(9)’s narrower reference to “circumstances [*elements*].” Model Penal Code § 5.01(1)’s reference to “circumstances as he believes them to be” includes conduct elements and result elements as well as circumstance elements. Thus, a person who is arrested just as he is about to shoot to kill a person who, as it turns out, is already dead is guilty under Model Penal Code § 5.01(1)(c), despite the fact that the “circumstances” about which he is mistaken is the result element of “killing.”

requires, something that no actor can ever possess who makes a mistake of law.²⁹ As a consequence, because Element One bases an actor's liability upon what he believes the "circumstances" to be, and because Element Two functions to eliminate liability for actors who make mistakes of law, actors are liable for impossibility attempts under MPC section 5.01(1) if, and only if, they make mistakes of fact.

We shall see shortly that the law/fact test has several strengths. Unfortunately, just as *Jaffe* hijacked the intent test, the law/fact test can be hijacked by a bogus test that masquerades under comparable terms and, yet, is as inconclusive as *Jaffe*. Indeed, the bogus test is *Jaffe* in disguise.

The bogus test mimics the law/fact test by employing the comparable terms "legal" and "factual" impossibility. Like the law/fact test, the bogus test treats legal impossibility as a defense to attempt liability, and factual impossibility as no defense. However, the bogus test measures "law" and "fact" differently than the genuine test. Rather than measure an actor's liability by the *kind of mistake* he makes as between law and fact, the bogus test measures his liability by whether it is fact or law that precludes the act he intends from being a completed crime.

Another of Sandy's cases, *People v. Dlugash*,³⁰ illustrates the bogus way in which the law/fact test can be hijacked in the name of "legal" and "factual" impossibility. Although New York had replaced its prior tests of impossibility with MPC section 5.01 by the time *Dlugash* arose, *Dlugash* reviews New York's prior effort to resolve impossibility attempts by distinguishing between legal and factual impossibility. *Dlugash* starts by saying that legal impossibility is based upon a "mistak[e]" of law, while factual impossibility is based upon a "mistak[e]" of fact. However, *Dlugash* immediately contradicts itself by implicitly taking the position that what determines whether an attempt is factually or legally impossible is which of the two acts we discussed above—namely, act #1 or act #2—an actor is adjudged to have intended. Thus, *Dlugash* refers to the shooting of a stuffed decoy in the mistaken belief it is a living deer as an instance of legal impossibility—reasoning, apparently, that (i) the shooter must intend to shoot the target he actually shoots, for otherwise he would not succeed in hitting the target, (ii) the target he shoots is a stuffed decoy, and (iii) what renders it impossible for him to commit the crime of poaching by shooting a decoy is the *law* that states that "poaching" is the shooting of *living* animals. At the same time, *Dlugash* refers to the futile picking of an empty pocket as an instance of factual impossibility—reasoning, apparently, that (i) the pickpocket, believing that the pocket might

²⁹ See John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1, 9, 32–33 (2004). *But see* DUFF, *supra* note 2, at 211 (arguing, mistakenly I believe, that it is legally possible to convict an actor under current attempt statutes whose mistake is one of law, e.g., to convict an actor of attempted "sexual intercourse with a girl who is under 16," who, acting with the purpose of violating the law, has sexual intercourse with a girl who he knows to be 17 in the mistaken belief that the age of consent is 18).

³⁰ 363 N.E.2d 1155 (N.Y. 1977).

contain valuables, intends to pick a pocket containing valuables, and (ii) what renders it impossible for him to pick the pocket is the *fact* that the pocket is empty.

Needless to say, this understanding of “factual” and “legal” impossibility suffers from the same fallacy as *Jaffe*: the fallacy of assuming that, as between acts #1 and #2, actors in impossibility attempts intend to commit only one, when in reality they intend to commit both. Because they intend to commit both, every impossibility case is both an instance of factual impossibility and legal impossibility, depending upon how it is characterized. Thus, instead of describing the attempted poaching as a legal impossibility and the attempted pick pocketing as factual impossibility, *Dlugash* could have said the opposite. It could have characterized the poacher’s act as an instance of act #2, and the pickpocket’s as an instance of act #1, thereby describing the former as factual impossibility and the latter as legal impossibility. Consequently, this kind of inquiry into factual and legal impossibility replicates the conclusory and random way the *Jaffe* court inquired into what actors intended.³¹

A better test of “legal” and “factual” impossibility focuses upon the kind of mistake, as between law and fact, that causes what he actually does not to be an offense.³² The “law,” for the purposes of the test, consists of a full specification of the act-types that the state officially declares to be punishable.³³ The “facts”

³¹ Commentators also fall into this trap. See, e.g., Alexander, *supra* note 4, at 34–35 (referring to a mistake in thinking a gun is loaded as “factual” and referring to a mistake in thinking that the owner has not consented to the transfer of property as “legal,” despite that the latter is not a mistake with respect to which he would have benefited from having a good lawyer, but, is a mistake with respect to which he would have benefited from information from having a good private investigator).

³² Larry Alexander denies that any “nonarbitrary line” exists between *law* and *fact* in impossibility cases. See *id.* at 45. He argues that, “If [the] application [of a law] is part of [its] meaning—and consider whether one ‘knows’ the meaning of a law if he cannot identify any actual extension of it in the world—then factual mistakes are legal ones, and factual impossibility is a species of legal impossibility.” *Id.* at 52. Despite my admiration for Alexander’s command of legal theory, I think Alexander confuses “application of law” qua a state’s *full specification of the act-types it prohibits* and “application of the law” qua *actual act-tokens thereof*. Yes, every criminal event is an act-token of an act-type that the state has declared to be prohibited. But mistakes regarding what act-types are prohibited (law) differ from mistakes regarding whether conduct is an act-token thereof (fact). Both mistakes can result in a person thinking that he has violated the law when he has not, but the *sources* of the mistakes differ. Both mistakes can also, confusingly, be said to be mistakes of “fact.” But one is a mistake about the fact of what act-types the state has declared to be prohibited, and the other is a mistake about whether conduct possesses the empirical features of an act-token thereof.

³³ Kenneth Simons would divide all such mistakes of law into two categories: (1) mistakes regarding the “governing law” that declares conduct to be an offense, which Simons treats as exculpatory in attempt cases, and (2) mistakes regarding “elements” of an offense, which, he says, some commentators would treat as inculpatory in attempt cases. See Simons, *supra* note 24, at 457. Much as I respect Simons, I agree with Alexander that no analytical line can be drawn between mistakes regarding a “governing law” and its “elements.” See Alexander, *supra* note 4, at 39–40, 43, 57 (discussing “Lady Eldon” in his hypotheticals “1.a.” and “1.b.”). Every person who makes a mistake regarding an element of an offense also, necessarily, makes a mistake about the governing law.

consist of the empirical features that determine whether conduct is an act-token of what is acknowledged to be a prohibited act-type. It follows, therefore, that no middle ground exists between law and fact,³⁴ and there are no “mixed”³⁵ mistakes that consist of neither one nor the other. An actor makes a mistake of law in an impossibility case and, hence, has a defense, if he is in need of the services of a good lawyer—that is, if, although he knows what he is empirically doing, he mistakenly believes that the state has officially declared acts of that type to be punishable. An actor makes a mistake of fact in an impossibility case, and, hence, has no defense, if he is in need of the services of a good private investigator—that is, if, although he knows what act-types the state officially declares to be punishable, he mistakenly believes that his conduct is an act-token thereof.

The best critique of the law/fact test is the one that Sandy levels in his “Comment” in “Hypothetical Law Review” against the position he previously expounded in “The Case of Lady Eldon’s Lace.” The problem, as Sandy admits in “Comment,” is that, while the categories “law” and “fact” generally correspond with shared intuitions about which attempts are exculpatory and inculpatory, respectively, the match is not perfect: mistakes of fact can occur that observers commonly regard as exculpatory, and mistakes of law can occur that observers commonly regard as inculpatory.

To illustrate a mistake of fact that observers commonly regard as exculpatory, consider the following version of a case that Sandy poses in his Comment, which I elaborate as follows:³⁶

Midwestern Voodoo

Mildred, a gullible, fifty-five-year-old house-bound woman in North Dakota, deeply resents her ex-husband and his trophy wife in Palm Beach, Florida. Mildred reads in the *National Examiner* and on the

³⁴ Larry Alexander hypothesizes four cases that he thinks fall in the middle. Alexander, *supra* note 4. However, the four reduce essentially to two, and neither is an instance of a middle ground. Thus, an actor who knows that the state declares hunting on days with a red flag to be an act-type of poaching, but who, being colorblind, sees a red flag where there is actually a green flag, makes a mistake of fact because, while he knows what act-types are prohibited, he mistakenly thinks that his conduct possesses one of the empirical features that, if present, constitutes what he knows is the act-type. In contrast, a woman who imports French lace knowing that she possesses French lace but misreading the statutory prohibition on “Flemish” to be a prohibition on “French” lace is making a mistake of law, because while she knows the empirical features that her conduct actually possesses, she does not know that the state has declared conduct with such features to be a prohibited act-type.

³⁵ For commentators who believe that a third category of “mixed” mistakes of law and fact exists, see Ira P. Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377, 394–97 (1986); Fernand N. Dutile & Harold F. Moore, *Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners*, 74 NW. U. L. REV. 166, 184–201 (1979); FLETCHER, *supra* note 21, at 686 (describing the “application” of law as being intermediate between law and fact). However, they are mistaken. There is no middle ground between its being a mistake of law or fact. See Simons, *supra* note 24, at 458.

³⁶ KADISH & SCHULHOFER, *supra* note 5, at 598.

Internet about lethal, Haitian-origin Voodoo rituals that novices can practice in their home, provided that they purchase a recommended booklet, do the exercises, and possess DNA-containing tissue of their target. Mildred, who possesses a lock of her ex-husband's hair that he gave her when they were dating, buys the book and becomes convinced that it is worth a try. Mildred reads that, although success is not guaranteed, a good chance always exists that Voodoo will succeed. She is relieved to learn that the method leaves no clues and does not require her to be in the presence of her husband. She is also comforted to learn that responsibility does not fall solely on her own shoulders, for she will not succeed unless the spirit world independently agrees that her target deserves his ill fate. Mildred practices a ritual designed to cause her ex-husband to die of disease. When it does not work, she confesses to a friend who, in turn, notifies the police who arrest her for attempted murder.

My students disagree about whether all instances of Voodoo are exculpatory. However, when they are asked to pass judgment on Mildred's case as if they were prosecutors, they agree that, whether or not Mildred deserves God's punishment for endeavoring to kill an innocent person, the state would be abusing its power if, given Mildred's mistake of fact, the state officially declared her to be an "attempted murderer" and made it part of her public record.³⁷

Now consider mistakes of law that my students regard as being just as inculpatory as most mistakes of fact. Again, the best illustration is one of Sandy's, i.e., his inventive hypothetical involving Mr. Fact and Mr. Law, which I elaborate as follows:

Mr. Fact and Mr. Law

Mr. Fact and Mr. Law both set out independently to get a jump on the bow-hunting season by sneaking out a day before the season begins. For technical reasons, the exact date of the state's bow-hunting season for deer tends to change from year to year, but this date this year is Friday, October 15. Ironically, Messrs. Fact and Law each make a mistake that results in their stalking and killing deer on what they mistakenly believe to be the day *before* the hunting season but is actually the first day *of* the season itself (Friday, October 15). Mr. Fact makes the factual mistake of thinking, "Today is Thursday, October 14." Mr. Law makes the legal mistake of thinking, "The season begins on Saturday, October 16."

³⁷ Cf. FLETCHER, *supra* note 21, at 166 ("[O]ne case in which virtually everyone agrees that there should be no liability . . . is the case of nominal efforts to inflict harm by superstitious means, say by black magic or witchcraft. The consensus of Western legal systems is that there should be no liability, regardless of the wickedness of intent, for sticking pins in a doll or chanting an incantation to banish one's enemy to the nether world.").

While each is butchering his deer carcass, he is each approached by a game warden who intends to congratulate him. Instead, Mr. Fact and Mr. Law both confess, thinking they have been caught red-handed while hunting out of season.

My students disagree about whether attempted hunting out of season ought to be a crime in the first place. However, they agree with Sandy and other scholars³⁸ who have commented on the case that in terms of culpability, Mr. Fact and Mr. Law are equally blameworthy.

In sum, the law/fact test has two defects. First, it fails to explain and predict all shared intuitions about impossibility attempts. Second, like Fletcher's intent test, even when it does explain shared intuitions, it fails to go further and also justify them—that is, it fails to ground them in normative principles of just responsibility.³⁹

C. *What Kind of Objective Act an Actor Performs*

The third test, which is typically attributed to Arnold Enker,⁴⁰ focuses on the “objective” act⁴¹ that an actor performs. Several federal courts have adopted

³⁸ See, e.g., Hasnas, *supra* note 29, at 31–32; Dutile & Moore, *supra* note 35, at 184. Cf. HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 209–11 (1979) (some mistakes of law are just as blameworthy as analogous mistakes of fact).

³⁹ Cf. Alexander, *supra* note 4, at 64 (Fletcher's test “has no . . . normative basis”).

⁴⁰ See Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665 (1969). Enker himself acknowledges the prior work of Graham Hughes. *Id.* at 684 (citing Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967)).

⁴¹ Enker's test is not the only legitimate test that is predicated on the “objective” nature of an actor's conduct. Other objective tests have also been advanced, see *infra* note 104, including by Antony Duff. Duff argues that an actor is not guilty of an impossibility attempt unless (1) the actor possesses a mental state of purpose regarding circumstance elements of the offense, and (2) the actor's “action, in the circumstances as they would appear to the reasonable observer in the agent's situation, is at all plausible as a means of trying to actualize the [agent's] further intention.” DUFF, *supra* note 2, at 208–09, 211, 226–29, 232–34, 378–83, 398–99. The problem with Duff's test is that it would acquit actors who are widely regarded as culpable. Thus, it would acquit an actor of attempted murder who, in an effort to recover insurance on airplane cargo, plants a bomb that he believes will kill the plane's passengers but that fails to detonate because of a faulty fuse, see *id.* at 208–09. And it would acquit an actor of attempted rape who has sexual intercourse at a party with a woman whom he believes and hopes is unconscious from drink but who actually just died. See *id.* at 229.

variations of Enker's test,⁴² and Sandy, despite his earlier doubts about it,⁴³ eventually embraced it also.⁴⁴

Enker's test is best understood by what it is a reaction to. Enker's test is a reaction to what Enker regards as an ominous trend toward "subjectivism" in criminal law, that is, a trend toward basing an actor's criminal liability less upon his actually engaging in "objective" conduct that the state specifically prohibits, and more on his being "subjectively" willing to do so. Enker worries that if overzealous prosecutors are freed from the obligation to prove objective conduct, they will be tempted to invoke questionable evidence of criminal intent, such as jailhouse informers, accomplice testimony, and prior crimes, to convict innocent defendants who lack an objective basis for rebutting false attributions of criminal intent.⁴⁵

Enker directs his criticism to criminal attempts because, in contrast to other inchoate offenses which specify *some* objective prohibited conduct on an actor's part, criminal attempt statutes can be satisfied by *any* objective conduct that is consistent with an actor's criminal intent. Among all attempts, Enker further focuses on a certain class of impossibility attempts, namely, where an actor makes a mistake of fact regarding the existence of circumstance elements of an offense⁴⁶ (e.g., that sexual intercourse is "without consent"). Enker argues that the latter attempts present a particularly high risk—and, ultimately, an unacceptable risk—of convicting the innocent.

To make the point, Enker contrasts this latter class of impossibility attempts with all other attempts. When an actor is charged with a non-impossibility attempt, Enker says, the actor will have engaged in objective conduct that, though it is not itself a crime, is nevertheless suspicious. Thus, when an actor is charged with attempted murder for having lain in wait to shoot a victim, he will have engaged in the objective and suspicious conduct of (i) concealing himself, (ii) in the proximity of a putative victim, (iii) while armed with a weapon. Similarly, Enker says, when an actor is charged with an impossibility attempt based upon a mistake regarding a conduct element or result element of an offense, he will also have engaged in objective conduct that is suspicious. Thus, when an actor is charged with attempted murder for trying to shoot a person with a gun that jammed, he will have engaged in the objective and suspicious conduct of (i) pointing a gun at a putative victim, and (ii) pulling the trigger. In contrast, Enker

⁴² See *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976); *United States v. Everett*, 692 F.2d 596, 600 (9th Cir. 1982); *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982).

⁴³ See *KADISH & SCHULHOFER*, *supra* note 5, at 596.

⁴⁴ *Id.* at 600–01. For commentators who have adopted similar tests, see *FLETCHER*, *supra* note 21, at 146–57 (a "manifest criminality" test of liability for attempts to commit crimes of social harm); *Robbins*, *supra* note 35, at 339–43, 398–412, 417–19; Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 *DEPAUL L. REV.* 231, 266–73 (1977).

⁴⁵ See Enker, *supra* note 40, at 670, 682, 687–88, 692.

⁴⁶ *Id.* at 669, 679.

says, no such suspicious, objective conduct obtains in the event of impossibility attempts based upon factual mistakes regarding circumstance elements. Thus, when Lady Eldon is charged with attempting to import French lace based upon her transporting English lace in the mistaken belief it was French, her objective conduct is not only lawful (as is always the case with criminal attempts), but also unsuspecting. For it consists of the innocuous conduct of (i) transporting, (ii) English lace, (iii) that is non-dutiable.⁴⁷

For these reasons, Enker rejects the Model Penal Code, which renders actors culpable for all mistakes of fact in impossibility cases. Instead, he proposes that courts continue to do what he claims many courts have been doing all along, namely, generally acquit actors who engage in impossibility attempts based upon factual mistakes regarding circumstance elements. Specifically, he advocates dividing all attempt cases into two sets, which he calls “legal” and “factual” impossibility, respectively, each consisting of two subsets:

“Legal Impossibility”—consisting of (1) impossibility cases based upon mistakes of law, and (2) impossibility cases based upon mistakes of fact regarding circumstance elements;⁴⁸

“Factual Impossibility”—consisting of (1) non-impossibility attempts, and (2) impossibility attempts based upon mistakes of fact regarding conduct and result elements.⁴⁹

Enker subjects all instances of “legal impossibility” to a *per se* rule, treating all of them as non-culpable. With respect to instances of “factual impossibility,” Enker entrusts it to the courts to decide on a case-by-case basis whether the features of an actor’s objective conduct sufficed to corroborate the allegation of criminal intent.⁵⁰

The strength of Enker’s thesis is that it highlights a legitimate concern about impossibility attempts, namely, that where an actor’s objective conduct does not corroborate his alleged intent, risks increase that he will be wrongly convicted based upon what false witnesses claim to have been his criminal intent. Nevertheless, the deficiencies in Enker’s thesis are several.

First of all, Enker mistakenly assumes that the risks of false conviction are distinctive to attempt cases, when, in reality, they exist to the same extent in non-attempt statutes that take the form, “It is a crime for a person to do X *with intent to commit offense Y.*” Yet despite the fact that commission of X itself is neutral on the probability of an actor’s committing offense Y, no jurisdiction requires that an actor’s objective conduct in committing X corroborate his intent to commit offense

⁴⁷ *Id.* at 677.

⁴⁸ *Id.*

⁴⁹ *Id.* at 669.

⁵⁰ *Id.* at 698–703.

Y. Instead, jurisdictions rely on the adversary process and on the presumption of innocence to ferret out false testimony of intent. Consider, for example, a statute that prohibits “assault with intent to kill.” Although particular assaults may possess features that are circumstantial evidence of intent to kill, assaults are not themselves evidence of intent to kill. Yet no jurisdiction requires as a matter of substantive criminal law that the objective circumstances of an actor’s assault corroborate his intent to kill.

Second, Enker mistakenly assumes that because risks of false conviction *correlate* with impossibility attempts based upon factual mistakes regarding circumstance elements, they are *necessarily present* in such cases. To illustrate the mistake, consider the following case, which Enker would classify as “legal impossibility” and, hence, non-punishable: an actor, having spent thousands of dollars refitting his car with a false container, fills it with packets of white power that he is observed purchasing at a great cost and is later stopped at the border—only to discover that the packets contain innocuous talcum powder. The actor’s mistake is about the existence of a circumstance element of the offense, i.e., that the material he is transporting is cocaine. Yet his objective conduct, i.e., the construction of the hidden container, the concealing of packets, and the enormous sum he paid, all strongly corroborate his criminal intent.

Third, Enker mistakenly assumes that evidence of objective conduct is the only way to decisively corroborate the existence of criminal intent. Criminal intent can be decisively proved—and sometimes better proved—by evidence in the form of wired, recorded, and videotaped conversations. Consider the following case, which Enker would classify as “legal impossibility” and, hence, non-punishable: the police, as part of a sting operation, videotape a suspect, A, as he talks in detail about wishing to purchase a kilo of cocaine; the police, having bugged A, also record his telephone conversations with potential purchasers; on the day agreed upon, A tenders the undercover agent \$50,000 in return for a kilo of white power to A that turns out to be talcum powder, whereupon the police arrest A for attempting to purchase cocaine. Again, contrary to what Enker assumes, this is a case in which the actor’s objective conduct *does* corroborate his intent to purchase drugs because no one would tender \$50,000 for innocuous powder. However, A’s videotaped and recorded conversations are even better proof of A’s intent than his objective conduct, and would stand alone to support a conviction.⁵¹

Fourth and finally, Enker mistakenly assumes that because it is conceptually difficult in law to frame an actor’s liability for a mistake of law, it is impossible.⁵² As a consequence, Enker groups all mistakes of law together and exculpates all who make them, despite the fact that Mr. Law is generally regarded as being just as blameworthy as Mr. Fact.

⁵¹ John Hasnas, who otherwise agrees with Enker, admits that an actor’s statements can be as probative of his intent as evidence of objective conduct. See Hasnas, *supra* note 29, at 68 n.186, 73.

⁵² Enker, *supra* note 40, at 669 n.13.

Some federal courts purport to adopt Enker's test, but, in reality, they depart from it significantly.⁵³ While they agree with Enker that all mistakes of law are exculpatory, they ignore Enker's distinction regarding mistakes of fact about circumstance elements and, instead, subject all mistakes of fact to the same analysis that Enker recommends for what he calls "factual impossibility." Specifically, they subject all mistakes of fact to a case-by-case analysis to determine whether an actor's objective conduct, unaided by evidence of his criminal intent, suffices to corroborate the state's allegation of criminal intent. The Fifth Circuit in *United States v. Oviedo* puts it this way:

[W]e demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying *mens rea*, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.⁵⁴

In addition, neither *Oveido* nor the courts that claim to follow it actually practice what the quotation in *Oveido* literally preaches—or what Enker would presumably wish them to practice. The quotation in *Oviedo* purports to require courts to examine an actor's "objective" acts "*without any reliance on the accompanying mens rea*,"⁵⁵ a requirement consistent with Enker's suspicion of *mens rea* evidence. In practice, however, courts interpret "objective acts" to include the very thing that Enker would exclude, namely, hearsay statements in the form of an actor's admissions of what he intends. Thus, in deciding that Mr. Oviedo's "objective acts" corroborated the state's allegation of criminal intent, the Fifth Circuit took into account not only what he physically did but also what a state undercover agent reported he "said."⁵⁶

In sum, Arnold Enker's test has four deficiencies set forth above. In contrast, the test that the federal courts mistakenly attribute to him has only one deficiency, i.e., that it aggregates all mistakes of law and exculpates them all. However, in order to avoid the other three deficiencies, the federal courts have largely transformed Enker's test from a controversial rule of substantive criminal law into an innocuous, sufficiency-of-the-evidence rule to the effect that persons not be

⁵³ See cited cases *supra* note 42.

⁵⁴ *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976). See also *United States v. Innella*, 690 F.2d 834 (11th Cir. 1982).

⁵⁵ *Oviedo*, 525 F.2d at 885 (emphasis added).

⁵⁶ *Id.* ("Here we have only two objective facts. First, Oviedo told the agent that the substance he was selling was heroin . . ."). Accord *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982) ("In the present case Innella's objective acts were unequivocal. His words . . . were consistent with an attempt to purchase a controlled substance.").

convicted of an impossibility attempt based upon mistakes of fact unless their conduct and statements support the existence of criminal intent on their part.⁵⁷

IV. A PROPOSAL

The key to the impossibility puzzle lies in examining why the law/fact test so often gets it right. If we can answer that question, we will have identified a test that explains and predicts all our widely shared intuitions. Then, having identified the test, we inquire into whether the test is normatively justified. Before we do so, however, it may be useful to examine several related paths that others have traveled.

A. *Traveled Paths*

1. Future Threat

Why, then, does the law/fact test so often get it right? When my students are asked that question, they give an answer that, I think, comes close to being correct and yet falls short. The reason, they say, is that mistakes of fact and law correlate with the respective presence and absence of future danger. When defendants make mistakes of fact that are widely intuited to be inculpatory, they reveal themselves to be future dangers—that is, they reveal themselves to constitute future threats to interests the law seeks to protect. When defendants make mistakes of law that are widely intuited to be exculpatory, they reveal themselves not to constitute such future threats.⁵⁸ Thus, my students say, consider the paradigmatic cases that are widely regarded as inculpatory and exculpatory, respectively, namely (1) where an actor shoots to kill but misses, and (2) where an actor engages in adultery mistakenly thinking it is a crime. Actor 1 (whose mistake is one of fact) is guilty

⁵⁷ See Robbins, *supra* note 35, at 418 (suggesting that *Oviedo* is essentially a sufficiency-of-the-evidence test). If the federal court test falls short of a sufficiency-of-the-evidence test, it is only because, while they take into account everything an actor says *in the course of his conduct*, they may exclude what he says *afterwards*, such as to confidants or the police. For commentators who embrace the latter approach, see Hasnas, *supra* note 29, at 71–77; Weigend, *supra* note 44, at 266–73.

Some commentators criticize the Model Penal Code for failing to make its “corroboration” requirement for interrupted attempts applicable to non-interrupted impossibility attempts as well. See Enker, *supra* note 40, at 682; Robbins, *supra* note 35, at 411, 422–30. I believe they misunderstand the purpose of the Code’s corroboration requirement. Its purpose is not to provide objective evidence that actors charged with attempt possess criminal intent. (If that were its purpose, it would, indeed, be a failing to refrain from requiring it in all attempt cases). Rather, it is to provide objective evidence of a *certain kind* of intent in a *certain kind* of attempt cases—namely, objective evidence in *interrupted-attempt* cases that an actor was sufficiently committed to his criminal enterprise to wish to *carry through with it*.

⁵⁸ For commentators who assume that references to threats are references to *future* threats and dangers, see Kevin Cole, *The Voodoo We Do: Harm, Impossibility, and the Reductionist Impulse*, 5 J. CONTEMP. LEGAL ISSUES 31, 55 (1994); Weigend, *supra* note 44, at 261–62.

of an attempt because he reveals himself to be someone who may be willing to shoot again. In contrast, Actor 2 (whose mistake is one of law) is not guilty of attempt because the only thing he reveals himself willing to do again is something that the state regards as lawful.

This hypothesis has some force to it. However, just as threats for purposes of impossibility are not a function of what an actor would do if his error were corrected in time to act,⁵⁹ so, too, threats for impossibility purposes are not a function of what an actor would do in the future. This is so for two reasons. First, it would transform the social practice of blaming from an exclusively backward-looking judgment of what an actor *has done* into a judgment that consists in part of what he *will do* in the future. The scholarship of impossibility attempts is rife with references to the conflict between “subjectivists” (who purportedly believe that actors ought to be judged entirely on the basis of the criminality of what they subjectively intend to do)⁶⁰ and “objectivists” (who believe that actors ought to be judged in significant part on the basis of the criminality of what they objectively do).⁶¹ Objectivists have several concerns, including Arnold Enker’s previously-discussed concern that, if actors are judged entirely on the basis of their intent, they will be falsely convicted of things they did not at all intend. In part, however, objectivists possess a more profound jurisprudential concern about the justice of blaming itself. They are rightly concerned that if guilt becomes a function of future dangerousness, actors will be blamed for something that has nothing to do with blame—namely for what actors are predicted to do in the future.⁶²

Second, the future-threat hypothesis fails to account for actors whose mistakes of fact are widely intuited to be inculpatory but who are *not* future threats. Consider, for example, a devoted and otherwise law-abiding son who, in order to put his aged, terminally-ill and near-comatose mother “out of her misery,” holds a pillow over her face to smother her breathing, only to discover afterwards that she had already died of natural causes. Most people would say that the son is guilty of attempted homicide, despite the fact that, realistically, he is no future threat to anyone. Or consider an actor who, while attempting to break into a safe that turns out to be empty, is himself shot by the homeowner and rendered a quadriplegic. Most people would say that he is guilty of attempted larceny, despite the fact that he is not an future threat to anyone.

⁵⁹ See text accompanying *supra* notes 21–23.

⁶⁰ Significantly, even the purest subjectivists, i.e., those who drafted Model Penal Code § 5.01(1), balk at punishing everyone with a guilty mind and willingness to act on it, because in accord with what I call the “third” element of criminal responsibility, they further require that actors also be “threat[s]” to the interests the substantive statute at hand seeks to protect. See MODEL PENAL CODE § 2.12 (1962) and text accompanying *infra* notes 76–84.

⁶¹ See Antony Duff’s masterful exposition of the divide between subjectivists and objectivists in Duff, *supra* note 2, at chs. 6–8, 10. See also FLETCHER, *supra* note 21, at 139–84; Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057–63 (1992); Hasnas, *supra* note 29, at 25–30.

⁶² See DUFF, *supra* note 2, at 381.

2. *Ex Ante* Threat

Lawrence Crocker agrees with my students that the key to impossibility attempts is the “threat”⁶³ of harm that an actor’s conduct presents. In contrast to my students, however, Crocker argues that the measure of a threat is not the future danger that an actor presents when he is viewed *ex post*, but the “objective risk”⁶⁴ that he imposes on the rights of others when his conduct is viewed *ex ante*. Crocker concedes that objective risks cannot be measured from the *ex ante* viewpoint of an omniscient observer because from an omniscient viewpoint, the probability of harm in impossibility cases is always zero.⁶⁵ He also concedes that risks cannot be measured from the *ex ante* viewpoint of the actor himself because in addition to the latter’s viewpoint being subjective, the probability of harm from an actor’s viewpoint is always high in impossibility cases.⁶⁶ Instead, he argues that the measure of “objective risks” in impossibility cases is the *ex ante* viewpoint of an “idealized”⁶⁷ observer. Whether an actor has a defense of impossibility, Crocker says, depends upon whether an idealized observer, viewing the actor’s conduct *ex ante*, would adjudge there to be a risk.

Crocker is in good company in thinking that the answer lies in the *ex ante* viewpoint of an idealized observer.⁶⁸ However, as Larry Alexander points out,⁶⁹ all such approaches suffer from a common failing. They require that idealized observers be hypothetically invested with a certain quantum of knowledge—knowledge that is neither omniscience nor whatever the actor himself possesses. Yet there is no non-arbitrary standard for affixing that quantum of knowledge. “[The idealized-observer] approach . . . is indeterminate through and through. Its application will perforce be completely arbitrary and manipulable.”⁷⁰

To illustrate, consider Crocker’s approach. Crocker proposes that an idealized observer be vested with all the knowledge, free of mistakes, that an expert in physics and engineering would possess who used her personal powers of observation to study the relevant courses of conduct from their outset, but who possessed no “instruments to boost her powers of observation,” that is, “no microscope, no instruments of chemical analysis, no transit, no x-ray, no wind gauge.”⁷¹ With such an observer in mind, now consider an actor who, having

⁶³ Crocker, *supra* note 61, at 1062 (quoting Hyman Gross).

⁶⁴ *Id.* at 1111.

⁶⁵ *Id.* at 1100.

⁶⁶ *Id.* at 1099.

⁶⁷ *Id.*

⁶⁸ See, e.g., DUFF, *supra* note 2, at 382–83 (advocating a “reasonable person” approach); FLETCHER, *supra* note 21, at 146–57 (advocating an ideal-observer approach for attempts to commit harm-based offenses).

⁶⁹ Alexander, *supra* note 4, at 65–67.

⁷⁰ *Id.* at 67.

⁷¹ Crocker, *supra* note 61, at 1100.

waited on a frigid morning to kill a romantic rival, seizes his target, places a loaded pistol to the target's head, and repeatedly pulls the trigger, hearing it click, only to realize to his fury that, because of the frigid cold, the gun is jammed and will not fire. Is the actor guilty of attempted murder? It depends, Crocker would say, on what an expert in physics and engineering who had observed the gun from the day of its manufacture till the day in question, but who lacked sophisticated "microscopes" and "x-rays," would have known about the gun. If the expert would have known about the defect even without resorting to the microscopes and x-rays, the actor is guilty of attempt. If the expert would not have known about the defect without resorting to such tools, the defendant is not guilty of attempt. The problem with Crocker's test is that it not only produces counterintuitive results, e.g., acquitting our guy with a jammed gun, but it also lacks any grounding in norms of criminal responsibility. There is no justification for making an actor's criminal responsibility depend upon what an expert would have known when the actor himself is less than an expert.

Sandy himself eventually embraced another idealized-observer test, namely, Ira Robbins's "reasonable-person" test.⁷² Robbins hypothesizes someone who is otherwise identical to the actor but whose inferences about what he observes are those of a "reasonable"⁷³ person, *i.e.*, a person of average or "normal" understanding.⁷⁴ An actor whose attempt fails because of a mistake is guilty of attempt, Robbins says, only if an average person who is otherwise identical to the actor would have made the same mistake. Thus, Robbins would say, Mildred the Voodoo practitioner is not guilty of attempt because an average person who wished to kill her ex-husband and who had read an article about Voodoo in the *National Inquirer* would not have inferred that Voodoo would work. In contrast, an actor who shoots to kill but misses is guilty of attempt if an average person would have realized that the actor was mistaken in thinking that the target was in the line of fire.

Robbins's test may appear to be more congenial than Crocker's because Robbins invokes the familiar and reassuring language of "reasonableness." Despite appearances, however, Robbins's test is just as arbitrary as Crocker's. For one thing, Robbins uses "reasonableness" differently than it is commonly used in criminal law and torts. "Reasonableness" in criminal law and torts is not an *empirical* measure of which facts actually obtain, e.g., whether Voodoo is in fact effective. It is a *normative* measure of what kinds of conduct, thinking, and emotions are normatively appropriate to such facts as obtain or are believed to

⁷² See Robbins, *supra* note 35, embraced in KADISH & SCHULHOFER, *supra* note 5, at 600-01 & n.12. For an earlier version of the same test, see Jerome Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 35 (1968).

⁷³ Robbins, *supra* note 35, at 441.

⁷⁴ *Id.* at 442 n.326 (citing Minnesota's statute favorably).

obtain.⁷⁵ Furthermore, although Robbins's test resolves Voodoo cases just as Crocker's does, it leaves other cases radically indeterminate. Consider a person who shoots but misses because he mistakenly thinks that his target is in his line of fire or within range. How can one decide whether an average person would know that target is in a line of fire or within range? Finally, like Crocker, Robbins does not ground his test in principles of criminal responsibility. There is no justification for making an actor's criminal responsibility depend upon whether an average or "normal" person would have made the same mistake.⁷⁶

B. A New Path

I believe that another path exists, a path that is consistent with the objectivist concern that actors be blamed for what they have done, and not for what they are predicted to do. To explore it, let us return to our prior hypotheticals regarding the son who mistakenly thinks he is putting his beloved mother out of her misery, and the safecracker who becomes a paraplegic in the course of theft. What explains the widely shared intuition that, despite the fact that neither is a future danger, both are guilty of attempt, while a person who commits adultery in the mistaken belief that adultery is a crime is not guilty?

The answer, I believe, is that although none of these actors is *presently* a threat, the son and safecracker revealed that they *were* threats while Mr. Adulterer revealed that he *was not* a threat. In the language of MPC section 2.12, Mr. Adulterer "did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense,"⁷⁷ while the son and safecracker did. The resulting test—that a person is guilty of an attempt to commit offense X if and only if he reveals himself to have been a threat to the interests that offense X seeks to protect—not only explains the cases that the law/fact test succeeds in explaining, it also explains the cases that the law/fact test fails to explain. Thus, it explains the widely shared intuitions that Mildred in "Midwestern Voodoo" is not guilty of attempt, and it explains why "Mr. Law" is just as blameworthy as "Mr. Fact."

Nevertheless, the proposed test raises at least two concerns. First, the test raises a concern about the meaning of "threat." The concern can be framed as follows:

⁷⁵ See Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. (forthcoming 2008).

⁷⁶ See Simons, *supra* note 24, at 485.

⁷⁷ MODEL PENAL CODE § 2.12 (1962) ("The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature and the attendant circumstances, it finds that the defendant's conduct . . . (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense . . .").

A Question Regarding “Threat”

Threats are a subset of risks, and risks, in turn, are probabilities of specified events, including specified harms and evils. As such, risks are epistemic in nature, that is, they are based upon the probabilities from zero to one (0 to 1) that arise from facts as known to specified observers.⁷⁸ It follows, therefore, that it is coherent to speak of *future* threats and risks, provided that one is referring to the incomplete knowledge that specified observers possess *ex ante*. And it is coherent to speak of *past* threats and risks regarding harms and evils that, we know *ex post*, actually occurred and, hence, we know *ex post* possessed probabilities of 1. And it is coherent to speak of *past* threats and risks regarding harms that, we know *ex post*, did *not* occur, provided that we are referring to the incomplete knowledge that specified observers possessed *ex ante*. But it is incoherent to speak of *actual* past risks and threats regarding harms that we know *ex post* did not occur if we mean to be referring to the knowledge that we possess *ex post*. For once we know that the harm did not occur—which is, indeed, what we know in all impossibility cases—we realize that, rather than their ever being an actual threat or risk of the harm, its probability was 0.

This concern has force because it derives from a commonplace understanding of threats and risks as epistemic concepts. However, it is a fallacy to assume this epistemic understanding of threats and risks exhausts their meaning. We often use “threats” and “risks” differently. We use them to refer—not to probabilities of future harm based upon limited knowledge of the totality of factors that render the harm certain to occur or certain not to occur—but to a likelihood of harm under counterfactual events that we can imagine occurring. That is, we use “threats” and “risks” of harm to refer in retrospect to how easily counterfactual events could have obtained that, had they obtained, would have produced harm that, thankfully, did not occur.⁷⁹

To illustrate, imagine that a CEO is told that an off-duty custodian happened to notice a disgruntled ex-employee behaving strangely; that the custodian took the initiative to notify security officers; and that the latter arrested the intruder just as he was about to enter the CEO’s office with a bomb and a suicide note. Upon receiving the report, the CEO says, “Wow, that is scary. What a close call! The

⁷⁸ See Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 936 (2000).

⁷⁹ Lawrence Crocker and John Strahorn argue that an actor cannot be a threat to a person who, unbeknownst to him, is already dead, because, they say, to be a threat is to be a risk to someone who still possesses interests. See Crocker, *supra* note 61, at 1097, 1103–04; John Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 970–79 (1930). I use “threat” to refer to harms that *ex-post* observers believe would have befallen persons whom the state seeks to protect under counterfactual events that observers believe could have obtained, regardless of whether they are the persons whom the actor at hand intended to harm.

guy was a real threat.” Obviously, by “scary” the CEO is not referring to his fears about the future because he knows that the intruder is no longer a threat. Nor is he referring to past fears, given that he was unaware of the threat at the time. Instead, he is referring to a fear he presently experiences as he retrospectively contemplates the “real threat” he feels he narrowly dodged—namely, the terrible harm *he would have suffered if even a single circumstance had been slightly different in ways he fears could easily have occurred.*

This brings us to the second concern about the proposed test. The second concern goes to its normative justification. What is the normative justification for confining liability for impossibility attempts to persons who were threats to the interests the law at issue seeks to protect? The justification, I believe, is that it is an appropriate limitation on state power, over and above the requirement of a guilty mind and manifest willingness to act on it.

State power is not the same as divine power.⁸⁰ Being omniscient about what is in people’s hearts, God presumably does not have to wait until people act on their guilty minds in order to know whether and how much punishment they deserve. Nor, being perfect in His righteousness, is God constrained in administering punishment by anything beyond what people deserve. In contrast, state officials who administer earthly punishment are neither omniscient about what is in people’s hearts nor free of wrongdoing themselves. Because the state can never know exactly what is in a person’s heart, the state conditions an actor’s criminal liability upon proof of not only a guilty mind, but also a manifest willingness to act on it. And because the state can neither know exactly how much punishment an actor deserves nor ever be completely righteous, the state ought to require something further before imposing the burden and disgrace of purposeful condemnation and suffering. It ought to require as a condition of criminal responsibility that an actor’s conduct actually *affect* the people of the state by either *infringing* or *threatening to infringe* interests that they seek to protect by means of the statutes at hand. It ought to require that an actor’s conduct *matter* to its citizens by “unnerving”⁸¹ them. Otherwise it is playing God.⁸²

This third element of criminal responsibility (over and above the requirements of a guilty mind and willingness to act on it⁸³) is a stealth requirement that, being

⁸⁰ For the argument that divine punishment differs from mundane punishment, see Hasnas, *supra* note 29, at 51–52.

⁸¹ FLETCHER, *supra* note 21, at 472.

⁸² DUFF, *supra* note 2, at 344. Even if we could make sense of this model of a cosmic ledger (and I am not sure that we can), is it an appropriate model for the human activity of blaming wrongdoers? Such a model is appropriate (if it is appropriate at all) to a detached, god-like observer of the human scene. We, however, are not such detached observers: we are participants in the human scene. We are agents, patients, and interested observers . . . acting, thinking and responding to each other within a human social life.

⁸³ See GROSS, *supra* note 38, at 223 (arguing that impossibility cases are a window into a “third dimension of culpability” beyond requirements of a bad act and guilty mind). John Hasnas also argues that impossibility cases reveal a third requirement of criminal responsibility over and

nearly always satisfied, tends to pass undetected. The requirement is always satisfied in the event of completed crimes, given that actors who commit completed crimes inflict the very harms or evils the state seeks to prevent. And it is nearly always satisfied in cases of inchoate crimes,⁸⁴ given that actors who commit inchoate crimes nearly always reveal themselves to have been threats to interests the state seeks to prevent. However, the requirement reveals itself in rare impossibility cases, e.g., *Midwestern Voodoo* and *Mr. Adultery*, in which actors neither inflict harms or evils nor threaten interests that the state seeks to prevent. Mildred the voodooist did not threaten the state's interest in life because, given the public's view of voodoo and its knowledge of Mildred's motivations in resorting to voodoo, no one is likely to believe she would have killed her ex-husband under any counterfactual circumstances they fear could have obtained. Nor does the adulterer threaten any interest the state seeks to protect by means of punishment. Given that adultery is not a crime, and given that the public has no intention of making it a crime, no one is likely to believe the adulterer would have committed a crime under any statute it fears the state might have enacted.

I have focused thus far on a test that I believe explains and justifies widely shared intuitions about who should, and should not, be punished for impossibility attempts. However, if I am right, it has implications for the law of attempt generally. For it means that when we punish criminal attempts, we are punishing persons not only for what they did, i.e., manifest a willingness to act on their guilty minds, but for something they clearly did *not do*. We are punishing them for what we believe they *would have done* under counterfactual circumstances that we know did not exist but that we fear could have occurred.

V. THE DISTINCTIVE CHALLENGE OF PUNISHING ACTORS FOR MISTAKES OF LAW

We have seen that the law/fact test, like MPC section 5.01(1), is deficient for two reasons: (1) it fails to explain why some mistakes of fact are widely regarded as being exculpatory, e.g., *Midwestern Voodoo*; and (2) it fails to explain why

above proof of a guilty mind and willingness to act on it. However, rather than claiming that the requirement consists of conduct by an actor that actually infringes or threatens to infringe interests that the state seeks to protect, Hasnas argues that it consists of "objective" behavior to prevent corrupt and overzealous state officials from falsely convicting innocent actors of possessing guilty minds they never possessed at all. See Hasnas, *supra* note 29, at 45–54.

⁸⁴ By "inchoate" crimes, I mean crimes of the form, "It is an offense to X, with an intent to commit offense Y," including impossibility attempts. For a different usage, see Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1139, 1139 (1997) (confining "inchoate" crimes to ones in which "there is still time [for an actor] to desist and renounce," thus excluding impossibility attempts).

some mistakes of law are widely regarded as being blameworthy,⁸⁵ e.g., the mistake by Mr. Law, even if they are also commonly thought to be unpunishable.⁸⁶

My proposal addresses the first problem by invoking language from another section of the Model Penal Code, i.e., MPC section 2.12,⁸⁷ though my proposal goes further than MPC section 2.12 by explaining what it means to have “threatened” interests that a statute seeks to protect, and why a threat-based test is normatively justified. The test’s effect is to reduce the class of factual mistakes that are inculpatory by making it an element of attempt that actors manifest themselves to be threats to interests that statutes at hand seek to prevent.

I shall now examine whether and how my proposal addresses the problem presented by inculpatory mistakes of law. I believe that my proposal explains why—and how—an actor can be rightly punished for an impossibility attempt based upon a mistake of law. Indeed, to show in detail how my proposal deals with mistakes of law and fact, I frame it as a statute that draws in part on what the Model Penal Code separately states in MPC sections 5.01(1) and 2.12 (see the “Appendix” to this article).

I must emphasize, however, that I do not advocate that my statutory proposal regarding mistakes of law be formally adopted. To be sure, the universal rule, which MPC section 5.01(1) codifies, that mistakes of law are exculpatory, produces some injustice because it exculpates actors like Mr. Law who are as blameworthy as Mr. Fact. However, such injustices are too rare and attenuated to justify the difficulties and controversies that a statute would generate that punishes actors for mistakes of law.⁸⁸ Accordingly, I tender my hypothetical statute solely to illustrate the proposal in concrete terms.

My proposal regarding mistakes of law will be controversial because the paradox it addresses seems irreconcilable. The paradox consists of the tension between Sandy Kadish’s implicit position in “Comment” in the “Hypothetical Law Review,” on the one hand, and Fernand Dutille and Harold Moore’s response, on the other. Sandy’s insight regarding “Mr. Fact” and “Mr. Law” is that the two actors are equally blameworthy. In contrast, Dutille and Moore argue that because Mr. Fact’s mistake presupposes the law as it *is* and Mr. Law’s mistake presupposes the law as it *is not*, no common legal norm exists by which they can be equally punishable.

I believe a middle ground exists between these two positions. However, I confess that I am less confident about the validity of my proposal than about the force of the opposing positions it seeks to reconcile. Accordingly, to acknowledge

⁸⁵ See *supra* note 37. Cf. Fletcher, *supra* note 13, at 59 (“The simple intuition that no one can attempt a crime that does not exist will not suffice.”).

⁸⁶ PAUL ROBINSON, CRIMINAL LAW 687 (1997); A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 315 (2d ed. 2003); ASHWORTH, *supra* note 26, at 406.

⁸⁷ MODEL PENAL CODE § 2.12 (1962) (see *supra* note 77).

⁸⁸ See Cole, *supra* note 58, at 55 (“[Given] the practical problems in punishing inculpatory legal mistakes, . . . the defense of pure legal impossibility seems like a good idea.”).

the difficulty of the problem, I shall explore it in the form of an imaginary dialogue between Sandy and Dutile/Moore. I take the liberty of attributing to Sandy the logic that I believe is implicit in his hypothetical regarding Messrs. Fact and Law, despite the fact that Sandy does not himself pursue it in his “Comment.” I attribute to Dutile and Moore the strongest arguments I can marshal in defense of their position.

An Imaginary Dialogue

KADISH. I drafted the hypothetical regarding Messrs. Fact and Law because I believed it illustrates something that, though rare, can nevertheless occur—namely, instances of impossibility in which an actor who makes a mistake of law and a comparable actor who makes a mistake of fact are equally blameworthy.

DUTILE/MOORE. We agree with you, Sandy, that Messrs. Fact and Law are equally blameworthy. Indeed, we have gone on record in saying so.⁸⁹ But that is not the question. The question is, not whether they are equally blameworthy, but whether any criminal prohibition exists that they equally violated.

KADISH. With due respect, I’m puzzled that you would distinguish the two questions. The question whether actors are equal in blameworthiness is *not* distinct from whether a prohibition exists that they both violated. To the contrary, to say that Messrs. Fact and Law are “equal” in their blameworthiness *means* that a norm must exist—a rule in the form of a norm, “It is wrong to do X”—by which each actor is measured and found to be identical to the other. That is what it is to be “equally” blameworthy.⁹⁰

DUTILE/MOORE. Nice point. You’re right that Messrs. Fact and Law’s equal blameworthiness presupposes a common prohibitory norm that they both violated. However, it need not be a *legal* norm. It can be a *moral* norm. Indeed, we have said all along that Messrs. Fact and Law are equally culpable “from a *moral*” rather than a “legal” standpoint.⁹¹ The fact that a moral norm exists that Messrs. Fact and Law both violated does not mean that a comparable *legal* norm—or comparable *criminal offense*—exists.

⁸⁹ Dutile & Moore, *supra* note 35, at 196 (“From a ‘moral’ standpoint, they are equally culpable.”).

⁹⁰ See generally PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF “EQUALITY” IN MORAL AND LEGAL DISCOURSE 59–92 (2001).

⁹¹ Dutile & Moore, *supra* note 35, at 196.

KADISH. I agree that moral blameworthiness is not necessarily coextensive with legal blameworthiness. Considerations can obtain that make it appropriate for society to embrace a moral norm without embracing a comparable criminal norm, and vice versa. However, the implicit norm that you now concede Messrs. Fact and Law must jointly have violated in order to become “equally culpable” cannot possibly be a moral norm apart from law. For there is no such thing as a “hunting season” in morals. The hunting season, like the criminal prohibition that gives it effect, is entirely a function of the law’s effort to regulate collective action. The implicit norm that Messrs. Fact and Law jointly violated is quintessentially a legal norm, not a moral one.

DUTILE/MOORE. We must disagree. There is, indeed, a moral norm that Messrs. Fact and Law did both attempt to violate—namely, the moral duty of all persons to “obey the law.” The duty to obey the law is a moral duty rather than a legal duty because the law confines itself to punishing persons for disobeying *particular* laws, rather than punishing them for disobeying law *in general* or for attempting to do so. Measured by the moral norm to obey the law, Messrs. Fact and Law are equally blameworthy—albeit morally rather than legally—of attempting to disobey the law.

KADISH. Actually, I agree that all persons have a duty to obey the law in general. I agree that the duty is moral, rather than legal, in nature,⁹² and that Messrs. Fact and Law both violated that moral duty—thereby rendering themselves equally blameworthy in that respect. However, *that* cannot be the respect in which Mr. Fact and Mr. Law are widely regarded as being equally blameworthy. For that is a sort of blameworthiness that *all* attempters share in common, regardless of whether their attempts are based on mistakes of fact or law. Measured by that norm, a person who engages in sexual intercourse with a married woman in the mistaken belief that adultery is a crime would be widely regarded as equally blameworthy as a person who shoots to kill in the mistaken belief that his gun is loaded, for both persons attempt to disobey the law. No, something distinctive must exist regarding Messrs. Fact and Law that renders them equally culpable, despite the fact that one of them made a mistake of fact and the other a mistake of law.

⁹² For disagreement about whether legislatures *should* make it an offense in law to “attempt to break the law,” compare DUFF, *supra* note 2, at 156–59 (no), with Fletcher, *supra* note 13, at 59 (yes).

Whatever it is, it cannot consist of their both having violated a moral norm to “obey the law,” for the blameworthiness of one of them, at least i.e., Mr. Fact, consists *predominantly* of his having also violated a legal norm.

DUTILE/MOORE. Perhaps you are right that the implicit prohibition that renders Messrs. Fact and Law equally blameworthy is not a “moral” prohibition. But that only shows how profound the problem is. For the fact remains that there is no single law—no one criminal prohibition—that Mr. Fact and Mr. Law could have attempted to violate. After all, by virtue of hunting on October 15, in the mistaken belief that he was doing so on October 14, Mr. Fact intended to violate the law as it stood, i.e., a law that made it an offense to hunt *before* October 15. In contrast, by virtue of intentionally hunting *on* October 15, Mr. Law intended to violate a law that existed only in his imagination: he intended to violate a non-existent law that made it an offense to hunt before *October 16*. Therefore, despite your plausible claim that by virtue of Mr. Fact and Mr. Law being equally culpable, they must have violated the same law, we know that they did *not* attempt to violate the same law.

KADISH. With due respect, again, I think you’re overlooking the single criminal offense that Messrs. Fact and Law both violated. The criminal offense they both violated is not the one that makes it a crime to hunt before October 15. They both fully complied with that law. Rather, the criminal offense they both violated is the one that makes it a crime to *attempt* to commit an offense—and, specifically, *attempting* to “hunt out of season.”⁹³

DUTILE/MOORE. Now we fear that it is you, Sandy, who are overlooking something. “Hunting out of season” may be the short title to an offense in a state’s penal code. But it cannot possibly be the offense itself because it is fatally incomplete. It fails to specify what every actor needs to know in order to comply with the law, i.e., the precise calendar dates before and after which it is illegal to hunt. To be complete, the offense must either specify those calendar dates explicitly or incorporate them by reference from elsewhere in the law. And it is entirely a formal matter, not a substantive one, whether the offense specifies the dates or incorporates the dates by reference.⁹⁴

⁹³ Sandy makes this very argument. See KADISH & SCHULHOFER, *supra* note 5, at 599–600.

⁹⁴ See Alexander, *supra* note 4, at 68–69.

KADISH. A nice point, and I must agree with you.

DUTILE/MOORE. Thank you. But notice what now follows from it. Once you specify the offense that each actor attempted to commit, you are forced to allege that the overall offenses of attempt that Messrs. Fact and Law allegedly committed are *different*. Mr. Fact must be alleged to have attempted the genuine offense of “Hunting before October 15,” while Mr. Law must be alleged to have attempted the imaginary offense of “Hunting before October 16.” As a result, no single offense of attempt exists that Messrs. Law and Fact can both be alleged to have committed.

KADISH. I agree with you that, *if* we are obliged to charge Mr. Law with a non-existent offense, then no single offense of attempt exists that Messrs. Law and Fact have both committed. I also agree that charging Mr. Law with attempting to commit a non-existent offense would be as unjust as charging Mr. Adulterer with the non-existent offense of adultery. However—and I must emphasize this—I do *not* believe that we are obliged to charge Mr. Law with attempting to commit a non-existent offense. Indeed, the contrasting case of Mr. Adulterer shows why. The reason that Mr. Adulterer’s mistake of law is exculpatory is that he reveals himself to have been no threat to interests that the state seeks to protect by means of a statute at hand. In contrast, the reason that Mr. Law’s mistake is inculpatory is that he reveals himself to have been a substantial threat to the interests that the state seeks to protect by means of the substantive statute at hand, i.e., the statute that makes it an offense to hunt before October 15. Mr. Law reveals that he would have committed an offense under counterfactual circumstances that the society at large fears could easily have obtained, namely, counterfactual circumstances in which he either discovers his mistake on October 13 or the state elects to start the season on October 16.

DUTILE/MOORE. Let’s be sure we understand you. Are you saying that Mr. Law could be charged with attempting to violate the hunting law that now exists—that is, “attempting to hunt *before* October 15”—when hunting *on* October 15 was precisely what he intentionally did?

KADISH. Exactly.

DUTILE/MOORE. Now we are the ones who are puzzled. Indeed, we hardly know where to begin. But for starters, how can you say that

Mr. Law is guilty of *attempting* to do something that he clearly did not *want* to do, i.e., to hunt *before* October 15?

KADISH. We must guard against allowing the lay meaning of words, including “attempt,” to govern their technical meanings as terms of art. For lay persons, to “attempt” X is to try to bring X about. But that is not its technical meaning in most jurisdictions in criminal law. Consider an actor who, to recover insurance, places a bomb on an airplane, believing that it will also kill the pilot but not wishing to—only to learn that an alert attendant defused the bomb. The Model Penal Code and many jurisdictions would regard the actor as guilty of “attempted murder,” despite the fact that he did not want to kill the pilot.

DUTILE/MOORE. Okay, we agree that the problem cannot be solved by consulting dictionaries. But surely you agree that a person is not guilty of an attempt to commit offense X unless he had a guilty mind and willingness to act on it.

KADISH. Yes, I agree.

DUTILE/MOORE. And surely you will also agree that possessing a “guilty mind” for purposes of an attempt to commit offense X means, at least, possessing mens rea regarding the material elements of offense X. In the words of the Model Penal Code, it means possessing the mens rea that is “otherwise required for commission of the crime.”⁹⁵

KADISH. I agree that the Model Penal Code—and every jurisdiction of which I’m aware—requires that an actor charged with an attempt to commit offense X possess mens rea regarding the material elements of offense X. But I do not agree that it is what *justice* requires. Indeed, as long as Messrs. Fact and Law are understood to be “equally culpable,” it *cannot* be what justice requires. Remember, we have seen that to say they are “equally culpable” presupposes a legal prohibition that they both violated. Yet the prohibition cannot be one that requires mens rea regarding the material elements of “hunting before October 15,” because while Mr. Fact intended to hunt before October 15, Mr. Law did not.

DUTILE/MOORE. Okay, but now the ball is squarely in your court. You admit that an actor is not guilty of attempt to commit offense X

⁹⁵ MODEL PENAL CODE § 5.01(1) (1962).

unless he possesses a “guilty mind.” Yet you deny that the guilty mind consists of mens rea regarding the material elements of offense X. What could an actor charged with attempt possibly have a guilty mind *about*, if not about the material elements of offense X?

KADISH. Good question. The answer is this: he could be charged with having a guilty mind about the material elements of *the crime he mistakenly thinks he is committing*.⁹⁶

DUTILE/MOORE. Uh-oh, we were afraid that you were going to say that—afraid for your sake, that is—because it puts you in the unhappy position of flouting the principle of legality. That is, it puts you in the unhappy position of presupposing the existence of a criminal offense that the legislature has not enacted.

KADISH. I am glad you invoke the principle of legality because I, too, used to think that it constituted a barrier to what I propose.⁹⁷ However, you must remember that my proposal grounds Mr. Law’s liability not on the *actual existence* of a non-existent offense, but on Mr. Law’s *subjective intentions*—in this case, his intentions regarding elements that would be an offense if it existed. I propose to base an actor’s attempt liability on two things: (1) on what the actor *believes* the material elements to be regarding the offense he believes he is committing, and (2) on his possessing the intentionality regarding them that criminal attempt ordinarily requires regarding such material elements. Thus, Mr. Law’s liability would be based on his intentionally engaging in what he believes to be the material elements regarding what he believes to be the offense he is committing, i.e., “hunting before October 16.”

DUTILE/MOORE. Perhaps you are right. Perhaps your proposal does not presuppose the actual existence of a non-existence offense and, hence, does not violate legality per se. But there is a problem nonetheless. By decoupling the material elements of the offense for which an actor possesses mens rea from the material elements of the crime that he is charged with attempting, you remove all restraints on which crimes an actor can be charged with attempting. Consider Mr. Law. Once Mr. Law possesses mens rea regarding the material elements of an imaginary offense, he could be charged with attempting to commit *anything*, say, murder. Or consider Mr. Adulterer. Mr. Adulterer has mens rea regarding the material

⁹⁶ See Alexander, *supra* note 4, at 67 (considering but rejecting this possibility).

⁹⁷ See KADISH & SCHULHOFER, *supra* note 5, at 597–98.

elements of an imagined offense. Does that mean that he could be charged with attempting to hunt before October 15? That is absurd.⁹⁸

KADISH. Your argument would be correct if the sole requirements for attempt liability were (1) a guilty mind, and (2) a manifest willingness to act on it. However, those are not the sole requirements—or, at least, not under my proposal. An actor is not guilty of an attempt under my proposal unless, in addition to possessing 1 and 2, he was a “*threat*” to interests that the statutory offense at hand seeks to prevent. This third element of criminal responsibility greatly restricts the range of offenses that actors who make mistakes of law can be charged with attempting. Thus, it would prevent prosecutors from trying Mr. Law with attempted murder, because no evidence exists that Mr. Law threatened interests that murder statutes seek to protect. And it would also prevent prosecutors from trying Mr. Adulterer for hunting out of season. But it would not prevent prosecutors from trying Mr. Law for attempting to hunt before October 15 because Mr. Law was a threat to the interests that the latter offense seeks to protect.

DUTILE/MOORE. We’re not surprised to see you invoke the language of “threat,” because MPC section 2.12 invokes it, too. However, you must admit that you and MPC section 2.12 are using the term “threat” in a strange way. You are using it to refer—not to risks of future harm, or past risks as measured *ex ante* by observers with limited information, or past risks as measured *ex post* by observers with unlimited information regarding harms that have since materialized. You are using it to refer to the strange creature of *past* risks as measured *ex post* by observers with unlimited information regarding harms that have *not* materialized. Given its strangeness, don’t you think that “threat” is too vague a term on which to base an actor’s liability?

KADISH. To be honest, I find myself vacillating. Sometimes I find myself agreeing with the framers of MPC section 2.12 that “threat” is sufficiently clear. At other times, I find it impermissibly vague. In any event, however, we can easily supplement the term “threat” with a provision that specifies precisely what we mean in this context. We can specify that an actor who possesses the mens rea I have described and who manifests a willingness to act on it is guilty of an attempt to commit an offense if *based upon his conduct and*

⁹⁸ See Cole, *supra* note 58, at 52–55 (making this *reductio ad absurdum*).

state of mind, the triers of fact, representing informed citizens of the jurisdiction, conclude that he would have committed the offense under counterfactual circumstances they fear could have obtained.

DUTILE/MOORE. Phew, now we have the opposite problem. Now you're asking that we base something as real as criminal liability upon something as hypothetical as counterfactual assumptions. That is asking a lot.

KADISH. It may *seem* that I'm asking a lot, but actually I'm not. First, we're all accustomed to making counterfactual determinations in criminal law because we do so every time we determine but-for causation. Second, my claim regarding counterfactuals is not something new that is being superimposed on existing norms in the area of attempt. It merely spells out what the legal term "threat" already means in provisions as commonplace as MPC section 2.12(2).

DUTILE/MOORE. Perhaps so, but as you know, counterfactual tests are said to be notoriously indeterminate. In order to apply them, one must possess criteria to decide precisely which historical facts are hypothetically altered and which are not. Yet such criteria are often lacking.⁹⁹

KADISH. You are right that counterfactual tests can be problematic, depending upon how precisely counterfactuals must be stated. However, notice how my proposal differs from most counterfactual tests. Mine does not require consensus on what historical facts are and are not changed. Mine is a psychological test that incorporates by reference whatever counterfactual determinations people happen to fear could occur.

DUTILE/MOORE. Still, we are not yet convinced that your proposal is sufficiently protective of defendants. How can you be sure that an actor who does one thing would have done something else—and a crime, at that—under circumstances that you now know never existed?

KADISH. Of course, I cannot be sure. No one can. But that is a problem that will forever plague us as long as "attempt" is a crime, regardless whether it is an impossibility attempt or an interruption attempt. To convict a person of an attempt is to convict him of

⁹⁹ See Alexander, *supra* note 4, at 63–64.

something we believe he would have done under circumstances that we now know never existed.

DUTILE/MOORE. Maybe so. But, nevertheless, attempts based upon mistakes of law possess a distinctive feature that increase the risk of false conviction if jurors are allowed to speculate regarding what an actor “would have done.” After all, an actor who makes a mistake of law is consciously doing something that the state regards as innocuous, while the conduct he is charged with attempting may be quite heinous. An actor who is willing to violate what he mistakenly thinks is the law may not be willing to do something heinous. How can we trust jurors to know what actors in this area “would have done?”

KADISH. You raise a valid point and one that must be addressed. However, I think it can be addressed by adding a proviso to the effect that an actor is not liable for attempt based upon a mistake of law unless *his principal goal would have been served as well by means that would have sufficed to commit offense X*. A proviso of that kind would protect a person who makes the mistake of law of thinking that importing a food staple like sugar is a crime but would hardly think of doing anything as heinous as importing products that are actually contraband. Yet it would not protect—nor should it—an actor like Mr. Law, whose principal goal would be served as well by hunting on October 14.

DUTILE/MOORE. Well, that is admittedly an improvement. However, it does not address all our concerns. We are also concerned about actors who mistakenly engage in conduct that is less onerous or less likely to be detected by the police than what they would actually have to do to commit a crime. If jurors possess open-ended authority to decide what an actor “would have done,” they may convict actors who are willing to do safe and easy things, but are not willing to do the onerous and detectable things that are actually needed to commit a crime.

KADISH. You may be right that I’m too optimistic about the jury’s ability to make the counterfactual judgments that inquiries into “threats” require. However, if so, you yourselves have put your fingers on a missing element that, if added to my proposal, may solve the problem. We can amend the proposal to specify that an actor is guilty of an impossibility attempt only if *the means he mistakenly believed would culminate in a crime are neither substantially harder for the police to detect nor substantially easier*

or safer for persons to execute than means that suffice to commit offense X. Does that satisfy you?

DUTILE/MOORE. Maybe. We will have to think about it. But we will say this, Sandy—you have gotten us thinking about something we assumed to be unthinkable.

VI. CONCLUSION

My interest in impossibility attempts began with Sandy's casebook essays, "The Case of Lady Eldon's French Lace," and "Hypothetical Law Review 'Comment'." Sandy's essays present students of impossibility with three challenges: (1) to explain the widespread intuition that certain impossibility attempts are culpable and certain others are not; (2) to explain the widespread intuition that impossibility attempts based on mistakes of law, e.g., Mr. Law, are sometimes just as culpable as their counterpart attempts based upon mistakes of fact, e.g., Mr. Fact; and (3) to account for cases where people have conflicting intuitions about whether impossibility attempts are culpable.

I believe that the three puzzles have a common solution. The solution lies in what I have argued is a third, "stealth" requirement of criminal responsibility over and above the two requirements of a bad act and guilty mind. The third requirement is that an actor not be punished unless citizens of the jurisdiction that enacted the criminal statute at issue regard the actor's conduct as a threat to interests that the statute seeks to prevent. Whether conduct is a "threat" is a matter of citizen psychology. An attempt to commit offense X is a "threat" if, and only if, citizens of the jurisdiction that enacted the statute making X a crime perceive it as such. In turn, citizens regard conduct as such a threat when they are convinced that an actor would have committed offense X under counterfactual circumstances that they fear could have obtained—or, more accurately, when they fear its commission sufficiently to feel he should be punished for his guilty mind and willingness to act on it.¹⁰⁰

This "psychology of threats" explains widespread intuitions that certain impossibility attempts are culpable and others are not. Actors who intentionally shoot to kill but miss are widely regarded as culpable because, in addition to their possessing guilty minds and a willingness to act on it, their conduct leaves people widely believing that they would have killed under counterfactual circumstances that people fear could easily have obtained, i.e., the bullet trajectories being slightly different. In contrast, superstitious voodooists in the United States who

¹⁰⁰ This test captures what, I believe, George Fletcher means in arguing that an impossibility attempt is not culpable unless the actor's conduct manifests "aptness," Fletcher, *supra* note 21, at 150, what R.J. Spjut means in arguing that an actor is not culpable unless he had a "real prospect of success," R.J. Spjut, *When is an Attempt to Commit an Impossible Crime a Criminal Act*, 29 ARIZ. L. REV. 247, 255, 278 (1987), and what Antony Duff means in arguing that an attempt is not culpable unless it is a "serious attempt." DUFF, *supra* note 2, at 383.

stick pins in dolls with intent to kill are widely regarded within the United States as nonculpable because, despite possessing guilty minds and willingness to act on it, their conduct leaves citizens of the United States widely *not* convinced that they would have killed, except under counterfactual circumstances that citizens of the United States do not fear could have obtained, i.e., voodoo pins being lethal. Similarly, actors within States where adultery is not a crime who engage in adultery in the mistaken belief that it is a crime are widely regarded as nonculpable because their conduct leaves citizens in such States widely unconvinced that the adulterers would have committed a crime, except under counterfactual circumstances the citizens do not fear could have obtained, i.e., that they would declare adultery to be a crime.

The psychology of threats also explains the widespread intuition that actors who make mistakes of law are sometimes just as culpable as their counterparts who make mistakes of fact. Consider Sandy's "Mr. Fact" and "Mr. Law" who both endeavored to go deer hunting on the day before the hunting season began but, being mistaken about dates, unwittingly ended up hunting *during* hunting season. Mr. Fact knew the hunting season legally began on October 15 but mistakenly thought he was hunting on October 14. Mr. Law knew he was actually hunting on October 15 but mistakenly thought the season legally began on October 16. The reason that observers regard the hunters as equally culpable is that in addition to being equally willing to hunt out of season, the hunters both revealed that they would have committed the crime of hunting before October 15 under counterfactual circumstances that observers regard as equally capable of having obtained. Thus, just as Mr. Fact could easily have learned before October 15 that he was making a mistake of fact about the dates of the week, Mr. Law could equally well have learned before October 15 that he was making a mistake of law about the date of the hunting season. And if they had learned of their mistakes before October 15, they would presumably both have hunted before October 15.

Finally, and most importantly, the psychology of threats explains why people often possess conflicting intuitions about whether impossibility attempts are culpable. Thus, just as people differ from age to age and from culture to culture in their assessments of retrospective threats, people within common cultures can differ, too, in the way they assess retrospective risks.¹⁰¹ They differ because they differ about how much they fear that counterfactual circumstances could have obtained, and about how fearful they must be in order to adjudge actors culpable of criminal attempt.

Consider, for example, the following hypotheticals that I discuss with my students: (1) actor A intentionally shoots to kill a target but misses; (2) actor B intends to shoot to kill, but his gun is defective; (3) actor C intends to shoot to kill,

¹⁰¹ See GROSS, *supra* note 38, at 206 ("Whether conduct will be thought to threaten harm depends on general expectations [among a jurisdiction's residents] about harmful outcomes under particular circumstances. These expectations may vary, and so then must judgments regarding attempt liability.").

but the police have replaced the target with a dummy and, in any event, the target has already died from unrelated causes. If my students are any measure, people in our culture differ in their judgments of culpability. All my students regard actor A as culpable; fewer regard actor B as culpable; and many fewer regard actor C as culpable. The difference, I suspect, lies in how fearful the attempts appear to them in retrospect—that is, how “close” students believe the actors came to succeeding, and how close they believe actors must come to be punishable. Actor A came the closest because the outcome depended at the last moment solely upon his agency and upon his exercising it a few millimeters in one direction rather than another. Actor C was the farthest from success because police, who were in control all along, knew well before the last moment that he would not succeed. Actor B is in between because, while the outcome of his conduct was not solely a function of his own agency (as it was for actor A), nevertheless, unlike actor C’s conduct, actor B’s conduct was such that no one knew—or was likely to be capable of knowing—whether he would succeed until after he pulled the trigger.

These differences in psychology seem to vary based upon the *gravity* of offenses and the *mental states* of actors. Consider the following sexual offenses cases that differ mostly in heinousness: (1) actor A, a twenty-one-year-old disk jockey at a tenth-grade prom, has sexual intercourse with a girl whom he is told is underage but who actually came of age six months before—resulting in A’s being charged with attempted statutory rape; and (2) actor B is a state prisoner whose intended victim is his prison cellmate, V, who, having complained to prison authorities that B was forcing him to engage in sodomy, cooperates in a sting operation with guards who maintain the cell under protective surveillance as he submits to B’s sexual demands under the pretense of fearing for his life, resulting in B’s being charged with attempted forcible sodomy.¹⁰² Again, if my students are a measure, people are more likely to find B culpable than A, apparently because attempted forcible sodomy is the graver offense. Yet, significantly, students with misgivings about convicting A of attempted statutory rape tend to diminish in number if they are told that, rather than merely *believing* that the grade girl was underage, A’s very *purpose* was that the girl be underage—say, in order to fulfill a wager with a fellow disk jockey that A could seduce an underage girl before the evening ended.

This psychological fact (that people can differ with one another in assessing retrospective risks for purposes of punishment) is relevant to which institution—as among legislatures, judges, and juries—ought to pass judgment on retrospective risks. Some authorities argue that legislatures and judges ought to make final determinations as matters of law regarding which risks are and are not culpable. Thus, they advocate tests that base attempt liability upon actors having “present and apparent ability” to succeed (as opposed to being “intrinsicly incapable” of succeeding), and upon putative victims and objects of criminal activity being

¹⁰² See *People v. Bink*, 84 A.D.2d 607 (N.Y. App. Div. 1981).

“present” (as opposed to being “missing” or “dead”).¹⁰³ The problem with such tests is that they impose procrustean views regarding the fearfulness of retrospective risks where, in reality, people’s views are variable, e.g., requiring that an actor who has sexual intercourse with a woman whom he believes and hopes is alive but is dead be acquitted, despite the fact that many regard such actors as culpable. Given the diversity of views regarding retrospective risks, it seems advisable to leave it to triers of fact, charged with representing informed¹⁰⁴ citizens of the jurisdiction which makes X a crime, to decide whether they believe the accused is guilty of attempt to commit offense X—by deciding whether the accused would have committed offense X under counterfactual circumstances they fear could have obtained.

APPENDIX: A HYPOTHETICAL STATUTE

A person is guilty of an attempt to commit an *offense, X*,¹⁰⁵ that the state declares to be punishable by at least three years in prison, if—

(1) while possessing purpose or belief regarding the circumstance and result elements of *a crime*,¹⁰⁶

(2) he purposely does or omits to do anything which, under the circumstances of law¹⁰⁷ or fact as he believes them to be, is an act or omission constituting a substantial step in a course of conduct that is planned to culminate in the crime;¹⁰⁸ and

¹⁰³ See DUFF, *supra* note 2, at 83–89 (reviewing such rules). Duff goes on to argue that his proposed “objective” test of impossibility attempts duplicates what the former objective tests are best understood to be designed to achieve. See *id.* at 206–36, 378–84.

¹⁰⁴ This requirement, that triers of fact act as representatives of citizens who are “informed,” is designed to address Sandy’s objection to basing the impossibility defense on uninformed popular fears, e.g., that HIV can be spread through spitting. See KADISH & SCHULHOFER, *supra* note 5, at 599 n.10. See also DUFF, *supra* note 2, at 381 (the impossibility defense cannot justly be made a function of uninformed, popular fears); GROSS, *supra* note 38, at 221–23 (same).

¹⁰⁵ The purpose of this introductory clause is two-fold: (1) to provide that an actor is guilty of an attempt only if he attempts to commit what the state has declared to be an offense; and (2) to provide that an actor is guilty of an attempt to commit an offense only if the offense is punishable by at least three years in prison.

¹⁰⁶ Section 1 distinguishes “a crime,” from “offense X.” The term “offense X” refers to an act-type that the state declares to be prohibited. The term “a crime” includes two kinds of act-types: (1) act-types that the state has declared to be prohibited, and (2) act-types that an actor *mistakenly believes* the state has declared to be prohibited.

¹⁰⁷ Section 2 extends liability to actors who make mistakes of “law,” thereby making it possible to punish actors like Mr. Law.

¹⁰⁸ Section 2 also collapses into a single clause, similar to § 5.01(1)(c), what the Model Penal Code now places in three clauses: § 5.01(1)(a), (b) & (c). It does so by recognizing that the class of defendants who are guilty of violating § 5.01(1)(c) necessarily includes the class of defendants who violate § 5.01(1)(a) & (b). Cf. MODEL PENAL CODE COMMENTARY § 5.01(1) pt.I, at 305 n.17 (1985)

(3) by virtue of his conduct and state of mind, he shows himself to have been a substantial threat to the interests that the law declaring X to be an offense seeks to protect.¹⁰⁹

[Alternative Provision]

[(3) based upon his conduct and state of mind, the triers of fact, representing informed¹¹⁰ citizens of the jurisdiction, conclude he would have committed offense X under counterfactual circumstances they fear could have obtained.]¹¹¹

(4) If the person's conduct is based upon a mistake of fact or law, his conduct and state of mind shall not be deemed to be a substantial threat to the interests the law declaring X to be an offense seeks to protect, unless the means he mistakenly believed would culminate in a crime are neither substantially harder for the police to detect nor substantially easier or safer for persons to execute, than means that suffice to commit offense X.¹¹²

(citing a Hawaii statute that similarly collapses into a single provision what the Model Penal Code separately does in §§ 5.01(1)(b) and 5.01(1)(c)).

¹⁰⁹ This is designed to exclude from liability for attempt persons who make mistakes of fact, such as Mildred the Midwestern Voodooist, and persons who make mistakes of law, such as Mr. Adulterer. The Model Penal Code, through § 2.12(2), excludes actors like Mildred. However, rather than doing so directly in its definition of attempt, the Model Penal Code first includes actors like Mildred within its definition of attempt (MODEL PENAL CODE § 5.01 (1962)) and, then, excludes them under the separate provision of § 2.12(2).

¹¹⁰ This requirement, that triers of fact act as representatives of citizens who are "informed," prevents the impossibility defense from turning upon uninformed popular fears, e.g., that HIV can be spread through spitting. *See supra* note 104.

¹¹¹ This Alternative Provision achieves the same thing as the standard formulation. If the standard formulation seems more acceptable, it is only because by employing the language of "threat," the standard masks its effect. To say an actor revealed himself to have been a "threat" means he revealed himself to be someone who would have jeopardized the interests that the law defining crime X is designed to safeguard under a counterfactual situation of a kind that society knows did not obtain but fears could have obtained.

¹¹² This explains why an actor who makes the mistake of fact in thinking that hemophiliacs will bleed to death if they are slightly nicked is not guilty of murder for inflicting a minor paper cut on a hemophiliac enemy with intent to kill him; because there is no reason to believe that, when the paper cut fails, the defendant would be willing to resort to the kinds of alternative methods that, to be effective, leave more incriminating trails of evidence. It may also distinguish Lady Eldon, who makes the mistake of law of thinking that there is a duty on French lace, from the professional smuggler, who makes the mistake of law of importing German brandy in the mistaken belief that there is a duty on such brandy: lace is easy to smuggle and hard to detect and, hence, there is no reason to believe that, just because she is willing to risk smuggling French lace, Lady Eldon would also be willing to smuggle the kinds of items on which there is a duty (e.g., Turkish brandy).

(5) If the person's conduct is based upon a mistake of law, his conduct and state of mind shall not be deemed to be a substantial threat to the interests the law declaring X to be an offense seeks to protect, unless his principal goal would have been served as well by means that would have suffice to commit offense X.¹¹³

¹¹³ This provision explains why a woman who makes the mistake of law of importing sugar in the mistaken belief that there is a duty on sugar is not culpable, while the professional smuggler who imports German brandy mistakenly thinking there is a duty on German brandy may be culpable of, say, attempting to smuggle Turkish brandy: the woman's goal is to possess a staple of life for personal cooking and, hence, is *not* a goal that is likely to be furthered by smuggling anything which there is or is ever likely to be contraband or dutiable; while the professional smuggler's goal is to exploit a black market and, hence, *is* a goal which is likely to be furthered by smuggling something that is contraband or dutiable (i.e., Turkish brandy).