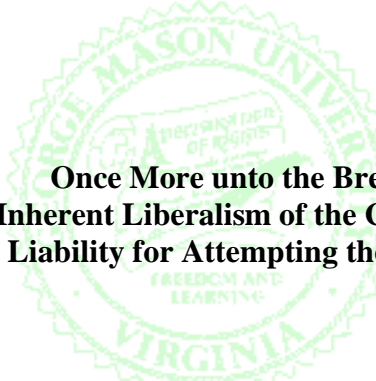


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The seal of George Mason University is a circular emblem with a scalloped border. It features the text "GEORGE MASON UNIVERSITY" at the top and "VIRGINIA" at the bottom. In the center, there is a shield with a scale of justice and a book, with the motto "FREEDOM AND LEARNING" below it. The seal is rendered in a light green color.

**Once More unto the Breach:
The Inherent Liberalism of the Criminal Law
and Liability for Attempting the Impossible**

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Attempting the Impossible

by
JOHN HASNAS*

Introduction

Jean-Claude, a practitioner of voodoo who fled to the United States from Haiti to escape the oppression of the Duvalier regime, passes a man on the street who he recognizes as a former member of the Tonton Macoutes, Duvalier's secret police. Consumed with hatred and the desire for revenge, he goes home, fashions a doll in his enemy's image, and drives a needle through its heart. He does so with the intention of producing his enemy's death, which he firmly believes will result from his action. His wife, another believer in voodoo, is horrified by his action and turns him in to the police, who arrest him for attempted murder. Jean-Claude is tried and convicted.

Laura and Frank are rabid anti-environmentalists who believe there should be no restrictions on people's ability to utilize natural resources. Intending to engage in an act of civil disobedience, they go deer hunting on October 31. Although hunting season runs from October 1 until October 31, Laura mistakenly believes the season runs from September 15 to October 15, while Frank, who has just returned from Japan, mistakenly believes the date to be November 1. While hunting, they encounter a forest ranger to whom they proudly confess their defiance of the law. The ranger promptly arrests Frank, who is tried and convicted for attempting to hunt out of season, but does not interfere with Laura, who has committed no crime.

A former dot-com millionaire, who has been reduced to liquidating his property to stave off bankruptcy, parks his SUV along a crowded street and offers to sell various electronic gadgets to passing pedestrians. Jenny is one such pedestrian to whom he offers

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his 700 MHz laptop computer for \$400. Jenny concludes that the computer must be stolen property, but buys it nonetheless. Thrilled with her purchase, she shows the laptop to a man coming from the opposite direction and says, “Hey, there’s a guy selling ‘hot’ electronic gear down the street for unbelievable prices. I got this laptop for only \$400.” Unfortunately for her, the man is an undercover police officer who places her under arrest. Jenny is tried and convicted of attempting to receive stolen property.

Clarissa, the long-suffering wife of a philandering husband, is in the habit of preparing him a cup of coffee with one spoonful of sugar each morning. However, when he comes home at 3:00 a.m. with lipstick smeared on his shirt collar, she decides that this is the final straw. The next morning, she stirs what she believes to be a spoonful of the arsenic she had purchased for this eventuality into his coffee. When her husband gets up from the breakfast table, kisses her on the cheek, and leaves for work, she realizes that she mistakenly added sugar to his coffee, just as she does every morning. Taking this as a sign from God to repent, she immediately goes to the police station to confess. Clarissa is arrested for attempted murder and is tried and convicted.¹

With the exception of Laura, the protagonist in each of the above dramas is being subjected to criminal punishment for attempting crimes that could not possibly be produced by their actions. Should they be? There is little question that in most American jurisdictions the defendants would have no grounds on which to appeal their convictions. Thirty-seven states have explicitly eliminated impossibility as a defense to a charge of attempt² and the

1. Each of these vignettes is derived from one of the classic illustrative cases associated with the problem of impossible attempts. The first originated in Justice Maxey’s dissenting opinion in *Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933). The second comes from Sanford Kadish and Monrad Paulsen’s story of Mr. Fact and Mr. Law that can be found in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 674 (5th ed. 1989). The third is an updated variant of the *People v. Jaffe*, 78 N.E. 169, 169 (N.Y. 1906). And the fourth was apparently derived from the case of *State v. Clarissa*, 11 Ala. 57, 60–61 (1847), in which a slave attempted to poison her master with an innocuous substance.

2. Thirty-one states have eliminated the defense of impossibility by statute. See ALA. CODE § 13A-4-2(b) (2000); ALASKA STAT. § 11.31.100(b) (Michie 2001); ARIZ. REV. STAT. § 13-1001(A)(1) (2001); ARK. CODE ANN. § 5-3-201(a)(1) (Michie 2001); COLO. REV. STAT. § 18-2-101(1) (2000); CONN. GEN. STAT. § 53a-49(a)(1) (1999); DEL. CODE ANN. tit. 11, § 531(1) (2000); GA. CODE ANN. § 16-4-4 (2000); HAW. REV. STAT. § 705-500(1)(a) (2000); 720 ILL. COMP. STAT. ANN. 5/8-4 (West 2000); IND. CODE ANN. § 35-41-5-1(b) (West 2000); KAN. STAT. ANN. § 21.3301(b) (2000); KY. REV. STAT. ANN. § 506.010(1) (Michie 2001); LA. REV.

federal circuits that have not done likewise have so limited the range of application of the defense as to render it virtually a dead letter.³ As a result, one's susceptibility to punishment for attempting the impossible is today a rather uncontroversial matter of settled law.

This was not always so. Thirty-four years ago Graham Hughes wrote that:

[t]he relevance on a charge of criminal attempt of the impossibility of the accused's attaining his objective 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 time and energy to this question is perfectly proper, for it is an important question in a number of ways. It raises very basic interrogatories concerning the aims and purposes of the criminal law; it compels us to focus attention on concepts such as "intention" and "purpose," an analysis of which is indispensable to criminal law scholarship; and it provides an

STAT. ANN. § 14:27(A) (West 2000); ME. REV. STAT. ANN. tit. 17-A, § 152(2) (West 2000); MINN. STAT. ANN. § 609.17(2) (West 2000); MO. REV. STAT. § 564.011(2) (1999); MONT. CODE ANN. § 45-4-103(2) (2000); NEB. REV. STAT. ANN. § 28-201(1)(a) (Michie 2000); N.H. REV. STAT. ANN. § 629:1(I) (2000); N.J. STAT. ANN. § 2C:5-1(a)(1) (West 2001); N.Y. PENAL LAW § 110.10 (McKinney 2001); N.D. CENT. CODE § 12.1-06-01(1) (2000); OHIO REV. CODE ANN. § 2923.02(B) (Anderson 2001); OKLA. STAT. ANN. tit. 21, § 44 (West 2000); OR. REV. STAT. § 161.425 (1999); 18 PA. CONS. STAT. § 901(b) (2000); TENN. CODE ANN. § 39-12-101(a)(1) (2001); UTAH CODE ANN. § 76-4-101(3)(b) (2000); WASH. REV. CODE § 9a.28.020(2) (2001); WYO. STAT. ANN. § 6-1-301 (Michie 2000). Seven states have eliminated the impossibility defense by judicial decision. *See Hudson v. State*, 745 So. 2d 997, 1000 (Fla. 1999); *State v. Curtis*, 603 A.2d 356, 359 (Vt. 1991); *State v. Lopez*, 669 P.2d 1086, 1087 (N.M. 1983); *State v. Ferreira*, 463 A.2d 129, 132 (R.I. 1983); *State v. Hageman*, 296 S.E.2d 433, 451 (N.C. 1982); *Duke v. State*, 340 So. 2d 727, 730 (Miss. 1976); *Darnell v. State*, 558 P.2d 624, 625 (Nev. 1976).

3. *See United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1978) (rejecting any distinction between legal and factual impossibility and holding that "generally a defendant should be treated in accordance with the facts as he supposed them to be"); *United States v. Parramore*, 720 F. Supp. 799, 800 (N.D. Cal. 1989) (stating that "[s]uffice it to say that the common law has rejected the impossibility defense"); *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973), *aff'd*, 484 F.2d 1271 (2d Cir. 1973) (stating that "however . . . impossibility may be categorized, [if] the defendants' objective . . . was criminal, impossibility is no defense"). Federal courts that have not explicitly rejected impossibility as a defense have effectively rendered the question moot by examining the legislative history of modern federal criminal statutes to find a Congressional intent to eliminate the common law defense. *See, e.g., United States v. Hsu*, 155 F.3d 189, 202 (3d Cir. 1998) (holding that "Congress could not have intended E[conomic] E[spionage] A[ct] attempt crimes to be subject to the somewhat obscure and rarely used common law defense of legal impossibility"); *United States v. Sobrilski*, 127 F.3d 669, 674 (8th Cir. 1997) (holding that "in enacting section 406 of the Comprehensive Drug Abuse and Prevention Control Act of 1970, . . . 'Congress intended to eliminate the defense of impossibility'").

excellent opportunity for reflecting on the pervasive and difficult distinction between mistake of fact and mistake of law. For these reasons the problem is a splendid set-piece which exhibits in a short space some of the most difficult issues of criminal law analysis.⁴

How did the “splendid set piece . . . of criminal law analysis” of a generation ago come to be a matter of routine today?

The answer apparently lies in the confusion and frustration courts experienced when trying to apply the common law rule governing impossible attempts. The rule itself was clear. Legal impossibility constituted a defense to a charge of attempt; factual impossibility did not.⁵ An attempt was legally impossible “where the intended acts, even if completed, would not amount to a crime.”⁶ An attempt was factually impossible “when extraneous circumstances unknown to the actor or beyond his control prevent consummation of the intended crime.”⁷ The confusion arose when courts tried to apply the rule to cases because the categories are not mutually exclusive.

Consider, for example, the case of Jenny, the laptop purchaser, described above. She completed all of her intended acts which did not amount to a crime. Therefore, her attempt was legally impossible.⁸ On the other hand, the fact that the laptop was not stolen property was an extraneous circumstance unknown to her that prevented the consummation of the intended crime. Therefore, her attempt was factually impossible.⁹ Consider also Clarissa, the long-suffering wife. She too completed all of her intended acts which amounted to sweetening her husband’s coffee as she does every morning; surely no crime. Therefore, her attempt was legally impossible. However, she failed to murder her husband only because she mistook sugar for arsenic, an extraneous circumstance that

4. Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1005 (1967).

5. *See, e.g., Sobrilski*, 127 F.3d at 674 (“Ordinarily, legal impossibility is a defense to a charge of attempt, but factual impossibility is not.”); *United States v. Oviedo*, 525 F.2d 881, 883 (5th Cir. 1976) (“The traditional analysis recognizes legal impossibility as a valid defense, but refuses to so recognize factual impossibility.”); *People v. Dlugash*, 363 N.E.2d 1155, 1160 (N.Y. 1977) (“A general rule developed in most American jurisdictions that legal impossibility is a good defense but factual impossibility is not.”).

6. *United States v. Berrigan*, 482 F.2d 171, 188 (3d Cir. 1973).

7. *Id.*

8. *See People v. Jaffe*, 78 N.E. 169 (N.Y. 1906).

9. *See People v. Rojas*, 358 P.2d 921, 922 (Cal. 1961).

prevented the consummation of the crime. Therefore, her attempt was factually impossible. As these examples suggest, whether an attempt is legally or factually impossible appears to depend more on the way the court chooses to characterize the defendant's actions than on the defendant's actions themselves.

This situation produced a howl of frustration from the judges who had to apply the rule. Characterizing legal and factual impossibility as "logically indistinguishable"¹⁰ and the distinction between them as "a matter of semantics,"¹¹ courts found the common law rule to be a "morass of confusion,"¹² and "a source of utter frustration."¹³ One court summed up the situation by stating:

[T]he application of the defense of impossibility is so fraught with intricacies and artificial distinctions that the defense has little value as an analytical method for reaching substantial justice. . . . We think the effort to compartmentalize factual patterns into these categories of factual or legal impossibility is but an illusory test leading to contradictory, and sometimes absurd, results.¹⁴

In the judicial equivalent of throwing up one's hands, courts both rejected the impossibility defense whenever possible¹⁵ and urged legislatures to supplant the common law doctrine with a "progressive and more modern view."¹⁶ The majority of state legislatures obliged,¹⁷ usually adopting an attempt statute patterned on section 5.01 of the Model Penal Code that eliminates the impossibility defense.¹⁸ Thus, courts now rarely if ever have to address the "splendid set piece . . . of criminal law analysis" of a generation ago.

In this Article, I will suggest that this is not necessarily a good thing. With a little help from our fictional friends, Jean-Claude,

10. *United States v. Darnell*, 545 F.2d 595, 597 (8th Cir. 1976). *See also* *United States v. Quijada*, 588 F.2d at 1255 (eschewing any effort to distinguish between the two concepts); *United States v. Duran*, 884 F. Supp. 577, 580 n.5 (D.D.C. 1995) ("categorizing a case as involving legal versus factual impossibility is difficult, if not pointless"), *aff'd*, 96 F.3d 1495 (D.C. Cir. 1996).

11. *United States v. Hsu*, 155 F.3d 189, 199 (3d Cir. 1998).

12. *United States v. Thomas*, 13 C.M.A. 278, 286 (1962).

13. *Id.* at 287.

14. *State v. Moretti*, 244 A.2d 499, 503 (N.J. 1968). *See also* *United States v. Hair*, 356 F. Supp. 339, 342 (D.D.C. 1973).

15. *See supra* note 2.

16. *People v. Rollino*, 233 N.Y.S.2d 580, 585 (1962).

17. *See supra* note 2.

18. *See* MODEL PENAL CODE § 5.01, cmt. n.3.

Laura, Frank, Clarissa, and Jenny, I hope to show that there was both significant wisdom in and good normative grounding for the common law impossibility defense. In Part I, I will argue that the distinction between legal and factual impossibility is not nearly as impenetrable as contemporary commentary suggests, and that, in fact, the essence of the distinction can be encapsulated in a single sentence. In Part II, I will argue that the confusion regarding the distinction arose from the difficulty that the early courts had in giving a clear explanation for the basis of their decisions. I will claim that the courts were saying one thing while doing another, and that by paying attention to what the courts said rather than what they did, subsequent courts and commentators stumbled into their “morass of confusion.”¹⁹ In Part III, I will examine the normative argument offered for the rejection of the impossibility defense by the authors of the Model Penal Code and other theorists who adopt what is known as a subjectivist approach to the crime of attempt. In doing so, I will review the main objections to the Model Penal Code’s subjectivist approach and catalog the responses the authors of the Code can make to each. In Part IV, I will argue that there is a principled distinction between moral and criminal responsibility, that the normative arguments supporting the Model Penal Code’s subjectivist approach are based on an improper conflation of the two, and that a correct understanding of the nature of criminal responsibility leaves the Code’s position without normative support. In Part V, I will argue that there is an inherent liberal bias built into the Anglo-American criminal law that supplies a principled basis for rejecting the Model Penal Code’s definition of attempt. In Part VI, I will propose a definition for attempt that encompasses and extends the common law defense of impossibility and rests upon a firm theoretical footing. Finally, in Part VII, I will conclude.

I. The Substance of the Common Law Doctrine

In the Introduction, I suggested that the courts lost patience with the common law doctrine of impossibility because the categories of legal and factual impossibility are not mutually exclusive. Indeed, given the definitions assigned to these terms by the common law decisions, they are not. But this implies only that the courts did a

19. *United States v. Thomas*, 13 C.M.A. 278, 286 (1962).

poor job of labeling the distinction they were making, not that no viable distinction exists. On the contrary, with some adjustment to our terminology, it is quite easy to distinguish the class of cases in which impossibility functioned as a defense at common law from those in which it did not.

A perhaps apocryphal story about football coach Vince Lombardi holds that following a bad game by the Green Bay Packers, he began a team meeting by saying, "Let's get back to fundamentals. This is a football." I believe an analogous approach can help elucidate the substantive features of the impossibility defense to attempt. This means beginning with the observation that "attempt is a crime." As such, it consists of a guilty act, an actus reus, undertaken with a guilty state of mind, a mens rea. The actus reus encompasses more than merely the bodily movement of the defendant, referring to an action that produces prohibited consequences and occurs under legally specified circumstances. Thus, the actus reus of a crime consists of three constituent elements: 1) a physical action, 2) its consequences, and 3) its attendant circumstances.²⁰ The mens rea describes the state of mind the actor must have with regard to each element of the actus reus.

Professor J.C. Smith has drawn a useful distinction between two types of attendant circumstances. Smith distinguishes "pure" from "consequential" circumstances. Pure circumstances are "[t]hose the existence of which is not essential to the occurrence of the consequences but is relevant to the legal effect of the consequences. The relevance of these circumstances lies simply in that their existence is required by the definition of the crime as a condition of liability."²¹ An example of a pure circumstance would be the requirement for the crime of burglary that the breaking and entering take place at night. This circumstance has no bearing on whether the consequences of the burglary, the breaking and entering, actually occur. However, because it is explicitly required by the definition of the crime, there can be no liability for burglary without it. Consequential circumstances are "[t]hose the existence of which is essential to the occurrence of the consequences" but whose "existence is not necessarily required by the definition of the

20. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 195 (2d ed. 1986); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 16 (2d ed. 1961).

21. J.C. Smith, *Two Problems in Criminal Attempts*, 70 *HARV. L. REV.* 422, 424 (1957).

crime”²² Examples of consequential circumstances would be: on a charge of murder, whether the gun to be used is loaded; and “on a charge of larceny, whether there was anything in the pocket into which D put his hand with intent to steal.”²³

Because attempt is a crime, it can be fully described by specifying its constituent *actus reus* and *mens rea*. What then is the *actus reus* of attempt? Although it is too early in our analysis to answer this question with precision,²⁴ we can say at least that the *actus reus* of attempt consists in trying and failing to commit another, completed crime. The *mens rea* of attempt is a bit easier to specify. Attempt is a specific intent crime, one whose *mens rea* requires two instances of intention. To be liable for a specific intent crime, one must 1) intentionally produce the *actus reus* of that crime while 2) entertaining a further intention to do something or produce certain consequences in the future.²⁵ This further intention is the specific intent. In the case of attempt, the required specific intent is the intent to commit the completed crime.²⁶ Thus, the *mens rea* of attempt consists in intentionally taking the actions that constitute the *actus reus* of attempt, i.e., the actions of trying and failing to commit a completed crime, with the further intention to commit that crime. Note that this implies that to be culpable for an attempt, one must act with the specific intention to produce a state of affairs prohibited by law.

This review of criminal law fundamentals should be sufficient for us to unravel the common law doctrine of impossibility. Consider first Laura, our anti-environmental rebel, who was trying to hunt out of season. Laura’s mistake about the law prevented her

22. *Id.* at 424–25.

23. *Id.* at 425.

24. Indeed, providing a definitive answer to this question is one of the ultimate objectives of this article. *See infra* Part VI.

25. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 202 (1972) (“the most common usage of ‘specific intent’ is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime”); ROLLIN M. PERKINS, *CRIMINAL LAW* 762 (2d ed. 1969) (“Some crimes require a specified intention in addition to the intentional doing of the *actus reus* itself This additional requirement is a ‘specific intent,’ an additional intent specifically required for guilt of the particular offense.”).

26. *See* LAFAVE & SCOTT, *supra* note 25, at 428 (1972) (“The mental state required for the crime of attempt, as it is customarily stated in the cases, is an intent to commit some other crime.”); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 137 (1978) (“It is generally agreed that the intent required for an attempt is the intent to effectuate the offense-in-chief.”).

from realizing her objective. Laura was not only not convicted of attempting to hunt out of season, she was not even arrested. Why not?

The simple answer is that Laura does not possess the mens rea of attempt. It is fair to say that Laura tried and failed to hunt out of season, and hence that her actions constitute the actus reus of an attempt. It is also fair to say that because she took these actions intentionally, she has one of the two instances of intent requisite for an attempt conviction. What is missing, however, is the specific intent. To be culpable, Laura must also intend to commit a completed crime, i.e., to produce consequences that are prohibited by law. Despite the fact that Laura intends to produce consequences that she mistakenly believes to be prohibited by law, she does not intend to produce consequences that are prohibited by law. Therefore, she does not possess the specific intent required by the mens rea of attempt.²⁷

Laura has attempted to commit an imaginary crime.²⁸ One attempts an imaginary crime when one makes a mistake of law such that he or she “either believes that he [or she] violates a criminal prohibition which, in reality, does not exist, or . . . wrongly expands the scope of an existing criminal statute to his [or her] disadvantage.”²⁹ One who attempts to engage in illegal gambling in Nevada or violate a motorcycle helmet law in a state that has not enacted such a statute would be attempting to commit an imaginary crime. Laura’s mistake caused her to “wrongly expand the scope of an existing criminal statute to [her] disadvantage.”³⁰ Our analysis suggests that there should be no culpability in cases of imaginary crimes because the defendant does not possess the mens rea of attempt. Thus, as common sense would suggest, attempting to commit an imaginary crime is not attempting to commit a crime.³¹

27. See LAFAVE & SCOTT, *supra* note 20, at 516.

28. I adopt the phrase ‘imaginary crime’ to refer to this class of cases from Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 235 (1978). Cases of inculpatory mistakes of law have also been referred to as illusory crimes. See Paul Kichyun Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U. L. REV. 1170, 1186 (1957).

29. Weigend, *supra* note 28, at 236.

30. *Id.*

31. There is nearly universal agreement that imaginary crimes are not culpable attempts. See, e.g., MODEL PENAL CODE:

Consider next the case of Clarissa, our aggrieved wife. Clarissa has made no mistake of law. What she tries to do—murder her husband—is certainly prohibited by law. However, due to a mistake about the condition of the world, i.e., the location of the arsenic, the means she employs cannot possibly achieve her end. Clarissa has made a mistake of fact that prevents her from producing the consequences she desires which would constitute a murder.

[O]f course, it is still necessary that the result desired or intended by the actor constitute a crime. If, according to his beliefs as to the facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt even though he firmly believes that his goal is criminal.

MODEL PENAL CODE § 5.01, cmt. 3 at 318 (Tent. Draft No. 10, 1960). See also HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 198 (1979) (“It is conceded universally that an incorrect belief by the accused regarding his criminal liability cannot cause him to be liable. Illustrations in the literature usually depict some mistake by the accused in thinking that there is a law that makes what he does a crime.”); Hughes, *supra* note 4, at 1006:

[Imaginary crime] describes a situation in which the objective of the accused . . . does not constitute an offense known to the law, even though the accused may mistakenly believe the law to be other than it is. Mistake of law may not generally excuse, but neither can it in itself be a sufficient ground for indictment.

Oddly, the explanation given for this is almost never the lack of *mens rea*. Instead, most commentators who address the issue argue that holding one culpable for an imaginary crime would contravene the principle of legality, which holds that “conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal,” LAFAVE & SCOTT, *supra* note 25, at 177, or that “there must be no crime or punishment except in accordance with fixed, predetermined law,” WILLIAMS, *supra* note 20, at 575. The reasoning advanced is that because in the case of imaginary crimes there is no prohibition against the conduct attempted, punishing the attempt would be to punish without the necessary advance warning. See Weigend, *supra* note 28, at 235–36:

The second group of relatively “clear” cases could be called “imaginary offenses.” . . . Among the various reasons given for the defendant’s impunity in these cases, the most convincing seems to be that there is just no law under which he could possibly be convicted. Thus, the imposition of punishment would clearly contravene the principle of legality (*nulla poena sine lege*).

See also WILLIAMS, *supra* note 20, at 633–34:

It should need no demonstration that a person who commits or attempts to commit what is not a crime in law cannot be convicted of attempting to commit a crime, and it makes no difference that he thinks it is a crime. . . . For if the legislature has not seen fit to prohibit the consummated act, a mere approach to consummation should a fortiori be guiltless. Any other view would offend against the principle of legality

See also LAFAVE & SCOTT, *supra* note 25, at 442:

The important point to keep in mind here is that one would not have to invent a doctrine called legal impossibility to dispose of [imaginary crimes.] Rather, all that is involved is an application of the principle of legality; the defendant did not intend to do anything which had been made criminal, and what is not criminal may not be turned into a crime after the fact by characterizing his acts as an attempt.

This line of reasoning undoubtedly provides a good ground for excluding imaginary crimes from the class of culpable attempts. It is, however, also a highly artificial one. It hardly seems necessary to resort to the principle of legality to explain why there should be no punishment in a class of cases in which the actors do not possess the *mens rea* required for the offense.

Employing Professor Smith's terminology, we can say that Clarissa is laboring under a mistake of fact with regard to a consequential circumstance.

By stirring sugar into her husband's coffee, Clarissa tried and failed to kill him. It is therefore fair to say that her actions constitute the *actus reus* of attempted murder. Further, Clarissa clearly possesses the *mens rea* of attempt. She intentionally performed the actions that constitute the *actus reus* of the attempt—stirring sugar into her husband's coffee—and she did so with the further specific intention to thereby cause her husband's death. Hence, Clarissa appears to be a good candidate for conviction for attempted murder.

Due to a mistake about a consequential circumstance, Clarissa has attempted to commit a crime by means that make it impossible for her to succeed. Other cases that share the characteristics of Clarissa's failed attempt include attempting to pick an empty pocket³² or to commit murder using an unloaded gun.³³ Our analysis suggests that in cases of this type in which the impossibility results from a factual mistake about a consequential circumstance, conviction for attempt is appropriate.

But now consider the case of Jenny, our pedestrian laptop purchaser. Like Clarissa, Jenny is not mistaken about the law. What she is trying to do—receive stolen property—is legally prohibited. Also like Clarissa, Jenny has made a mistake about the condition of the world, i.e., whether the laptop she purchased had been stolen. Unlike Clarissa, however, Jenny's mistake of fact did not prevent her from producing the consequences she intended to produce, i.e., obtaining a laptop at a low price. It did, however, prevent her from producing the *actus reus* of the crime of receiving stolen property. This is because Jenny was laboring under a mistake of fact with regard to a pure circumstance, that is, a circumstance “the existence of which is not essential to the occurrence of the consequences but is relevant to the legal effect of the consequences.”³⁴

It appears that Jenny had the *mens rea* required for an attempt. She intentionally took the actions by which she received the laptop and she did so with the further specific intention to receive stolen property. But what can we say about whether her actions constitute

32. *See Regina v. Ring*, 17 Cox Crim. L. Cas. 491 (1892) (Eng.).

33. *See State v. Damms*, 100 N.W.2d 592 (Wis. 1960).

34. Smith, *supra* note 21, at 424.

the actus reus of an attempt to receive stolen property? On the one hand, Jenny successfully accomplished her objective of obtaining a laptop computer at a very low price. She does not appear to have failed at anything at all, and had she known that the laptop was not in fact stolen property, she would have been even more delighted with her purchase. Given this, it seems odd to characterize Jenny's activities as trying and failing to commit the crime of receiving stolen property. Thus, one could argue that her activities do not constitute the actus reus of an attempt. On the other hand, because Jenny believed that the laptop was stolen property, it is not unreasonable to say that she was trying to receive stolen property, and, because the laptop was not stolen property, that she failed to accomplish this. Thus, one could also argue that her actions do constitute the actus reus of an attempt.

It appears that whether Jenny has produced the actus reus of an attempt to receive stolen property depends on whether the object she seeks to obtain is characterized as a low-priced laptop or as putative stolen property. Fortunately, it is not necessary to resolve this question at the moment. For now, we can simply say that a preliminary analysis in terms of the fundamental concepts of criminal law leaves us uncertain as to whether Jenny should be liable to conviction for attempting to receive stolen property.

Due to a mistake of fact about a pure circumstance, Jenny has achieved an objective that she believed to be criminal without thereby committing a crime. Other examples of this type of impossible attempt are attempting to steal one's own umbrella³⁵ or to distribute a controlled substance by distributing an uncontrolled substance.³⁶ At present, our analysis leaves us uncertain as to whether there should be a conviction in cases such as these in which the impossibility results from a mistake of fact about a pure circumstance.

We are now in a position to give a clear account of the common law impossibility doctrine. At common law, a factually impossible attempt was one in which the impossibility arose from a mistake of fact with regard to a consequential circumstance, the type of mistake Clarissa made. Factual impossibility was no defense at common law,

35. *See Regina v. Collins*, 9 Cox Crim. Cas. 497, 498 (1864) (Eng.).

36. *See United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976).

a result which squares with our analysis of Clarissa's situation above. A legally impossible attempt was either an imaginary crime or one in which the impossibility arose from a mistake of fact with regard to a pure circumstance, the type of mistake Jenny made. Legal impossibility was a common law defense, a result which squares with our analysis of imaginary crimes such as Laura's, and resolves our uncertainty about Jenny's situation in favor of finding no liability.

The common law decisions overwhelmingly support this analysis. With the exception of a few nineteenth century English cases,³⁷ almost all cases in which an attempt was impossible because of the defendant's mistake of fact with regard to a consequential circumstance have been classified as factually impossible and the conviction upheld. Thus, attempts to pick empty pockets,³⁸ perform abortions on women who were not pregnant,³⁹ commit rape when impotent,⁴⁰ and kill someone already dead,⁴¹ or with an inadequate dose of poison⁴² or an unloaded gun,⁴³ or by shooting into an empty bed⁴⁴ or in the wrong direction⁴⁵ have all been held to give rise to attempt liability.⁴⁶ In addition, almost all cases in which attempt convictions have been reversed on the grounds of legal impossibility are either cases of imaginary crimes or those in which the defendant made a mistake of fact with regard to a pure circumstance. Thus, convictions have been reversed for attempting to commit forgery by altering a non-material portion of a check,⁴⁷ attempting to receive

37. See FLETCHER, *supra* note 26, at 146–47.

38. See *People v. Fiegelman*, 91 P.2d 156 (Cal. Ct. App. 1937).

39. See *State v. Moretti*, 244 A.2d 499 (N.J. 1968).

40. See *Preddy v. Commonwealth*, 36 S.E.2d 549 (Va. Ct. App. 1946).

41. See *People v. Dlugash*, 363 N.E.2d 1155 (N.Y. 1977).

42. See *Commonwealth v. Kennedy*, 48 N.E. 770 (Mass. 1897).

43. See *State v. Damms*, 100 N.W.2d 592 (Wis. 1960).

44. See *State v. Mitchell*, 71 S.W. 175 (Mo. 1902).

45. See *People v. Lee Kong*, 30 P. 800 (Cal. 1892).

46. See Ira P. Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377, 379–83 n.10, 16–19 (1986) (listing fifty-two cases in which mistakes about consequential circumstances were held to be cases of factual impossibility giving rise to attempt liability).

47. See *Wilson v. State*, 38 So. 46 (Miss. 1905). This is probably the only reported case of attempting an imaginary crime. That there have been few such cases is unsurprising since in cases in which one “believes that he violates a criminal prohibition which, in reality, does not exist,” Weigend, *supra* note 28, at 236, it is not even clear how the prosecutor would frame the charges. Wilson was the type of imaginary crime in which the defendant “wrongly expand[ed] the scope of an existing criminal statute to his disadvantage.” *Id.* Wilson thought he was committing forgery by altering the numerals on a check. Forgery, however, required the

stolen property by receiving non-stolen property,⁴⁸ attempting to suborn perjury by soliciting false testimony on an immaterial matter,⁴⁹ attempting rape by having forcible intercourse with one's wife,⁵⁰ attempting to distribute a controlled substance by distributing an uncontrolled substance,⁵¹ and attempting to smuggle letters out of prison without the warden's knowledge when the warden was aware of the smuggling.⁵² Far from involving the "highly abstract issues that are notorious for their degree of difficulty,"⁵³ that were decried by courts and commentators, the common law distinction between factual and legal impossibility is really quite simple. Because cases of true imaginary crimes almost never arise, courts can accurately and easily categorize attempts as legally or factually impossible by focusing on whether the defendant was mistaken about the existence of a pure or consequential circumstance. Discounting imaginary crimes, the common law doctrine of impossibility can be summed up in a single sentence: impossibility is a defense to a charge of attempt if it results from the defendant's mistake concerning a pure circumstance.

alteration of a material part of the document and the numerals were not material. He was thus laboring under a mistake of law that caused him to believe his action to be criminal when it was not. *Id.*

48. See *People v. Jaffe*, 78 N.E. 169 (N.Y. 1906).

49. See *People v. Teal*, 89 N.E. 1086 (N.Y. 1909). *Teal* is often incorrectly treated by commentators as though it were a case of attempting an imaginary crime, or in the more commonly employed terminology, an example of "pure legal impossibility." See Fernand N. Dutile & Harold F. Moore, *Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners*, 74 NW. U. L. REV. 166, 181–84 (1979); Robbins, *supra* note 46, at 390–94. In *Teal*, the defendant was convicted of attempting to suborn perjury for trying to convince a witness to lie concerning an act of adultery that had never been alleged and therefore was not material to a divorce case. This is not a case of attempting an imaginary crime because *Teal* was not making a mistake of law. He did not erroneously construe the scope of subornation of perjury to include immaterial testimony. Rather, he mistakenly believed that the act of adultery concerning which he was attempting to procure false testimony had been alleged and thus was material. This is a mistake of fact as to a pure circumstance. It did not interfere with the production of the consequences he intended, the obtaining of false testimony on the immaterial act of adultery, but it did prevent his action from amounting to the subornation of perjury. 89 N.E. 1086.

50. See *Frazier v. State*, 86 S.W. 754 (Tex. Crim. App. 1905). At the time, one of the pure circumstances for conviction for rape was that the victim not be one's spouse. Although the actual charge in this case was assault with intent to rape rather than attempted rape, the court's reasoning equally applies to an attempt charge. See *United States v. Thomas*, 13 C.M.A. 278, 299 (1962).

51. See *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976).

52. See *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973).

53. Dutile & Moore, *supra* note 49, at 166.

II. Theory and Confusion

In Part I, I argued that impossibility constituted a defense to a charge of attempt at common law if it arose from the defendant's mistake concerning the existence of a pure circumstance. If things really are as simple as that, what accounts for all the confusion over the issue? After all, the courts were not the only ones to regard the doctrine of impossibility as a "morass of confusion."⁵⁴ Virtually all academic commentators who address the subject begin with a reference to the conceptual difficulty of the distinctions involved. Thus, the impossibility doctrine is declared to be "quicksand"⁵⁵ or "an intellectual quagmire"⁵⁶ that "has resulted in extreme confusion"⁵⁷ and constitutes "the most intractable problem of all."⁵⁸ How could what is essentially a simple distinction give rise to so much intellectual tumult?

The answer may be as simple as that courts and commentators paid too much attention to what judges said and not enough to what they did. To explain what I mean, let me begin with a brief digression on the behavioral significance of making a mistake about a consequential as opposed to a pure circumstance. Recall that a consequential circumstance is one "the existence of which is essential to the occurrence of the consequences"⁵⁹ of the completed crime. Thus, defendants who are mistaken about the existence of a consequential circumstance are prevented from achieving their objectives. Were such defendants to become aware of their mistake, they would change their behavior to make it possible for them to attain their ends. For example, when one attempts to kill with an

54. *Thomas*, 13 C.M.A. at 286.

55. Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 448 (1990).

56. *Id.*

57. PERKINS, *supra* note 25, at 570.

58. Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 665 (1969). *See also* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 238 (1995) ("The debate surrounding the impossibility defense was in large part instigated by the confusion and frustration surrounding the common law history of impossibility."); Dutile & Moore, *supra* note 49, at 166 ("Questions concerning legal impossibility involve highly abstract issues that are notorious for their degree of difficulty."); Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 20 (1968) ("The question of when an unsuccessful attempt at committing a crime becomes a crime in itself is rife with conceptual difficulties, and where the attempt cannot possibly attain the intended criminal goal, these difficulties are compounded.").

59. Smith, *supra* note 21, at 424.

unloaded gun, he or she is mistaken with regard to the consequential circumstance as to whether the gun is loaded. The mistake makes it impossible for the defendant to achieve his or her objective of killing the victim. If the defendant became aware that the gun was not loaded, he or she would surely load it.

A pure circumstance, on the other hand, is one “the existence of which is not essential to the occurrence of the consequences”⁶⁰ of the completed crime. Defendants who are mistaken about the existence of a pure circumstance are therefore not prevented from producing the consequences they intend to produce and achieving their ends. Were such defendants to become aware of their mistake, they would not change their behavior in any way. For example, when one attempts to burglarize a home believing it to be 5:00 a.m. when it is actually 7:00 a.m., he or she is mistaken with regard to the pure circumstance of whether it is night. The mistake does not interfere in any way with the defendant achieving his or her objective of breaking into the home. If made aware of the true time, the defendant would simply proceed with the breaking and entering, although he or she might be relieved to know that there could be no liability for burglary for doing so.

Now consider what the common law judges did when faced with a case involving an impossible attempt. Keep in mind that originally such judges did not see themselves as drawing a distinction between legal and factual impossibility. Their task was simply to determine whether the defendant before them should be liable for punishment for an attempt. Because in virtually every case the defendant had the necessary *mens rea*,⁶¹ this meant deciding whether the defendant’s actions constituted the *actus reus* of an attempt. But because the law provided no specific guidance on how to deal with impossible attempts,⁶² judges had to make this determination on the basis of ordinary English usage and common sense notions of what

60. *Id.*

61. As discussed above, *see supra* note 47, *mens rea* was lacking only in cases of imaginary crimes which were exceedingly rare. *Wilson v. State*, 38 So. 46 (Miss. 1905), is one of the few reported such cases.

62. The legal rules governing impossibility, that legal impossibility was a defense and factual impossibility was not, were, of course, later day derivations from the decisions common law judges made throughout the latter part of the nineteenth century and first part of the twentieth.

constituted an attempt.⁶³ In ordinary usage, an attempt is a try or an effort to achieve an objective.⁶⁴ In the context of the criminal law in which attempt could be charged only when the defendant had failed to commit a completed crime, ordinary usage and common sense suggested that an attempt was an unsuccessful try or a failed effort to achieve a criminal objective.⁶⁵ Thus, judges typically, and not unexpectedly, found attempt liability where defendants had tried and failed to obtain a criminal objective and found no liability where the defendants' actions did not fit this model.

What results did this decision process produce? Because mistakes about consequential circumstances prevented defendants from attaining their goals, defendants who made such mistakes always fit the model of those who had tried and failed to achieve a criminal objective. As a result, common law judges almost always found that the actions of such defendants constituted the actus reus of an attempt and upheld their convictions.⁶⁶ On the other hand, mistakes about pure circumstances did not prevent defendants from attaining their goals. The actions of such defendants are not conveniently described as unsuccessful tries or failed efforts, as we saw in our discussion of Jenny's actions in Part I.⁶⁷ As a result, common law judges were unlikely to view the actions of these defendants as the actus reus of an attempt and would overturn their

63. See FLETCHER, *supra* note 26, at 161 (arguing that “[w]hen the law itself provides no guidance to the meaning of one of its critical terms, we have to fall back on the source of Anglo-American legal terms—namely, the English language”—and thus that an adequate theory of attempts “depends on its providing an account of what ordinary people mean when they talk about ‘trying’ or ‘attempting’ to do something”). See also Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1072 (1992):

The way ordinary speakers use a term will not necessarily control the contours of the legal concept answering to that term, but if the term is used in a statute, particularly a criminal statute, adopting a broader interpretation of the term requires a good reason. To criminalize an act as an “attempt,” it prima facie ought to be an “attempt” in ordinary parlance.

64. The Oxford English Dictionary defines an attempt as “a putting forth of effort to accomplish what is uncertain or difficult; a trial, essay, endeavor . . .” 1 OXFORD ENGLISH DICTIONARY 764 (1989).

65. Thus, the OED's second definition for attempt is “the effort in contrast with the attainment of its object; effort merely, futile endeavor.” *Id.* An excellent example of the court's appeal to the ordinary meaning of attempt is supplied by *People v. Moran*, 25 N.E. 412, 413 (N.Y. 1890), in which the court helped justify its ruling by observing that “[m]any efforts have been made to reach the North Pole, but none have thus far succeeded, and many have grappled with the theory of perpetual motion without success—possibly from the fact of its non-existence—but can it be said in either case that the attempt was not made?”

66. See *supra* note 46 and accompanying text.

67. See *supra* pp. 11–12.

convictions.⁶⁸ Thus, by responding in a perfectly natural way to the need to decide the cases before them, the common law courts produced a division between culpable and non-culpable impossible attempts on the basis of whether the defendant's mistake concerned a consequential or pure circumstance.⁶⁹ Failed attempts to pick empty pockets would support liability; successful attempts to receive property erroneously believed to be stolen would not.

Why then did commentators fail to recognize this distinction? I believe it is because the language the courts used to justify their decisions suggested that a different distinction was being made. In the cases in which convictions for impossible attempts were upheld, the early opinions fairly explicitly justified the convictions on the basis of the ordinary meaning of an attempt. These opinions invariably characterized an attempt as a failed effort. The fact that the effort could not possibly succeed in no way changed its character as a failed effort, and therefore could not shield the defendant from liability for attempt.⁷⁰ In making this point, however, the courts

68. See *supra* notes 47–52 and accompanying text.

69. For the reasons discussed below, see *infra* text accompanying notes 78–100, very few commentators see this as the basic distinction between factual and legal impossibility. George Fletcher, however, clearly recognizes the significance of the distinction. In *Rethinking Criminal Law*, Fletcher sought to explain how to distinguish culpable from non-culpable attempts in cases in which the attempted crime was a regulatory offense or a derivative crime whose consequences are not harmful in themselves, i.e., “that in themselves do not threaten the core interests protected under the criminal law.” FLETCHER, *supra* note 26, at 160 (1978). As examples of such offenses, Fletcher gives receiving stolen property, citing *People v. Jaffe*, 78 N.E. 169 (N.Y. 1906), and smuggling letters out of prison, citing *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973).

Fletcher argues that distinguishing culpable from non-culpable attempts in such cases requires a test that tells us when a mistake as to an attendant circumstance will be inculpatory. As he puts it, “It is little help to say that he must be mistaken about an ‘attendant circumstance,’ for until we formulate a general test for the relevance of mistaken beliefs on the concept of attempting, there is no way of specifying which ‘attendant circumstances’ ought to fall within the description of the attempted act.” FLETCHER, *supra* note 26, at 160. The test Fletcher proposes is his rational motivation test which identifies mistaken beliefs as relevant when they “affect [the defendant’s] incentive in acting. They affect his incentive if knowing of the mistake would give him a good reason for changing his course of conduct.” *Id.* at 161. For the reasons discussed above, see *supra* text accompanying note 59–60, this definition implies that consequential circumstances are always relevant and pure circumstances are not. Thus, Fletcher’s rational motivation test is functionally equivalent to a test that distinguishes between consequential and pure circumstances. This is evidenced by the fact that he would not hold either Jaffe or Berrigan culpable for an attempt.

In a later work, Fletcher apparently broadens the range of application of his rational motivation test beyond mere regulatory or derivative offenses. See George P. Fletcher, *Constructing a Theory of Impossible Attempts*, 5 CRIM. JUST. ETHICS 53 (1986).

70. See, e.g., *People v. Lee Kong*, 30 P. at 801 (“[W]here the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed.”);

regularly characterized the cause of the effort's failure in terms of unknown facts,⁷¹ unexpected obstacles,⁷² extrinsic causes,⁷³ and similar language that suggested a factual error or physical impediment.

The courts had more difficulty explaining their decisions in the cases in which convictions for impossible attempts were overturned. Because in these cases the defendants' errors about pure circumstances did not prevent them from achieving their objectives, their actions did not fit the model of a failed effort and did not square with the ordinary meaning of "attempt." However, it would not do for courts to simply declare that a defendant's conviction must be reversed because his or her actions did not look like an attempt.⁷⁴ But without the benefit of the terminology we are retroactively applying, courts found it difficult to specify the class of cases for which they considered attempt liability inappropriate. As a result, they groped for a description of the distinction they were after with locutions such as: "[i]f all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended"⁷⁵ and "[i]f the thing defendant attempted to do would not and could not, under the statute, have been a crime if accomplished, how can it be said that he attempted to commit the denounced crime, however reprehensible may have been his intent from the standpoint of morals?"⁷⁶

State v. Wilson, 30 Conn. 500, 506 (1862) ("[T]he only safe rule is, that the attempt is complete and punishable, when an act is done with intent to commit the crime, which is adapted to the perpetration of it, whether the purpose fails by reason of interruption, or because there was nothing in the pocket, or for other extrinsic cause."); Kunkle v. State, 32 Ind. 220, 232 (1869) ("[W]here the object is not accomplished, simply because of obstructions in the way, or because of the want of the thing to be operated upon, when the impediment is of a nature to be wholly unknown to the offender, who used appropriate means, the criminal attempt is committed."); People v. Moran, 25 N.E. at 413 ("An attempt is made when an opportunity occurs, and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition.").

71. See *Lee Kong*, 30 P. at 801.

72. See *Moran*, 25 N.E. at 413.

73. See *Wilson*, 30 Conn. at 506.

74. Although in certain early cases, the court's rationale amounted to little more than that. See *Nicholson v. State*, 25 S.E. 360 (Ga. 1896) ("[I]t does not appear that the act which the accused attempted to procure Whittier to commit would have amounted to the crime of perjury, if such attempt had resulted successfully.").

75. *People v. Jaffe*, 78 N.E. 169, 170 (N.Y. 1906).

76. *State v. Taylor*, 133 S.W.2d 336, 340 (Mo. 1939). See also *People v. Teal*, 89 N.E. 1086, 1090 (N.Y. 1909):

Unfortunately, these descriptions are highly ambiguous and depend on how one interprets phrases such as “what an accused person intends to do.” Is “what an accused person intends to do” merely to produce the consequences he or she seeks or is it to produce these consequences under the attendant circumstances as he or she believes them to be? Should the accused person’s intent ignore or incorporate his or her mistaken belief about the pure circumstances? Was Jenny’s intention to receive a 700 MHz laptop or was it to receive a stolen laptop?

If the former, then the courts’ language would refer to a class of cases that includes both mistakes about pure circumstances and imaginary crimes. When the desired consequences are viewed objectively, a defendant can be said to “intend” to produce consequences that he or she believes to be criminal but which are not both when a necessary pure circumstance is missing and when he or she mistakenly believes the consequences to be legally prohibited. If Jenny’s intention is to receive a 700 MHz laptop, then she can believe this to be a criminal activity either because she believes the laptop to be stolen property or because she believes purchasing such a machine for less than \$500 violates a non-existent price regulation.

On the other hand, if “what an accused person intends to do” incorporates the defendant’s mistaken belief, then the courts’ language can refer only to imaginary crimes. When the desired consequences are viewed from the defendant’s perspective, the defendant intends to produce criminal consequences. But the only way one can intend to produce criminal consequences that are not in fact criminal is to be mistaken about what is legally prohibited. If Jenny’s intention is to receive a stolen 700 MHz laptop, then the only way this could not be criminal would be if the jurisdiction did not have a statute prohibiting the receipt of stolen property.

It should be apparent that the courts’ language in these cases was sure to create confusion. We know the courts were trying to identify the class of cases in which defendants made a mistake of fact about a pure circumstance because virtually all of the cases in which

Without it the crime cannot be committed, no matter what the intent may be. The same rule applies to subornation, and where there is neither perjury nor subornation thereof, there can be no such attempt to commit either of these crimes as to fall within the statutes relating to attempts at commission of crimes.

the relevant language was employed have this characteristic.⁷⁷ This implies that the courts were viewing “what an accused person intends to do” from an objective standpoint. But nothing in the courts’ language suggests that this, rather than the defendant’s perspective, is the proper interpretative viewpoint. And even if the language is interpreted as the courts apparently intended, it is still problematic in that it refers not only to cases of mistake of fact about a pure circumstance, but also to imaginary crimes involving mistakes of law. In fact, phrases such as “[i]f all which an accused person intends to do would, if done, constitute no crime” and “[i]f the thing defendant attempted to do would not and could not . . . have been a crime if accomplished” seem more suggestive of mistakes of law than mistakes of fact.

The courts’ difficulty articulating the basis for their decisions in cases of impossible attempts produced the following situation for those seeking to explain when impossibility could serve as a defense. In virtually all the reported cases of impossible attempts, the defendant had made a mistake of fact. The factor that actually determined whether the defendant’s conviction would be upheld was what kind of circumstance the mistake of fact was about; consequential or pure. But judicial opinions in the cases that upheld attempt convictions misleadingly emphasized the factual nature of the defendant’s mistake rather than that the mistake caused the failure of the defendant’s efforts. And judicial opinions in the cases that overturned attempt convictions used language that could be interpreted either to include or to exclude the class of cases the courts’ were seeking to identify and, in addition, misleadingly suggested that the defendant had made a mistake of law. Thus, legal analysts were faced with a situation in which the opinions they were analyzing directed their attention away from the distinction that was doing the work and toward a specious distinction between mistake of fact or physical impediment and mistake of law.

Although specious, the distinction between factual mistake and legal mistake was seductive. This is due, in part, to the well-known role the distinction plays with regard to completed crimes. An elementary tenet of criminal law is that mistake of fact can negate *mens rea* and thus criminal culpability, but mistake or ignorance of

77. As noted above, *Wilson*, 38 So. 46, is an exception. See *supra* note 47.

the law cannot.⁷⁸ There is an appealing intellectual elegance to the observation that in the case of the inchoate crime of attempt, it is mistake of law that defeats liability and mistake of fact that does not. Furthermore, for the most part, this observation is correct. Mistake of law, which cannot exculpate in the case of completed crimes, also cannot inculcate in the case of attempt. The belief that gambling is legal will not relieve one of liability for illegal gambling in New York, and the belief that gambling is illegal will not subject one to liability for attempted illegal gambling in Nevada. In addition, because factual mistakes usually concern a consequential circumstance, in most cases a mistake of fact, which can exculpate in the case of completed crimes, also can inculcate in the case of attempt. The belief that a gun was not loaded can relieve one of liability for murder, and the belief that a gun was loaded can subject one to liability for attempted murder. The desire to assimilate attempt doctrine symmetrically into the established doctrine of mistake of fact and mistake of law created a powerful temptation to overlook the qualifying phrase “in most cases.”⁷⁹

In the end, this temptation proved too powerful for many commentators to resist. The very practice of referring to the distinction between culpable and non-culpable impossible attempts as the distinction between factual and legal impossibility reinforced the impression that factual errors were invariably, rather than usually, inculpatory and that exculpatory errors necessarily concerned matters of law.⁸⁰ As a result, many commentators found cases of factual mistakes about pure consequences anomalous. Cases such as Jenny’s that contained exculpatory mistakes of fact disrupted the elegant symmetry of the mistake of fact/mistake of law

78. See LAFAYE & SCOTT, *supra* note 20, § 5.1(a).

79. See, e.g., Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 757–58 (1988) (discussing the Model Penal Code, stating, “The thrust of both sections is that liability should be based on the facts or circumstances as the actor believed them to be, thereby promoting a symmetry between the exculpatory and inculpatory provisions in the law.”).

80. Examined in isolation, there is nothing necessarily misleading about the factual impossibility/legal impossibility label. Factual impossibility is not an inaccurate way of describing an effort that, due to a factual mistake about the state of the world, cannot possibly succeed. And legal impossibility is a reasonable way of indicating that, due to a factual mistake about a pure circumstance, a defendant’s successful effort cannot constitute a crime. This labeling would be misleading only in the absence of knowledge that the focus of the distinction is whether the defendant’s effort has succeeded or failed. This, however, is exactly the situation the early courts and commentators were in.

distinction. The commentators who were bothered by this tended to view these as cases in which the courts were confused or had made a mistake. Thus, Francis Sayre, one of the earliest commentators, played upon the ambiguity of the phrases such as “what an accused person intends to do” to argue that courts that overturned convictions in cases of mistake as to pure circumstances had failed to appreciate that one of the defendant’s objectives had been criminal.⁸¹ Once this is recognized, he contended, it would be apparent that impossibility resulting from mistake of fact cannot exculpate.⁸² Robert Skilton, another early commentator, exploited the same ambiguity to contend that the courts’ mischaracterization of the defendant’s intent in cases like Jenny’s caused them to incorrectly overturn the convictions.⁸³ Similarly, Jerome Hall regarded the idea of legal impossibility as merely “an awkward expression of the principle of legality,”⁸⁴ indicating that he identified it exclusively with attempts to commit imaginary crimes and regarded the interpretation that included mistakes about pure consequences as “untenable.”⁸⁵

The later commentators who felt the allure of the mistake of law/mistake of fact doctrine similarly had their attention drawn in an inappropriate direction. In the decided cases, the key distinction was between mistakes of fact about consequential circumstances and mistakes of fact about pure circumstances. The question of whether the defendant had made a mistake of law and attempted an imaginary crime was, at best, of tangential significance since almost no cases involved such mistakes. The mistake of fact/mistake of law distinction placed the focus on the difference between imaginary crimes and all mistakes of fact, and relegated the distinction between factual mistakes as to pure versus consequential circumstances to a subsidiary, and apparently superfluous, role. This was eventually reflected in the terminology the commentators employed. Imaginary crimes came to be referred to as cases of “pure legal impossibility,”⁸⁶ while all cases of mistake of fact were referred to as either “pure

81. Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 838–39, 853–54 (1928).

82. *Id.* at 854.

83. Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 312 (1937).

84. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 586 (2d ed. 1947).

85. *Id.* at 590–91.

86. Dutile & Moore, *supra* note 49, at 181; Robbins, *supra* note 46, at 389.

factual impossibility”⁸⁷ or simply “factual impossibility.”⁸⁸ Cases of factual mistakes about pure circumstances were given the anomalous appellations of “mixed legal and factual impossibility,”⁸⁹ “mixed fact/law impossibility,”⁹⁰ or even “‘legal (?)’ impossibility.”⁹¹ As this terminology suggests, those employing it almost always regarded the courts’ failure to uphold convictions in cases of factual mistake about pure circumstances as erroneous. For example, Professor Simons believes that the very specification of these cases as a separate class is based on an erroneous belief that they involve a mistake of law,⁹² and that “[t]he category of traditional ‘legal (?)’ impossibility is therefore conceptually confused and essentially indistinguishable from the category of factual impossibility.”⁹³

Of course, not all commentators were seduced into viewing the distinction between culpable and non-culpable impossible attempts purely in terms of the mistake of law/mistake of fact distinction. Among those who were not, however, the language the courts had employed was sufficiently misleading so that few saw the distinction in terms of the failed effort/successful effort model.⁹⁴ Thus, commentators sought the crucial distinguishing element in factors as diverse as whether the defendant’s actions were overt or innocent,⁹⁵ were reasonable or unreasonable,⁹⁶ invaded a legally protected interest,⁹⁷ were sufficient to cause public alarm,⁹⁸ threatened harm,⁹⁹ or were apt.¹⁰⁰ The result of all this was that when the courts looked to the academic commentary for guidance on impossible attempts,

87. Dutile & Moore, *supra* note 49, at 183.

88. Robbins, *supra* note 46, at 380.

89. Dutile & Moore, *supra* note 49, at 184.

90. Robbins, *supra* note 46, at 394.

91. Simons, *supra* note 55, at 472.

92. *See id.* (“This categorization of ‘legal (?)’ impossibility is spurious: it does not describe cases of legal mistake or ignorance at all. Rather, it captures one category of factual impossibility cases.”).

93. *Id.* at 474.

94. Two notable exceptions to this rule are Professors J.C. Smith and Graham Hughes. *See* Smith, *supra* note 21, at 422; J.C. Smith, *Two Problems in Criminal Attempts Re-Examined—II*, 1962 CRIM. L. REV. 212; Hughes, *supra* note 4.

95. *See* Enker, *supra* note 58.

96. *See* Elkind, *supra* note 58; Sayre, *supra* note 81.

97. *See* Ian H. Dennis, *Preliminary Crimes and Impossibility*, 31 C. L. P. 31 (1978); John S. Strahorn, Jr., *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962 (1930).

98. *See* Weigend, *supra* note 28.

99. GROSS, *supra* note 31, at 196.

100. FLETCHER, *supra* note 26, § 3.3.

they met with a frustrating lack of consensus,¹⁰¹ which was then cited as a reason for abandoning the effort to make a distinction at all.

In sum, it seems likely that impossible attempts came to be regarded as “a morass of confusion”¹⁰² because although the early courts distinguished culpable from non-culpable impossible attempts in an entirely natural and common sense way, they did a poor job of describing the distinction they made. By describing the distinction between factual mistakes about pure versus consequential circumstances with language that suggested a distinction between mistake of fact and mistake of law, many commentators were led to view the distinction in terms of the conventional mistake of fact/mistake of law doctrine for completed crimes. These commentators adopted terminology that reinforced the focus on the fact/law distinction: first by labeling the distinction as factual versus legal impossibility, and later by refining this into the distinctions among pure legal impossibility, mixed fact/law impossibility, and factual impossibility. Because this was not the distinction the courts actually employed, the decided cases did not fit conveniently into the academic categories. Furthermore, even among the commentators who were not seduced by the intellectual elegance of the mistake of fact/mistake of law analogy, the courts’ language was imprecise enough to allow for various interpretations of the distinction. As a result, the efforts made by later courts to apply the academic distinctions were maddeningly difficult, which, in turn, led the courts to abandon the effort or ask the legislatures to do away with the impossibility defense. Thus, by paying more attention to what the courts said than what they did, courts and commentators sounded the death knell of the impossibility defense.

101. *See, e.g.*, *United States v. Hair*, 356 F. Supp. 339, 342 (D.D.C. 1973) (“Added to the lack of uniformity among other jurisdictions on this issue is the morass of commentary surrounding the defense of impossibility in attempt crimes.”); *United States v. Thomas*, 13 C.M.A. 278, 283 (1962) (citing commentators and text writers to conclude “[w]hat is abundantly clear . . . is that it is most difficult to classify any particular state of facts as positively coming within one of these categories to the exclusion of the other); *Booth v. State*, 398 P.2d 863, 870 (Okla. Crim. App. 1964) (citing several commentators and concluding that “[d]etailed discussion of the subject is unnecessary to make it clear that it is frequently most difficult to compartmentalize a particular set of facts as coming within one of the categories rather than the other”).

102. *Thomas*, 13 C.M.A. at 286.

III. The Subjectivist Challenge

In Part II, I suggested that the confusion that served as the impetus for the rejection of the impossibility defense to a charge of attempt resulted from the courts' difficulty describing what was really a rather simple distinction. Had the courts and commentators been able to describe the distinction between culpable and non-culpable impossible attempts as the difference between a factual mistake as to a consequential or pure circumstance, they may have had no trouble applying it. This suggests that the difficulty of deciphering the common law distinction was not an adequate reason for its rejection.

Of course, the fact that the common law impossibility defense was intelligible does not mean that it was normatively justified. To say that it should not have been discarded as unworkable is not to say that it should not have been discarded. It may well be that under the properly understood common law distinction, Jenny, who made a factual mistake about a pure circumstance, would not be subject to punishment for attempt, while Clarissa, who made a factual mistake about a consequential circumstance, would be. But how can this differential treatment be justified? Aren't Clarissa and Jenny equally blameworthy? Didn't they both intend to violate the law and haven't they each demonstrated their willingness to act on this intention? Both would have violated the law if the facts were as they believed them to be. Why should Clarissa be liable for an attempt, but not Jenny?

Although there is an intelligible difference between Clarissa and Jenny's cases, many commentators would argue that there is no morally relevant difference. Clarissa and Jenny are equally blameworthy, and therefore should be treated the same way by the law. In fact, it is clear that at least some of what caused the early academic commentators to see the distinction between culpable and non-culpable impossible attempts in terms of the mistake of law/mistake of fact distinction was not merely the belief that this was the distinction the courts were making, but that it was the one the courts should be making. When two parties have manifested their willingness to violate a valid provision of criminal law, there seems to be no reason to relieve one of liability for attempt because of the type of mistake of fact he or she has made.

Commentators who subscribe to this conclusion offer a simple, straightforward argument in its support. The purpose of the criminal law is to punish those who manifest their dangerousness or moral depravity through their actions. Those who try to violate the criminal law, but fail to do so due to a mistaken belief about the nature of the world have manifested their dangerousness and/or moral depravity, regardless of whether their mistake was about a consequential or pure circumstance. Therefore, all who make such mistakes should be subject to criminal punishment.

This argument obviously entails the rejection of the common law impossibility defense. A defendant whose attempt to commit a crime is rendered impossible because of his or her mistake of fact about a pure circumstance has nevertheless manifested his or her dangerousness or depravity. Therefore, the fact that the attempt could not result in a completed crime should not bar liability. It remains true that when, due to a mistake of law, the defendant attempts an imaginary crime, there can be no conviction for attempt. But this is because the mens rea of attempt is not present, not because the attempt cannot be completed.¹⁰³

The argument thus provides a principled resolution to the initial uncertainty we felt about Jenny's culpability:¹⁰⁴ she should be convicted. It also resolves the courts' confusion about whether to characterize the consequences the defendant intends to produce objectively or in accordance with his or her erroneous belief.¹⁰⁵ Because the defendant's dangerousness or moral depravity is manifested by what the defendant thinks he or she is doing, the relevant consequences are those the defendant thinks he or she is producing. Therefore, the defendant's actions should be described according to the circumstances as he or she believes them to be.

Because of this last feature, commentators who adopt this line of argument are usually known as subjectivists.¹⁰⁶ These commentators answer the question of which actions can constitute the actus reus of attempt very broadly, allowing any or almost any action the defendant subjectively believes to be in furtherance of his or her

103. See *supra* text accompanying note 27.

104. See *supra* pp. 11–12.

105. See *supra* text accompanying notes 76–77.

106. See FLETCHER, *supra* note 26, at 166; Crocker, *supra* note 63, at 1057 (“On one theory, or more accurately family of theories, society’s license to punish the offender derives from her dangerousness or wickedness. . . . Such theories are ‘subjective.’”) (footnote omitted).

criminal intent to support a conviction.¹⁰⁷ Not all commentators agree that this broad answer is the correct one. Those who would answer the question more narrowly by requiring the defendant's actions to possess particular, objectively identifiable characteristics are usually referred to as objectivists.¹⁰⁸

The authors of the Model Penal Code explicitly adopted the subjectivist approach to attempt in drafting the Code. Section 5.01 defines attempt as follows:

- (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
- (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

107. Because it is based on the premise that the purpose of criminal law is to punish those who manifest their dangerousness or moral depravity through their actions, the subjectivist approach casts the *actus reus* requirement in a subsidiary role. Unlike objectivist theories in which "the act of attempting should be taken as an independent element of the crime of attempting," and "no liability should attach unless, first, the defendant's conduct objectively conforms to criteria specified in advance," subjectivist theories are "defined by the rejection of the claim that the act of attempting is a distinct dimension of liability. For subjectivists, it is important that the actor take steps to execute his criminal intent, yet no specifically defined act is required for liability." FLETCHER, *supra* note 26, at 157. Thus, subjectivists are "interested in the defendant's conduct only in so far as it reveals and confirms his *mens rea*." Jeremy Temkin, *Impossible Attempts—Another View*, 39 MOD. L. REV. 55, 66 (1976).

108. See, e.g., FLETCHER, *supra* note 26:

We have referred several times to the distinguishing claim of objectivist theory that the act of attempting should be taken as an independent element of the crime of attempting. . . .

The premise underlying objectivist theory is a general proposition about the nature of legal liability, particularly criminal liability. The proposition is that no liability should attach unless, first, the defendant's conduct objectively conforms to criteria specified in advance; and secondly, that his mental state should bear solely on his accountability for this act in violation of the law. . . .

This is the point at which the critical feature of objectivist theory becomes clear. Not any act will satisfy the requirement of conduct in violation of the law.

Id. at 157–58; Note, *The Trend Away from Legal Impossibility as a Defense*, 14 WAKE FOREST L. REV. 243, 251 (1978) ("Two schools of thought have developed with respect to the crime of attempt and the defense of impossibility: the objectivist and the subjectivist. Under the objectivist theory, it is the *actus reus*, the external manifestation of the actor's criminal conduct, which injures society.").

As one commentator expressed the distinction between the objectivist and subjectivist approach to attempt, "[p]ut rather crudely, the 'objectivists' would punish only dangerous *acts*, while the 'subjectivists' would punish dangerous *actors*." Michael Cohen, *The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy, and Incitement: (2) Questions of Impossibility*, 1980 CRIM. L. REV. 773, 774.

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.¹⁰⁹

As indicated by the emphasized phrases, the Code explicitly incorporates the defendant's subjective characterization of his or her actions into its description of the acts that will support a conviction for attempt. Thus, under the Code, any action at all can serve as the *actus reus* of an attempt as long as the defendant believes it will further his or her criminal intention.

The definition reflects the Code's acceptance of the fundamental proposition that the criminal sanction should be imposed on those who manifest their dangerous or depraved propensities:

Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides.¹¹⁰

This causes the authors of the Code to explicitly reject an objectivist approach to attempt:

The literature and the decisions dealing with the definition of a criminal attempt reflect ambivalence as to how far the governing criterion should focus on the dangerousness of the actor's conduct, measured by objective standards, and how far the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime. . . . [T]he proper focus

109. MODEL PENAL CODE § 5.01(1) (1985) (emphasis added).

110. MODEL PENAL CODE art. 5, introduction at 294 (1985).

of attention is the actor's disposition. The Model Code provisions are accordingly drafted with this in mind.¹¹¹

Accordingly, the Code would convict all those who, like Jenny, make a mistake of fact about a pure circumstance:

The primary rationale of these decisions is that, judging the actor's conduct in the light of the actual facts, what he intended to do did not amount to a crime. This approach, however, is unsound in that it seeks to evaluate a mental attitude—"intent" or "purpose"—not by looking to the actor's mental frame of reference, but to a situation wholly at variance with the actor's beliefs. In so doing, the courts exonerate defendants in situations where attempt liability most certainly should be imposed. In all of these cases the actor's criminal purpose has been clearly demonstrated; he went as far as he could in implementing that purpose; and, as a result, his "dangerousness" is plainly manifested.¹¹²

Thus, the Code is explicitly designed "to extend the criminality of attempts by sweeping aside the defense of impossibility (including the distinction between so-called factual and legal impossibility)"¹¹³

111. MODEL PENAL CODE § 5.01, cmt. 1 at 298 (1985) (footnote omitted).

112. MODEL PENAL CODE § 5.01, cmt. 3(a) at 308–09 (1985) (footnote omitted).

113. MODEL PENAL CODE, *supra* note 10, at 295. Glanville Williams, one of the pre-eminent advocates of the subjectivist approach, argued that the subjectivist conclusion followed directly from the basic function of the *actus reus*, which is to demonstrate the defendant's determination to effectuate his or her criminal intent. His explanation of the *actus reus* requirement is:

That crime requires an act is invariably true if the proposition be read as meaning that a private thought is not sufficient to found responsibility. . . . [The] reasons for the rule would be (1) the difficulty of distinguishing between daydream and fixed intention in the absence of behaviour tending towards the crime intended, and (2) the undesirability of spreading the criminal law so wide as to cover a mental state that the accused might be too irresolute even to begin to translate into action.

Williams, *supra* note 20, at 1–2.

Applying this theory of the *actus reus* to the crime of attempt, Williams argued that there is no need for a defendant's conduct to exhibit any particular characteristics to constitute the *actus reus* of an attempt.

As a general rule, a crime is composed of *actus reus* and *mens rea*, and both of these are necessary to constitute a crime. This interdependence of act and mind means that neither alone can be strictly characterized as "criminal" or "*reus*," notwithstanding the Latin phrases. Act and mind are literally *reus* only in combination. However, in legal discussion it is convenient to use *mens rea* to mean a state of mind that is criminal if there is the requisite act, and *actus reus* to mean an act that is criminal if there is the requisite mind, whether or not the other exists on the facts of the case. In this terminology, a surgeon who without intention (or even negligence) causes his patient to die on the operating table commits the *actus reus* of murder, though he is not guilty of

Given the judicial confusion and frustration concerning the common law defense of impossibility described in the Introduction and Part II, the Model Penal Code's simple, logically coherent argument for its rejection had sufficient appeal to carry the day. As noted in the Introduction, impossibility is now almost never a valid defense to a charge of attempt in the United States. With most states adopting some version of the Model Penal Code's definition of attempt, the subjectivist approach has become the orthodox position on attempt.¹¹⁴ But should it be? Is the Model Penal Code's subjectivist argument sound?

murder. He commits an act that would, given the requisite intention, be murder.

An *actus reus*, then, need not be a crime apart from the state of mind. It need not even be a tort, or a moral wrong, or a social mischief. Suppose that D puts an aspirin in P's tea, thinking that it is the sweetening tablet for which P has asked. This act is innocent; it harms no one; yet it is the *actus reus* of attempt to murder. For if D intended to poison P, and believed that an aspirin would kill him, his administration of it would be an attempt to murder.

Id. at 642 (footnote omitted).

This implies that although an act is required for there to be a conviction for attempt, this requirement is satisfied by any act a defendant believes to be in furtherance of his or her criminal ends. "[T]he question of whether there is an attempt may depend exclusively on the *mens rea*. If there is a *mens rea*, it is capable of establishing as an *actus reus* an act that would otherwise be not only legally but morally and socially innocent." *Id.* at 643. Therefore, there are no particular, objectively identifiable features that a defendant's conduct must possess to qualify as an *actus reus* of an attempt.

Williams' argument was persuasive enough to convince the English Law Commissioners that England's law of attempt should be reformed on the subjectivist model, which was done in the Criminal Attempts Act of 1981. See Criminal Attempts Act, 1981 § 1(2) (Eng.). Following Williams, the Law Commissioners argued that

[it] would be generally accepted that if a man possesses the appropriate *mens rea* and commits acts which are sufficiently proximate to the *actus reus* of a criminal offence, he is guilty of attempting to commit that offence. Where, with that intention, he commits acts which, if the facts were as he believed them to be, would have amounted to the *actus reus* of the full crime or would have been sufficiently proximate to amount to an attempt, we cannot see why his failure to appreciate the true facts should, in principle, relieve him of liability for the attempt.

BRITISH LAW COMMISSION, REPORT NO. 102, CRIMINAL LAW: ATTEMPT, AND IMPOSSIBILITY IN RELATION TO ATTEMPT, CONSPIRACY, AND INCITEMENT 51 (1980) [hereinafter LAW COMMISSION REPORT].

The Commission found that defendants such as Jenny "are prepared to do all they can to break the criminal law even though in the circumstances their attempts are doomed to failure; and if they go unpunished, they may be encouraged to do better at the next opportunity." *Id.* In accordance with the basic subjectivist assumption that the purpose of criminal law is to punish those who have manifested their dangerous character, the Commission concluded that "the fact that it is impossible to commit the crime aimed at should not preclude a conviction for attempt." *Id.* at 53.

114. See *supra* text accompanying note 2. See also Crocker, *supra* note 63, at 1059 ("Commentators are so nearly unanimous that the key to criminal liability ought to be the dangerousness or depravity of the offender . . . that this subjective theory is sometimes simply called the 'modern' theory.").

The minority of commentators who favor a narrower construction of the actus reus of attempt do not believe that it is. These objectivist theorists have raised several objections to the Model Penal Code's position, the most significant of which are that: 1) its logic mandates the punishment of imaginary crimes, 2) its standard for liability is impracticable, 3) it subjects the public to improper preventative detention, 4) it permits punishment for thoughts alone, 5) it violates the principle of legality, 6) it improperly requires the punishment of harmless, irrational attempts, and 7) it would allow convictions to be based on unreliable forms of evidence. On close examination, however, none of these objections seem to deal a fatal blow to the Model Penal Code's subjectivist approach. The first five appear to misconstrue the Code's position, while the last two, which do accurately address the Code, fail to provide a principled normative rationale for its rejection.

A. Imaginary Crimes

Neither the Code nor any other subjectivist theorist advocates punishment for attempting imaginary crimes. However, objectivist critics claim that the logic underlying the Code's definition suggests that they should.¹¹⁵ One who attempts to commit an imaginary crime is one who, laboring under a mistake of law, performs an action he or she believes to be a crime, but which, in fact, is not. The only thing that distinguishes such a case from any other impossible attempt is that in imaginary crimes, the defendant has made a mistake of law while in all other cases, the defendant has made a mistake of fact. But whether one's mistake is of law or fact seems wholly immaterial to the question of whether one has manifested his or her dangerousness or depravity. In imaginary crimes, no less than in ordinary impossible attempts, the defendant has shown himself or herself willing to violate the law. In both cases, the defendant has intentionally taken actions which, if things were as he or she believed them to be, would constitute a crime. Such defendants appear equally dangerous or depraved and equally likely, if left unpunished, to try to violate the law in the future. As an illustration, consider Laura and Frank, our anti-environmental activists. As one commentator put it:

115. FLETCHER, *supra* note 26, at 175-76.

We fail to see how any rational system of criminal law could justify convicting one and acquitting the other on so fragile and unpersuasive a distinction that one was suffering under a mistake of fact, and the other under a mistake of law. Certainly if the ultimate test is the dangerousness of the actor (i.e., readiness to violate the law), as [the subjectivist] would have it, no distinction is warranted—[Laura] has indicated [her]self to be no less “dangerous” than [Frank].¹¹⁶

Thus, the objectivists would argue that it is difficult to see how an acquittal in the case of imaginary crimes could be justified under the Code’s standard.

The problem with this objection is that it misconstrues the Code and the subjectivist position generally. It is certainly true that whether a defendant’s mistake is about a matter of fact or law is irrelevant to how dangerous or depraved he or she is. This is beside the point, however, because the subjectivists are not advocating that all dangerous or depraved people should be subject to criminal punishment. They are proposing a standard for the actus reus of attempt, not for attempt liability in toto. Subjectivists argue that given a criminal mens rea, any action that demonstrates the defendant’s dangerousness or depravity can serve as an actus reus, not that all dangerous or depraved people be punished for attempt.

The authors of the Code can freely admit that one who attempts an imaginary crime is every bit as dangerous or depraved as one who engages in a factually impossible attempt since each has equally demonstrated his readiness to break the law. Laura is indeed as dangerous as Frank. However, under the Code’s approach, this implies only that there is no difference between Laura and Frank with regard to the actus reus of attempt. It does not imply that Laura and Frank are equally culpable. The subjectivists can consistently maintain that Laura is not liable for an attempt because she does not possess the requisite mens rea. As previously noted,¹¹⁷ one who attempts an imaginary crime does not have the specific intent required by the offense. Because such a defendant would not be guilty of an attempt regardless of whether his or her action constitutes an actus reus, the logic of the subjectivist approach does

116. KADISH & SCHULHOFER, *supra* note 1, at 674 (footnote omitted).

117. See *supra* text accompanying note 27.

not require convictions in cases of imaginary crimes. Laura and Frank may be equally dangerous or depraved, but they have not equally met the mens rea requirement for an attempt conviction.

B. Impracticability

Another objection brought against the Code's definition of attempt is that it is fundamentally unworkable. Critics who advance this objection point out that the Code's definition of attempt is based on the assumption that the purpose of the law of attempt is the protection of the public from dangerous or depraved individuals. Realizing this end requires a standard of liability that will convict those with socially dangerous or depraved characters, but acquit those who pose no danger to society. The problem, according to the critics, is that recent psychological and criminological developments have shown that such a standard is unattainable because there is no practicable way of differentiating dangerous from non-dangerous individuals. This is evidenced by recent efforts to introduce effective rehabilitation into the criminal punishment system which demonstrated the futility of trying to determine the danger to society presented by an individual:

The rehabilitative ideal, of which the concept of dangerousness is a cornerstone, has recently undergone a rather painful process of demystification. . . .

The most comprehensive study so far on the effectiveness of rehabilitation programs has led its authors to the devastating judgment that "nothing works." . . . [T]he very foundations of the belief in our ability to identify and cure socially dangerous individuals have now been shattered.¹¹⁸

Because the subjectivist approach to attempt requires precisely this judgment, it must be rejected as unworkable:

As a consequence of the decay of the rehabilitative ideal, a reorientation of the basic assumptions of attempt law seems necessary. The fairly modern idea that a psychiatrist should determine the attemptor's guilt by diagnosing the amount of subconscious internal control which helped to foil the

118. Weigend, *supra* note 28, at 261–62 (footnotes omitted).

attempt and thus indicated lesser dangerousness, appears as rather grotesque today. Nevertheless, it is but a logical endpoint of the “rational course” proposed by Professor Glanville Williams, which is to “catch intending offenders as soon as possible, and set about curing them of their evil tendencies.”

That course seems much less “rational” today as we know more about our ignorance.¹¹⁹

Much like the last objection, the charge of impracticability appears to be an attack on a straw man. There may indeed be no practicable method for identifying who possesses a dangerous or depraved character in the sense of being likely to violate the law in the future. However, the subjectivist definition of attempt requires no such determination. It does not require the prediction of future criminal acts. It advocates the punishment of dangerous or depraved people only in the sense that those who have already taken actions that demonstrate their willingness to break the law should be punished. The subjectivist position asserts that, given the mens rea of attempt, one who has taken any past action that demonstrates his or her willingness to violate the law should be convicted of attempt. Our inability to predict who will violate the law in the future clearly has no bearing on the adequacy of this claim.

C. Preventative Detention

Some objectivist theorists charge that the Model Penal Code’s definition of attempt converts the law of attempt into a mechanism for improper preventative detention. Because the chief concern of the Code is to protect the public from dangerous or depraved individuals, its definition of attempt allows the punishment of those who, like Jean-Claude, Frank, Clarissa, and Jenny, have engaged in entirely harmless conduct on the ground that they may do harm in the future. As Glanville Williams, a pre-eminent subjectivist theorist, explains with regard to cases like Clarissa’s and Jenny’s:

Getting away from dialectics, it is said in favor of the narrower construction of the law that one who attempts to murder with sugar, thinking it to be arsenic, ought not to be

119. *Id.* at 262 (quoting WILLIAMS, *supra* note 20, at 632) (footnotes omitted).

held guilty of an attempt because “there is no danger to the public.” The short answer to this is that there is danger to the public in leaving uncorrected a man who is bent on murder.¹²⁰

Th[e] attempted receiver [of unstolen property] should be liable to punishment for the same reason as other attempters are: that he has shown himself prone to crime and may well do it again if he does not receive an effective warning.¹²¹

Objectivist critics claim that this runs afoul of the fundamental tenet of criminal jurisprudence that holds that one can be punished only for what one does, not for what one may do in the future. The essential purpose of the actus reus requirement is to bar preventative detention by limiting the state to proceeding against those who have already engaged in conduct that has been expressly prohibited, rather than those who merely plan to do so in the future. The critics accuse the Code of defeating this purpose by interpreting the actus reus of attempt to allow for the punishment of those who have, in fact, done no harm merely because they may do so in the future.

This is the price of the choice made long ago in favour of guaranteeing that the innocent be protected, that the heavy weight of the criminal sanction be not imposed too broadly and that the process work moderately rather than oppressively. The [subjectivist approach], however, seem[s] unconcerned about all this. It would make of the law of attempt a full-scale method of preventive detention.¹²²

As was the case with the previous two objections, this objection misconstrues the subjectivist position on attempt, in this case by confusing the concept of harm with the concept of action. Preventative detention consists of the incarceration of an individual who has not yet taken wrongful or harmful action to prevent such action in the future. The Code’s definition of attempt does not allow for the detention of one who has not yet acted; it allows for the detention of one who has acted in furtherance of a criminal intention even though that action produces no harm. The subjectivist position

120. WILLIAMS, *supra* note 20, at 645 (footnotes omitted).

121. Glanville Williams, *Attempting the Impossible—A Reply*, 22 CRIM. L.Q. 49, 55 (1979). This is also the position taken by the Model Penal Code. See *infra* text accompanying note 136.

122. Temkin, *supra* note 107, at 66.

is indeed justified on the basis of the need to prevent those who have demonstrated their dangerousness or depravity from causing harm in the future. But this does not imply that the defendant is being incarcerated for actions he or she has not yet and only might take. The defendant is being incarcerated for actions he or she has already taken because those actions demonstrate that he or she is a dangerous or depraved person. This is not preventative detention, but perfectly appropriate punishment for past actions.

D. Punishment for Thoughts Alone

A related objection frequently brought against the Code's subjectivist position is that it permits punishment for thoughts alone. Objectivist critics claim that the Code's approach does not merely place the *actus reus* requirement in a subsidiary role as the subjectivists admit,¹²³ but renders it entirely devoid of content, and thus is equivalent to punishing defendants for their thoughts alone.¹²⁴ Although the subjectivists claim to be retaining the *actus reus* element, they regard this element as fulfilled by any action whatsoever as long as the accused believes it will result in a crime. But, the critics assert, being subject to conviction for doing anything with the belief that it will result in a crime is functionally indistinguishable from being liable to conviction for merely resolving to commit a crime:

[The subjectivist] is inviting us to say that attempted murder can be doing anything while thinking (mistakenly) that you are going to cause [the death of a human being]. This is a dangerous invitation which should be rejected, since it provides no criterion whatsoever for characterizing an act as an attempt other than the mistaken view under which it is being done, and is thus, in spite of [the subjectivist's] denials, tantamount to punishment for intention alone.¹²⁵

This objection can also be illustrated with Clarissa's case. Because Clarissa's act of stirring sugar into her husband's coffee is completely innocent, the only factor that will distinguish her case

123. *See supra* note 107.

124. *See Note, supra* note 108, at 251–52 (“Subjectivism, on the other hand, virtually eliminates any consideration of the *actus reus* and instead imposes criminal liability for a criminal *mens rea*.”) (footnote omitted).

125. Hughes, *supra* note 4, at 1026.

from non-criminal activity is Clarissa's belief that the sugar is arsenic. If, however, the only factor that distinguishes the culpable from the non-culpable is Clarissa's belief, then the actus reus requirement apparently affords her no substantive protection from conviction. She is being punished exclusively for what is in her mind.

In this case, the authors of the Code can reasonably respond that this objection is wrong on its face. The Code's definition of attempt punishes not mere intention, but only proscribed intentions that have been acted upon.

Superficially it may seem as though . . . the use of the law of attempt would result in punishing a man for mens rea alone, in defiance of the principle that the criminal law requires an act or omission. But it is hoped that this objection has already been sufficiently answered: the accused has gone far beyond mental preparation for a crime; he has adopted a course of conduct which, on the facts as he believes them to be, constitute not merely an attempt but the consummated crime.¹²⁶

The subjectivists can fairly claim that there is a substantive, practical difference between punishing one who intends to commit a crime but takes no action and punishing one who intends to commit a crime and acts upon his intention, albeit mistakenly. Thus, the Code's approach to attempt is not functionally equivalent to punishing for thoughts alone. The requirement of action obviously provides more of a limitation on liability than its absence.

The only sense in which the Code's approach is indistinguishable from punishment for intention alone is to outward appearance; there may be no apparent difference between punishing one who intends to commit a crime but takes no action in furtherance of this intent and punishing one who intends to commit a crime, acts upon his intent, but due to a mistake, acts in a perfectly innocent way. However, punishing an innocent-appearing action taken with a

126. WILLIAMS, *supra* note 20, at 649–50. See also LAW COMMISSION REPORT, *supra* note 113, at 49:

It would not mean that a man would be liable for an attempt by reason of his intent alone. An attempt would still require a proximate act as well as an intent although the proximity of the act would have to be judged in the light of the facts as the defendant believed them to be.

criminal intent is far from a novel event. Driving one's car across a state line is a perfectly innocent action, but if done with the intent to avoid prosecution, it is a crime.¹²⁷ This does not imply that the prohibition on flight from prosecution constitutes punishment for thoughts alone.

The subjectivists appear to be able to distinguish their position from punishment for thoughts alone on a principled basis. Because the criminal law is designed to protect the public from dangerous people, and because taking action in furtherance of a criminal intent is sufficient to demonstrate a defendant's dangerousness or depravity, it is proper to punish such a defendant even if his or her actions appear innocent. However, because one who merely forms a criminal intent but does nothing to effectuate it has demonstrated neither dangerousness nor depravity, he or she should not be punished. Thus, there should be no punishment for thoughts alone.

E. Legality

An objection that is often brought against the Code's approach is that its definition of attempt violates the principle of legality. The principle of legality holds that "there must be no crime or punishment except in accordance with fixed, predetermined law":¹²⁸

Legality requires that the forbidden conduct be defined in advance. This is in part so that the citizen will receive advance guidance as to what conduct is forbidden. But it is well recognized that the requirement of advance definition also serves to control the discretion, and thereby minimize the bias, of those officers of the criminal process who make decisions affecting the defendant.¹²⁹

Objectivists claim that because the subjectivist definition of attempt is essentially "doing anything with the intention of committing a crime," under it, the law of attempt is neither fixed nor predetermined. This definition not only fails to provide the public

127. 18 U.S.C. § 1073 (1970) (flight to avoid prosecution or giving testimony). Recall that Glanville Williams pointed out that "if there is a *mens rea*, it is capable of establishing as an *actus reus* an act that would otherwise be not only legally but morally and socially innocent. Consequently, it is false to say that, because an act is 'objectively' innocent it cannot be a criminal attempt." WILLIAMS, *supra* note 20, at 575. See also *supra* note 113.

128. WILLIAMS, *supra* note 20, at 575.

129. Enker, *supra* note 58, at 670.

with advance warning of what conduct is prohibited, it leaves prosecutorial and judicial officials with virtually unlimited discretion to determine what conduct contravenes the law.¹³⁰ To realize the end of subjecting all those who demonstrate their dangerousness or depravity to the criminal sanction, the Code's definition of attempt must be extremely flexible:

But, of course, this flexibility is bought at the cost of legality and notice. The simple truth is that when any version of the subjective theory holds sway, a potential offender can have no confidence as to how much conduct towards the commission of a crime will be sufficient to constitute an attempt—unless there happens to be a case directly on point.¹³¹

As with the last objection, the authors of the Code can make a reasonable case that this objection is simply wrong. The Code's definition of attempt entails no lack of advanced warning of what conduct is subject to punishment. The substantive crimes the defendants are trying to commit are all clearly defined and the law of attempt informs the public that doing anything in the effort to commit them is prohibited. This may be a broad definition of the range of attempt liability, but it is perfectly clear and definite. The public is not left in doubt as to which actions intended to result in a crime constitute attempts and which do not; all do. This is perfectly adequate advanced warning of what conduct is subject to punishment. It certainly does not invest prosecutorial agents and judges with discretion to redefine the nature of the offense or to do the type of "criminal equity" that is prohibited by the principle of legality.¹³² Though broad, the Code's definition of attempt is entirely fixed.¹³³

130. See Ryu, *supra* note 28:

In modern times the idea developed that there can be no crime without a clear *actus reus*. The legality principle (*nulla poena sine lege*) is based upon that idea. Subjectivism in the law of attempt constitutes a threat to this principle. For this reason we cannot accept subjectivism, just as we cannot abdicate the legality principle in the interpretation of statutes, as did the National Socialists and Soviet Russia.

Id. at 1188–89.

131. Crocker, *supra* note 63, at 1093.

132. See WILLIAMS, *supra* note 20:

Observe that the principle is not satisfied merely by the fact that the punishment inflicted is technically legal. The Star Chamber was a legal tribunal, but it did not exemplify the rule of law in Dicey's philosophy. "Law" for this purpose means a body

F. Irrational Attempts

A common objection raised against the Model Penal Code's approach to attempt implicates our hypothetical friend Jean-Claude, who was convicted of attempted murder for driving a needle through the heart of a voodoo image of his enemy. Under the Code's subjectivist approach, it would appear that Jean-Claude was rightly convicted. He certainly had the *mens rea* required for attempted murder, and if the circumstances were as he believed them to be, he would not only have taken a substantial step toward producing his enemy's death, he would have done everything required to bring it about. Thus, under the Code, his actions constitute the *actus reus* of attempted murder. They certainly demonstrate that he has the dangerous or depraved disposition to commit murder. Therefore, Jean-Claude's culpability appears clear cut.

Objectivist critics of the Code contend that this result is simply wrong. They argue that Jean-Claude's actions were patently harmless, and that any standard of liability that imposes criminal sanctions on someone like Jean-Claude is clearly too broad. George Fletcher, a leading objectivist theorist, points out that Jean-Claude's situation represents:

[O]ne case in which virtually everyone agrees that there should be no liability . . . [i.e.,] 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.¹³⁴

of fixed rules; and it excludes wide discretion even though that discretion be exercised by independent judges. The principle of legality involves rejecting "criminal equity" as a mode of extending the law.

Id. at 576.

133. This point has been recognized by Thomas Weigend, a prominent objectivist theorist, who concedes:

The demands of the principle of legality, which calls for a formal statement of the limits between permissible and criminal conduct, could be satisfied by a general statutory provision excluding the defense of legal impossibility. To read into *nulla poena sine lege* the requirement of a particular amount of *actus reus* and *mens rea* in each definition of an offense would be an illicit extension of that basically formal principle.

Weigend, *supra* note 28, at 245.

134. FLETCHER, *supra* note 26, at 166.

Thus, objectivist theorists offer Jean-Claude's conviction as a counter-example to the Code's subjectivist approach to attempts.¹³⁵

This objection is likely to be persuasive only to those who already share the intuitions of the critics who make it. Subjectivist theorists can with some justice claim that the objectivists' assertion constitutes mere disagreement rather than a principled objection. Because there are almost no reported cases of irrational attempts, the consensus Fletcher refers to is merely agreement among commentators who apparently do not accept the subjectivist approach. It is true that Jean-Claude's actions are harmless. However, this is relevant only if one has already discounted the subjectivist approach to attempt for which the salient feature is not the harmfulness of Jean-Claude's actions per se, but whether they demonstrate his dangerousness. One who has made every effort to kill by irrationally ineffective means may well employ more efficacious means the next time. Had Jean-Claude not been arrested, he may well have tried again with a machete.

Viewed in isolation, punishing Jean-Claude for attempted murder may seem to be a harsh result. But the authors of the Code

135. See, e.g., Weigend, *supra* note 28, at 260 (footnote omitted):

Under the dangerousness rationale, there is no convincing reason why we should not impose punishment on the Haitian voodoo doctor of hypothetical fame who sets out to kill persons by means of incantation and witchcraft. He has clearly shown his dangerous propensities and may well use more effective means the next time. While only few proponents of the subjective theory would be ready to carry the principle that far, the majority has great difficulties distinguishing these cases of "unreal" attempts from other situations in which the actor's efforts are destined to fail and yet demonstrate his dangerousness.

See also Ian Dennis, *The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement: (1) The Elements of Attempt*, 1980 CRIM. L. REV. 758:

However, the subjectivist approach to attempts has always been open to certain objections. It produces absurd results in extreme cases. Glanville Williams gives the example of a D who believes that the person he wishes to kill has changed into the form of a white cat. If he then shoots at a white cat which he believes to be the victim, the theory ought to require a conviction for attempted murder of the supposed victim. Williams claims that such a conclusion could be scouted, but it is difficult to see the limitation in the subjectivist argument which permits a statement that this conduct is not criminal. Why should D not be deterred from trying again at his victim, when he might not be suffering from his anthropomorphic delusion?

See also FLETCHER, *supra* note 26, at 175:

Yet within the framework of the subjective standard that the facts should be taken as the actor perceives them to be, it is by no means easy to explain why superstitious attempts . . . should be exempt from punishment. According to the actor's view of the world, his use of black magic is likely to produce the desired effect, and therefore he should be held accountable.

would argue that such cases should not be viewed in isolation. Jean-Claude's attempt may have been irrational in that it employed means that a reasonable person would know could not accomplish his objective, but it demonstrated his willingness to take another's life and hence his dangerousness. Since, according to the Code, the purpose of punishing attempts is to subject those who pose a danger to their fellow citizens to criminal sanction, Jean-Claude is a proper candidate for punishment:

Cases can be imagined in which it might well be accurate to say that the nature of the means selected, say black magic, substantially negates dangerousness of character. On the other hand, there are many cases as well where one who tries to commit a crime by what he later learns to be inadequate methods will recognize the futility of his course of action and seek more efficacious means. There are, in other words, many instances of dangerous character revealed by "impossible" attempts, and to develop a theory around highly exceptional situations ignores the propriety of convictions in these.¹³⁶

Thus, subjectivists can fairly contend that a shared intuition among non-subjectivist theorists that people like Jean-Claude should not be subject to punishment does not constitute an adequate reason for rejecting the Code's definition of attempt.

G. Unreliable Evidence

Finally, objectivist critics charge that the Code's subjectivist approach to attempt endangers the innocent by allowing convictions to be based on unreliable forms of evidence. These critics point out that to gain a conviction in criminal cases, the prosecution must establish both that the defendant's conduct conformed to an

136. MODEL PENAL CODE § 5.01, cmt. 3(b) at 316, n.88 (1985). In addition, it should be noted that the authors of the Code created section 5.05, which allows the court to dismiss a prosecution in the former type of case in which the irrationality of the defendant's conduct negates his or her dangerousness. See MODEL PENAL CODE:

If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.12 to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

MODEL PENAL CODE § 5.05(2) (1985).

antecedently defined standard and that he or she possessed the requisite state of mind when engaging in such conduct. This means that in addition to evidence of the defendant's state of mind, the prosecution must produce specific evidence demonstrating that the defendant's conduct constituted the actus reus of the relevant offense. However, under the Code's definition, the defendant's conduct need not meet any particular set of criteria. Any action that the defendant believes will result in a crime will suffice when undertaken with the appropriate mens rea. This means that, under the Code, a conviction can be obtained based solely upon evidence of what was in the defendant's mind. The evidence that is usually required to establish what the defendant has done is replaced by evidence of what the defendant believed he or she has done.

The problem, according to objectivist theorists, is that evidence of a defendant's state of mind in the absence of any objectively verifiable supporting facts is notoriously unreliable. Arnold Enker points out that in cases like Jenny's, for example, there is:

a significant statistical correlation between possession of recently stolen goods and knowledge of the fact that they have been stolen. If we can say that in a given percentage of the cases the possessor knows the good [sic] are stolen, then possession of stolen goods is probative of knowledge that the good [sic] are stolen at least in the sense that proof of possession of such goods makes it more likely that the defendant knew the goods were stolen than if there is no proof of possession. . . . [However,] whatever the statistical relation between possession and knowledge may be, the percentage of persons possessing unstolen goods who believe the goods are stolen is clearly much lower.¹³⁷

As a result, one can be convicted of an attempt on highly suspect evidence:

The point is . . . that by eliminating these objective elements we create newly defined crimes in which we replace the statutorily defined fixed reference points for judging the defendant's mens rea with an open-ended sufficiency-of-the-evidence test which may include the less reliable forms of evidence such as questionable admissions, the testimony of

137. Enker, *supra* note 58, at 680–81 (footnote omitted).

informers and accomplices, and proof of prior convictions.¹³⁸

Consider Clarissa's case again. She stirred sugar into her husband's coffee just as she did every morning. It was only because she went to the police to confess that she was arrested. But, as Graham Hughes points out, "apart from [her] confession, there is nothing at all that approaches the threshold of criminal behavior."¹³⁹ In such cases, "the danger of the [subjectivist] view is that under it cases appear as indictable attempts in situations where proof of the intention of the accused is the only circumstance that could make us begin to think of what has been done as a criminal attempt."¹⁴⁰

This is a potentially serious objection to the Code's subjectivist position. If the subjectivist theory of attempt really does create an unacceptable risk of convicting the innocent, that would seem to be a good reason for its rejection. However, the supporters of the Code's definition respond to this charge by denying that the subjectivist position creates any greater danger of convicting the innocent than that of many substantive crimes that permit conviction on the basis of conduct that is innocent on its face:

A considerable number of instances can be named in which the offender's act, viewed by itself, is harmless, but is nevertheless punishable if a particular accompanying state of mind on his part can be proved. . . . It is generally unobjectionable, and often highly desirable, to enter into a room [breaking and entering or entering], to make a telephone call [disorderly conduct], to stand upon the sidewalk [loitering with intent to disturb school], to pay money to a party in a lawsuit [communicating with jurors and witnesses], to travel [flight to avoid prosecution or giving testimony] or to transport a woman across state borders [White Slave traffic]. Yet all these activities are punishable if done with the "proper" criminal intent. The law of criminal omissions is another concededly atypical example—if there exists a legal duty to act, the offender may

138. *Id.* at 682.

139. Hughes, *supra* note 4, at 1024.

140. *Id.*

be peacefully asleep and yet thereby incur criminal liability.¹⁴¹

If innocent acts can serve as the *actus reus* of substantive crimes without posing an unacceptable risk that the innocent will be convicted, subjectivist theorists can reasonably ask why that risk is unacceptable when the crime is attempt.

The force of the objectivist criticism comes from the implication that the subjectivist approach to attempts presents a greater risk of convicting the innocent than does the theory underlying the substantive crimes. The subjectivist response appears to show that this is not the case. Every crime poses some risk that innocent people will be convicted. How much is unacceptable? Subjectivist theorists can argue that the proper amount of this risk is the minimum necessary to accomplish the goal of the criminal law, which, according to them, is to protect the public from dangerous or depraved individuals. This is precisely the amount of risk their approach to attempts presents. Unless the objectivists can provide a principled reason why this level of risk is unacceptable, it does not appear that the present objection can effectively undermine the subjectivist position.

H. Summary

This review of the complaints that objectivist theorists typically bring against the Code's definition of attempt shows that most are ineffective. Several, such as the claims that the logic of the Code's definition requires the punishment of imaginary crimes, that the Code's definition permits preventative detention, and that the Code's standard of attempt liability is impracticable, turn out to be attacks on a straw man. Each of these criticize the proposition that the law of attempt should be defined to permit the punishment of anyone with a dangerous or depraved character. But this is much broader than the Code's position, which is that given the *mens rea* of attempt, any act in furtherance of that *mens rea* can serve as the *actus reus* of an attempt. This more modest proposition does not fall victim to these objections. In addition, the claims that the Code's definition would

141. Weigend, *supra* note 28, at 245–46 (footnote omitted). *See also* Glanville Williams' account of the purpose of the *actus reus* requirement, *supra* note 113.

allow punishment for thoughts alone and violates the principle of legality appear to be inaccurate exaggerations.

The remaining objections—that the Code would punish irrational attempts and allow convictions based on unreliable forms of evidence—amount to a charge that the Code’s definition of attempt is too broad. These objections accurately point out that the Code would punish those who employ irrational means to accomplish their criminal ends and those whose actions are outwardly indistinguishable from innocent activity. However, they do not present a compelling case that punishing irrational or innocent-appearing attempts is normatively unacceptable. Moreover, the authors of the Code have provided a principled argument for the conclusion that it is not. If the criminal law is designed to protect the public from dangerous or depraved individuals and punishing irrational and innocent-appearing attempts will help realize this end, then punishing these attempts is normatively justified. Jean-Claude may have acted in a harmlessly ineffectual manner and Frank’s, Clarissa’s, and Jenny’s conduct may appear outwardly innocent, but each is just as morally blameworthy as the pickpocket who reaches into an empty pocket or the jealous lover who fires a pistol at his rival but misses. Why should they escape punishment when the pickpocket and lover do not? Indeed, Glanville Williams poses precisely this question as a challenge to all those who advocate an objectivist approach to attempt: “The burden lies on those who would restrict the law of attempt to show 1) that there is a reason of policy for so restricting it and 2) that a line between punishable and non-punishable impossible attempts can be satisfactorily drawn.”¹⁴² Can this challenge be met?

IV. The Distinction between Moral and Criminal Responsibility

I believe that Professor Williams’ challenge can be met. In subsequent Parts of this Article, I will both identify the “reason of policy” that justifies narrowing the Model Penal Code’s definition of attempt and show that there is a practicable method for identifying the cases in which impossibility should serve as a defense to a charge of attempt. But to do so, I must begin by highlighting a fundamental flaw in the normative arguments offered in support of the Code’s

142. Williams, *supra* note 121, at 55.

definition: the improper conflation of moral and criminal responsibility.

In the preceding section, we saw that the basic argument for the Model Penal Code's definition of attempt rested on the premise that the criminal law is designed to punish those who manifest their dangerousness or moral depravity through their actions.¹⁴³ This is merely a reflection of what the subjectivists regard as the underlying reason for having a criminal justice system in the first place, which is to provide for an orderly society and secure the persons and property of law-abiding citizens against invasion by their ill-motivated (or negligent) fellows. Punishing those who act in furtherance of a criminal intention, even if their efforts are extremely inept and cannot possibly succeed, advances this purpose by preventing these individuals from trying again by more effective means. Therefore, the subjectivists argue that the Model Penal Code's definition allowing any action in furtherance of a criminal intention to serve as the *actus reus* of an attempt advances the fundamental purpose of the criminal law.

The subjectivists' basic argument is typically supplemented with two other normative arguments: 1) that the Code's definition is derived from an analysis of the underlying purposes of punishment; and 2) that it is required by the fundamental principle of justice that requires treating like cases alike. The former argument recognizes that there is much controversy over what constitutes the proper purpose of criminal punishment. Debate rages over the relative importance of deterrence, retribution, and rehabilitation and how to reconcile conflicts among these ends. This is immaterial to the subjectivist argument, however, which contends that all of the putative purposes of punishment support the Model Penal Code's standard for attempt liability. For example, if the proper purpose of punishment is deterrence, punishing those who intend to violate the law and fail is fully justified regardless of the reason for the failure. Doing so certainly provides specific deterrence by preventing the particular defendant from trying again. It also provides general deterrence by discouraging both those who

are not completely confident that they will succeed in their criminal objective, but will be prepared to run the risk of

143. See *supra* p. 26.

punishment if they can be assured that they have to pay nothing for attempts which fail; whereas if unsuccessful attempts were also punished the price might appear to them to be too high . . .¹⁴⁴

and those who “might with good or bad reason believe that if they succeed in committing some crime they will escape, but if they fail they may be caught.”¹⁴⁵ Those who demonstrate their willingness to violate the law by acting in furtherance of a criminal intent are precisely the individuals who need deterring. The particular reason why such attempts fail seems wholly irrelevant to the deterrent value of punishing the attempt. Further, if the purpose of punishment is either retribution or rehabilitation, the case is even clearer. For the retributivist, punishment must be assigned in proportion to the moral deserts of the defendant. But one who has done all he or she can to violate the law but failed is just as morally culpable as one who succeeds, and thus just as deserving of punishment.¹⁴⁶ Once again, the reason why the attempt failed is irrelevant to the defendant’s moral blameworthiness, and thus to his or her liability to punishment. Similarly, anyone who demonstrates his or her willingness to violate the law is in need of rehabilitation regardless of whether his or her efforts were successful. Jean-Claude, Frank, Clarissa, and Jenny are all just as morally culpable and just as in need of deterrence or rehabilitation as anyone else who attempts to commit a crime, and hence just as deserving of punishment. Thus, the subjectivists

144. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 129 (1968).

145. *Id.*

146. *See id.* at 128 (“On a retributive view perhaps the answer is easy. The criminal had gone so far as to do his best to execute a wicked intention . . .”). Professor Crocker claims that his objectivist imposition theory is based on the requirements of “retributive justice,” *see* Crocker, *supra* note 63, at 1095–96, by which he means a notion of reciprocity in which punishment is assigned in proportion to the amount of harm done. However, this seems to confuse tort and criminal law. Crocker’s retributive justice sounds more like the concept of corrective justice that grounds liability in tort than a theory of criminal punishment, something that was noted by H.L.A. Hart who pointed out that:

[T]he simple theory that it is a perfectly legitimate ground to grade punishments according to the amount of harm actually done . . . seems to confuse punishment with compensation, the amount of which should indeed be fixed in relation to harm done. Even if punishment and compensation were not distinguished in primitive law, many think that this is no excuse for confusing them now. Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?

HART, *supra* note 144, at 130–31.

contend that regardless of which theory of punishment is correct, the Model Penal Code supplies the proper definition of attempt.¹⁴⁷

The subjectivists also argue for the Model Penal Code's definition of attempt indirectly by contending that all objectivist definitions violate the basic principle of justice that requires that like cases be treated alike. This is because no matter where the objectivist theorists draw the line between culpable and non-culpable attempts, parties who are identical in all morally relevant respects will end up on opposite sides of it. This point was made by the British Law Commission which argued:

[O]ne may contrast the case of the intending murderer who doses his victim with too weak a solution of poison with that of another who administers an entirely innocent liquid. Both believe that what they are giving is lethal. The only possible explanation which can be given for holding the former guilty of attempted murder and the latter not guilty is that the actions of the former were in some sense more dangerous than those of the latter. The explanation itself poses the question of how weak the mixture has to be before it becomes innocent.

Results as capricious as these do not seem acceptable in the criminal law.¹⁴⁸

Further, the objectivist approach to attempt by definition distinguishes culpable from non-culpable attempts on the basis of something other than the moral characteristics of the defendant. This seems to guarantee that "it would have an arbitrary operation"¹⁴⁹ often "acquitting persons who may be even more dangerous to the public than those who are convicted."¹⁵⁰ As Professor Michael Cohen put it:

What is being submitted is that the "objectivists" are being seduced by the relative harmlessness of the extreme

147. Indeed, even the objectivist theorist J.C. Smith concedes that:

It may be said that from the point of view of the moral culpability of the actor, there is no difference between the two types of case; and this is true. It may also be said that if the object of the law is to deter, there is no valid ground for distinguishing between them. This is equally true.

Smith, *supra*, note 94 at 217.

148. LAW COMMISSION REPORT, *supra* note 113, at 50.

149. Glanville Williams, *Criminal Attempts—A Reply*, 1962 CRIM. L. REV. 300, 307.

150. *Id.*

examples. They would throw away a device that would enable conviction in those analytically indistinguishable cases where, on any view, D is a social danger. The price for not convicting the relatively harmless would be that the criminal law would be impotent to deal with the wicked and the dangerous.¹⁵¹

It must be admitted that these arguments for the Model Penal Code's definition of attempt are impeccable under the assumption that there is no difference in principle between moral and criminal responsibility. One is morally responsible and hence subject to moral censure when one acts immorally, i.e., when one intentionally or at least negligently violates a moral tenet or fails to fulfill a moral obligation.¹⁵² The subjectivist arguments proceed as though the class of actions for which one may be held criminally responsible and hence subject to criminal punishment is simply a subset of the class of actions for which one may be held morally responsible; the subset that has been deemed worthy of enforcement by state sanction. Under this view, criminal responsibility may be properly imposed when one has engaged in morally culpable action of the type that the criminal law is designed to suppress. If, indeed, the purpose of the criminal law is to secure the persons and property of citizens against harm from their fellows, as the subjectivists contend, this would mean that criminal responsibility may be imposed whenever a defendant acts in a morally culpable way that demonstrates that the defendant poses the danger of harm to his or her fellow citizens. This conception of criminal responsibility leads directly to the Model Penal Code's subjectivist position on attempt because, given action on the part of the defendant that demonstrates he or she is a danger to others, the determining factor as to whether the defendant should be subjected to criminal punishment must be his or her moral culpability.

151. Cohen, *supra* note 108, at 775. Indeed, even objectivist theorists such as Professor Jeremy Temkin admit that "[s]trange results are likely to flow from such a distinction . . ." Temkin, *supra* note 107, at 57. See also Elkind, *supra* note 58, at 23 ("[T]he result does not always conform to our notions of what is blameworthy conduct, and some, such as Jaffe, go unpunished despite a clear intent to violate substantive law.").

152. Technically, one is morally responsible whenever one's actions are worthy of either moral blame or moral praise. The present discussion is restricted exclusively to blameworthy actions which are the only relevant analog for criminal responsibility.

The problem with this line of reasoning is that the assumption upon which it is based is incorrect. There is a principled difference between moral and criminal responsibility. Moral responsibility indicates that one is deserving of punishment. Criminal responsibility authorizes some human beings to punish others. Criminal responsibility inherently involves an element of human agency that moral responsibility does not.

In making a determination of moral responsibility, we are concerned only with the actions of one party, the agent whose conduct is being evaluated. The only relevant issue is whether the agent has acted in a morally unacceptable way; whether he or she has violated a moral tenet or failed to fulfill a moral obligation.¹⁵³ Determining that the agent has acted in a morally blameworthy manner does not in itself authorize anyone else to take action against him or her. The inquiry is an abstract one involving no practical enforcement issues.

The case is different when we make a determination of criminal responsibility. Such a determination requires not only a finding that the defendant has acted in a culpable manner that manifests his or her dangerousness or depravity, but also that it is proper for agents of the government to impose a criminal sanction on him or her. Here, we are necessarily concerned with the actions of two parties, the defendant and the government enforcement agents. Unless these agents are both omniscient and incorruptible, the class of cases in which the defendant has culpably manifested his or her dangerousness or depravity cannot be coextensive with the class of cases in which the imposition of the criminal sanction is justified. There will always be some cases in which the effort to impose punishment on a class of defendants who morally deserve it would subject the public to an unacceptable risk of harm from the errors or venality of the human beings charged with enforcing the law. If the criminal justice system were guaranteed to be administered with godlike perfection, then realms of criminal responsibility and moral responsibility would indeed be co-extensive. But this is not the

153. I am, of course, not suggesting that determining moral responsibility is a simple matter. There is little current agreement on what constitutes the proper set of moral tenets, or for that matter whether there are any valid moral tenets at all. I am suggesting only that under the assumption that we know what moral tenets should be applied, the determination of an agent's moral responsibility requires no considerations other than whether his or her conduct violates the relevant tenets.

world in which we live. Thus determinations of criminal responsibility must always consider practical matters of administration that determinations of moral responsibility ignore.

In asserting that criminal responsibility is different in kind from moral responsibility, I am not making an appeal to any constitutional or extra-legal values. The distinction is not based on the constitutional restraints on police and prosecutorial practices derived from the Bill of Rights or any philosophical argument about the value of a free society. It is derived from the internal logic of the criminal law itself. The purpose of the criminal law is to provide an orderly society in which citizens are secure in their persons and property; to protect citizens against harm from the other members of society. Obviously, to accomplish this end, it must protect citizens against threats to their persons and property from other members of society acting in their individual capacities; it must provide protection against "criminals." However, it would be pointless to do so in a way that left the citizens exposed to threats to their persons and property from the individuals acting as governmental enforcement agents. To serve its purpose, the criminal law must be structured to provide citizens with the optimal amount of protection to their persons and property against invasion from all other members of society, whether acting individually or officially.

The need for protection against the human beings who administer the criminal justice system explains why criminal responsibility is inherently different from moral responsibility. Moral responsibility is an all or nothing affair. One has or has not acted in a morally culpable way. If one has, he or she is liable to moral censure. Criminal responsibility, on the other hand, always involves a balancing of competing interests. Because the criminal law is administered by human beings who are as error-prone and susceptible to temptation as anyone else, every gain in protection against criminal activity that comes from more effective enforcement produces a loss in protection against ill-considered or improper official action. Conversely, every enhancement in protection against the state hampers governmental agents' ability to provide protection against individual criminals. Theorists can and do argue about where the line should be drawn to realize the optimal level of protection, but the line must be drawn somewhere. Thus, judgments of criminal

responsibility necessarily involve a weighing of competing interests that judgments of moral responsibility do not.

The recognition of the fundamental difference between criminal and moral responsibility, i.e., that judgments of criminal responsibility necessarily involve consideration of the risk of harm presented by enforcement agents in a way that judgments of moral responsibility do not, reveals the defects in the subjectivist arguments for the Model Penal Code's definition of attempt. By treating criminal responsibility as though it was isomorphic with moral responsibility, the subjectivist arguments depersonalize the state. They yield judgments of criminal responsibility that would be correct only if the government enforcement mechanism functioned perfectly with no risk of enforcement error or abuse; that is, as though it was not administered by human beings. The subjectivists' basic argument for the Model Penal Code's definition of attempt rests on the fundamental premise that those who manifest their dangerousness or depravity through their actions should be subject to criminal punishment. This is supposed to derive directly from the essential purpose of criminal law, which subjectivists characterize as the protection of the persons and property of the citizenry against harm from their ill-motivated fellows, i.e., from "criminals." But this characterization of the purpose of the criminal law completely ignores the danger to citizens' persons and property presented by state enforcement agents. By analyzing the issue as though it were one of moral responsibility, the subjectivists implicitly assume a perfectly functioning enforcement mechanism not burdened by human errors or weakness of will. Approaching the matter as one of criminal rather than moral responsibility suggests that the correct characterization of the purpose of criminal law is the protection of the persons and property of citizens against harm from all human agents, whether acting in their individual capacity as criminals or in their official capacity as state agents of enforcement. But if this is so, it is not true that all individuals who manifest their dangerousness or depravity through their actions should be subject to criminal punishment. Only as many as can be punished without creating too great a risk of harm from enforcement agents should be held criminally responsible. This means that it is possible for one or more of Jean-Claude, Frank, Clarissa, or Jenny, all of whom are morally culpable, not to be criminally responsible for attempt because they

represent a class of defendants whose punishment would create too great a risk of enforcement error or abuse.

The depersonalization of the state that results from treating criminal responsibility as though it was moral responsibility also causes the subjectivists to mistake conditions that are merely necessary for criminal responsibility for those that are sufficient for it. It is certainly true that punishment is proper only when one has acted in a blameworthy way; that moral culpability is necessary for punishment. It is also true that criminal punishment is proper only when one has acted in a blameworthy way that is at variance with the ends of the criminal law; that both moral culpability and an action demonstrating one's dangerousness or depravity are necessary for criminal punishment. But this implies only that criminal punishment is improper in the absence of either of these elements, not, as the subjectivist argument assumes, that it is justified when they are present. The latter would be the case only if punishing all morally culpable agents whose actions demonstrate their dangerousness or depravity posed no risk of harm from enforcement error or abuse; in other words, if the mechanism of punishment were not administered by human beings. Because this mechanism is administered by human beings, however, there is an additional necessary condition for criminal responsibility: that punishment can be imposed without creating an unacceptable level of risk of harm from government agents.

The existence of this third condition for criminal responsibility converts the subjectivist argument that the Code's definition of attempt follows from the purposes of punishment into a non sequitur. The fact that society's interest in deterrence, retribution, and rehabilitation would all be served by punishing those who take any action in furtherance of a criminal intention proves only that punishing such individuals is not unjustified as a pointless infliction of harm upon them. It does not establish that all such individuals should be punished unless that can be done without creating an unacceptable level of risk of harm from government agents. It is only by viewing the assignment of criminal responsibility as though it were the assignment of moral responsibility, i.e., only by viewing the state as a depersonalized, perfectly functioning enforcement machine, that the subjectivists can argue that all those who morally deserve punishment should in fact be criminally punished.

This third necessary condition for the imposition of criminal responsibility also undermines the subjectivist argument based on the fundamental normative requirement that like cases be treated alike. It is true that unless all those who act in furtherance of a criminal intention are subject to punishment for attempt, parties who are indistinguishable with regard to their moral blameworthiness will end up on opposite sides of the liability line. An objectivist definition of attempt would allow some parties to escape punishment who are equally or, as Glanville Williams points out,¹⁵⁴ even more morally blameworthy than those who would be punished. Clarissa or Jenny might get off scot-free while one who attempted murder with a harmlessly small dose of poison or who attempted to receive stolen property that was actually stolen would be incarcerated. But this does not imply that an objectivist definition of attempt “would have an arbitrary operation.”¹⁵⁵ There is no violation of the duty to treat like cases alike because cases such as Clarissa’s or Jenny’s are like those of their incarcerated counterparts only with respect to their moral responsibility, not their criminal responsibility. It is criminal responsibility, however, that renders one liable to criminal punishment. The principled difference between the cases of those who escape punishment and those who do not is that the former cannot be subjected to criminal punishment without an unacceptable risk of enforcement error or abuse while the latter can. Moral responsibility looks only to the actions of those to be punished. If such parties are equally blameworthy, a rule which exempts some from moral censure would indeed run afoul of the requirement to treat like cases alike. Criminal responsibility, however, inherently requires the evaluation of the actions of not only the persons to be punished, but also those of the agents imposing the punishment. Cases which are indistinguishable with regard to the actions of the recipient of punishment may be completely different with regard to the actions of those meting it out. For purposes of criminal responsibility, such cases are not alike and do not require similar disposition.

It should be noted that if my argument for the distinction between criminal and moral responsibility is correct, it implies only

154. Williams, *supra* note 149, at 307.

155. *Id.*

that the arguments offered in support of the Model Penal Code's definition of attempt are flawed, not that the Code's definition is not in fact correct. Proving that the Code's definition accurately apportions moral responsibility cannot prove that it accurately apportions criminal responsibility, which is the present concern. However, whether the Code's definition does accurately apportion criminal responsibility remains, at this point, an open question. All criminal punishment presents some risk of enforcement error or abuse. The crucial issue is how much is too much. The proper assignment of criminal responsibility requires the optimization of the balance between protection against harm from criminals and protection against harm from enforcement agents. To determine whether the Code's definition is acceptable, we must determine whether it falls within the acceptable range of risk of enforcement error and abuse.

But how is this range to be determined? An examination of the internal logic of the criminal law tells us only that the threat of harm from criminal activity must be balanced against the threat of harm from enforcement error and abuse. It tells us nothing about where this balance should be struck. Making this determination requires an appeal to the normative values that underlie the criminal law.

V. The "Reason of Policy": The Liberal Bias of the Criminal Law

I have argued that a correct understanding of criminal responsibility requires consideration of both the threat presented by criminal activity and that presented by enforcement error and abuse. Criminal responsibility is correctly assigned when the balance between these conflicting values is optimized. But striking this balance requires a normative standard by which to judge the relative importance of the values in conflict. Fortunately, such a standard is close at hand, for the Anglo-American criminal law has a standard of values embedded within it, something we might call the inherent liberal bias of the criminal law.

As a political theory, liberalism gives primacy of place to individual liberty and autonomy. It is usually presented as a deontological theory that declares that the duty to preserve the autonomy of the individual members of society (usually embodied in a set of individual rights) must be respected even if significant gains in the aggregate welfare of society could be achieved by violating

it.¹⁵⁶ Thus, liberalism places a higher normative value on liberty than on improvements in material welfare or physical security, and when such values come into conflict, tips the balance toward the preservation of liberty.¹⁵⁷

In the context of the criminal law, liberalism requires that state enforcement power be curtailed sufficiently to ensure respect for the autonomy of the citizens. Criminal law may be necessary to provide for the security of citizens' persons and property, but it does so by depriving those who violate the law of their liberty. The normative priority of liberty over security requires that criminal responsibility be assigned so that increases in security against criminals are not purchased with decreases in the liberty of law-abiding citizens. Accordingly, liberalism regards the protection of citizens against state enforcement error and abuse as relatively more important than protection against criminal activity. This argument, which is based on the philosophical commitment to the priority of liberty, is reinforced with the practical observation that the state generally constitutes a greater danger to citizens than do individual criminals. Even in a relatively lawless society, citizens can act to protect themselves against theft and injury. Installing burglar alarms, purchasing a gun, forming a neighborhood watch group, and hiring private security services are all steps citizens can take to protect themselves against the criminal activity of their fellows. However, there is little citizens can do to protect themselves against abuse by state officials. Self-help against official action is itself illegal. The only redress available against the state is an appeal to the state itself.¹⁵⁸ This makes the danger of a state that has slipped its bonds

156. See, e.g., RONALD DWORKIN, *Taking Rights Seriously*, in *TAKING RIGHTS SERIOUSLY* 184 (1977).

157. Under almost any definition, liberalism privileges liberty as the pre-eminent normative value. Perhaps the most conventional reference for this would be Rawls' theory of justice in which liberty is given priority of place in a lexical ordering to indicate that liberty is qualitatively different from the other political values and cannot be sacrificed for gains in these other values. See JOHN RAWLS, *A THEORY OF JUSTICE* § 39 (1971). There is, of course, much debate over precisely how liberty should be understood, e.g., positive versus negative liberty, but these issues will not concern us in the present context. For purposes of the present discussion, a liberal political system can fairly be described as one that institutionalizes the superior value of political liberty over other social values including security of property and even of the person.

158. There is no intention to overstate the case. In a democratic society, the state can and often does provide redress against abuse by its agents. Citizens are not at the mercy of the police and prosecutorial agents as they are under more repressive regimes. However, even in a democratic system, the risks are significant, as members of unpopular or discriminated-against

significantly greater than that posed by even the most malicious of criminals.

There is, of course, nothing sacrosanct about liberalism, which is under attack from various academic and ideological quarters. It is, however, the value system that is embedded in the Anglo-American criminal law. The idea that a state that does not respect the rights of its citizens is a greater danger than individual criminals is the source of many of the structural features built into the criminal law. The presumption of innocence, the prosecutorial burden to prove every element of a crime beyond a reasonable doubt, and the requirement of a unanimous jury verdict for conviction all exemplify the inherent liberal bias of the criminal law. Even the constitutional protections of the Bill of Rights such as the right to trial by jury, to be represented by counsel, to confront one's accuser and be informed of the charges brought against one, and to be free from compulsion to testify against oneself and from double jeopardy were originally derived from the common law of crime.¹⁵⁹ The oft-quoted maxim that it is better that nine guilty people go free than that one innocent person be wrongly convicted reflects the liberal standard of values that is an imminent feature of Anglo-American criminal law.¹⁶⁰ Thus, basing judgments of criminal responsibility on a liberal normative standard that privileges citizens' interest in protection against state enforcement error and abuse over their interest in protection against criminals ensures that criminal responsibility is assigned in a manner consistent with the law's internal value structure—surely a strong consideration in its favor.

minority groups can attest. And the incentives within the criminal justice system are such that even prosecutors motivated solely to protect the public can be tempted to take shortcuts with the rights of those they consider a danger to society. If the target of such prosecutorial attention has a criminal record or a disreputable character, there is usually very little in the way of official redress available.

159. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* ch. 1 (1986).

160. No claim is being made that there was ever any conscious design to inculcate liberal values into the criminal law. What I am calling the liberal bias of the criminal law evolved out of historical happenstance, *id.* at 40 (early formation of the Norman administrative state); see also HAROLD BERMAN, *LAW AND REVOLUTION* 440–45 (1983), and the struggle between first the barons and later Parliament and the Crown for supremacy. However, centuries of common law evolution produced an in-built bias against overreaching by those in control of the enforcement mechanism that was wholeheartedly embraced by the drafters of the federal Bill of Rights and most state constitutions when the United States was founded. For purposes of this article, my claim is merely that there is a liberal bias in the criminal law, not that it represents a social contract or any conscious acceptance of a liberal standard of criminal justice.

A full consideration of the relative merits of a liberal value structure as opposed to more right- or left-wing alternatives is obviously beyond the scope of the present work. I suggest, however, that in the absence of a reason to reject the fundamental liberal bias of the criminal law as presently constituted, this inherent bias can supply the “reason of policy” for narrowing the scope of attempt liability demanded by the subjectivist challenge.

The argument for this conclusion rests on the claim that achieving the level of protection against excessive governmental interference with citizens’ liberty that is required by the inherent liberalism of the criminal law mandates an objective condition for attempt liability. The requirement that the prosecution establish an objectively verifiable element before convicting a citizen of attempt acts as a check on prosecutorial abuse. Imagine, for example, a crusading anti-drug prosecutor willing to stop at nothing to shut down the drug trade. The prosecutor decides to pressure a suspected drug courier into testifying against his kingpin boss by charging him with the attempt to smuggle a controlled substance into the country when he flies into the United States with talcum powder in his luggage. Under the Model Penal Code, the only thing the prosecutor need prove is that the courier believed the talcum powder to be heroin, something it would be difficult for one with a record of drug smuggling to convincingly deny. Or imagine a prosecutor trying to extort testimony from a suspected member of organized crime by sending a police agent to offer him a valuable product at a below-market price and then charging him with the attempt to receive stolen property. Would such a defendant be willing to face a jury if, as is the case under the Model Penal Code definition, all the prosecutor has to prove is that the defendant believed the product to be stolen property? The requirement that the prosecutor establish an objective element of the *actus reus* acts to prevent this sort of prosecutorial abuse.

Professor Arnold Enker has provided an eloquent argument for the claim that the inherent liberalism of the criminal law requires an objective condition for attempt. Enker begins by appealing to H.L.A. Hart’s argument that a major function of the *mens rea* requirement is to “maximize the individual’s power at any time to predict the likelihood that the sanctions of the criminal law will be applied to

him.”¹⁶¹ Enker agrees with Hart that if the purpose of the criminal law is to protect citizens from harm, the mens rea requirement is necessary to protect citizens from the risk of harm from the state:

It is the function of the criminal law to promote the security and well being of members of society by securing for them a high measure of protection from harmful acts. But since society achieves such protection by inflicting harm on those who would commit such acts, it must take care not to offset this gain in security by unduly increasing the risks that persons will be subjected to official harm unpredictably. Acts can occur accidentally, but the state of mind that accompanies one's acts is entirely within the individual's control. Thus, by recognizing mens rea as an indispensable element of crimes, we substantially increase the individual's power to control his freedom from punishment.¹⁶²

Enker simply extends this argument to the actus reus. Both actus reus and mens rea are requirements for criminal liability. As such, both serve to protect citizens from oppression by the state. The rationale that underlies the mens rea requirement applies equally to the actus reus requirement:

But it would be shortsighted to think that only the mens rea element serves this function. Mens rea is within one's control but, as already seen, it is not subject to direct proof. More importantly, perhaps, it is not subject to direct

161. H.L.A. Hart, *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 81, 99 (S. Hook ed., 1965). See also H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW 26 (1964), where Hart expands on this point as follows:

In a system in which proof of *mens rea* is no longer a necessary condition for conviction, the occasions for official interferences with our lives and for compulsion will be vastly increased. Take, for example, the notion of a criminal assault. If the doctrine of *mens rea* were swept away, every blow, even if it was apparent to a policeman that it was purely accidental or merely careless and therefore not, according to the present law, a criminal assault, would be a matter for investigation under the new scheme, since the possibilities of a curable or treatable condition would have to be investigated and the condition if serious treated by medical or penal methods. No doubt under the new dispensation, as at present, prosecuting authorities would use their common sense; but very considerable discretionary powers would have to be entrusted to them to sift from the mass the cases worth investigation as possible candidates for therapeutic or penal treatment. No one could view this kind of expansion of police powers with equanimity, for with it will come great uncertainty for the individual: official interferences with his life will be more frequent but he will be less able to predict their incidence if any accidental or careless blow may be an occasion for them.

162. Enker, *supra* note 58, at 688.

refutation either. It is the subject of inference and speculation. The act requirement with its relative fixedness, its greater visibility and difficulty of fabrication, serves to provide additional security and predictability by limiting the scope of the criminal law to those who have engaged in conduct that is itself objectively forbidden and objectively verifiable. Security from officially imposed harm comes not only from the knowledge that one's thoughts are pure but that one's acts are similarly pure. So long as a citizen does not engage in forbidden conduct, he has little need to worry about possible erroneous official conclusions about his guilty mind.¹⁶³

Thus, a major purpose of the actus reus requirement is to set "an objective limit to those situations and persons that can become the objects of official assertions of control."¹⁶⁴ Enker argues that the Model Penal Code's definition of attempt, which allows any action at all to serve as the actus reus of attempt when it is accompanied by the required mens rea, cannot serve this purpose. Only a definition that requires the prosecution to prove an antecedently defined objective feature of a defendant's conduct can.

In asserting that the liberal bias of the criminal law provides the normative justification for requiring an objective condition for attempt liability, I have no desire to overstate the case. Despite the above-quoted maxim that it is better that nine guilty people go free than that one innocent person be wrongfully convicted, I make no claim that the balance between protection against enforcement error and abuse and protection against criminal activity demanded by the inherent liberalism of the criminal law is subject to precise quantification. The appeal to liberalism that I am making may supply nothing more than a general rule of prudence that when a balance is required between the need to protect citizens against enforcement error and abuse and the need to protect them against criminals, it is best to err on the side of protection against enforcement error. If so, it may be insufficient to resolve very close cases in which the competing interests are evenly balanced. Liability for impossible attempts is not such a case, however. In the context

163. *Id.*

164. *Id.*

of attempting the impossible, even a minimal rule of prudence is sufficient to ground the requirement of an objective condition for liability.

Adding an objective condition to the *actus reus* of attempt adds somewhat to the danger citizens will experience from their fellows. Assume for the moment that the objective condition mirrors the common law rule that exempted legally impossible attempts from liability.¹⁶⁵ There will be people like Jenny who will have done everything that they believe to be necessary to break the law without either succeeding or satisfying the objective condition for attempt liability. Such people will not be liable to criminal sanction and will remain free to break the law in the future as the authors of the Model Penal Code contend.¹⁶⁶ The added danger to society will be rather slight, however. Most of those who attempt to commit crimes and fail will still be liable to the criminal sanction. Only in the somewhat unusual cases in which a defendant has made a mistake about a pure circumstance would he or she constitute an ongoing danger.

On the other hand, the lack of an objective condition for liability poses a significant risk of enforcement error or abuse. Almost all of us jump at the chance to purchase an item we want at a bargain price, often from non-retail sources. How secure can those of us with criminal records or other associations or characteristics that reduce our credibility with a jury be if a prosecutor can obtain a conviction for receiving stolen property merely by convincing a jury that we believed the property to be stolen? A subjectivist definition of attempt would allow one to be convicted of the attempt to possess a controlled substance when one possessed an uncontrolled substance he or she mistakenly believed to be controlled.¹⁶⁷ Most prosecutors are entirely honest. But the incentives within the criminal justice system reward those who obtain convictions and “get the bad guys off the streets.” One of the best ways to do this is to get participants in criminal enterprises to become informers or turn state’s evidence. A law that allows a prosecutor to pressure drug suspects to inform by charging those who have baby powder or sugar in their homes with the attempt to possess a controlled substance and challenging them to

165. This assumption will be abandoned subsequently. *See infra* Part VI.

166. *See supra* text accompanying note 110.

167. This was the issue presented in *United States v. Oviedo*, 525 F.2d 881, 883 (5th Cir. 1976).

convince a jury that they did not believe it to be heroin provides a temptation to abuse that may be difficult to resist.¹⁶⁸ Furthermore, even in the absence of abuse, a subjectivist definition of attempt creates strong incentives for informers and those facing charges themselves to accuse others of possessing what they believed to be controlled substances, whether they do or not, in return for monetary payments or leniency in sentencing. To the extent that police and prosecutors rely on such evidence, the risk of enforcement error is greatly increased.

These considerations suggest that in the context of attempt, removing the requirement of an objective condition for the *actus reus* significantly reduces the burden of proof on the prosecution in order to punish a relatively small additional number of morally culpable actors. It thus creates an incremental but wide-ranging increase in the risk of enforcement error and abuse for very little added protection against criminal activity. Even if the inherent liberalism of the criminal law provides no more than a prudential rule to err on the side of protection against enforcement error and abuse, that would be sufficient to justify requiring the prosecution to establish an objective condition to obtain a conviction for attempt. At least in the case of attempt, the reduction in criminal activity to be gained is simply too small to justify the increased risk from the state.

The subjectivists are entirely correct to point out that requiring an objective condition for attempt liability makes obtaining a conviction in non-abusive cases more difficult and will result in some who deserve punishment escaping liability. But, of course, so does the exclusionary rule. The objectivists claim that this is the price we pay for living in a liberal society; “the price of the choice made long ago in favour of guaranteeing that the innocent be protected, that the heavy weight of the criminal sanction be not imposed too broadly and that the process work moderately rather

168. It may be argued that in the real world, the definition of attempt is almost immaterial to the danger of enforcement error and abuse. A prosecutor who would threaten to bring a false charge of attempt to possess a controlled substance under a subjectivist definition of attempt would be equally willing to plant drugs on the suspect if there were an objectivist definition of attempt. Even if this were true, however, planting the drugs requires enlisting the help of others and taking active steps that may be discovered. This is certainly more difficult than merely bringing a charge one knows to be groundless but for which one has a reasonable prospect for conviction or plea bargain. The fact that the potential for abuse exists under the law as it now stands cannot be a good reason for making it easier to engage in the abusive practices.

than oppressively.”¹⁶⁹ And this constitutes the reason of policy that justifies a narrower definition of attempt than that supplied by the Model Penal Code.

VI. Drawing the Line: A Proposed Definition for Attempt

In Parts I and II of this Article, I suggested that the common law distinction between legal and factual impossibility was not as impenetrable as modern courts and commentators make it seem. In Part III, I noted that despite the intelligibility of the distinction, the question still remained as to whether there was a normative justification for the common law impossibility defense. It now appears that the recognition in Part IV that, unlike moral responsibility, criminal responsibility requires a balancing of the interests in protection against criminal activity with protection against enforcement error and abuse and, in Part V, that the inherent liberalism of the criminal law requires this balance to favor protection against enforcement error and abuse, provides a positive answer to this question.

It will be recalled that the defense of legal impossibility evolved because when a defendant was mistaken about a pure circumstance, his or her conduct did not fit the model of a failed effort to achieve a criminal end, i.e., that his or her conduct did not “look like an attempt.”¹⁷⁰ Jenny’s conduct in attempting to receive stolen property is outwardly indistinguishable from that of someone legally purchasing a low-priced item from a street vendor. The supporters of the Model Penal Code definition argued that this should not constitute a defense to a charge of attempt because whether the defendant’s conduct had the outward appearance of an attempt or not was irrelevant to his or her moral culpability. Although this is true, whether a defendant’s conduct looks like an attempt is highly relevant to the question of whether the effort to punish it will create too great a risk of enforcement error or abuse. Empowering state enforcement agents to punish those whose conduct is indistinguishable from that of innocent citizens solely because of what is in their minds provides the enforcement agents with more power and temptation to interfere with the liberty of citizens than can

169. Temkin, *supra* note 107, at 66.

170. See *supra* text accompanying notes 62–65.

be justified by the added security that would be achieved. Thus, the common law impossibility defense is normatively justified not because the defendants who utilize it do not deserve punishment, but because it is necessary to protect law-abiding citizens from the risk of enforcement error and abuse.

The twin observations that criminal responsibility requires a balancing of interests between protection against criminals and protection against the state and that this balance should favor protection against the state also supplies a principled explanation as to why the defendant's conduct should be characterized from an objective viewpoint rather than the defendant's subjective viewpoint. It will be recalled that much of the confusion surrounding the distinction between legal and factual impossibility arose from the difficulty in characterizing the defendant's conduct. Courts were unsure as to whether to incorporate the defendant's mistaken belief into their description; whether to describe Jenny's conduct as receiving an unstolen laptop or a laptop she believed to be stolen.¹⁷¹ The authors of the Model Penal Code argued that the courts should adopt the defendant's "mental frame of reference"¹⁷² because the defendant's dangerousness, and hence moral culpability, is manifested by what the defendant believes himself or herself to be doing. Jenny's conduct should be characterized as receiving a stolen laptop, as she herself sees it, not as receiving an unstolen laptop, which is in fact the case. This argument, which would be unexceptionable if we were concerned with moral responsibility, ignores the issue of enforcement error and abuse that must be considered in making determinations of criminal responsibility. Characterizing the defendant's conduct on the basis of what is in the defendant's mind would allow the state enforcement agents to punish those whose outward conduct is indistinguishable from entirely innocent activity. But, as noted above, this creates too great a risk of enforcement error and abuse to be justified by the gain in security it achieves. Hence, the defendant's conduct should be characterized objectively, as it would appear to an outside observer with no access

171. *See supra* text accompanying notes 76–77.

172. MODEL PENAL CODE § 5.01, cmt. 3 at 308 (1985). *See generally* text accompanying notes 110–13.

to the defendant's thoughts, precisely as required by the common law impossibility defense.¹⁷³

Although these observations provide a normative grounding for the common law's refusal to convict in cases of legal impossibility, they do not support the common law distinction between legal and factual impossibility as it actually developed. The common law of impossibility held not only that there should be no liability in cases of legal impossibility, but also that there should be liability in cases of factual impossibility. But if my account of the nature of criminal responsibility is correct, not all cases of factually impossible attempts should sustain liability. Rather than being too broad as the subjectivists contend, the impossibility defense is actually too narrow.

Although it is true that whenever a defendant has made a mistake about a pure circumstance his or her conduct is outwardly indistinguishable from innocent activity, it is not true that a defendant's conduct is outwardly indistinguishable from innocent activity only when he or she has made a mistake about a pure circumstance. The conduct of one who is mistaken about a consequential circumstance can still appear to be perfectly innocent, as the examples of Clarissa and Frank demonstrate. If the reason why there should be no liability in cases of legally impossible attempts is that the defendant's conduct is innocent in appearance, then it is equally true that there should be no liability in cases of factually impossible attempts in which the defendant's conduct is innocent in appearance. The risk of enforcement error and abuse that arises from the effort to subject Clarissa or Frank to punishment for attempt is precisely the same as that required to punish Jenny.

This observation gives renewed significance to two of the previously considered objections lodged against the Model Penal Code's definition of attempt. In Part III, I dismissed several of the objections brought against the Code's position as being either mischaracterized or misdirected.¹⁷⁴ However, the claims that the

173. *See supra* text accompanying note 77.

174. It is worth noting that in light of the distinction between moral and criminal responsibility, three of these objections, i.e., that the Code's position authorized improper preventative detention, allowed punishment for thoughts alone, and violated the principle of legality, could be rehabilitated. As previously discussed, because the Code requires past action for attempt liability, it does not authorize improper preventative detention. *See supra* text following note 122. And if the state enforcement mechanism functioned flawlessly and honestly,

Code's definition would allow convictions to be based on unreliable forms of evidence and permit the punishment of irrational attempts did accurately address the Code's position. These objections were designed to show that the Code extended attempt liability too broadly. The subjectivist response to these objections was to claim that those who engage in innocent-appearing and irrational attempts are just as morally blameworthy, and hence just as deserving of punishment, as those who engage in more overt or effective attempts. The subjectivist challenge was based on the claim that in the absence of a principled reason why people like Jean-Claude, Frank, Clarissa, and Jenny should escape punishment when pickpockets reaching into empty pockets and jealous lovers inaccurately shooting at their rivals do not, these objections are without force.¹⁷⁵ That principled reason has now been supplied. Jean-Claude, Frank, Clarissa, and Jenny may indeed be indistinguishable from their incarcerated counterparts with regard to their moral responsibility, but this does not imply that they are indistinguishable from them with regard to their criminal responsibility. If the effort to punish Jean-Claude, Frank, Clarissa, or Jenny creates an unjustified risk of enforcement error and abuse, then they should not be held criminally responsible even though they are morally blameworthy.

The objection that the Code's definition of attempt would allow convictions to be based on unreliable forms of evidence is merely an alternative way of asserting that the effort to subject people like

the Code's definition would indeed pose no risk of preventative detention. But the state enforcement mechanism does not function flawlessly. By authorizing the punishment of conduct that is indistinguishable from entirely innocent activity, the Code's definition creates the incentive for state enforcement agents to improperly bring a charge of attempt as a means of preventative detention. Thus, the objection can be recast to assert not that the Code's definition authorizes improper preventative detention, but that it creates too great a risk that attempt charges will be improperly brought to achieve that end than can be justified by the small gain in security it achieves.

Similar arguments apply to the other two objections. Because the Code's definition requires action for liability, it does not authorize punishment for thoughts alone. *See supra* text accompanying note 126. However, by allowing state enforcement agents to bring charges on the basis of innocent-appearing conduct, it gives those agents too much power to improperly use attempt to punish for criminal intentions that in fact have not been acted upon to be justified by the small gains it achieves. Thus, although the Code does not authorize punishment for thoughts alone, it does create *an unacceptable risk* that citizens will be punished for thoughts alone. Likewise, the Code's definition does not violate the principle of legality by authorizing prosecutors to make up new crimes. *See supra* text preceding note 133. But by authorizing them to bring charges of attempt on the basis of outwardly innocent activity, it creates an unacceptable risk that they will do so.

175. *See supra* text preceding note 142.

Frank and Clarissa whose outward conduct is innocent in appearance to punishment does create an unjustified risk of enforcement error and abuse. When conduct that is indistinguishable from innocent activity can serve as the actus reus of attempt, convictions can indeed be obtained on the basis of “the less reliable forms of evidence such as questionable admissions, the testimony of informers and accomplices, and proof of prior convictions.”¹⁷⁶ Especially in the context of the war on drugs where such evidence necessarily comprises the bulk of the prosecution’s case, the absence of a requirement that there be some conduct that objectively suggests criminality poses a significant risk of enforcement error and abuse. One caught with a small quantity of cocaine and charged with possession of a controlled substance could actually fare better than one arrested with a pound of sugar and charged with attempted possession.

The objection that the Code’s definition of attempt would permit punishment of irrational attempts is a way of asserting that the effort to subject people like Jean-Claude to punishment likewise creates an unjustified risk of enforcement error and abuse. Irrational attempts may be overt in the sense that they are distinguishable from entirely innocent activity. Pushing needles into voodoo images, casting spells, or even firing toy phasers at one’s intended victim may adequately demonstrate the defendant’s desire for the victim’s death. However, such actions do not demonstrate the fixity of purpose usually required for criminal punishment. A definition of attempt that authorizes the conviction of such defendants in order to protect the public from those who would try again with more effective means also creates the risk that those who desire a criminal end but do not have the will to produce it will be subject to criminal punishment. In this context, the concern is more with enforcement error than abuse since prosecutors have little incentive to gain convictions by locking up people who act irrationally. However, the skepticism about officials’ ability to distinguish those who constitute a genuine danger of future harmful action from those who do not (which was the basis of the flawed charge that the Model Penal Code’s definition was impracticable¹⁷⁷) is entirely relevant here.

176. Enker, *supra* note 58, at 682.

177. See *supra* text accompanying note 118.

Whatever the number of irrational attemptors, it can be only a very small percentage who actually have the will to try again with more effective means. A definition of attempt that permits punishment for irrational attempts also empowers the state enforcement agents to try to cull out the truly dangerous from those without the fixity of purpose to proceed. This puts the vast majority of non-dangerous individuals at risk of criminal punishment in order to subject the very few who are truly dangerous to the criminal sanction. Given the inherent liberal bias of the criminal law, this cannot be justified.

These observations suggest the contours of a definition of attempt that correctly assigns criminal, as opposed to moral, responsibility. Generally speaking, criminal responsibility requires that crimes be defined so as to punish as many of those who manifest their dangerousness or depravity through their actions as possible without creating an unjustifiable risk of enforcement error and abuse. In the context of attempt, the check on enforcement error and abuse comes in the form of an objective condition for the actus reus. Because a definition that allowed any act at all to serve as an actus reus gives state enforcement agents too much power to curtail the liberty of law-abiding citizens, the prosecution must be required to establish that the defendant's conduct has met an antecedently specified condition. This condition must be such as to eliminate from liability both those whose actions are outwardly indistinguishable from entirely innocent activity and those whose actions are so irrationally ill-suited to their intended ends as to raise a question about the defendant's fixity of purpose.¹⁷⁸ What remains,

178. These conditions clearly indicate that despite the common law evolution of the distinction between legal and factual impossibility, not all factually impossible attempts should give rise to liability. Jean-Claude's, Frank's, and Clarissa's actions all involve mistakes about consequential circumstances and hence constitute factually impossible attempts. Yet Jean-Claude's do not demonstrate the fixity of purpose necessary to justify authorizing state enforcement action and Frank's and Clarissa's are perfectly innocent to outward appearance.

There is a perfectly logical explanation for why the common law rules seem to overlook these types of situations. The common law evolves in response to cases that actually arise. The defense of legal impossibility arose because cases in which the defendant had made a mistake about a pure circumstance were brought to trial and convictions obtained. This provided appellate courts the opportunity to review the convictions. On the other hand, I am unaware of any actual cases in which charges were brought against someone who committed an irrational attempt. Similarly, there are few, if any, actual cases of entirely innocent-appearing attempts, probably because in the absence of a confession, such cases would never come to a prosecutor's attention. Thus, appellate courts never had the opportunity to consider such cases directly; at least not until long after the distinction between legal and factual impossibility had hardened into settled law.

then, to fully meet the subjectivist challenge is to identify the requisite condition clearly enough to show that it can practically be applied by courts, i.e., to show that “a line between punishable and non-punishable impossible attempts can be satisfactorily drawn.”¹⁷⁹

One candidate for the necessary condition is the requirement that the defendant’s conduct be overt, meaning that it would suggest criminal activity to a neutral observer with no access to the defendant’s thoughts. The main problem with the Model Penal Code’s definition of attempt is that it authorizes the prosecution of conduct that is indistinguishable from innocent activity. Requiring overt conduct eliminates this possibility and with it the main source of potential enforcement error and abuse.

This solution has been suggested by Professor Arnold Enker in a highly influential article.¹⁸⁰ As previously discussed,¹⁸¹ Enker argued that allowing innocent-appearing acts to serve as the *actus reus* of an attempt meant that convictions could be based on unreliable forms of evidence. To avoid this, Enker proposed the requirement that “the criminal act itself, as distinguished from the act with its accompanying *mens rea*, should set off the actor from the rest of society. The act should be unique rather than so commonplace that it is engaged in by persons not in violation of the law.”¹⁸² Enker’s article was persuasive enough so that the Fifth Federal Circuit adopted his proposal almost verbatim. In *United States v. Oviedo*,¹⁸³ the court held that a conviction for attempt required that “the objective acts performed, without any reliance on the accompanying *mens rea*, [must] 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 common law created a defense for legally impossible attempts because such cases came up. It did not create a defense for innocent-appearing or irrational factually impossible attempts because such cases did not come up. The commentators who identified the common law defense and labeled it legal impossibility simply concluded that all cases that did not constitute legal impossibility gave rise to liability. Once this analysis gained widespread acceptance, even if the courts were presented with an irrational or innocent-appearing factually impossible attempt, they would be likely to rule in favor of liability.

179. Williams, *supra* note 121, at 55.

180. Enker, *supra* note 58, at 665.

181. See *supra* text accompanying notes 137–40.

182. Enker, *supra* note 58, at 689.

183. 525 F.2d 881.

the law.”¹⁸⁴ This requirement was subsequently adopted by the Ninth and Eleventh Circuits as well.¹⁸⁵

This suggestion has much to recommend it. In the first place, it encompasses and therefore preserves the common law defense of legal impossibility, which we have seen to be normatively justified. Because the actions of one who has made a mistake about a pure circumstance appear innocent to a neutral observer,¹⁸⁶ such an individual would not be subject to liability under the proposed condition. Furthermore, it excludes from liability the majority of cases that present an unacceptable risk of enforcement error and abuse. Requiring the prosecution to establish an element beyond merely what the defendant was thinking reduces the opportunity and the temptation for state enforcement agents to bring unfounded charges of attempt for ulterior reasons, thereby reducing the risk of enforcement abuse. It also decreases the likelihood that charges will be mistakenly brought on the basis of false or ambiguous information regarding the defendant’s state of mind, e.g., on the basis of informer testimony, thereby reducing the risk of enforcement error. This clearly represents a major improvement over the purely subjectivist approach of the Model Penal Code.

184. *Id.* at 885. In adopting this requirement, the Fifth Circuit also explicitly adopted Enker’s reasoning in support of it, stating, “[t]o the extent that this requirement is preserved it prevents the conviction of persons engaged in innocent acts on the basis of a *mens rea* proved through speculative inferences, unreliable forms of testimony, and past criminal conduct.” *Id.*

185. *See* *United States v. Everett*, 692 F.2d 596, 600 (9th Cir. 1982); *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982); *United States v. Bagnariol*, 665 F.2d 877, 896 (9th Cir. 1981).

186. A couple of caveats are necessary in this context. First, it is logically possible for the actions of one who is mistaken about a pure circumstance to be overt if he or she were to verbalize his or her criminal intention while performing the otherwise innocent-appearing acts. Jenny could call out to the public how thrilled she is to be receiving a stolen laptop while making her purchase. In such a case, conviction would be proper, however, because allowing prosecution of such unusual criminals does not increase the risk of enforcement error or abuse. The prosecution is not empowered to gain a conviction strictly on the basis of evidence of what was in the defendant’s mind. Second, whether conduct is overt must be understood in relation to the particular crime charged. For example, one who breaks and enters a home under the belief that it is night when it is in fact day is acting in a way that provides evidence that he or she is acting on a criminal intent. However, it does not supply evidence that he or she is acting on the intent to commit a burglary. Such an individual could be charged with the completed crime of breaking and entering, but could not be charged with attempted burglary. To be overt for purposes of a charge of attempt, the defendant’s conduct must indicate to a neutral observer the intention to commit the crime for which the charge of attempt is to be brought. This is the sense in which one can say that a defendant acting under a mistake as to a pure circumstance has acted in an innocent-appearing way.

Although requiring a defendant's conduct to be overt is certainly a step in the right direction and has the virtue of having already been adopted in a few jurisdictions, I do not believe it is the best articulation of the required objective condition for attempt liability. Perhaps this is because it has a rather ad hoc quality. The main problem with the Model Penal Code's definition is that it allows convictions to be based solely on evidence of what the defendant was thinking. Enker's solution was designed to and does remedy this problem. However, it does not address the problem of irrational attempts, which, because they are overt, would still give rise to attempt liability. Further, it seems to be a solution designed specifically for attempt, and as such, lacks a principled connection to a more general theory of criminal liability.¹⁸⁷

187. This criticism should not be misunderstood. I am suggesting only that Enker's proposal that the proper objective condition for attempt liability is that the defendant's conduct be overt is not theoretically grounded, not that his assertion that an objective condition is necessary is not. Indeed, Enker presents an impressive theoretical argument for the latter point as evidenced by his discussion of the difference between the "crime" and "criminal" models of criminal investigation:

At the risk of some exaggeration, we might posit two models of investigation. Traditionally, the emphasis was on the investigation of crimes rather than criminals. A crime had been committed and the officials sought its perpetrator. Not having made up their minds in advance as to the identity of the person they sought, the direction of the investigation was undetermined; it was controlled to a significant degree by the objective facts developed. More recently, in part the result of efforts to combat organized crime, there has been a greater emphasis on the investigation of individuals and the search for crimes for which the chosen individuals can be prosecuted.

Under the "crime" model, the facts of a crime determined to a degree the persons on whom official suspicion focused, whereas under the "criminal" system no such element of neutrality is introduced.

Enker, *supra* note 58, at 703–04 (footnotes omitted).

Enker argues that the criminal model of investigation is inconsistent with the inherent liberalism of the criminal law:

Both models of investigation operate within a legal system that presumes innocence and requires proof of guilt to the satisfaction of a jury. But in the "crime" model, the presumption of innocence takes on added meaning from the fact that the prosecutor will weigh the evidence carefully before deciding to prosecute. Prosecutorial screening will eliminate cases in which the evidence, though sufficient to go to the jury, is weak or is based on witnesses of doubtful credibility. And in cases that pass such screening the jury, having no bias against the defendant, may still find reasonable doubt. These protections do not function so well in the "criminal" model. The law enforcement authorities make up their minds about the defendant before the evidence is developed, and being engaged in a search for a case that can be "made," the prosecutor will not screen out potential cases based on doubtful witnesses. And the jury, having been conditioned by the authorities for years to believe that X is a Mafia leader or a labor racketeer, is far more likely to believe the doubtful witness or draw the questionable inference against the defendant.

Id. at 704–05.

I believe that there is another candidate for the necessary objective condition that is both more comprehensive and theoretically more satisfying. To explain what this is, however, requires me to broaden my focus for a moment. My argument for an objective condition for attempt liability was based on the premises that determinations of criminal responsibility require a balancing of the citizens' interest in protection against criminal activity with their interest in protection against state enforcement error and abuse and that the inherent liberalism of the criminal law skews this balance in favor of protection against the state. These premises, however, apply not merely to the crime of attempt, but to all crimes. The way they manifest themselves in the context of completed crimes is in the general requirement that criminal prohibitions be designed to avert harm to the public.

The criminal law provides the state with a powerful instrument for social control. The challenge this presents is to ensure that the criminal law be used only to secure the persons and property of the citizenry and not as a mechanism of oppression. Requiring that all criminal prohibitions be directed against an identifiable harm to the public is a way of guaranteeing that this remains the case. All criminal provisions curtail the liberty of the citizenry. Showing that these restrictions are justified requires showing how the actions to be prohibited pose a threat to the security of the persons or property of the citizenry, that is, a showing of the harm that these actions will cause.¹⁸⁸ Thus, the requirement that criminal prohibitions be

Enker also argues that this inherent liberalism is inconsistent with constitutional safeguards: "Double jeopardy retains its meaningfulness as a protection against harassment when a specific crime is the object of attention. It becomes a very limited protection when the government decides that X is dangerous to society and invests enormous resources to research his entire life to seek prosecutable actions." *Id.* at 704. By associating the Model Penal Code's emphasis on punishing dangerous persons with the criminal model of investigation, Enker presents an excellent reason for its rejection in preference to an objective condition that is necessary to ensure "[t]he effectiveness of the trial process as a control over prosecutorial decisions." *Id.* at 705. What Enker does not do is provide a firm theoretical grounding for his claim that the necessary objective condition is that the defendant's conduct be overt.

188. Such a requirement derives directly from the "harm" principle most often associated with John Stuart Mill's injunction that:

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

JOHN STUART MILL, ON LIBERTY 10–11 (David Spitz ed., 1975) (1859).

directed against harm to the public is the mechanism by which the inherent liberalism of the criminal law is operationalized.¹⁸⁹

Returning our focus now to attempt, the requirement of harm provides a useful analytical tool for determining the nature of the required objective condition for liability. For the prohibition on attempt to be normatively justified, it must be designed to protect the public from an identifiable harm. By determining the nature of this harm, we can determine the class of actions that threaten it, and hence the class of actions to be proscribed by attempt. The necessary objective condition will then be the one that restricts attempt liability to this class of actions.

But what is the harm of an attempt? An answer frequently given to this question is that it is the danger or threat that the harm of the substantive offense will occur.¹⁹⁰ I do not believe that this is a tenable response, however. The effort to explain how the failure to produce harm can present a danger of harm almost always devolves into a debate over semantics. Because attempts are failures, the risk of any particular attempt succeeding is always zero. The defendant's actual conduct presents no danger of the harm of the substantive offense being produced. This means that the harm of attempt must be the danger presented by conduct of the type that the defendant has engaged in. But this inevitably leads to debate over both which characteristics of the defendant's conduct should be included in the description of the relevant type of conduct and what likelihood of success is required for the relevant type of conduct to be considered sufficiently dangerous or threatening. The former judgment often

189. Professor Paul Ryu has provided an excellent explanation of how this applies in the context of attempt as follows:

The ideology of a free society, however, requires that no person should be subject to punishment beyond a necessary minimum. For "minimum respect for human dignity enjoins the alleviation of unnecessary suffering and maintaining of bodily integrity (well-being)." If no social harm has resulted from the act of the accused, although failure of the result is due to a pure accident unrelated to any merit on his part, the accident should be considered in his favor in order to safeguard his well-being to the utmost extent permissible.

Ryu, *supra* note 28, at 1174 (quoting LASSWELL, POWER AND PERSONALITY 123 (1948)).

190. *See, e.g.*, GROSS, *supra* note 31, at 196; Crocker, *supra* note 63. Gross argues that conduct poses a threat of harm when the harm is "expectable," meaning that "the actor had reason to believe that what he was doing would bring about the harm he intended." GROSS, *supra* note 31, at 215. This is the case "whenever the belief is, under the circumstances, a rational one." *Id.* at 226. Crocker argues that conduct poses a threat of harm or "impose[s] upon society," Crocker, *supra* note 63, at 1058, if it creates an objective risk of harm, i.e., something that would suggest the risk of harm to an ideal observer. *Id.* at 1099.

becomes entangled in the effort to characterize an ideal observer¹⁹¹ or to define what a rational person would perceive,¹⁹² while the latter typically becomes bogged down in ungrounded discussions of probability.¹⁹³ Especially in the context of impossible attempts, the effort to identify the danger presented by an attempt that cannot possibly succeed inevitably leads to the type of metaphysical or disguised normative question that led to the second part of the subjectivist challenge in the first place. Such a definition of the harm of attempt is extremely unlikely to provide “a line between punishable and non-punishable impossible attempts”¹⁹⁴ that can practically be applied by courts.

I believe that a better answer has been provided by Professor Thomas Weigend, who suggests that the harm caused by the crime of attempt is the spread of public alarm.¹⁹⁵ Weigend reached this conclusion by examining several of the archaic inchoate offenses that were the precursors of attempt such as the prohibitions on being a vagabond, going armed, and lying in wait. He noticed that:

[a]ll of these diverse forerunners of today’s criminal attempt have one common feature: they penalize behavior which does not bring about actual harm, but which tends to cause public alarm. What made these actions appear reprehensible was not the actual danger so much as the fact that they are apt to disturb the peace in the community and threaten the feeling of safety of all those who watch or hear about the offender’s conduct.¹⁹⁶

Weigend asserts that the interest in avoiding disturbances of the public peace has survived as a rationale for criminal punishment and constitutes the harm to the public caused by criminal attempts:

191. *See, e.g.*, Crocker, *supra* note 63, at 1099.

192. *See, e.g.*, GROSS, *supra* note 31, at 215, 226.

193. *See, e.g.*, Crocker, *supra* note 63:

Exactly how much risk in quantitative terms is enough, is a function of the seriousness of the concrete harm intended. The law does, and ought, look the other way for higher risks if the harm intended is minor than if death is intended. Thus the ratio aspect of the question for the observer should be phrased: “If the conduct is repeated n times would it give rise to a concrete harm at least once?” where n is set by the substantive criminal law for each primary offense.

Id. at 1100.

194. Williams, *supra* note 121, at 55.

195. Weigend, *supra* note 28, at 264.

196. *Id.* at 263–64.

We have seen that an attempt usually does not do damage to any tangible object. But that does not mean that an attempt is harmless. . . . Every such act has the potential to violate an intangible good—the public peace. The harm caused is the apprehension and fear of the victim as well as the alarm of the community about the fact that someone has set out to do serious damage to a fellow citizen and to break the accepted rules of social life.¹⁹⁷

Professor Weigend's suggestion that the harm caused by attempt is the spread of public alarm seems eminently sensible to me. Attempts are failures by definition. What they fail to produce is the harm of the completed crime. Therefore, the harm of attempt cannot be the harm of the completed offense and the effort to derive it therefrom must lead to metaphysical conundrums. On the other hand, attempts clearly have their own harmful effects on citizens' ability to lead peaceful and secure lives. Attempts to kill, injure, or steal or destroy property are extremely likely to provoke violent responses when the perpetrator is known, placing both the antagonists and innocent members of the community at risk. And when the perpetrators are not known or not apprehended, attempts produce unease that causes citizens to either restrict their activities to avoid harm or expend resources on protective measures. Attempted muggings keep people off the streets and attempted burglaries boost home security system sales as much as successful muggings and burglaries. The need to protect the public against this type of harm provides a perfectly coherent and adequate justification for the criminalization of attempts.

If this is correct and the harm that justifies outlawing attempts is their potential to spread public alarm, the nature of the objective condition for the actus reus of attempt becomes plain. To be punishable, an attempt must consist in conduct sufficient to arouse public alarm. As Weigend himself expresses this, "the proposed test can be formulated by the following sentence: An attempt which cannot succeed is punishable if the offender's conduct, seen in the light of his statements accompanying the acts he deemed necessary

197. *Id.* at 264 (footnotes omitted).

for achieving his purpose, would cause alarm or apprehension to an average observer.”¹⁹⁸

There is every reason to believe that the requirement that the defendant’s conduct be sufficient to cause public alarm is the proper objective condition for attempt liability. In the first place, it properly excludes from liability the cases of innocent-appearing and irrational attempts that create an unjustifiable risk of enforcement error and abuse. It eliminates liability for innocent-appearing attempts because in order for conduct to cause public alarm, it must be overt. Only conduct that would suggest criminal activity to an observer can cause public alarm. Thus, like the previously discussed overtess condition,¹⁹⁹ the public alarm requirement both preserves the common law defense of legal impossibility and eliminates liability for cases of innocent-appearing factual impossibility. It also eliminates liability for irrational attempts because even though the conduct of one engaged in an irrational attempt may suggest that he or she desires a criminal end, such conduct “would not impress the average, moderately enlightened observer as being a serious menace to his feeling of safety.”²⁰⁰ Thus, it would not be adequate to cause public alarm.

Secondly, the requirement that the defendant’s conduct cause public alarm stands on a firm theoretical footing. Generally speaking, restrictions on citizens’ liberty need justification. In the context of the criminal law, this justification takes the form of a showing that the restriction is necessary to prevent harm to the public. Attempted crimes cause harm to the public when they produce the type of public alarm that can lead to violent retaliation or cause citizens to curtail their activities or expend resources on self-protection. Therefore, there is clear normative justification for punishing attempts that cause public alarm and only attempts that cause public alarm.

Finally, the requirement that the defendant’s conduct cause public alarm is an entirely practicable one. It requires no dense metaphysical discriminations or complex normative judgments to apply it. The decision as to whether conduct is sufficient to cause public alarm is clearly within the competence of the courts. A

198. *Id.* at 268–69.

199. *See supra* text accompanying note 186.

200. Weigend, *supra* note 28, at 270.

judiciary that is competent to make decisions as to how a reasonable person would act is competent to make judgments as to what would alarm an average citizen.

Thus, the subjectivist challenge has now been met. The inherent liberalism of the criminal law provides the reason of policy for requiring an objective condition for liability for attempt and the requirement that the defendant's conduct be sufficient to cause public alarm provides a practicable distinction between punishable and non-punishably impossible attempts. It appears that the decades-old puzzle of when one can be punished for attempting the impossible has a rather simple solution. One can be punished for an attempt that cannot possibly succeed when, with the specific intent to commit an offense known to the law, one engages in conduct sufficient to cause public alarm if observed by an average citizen.

VII. Conclusion

In this article, I have argued that the common law defense of impossibility on a charge of attempt is both intelligible and normatively grounded. Far from the morass of confusion its critics make it out to be, the defense is actually quite easy to apply when correctly understood. Furthermore, it preserves an important protection against enforcement error and abuse by state officials that is mandated by a correct understanding of the nature of criminal responsibility and the inherent liberalism of the criminal law. As a result, its abandonment in most jurisdictions in the United States has been an unfortunate occurrence.

I have also argued that although the common law impossibility defense is normatively justified as far as it goes, it does not go far enough. By allowing conviction in all cases of factual impossibility, the defense permits the prosecution of innocent-appearing and irrational factually impossible attempts that present the same unjustified risk of enforcement error and abuse as the cases of legal impossibility covered by the defense. Because the requirement that criminal prohibitions be designed to prevent harm to the public is the mechanism by which the inherent liberalism of the criminal law is given effect, I then argued that punishable attempts can be separated from non-punishably impossible attempts on the basis of whether they produce the harm the prohibition on attempt is designed to prevent. Because this harm is the spread of public alarm, attempts, whether impossible

or not, should be punished when and only when the defendant, acting with the specific intent to commit an offense known to the law, engages in conduct sufficient to cause public alarm if observed by an average citizen.

This definition of attempt appears to resolve the classic conundrums associated with the prosecution of impossible attempts that are reflected by the sagas of our fictional friends. Jean-Claude and people like him have long been a thorn in the side of attempt theorists. Frequently more pitiable than truly dangerous, our intuitions suggest that they are poor candidates for criminal punishment, something that is even implicitly recognized by the Model Penal Code.²⁰¹ Yet under both the common law classifications and the Model Penal Code's definition, Jean-Claude was subject to punishment for attempted murder. The proposed definition brings the law of attempt into line with our normative intuitions by exempting Jean-Claude from liability. Jean-Claude may have acted with malice, but he did not act in a way that would cause the public alarm that the prohibition on attempt is designed to prevent. Therefore, Jean-Claude should not be subject to punishment.

Consider next the case of Laura and Frank. Both intended to violate the law and both engaged in the identical innocent-appearing action in an effort to realize their end. As a result, our intuitions strongly suggest that they should be treated identically by the law. Yet under the Model Penal Code's definition of attempt, Laura, who made a mistake of law, remains free to continue her anti-environmental activity, while Frank, who made a mistake of fact, ends up in jail. This anomalous result occurs because under the Code's definition, one's liability for punishment is determined by the type of mistake one makes. Under the proposed definition, however, Laura and Frank are treated identically by the law, as we feel is appropriate. Both remain free to continue their agitation. Because the conduct of both is innocent to outward appearance, neither's conduct can cause public alarm. Thus, because neither threaten the

201. See MODEL PENAL CODE § 5.01, cmt. 3 at 316 (1985) (referring to section 5.05(2) that permits the dismissal of charges against those whose "conduct charged to constitute an attempt is 'so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents . . . a serious threat to the public'").

harm the prohibition on attempt is designed to prevent, neither is subject to punishment.

Jenny's case, which is the classic example of the common law defense of legal impossibility, has always been the focus of subjectivist discontent. Why, they demanded, should one be allowed to escape punishment who is every bit as blameworthy as those who are subject to the criminal sanction? The proposed definition supplies a clear and principled answer to this demand. Jenny should escape punishment when others who are equally blameworthy do not because her actions, which appear to be innocent, cannot cause the public alarm that constitutes the harm the prohibition on attempt is designed to prevent. The effort to subject her to criminal punishment merely because she is morally blameworthy requires investing state enforcement agents with more power to interfere with the liberty of innocent citizens than can be justified by the minuscule gain in security that would be achieved.

Finally, there is Clarissa's case. Under both the common law and the Model Penal Code, Clarissa would be liable for attempted murder. There can be no gainsaying that Clarissa is a dangerous individual who, because her actions are not overt and hence cannot cause public alarm, would not be subject to punishment under the proposed definition. However, she is also the type of individual that it is most dangerous to attempt to subject to criminal sanction because "apart from [her] confession, there is nothing at all that approaches the threshold of criminal behavior."²⁰² Authorizing the prosecution of people like Clarissa authorizes the prosecution of defendants "where proof of the intention of the accused is the only circumstance that could make us begin to think of what has been done as a criminal attempt,"²⁰³ something that certainly provides state enforcement agents with too much power to interfere with the liberty of citizens. By exempting Clarissa from liability for attempt, the proposed definition protects all of us against the danger of overreaching by the state.

It may appear rather late in the day to suggest that we reverse the trend away from the impossibility defense. But perhaps all is not lost. In this Article, I have not suggested that we return to the

202. Hughes, *supra* note 4, at 1024.

203. *Id.*

common law defense, but that we recognize an expanded and theoretically grounded version of it that requires conduct capable of causing public alarm for attempt liability. By not referring to this as an impossibility defense, the proposed definition of attempt should be able to avoid the negative reputation associated with the common law defense. I therefore respectfully submit that the state legislatures consider revising their criminal codes to incorporate the public alarm definition of attempt in preference to the open-ended Model Penal Code definition.