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Attempting the Impossible: The Emerging Consensus

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Impossible attempts are situations in which an actor fails to consummate a substantive crime because he is mistaken about attendant circumstances. Professor Robbins divides mistakes regarding circumstances into three categories: mistakes of fact, mistakes of law, and mistakes of mixed fact/law. Courts and commentators disagree primarily over the identification and treatment of mixed fact/law cases.

Professor Robbins surveys each category of mistake. He then examines the objective, subjective, and hybrid approaches to dealing with the mixed fact/law category. The objective approach requires an objective manifestation of the actor's intent before conviction is allowed. The subjective approach permits convictions based on intent alone. Under the hybrid approach, the individual's acts must independently evince an intent to commit a specific crime before conviction is allowed. Professor Robbins concludes that the hybrid approach strikes the optimal balance between crime prevention and freedom from unwarranted interference by law-enforcement authorities. Noting the growing acceptance of the hybrid approach, he proposes a model criminal-attempt statute that codifies it.

The exploits of Lady Eldon, Mr. Fact and Mr. Law, the murderous Haitian voodoo doctor, the soldier who shot an enemy mistakenly believing that he was his sergeant, the individual who shot a tree stump mistakenly believing that it was his enemy, and the larcenous professor who mistakenly "stole" his own umbrella have long baffled courts and commentators.

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1 See 1 F. WHARTON, CRIMINAL LAW § 225, at 304 n.9 (12th ed. 1932).
Each of these instances poses the problem of the impossible attempt.

The term impossible attempt refers to a situation in which an actor fails to consummate a substantive crime because the circumstances (factual and/or legal) were different from those that he anticipated. One problem in dealing with the impossible attempt is determining whether a mistake has occurred. The easiest case is one in which the mistake is apparent from the defendant's objective acts—for example, where an individual shoots at his rival, but the gun misfires. More difficult problems arise, however, when the defendant's acts are neutral, equivocal, or innocuous. What should be done, for example, with the individual who shoots at a tree stump, mistakenly believing it to be his rival? Can he be convicted without exclusive reliance on proof of his subjective intent? If not, would such a conviction give the police and courts a dangerous amount of power? Would it make a difference if the defendant shouted out a cry of revenge as he shot at the stump?

I conclude that an "objective check" is necessary in subjective attempt statutes to prevent the state from convicting individuals who have performed ambiguous acts. The state should not convict an individual of an attempt crime unless his acts, viewed without reference to his underlying intent, at least raise the possibility that the defendant intended to commit a crime. This hybrid test does not require, however, that the defendant's actions unequivocally demonstrate his intent to commit a crime. Several federal and state courts and state legislatures have adopted a similar approach. It has also received the support of several commentators on criminal law. My purpose is to demonstrate that this approach is the only one that adequately balances society's interests in identifying and deterring those who have shown criminal propensities with society's need to control the discretion of its law-enforcement officials.

Part I of the Article separates the impossibility cases into three distinct groups and discusses the rationales for this clas-

7 See infra note 124 (citing cases and state statutes that have adopted an "objective check" approach).
sification system. Part II presents the debate between the objectivists and the subjectivists. This section includes a response to subjectivists' criticism of the hybrid approach. Part III of the Article discusses the statutory response to impossibility and proposes a model statute that is essentially subjective, but which includes an objective check.

I. CLASSIFICATION OF IMPOSSIBILITY CASES

Courts have traditionally analyzed impossibility cases by classifying them as cases of either factual or legal impossibility. If the court found the case to be one of "factual" impossibility, the defendant would generally be found guilty. On the other hand, if the court determined that the crime was "legally" impossible to commit, the defendant would generally be found not guilty. Although courts have expressed dissatisfaction with this system, it remains a useful mode of analysis. The legal impossibility category should, however, be subdivided to distinguish between cases involving pure legal impossibility and those involving mixed fact/law impossibility.


10 See, e.g., State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902) (defendant guilty of attempted murder for shooting into empty bed in which he believed victim was sleeping); People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890) (defendant guilty of attempted larceny for attempting to pick pocket he believed contained valuables); State v. Damms, 9 Wis. 2d 183, 100 N.W.2d 592 (1960) (defendant guilty of attempted murder for attempting to shoot wife with gun he believed was loaded); see also infra notes 16-19 (listing factual impossibility cases).

11 See, e.g., State v. Taylor, 345 Mo. 325, 133 S.W. 336 (1939) (defendant not guilty of attempted bribery for bribing individual he believed was a juror); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906) (defendant not guilty of attempting to receive stolen property when property had been recovered by police before defendant received it); see also infra notes 91-95 (listing legal impossibility cases).

12 There is a fourth category of cases in which inherently impossible or absurd attempts are placed. This category is commonly designated inherent impossibility. Most of the examples of inherently impossible attempts are the creations of courts and commentators, rather than actual cases. For example, in Commonwealth v. Johnson, 312 Pa. 140, 167 A. 344 (1933), a dissenting judge stated:

   Even though a "voodoo doctor" [who] just arrived here from Haiti actually believed that his malediction would surely bring death to the person on whom he was invoking it, I cannot conceive of an American court upholding a conviction of such a maledicting "doctor" for attempted murder or even attempted assault and battery.

Id. at 152, 167 A. at 348 (Maxey, J., dissenting). In an early English case, Attorney General v. Sillem, 2 H. & C. 431, 159 Eng. Rep. 178 (Ex. Ch. 1863), Chief Baron Pollock stated:
A. Factual Impossibility

The defense of factual impossibility may be raised when the actor is unable to complete the substantive crime because of the existence of facts unknown to him.\(^{13}\) Almost without exception,\(^{14}\) however, this defense has not proven to be

If a statute simply made it a felony to kill any human being..., an attempt by means of witchcraft... would not be an offense within such a statute. The poverty of language compels one to say "an attempt to kill by means of witchcraft," but such an attempt is really no attempt at all to kill. It is true the sin or wickedness may be as great as an attempt... by similar means, but human laws are made, not to punish sin, but to prevent crime and mischief.

\(\text{Id. at 525-26, 159 Eng. Rep. at 222.}\)

Generally, commentators believe that actors in inherent impossibility cases have not demonstrated sufficient dangerousness to warrant punishment. See, e.g., G. Fletcher, Rethinking Criminal Law § 3.3.4, at 165–66 (1978); Sayre, Criminal Attempts, 41 Harv. L. Rev. 621, 850 (1928); Weigend, supra note 8, at 270. Other commentators suggest, however, that such individuals have shown themselves to be willing to perform acts that they believe violate the law and that therefore they should be found guilty to ensure that they do not select a more effective means of accomplishing their goals in the future. See, e.g., 1 P. Robinson, Criminal Law Defenses § 85(e) (1984); G. Williams, Criminal Law, The General Part §§ 203, 207(b) (2d ed. 1961); Elkind, Impossibility in Criminal Attempts: A Theorist's Headache, 54 Va. L. Rev. 20, 33-34 (1968). But see Williams, Attempting the Impossible—A Reply, 22 Crim. L.Q. 49, 55 (1979-80) (suggesting use of discretion in determining whether to charge a voodooist).

For a discussion of the statutory treatment of inherent impossibility, see infra notes 243 & 313.

\(^{13}\) Courts and commentators have offered similar definitions of factual impossibility. See, e.g., People v. Rollino, 37 Misc. 2d 14, 15, 233 N.Y.S.2d 580, 582 (Sup. Ct. 1962) (factual impossibility exists when the "substantive crime is impossible of completion, simply because of some physical or factual condition unknown to the defendant"); Hughes, supra note 8, at 1006-07 (factual impossibility is the "situation in which the objective of the accused, if achieved, would amount to an offense known to the law, but where the achievement is frustrated by some circumstance such as the inadequacy of the instrument, the intervention of some third person, or the misapprehension of some material matter by the accused"). In each definition it is assumed that, if the defendant had completed his acts and the circumstances were as he believed them to be, the result would have been illegal. The more difficult question is which causes of failure may be correctly classified as purely factual. See generally infra notes 90-99 and accompanying text (discussing mixed fact/law cases).

\(^{14}\) For a brief period in Great Britain there could be no conviction for attempted larceny if there was no property in the pocket of the intended victim. See Regina v. Collins, 1 Le. & Ca. 471, 169 Eng. Rep. 1477 (Cr. Cas. Res. 1864), overruled, Regina v. Ring, 17 Cox C.C. 491 (Cr. Cas. Res. 1892). In Collins, Baron Bramwell posed the question of "whether a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of intending to murder...?" Id. at 473, 169 Eng. Rep. at 1478. Finding this question analogous to the case of an empty pocket, the court in Collins held that there could be no conviction if the pocket was empty. With no explanation, Collins was overruled 28 years later by Ring. See also Regina v. Brown, 24 Q.B.D. 357, 359 (1889) (noting the dissatisfaction of the Collins judges with their decision).

In another early factual impossibility case, the court overturned the defendant's conviction because the goods that the defendant intended to steal had been removed from the house that he had broken into to commit the larceny. Regina v. M'Pherson, 1 Dears. & B.C.C. 197, 197, 169 Eng. Rep. 975, 975 (Crim. App. 1857). Chief Judge Cockburn reasoned:
successful. It has been raised and rejected most commonly with respect to four substantive crimes: attempted abortions on non-pregnant women; attempted rapes by impotent men; at-

There is a difference between intending to do a thing and attempting to do it. A man goes to a place intending to commit a murder, but when he is there he does not find the man he expected to find. How can he be said to have committed the murder? He merely attempts to carry an intention into effect.

After Ring, factual impossibility was not a good defense to attempt crimes through the early 1970's. In Regina v. Curbishley, 55 Crim. App. 318 (C.A. 1970), for example, the defendants were convicted of dishonestly attempting to assist in the removal or disposal of stolen goods even though the goods were not at the designated place when the defendants arrived to move them. Almost 80 years after Collins was overruled by Ring, however, the court in Partington v. Williams, 62 Crim. App. 220 (C.A. 1975), declared that M'Pherson and Collins were still good law. In Williams, the defendant had taken a wallet from a drawer in the office of her employers, but found that it was empty and returned it. Because the court focused on the culpability of the objective act, rather than on the belief of the defendant when she took the wallet, the defendant's conviction was overturned on the ground that she had not stolen anything. Haughton v. Smith, [1975] A.C. 476 (H.L.), was the main precedent for Williams. The Criminal Attempts Act of 1981, see infra note 320, finally abolished factual impossibility as a defense in England.

Some courts differ, however, regarding which crimes are properly classified as factually impossible. Compare State v. Tropiano, 154 N.J. Super. 542, 459, 381 A.2d 828, 831 (1977) (receiving stolen property no longer stolen presents case of factual impossibility) with State v. Vitale, 23 Ariz. App. 37, 44, 530 P.2d 394, 401 (1975) (legal impossibility no bar to conviction for receiving stolen property that was no longer stolen). Before the elimination of the impossibility defense by a majority of state legislatures, these classifications could determine the outcome of the case. See, e.g., United States v. Hair, 356 F. Supp. 339, 342 (D.D.C. 1973) (legal impossibility bars conviction for attempting to receive stolen property if property lost legal status as stolen); People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962) (defendant successfully raised legal impossibility defense when property received was not actually stolen).

See, e.g., United States v. Woodard, 17 C.M.R. 813 (B.R. 1954) (fact that patient was not pregnant is not a defense to attempted abortion); People v. Feigin, 174 Cal. App. 2d 273 (1959) (need not aver pregnancy for charge of attempted abortion); People v. Cummings, 141 Cal. App. 2d 193, 296 P.2d 610 (1956) (same); People v. Raffington, 98 Cal. App. 2d 455, 220 P.2d 967 (1950) (need not aver pregnancy since statute referred to "any woman"), cert. denied, 340 U.S. 912 (1951); Eggart v. State, 40 Fla. 252, 25 So. 144 (1898) (need not aver pregnancy in indictment for attempted abortion); People v. Huff, 339 Ill. 328, 171 N.E. 261 (1930) (same); Dotye v. Commonwealth, 289 S.W.2d 206 (Ky. 1956) (need not aver pregnancy for charge of attempted abortion); Commonwealth v. Tibbetts, 157 Mass. 519, 32 N.E. 910 (1893); State v. Moretti, 52 N.J. 182, 224 A.2d 499 (1968) (attempted abortion conviction not barred because patient was an undercover investigator who was not in fact pregnant), cert. den., 393 U.S. 952 (1962); State v. Elliot, 206 Or. 82, 289 P.2d 1075 (1955) (defendant guilty of attempted abortion when, unbeknownst to him, woman was pregnant in Fallopian tubes and thus defendant's techniques could not succeed); Regina v. Brown, 63 J.P. 790 (Eng. 1899) (defendant guilty if he believed pills would induce abortion); Regina v. Goodchild, 2 Car. & K. 293, 175 Eng. Rep. 121 (1846) (woman's pregnancy immaterial); Rex v. Austin, [1905] N.Z.L.R. 983 (N.Z. Ct. App.) (woman need not be pregnant for attempted abortion conviction); Rex v. Freestone, [1913] T.P.D. 758 (S. Afr.) (same).

tempted larceny of empty pockets;\textsuperscript{18} and attempted murder either by inadequate means or when the victim was not in the location in which the defendant expected he would be.\textsuperscript{19}

\textsuperscript{18} See, e.g., People v. Fiegelman, 33 Cal. App. 2d 100, 91 P.2d 156 (1937) (factual impossibility not a defense to attempted larceny of an empty pocket); State v. Wilson, 30 Conn. 500 (1862) (fact that defendant expected the pocket to contain money is sufficient); In re Appeal No. 568, 25 Md. App. 218, 333 A.2d 649 (1975) (factual impossibility not a defense to attempted larceny of empty pocket); Commonwealth v. McDonald, 59 Mass. (5 Cush.) 365 (1850) (failure due to pocket being empty is no different from failure due to any other reason); People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890) (culpability for attempt determined solely by actor's intent); State v. Beal, 37 Ohio St. 108 (1881) (empty pocket not a defense since failure resulted from an unforeseen and unexpected circumstance); Rogers v. Commonwealth, 20 Penn. (5 Serg. & Rawle) 463 (1820) (contents irrelevant to conviction for attempted larceny of pocket); Clark v. State, 86 Tenn. 511, 8 S.W. 143 (1888) (defendant guilty of attempted larceny because his intent was evidenced by his actions); cf. Gargan v. State, 436 P.2d 968 (Alaska 1968) (presence of coins not a prerequisite to conviction for attempted larceny of a laundry machine); People v. Dogoda, 9 Ill. 2d 198, 137 N.E.2d 386 (1955) (presence of property not a prerequisite to conviction for attempted larceny of store); State v. Meisch, 86 N.J. Super. 279, 206 A.2d 763 (presence of valuables not a prerequisite to conviction for attempted larceny of desk), certif. denied, 44 N.J. 583, 210 A.2d 627 (1965).

Professor Meehan notes that "although the analogy between an empty pocket and an empty womb is a convenient one, it is curious to note that in Scotland, the conclusion in each has gone a separate way." E. MEEHAN, THE LAW OF CRIMINAL ATTEMPT 158–59 & n.83 (1984) (noting that in Scotland one may be convicted for attempting to pick an empty pocket, whereas pregnancy is essential to a conviction for attempted abortion).

\textsuperscript{19} See, e.g., United States ex rel. Rangel v. Brierton, 437 F. Supp. 908 (N.D. Ill. 1977) (defendant guilty of attempted murder if he believed victim was alive at time of act); United States v. Cruz-Gerena, 49 B.R. 245 (1943) (defendant guilty of attempted murder for shooting into empty bed); State v. Mandel, 78 Ariz. 226, 278 P.2d 413 (1954) (factual impossibility not a defense when defendant hired undercover policeman to kill
The decisions regarding these four crimes are an anomaly within the impossibility area—they have almost all been decided consistently.\textsuperscript{20} The common element among these recurring fact patterns is that the defendant's act, but for the intrusion of a purely factual misconception, would have resulted in a legislatively proscribed harm.\textsuperscript{21} Assuming that proof of the requisite mens rea is possible,\textsuperscript{22} the important question in factual impossibility cases is whether the acts that the defendant successfully completed had progressed beyond the stage of mere preparation and into the range of actual perpetration.\textsuperscript{23}

Courts offer three related rationales for rejecting the factual impossibility defense: first, the actor has demonstrated his dangerousness; second, the actor has violated his proposed victim's interests; and third, the actor has violated the public's interests.

Most commonly, courts believe that the defendant has sufficiently manifested his dangerous propensities.\textsuperscript{24} This rationale

\textsuperscript{20} But see supra note 14 (discussing brief period in Great Britain when factual impossibility was a valid defense).

\textsuperscript{21} See infra notes 96–99 and accompanying text (distinguishing factual impossibility from mixed fact/law impossibility).

\textsuperscript{22} Because the actor did not complete his intended course of conduct, inferring the requisite mens rea from his acts may be especially difficult in impossibility cases. Although many commentators discuss impossibility under the assumption that the requisite intent has been shown, at least one commentator, as well as the United States Court of Appeals for the Fifth Circuit, recognizes the significant practical problems of proof that are posed in these cases. See United States v. Oviedo, 525 F.2d 881, 885 (5th Cir. 1976) ("objective acts performed, without any reliance on the accompanying mens rea, [must] mark defendant's conduct as criminal in nature"); Hughes, supra note 8, at 1033 (defendant's conduct must match model of success in completing crime). Both the court in Oviedo and Professor Hughes were concerned primarily with the possibility of convictions that were based on innocent acts. In response to this concern, each suggested a test in which the defendant's actions, viewed without reference to mens rea, must clearly evince a guilty mind. See infra notes 127–32 (Hughes's test) and 173–79 (Oviedo court's test) and accompanying text.

\textsuperscript{23} See infra note 254 (discussing various definitions of substantial step).

\textsuperscript{24} See, e.g., People v. Dlugash, 41 N.Y.2d 725, 735, 363 N.E.2d 1155, 1161, 395

husband); People v. Lee Kong, 95 Cal. 666, 30 P. 800 (1892) (defendant guilty of assault with intent to kill for shooting through hole in roof while believing that policeman was observing him through that hole); People v. Van Buskirk, 113 Cal. App. 2d 789, 249 P.2d 49 (1952) (defendant guilty of attempted murder although gun mishired); People v. Grant, 105 Cal. App. 2d 347, 233 P.2d 660 (1951) (factual impossibility not a defense to attempted murder when defendant tried to destroy airplane); Kunkle v. State, 32 Ind. 220 (1869) (defendant guilty of assault with intent to kill if he believed means used were adequate); Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897) (defendant guilty of attempted murder although the poison administered was insufficient to kill); State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902) (defendant guilty of attempted murder for shooting into empty bed); People v. Dlugash, 41 N.Y.2d 725, 363 N.E.2d 1155, 395 N.Y.S.2d 419 (1977) (factual impossibility not a defense if defendant believed victim was alive when shots were fired); State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888) (defendant guilty of assault with intent to kill if he believed substance administered was poisonous); State v. Damms, 9 Wis. 2d 183, 100 N.W.2d 592 (1960) (factual impossibility not a defense if defendant believed gun was loaded); Rex v. White, [1910] 2 K.B. 124, 129–30 (inadequate means not a defense to attempted murder).
stems from the preventative underpinnings of inchoate liability.\(^2\) Similarly, courts note that, in instances of factual impossibility, the defendant's failure to complete the crime cannot be attributed to a change of heart or renunciation of criminal intent.\(^2\) Rather, if not for an unexpected and fortuitous circumstance,\(^2\) the defendant would have succeeded in committing the substantive crime.

Those courts that focus on the dangerousness of the actor in factual impossibility cases are concerned more with his potential to commit future harmful acts than with punishment for the acts that he has successfully completed.\(^2\) Other courts and com-

N.Y.S.2d 419, 426 (1977) (factual impossibility immaterial; actor's intent determines his dangerousness to society); People v. Moran, 123 N.Y. 254, 25 N.E. 412, 413 (1890) (punishment of an unsuccessful defendant just as essential to protection of public as punishment of one whose designs have been successful); State v. Damms, 9 Wis. 2d 183, 188, 100 N.W.2d 592, 595 (1960) (an unequivocal act accompanied by intent is sufficient to constitute a criminal attempt); HAWAII REV. STAT. § 705-500, commentary at 284 (1976) (question is whether defendant's conduct marked him as a dangerous person); Mo. ANN. STAT. § 564.011 (Vernon 1979), comment to 1973 Proposed Code at 387-88 (quoting MODEL PENAL CODE, Tent. Draft No. 10 (1960), commentary at 30-31) (question is whether defendant has manifested his dangerousness).


Professor Temkin also focuses on the dangerousness of actors in impossibility cases to justify their conviction, but takes a slightly different approach. Temkin, Impossible Attempts—Another View, 39 MOD. L. REV. 55 (1976). Because of the great danger that a defendant who attempts to commit a crime involving death or grievous bodily injury poses to society, Temkin would convict him if he went "so far in pursuit of his intention that there was, discounting any element of impossibility, some real danger of his accomplishing his criminal purpose." Id. at 69. Because of the serious nature of the crime, Temkin would not be influenced by the impossibility of the defendant's attempt. Although Temkin characterizes this test as "subjective" in nature, she emphasizes that there must be a "real danger" of the defendant's success. Id. at 69.

In instances that do not involve a threat to an individual's safety, Temkin suggests a less restrictive test: the defendant must have "been on the verge of accomplishing his criminal purpose." Id. at 69. This standard is less rigorous than Temkin's "real danger" standard for crimes involving the threat of personal injury. In this second class of cases, if any circumstance that is essential to the defendant's success is absent, he must be acquitted. Therefore, unlike Temkin's first category of cases, impossibility is a factor that works in favor of the defendant's acquittal. See id. at 69. This view lends a decidedly objective nature to Temkin's analysis, because, regardless of the circumstances that the defendant believed existed, if an essential circumstance was absent, there can be no conviction. See id. at 69; infra notes 114-23 and accompanying text (discussing objective approach).

\(^{26}\) See, e.g., People v. Lee Kong, 95 Cal. 666, 670, 30 P. 800, 801 (1892) ("that the shot did not fulfill the mission intended was not attributable to forbearance or kindliness of heart upon defendant's part"); State v. Beal, 37 Ohio St. 108, 112 (1881) (failure was wholly independent of defendant's will, and did not in the least mitigate turpitude of the offense).

\(^{27}\) See, e.g., State v. Lopez, 100 N.M. 291, 293, 669 P.2d 1086, 1088 (1983) (that the victim had been alerted to the crime and removed himself to a place of safety should not benefit the accused).

\(^{28}\) See supra note 24 (listing cases that disallow a factual impossibility defense for preventive purposes).
mentators, however, take the position that the actor in a factual impossibility case, despite his inability to achieve his desired goal, nevertheless violated either the protected interests of the public in general, or of a particular individual.29

In an early pickpocket decision,30 for example, the Supreme Court of Tennessee affirmed the conviction of a defendant because the "community suffers from the mere alarm of crime" and the defendant's acts "disturbed the public repose."31 Others focus on the effect of unsuccessful attempts on the intended victim, rather than on the effect that the act had on the public in general. Professor Strahorn,32 for example, would convict the actor who shot into an empty bed believing that his intended victim was there because he violated an individual's interest in having his habitation "free from . . . instrumentalities of violence directed against it."33

Strahorn's individual-based approach could lead to some unsettling results. If the defendant had placed sugar in his intended victim's coffee, for instance, erroneously believing the the sugar was arsenic, and the intended victim drank the coffee, Strahorn would convict the defendant of attempted murder.34 The con-

Professor Sayre, in rejecting an objective approach, suggests that proponents of the protection-of-the-public rationale would adopt an objective test to determine if convictions were warranted. Because the question is whether a protected interest was violated, only an objective analysis is necessary to determine if actual harm resulted. Professor Sayre criticizes this position as not considering sufficiently the potential dangerousness of actors who were frustrated by an unexpected factual circumstance. See Sayre, supra note 12, at 849-50. This construction of the public-interest rationale is unnecessarily narrow. Proponents of this position could reasonably argue for a subjective test that takes into consideration the actor's demonstrated potential for harm, since the protected interests of society are entitled to protection from a substantial potential threat as well as from the infliction of actual harm.

29 See United States v. Woodard, 17 C.M.R. 813, 832 (B.R. 1954) (defendant guilty of attempted abortion although the patient was not actually pregnant, because of "public's right to protect the female's person, which is implicit within the basic proscription against abortion, and morals"); People v. Jones, 46 Mich. 441, 442, 9 N.W. 486, 487 (1881) (rejection of factual impossibility rule necessary for protection of individual and public safety); G. Fletcher, supra note 12, § 3.3.2, at 141 (the social interest is injured when defendant's actions cause anyone to fear harm). For a detailed discussion of Fletcher's theory of impossibility, see infra note 132.

30 Clark v. State, 86 Tenn. 511, 8 S.W. 145 (1888).
31 Id. at 518, 8 S.W. at 147; see also United States v. Woodard, 17 C.M.R. 813, 832 (B.R. 1954); State v. Beal, 37 Ohio St. 108, 111 (1881) (public security was as much disturbed by the act committed as it would have been if the money had been actually found); Dutile & Moore, Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners, 74 Nw. U.L. Rev. 166, 184 (1979) (advocating punishment of an impotent rapist because he violated an interest protected by statute).
33 Id. at 982.
34 Id. at 977.
Vicrion would be premised on the violation of the individual's right to be free from contact with foreign substances. On the other hand, if the defendant had actually placed arsenic in the coffee, but the victim fortuitously did not drink the coffee, Strahorn would not convict the defendant, because the victim's interest in having his food free from poison is an insufficient basis on which to premise liability.

Strahorn concedes that the unconsumed-poison scenario is analogous to a case of a poorly aimed bullet; yet he would convict the actor who fired a gun but missed his victim. He explains this result by suggesting that the degree of alarm that is created by a bullet that "whizzes by one's head" is significantly greater than the alarm that results from discovering arsenic in one's food. Besides being empirically problematic—how close must the bullet pass for it to cause a sufficient degree of alarm?—Strahorn's focus on the individual's reaction does not adequately consider each actor's relative dangerousness. In fact, the actor who mixed arsenic in his victim's coffee may have shown himself to be more dangerous than the actor who merely put sugar—although believing that it was arsenic—in his victim's coffee, if only because he has effectively performed every act that was necessary to carry out his criminal intent.

Professor Weigend rejects the individual-protected-interest approach in favor of an approach that considers whether the defendant's acts caused public alarm. Weigend finds the individual-protected-interest rationale, which he terms the "objective-harm theory," inadequate because it would require acquittals in cases such as shooting into an empty bed. He asserts that in these cases there is no real threat to an individual and

35 Id.
36 Id. at 985.
37 Id. at 985–86.
38 See also Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897) (need not allege consumption of poison for attempted murder conviction) (Holmes, J.); Weigend, supra note 8, at 258–59 & n.145 (criticizing Strahorn's approach). Compare State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888) (defendant guilty of attempted murder for mixing what he believed to be poison in food consumed by victim) with State v. Clarissa, 11 Ala. 57 (1847) (defendant not guilty of attempted murder for mixing what he erroneously believed to be poison in food consumed by victim).
39 See id. at 258–59. Weigend cites Strahorn as a proponent of the individual-protected-interest or objective-harm approach. See id. at 258 nn.140–41.
40 See id. at 258. Professor Strahorn, however, believed that an individual who shot into an empty bed could be convicted of attempted murder based on his violation of an individual's right to have his habitation free from violence. See Strahorn, supra note 32, at 982.
thus, under the objective-harm theory, there could be no conviction.\footnote{See Weigend, \textit{supra} note 8, at 258.}

Weigend also criticizes the dangerousness rationale as a basis for punishing defendants in impossibility situations. First, he notes that, if the dangerousness rationale is taken to its logical conclusion, those who perform inherently impossible acts, such as attempting to kill by voodoo,\footnote{See \textit{supra} note 12 and \textit{infra} notes 243 & 313 (discussing inherent impossibility).} would have to be punished.\footnote{See Weigend, \textit{supra} note 8, at 260–61.} This conclusion, however, is an overstatement of the dangerousness rationale. In such cases, proponents of the dangerousness rationale would not punish the actor, because such absurd acts demonstrate the actor’s harmlessness.\footnote{Weigend acknowledges that advocates of the dangerousness rationale would reply that practitioners of voodoo, for example, pose no danger to society. \textit{See id.} at 261 n.159 (citing S. KADISH \& M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 366–67 (3d ed. 1975); W. LaFAVE \& A. SCOTT, HANDBOOK ON CRIMINAL LAW § 60, at 445–46 (1972)).}

Weigend also asserts that the dangerousness rationale is based on the belief that society can predict who is likely to commit a crime and then, once these individuals are placed under the state’s control, rehabilitate them.\footnote{See Weigend, \textit{supra} note 8, at 260–61.} He rejects the dangerousness rationale based on the documented failure of society either to predict who is likely to commit a future crime or to rehabilitate individuals who are likely to commit crimes.\footnote{See \textit{id.} at 264.}

Despite society’s inability to rehabilitate dangerous individuals, Weigend believes that individuals who have clearly manifested dangerous propensities should be convicted of attempt crimes.\footnote{\textit{Id.}} He would premise these convictions on the violation of a societal interest or, in his words, the violation of “an intangible good—the public peace.”\footnote{\textit{See \textit{id.} at 261–62.}} Under this approach, if a defendant’s acts would cause an observer of those acts to fear that a crime was in the making, the public peace would be violated and an attempt conviction would be warranted.\footnote{\textit{Id.} at 264.}

Weigend’s public-interest approach is broader than Strahorn’s individual-protected-interest approach because, under the former, culpability is not contingent on the response of a particular individual to the defendant’s acts. Under the public-interest
approach, an actor who shoots at a tree stump believing that it is his rival may be convicted based on society's general interest in punishing those who disturb the public peace, regardless of the act's effect on a particular individual.\textsuperscript{51}

The public-interest approach should be distinguished from the dangerousness rationale that focuses on society's general interest in segregating those who have shown themselves to be likely to violate the law.\textsuperscript{52} Under the dangerousness rationale, courts and commentators have emphasized the potential danger that these actors pose to society.\textsuperscript{53} Having failed to commit a substantive crime merely because of a fortuitous circumstance, it is reasonable to believe that the actor will try again.\textsuperscript{54} On the other hand, proponents of the protected-interest rationale suggest that the acts that were committed did result in a judicially cognizable harm to society.\textsuperscript{55} Although the acts that were completed were insufficient for conviction on the substantive crime, the interests of a particular individual and of society in general were violated.

In conclusion, courts and commentators agree that factual impossibility is not a good defense. Although the underlying rationales differ, it is widely recognized that an attempt that fails because of a mistake regarding factual circumstances is not qualitatively different from other attempts.

\section*{B. Legal Impossibility}

Courts state that legal impossibility occurs when the acts intended\textsuperscript{56} by the defendant, even if they had been com-
completed, would not have resulted in a crime. This broad definition describes two analytically distinct situations. First, the definition applies when the law does not proscribe the goal that the defendant sought to achieve. This situation will be termed "pure legal impossibility." Second, the definition applies to more difficult situations in which the defendant's goal is proscribed, but, due to a mistake regarding legal status, the sub-

His failure to achieve his goal does not alter his intent to achieve that goal. See S. Kadish & M. Paulsen, supra note 45, at 365.

In United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), the court adopted Professor Keedy's distinction between intent, on the one hand, and motive, desire, and expectation, on the other hand. Id. at 188 n.35; Keedy, Criminal Attempts at Common Law, 102 U. Pa. L. Rev. 464, 467 (1954). In Keedy's terms, intent is defined with reference to what the actor actually achieved. If a man shoots at a tree stump, for example, mistakenly believing that it is his enemy, although his motive, desire, and expectation may be to shoot his enemy, his "intent" is to shoot the stump. Id. at 467.

Keedy's definition of intent has been criticized because it imputes no intent even where the defendant believed that he was committing a crime. See Criminal Law and Its Processes, supra note 2, at 604-05; Dutile & Moore, supra note 31, at 184; Williams, supra note 12, at 49 (describing the reduction of intent from purpose to motive as a "trick with words"); see also infra note 120 (discussing weakness of Keedy's distinction).

The characterization of legal impossibility cases as instances in which the defendant completed his intended acts yet failed to consummate the desired crime has apparently been perpetuated in section 5.01(1)(a) of the Model Penal Code. See infra notes 245-50 and accompanying text (discussing § 5.01(1)(a) of the Model Penal Code).

See, e.g., United States v. Berrigan, 482 F.2d 171, 188 (3d Cir. 1973) ("Legal impossibility ... occur[s] where the intended acts, even if completed, would not amount to a crime."); State v. Guffey, 262 S.W.2d 152, 156 (Mo. App. 1953) ("[N]either can one be convicted of an attempt to commit a crime unless he could have been convicted if his attempt had been successful; thus, where the act, if accomplished, would not constitute the crime intended, as a matter of law, then there is no indictable attempt.") (quoting 22 C.J.S. Criminal Law § 74 (1936)); People v. Jaffe, 185 N.Y. 497, 501, 78 N.E. 169, 170 (1906) ("If 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.") (citing 1 J. Bishop, Commentaries on the Criminal Law § 747 (7th ed. 1892)).

Through the use of Keedy's definition of "to intend," the legal impossibility defense has been applied to a broader range of situations than might be expected. See infra notes 114-23 and accompanying text (discussing traditional objectivist approach to legal impossibility).

Commentators define legal impossibility similarly. See, e.g., E. Meehan, supra note 18, at 152 ("[L]egal impossibility occurs when the defendant has done all that he intended to do which nevertheless did not amount to a crime."); Elkind, supra note 12, at 21 ("attemptor's intended act, if completed, would not be a crime"); Hughes, supra note 8, at 1006 ("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").

The problem with most definitions is their application, rather than their wording. In the impossibility area, the same definitions have been used to describe wholly distinct situations. See infra notes 90-95 and accompanying text (discussing traditional judicial definition of mixed fact/law impossibility).

These terms were first used by Professors Dutile & Moore, supra note 31, at 181-84.

See, e.g., infra note 99 and accompanying text (discussing definition of legal status and giving examples).
stantive crime is not committed. This category of attempts will be designated "mixed fact/law impossibility."\(^6\)

1. Pure Legal Impossibility

The most obvious situation in which impossibility will bar an attempt conviction occurs when a pre-existing statute does not proscribe the result that the defendant expected, desired, and intended to achieve. For example, a defendant who attempts to sell liquor in a jurisdiction that permits the sale of liquor, believing that the sale of liquor is illegal, could not be convicted of an attempt crime.\(^6\) This attempt would be an instance of pure legal impossibility. Unlike instances of factual or mixed fact/law impossibility, the legislature has not proscribed the end that the defendant sought to achieve.

Predictably, very few pure legal impossibility cases have been litigated. One clear example is *Wilson v. State*,\(^6\) in which the defendant attempted to commit forgery by altering the numbers on a check.\(^6\) He did not, however, attempt to alter the words on the check that referred to the amount of payment.\(^6\) The Supreme Court of Mississippi reversed the defendant's conviction "because [the amount written in numbers] was an immaterial part of the paper, and because it could not possibly have injured anybody."\(^6\) The applicable forgery statute "confine[d] the crime of forgery to instances where any person may be affected, bound, or in any way injured in his person or property."\(^6\) Although not mistaken about the existence of a law

\(^6\) See Dutile & Moore, supra note 31, at 184; infra notes 90-108 and accompanying text (discussing mixed fact/law impossibility).

\(^6\) See also Commonwealth v. Henley, 504 Pa. 408, 416, 474 A.2d 1115, 1119 (1984) ("[A]n intent to commit an act which is not characterized as a crime by the laws of the subject jurisdiction can not be the basis of a criminal charge . . . ."); State v. Davidson, 20 Wash. App. 893, 898, 584 P.2d 401, 404 (1978) (defendant not guilty for intending to do an act that he mistakenly believed was criminal); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 595 (2d ed. 1960) (actor's intent to throw Kansas steak in garbage not punishable even if he believed that the act was illegal); Elkind, supra note 12, at 26 (man who mistakenly believed that dancing on Sunday was illegal should not be subject to punishment).

\(^6\) 85 Miss. 687, 38 So. 46 (1905); see also Rex v. Percy Dalton, Ltd., 33 Crim. App. 102, 110 (1944) ("steps on the way to the doing of something which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime").

\(^6\) The defendant in *Wilson* had inserted the numeral "1" before the figure "2.50" in an attempt to increase the check's value by $10. *Wilson*, 85 Miss. at 690, 38 So. at 47.

\(^6\) See *id.* at 691, 38 So. at 47.

\(^6\) Id. at 690, 38 So. at 47.

\(^6\) Id. at 691, 38 So. at 47; cf. supra notes 29-55 and accompanying text (discussing protected-interest approaches to disallowing a factual impossibility defense).
against forgery, the defendant was mistaken about the scope of that law and its application. While this is not the typical case in which a defendant is entirely mistaken with respect to the existence of a law, it nevertheless falls within the category of pure legal impossibility. Thus, unlike the defendant in factual or mixed fact/law impossibility cases, the defendant in Wilson misunderstood how the law related to his conduct.

People v. Teal is also commonly considered to be an instance of pure legal impossibility. In Teal, the defendant had hired an individual to offer false testimony at a divorce trial. The testimony was immaterial, however, because it referred to an incident that was not described in the complaint. Although the court explicitly recognized the defendant's moral guilt, it held that she could not be convicted of attempted subornation of perjury. The court offered several explanations for what it acknowledged was a highly technical interpretation of the statute. Most importantly, the court stated that the defendant, although not guilty of attempting to suborn perjury, was guilty of attempting to falsify evidence, a separate but less serious offense. The court did not find it necessary to adopt a more liberal reading of the statute because the defendant could have been convicted under existing law if she had been properly charged.

Commentators disagree whether Teal represents a case of pure legal impossibility or one of mixed fact/law impossibility.

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68 See Dutile & Moore, supra note 31, at 182–83; Weigend, supra note 8, at 235–36.
69 Professors LaFave and Scott distinguish Wilson from People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906) (defendant could not be convicted of attempted larceny when the goods that he attempted to steal were not in fact stolen) as follows:

In Wilson the defendant may have thought he was committing a crime, but if he did it was not because he intended to do something that the criminal law prohibited but rather because he was ignorant of the material alteration requirement of the crime of forgery. In Jaffe, on the other hand, what the defendant intended to do was a crime, and if the facts had been as the defendant believed them to be he would have been guilty of the completed crime.

W. LAFAVE & A. SCOTT, supra note 45, § 60, at 443. Jaffe is discussed further infra at notes 121–23, 125–26, 133–39, 200–08, 222–24 and accompanying text.
71 Id. at 376, 89 N.E. at 1087.
72 Id. at 377-78, 89 N.E. at 1088.
73 See id. at 379, 89 N.E. at 1088–89. The court in Teal also asserted that it must “read the statute as it finds it” and that, if the legislature determined that mere belief in the materiality of testimony was sufficient, it should amend the statute. Id. at 378, 89 N.E. at 1088.
74 Id. at 380, 89 N.E. at 1089.
75 See infra notes 90–108 and accompanying text (discussing mixed fact/law impossibility).
Professors Dutile and Moore, for example, suggest that Teal presents an instance of pure legal impossibility because the "transaction the defendant intended and completed was not against the criminal law. Any mistake he [sic] made was as to the statute he [sic] allegedly violated." Professor Hughes also contends that Teal presents an instance of pure legal impossibility. He argues that, just as the defendant in Wilson misunderstood the scope of the forgery statute, the defendant in Teal misunderstood the scope of materiality under the perjury statute.

Professor Williams, however, argues that the defendant in Teal should have been convicted because it is unlikely that she was familiar with the concept of materiality. Instead, Williams contends that the defendant intended to offer testimony that would influence the court. Although Teal probably believed that the testimony offered was material, this approach places too much emphasis on what we suspect the defendant believed, rather than on what we can prove the defendant believed.

The reasons for barring conviction in cases of pure legal impossibility are well documented. Most importantly, the principle of legality forbids conviction. Legality requires the government to define illegal acts clearly before it imposes punishment. Without this rule, individuals would be unable to plan their conduct so as to avoid penalty. This rule also limits the

76 Dutile & Moore, supra note 31, at 183 n.59; see also Model Penal Code and Commentaries § 5.01, at 318 (Proposed Official Draft and Revised Comments 1985) [Revised Comments hereinafter cited as Revised Commentary]. The original official draft of the Modern Penal Code was proposed in 1962. Except for minor grammatical revisions, the 1985 version of the Code is the same. Subsequent references in this Article are to the 1985 publication.

77 See Hughes, supra note 8, at 1023.

78 See G. Williams, supra note 12, § 205; see also Revised Commentary, supra note 76, § 5.01, at 318 n.92.

79 Professor Mueller identified the three essential components of the legality principle: 1. Nullum crimen sine lege: there must be a valid criminal law completely covering the conduct of the defendant; 2. Nullum crimen sine poena: conduct cannot amount to a crime unless a punishment is provided; 3. Nulla poena sine lege: the act must be proscribed prior to its performance. Mueller, Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence, 34 Ind. L.J. 206, 217–18 (1959); see also J. P. Robinson, supra note 12, § 85(d); G. Williams, supra note 12, § 184. For the purposes of impossibility, the component requiring that proscribed acts be defined in advance is most relevant.

80 See, e.g., Commonwealth v. Henley, 504 Pa. 408, 417, 474 A.2d 1115, 1120 (1984) (Nix, C.J., concurring) (cannot use the law of attempt to punish "a willingness to break the law" absent a criminal act); see also G. Williams, supra note 12, § 184, at 575; Mueller, supra note 79, at 218.
discretion of law-enforcement officials. Our ordered system of law could not tolerate the unpredictability resulting from punishing acts that are legal when they are performed but are later deemed to be undesirable.

Closely related to the principle of legality is the maxim that guilt may not be premised on evil thoughts alone. To punish an individual merely because he thought that what he was doing was illegal would violate the requirement that the defendant perform a proscribed act. Professors Kadish, Schulhofer, and Paulsen, however, argue that there is no lack of an actus reus in pure legal impossibility cases. Instead, they note that the defendant may have performed every act that he wished to perform to attain his goal. From this perspective, the actor has progressed beyond the realm of fantasy or contemplation and performed acts that he believes violate the criminal law. Acquittal, therefore, must turn on considerations other than the lack of an actus reus.

81 See Enker, Impossibility in Criminal Attempts—Legality and the Legal Process, 53 MINN. L. REV. 665, 670 (1969). Professor Enker believes that the legality principle limits the jury's power to speculate on the defendant's intent by fixing objective requirements that must be fulfilled before the state can impose punishment. These requirements also guard against punishment that is based on the biases of law-enforcement officials. Id. at 670; see also Henley, 304 Pa. at 417-18, 474 A.2d at 1120 (Nix, C.J., concurring); Elkind, supra note 12, at 25 (legality prevents state from being "a perpetrator of arbitrary violence").

82 See, e.g., Booth v. State, 398 P.2d 863, 872 (Okl. Crim. App. 1964) (defendant held not guilty of attempting to receive stolen property even though he fully intended to do so, because the property had been intercepted by the police).

83 See supra note 79 (listing elements of legality).

84 See CRIMINAL LAW AND ITS PROCESSES, supra note 2, at 605.

85 See id.

86 See id. General statutes have been drafted that allow convictions for acts that were not proscribed when they were performed. Nazi Germany, for example, enacted a law in 1935 that allowed for punishment of an act that "according to the fundamental idea of penal law and sound popular feeling" deserved punishment. See G. WILLIAMS, supra note 12, § 184, at 577. A similar Soviet statute was repealed in 1958. Id. at 577 nn.6-7. Denmark also had such a statute as of 1961. This statute punished acts that were proscribed by statute and those "of a similar nature." DANISH COMMITTEE ON COMPARATIVE LAW, DANISH AND NORWEGIAN LAW 210 (1963) (citing THE DANISH CRIMINAL CODE § 1 (1930)); Mueller, supra note 79, at 227-28. Mueller noted that this statute has seldom been invoked. Id. For a detailed discussion of these statutes, see G. WILLIAMS, supra note 12, § 184; see also United States v. Berrigan, 482 F.2d 171, 189 n.39 (3d Cir. 1973).

87 Professors Kadish, Schulhofer, and Paulsen's Mr. Fact and Mr. Law hypothetical demonstrates the equivalence of the dangerousness that is manifested by actors in factual and pure legal impossibility scenarios. In this hypothetical, hunting has been forbidden except between October 1 and November 30. Mr. Fact and Mr. Law both kill a deer on October 15. Mr. Fact claims that he believed that the date was September 15. Mr. Law, on the other hand, knew the correct date, but believed that the hunting season did not begin until November 1. The authors state: "[i]f the ultimate test is the dangerousness of the actor . . . , no distinction is warranted—Mr. Law has indicated himself
There are two explanations for not convicting defendants in pure legal impossibility cases. First, although an attempt to violate a nonexistent law may demonstrate an individual's willingness to violate the law, it may nevertheless be an insufficient manifestation of dangerousness. More importantly, the constitutional provision against ex post facto laws forbids punishment in such instances even if a court believed that the actor might try again.

2. Mixed Fact/Law Impossibility

The same definition that courts use to define pure legal impossibility has also been used to define mixed fact/law impossibility. These cases—the most problematic in the impossibility milieu—involve a factual mistake relating to a legal determination. In every case, however, a pre-existing law proscribed the actor's goal, thus distinguishing this category from pure legal impossibility.

The impossibility defense to mixed fact/law situations has been accepted most commonly in two situations: (1) when the actor attempts to receive stolen property, but, unbeknownst to him, the property has lost its character as stolen; and (2) when to be no less 'dangerous' than Mr. Fact." Criminal Law and Its Processes, supra note 2, at 609. But, as they note later, considerations other than dangerousness are involved in the ultimate disposition of these cases. See infra notes 88–89 and accompanying text.

Professor Robinson also notes that, from an entirely subjective point of view, pure legal impossibility should not be a defense. 1 P. Robinson, supra note 12, § 85(d), at 432. Although Robinson concludes that the legality principle ultimately bars such convictions, he suggests that legislatures may find it desirable to give courts the power "to convict actors of offenses that they (the actors) believed existed and believed they were committing." Id. at 433 (emphasis in original).

After arguing that mens rea simpliciter is an inadequate explanation for acquitting the actor in a pure legal impossibility situation (see supra text accompanying notes 84–87), Kadish, Schulhofer, and Paulsen suggest that such actors will not be convicted because the law is unwilling to predict future violations from such harmless acts. Criminal Law and Its Processes, supra note 2, at 609. They explain that the law "has not gone so far in accepting the social defense theories of the criminal positivists" as to permit convictions for imagined laws. Id. at 607.

See infra note 99 (Dutile and Moore's definition of mixed fact/law impossibility).

the actor attempts to bribe an individual whom he erroneously believes to be a juror or a government official. The defense has also been allowed when an actor: offered false testimony, believing that it was material; shot a stuffed deer, believing that it was alive; and secretly mailed letters from prison, believing that the warden was unaware of his mailings.

Mixed fact/law cases should be distinguished from factual impossibility cases. In cases of factual impossibility, the defendant’s mistake is of a purely factual nature. In People v. Lee Kong, for example, the defendant shot through a hole in a roof through which he erroneously believed a policeman was observing him. He was mistaken about the physical location of the police officer whom he intended to shoot. Similarly, when a defendant attempts to perform an abortion on a woman who is not pregnant, he is mistaken about the physical condition of the woman. In the mixed fact/law cases, however, the question is whether the property is properly classified as stolen property, or whether the individual whom the defendant attempted to bribe had the status of a juror at the time of the offer. These determinations, although factual in nature, involve a determination of legal status as well.

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92 See, e.g., Roberts v. State, 131 Ga. App. 316, 205 S.E.2d 494 (1974) (actor believed individual was state official); State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939) (actor believed individual was juror); State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903) (official lacked authority to perform act he had been bribed to do); State v. Porter, 125 Mont. 503, 242 P.2d 984 (1956) (actor believed individual was juror); Marley v. State, 58 N.J.L. 207, 33 A. 208 (1895) (actor bribed official to perform act he lacked authority to perform); cf. Nicholson v. State, 97 Ga. 672, 25 S.E. 360 (1896) (individual bribed to present false testimony but no judicial proceeding was pending).

93 People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909). Some commentators, however, believe that Teal is a case of pure legal impossibility. See supra notes 70–78 and accompanying text.

94 State v. Guffey, 262 S.W.2d 152 (Mo. Ct. App. 1953).


96 95 Cal. 666, 30 P. 800 (1892).

97 See id. at 668, 30 P. at 801.

98 See supra note 16 (citing cases involving failed abortions).

99 Professors Dutile and Moore designate this situation, and others similar to it, as instances of “mixed legal and factual impossibility.” Dutile & Moore, supra note 31, at 184. They offer the following definition: “[T]he transaction which the defendant contemplates is within the statute whose violation is under consideration, but, for reasons having a legal implication, the defendant’s conduct fails to meet the requirements of the statute.” Id. at 184 (emphasis in original). Other situations that Dutile and Moore classify as mixed legal and factual impossibility include: a man raping his wife believing she is a stranger; a convict surreptitiously sending letters from prison, believing the warden was unaware of these mailings; and Lady Eldon’s attempt to smuggle French lace into Great Britain. Id. at 170. In these cases, Dutile and Moore contend that conviction for attempt is warranted because the actor believed that he was violating an existing statute, and, having demonstrated a willingness to violate the law, is likely to attempt similar acts in the future. See id. at 185.
Courts that permit a legal impossibility defense in mixed fact/law situations do not offer convincing rationales for treating these actors differently from those in factual impossibility cases. Among the most common of the rationales offered is that an individual may not be convicted for evil thoughts alone. In Booth v. State, for example, the defendant purchased what he reasonably believed to be stolen goods. The police had the goods under surveillance, however, and thus they had lost their status as stolen goods when the defendant received them. In acquitting the defendant, the court stated that "it is fundamental to our law that a man is not punished merely because he has a criminal mind. It must be shown that he has, with that criminal mind, done an act which is forbidden by the criminal law." This mens rea simpliciter theory is flawed. The act requirement prevents the punishment of those who have not implemented their unlawful ideas. There must be clear evidence that the defendant engaged in more than fantasy. Applying this concept to Booth, it is clear that the defendant did translate his thoughts into action. In fact, just as the actor in a pure legal impossibility case did everything in his power to violate what he believed to be the law, so too the defendant in Booth performed every act that he believed was necessary to violate the law. The crucial difference, however, is that the actor in Booth hoped to achieve a result that was illegal. To claim that the actor in mixed fact/law cases has not performed a sufficient act is to extend the actus reus requirement beyond its purpose.

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102 See id. at 870–72.
103 Id. at 872.
104 See G. Williams, supra note 12, § 1. Williams identifies two fundamental purposes of the actus reus requirement: "(1) the difficulty of distinguishing between day-dream 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." Id.; see also W. LaFave & A. Scott, supra note 45, § 25, at 177–78.
105 See G. Williams, supra note 12, § 1.
106 See supra notes 82–89 and accompanying text (discussing actus reus in instances of pure legal impossibility).
107 See supra notes 62–89 and accompanying text (discussing pure legal impossibility); see also Williams, supra note 12, at 55 (in mixed fact/law cases, defendant "has shown himself prone to crime and may well do it again if he does not receive an effective warning").
If, as the Booth court stated, there can be no liability unless an unlawful act is performed, then there could never be inchoate liability, because such liability is always based on intent and on an act that need not itself be illegal.\(^\text{108}\)

II. APPROACHES TO MIXED FACT/LAW IMPOSSIBILITY

Modern courts have developed two divergent approaches in response to the conceptual difficulties that are posed by mixed fact/law impossibility. The proponents of a subjective approach with an objective check ("the hybrid approach") contend that act and intent must—at first—be viewed independently.\(^\text{109}\) Under this approach, unless the act itself evinces an intent to commit a specific crime, no liability can result.\(^\text{110}\) The pure subjectivists, on the other hand, focus exclusively on intent.\(^\text{111}\)

These contrary positions stem from different concerns. Those who advocate the hybrid approach are worried about permitting courts to infer an actor's intent from equivocal acts.\(^\text{112}\) To prevent such speculation and the use of the necessarily flexible requirements of inchoate liability to further the prejudices of law-enforcement officials, they insist that the acts alone must evoke an image of criminality before an inquiry into intent proceeds.\(^\text{113}\) Pure subjectivists, on the other hand, believe that failure to restrain individuals who have shown themselves to be willing to violate the law poses a greater danger to society than does granting officials discretion to infer intent from facially neutral acts. They would therefore permit courts to make de-

\[^{108}\text{See J. Hall, supra note 62, at 594–99. Professor Hall suggests that, in impossibility cases, once the requisite intent is shown, the only remaining question should be whether the act that was performed progressed beyond mere preparation.}\]

\[^{109}\text{See, e.g., Enker, supra note 81, at 687–88; Hughes, supra note 8, at 1024–27.}\]

\[^{110}\text{See infra notes 124–92 and accompanying text (discussing hybrid approach to impossibility).}\]

\[^{111}\text{See infra notes 193–220 and accompanying text (discussing subjective approach to impossibility).}\]

\[^{112}\text{See infra notes 127–39, 148–49 and accompanying text (discussing Hughes's hybrid approach to impossibility).}\]

\[^{113}\text{See infra notes 150–56 and accompanying text (discussing Kadish, Schulhofer, and Paulsen's approach to impossibility).}\]
terminations of intent even when the acts performed appear to be innocent.

A. Evolution of the Hybrid Approach

1. Traditional Objective Analysis

Although the hybrid approach bears similarity to the traditional objective approach, it is important to distinguish between the two. The hybrid approach addresses many of the same concerns as the traditional objective approach, but without reliance on artificial definitions of intent and motive.

The formula that objectivists traditionally invoke for not convicting actors in mixed fact/law situations consists of the following truism, or a variation on it: "an unsuccessful attempt to do that which is not a crime cannot be held to be an attempt to commit the crime specified."114 By its terms, this statement applies only to instances of pure legal impossibility, but courts have used this approach to bar convictions of actors in mixed fact/law cases by defining what the actor attempted in objective terms.115

Professor Keedy provides one of the earliest and clearest statements of this approach.116 He distinguishes between intent, on the one hand, and motive, expectation, or desire, on the other.117 Intent—the only legally relevant state of mind—is determined solely from acts that the individual actually performed, without reference to what the actor believed or expected to do;118 it is inferred from the consequence that the actor actually


115 See, e.g., United States v. Berrigan, 482 F.2d 171, 185–89 (3d Cir. 1973) (defendant not guilty of attempting to send letters out of prison without consent of warden when the warden was in fact aware of the letters); United States v. Hair, 356 F. Supp. 339, 342 (D.D.C. 1973) (defendant not guilty of attempting to receive stolen property when the property was in fact not stolen); see also State v. Lopez, 100 N.M. 291, 296, 669 P.2d 1086, 1091 (1983) (Sosa, J., dissenting) (adopting in full lower court opinion that defendant was not guilty for attempting to traffic in a controlled substance when the substance he sold was not in fact controlled).

116 See Keedy, supra note 56.


118 See Keedy, supra note 56, at 466–68.
achieved, rather than by reference to his desired goal. For example, if an individual takes his own umbrella from a stand erroneously believing it to be the property of another, he has "intended," in a legal sense, to take his own umbrella.

Perhaps the most renowned example of the objective approach involved an unsuccessful attempt to receive stolen goods. In People v. Jaffe, the defendant believed that he was receiving stolen goods. The police had recovered the goods, however, and thus the goods had lost their status as stolen. The New York Court of Appeals apparently held that the defendant could not be convicted of attempting to receive stolen goods because he lacked the necessary intent. It was clear that the defendant received the goods with the expectation that they were stolen. Only by inferring intent directly from the actual result of the action could the court contend that intent to receive stolen goods did not exist.

119 Id. at 467 (citing Turner, Attempts to Commit Crimes, 5 CAMBRIDGE L.J. 230 (1934)). Professors Kadish, Schulhofer, and Paulsen reject Keedy's definition of attempt and make an effort to demonstrate its weakness through the following dialogue:

Keedy would reach a conclusion [regarding intent from] the premise that what a person intends to do is what he actually does, even if that was the furthest thing from the person's mind:

"You're eating my salad."

"Sorry, I didn't mean to; I thought it was mine."

"You might have thought it was yours. But in fact it was mine. Therefore you intended to eat mine. You should be ashamed!"

120 See id. at 502, 78 N.E. at 170; see also Keedy, supra note 56, at 476 n.85 (discussing People v. Jaffe). It is difficult to isolate precisely the rationale the Jaffe court employed. One possible interpretation is that the court found that the defendant lacked the requisite intent. This interpretation of the case is based on the court's reliance on the following statement from Bishop: "If all which the accused person intended, would, had it been done, constitute no substantive crime, it cannot be a crime under the name attempt, to do, with the same purpose, a part of this thing." 1 J. Bishop, supra note 58, § 747. An alternative interpretation of the case is possible. The statute under which the defendant was charged required knowledge that the goods purchased were stolen. Because the goods were not in fact stolen, the defendant could never fulfill that particular element of the crime. See E. Meehan, supra note 18, at 184–85. Under this interpretation, rather than accuse the court of having adopted a strained and artificial definition of the term "intent," the case can be said to have turned on no more than a strict interpretation of a particular statute. See id. at 147–51. Indeed, the court stated that the prosecution could prove the first two elements of the crime—the act and the intent. It was the third element, knowledge of an existing condition, that could not be shown. See 185 N.Y. at 501, 78 N.E. at 170.
2. The Subjective Approach with an Objective Check—
The Hybrid Approach

Recently, several courts and commentators have adopted an approach that requires that the defendant's acts corroborate other evidence of the intent that is necessary to prove the substantive crime. Under this approach, the actor's intent is not inferred solely from his acts—a subjective inquiry into his actual intent ensues only if his acts, viewed independently, appear to be suspicious.

This approach represents a compromise between traditional objective analysis and a purely subjective approach. By requir-

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124 This approach has received support from Hughes, infra notes 127-39, 142, 148-49 and accompanying text; from Kadish, Schuhlhofer, and Paulsen, infra notes 150-56 and accompanying text; from Fletcher, infra note 132; and from Weigend, infra notes 157-63 and accompanying text.


The hybrid approach has also been codified in six states: COLO. REV. STAT. § 18-2-101(1) (1973); ME. REV. STAT. ANN. tit. 17-A, § 152(1) (1983); MO. ANN. STAT. § 564.01(1) (Vernon 1979); N.H. REV. STAT. ANN. § 629:1 (1974); N.D. CENT. CODE § 12-1-06-01 (1985); UT. CODE ANN. § 76-4-101 (1978). Under each of these statutes, the actor's conduct is subject to a substantial-step analysis that requires that the actor's conduct be strongly corroborative of his intent to commit the substantive crime. The actor's conduct, in all attempt situations, is subject to this substantial-step/strongly-corroborative analysis to determine if it constituted a criminal attempt. Eight additional states require that the actor's conduct constitute a substantial step toward the commission of the substantive offense for a criminal attempt to exist, but they do not define substantial step: ALASKA STAT. § 11.31.100 (1983); GA. CODE ANN. § 16-4-1 (1984); ILL. REV. STAT. ch. 38, § 8-4 (1983); IND. CODE § 35-41-5-1 (1981); MINN. STAT. § 609.17 (1982); OH. REV. STAT. § 161.405 (1985); 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983); WASH. REV. CODE. § 9A.28.020 (1983). The Revised Commentary to the Model Penal Code groups Puerto Rico and Wisconsin with those states that have adopted the hybrid approach, but notes that these jurisdictions go substantially beyond the hybrid approach. Wisconsin requires that the defendant's conduct "demonstrate unequivocally, under all the circumstances, that he formed that intent. . . ." WIS. STAT. § 939.32(3) (1983-84). Similarly, Puerto Rico requires that the defendant's conduct demonstrate "unequivocally" the necessary intent. P.R. LAWS ANN. tit. 33, § 3121 (1983). Delaware and Kentucky have also adopted a more stringent actus reus requirement than that advocated in this Article. See DEL. CODE ANN. tit. 11, §§ 531, 532 (1979); KY. REV. STAT. § 506.010 (1985).
ing that the defendant’s acts, viewed objectively, corroborate the requisite intent, this approach ensures that entirely neutral acts will not be punished. This approach also acknowledges that the defendant’s dangerousness is best determined by reference to what he believed he was doing, regardless of what he actually did.

The hybrid approach is not as strict as the traditional objective approach. Under the latter, a defendant in the *Jaffe* scenario could never be convicted because he could not have “intended” to receive stolen goods. Under the hybrid approach, by contrast, a *Jaffe* defendant could be convicted if his acts appeared sufficiently suspicious to corroborate other evidence of his intent.\(^\text{125}\) The fundamental difference between the two approaches is that under the traditional approach no attempt is made to discover the defendant’s true intent, while under the hybrid approach the defendant’s conduct is evaluated in terms of the circumstances that he believed existed. Requiring that the acts corroborate the intent prevents conviction for neutral acts. Once this requirement is met, the defendant can be convicted for attempt if the substantive crime would have been committed had the attendant circumstances been as he believed them to be.\(^\text{126}\)

Perhaps the most forceful advocate of the hybrid approach is Professor Hughes.\(^\text{127}\) Hughes is primarily concerned about the possibility that courts will convict individuals for attempt without adequate proof of intent.\(^\text{128}\) To prevent such convictions,

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\(^{122}\) See *infra* notes 136–39 and accompanying text (discussing Hughes’s treatment of *Jaffe*); *infra* note 240 (discussing the Texas solution to *Jaffe*-type situations).

\(^{126}\) See *infra* notes 148–49 and accompanying text (discussing Hughes’s treatment of pure legal impossibility).

\(^{127}\) See Hughes, *supra* note 8.

\(^{128}\) See id. at 1023. Other commentators have expressed concern over the legality of attempt convictions that are based on wholly innocent acts. See Elkind, *supra* note 12, at 23; Enker, *supra* note 81, at 670–73. Professor Enker would go further than Professor Hughes, and would bar attempt convictions whenever the objective elements of the statute involved were not fulfilled. For example, even if *Jaffe’s* conduct clearly demonstrated the intent to receive stolen goods, Professor Enker would not permit conviction because the statute requires knowledge that the goods are stolen. If the goods are not stolen, this element can never be fulfilled. Enker argues that these objective elements are necessary to control the discretion of law-enforcement officials and prevent speculation regarding the actor’s intent. Rather than adopt a sufficiency-of-the-evidence approach to mens rea, as Hughes does, Enker would prohibit courts from testing mens rea until the objective elements of the offense are satisfied. Id. at 683–87. Enker adds that the legislature is, of course, free to amend particular statutes so that a belief in the existence of only certain elements is necessary. Id. at 687. Several provisions of the Model Penal Code incorporate Enker’s suggestion by making belief an alternative to knowledge. See Model Penal Code § 223.6 (Proposed Official Draft 1985) (requiring belief that goods received were stolen); id. § 241.6 (requiring belief that proceedings were official for charge of tampering).
Hughes would establish a threshold requirement: the acts that are performed, when viewed from the perspective of an objective third party having no prior knowledge of the actor's intent, must demonstrate an intent to commit a known crime. Until a sufficient connection between the act and a crime is shown, there can be no inquiry into the actor's intent. Simply stated, the acts that are performed must parallel a model of success for the actus reus of the intended crime.

See infra text accompanying notes 140-42 (discussing information that will be made available to a neutral observer).

See Hughes, supra note 8, at 1024; see also infra notes 150-56 and accompanying text (discussing approach of Kadish, Schulhofer, and Paulsen to impossibility).

See Hughes, supra note 8, at 1024; see also HAWAII REV. STAT. § 705-500 commentary at 285 (1976) (requiring defendant's conduct to corroborate strongly the requisite intent, "so that law enforcement agencies and triers of fact will not put equivocal conduct within [the crime's] ambit"). Professor Hughes disputes Glanville Williams's contention that the actus reus must be viewed in terms of the intent with which the act was committed. Williams posed the example of a surgeon whose patient dies as a result of the surgeon's actions in the operating room. These acts, although innocent, could constitute the actus reus of a murder conviction had the surgeon performed them intentionally. Hughes accepts this formulation with respect to substantive crimes, but rejects its extension to inchoate crimes only because the act itself raises a reasonable question about the intent with which the individual performed an act. In attempt cases, however, Hughes would require some overt connection between the act and the crime. For example, the act of putting sugar in someone's coffee while believing that the sugar was arsenic is not sufficiently connected to the crime of attempted murder to justify an inquiry into the intent with which the act was committed. Id. at 1024-26.

The examples that Hughes cites belie the soundness of his assumptions. For some substantive offenses, the act (for example, surgery that results in a patient's death) may occur with sufficient frequency that an inquiry into the actor's intent is unjustified. If Hughes is concerned with unwarranted speculations about an actor's intent, then he may find it necessary to apply his threshold test to substantive as well as inchoate liability.

Professor Fletcher also adopts an objective approach, but does not premise it on the need to control prosecutorial discretion. See G. Fletcher, supra note 12, §§ 3.3.2-3.3.8. His explanation is far more basic, suggesting that the goal of attempt liability is to punish those whose actions create a degree of apprehension in the community. See id. § 3.3.2, at 141-42; see also supra notes 49-55 and accompanying text (discussing public-interest approach as a rationale for convictions in factual impossibility situations). Once this apprehension is felt, a social interest has been injured and punishment is warranted. See G. Fletcher, supra note 12, § 3.3.2, at 141-42 & n.28 (citing The King v. Barker, [1924] N.Z.L.R. 865, 872 (N.Z. Ct. App.)); see also J. Salmon, Jurisprudence § 137, at 404 (7th ed. 1924). For an act to be punishable, therefore, it "must bespeak criminality," because only such an act can create public apprehension. G. Fletcher, supra note 12, § 3.3.2, at 143. This test of manifest criminality is the same as the one that Hughes advocates, although it is based on a different set of concerns. See supra notes 127-31 and accompanying text (describing Hughes's test).

Fletcher suggests two tests that can be used to determine which types of impossible attempts should result in convictions. First, an act must be "aptly related to the actor's objective." G. Fletcher, supra note 12, § 3.3.3, at 149. To be "apt," an act must signal the threat of impending danger to the community. Therefore, although shooting a tree stump believing that it is a man is not punishable, shooting into an empty bed constitutes behavior that will cause sufficient alarm in the community to warrant punishment. See id. Fletcher acknowledges that his objective-aptness approach begins to break down...
The hybrid approach, as stated by Hughes, would lead to acquittals in situations in which subjectivists believe conviction is appropriate. In Jaffe, for example, the court acquitted a defendant who had been accused of receiving stolen goods because the goods had lost their status as stolen before the defendant obtained them. Hughes agrees with this outcome: because the acts that the defendant performed consisted of nothing more than receiving non-stolen goods, the insufficient nexus between the acts that had actually been performed and the

when we move from the simple factual impossibility scenarios to the more subtle questions that are presented in the mixed fact/law category. See id. § 3.3.3, at 153. In the Jaffe situation, for example, an aptness approach could require conviction if the goods that the defendant received appeared to have been stolen. See id. at 154–56. Fletcher does not believe convictions in such cases are appropriate, however. He contends that the simple receipt of stolen goods is not a "harm." Id. at 155. Rather, the act was made criminal only to discourage thievery. Id. Unlike murder or theft, receiving stolen goods is not manifestly criminal and must be analyzed under a different test.

Fletcher’s second test for distinguishing between exculpatory and inculpatory mistakes is a “rational motivation” test. It would apply to those offenses that do not endanger society’s “core interests” in preventing rape, murder, or thievery. Id. § 3.3.4, at 160–63. Under this approach, only mistakes that alter an individual’s behavior provide a successful defense. Jaffe, for example, would not be guilty of attempting to receive stolen goods because he would probably have purchased the goods even if he had known that they were not stolen. Id. Fletcher acknowledges that the rational-motivation test will be difficult to apply if the actor had an unusual incentive. Some men, for example, may want to have sexual intercourse only with women below the age of consent. To ensure that such men are not acquitted on the basis of the rational-motivation theory, Fletcher suggests that courts permit the defense only if the mistake would have affected the motivation of a reasonable man. See id. at 164.

Professor Fletcher concedes that the rational-motivation theory is subjective in nature. Id. at 163. He contends, however, that it is preferable to the subjective approach because his subjective inquiry concerns motivation rather than intent. Id. at 163–64. Intent, therefore, remains a distinct inquiry.

The major remaining difficulty with Fletcher's rational-motivation test is determining when it applies. He would continue to apply the aptness test to attempts to violate core interests that are protected by the law. This distinction is crucial, because the results that are reached under an aptness test differ from those that are reached under a rational-motivation test. The mistaken shooter of tree stumps, for example, would be acquitted under an aptness test because the means used were not reasonably related to his desired end. Under a rational-motivation test, however, he would be convicted because it is unlikely that he would shoot at the stump once he knew it was a stump. Id. at 165.

Fletcher would also apply the rational-motivation test in conjunction with the aptness test to instances of pure legal impossibility. Because it is unlikely that an actor would change his course of conduct once he was told that his acts were legal, such actors would be acquitted. See id. at 165–66.

Although Fletcher’s model produces results that are in accord with the decisions of many courts, it suffers from two basic flaws: first, it is difficult to determine when each test should be applied; and second, once it is determined that the rational-motivation test rather than the aptness test should apply, the subjective regression feared by Fletcher appears, if only under another name. Id. at 159.

133 See infra notes 200–03 and accompanying text (discussing subjectivists' treatment of Jaffe).

134 People v. Jaffe, 185 N.Y. 497, 501–02, 78 N.E. 169, 170 (1906); see also supra notes 121–23 and accompanying text (discussing Jaffe).
model actus reus for receiving stolen goods prohibits further inquiry into the defendant’s intent.\textsuperscript{135}

Hughes recognizes, however, the desirability of convicting actors such as Jaffe.\textsuperscript{136} Rather than concede that convictions would never be proper in Jaffe-type situations, Hughes advocates a more flexible test in which courts must examine the totality of the circumstances.\textsuperscript{137} If the surrounding circumstances (for example, the purchase of the goods at an excessively low price from a known fence) suggest that the actor is involved in criminal activity, Hughes would consider the threshold actus reus test satisfied.\textsuperscript{138} But he would not permit evidence of “confessions, admissions, or any other testimony of the accused’s intent” to clarify an ambiguous act until that act raised the necessary inference of criminality.\textsuperscript{139}

Whether an objective observer would recognize that criminal activity was afoot, of course, depends largely on the amount of information that is made available to him. Professor Fletcher, for example, reasons that, if an objective observer is told that the shooter of a tree stump mistakenly believed that the tree stump was a man, he could reasonably conclude that the actor

\textsuperscript{135} See Hughes, supra note 8, at 1030.

\textsuperscript{136} Id. Hughes notes that, if the defendant in Jaffe is not convicted of attempting to receive stolen goods, it is unlikely that he will be convicted of any crime at all. Id.; cf. supra text accompanying notes 70–74 (discussing the willingness of the Teal court to accept an impossibility defense to the charge of attempting to suborn perjury because the defendant could still be convicted of attempting to falsify evidence).

\textsuperscript{137} See Hughes, supra note 8, at 1030.

\textsuperscript{138} Id. Yet another approach—albeit an indirect one—to eliminating the impossibility defense in Jaffe-type situations is to redefine the substantive offense of theft. Texas, for example, treats the appropriation of property in the custody of a law-enforcement agent as unlawful if the agent explicitly represents it as stolen to the actor, and the actor appropriates the property believing that it is stolen. See \textsc{Tex. Penal Code Ann.} \textsection 31.03 (Vernon Supp. 1986), discussed infra at note 240.

\textsuperscript{139} Hughes, supra note 8, at 1030. But cf. United States v. Hough, 561 F.2d 594 (5th Cir. 1977) (defendant’s admission that he mistakenly believed noncontrolled substance was cocaine sufficed for conviction pursuant to hybrid approach).

Professor Meehan sees the question of impossibility largely as a question of proof: If the only evidence available is that of a man who fired a bullet at a stump on a dark and stormy night, then he could not be convicted of an attempt because there is not enough evidence to indicate an intention to kill, not because it was impossible to kill his enemy. But if the evidence indicated that the accused was a hired assassin, that the victim was a prominent public figure, who was known regularly to take walks in that area at night, that the stump was not a recognized target and actually resembled a human being, and that the victim was standing close by when the bullet hit the stump? Surely this is attempted murder.

\textsc{E. Meehan, supra} note 18, at 163. This approach is, in effect, quite similar to the hybrid approach, in the sense that it requires a certain threshold of evidence before a conviction is allowed.
posed a significant danger to society. On the other hand, if the observer knew nothing more than what he had observed, he would be unlikely to consider the act of shooting a tree stump to be dangerous. To resolve this problem, Fletcher suggests that only facts that are "likely to be known to objective observers of the event" should be incorporated into the description of the event to the observer.

An observer’s perspective, as well as the information that is available to him, can result in fundamental changes in approach. Professor Elkind, for example, suggests that the defendant’s conduct should be judged by a reasonable third party. Elkind proposes, however, that this hypothetical observer view the defendant’s conduct entirely from the defendant’s perspective. The observer should find the defendant guilty of attempt if, “given the sense data of the defendant and the surrounding circumstances as they appeared to [the defendant], a crime was the probable consequence of his act.” This approach is entirely subjective. Elkind states, in fact, that “[w]e are punishing intent, and the slim chance of success should not be found exculpatory when a criminal intent is found.” His approach would lead to convictions in most instances, because only rarely would the defendant’s actions, viewed from his own perspective, not result in a crime.

The final element in the Hughes test is that the defendant must not be mistaken about the scope of the law in question. This element ensures that defendants are not convicted for acts that they erroneously believe are proscribed.

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140 See G. FLETCHER, supra note 12, § 3.3.3, at 150.
141 Id.
142 Although Hughes would be likely to agree with Fletcher’s proposal, it should be noted that Hughes and Fletcher adopted the hybrid approach for different reasons. Fletcher contends that an objective test is appropriate because the societal interest is violated only when an act reaches a certain level. See supra note 132. Hughes, however, is more concerned with the danger of inferring intent from innocent acts. See supra notes 127-32 and accompanying text (describing Hughes’s approach).
143 See Elkind, supra note 12, at 31. Much of Elkind’s approach is based on the writings of Jerome Hall. See J. HALL, supra note 62.
144 See Elkind, supra note 12, at 31.
145 Id.
146 Id.
147 Elkind includes two restraints in his approach. First, if the defendant’s goal was legal, then the principle of legality bars conviction. Id. at 23. Second, actors in the inherent impossibility category could not be punished because, from a reasonable man’s perspective, such absurd acts could not result in a crime. Id. at 35.
148 Hughes, supra note 8, at 1033–34; see supra text accompanying notes 63–69 (discussing People v. Wilson).
149 See Hughes, supra note 8, at 1033–34; see supra notes 62–89 and accompanying text (discussing pure legal impossibility).
Professors Kadish, Schulhofer, and Paulsen are also troubled by the possibility of convicting individuals whose objective acts are equivocal. Kadish poses the following hypothetical: "[A] soldier during wartime shoots and kills an enemy soldier, under the belief, however, that he was shooting his hated sergeant." Although ideally the soldier should be convicted of attempted murder, Kadish asserts that punishment of the soldier would be tantamount to punishment for thoughts alone because the act that he performed was objectively innocent. To prevent convictions when acts are equivocal, Kadish, Schulhofer, and Paulsen propose an amendment to section 5.01(1)(a) of the Model Penal Code that would add an objective element to the otherwise subjective orientation of that provision. The revised statute would provide:

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 strongly corroborates the required culpability and would constitute the crime if the attendant circumstances were as he believes them to be . . . .

Unlike Hughes, Kadish does not insist that the acts that are committed evince criminal intent. He would be satisfied if the acts merely "corroborated other evidence of [the required] intent."
Professor Weigend also recommends adoption of the hybrid approach.\footnote{See Weigend, \textit{supra} note 8, at 266–73.} The starting point of Weigend's analysis is whether the defendant's acts, regardless of their success or failure, create an "apprehension of crime."\footnote{Id. at 266; \textit{see also supra} notes 39–51 and accompanying text (discussing Weigend's public-interest theory).} Weigend states that "[t]he answer to [this question] does not depend on the objective existence of any danger, but solely on the appearance of dangerousness which the offender's conduct would have for a possible observer."\footnote{Weigend, \textit{supra} note 8, at 266.} Weigend's hypothetical observer would be drawn from the local community and would be imbued with the values of that particular community.\footnote{\textit{See id.} at 267.} Weigend's observer would also have an accurate perception of all of the objective circumstances, regardless of the actor's misconceptions concerning the circumstances under which he was acting.\footnote{\textit{Id.} at 267 n.183 (citing Williams, \textit{supra} note 12, at 652).} Moreover, statements that were made by the defendant while acting would be made available to Weigend's observer;\footnote{\textit{Id.} at 267.} confessions and other statements that were made subsequent to the act would be withheld because they do not disturb the public peace.\footnote{\textit{Id.}} The hybrid approach advocated by Kadish, Hughes, and Weigend is of more than only academic concern. The United States Court of Appeals for the Fifth Circuit adopted the hybrid approach in \textit{United States v. Oviedo}.\footnote{525 F.2d 881 (5th Cir. 1976).} In \textit{Oviedo}, the defendant was charged with attempting to distribute heroin.\footnote{\textit{Id.} at 882.} Oviedo had been contacted by an undercover police officer who claimed that he wanted to purchase heroin.\footnote{\textit{Id.}} At a meeting, Oviedo gave the agent what appeared to be heroin.\footnote{\textit{Id.}} The agent performed a field test on the substance and concluded that the substance was indeed heroin.\footnote{\textit{Id.}} The agent arrested Oviedo, and, in a later
search of the defendant’s home, the police discovered two more pounds of the substance secreted in a television set.\textsuperscript{169} The police performed a second test on the substance that Oviedo had offered to the agent, and, despite the positive field test that the agent had performed earlier, the substance was determined to be procaine hydrochloride, an uncontrolled substance.\textsuperscript{170}

The trial court convicted Oviedo of attempting to distribute heroin.\textsuperscript{171} Although Oviedo claimed that he knew that the substance was not heroin and that he was merely trying to defraud the agent, the jury concluded that Oviedo’s statement to the agent that the substance was heroin and his hiding of the substance inside his television set proved that Oviedo actually believed that the substance was heroin.\textsuperscript{172}

The Fifth Circuit reversed, holding that, although the jury’s finding of intent was correct, an independent determination of the actus reus was required.\textsuperscript{173} Noting “the inconsistency of

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\item[\textsuperscript{169}] Id.
\item[\textsuperscript{170}] Id.
\item[\textsuperscript{171}] Id.
\item[\textsuperscript{172}] Id.
\item[\textsuperscript{173}] Id. at 882–83 n.4. The court in Oviedo accepted the jury’s conclusion that the defendant intended to distribute heroin. Id. The court also found, however, that Oviedo’s conduct was not strongly corroborative of the intent that was required for conviction of attempt to distribute heroin. Id. at 886. How the court could have found the jury’s inference of intent proper, yet also have found that the acts that had been performed did not corroborate the requisite intent is difficult to understand. See Fletcher, Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb, 90 YALE L.J. 319, 341 (1980). Professor Fletcher, however, finds this “paradox . . . easily resolved.” Id. He suggests that the court found, as a matter of law, that the acts that the defendant performed were not within that class of acts from which the requisite intent could be inferred beyond a reasonable doubt. Id. at 341–42. Therefore, although the jury could find that Oviedo intended to distribute heroin, the court was empowered to take the question from the jury if the court found that the acts could not legally support a finding of intent beyond a reasonable doubt. Id. at 342. In this scheme, the judge acts as the critical check against jury speculation regarding the intent with which an act was performed.

Fletcher’s analysis assumes, however, that the jury’s finding of Oviedo’s mens rea was based on a lesser evidentiary standard than “proof beyond a reasonable doubt.” This assumption is dubious, because each element of a crime, including mens rea, must be proven beyond a reasonable doubt. See 525 F.2d at 882 n.3 (quoting charge to jury). If the jury did find the requisite intent beyond a reasonable doubt, then the court in Oviedo, by holding that the acts did not strongly corroborate the jury’s findings, went well beyond the appropriate role of an appellate court in reviewing the factual findings of a jury. Furthermore, if we assume that the jury did indeed find beyond a reasonable doubt that Oviedo believed he was distributing heroin, then the court’s finding that the acts did not strongly corroborate the intent stands directly opposed to the jury’s finding. The court cannot logically state that, although the jury correctly inferred intent from the acts, the acts did not corroborate the intent.

A more plausible explanation of this decision than Fletcher’s assumption that the jury made a finding on an incorrect evidentiary standard is that the court framed its decision in terms of the actus reus because it was reluctant to overturn the jury’s factual determinations.
 Attempting the Impossible

approach which plagues this area of legal theory,” the court held that, “in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, [must] mark the defendant's conduct as criminal in nature.” Like Hughes and Kadish, Schulhofer, and Paulsen, the court was concerned with the danger of inferring intent from “acts . . . consistent with a noncriminal enterprise.” Applying its test, the court found that the defendant's statement to the agent that the substance was heroin, taken with his hiding of the substance in a television set, were too equivocal to permit a conviction of attempted distribution of heroin.

\[174\] 525 F.2d at 883 n.7.

\[175\] Id. at 885. The court rejected both the subjective approach that was adopted by the United States Court of Appeals for the Second Circuit in United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y.), aff'd, 484 F.2d 1271 (2d Cir. 1973), and the traditional objective approach that was adopted by the United States Court of Appeals for the Third Circuit in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973). In Roman, the court convicted the defendants of attempted possession of heroin, although the substance that they possessed was actually soap powder. Roman, 356 F. Supp. at 438. The court reasoned that, if the defendant's objective was criminal, impossibility was no defense. Id. The court in Oviedo rejected the Roman approach to prevent convictions in instances in which the defendant's acts are ambiguous. Oviedo, 525 F.2d at 884. The Oviedo court condemned the decision in Roman because of the danger that it would encourage speculative inferences of intent from innocuous acts, rather than because of the actual sufficiency of the evidence in Roman. Id.

The court in Berrigan acquitted a federal prisoner of attempting to mail a letter from prison without the consent of the warden. The court held that, because the warden actually knew of the defendant's actions, the defendant could not be found to have "intended" to mail letters without the warden's consent. Berrigan, 482 F.2d at 188 n.35. The court inferred intent solely from the acts that the defendant successfully performed, without reference to the acts or results that the defendant hoped to achieve. Id. The Oviedo court rejected the Berrigan approach because it believed that this methodology would permit a successful impossibility defense in every instance in which the defendant had failed to achieve his objective. Oviedo, 525 F.2d at 884. The court reasoned that, if intent is to be based solely on the acts that were actually performed, the requisite intent would never be found because, by definition, an attempt fails to achieve the desired criminal goal. Id.; see also United States v. Brooklier, 459 F. Supp. 476, 481 (C.D. Cal.) (adopting analysis of Oviedo), aff'd, 685 F.2d 1208 (9th Cir. 1978). For a discussion of Berrigan's limits, see United States v. Everett, 700 F.2d 900, 903 (3d Cir. 1983) (Berrigan not controlling because federal drug-abuse statute in case at bar was "intended to punish attempts even when completion of the attempted crime was impossible").

\[176\] See supra notes 127–39 and accompanying text (discussing Hughes's approach to impossibility).

\[177\] See supra notes 150–56 and accompanying text (discussing Kadish, Schulhofer, and Paulsen's approach to impossibility).

\[178\] Oviedo, 525 F.2d at 886.

\[179\] Id. Weigend suggests that the court in Oviedo may have misapplied its own test. See Weigend, supra note 8, at 254–55.

Dutile and Moore argue that the hybrid approach is unnecessary and would revive the impossibility defense in cases involving mixed fact/law situations. They contend that standard preparation/perpetration analysis protects against the danger that individuals would be convicted based solely on innocuous acts. See Dutile & Moore, supra...
Later courts applying the Oviedo standard have not been as stringent in finding the requisite act as was the Fifth Circuit panel in Oviedo. In United States v. Korn, Judge Godbold sat on both panels, and wrote the opinion in Korn. The court distinguished the acts that the defendant performed in Korn from those that the defendant performed in Oviedo on two grounds. First, the defendant in Korn, unlike the defendant in Oviedo, paid the agent $20,000 for the substance. Id. Furthermore, in each case the ambiguous fact was the defendant's misconception regarding the nature of the substance. In Korn, however, it was the police who performed the equivocal act by supplying the uncontrolled substance. The acts in Oviedo were rendered ambiguous because the defendant supplied the substance to the police. Id.; see also United States v. Pennell, 737 F.2d 521, 525–26 (6th Cir. 1984) (distinguishing Oviedo and convicting defendant although the substance was not controlled), cert. denied, 105 S. Ct. 906 (1985). United States v. Brooklier, 459 F. Supp. 476, 479–82 (C.D. Cal.), aff’d, 685 F.2d 1208 (9th Cir. 1978). The Hobbs Act makes it a federal offense to obstruct commerce through robbery or extortion. 18 U.S.C. § 1951 (1982). Other courts have also convicted defendants under the Oviedo test. See, e.g., United States v. Johnson, 767 F.2d 673, 675–76 (10th Cir. 1985) (defendant’s use of alias, request that substance be mislabeled, and payment of inflated price were found sufficient to corroborate his intent to receive controlled substance, even though substance actually received was not controlled); Pennell, 737 F.2d at 525 (defendant’s insistence on obtaining a sample of drug to test and payment of $43,000 proved requisite intent although substance purchased was powder); United States v. McDowell, 714 F.2d 105, 107 (11th Cir. 1983) (per curiam) (although defendant received noncontrolled substance and had small amount of cash, acts were strongly corroborative of intent to purchase illegal drugs); United States v. Innella, 690 F.2d 834, 835 (11th Cir. 1982) (objective acts held sufficient for attempt conviction), cert. denied, 460 U.S. 1071 (1985); United States v. Williams, 603 F.2d 1168, 1174 (5th Cir. 1979) (presence of PCP formula at defendant’s home, evasive driving after purchase of chemicals while under surveillance, false explanation of need for chemicals, and post-arrest statements held strongly corroborative of intent to manuf-
Section 5.01(1)(c) of the Model Penal Code also incorporates the hybrid approach.\textsuperscript{184} The drafters of the Model Penal Code explicitly rejected the traditional objective approach because of its requirement that the actor's conduct unequivocally demonstrate the requisite intent.\textsuperscript{185} Instead, they adopted a less stringent version of the objective approach by requiring that the defendant's actions strongly corroborate the actor's criminal intent.\textsuperscript{186} Under this approach, the defendant's conduct must corroborate other evidence of the requisite intent.\textsuperscript{187} The Model Penal Code, however, does not extend this approach to all attempts. Rather, it applies a subjective approach to instances of mixed fact/law impossibility.\textsuperscript{188}

The hybrid approach has also been extended to the impossibility defense when the defense is raised in a conspiracy case.\textsuperscript{189}

\textsuperscript{184} See infra notes 241–76 and accompanying text (discussing Model Penal Code).

\textsuperscript{185} See REVISED COMMENTARY, supra note 76, § 5.01, at 329–31 (discussing §§ 5.01(1)(c), (2)).

\textsuperscript{186} Id. § 5.01, at 330; see also MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1985).

\textsuperscript{187} See supra notes 127–39, 142, 148–49 and accompanying text (discussing Hughes's approach).

\textsuperscript{188} See infra notes 244–50 and accompanying text (discussing § 5.01(1)(a) of Model Penal Code).

\textsuperscript{189} Courts are less receptive to an impossibility defense when the charge is conspiracy rather than attempt. Among the most common instances of impossibility in the context of conspiracy occurs when an undercover police agent or informer feigns an agreement with the defendant. The outcome of these cases has turned largely on whether the particular jurisdiction has adopted a bilateral or a unilateral approach to conspiracy. Under a bilateral approach, there must be a "meeting of the minds," see State v. Marian, 62 Ohio St. 2d 250, 252, 405 N.E.2d 267, 269 (1980); Burgman, Unilateral Conspiracy: Three Critical Perspectives, 29 De PAUL L. Rev. 75, 78–79 & n.16 (1979) (medieval British conspiracy statute defined conspiracy in terms of "combination" and "confederacies"); Developments in the Law—Criminal Conspiracy, 72 HARV. L. REV. 920, 926 (1959) (conspiracy is a "group act" requiring each conspirator to commute "with a mind and will outside himself"), or at least a tacit understanding, see W. LAFAVE & A. SCOTT, supra note 45, § 62, at 477. Thus, if one of the conspirators was merely pretending to enter into an agreement, there can be no agreement and therefore no conviction. See, e.g., United States v. Pennell, 737 F.2d 521, 536 (6th Cir. 1984) (must be actual agreement), cert. denied, 105 S. Ct. 906 (1985); United States v. Chase, 372 F.2d 453, 459 (4th Cir.) (conspiracy charge dismissed because no evidence that defendant conspired with anyone other than government agent was introduced), cert. denied, 387 U.S. 907 (1967); Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965) ("no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy"); State v. Mazur, 158 N.J. Super. 89, 385 A.2d 878, 884–85 (1978) (no conviction for conspiracy when other conspirator was a government informer).

Numerous jurisdictions, however, have adopted a unilateral approach to conspiracy. See, e.g., DEL. CODE ANN. tit. 11 §§ 511–513 (1974); IND. CODE ANN. § 35-41-5-2 (West 1979); MINN. STAT. § 609.175, subd. 2 (1963); N.Y. PENAL LAW § 105 (McKinney 1975); see also MODEL PENAL CODE § 5.03 (Proposed Official Draft 1985). Under this
In *United States v. Everett*, the United States Court of Appeals for the Ninth Circuit held that there must be "significant objective acts to corroborate unequivocally the criminal intent in a conspiracy." Although this conspiracy case appears to be the only one that explicitly adopts the hybrid approach, other courts have emphasized the importance of there being significant evidence of the requisite intent.

approach, a person may be found criminally liable for agreeing to commit an unlawful act regardless of whether any of his conspirators is also indictable for the conspiracy. Under the unilateral approach, therefore, it will be no defense that the individual with whom the defendant believed he had made an agreement was actually a police officer; the goal of the approach is to prosecute each defendant for his own participation in the conspiracy. See, e.g., *Saienni v. State*, 346 A.2d 152, 154 (Del. 1975) (meeting of minds unnecessary under unilateral-conspiracy statute); *Garcia v. State*, 71 Ind. 366, 394 N.E.2d 106 (1979) (under unilateral-conspiracy statute, defendant convicted of conspiracy even though co-conspirator only feigned agreement); *State v. Christopher*, 305 Minn. 226, 227-29, 232 N.W.2d 798, 799-802 (1975) (no need for actual agreement under unilateral approach to conspiracy); *State v. John*, 213 Neb. 76, 85, 328 N.W.2d 181, 191 (1982) (adopting reasoning of *Christopher*); *State v. Marian*, 62 Ohio St. 2d 250, 252, 405 N.E.2d 257, 270 (1980) (meeting of minds unnecessary under unilateral-conspiracy statute).

The impossibility defense has also been raised when the conspirators' goal was rendered impossible to achieve because of a circumstance that was unknown to them. Under the bilateral approach to conspiracy, this defense generally fails because the focus is on the danger that the illicit agreement itself poses to society; the substantive crime is complete with the making of the agreement and a subsequent overt act. See, e.g., *United States v. Giordano*, 693 F.2d 245, 250 (2d Cir. 1982) (misapprehension regarding facts does not make conspiracy less culpable); *United States v. Thompson*, 493 F.2d 305, 310 (9th Cir. 1974) (crime of conspiracy is not dependent on ultimate success or failure of planned scheme); *Beddow v. United States*, 70 F.2d 874, 876 (8th Cir. 1934) ("neither the success nor failure of criminal conspiracy is determinative of the guilt or innocence of the conspirators"); *United States v. Senatore*, 509 F. Supp. 1108, 1110 (E.D. Pa. 1981) (defendant guilty of conspiracy to distribute controlled substance although substance was not actually controlled); *State v. Moretti*, 52 N.J. 182, 244 A.2d 499 (1966) (rejecting impossibility as defense to conspiracy). But see *United States v. McInnis*, 601 F.2d 1319, 1326 (5th Cir. 1979) (no conspiracy conviction when object of conspiracy is not unlawful); *Ventimiglia v. United States*, 242 F.2d 620, 625 (4th Cir. 1957) ("[A]n attack on a wooden Indian cannot be an assault and battery . . . , and hence a combination and agreement to do so cannot be a conspiracy to commit assault and battery, although the defendants, before acting, thought the 'victim' a living person.").

The defense of impossibility of committing the substantive crime cannot be analyzed from the same perspective under the unilateral approach as under the bilateral approach. Because unilateral theory focuses on the intent of the individual conspirator, a conviction cannot be premised on the increased danger of "group" activity. To support a conviction despite the impossibility of the underlying crime, courts in unilateral-conspiracy jurisdictions have drawn analogies to impossible attempts. See *State v. Bird*, 285 N.W.2d 481, 482 (Minn. 1979) (unlike attempt context, drafters of Minnesota Criminal Code felt no need to reject explicitly an impossibility defense in context of conspiracy); *Commonwealth v. Reed*, 276 Pa. Super. 467, 472, 419 A.2d 552, 555 (1980) ("agreement necessary to create a conspiracy may involve an attempt to commit a crime, and impossibility of completion is not a defense to an attempt").

90 692 F.2d 596 (9th Cir. 1982), cert. denied, 460 U.S. 1051 (1983).

91 Id. at 600.

92 See *United States v. Shively*, 715 F.2d 260, 266 (7th Cir. 1983) (court stressed that there was "[s]trong" evidence to show that defendant had requisite intent); *United States
Subjective theory focuses primarily on the intent with which an individual acted. Unlike proponents of the objective and hybrid approaches, subjectivists do not evaluate the sufficiency of an act apart from the actor's state of mind at the time that he performed the act. Instead, they believe that a particular act cannot be interpreted accurately without reference to the intent underlying the act.

To illustrate the difficulty that is involved with evaluating an act without reference to the underlying intent, Professor Williams poses the example of an individual who lights his pipe while standing next to a haystack. This act, viewed without...
reference to the underlying intent, can be interpreted as being entirely innocent: the individual may merely be lighting his pipe.\textsuperscript{197} Possibly, however, the pipe is a diversion and the man is actually about to ignite the haystack.\textsuperscript{198} Williams implies that, unless the intent with which the individual acted is considered, it is impossible to interpret the individual’s actions accurately.\textsuperscript{199}

Subjectivists, therefore, would permit courts to consider extrinsic evidence regarding intent in determining the sufficiency of an act.\textsuperscript{200} In a Jaffe situation, for example, a court employing the subjective approach would be allowed to consider statements by the actor that are relevant to his intent, statements by witnesses and other third parties bearing on the actor’s intent, and circumstantial evidence from which the court could infer the defendant’s intent.\textsuperscript{201} The ultimate goal of this subjective inquiry is to determine the dangerousness of the actor in light of the situation that he believed existed.\textsuperscript{202} The relationship between the acts that he performed and the situation that he believed existed, rather than the situation that actually existed, provides the surest indication of an individual’s willingness to violate the law.\textsuperscript{203}

\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} See id. \S 199; Wechsler, Jones \& Korn, supra note 193, at 594.
\textsuperscript{201} In People v. Rojas, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961), for example, the defendant was charged with attempting to receive stolen goods. The evidence against him consisted of police testimony recounting his statement that he “knew” the goods were stolen. Id. at 256, 358 P.2d at 923, 10 Cal. Rptr. at 467. The court found that, in light of his actions and statements, he had the intent required for the substantive crime. See id. at 258, 358 P.2d at 924, 10 Cal. Rptr. at 468.

Both Hughes and Fletcher, proponents of the hybrid approach, recognize that some extrinsic evidence should be given to the factfinder to aid him in determining the nature of the defendant’s acts. See supra notes 136–39 and accompanying text (Hughes); supra note 132, note 142 and accompanying text (Fletcher). Weinreb notes that, as more information is given to the factfinder, we move further away from a theory of “manifest criminality.” Weinreb, supra note 194, at 310–11.

\textsuperscript{202} See Wechsler, Jones \& Korn, supra note 193, at 579 (“the actor’s mind is the best proving ground of his dangerousness”); Williams, supra note 12, at 55 (the subjective approach is concerned with the individual who “has shown himself prone to crime and may well do it again if he does not receive an effective warning”); see also State v. Rios, 409 So. 2d 241, 244 (Fla. Dist. Ct. App. 1982); People v. Dlugash, 41 N.Y.2d 725, 734, 363 N.E.2d 1155, 1161, 395 N.Y.S.2d 419, 426 (1977).

\textsuperscript{203} See Wechsler, Jones \& Korn, supra note 193, at 592–95. The Model Penal Code rejected the adoption of the objective approach (termed the “res ipsa loquitur” approach) not only regarding impossibility, but with respect to all crimes of attempt. The Commentary specifically rejected defining a “substantial step” as conduct that unequivocally demonstrates criminality. Id. at 592. Instead, the Code evaluates the sufficiency of the act in terms of the circumstances that the actor believed existed and requires that the conduct “strongly corroborate” the actor’s criminal purpose. Id. While the drafters of the Model Penal Code recognized that “there is . . . [a] relationship between the actor’s
Subjective theory is based on the belief that individuals whose actions are ambiguous may nevertheless present a threat to society.\(^\text{204}\) Again, the Jaffe situation demonstrates this concept. The acts that are necessary to receive stolen goods may be entirely neutral. The defendant need not have paid an excessively reduced price for the contraband and the seller need not have been a known fence.\(^\text{205}\) But, absent these or other similarly incriminating circumstances, the hybrid approach would not permit a conviction for attempt, regardless of the strength of other extrinsic evidence concerning mens rea.\(^\text{206}\) Courts have repeatedly determined, however, that such actors should be found guilty of attempting to receive stolen goods.\(^\text{207}\) Subjective theory would allow the conviction of these individuals if the requisite intent could be shown and if the act, under the circumstances that the defendant believed existed, constituted a substantial step toward the completion of the substantive crime.\(^\text{208}\)

Subjectivists claim that the principal shortcoming of the traditional objective and the hybrid approaches is that acts that
society has previously determined to merit punishment would no longer be within the ambit of the criminal law.\textsuperscript{209} Professor Weinreb contends that "[t]he assumption that criminality can generally be perceived as an observable characteristic of the events that properly constitute crime is wrong."\textsuperscript{210} Instead, Weinreb, like Williams,\textsuperscript{211} finds that an act may or may not be worthy of punishment, depending on the intent behind the act.\textsuperscript{212} Weinreb believes that society might not accept the increased risk of crime that would result if we could not intervene until "every possibility other than an intended crime was eliminated."\textsuperscript{213}

In contrast, proponents of the hybrid approach believe that the risk of erroneous convictions resulting from the subjective approach presents an even greater danger to society than does requiring a clear manifestation of intent.\textsuperscript{214} Weinreb asserts that this fear is empirically unsound and that the recent trend toward subjectivism has not resulted in the punishing of "dangerous persons" rather than persons who have committed dangerous acts.\textsuperscript{215} Furthermore, he contends that adoption of the objective approach could actually result in erroneous convictions of individuals who have innocently committed apparently dangerous acts.\textsuperscript{216} If courts mistakenly equate manifest criminality with criminal intent, then objectivists will have created a new danger,

\textsuperscript{209} See, e.g., Weinreb, supra note 194, at 315. But see supra note 183 (citing convictions based on Oviedo approach). Weinreb also notes that the objective approach cuts both ways, i.e., that acts that are considered neutral under current law might constitute an attempt under a pure objective approach. \textit{Id.}

\textsuperscript{210} Weinreb, supra note 194, at 310.

\textsuperscript{211} See G. WILLiAMS, supra note 12, § 207(b), at 643. Williams poses the problem of $X$ shooting in the direction of $Y$. The act of shooting may or may not constitute a crime. If $X$ shot at $Y$, believing that $Y$ was in range of the gun, then $X$ will have attempted to murder $Y$. If, however, $X$ knew that $Y$ was out of range and $X$ was merely testing his gun, then $X$ will have committed no crime. \textit{Id.} Williams offers this example to illustrate his belief that appearances alone are an insufficient means to determine criminal liability. \textit{Id.}; see also Williams, supra note 12, at 49 (advocating subjective approach); supra notes 196–99 and accompanying text (additional example of application of Williams's subjective approach).

\textsuperscript{212} See Weinreb, supra note 194, at 317.

\textsuperscript{213} \textit{Id.} at 315. Weinreb also notes, however, that if the objective approach were adopted courts might declare acts that previously had been thought to be innocuous to be manifestly criminal. He stresses the indeterminacy of the objective approach. \textit{See id.} Although only a few cases have been decided under the Oviedo standard, in later cases applying Oviedo the courts found the acts at issue to be sufficient to support a finding of intent. \textit{See supra} note 183 (citing such cases).

\textsuperscript{214} See \textit{supra} text accompanying notes 124–39 (discussing concerns of hybrid approach's proponents, particularly the views of Professor Hughes).

\textsuperscript{215} Weinreb, supra note 194, at 295.

\textsuperscript{216} \textit{Id.} at 296.
one that is perhaps equal to the danger of speculation into intent based on ambiguous acts.\textsuperscript{217}

Weinreb also finds that the hybrid approach is of no value in the specific area of impossibility.\textsuperscript{218} When an individual commits an act believing that a particular set of circumstances exists, when in fact a different set of circumstances exists, the problem is not solved “by looking at appearances.”\textsuperscript{219} He reasons that the issue in such instances is the potential dangerousness of the actor, despite his mistake, and he would therefore focus on whether the actor came dangerously close to achieving his goal.\textsuperscript{220}

\textbf{C. The Response of Proponents of the Hybrid Approach}

Supporters of the hybrid approach do not dispute the subjectivists’ contention that the dangerousness of an act cannot be accurately gauged without considering the intent with which it was performed. If identifying, without fail, all potentially dangerous individuals was our only goal, then this would be a strong argument. Other considerations come into play, however. In order to control the discretion of law-enforcement officials, certain safeguards must be built into the system.\textsuperscript{221} The safeguard that the hybrid approach imposes is to require that the defendant’s act, viewed independently of extrinsic evidence of intent, must corroborate the intent that is necessary for the substantive crime.

Under the hybrid approach, the defendant’s act is not viewed in a vacuum. Instead, the hybrid approach considers the act with reference to other circumstantial evidence.\textsuperscript{222} For example,

\begin{itemize}
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{See id.} at 314.
\item \textsuperscript{219} \textit{Id.}
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} \textit{See supra} notes 81 and 128 (discussing Enker’s approach to impossibility).
\item \textsuperscript{222} \textit{See supra} notes 136–39 and accompanying text (discussing Hughes’s approach to impossibility). Professor Hughes was careful to distinguish his approach to impossibility from that which had been adopted by a New Zealand court in Campbell & Bradley v. Ward, [1955] 1 N.Z.L.R. 471 (N.Z.S.C.). In \textit{Ward}, three men were charged with attempting to steal a battery from a parked car. One of the accused had been seen entering the car, and one of his accomplices later stated that the first accused had entered the car to steal a radio and the car’s battery. According to Hughes, the appellate court reversed the conviction because the defendant’s act “did not on its face show an intent to steal a battery as opposed to an intent to steal something else.” Hughes, \textit{supra} note 8, at 1027. Hughes goes on to state:
\end{itemize}
the requisite act could be found in a Jaffe-type situation if the defendant received the goods at a very low price from a known fence.\textsuperscript{223} Weinreb’s contention that the hybrid approach moves away from an objective approach as the “objective viewer” is given more and more information\textsuperscript{224}—thereby moving toward the subjective approach—is obviously correct. The hybrid approach stops short of giving courts free rein, however, even when such circumstantial evidence is lacking.

It is important to note that the hybrid approach does not exclude the use of confessions or other statements by the defendant. Rather, it requires that the defendant’s actions, viewed at first without reference to such often unreliable evidence,\textsuperscript{225} at least raise the possibility of criminal acts. Once this threshold test has been met, all other available evidence can be used to confirm that the defendant indeed intended to violate an existing law.

Finally, in response to the subjectivists’ contentions that the hybrid approach would preclude convictions in many cases in which convictions are presently obtained, the hybrid approach merely makes explicit what is already implicit in the law: every element of a crime must be proven beyond a reasonable doubt.\textsuperscript{226} Absent a confession, the requisite intent must be inferred from the defendant’s actions and other circumstantial evidence. If an act is entirely neutral and little circumstantial evidence regarding the defendant’s intent exists, it will be impossible to prove the elements of the crime under either the hybrid or the subjective approach. On the other hand, when there is sufficient evidence

\textsuperscript{223} See supra notes 136–49 and accompanying text (discussing Jaffe and the hybrid approach).

\textsuperscript{224} See supra note 201.

\textsuperscript{225} See supra text accompanying notes 214–17 (discussing unreliability of ostensibly criminal acts).

\textsuperscript{226} Cf. Hughes, supra note 8, at 1023 (subjective theory’s virtue lies in protection that it provides for defendants by “stressing the necessity for a strict proof of mens rea by the prosecution”). But see Weinreb, supra note 194, at 310 (arguing that Fletcher’s “manifest criminality” theory—a type of hybrid approach—“should not be confused with a strong, even a very strong, requirement that guilt be proved with certainty”). See also supra note 132 (discussing Fletcher’s approach); supra notes 136–39 and accompanying text (discussing Hughes’s approach).
from which the necessary intent can be inferred, in all but the rarest of cases the defendant's actions would meet the threshold test that the hybrid approach imposes.

III. THE STATUTORY SOLUTION

Recently, many legislatures have enacted statutes that address the impossibility problem. Almost two-thirds of the states have adopted provisions that are aimed at eliminating the impossibility defense, modeled after either section 5.01(1) of the Model Penal Code or section 110 of the New York Penal Code. Although these various state statutes have successfully eliminated the impossibility defense, not all states have enacted

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Both California and Michigan have proposed legislation that would eliminate the impossibility defense. Section 705 of California's Proposed Criminal Code provides: "In a prosecution for an attempt to commit a crime, it is no defense that it was impossible to commit the crime." Joint Legislative Comm'n for Revision of the Penal Code, State of California, The Criminal Code § 705 (Staff Draft 1971) [hereinafter cited as Proposed Cal. Crim. Code]. This legislation was never adopted. For further discussion, see generally Comment, Attempt, Solicitation, and Conspiracy Under the Proposed California Criminal Code, 19 UCLA L. REV. 603, 604-14 (1972). Section 1001(2) of Michigan's Second Revised Criminal Code, which was also not adopted, includes a similar provision: "It is no defense to a prosecution under this section that the under the actual attendant circumstances the offense charged to have been attempted was factually or legally impossible of commission, if it could have been committed had the attendant circumstances been as the actor believed them to be." Mich. Second Rev. Crim. Code § 1001(2) (Proposed Final Draft 1979).

228 MODEL PENAL CODE § 5.01 (Proposed Official Draft 1985); see infra text accompanying note 243 (text of Model Penal Code § 5.01(1)).

229 N.Y. PENAL LAW § 110.10 (McKinney 1975); see infra text accompanying note 300 (text of Pennsylvania's New York-type attempt statute). Although the drafters of the New York statute used the Model Penal Code as a guide for the New York Code, there are nevertheless sufficient differences between the two formulations to merit separate discussion.

230 Research revealed no cases in which the defendant successfully raised an impossibility defense in a jurisdiction that had a statute eliminating the impossibility defense.
provisions dealing with impossibility, and impossibility remains a defense under some interpretations of federal law. In United States v. Hair, for example, the United States District Court for the District of Columbia stated that, until Congress adopts a general federal attempt statute, the federal courts cannot abolish the impossibility defense. Some state courts have been similarly reluctant to abolish the impossibility defense without explicit legislative action.

\[\text{See infra note 239 (listing states that have not enacted or proposed legislation specifically addressing the impossibility defense).}\]

Some federal statutes include provisions concerning attempts to commit particular substantive crimes. In United States v. Everett, 700 F.2d 900 (3d Cir. 1983), for example, the defendant was convicted of attempting to distribute a controlled substance although the substance that he sold was not controlled. See id. at 907-09. The defendant's act, however, constituted an attempt under section 846 of the Drug Abuse Prevention Act. See id. at 909. The court refused to recognize an impossibility defense because it would have narrowed the scope of the statute, which the court believed Congress intended to have as broad a reach as possible. Id. For a discussion of Everett, see Casenote, Criminal Law—The Distribution of a Non-Controlled Substance Believed To Be a Controlled Substance Constitutes an Attempt Under the Comprehensive Drug Abuse Prevention and Control Act of 1979. United States v. Everett, 700 F.2d 900 (3d Cir. 1983), 61 U. Det. J. Urb. L. 625 (1984).

Other federal courts have recognized a legal impossibility defense under federal common law. See United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973) (recognizing legal impossibility defense because no federal statute had eliminated it).

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Some state courts have been similarly reluctant to abolish the impossibility defense without explicit legislative action. \[\text{See infra note 239 (listing states that have not enacted or proposed legislation specifically addressing the impossibility defense).}\]
The criminal code provisions that address impossibility abolish the defense in one of two ways. First, statutes that are based on section 5.01(1) of the Model Penal Code implicitly abolish the defense in mixed fact/law situations by focusing on whether the actor would have committed a crime had the attendant circumstances been as he believed them to be when he acted. Section 110.10 of the New York Penal Code and those statutes that are similarly constructed simply state that factual and legal impossibility are not recognized defenses to attempt crimes. In short, neither approach allows the defendant an impossibility defense to a criminal attempt charge, although a legality or pure legal impossibility argument remains a defense in these jurisdictions.


37 Misc. 2d at 22, 233 N.Y.S.2d at 588. The court in Rollino was not the first court to request legislative assistance in dealing with impossibility. As early as 1849, courts asked for guidance. See, e.g., State v. Cooper, 22 N.J.L. 52, 58 (1849) (courts cannot "extend the penal code or multiply the objects of criminal punishment"). But see State v. Latraverse, 443 A.2d 890 (R.I. 1982) (adopting Model Penal Code by judicial fiat).


218 See supra notes 62-89 and accompanying text (discussing pure legal impossibility).

yet to determine whether mixed fact/law impossibility is a defense.240

A. Section 5.01(1) of the Model Penal Code

The drafters of the Model Penal Code intended to abolish the impossibility defense by adopting a generally subjective approach to criminality.241 Under the model statute, the defen-

S.W.2d 278, 280 (Tenn. 1979) (rejecting legal impossibility); State v. Damms, 9 Wis. 2d 183, 190, 100 N.W.2d 592, 596 (1960) ("[s]ound public policy would seem to support the majority view that impossibility not apparent to the actor should not absolve him from the offense of attempt"); see also United States v. Thomas, 13 C.M.A. 278, 286, 32 C.M.R. 278, 286 (1962) (no impossibility defense available when soldiers attempted to rape a dead woman mistakenly believing her to be alive); State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888) (apparently rejecting factual impossibility defense).

240 See IDAHO CODE § 18-306 (1979); MASS. GEN. LAWS ANN. ch. 274, § 6 (West 1970); MICH. COMP. LAWS § 750.92 (1979); S.D. CODIFIED LAWS ANN. § 22-4-1 (1979); TEX. PENAL CODE ANN. § 15.01 (Vernon 1974); VT. STAT. ANN. tit. 13, § 9 (1974); W. VA. CODE § 61-11-8 (1984). The Texas legislature acknowledged that its provision, applicable to a defendant who "'tends but fails to effect the commission of the offense intended[,]' appears to exclude from attempt many impossibility situations." TEX. PENAL CODE ANN. § 15.01 practice commentary (Vernon 1978).

Texas has recently added an interesting twist to impossibility law. The legislature revised its definition of theft to include instances in which law-enforcement officers are involved in a transaction regarding property that has been represented as stolen or property that has been stolen but is later recovered by law-enforcement officers. Act of June 14, 1985, ch. 599, 1985 TEX. Sess. Law Serv. 4568 (Vernon) (codified as amended at TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1986)). The Act expands the definition of unlawful appropriation, an element required for theft in Texas, to include appropriation of property in the custody of a law-enforcement agent that is represented by the agent as being stolen if the actor who appropriates the property believes that it is stolen. IDAHO CODE § 18-303(b)(3). The Act further provides that stolen property does not lose its "stolen" character when it is recovered by law-enforcement agents, id. § 31.03(c)(5). Thus, the Act deals with the impossibility defense in this one instance by redefining the substantive crime of theft; it is unclear why the legislature did not go further and eliminate impossibility as a defense entirely.

The following jurisdictions have no general attempt statutes that are intended to address impossibility questions, and research revealed no cases dealing with such attempts: Iowa, Virginia, and the District of Columbia. One state court, however, stated in dicta that legal impossibility may be a valid defense. Waters v. State, 2 Md. App. 216, 226–28, 234 A.2d 147, 153 (1967) (dicta); see also In re Appeal No. 568, 25 Md. App. 218, 220–23, 333 A.2d 649, 651–52 (1975). Recently, Maryland adopted the substantial-step language of the Model Penal Code, but "delete[d] the subjective considerations on the part of the actor." Young v. State, 303 Md. 298, 311, 493 A.2d 352, 359 (1985).

241 See 1 P. ROBINSON, supra note 12, § 85(a), at 423 n.4 (Model Penal Code takes subjective view and relies primarily on actor's dangerousness); Wechsler, Jones & Korn, supra note 193, at 578 (evaluating defendant's conduct in terms of circumstances that actually existed is "unsound in that it seeks to evaluate a mental attitude . . . by looking to . . . a situation wholly at variance with the actor's beliefs").
dant's actions are evaluated in light of the circumstances that he believed existed at the time he acted. Section 5.01(1) of the Model Penal Code provides:

Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the 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

(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.

242 According to the Revised Commentary to the Model Penal Code, "[t]he 'circumstances' of the offense refer to the objective situation that the law requires to exist, in addition to the defendant's act or any results that the act may cause." REVISED COMMENTARY, supra note 76, § 5.01, at 301 n.9. For example, in order for there to be a theft, the object of the actor's intentions must be the property of another. See id.; see also infra note 261 (discussing difference between circumstances and attendant circumstances).

243 MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1985). Inherent impossibility is addressed by section 5.05(2) of the 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.

Id. § 5.05(2). Professor Elkind notes that this section indicates that "the drafters of the Model Penal Code . . . agree with the view that society should be more tolerant of an attempt which involves little or none of the danger protected against by the criminal statute." Elkind, supra note 12, at 34. Elkind believes that the statute should "permit the court to balance retributive values with the values of deterrence and neutralization." Id. He suggests a revision of section 5.05(2) that would "separate the question of the likelihood that the attemptor would succeed from the question of whether he presents a public danger." Id. Elkind's revised statute would provide as follows: "Where the particular conduct charged to constitute a criminal attempt is inherently unlikely to culminate in the commission of a crime, the court, in setting a penalty, shall consider the extent to which the actor presents a public danger." Id.

Wechsler, Jones, and Korn warn against using impossibility as an indicator of an individual's dangerousness of personality. The nature of the means that are employed can negate the dangerousness of character, particularly if the means were so absurd that they create substantial doubt that the actor actually intended to commit a crime. On the other hand, the actor who fails to consummate his intended crime due to inadequate means could try more efficacious means at a later time. See Wechsler, Jones & Korn, supra note 193, at 584-85; see also REVISED COMMENTARY, supra note 76, § 5.01, at 316 n.88 (discussing difficulties in using impossibility as a guide to gauging dangerousness of personality).
Professor Robinson explains the situations to which these provisions are intended to apply:

Subsection (a) contemplates the case where, from the defendant's mistaken view, he has satisfied the objective elements of the substantive offense; subsection (b), applicable to offenses with a result element, punishes where, from the defendant's view, he has done everything he need do to cause the prohibited result; and subsection (c) imposes liability where, from the defendant's view, he has taken a substantial step toward commission of the offense.244

According to the drafters of the Model Penal Code, cases of mixed fact/law impossibility should be evaluated under subsection (a) of section 5.01(1) of the Code.245 This subsection rejects the impossibility defense by focusing on the attendant circumstances that the defendant believed existed, rather than on those that actually existed.246 If the defendant was charged with at-

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244 See Wechsler, Jones & Korn, supra note 193, at 578 (“purpose of paragraph 1(a) is to eliminate legal impossibility as a defense to an attempt charge”). But see Revised Commentary, supra note 76, § 5.01, at 317 (applying subsection (a) to Jaffe-type case).

245 See Wechsler, Jones & Korn, supra note 193, at 578–79.
tempting to receive stolen property, for example, and the property had not in fact been stolen, an impossibility defense would fail because the conduct would have constituted a crime had the circumstances been as the defendant believed them to be.247

In this context, the 1985 Revised Commentary to the Model Penal Code states that, "[s]ince the defendant believed the property to be stolen, he could be convicted even though at the time the property was technically classified as non-stolen."248 The drafters of the Model Penal Code intended mixed fact/law problems to be addressed primarily under subsection (a) rather than under subsection (c).249 Unlike subsection (c), subsection (a) does not require that the defendant's conduct constitute a substantial step in furtherance of the crime. Without this constraint, the Model Penal Code applies a subjective test to mixed fact/law impossibility.250

Although Wechsler, Jones, and Korn state that mixed fact/law impossibility comes within subsection (a) of the Code, a fair reading of the Revised Commentary suggests that subsections (a) and (c) may apply to both factual and mixed fact/law impossibility defenses.251 The Commentary uses examples of

247 See Revised Commentary, supra note 76, § 5.01, at 317; Ark. Stat. Ann. § 41-701 commentary at 93 (1977) (statute intended to abolish defense of impossibility); Ky. Rev. Stat. Ann. § 506.010 commentary (Baldwin 1974) (hypothetical defendant guilty under § 506.010(a) when he bribed X under the mistaken belief that X was a juror).

248 Revised Commentary, supra note 76, § 5.01, at 317 (emphasis added).

249 See Wechsler, Jones & Korn, supra note 193, at 578 (subsection (a) designed to "eliminate legal impossibility defense"); see also supra note 245 (Wechsler, Jones & Korn use legal impossibility to refer to mixed fact/law impossibility).

250 See Wechsler, Jones & Korn, supra note 193, at 578. The drafters of the Code believed that in mixed fact/law situations the defendant manifests his dangerousness when he has done as much as "he could in implementing [the criminal] purpose [of his act]." Id. Under subsection (a), the defendant's mental frame of reference should be conclusive regarding his guilt as long as the intended result constitutes a crime. See id. at 578-79.

Professors Kadish, Schuhlhofer, and Paulsen criticize the Model Penal Code for not including an objective element in the impossibility provision. See Criminal Law and Its Processes, supra note 2, at 609-10. They recommend amending section 5.01(1)(a) as follows:

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 strongly corroborates the required culpability and would constitute the crime if the attendant circumstances were as he believes them to be . . .

Id. at 610 (emphasis in original). This proposal incorporates into subsection (a) the objective element that is already included in subsection (c). See supra notes 150-56 and accompanying text (discussing Kadish proposal).

251 See Revised Commentary, supra note 76, § 5.01, at 317-18. Although Wechsler, Jones, and Korn never explicitly state which provision of the Code applies to factual impossibility, see Wechsler, Jones & Korn, supra note 193, at 578-85, Professor Enker determined that subsection (a) covered factual impossibility and that subsection (b) dealt
factual impossibility and mixed fact/law impossibility to illustrate the application of these two subsections. It states, for example, that subsection (a) can be applied to convict a defendant in the empty-pocket cases and in the stolen-property cases. The Revised Commentary uses the same examples to illustrate how subsection (c) will apply. As stated above, determining which subsection applies to which situation is crucial, because only subsection (c) includes the objective requirement that the defendant's conduct must corroborate his intent.

with legal (my mixed fact/law) impossibility cases. He also suggested that subsection (c) is the general attempt statute that deals with the preparation-perpetration cases. See Enker, supra note 81, at 682 n.40; see also infra note 254 (discussing preparation-perpetration approaches).

Section 5.01(2) provides:

(2) Conduct That May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;
(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
(c) reconnoitering the place contemplated for the commission of the crime;
(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
(e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

The drafters of the Model Penal Code considered several possible definitions of when conduct should be considered a substantial step before adopting this definition in section 5.01(2). First, the drafters considered the "physical proximity doctrine." See Wechsler, Jones & Korn, supra note 193, at 586. This doctrine requires that the conduct be "proximate to" or "directly tending" toward the completion of the crime. Id. The drafters rejected this test because of its vagueness and because it emphasizes only one aspect of the actor's behavior. See id. at 586-87.

Second, the drafters considered the "dangerous proximity doctrine." This doctrine provides that the following factors be considered: "the gravity of the offense intended, the nearness of the act to completion of the crime, and the probability that the conduct will result in the offense intended." Id. at 587. This approach was rejected because it focuses on deterring dangerous acts rather than on "neutraliz[ing] dangerous individuals." Id.

The third approach to defining substantial step that the drafters of the Model Penal Code considered was the "indispensable element approach." This approach precludes an attempt conviction if the defendant failed to acquire control of an indispensable
the typical empty-pocket case, for example, a defendant would be found guilty under subsection (a) upon proof that he believed that the pocket contained something. Under subsection (c), however, the prosecution would also have to prove that the defendant's actions were not equivocal—in other words, that his conduct, on its face, demonstrated the intent that is necessary for the underlying substantive crime. This thorny legal question could be avoided under subsection (a).

The relationship of subsection (b) to cases of impossibility is similarly unclear. With respect to attempts in general, subsection (b) applies to those crimes that require causing a particular result as an element of the substantive crime. The Revised Commentary to the Model Penal Code states, for example, that "a belief that death will ensue from the actor's conduct, or that property will be obtained, will suffice" for liability. This subsection is intended to extend criminality to cases in which the defendant merely believed that certain results would occur; the aspect of the criminal endeavor, either because he could not secure the assent or action of a necessary third party or because "he lack[ed] a means essential to completion of the offense." Id. at 587-88. The drafters did not adopt this approach because it was found too vague to be functional, and because it focuses on the defendant's acts rather than on his intent. See id. at 588.

The "probable desistance test" was also considered. This approach allows a conviction only "if, in the ordinary and natural course of events, without interruption from an outside source, [the defendant's conduct] will result in the crime intended." Id. This approach was rejected because it places too much emphasis on the conduct itself, rather than on the personality of the particular defendant. See id. at 588-89.

The penultimate approach that the drafters of the Model Penal Code considered was the "abnormal step approach." This approach "defines an attempt as a step toward crime that goes beyond the point where the normal citizen would think better of his conduct and desist." Id. at 589. Although the drafters were sympathetic to this approach's focus on the personality of the defendant, they rejected it largely because of the difficulty of judging when a normal person would break off a course of conduct tending toward a crime. See id. at 589-90.

The final approach that the drafters of the Code considered and rejected was the "res ipsa loquitur test." Under this approach, the defendant's conduct must "unequivocally [manifest] an intent to commit a crime" without consideration of any statements concerning his intent. Id. at 590. The drafters acknowledged the value of this approach in preventing convictions based on innocuous acts, see id. at 590-91, but rejected it because they believed that, at the same time, too many otherwise culpable defendants would escape liability. See id. at 594. The prosecution would often be unable to meet the burden of proof that the res ipsa loquitur test demands. See id. at 593-94. Under section 5.01(2) of the Code, the concerns of proponents of the res ipsa loquitur test about both firmness of purpose and problems of proof are accounted for by the requirement that the actor's conduct strongly corroborate his intent. See id. at 595.

255 See Model Penal Code § 5.01(2) (Proposed Official Draft 1985) (defining conduct that will satisfy substantial-step requirement).
256 See id. § 5.01(1)(b).
257 Revised Commentary, supra note 76, § 5.01, at 304.
defendant’s *purpose* need not have been to cause a particular result.\textsuperscript{258}

With respect to impossibility, the Revised Commentary states that subsection (b) would lead to a conviction when “the result that the defendant seeks to cause or believes will be caused by his conduct does not occur because of some fortuity.”\textsuperscript{259} For example, when “the defendant shoots at an empty bed, believing that his intended victim is in the bed, he engages in conduct with the purpose of causing the death of his victim without further conduct on his part, and thus is guilty of an attempted homicide under Subsection (1)(b).”\textsuperscript{260} It is uncertain why this situation could not be addressed under subsection (c), pursuant to which the missing victim would be treated as a “circum-
stance.”\textsuperscript{261} If subsection (c) were applied, an attempt conviction would result as long as the defendant’s conduct corroborated the requisite intent.

If subsection (b) is adopted in the form in which it appears in the Model Penal Code, however, there will be no objective check on convictions under that provision as well as under subsection (a).\textsuperscript{262} Subsection (b), like subsection (a), does not

\textsuperscript{258} See id. at 304–05. Therefore, if a defendant intends to destroy a building and he knows that people would be inside the building, he could be convicted of attempted murder even though it was not his purpose to kill these people. See id. at 318.

\textsuperscript{259} Id.

\textsuperscript{260} Id.

\textsuperscript{261} Professor Robinson notes that in subsection (a) the Model Penal Code uses the term attendant circumstances, I P. Robinson, *supra* note 12, § 85(c), at 429. Subsection (c), on the other hand, employs the term circumstances. Robinson explains that “‘attendant circumstances’ is a term of art used . . . to distinguish circumstance elements from conduct and result elements of an offense definition.” Id. Under this definition, property losing its character as stolen would be considered an attendant circumstance, while an intended victim missing from his bed would not. Instead, this mistake relates to the result element of the crime, id., and would come under either subsection (b) or (c). Robinson rejects this confusing distinction among attendant circumstances, result elements of substantive crimes, and ordinary circumstances, see id., and proposes a single provision in which all of the defendant’s misapprehensions would simply be treated as “circumstances” and the defendant would be judged as if the circumstances that he believed or hoped existed actually did exist. Id. at 430–31.

\textsuperscript{262} The only two states that have adopted subsection (b) substantially as it appears in the Model Penal Code are New Jersey and Oklahoma. See N.J. STAT. ANN. § 2C:5-1(a)(2) (West 1982); OKLA. STAT. tit. 21, § 44 (1981).

The following jurisdictions have omitted subsection (b) entirely: CONN. GEN. STAT. § 53a-49 (1985); DEL. CODE ANN. tit. 11, § 531 (1979); KY. REV. STAT. § 506.010 (1985); W. VA. CODE § 61-11-8 (1984). For the Model Penal Code’s breakdown of state statutes in comparison to the Model Penal Code, see REVISED COMMENTARY, *supra* note 76, § 5.01, at 320 n.95. Arkansas, which adopted all three provisions of the Model Penal Code, noted that the three provisions “have overlapping coverage and are not set out in alternative form solely to pick up distinct kinds of conduct.” ARK. STAT. ANN. § 41-701 commentary at 93 (1977). The commentary noted, as one illustration, that a defendant who shot at a tree believing that it was his enemy could be convicted under each
require that the defendant’s conduct corroborate the requisite intent for the substantive offense. Arkansas, Hawaii, and Nebraska have recognized this problem, and have added to subsection (b) the requirement that the defendant’s conduct meet the substantial-step requirement that the Model Penal Code includes only in subsection (c).263

Supporters of the hybrid approach contend that the Model Penal Code gives “insufficient protection to conduct that is externally equivocal” by omitting the corroboration requirement in subsections (a) and (b).264 The Revised Commentary states that an individual is unlikely to be prosecuted based on admissions alone if he acted in an entirely innocuous manner.265 The Commentary also notes that, under section 5.05(2) of the Code, judges have discretion to charge the defendant with a lesser included crime or to dismiss the prosecution entirely.266 The Revised Commentary suggests that this section may be applied in those instances in which there has been no apparent threat to society.267

The Revised Commentary further states that, in certain circumstances, the defendant will have completed his conduct, and the only remaining issue is what the actor believed the attendant circumstances were at the time he acted.268 The Commentary contends that the “strongly corroborative” requirement might not allow for prosecuting “persons whose contemporaneous statements plus their behavior are strongly suggestive of criminal purpose but whose behavior alone arguably would not be strongly corroborative of that purpose.”269 Proponents of the hybrid approach, however, would allow the “objective observer” to consider such contemporaneous statements and would judge the defendant’s conduct in light of those statements.270

The approach of the Model Penal Code is flawed. There should be no attempt conviction at all in factual and mixed fact/
law impossibility cases, which could be prosecuted under subsection (a) of section 5.01(1), unless the act itself provides some verification of the requisite intent. This approach will not revive the impossibility defense in mixed fact/law situations. In cases of attempts to receive stolen property, for example, there will often be sufficient circumstantial evidence from which the defendant’s intent can be inferred.\textsuperscript{271} If such evidence is lacking, conviction may be both impermissible\textsuperscript{272} and undesirable.\textsuperscript{273}

The drafters of the Model Penal Code may have intended to apply a purely subjective approach to impossibility.\textsuperscript{274} There does not appear to be any acceptable reason, however, for treating impossibility cases—particularly mixed fact/law cases—under a purely subjective approach while applying a more objective test to other attempts.\textsuperscript{275} In fact, the drafters of the Code otherwise seemed intent on not adopting a purely subjective approach to criminality.\textsuperscript{276}

\section*{B. Statutes That Explicitly Abolish the Impossibility Defense}

Much of the confusion surrounding the prosecution of impossible attempts in New York was resolved when New York enacted section 110.10 of the New York Penal Law.\textsuperscript{277} Mixed fact/law cases had posed the most difficulty for New York courts because judges often believed that defendants in such cases

\begin{itemize}
\item \textsuperscript{271} See supra notes 164–92 and accompanying text (discussing use of circumstantial evidence in Oviedo-type situation).
\item \textsuperscript{272} See Wechsler, Jones & Korn, supra note 193, at 584 (preventing punishment of innocuous acts was among the purposes of courts that recognized the impossibility defense).
\item \textsuperscript{273} See supra notes 221–26 and accompanying text (discussing problems with the subjective approach).
\item \textsuperscript{274} Professor Fletcher notes that, "[s]ince the late nineteenth century, the principle of subjective criminality has been almost unceasingly ascendant." G. Fletcher, supra note 12, § 3.3.5, at 167. Reflecting this trend, the drafters of the Model Penal Code wanted to "overcome all objective impediments to attempt convictions." Id. The corroboration requirement represents the translation of objectivist concerns into problems "in the technique of proving intent." Id. at 168.
\item \textsuperscript{275} Okla. Stat. tit. 21, § 44 (1981) adopted Model Penal Code sections 5.01(1)(a) and 5.01(1)(b). The problem with this approach is twofold: first, a purely subjective standard would be in effect for those attempts that are covered by subsection (a); second, and more importantly, the drafters of the Oklahoma statute ignored the fact that the general attempt provision of the Model Penal Code is Model Penal Code section 5.01(1)(c) and that factual impossibility cases were meant to be treated under that provision.
\item \textsuperscript{276} See generally Wechsler, Jones & Korn, supra note 193, at 593–607 (discussing corroboration requirement).
\item \textsuperscript{277} Act of July 20, 1965, ch. 1030, § 110.10, 1965 N.Y. Laws 1529, 1578 (codified at N.Y. Penal Law § 110.10 (McKinney 1975)).
\end{itemize}
should be punished, but they also believed that defendants could not be convicted of attempt crimes under the statutes as they were then written.\textsuperscript{278} The New York impossibility provision corrected this problem by explicitly rejecting the impossibility defense in both legal and factual cases.\textsuperscript{279} The New York statute provides: "[I]t is no defense ... that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission ... ."\textsuperscript{280} Eight other state statutes explicitly reject factual and legal impossibility defenses and are similar to the New York provision.\textsuperscript{281}

\textsuperscript{278} See People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962). In Rollino, the defendant was charged with attempted larceny. The court acquitted him because the property was not actually stolen. See supra note 235 (court calls for modification of attempt law).

Before Rollino, the decisions of the New York courts were in disarray. In People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906), the court held that a defendant could not be convicted of attempted larceny when the goods that he attempted to steal were not in fact stolen. Id. at 501, 78 N.E. at 170. Three years later, the court in People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909), held that it was no crime to testify falsely if the testimony that was offered was immaterial, even if the defendant believed that the testimony was material. Id. at 377; see supra notes 75–78 and accompanying text (discussing debate over whether Teal represents case of pure legal or mixed fact/law impossibility). In both Jaffe and Teal, the court stated that "an unsuccessful attempt to do that which is not a crime, when effectuated, cannot be held to be an attempt to commit the crime specified." Teal, 196 N.Y. at 377, 89 N.E. at 1088; Jaffe, 185 N.Y. at 501, 78 N.E. at 170.

Later New York decisions sought to limit Jaffe and Teal. In People v. Moore, 142 A.D. 402, 127 N.Y.S. 98, aff'd mem., 801 N.Y. 570, 95 N.E. 1136 (1911), the defendant was charged with knowingly receiving money on account of placing a woman in the custody of another person for immoral purposes. 142 A.D. at 403, 127 N.Y.S. at 99. The defendant argued that, because the police had lain a trap, she could not have completed the substantive crime even if she had completed the act. Id. The court rejected this defense and held that it was sufficient that the defendant knowingly received the money even if it was impossible for her to commit the substantive crime. Id. at 405, 127 N.Y.S. at 100.

In People v. Boord, 260 A.D. 681, 23 N.Y.S.2d 792 (1940), the defendant was charged with attempting to divert a traveler to a hotel through false statements. Because the traveler was actually an undercover policewoman, the defendant contended that the completed act could not have resulted in an actual diversion. Without reference to Jaffe, the court convicted the defendant because his conduct, regardless of its actual effect, was the evil at which the statute was aimed. Id. at 684, 23 N.Y.S.2d at 796.

\textsuperscript{279} See People v. Reap, 68 A.D.2d 964, 965, 414 N.Y.S.2d 775, 776 (1979) ("impossibility is not a defense to an attempt to crime [sic]"); People v. Leichtweiss, 59 A.D.2d 383, 388, 399 N.Y.S.2d 439, 441 (1977) (1967 revision of statute intended to eliminate both factual and legal impossibility defense).

\textsuperscript{280} N.Y. PENAL LAW § 110.10 (McKinney 1975).


Unlike in the states that have adopted the Model Penal Code attempt statute, several cases have been decided under the New York type of impossibility provision. See, e.g., People v. Hrapski, 658 P.2d 1367 (Colo. 1983) (defendant guilty of possession of firearms although bullet was defective); Darr v. People, 193 Colo. 445, 568 P.2d 32 (1977)
The New York Court of Appeals first interpreted section 110.10 in *People v. Dlugash.*

Melvin Dlugash was convicted of attempted murder even though his "victim" might already have been dead when Dlugash "fired approximately five shots in the victim's head and face." The court decided that Dlugash's actions constituted "conduct which tended to effect the commission of [the murder]," thereby fulfilling the requirements for a conviction under New York's general attempt statute. The court acknowledged that reasonable doubt existed concerning whether the victim was still alive when Dlugash fired the shots, but said that the presence of such doubt was no defense to attempted murder under section 110.10. Because the jury found that Dlugash believed that his victim was alive, he could be convicted of attempted murder regardless of whether the victim was actually alive. With respect to the New York statute in general, the court stated:

(Defendant guilty of attempting to receive stolen goods although goods were actually part of a police operation and were not stolen); People v. Rosencrants, 89 Misc. 2d 721, 392 N.Y.S.2d 808 (Sup. Ct. 1977) (defendant guilty of attempting to possess controlled substance although substance was not actually controlled); State v. James, 26 Wash. App. 522, 614 P.2d 207 (1980) (defendant guilty of attempted burglary although it was impossible to pick lock with wire); State v. Davidson, 20 Wash. App. 893, 584 P.2d 401 (1978) (defendant guilty of attempting to receive stolen goods although goods were not actually stolen).

The New York-type statute withstood a constitutional challenge in *State v. Sommers*, 569 P.2d 1110 (Utah 1977). The defendant in *Sommers* contended that the Utah attempt provision was facially void under the due process clause of the fourteenth amendment. See *id.* at 1111. The court held that the statute did not violate the defendant's right of "fundamental fairness" and that a legal impossibility defense was not a "fundamental right essential to an Anglo-American regime of ordered liberty." *Id.* The court found the defendant guilty of attempting to receive stolen property although the property was not actually stolen. *Id.* at 1112.

Two years before *Dlugash*, in *Haughton v. Smith*, [1975] A.C. 476 (H.L.), Lord Reid addressed the same issue and apparently would have disagreed with the New York Court of Appeals:

I would not, however, decide the matter entirely on logical argument. The life blood of the law is not logic but common sense. So I would see where this theory takes us. A man lies dead. His enemy comes along and thinks he is asleep, so he stabs the corpse. The theory inevitably requires us to hold that the enemy has attempted to murder the dead man. The law may sometimes be an ass but it cannot be so asinine as that.

*Id.* at 500.


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*Id.* at 500.
In the belief that neither of the two branches of the traditional impossibility arguments detracts from the offender's moral culpability . . . , the Legislature substantially carried the [Model Penal Code's] treatment of impossibility into the 1967 revision of the Penal Law . . . . Thus, a person is guilty of an attempt when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime . . . . It is no defense that, under the attendant circumstances, the crime was factually or legally impossible of commission, "if such crime could have been committed

1979). The Court found that Dlugash had been denied due process when the New York Court of Appeals modified his conviction from murder to attempted murder. The appellate division had refused to modify the judgment into a conviction for attempted murder. Instead, it overturned the murder conviction and dismissed the indictment, saying that the evidence was insufficient for the jury to have found beyond a reasonable doubt that the victim was alive when Dlugash shot him. See People v. Dlugash, 51 A.D.2d 974, 975, 380 N.Y.S.2d 315, 316 (1976). The New York Court of Appeals, however, found that there was sufficient evidence to convict Dlugash of attempted murder and reinstated the conviction with that modification. People v. Dlugash, 41 N.Y.2d 725, 735, 363 N.E.2d 1155, 1161, 395 N.Y.S.2d 419, 426 (1977). That court explained that when the jury found Dlugash guilty of murder it necessarily found that Dlugash believed that the victim was alive when he shot him. Id. at 737, 363 N.E.2d at 1162, 395 N.Y.S.2d at 427.

The federal district court ruled that Dlugash was entitled to a new trial for attempted murder because the conviction for murder was based on an instruction that the defendant intended the natural and probable consequences of his actions. See 476 F. Supp. at 923. Accordingly, once the jury found that the victim was alive at the time of the shooting, it was entitled to presume that Dlugash actually believed that the victim was alive. Therefore, a finding that Dlugash intended to murder the victim did not necessarily subsume a finding that Dlugash believed the victim was alive at the time of the shooting. Id.

After the federal district court granted Dlugash a new trial, his attorney, Harvard Law School professor Alan Dershowitz, entered into plea negotiations with the district attorney. Dershowitz, wanting to assure that Dlugash remained out of prison (he had been out on bail), wrote to the district attorney:

What conceivable purpose would be served by sending him back to prison . . . ? The man who would go to prison would be a different person from the one who is alleged to have participated in the tragic events [many years earlier].

A. DERSHOWITZ, supra note 282, at 115. The district attorney agreed to bargain, but insisted that Dlugash plead guilty to manslaughter, the most serious crime that would not require a prison term. See id. Dlugash refused to plead guilty to that crime, however, because he would have been admitting that he had actually killed the victim. Id. After additional bargaining, which included the possibility of pleading guilty to the crime of desecrating a corpse, the attorneys invented a crime—attempted manslaughter. As the judge who accepted the plea bargain explained, Dlugash pleaded guilty to the crime of attempting to recklessly cause the death of the victim. Id. Dlugash was sentenced to five years' probation.

In contrast to Dlugash, compare the Canadian approach in Regina v. Ladue, 51 W.W.R. 175 (Can. Y.T.C.A. 1965). In Ladue, the defendant attempted to have sex with a dead woman whom he believed was alive. The defendant was charged with "indecently interfering with a dead human body." Id. at 176. The defendant claimed that he could not be guilty of the crime because he did not know that the victim was dead. Id. The court held, however, that knowledge of the death was not an element of the offense. Id. at 178. The court further noted that, if the defendant had believed that the woman was alive, he would have been guilty of attempted rape. Id.
had the attendant circumstances been as such person believed them to be.” ... Thus, if defendant believed the victim to be alive at the time of the shooting, it is no defense to the charge of attempted murder that the victim may have been dead. 288

Washington’s statute provides a typical example of the mechanics of the New York statutory model:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.
(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission. 289

Section (2) of the Washington attempt statute effectively precludes an impossibility defense and assesses the defendant’s conduct under section (1), the general attempt provision. In State v. Davidson, 290 for example, the defendant was charged with attempting to receive stolen property. 291 Because the property was not actually stolen, the defendant raised a legal impossibility defense. 292 The court held that the Washington statute eliminated such a defense and said that the defendant would be guilty if “his conduct satisfied the elements of attempt: (1) intent to commit a specific crime; [and] (2) an act which is a substantial step toward the commission of that crime.” 293 The effect of the New York statutory model, therefore, is quite different from that of the Model Penal Code. Unlike the Model Penal Code, which appears to treat different categories of attempt crimes differently, 294 the New York model subjects all attempts to the same regimen. Rather than devise a special test with which to treat impossible attempts, those legislatures adopting the New

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288 41 N.Y.2d at 735, 363 N.E.2d at 1161, 395 N.Y.S.2d at 426 (quoting N.Y. PENAL LAW § 110.10 (McKinney 1975)) (emphasis added) (citations omitted).
291 Id. at 894, 584 P.2d at 402.
292 The property that the defendant believed was stolen had actually been planted by the police. Id.
293 Id. at 895, 584 P.2d at 404. The court in Davidson noted that the purpose of both the Model Penal Code and those legislatures that adopted the New York form of attempt statute was “to focus on the criminal intent of the actor, rather than the impossibility of convicting him of a completed crime.” Id. (citing W. LAFAVE & A. SCOTT, supra note 45, § 60, at 438–46).
294 See supra notes 241–55 and accompanying text (discussing differences between §§ 5.01(1)(a) and 5.01(1)(c) of the Model Penal Code).
York model have determined that all attempts should be similarly treated. 295
Several states have also explicitly abolished the impossibility defense but, unlike New York, did not use the terms "factual" or "legal" impossibility. For example, the attempt statutes of Illinois, Indiana, Montana, and Pennsylvania provide, in essentially the same words, that "[i]t shall not be a defense to a charge of attempt that, because of a misapprehension of the circumstances, it would have been impossible to commit the offense attempted." 296 These statutes draw from the language of both section 5.01 of the Model Penal Code and section 110.10 of the New York Penal Law and bar reliance on the impossibility defense if the defendant would have committed a crime had the circumstances been as he believed them to be.

In a recent case, Commonwealth v. Henley, 297 the Pennsylvania Supreme Court held that this type of impossibility statute was intended to abrogate both factual and legal impossibility

295 Different states that have adopted the New York model could end up with strikingly different approaches to criminality. These differences will depend on how each state defines substantial step or on what degree of conduct the state requires in its general attempt provision. See supra note 254 (discussing various definitions of substantial step).

In Colorado, for example, the general attempt statute defines substantial step—as does section 5.01(1)(c) of the Model Penal Code—in terms of conduct that is strongly corroborative of the actor's intent:

_Criminal attempt. (1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be, nor is it a defense that the crime attempted was actually perpetrated by the accused._

COLO. REV. STAT. § 18-2-101 (1973). The result of this definition is that all attempts in Colorado, regardless of the category in which they might otherwise be classified, are subjected to a Model Penal Code section 5.01(1)(c) or Oviedo-type analysis. See supra notes 164–83 and accompanying text (discussing Oviedo approach).

In People v. Hrapski, 658 P.2d 1367 (Colo. 1983), for example, the defendant was charged with attempting to possess a dangerous instrument while in a detention facility. See id. at 1368. The defendant, who had concealed a .22 caliber bullet in his rectum, contended that he could not be convicted of the offense because the bullet was defective. See id. at 1368–69. The court rejected the defendant's assertion of an impossibility defense and found that, for purposes of a preliminary hearing, the act of hiding the bullet was sufficient corroborative of the defendant's intent to commit the substantive crime. Id. at 1369.


defenses. When Pennsylvania proposed amending its penal code to eliminate the impossibility defense, a government commission recommended adoption of the Model Penal Code provision. The legislature decided not to adopt that provision, however, and instead enacted the following one:

(a) Definition of attempt—a person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward commission of that crime.

(b) Impossibility—it shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the crime attempted.

The most important difference between this provision and the Model Penal Code attempt sections is the use of the explicit statement that impossibility is no defense. The defendant in Henley invoked this difference and argued that it indicated that the Pennsylvania legislature intended to retain the legal impossibility defense. The court rejected this claim and held that Henley would be guilty of attempt "if the completed offense could have occurred had the circumstances been as the defendant believed them to be." Therefore, this form of attempt statute operates like the New York statute by treating impossible attempts under the state's general attempt provisions.

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298 Id. at 415, 474 A.2d at 1117.
301 See 504 Pa. at 413, 474 A.2d at 1117–18. The defendant in Henley was charged with attempted theft. Because the goods were not actually stolen, the defendant raised an impossibility defense. Id.
302 Id. at 413–14, 474 A.2d at 1118. The court stated that "the mere fact that our Legislature improved upon the language in its Criminal Attempt Section over that found in the Model Penal Code cannot by itself support the conclusion that the Legislature intended to reject the provisions of the Model Penal Code and thus, to retain the legal impossibility defense." Id. The court did not, however, explain how the change in language represented an improvement over the Model Penal Code provisions.
303 Other cases decided under the Pennsylvania form of statute have also found that the statute was intended to eliminate the impossibility defense. See People v. Elmore, 128 Ill. App. 2d 312, 314, 261 N.E.2d 736, 737 (1970) (statute codifies rule that factual or legal impossibility is no defense), aff'd, 50 Ill. 2d 10, 276 N.E.2d 325 (1971); People v. Steward, 74 Ill. App. 2d 407, 412, 221 N.E.2d 80, 84–85 (1966) (defendant guilty of
As with the New York form of attempt statute, it is unclear whether courts will apply an objective, subjective, or hybrid approach under this statute.\textsuperscript{304} Two recent Indiana decisions demonstrate this ambiguity. In \textit{Zickefoose v. State},\textsuperscript{305} the Supreme Court of Indiana held that a defendant tried under the Indiana attempt provision could only be convicted of an attempt if his "conduct strongly corroborated the firmness" of his intent.\textsuperscript{306} This standard has the same effect as the corroboration requirement of subsection 5.01(1)(c) of the Model Penal Code\textsuperscript{307} or of the standard that was adopted in \textit{United States v. Oviedo}.\textsuperscript{308} Only two years later, however, the Court of Appeals of Indiana held in \textit{State v. Gillespie}\textsuperscript{309} that the Indiana attempt statute "pointedly intended to include \textit{Oviedo}-type conduct within the proscription of the attempt statute" and that the "basic premise [of \textit{Oviedo}] has been rejected by our legislature in the general attempt statute."\textsuperscript{310}

Kansas\textsuperscript{311} and Minnesota\textsuperscript{312} have also enacted statutes that explicitly abolish the impossibility defense. The Kansas statute provides: "It shall not be a defense to a charge of attempt that the circumstances under which the act was performed . . . were such that the commission of the crime was not possible."\textsuperscript{313}
Unlike the New York type of statute, the Kansas statute does not mention legal and factual impossibility. Instead, like the Pennsylvania statute, it states that the impossibility of commission of the substantive crime is no defense. This wording has led to some problems as defendants sought to limit application of the statute to factual impossibility. In State v. Logan,\textsuperscript{314} for example, the Supreme Court of Kansas rejected this argument and held that the defendant could be convicted of attempted theft although the property that was taken had not actually been stolen.\textsuperscript{315} The lower court, however, had concluded that legal impossibility remained a viable defense even after passage of the Kansas statute.\textsuperscript{316} Once it is clear that this type of statute was intended to eliminate both legal and factual impossibility, it functions in the same manner as the New York and Pennsylvania statutes by analyzing the defendant’s conduct under the statute’s general attempt provision.\textsuperscript{317}

\textsuperscript{314} 232 Kan. 646, 656 P.2d 777 (1983).
\textsuperscript{315} Id. at 650, 656 P.2d at 780. The court noted that the Kansas statute was patterned after the Minnesota statute and relied on the decision of the Supreme Court of Minnesota in \textit{Bird}, 285 N.W.2d 481. In \textit{Bird}, the court acknowledged the modern trend toward abolishing the legal impossibility defense, \textit{id.} at 482, and held that a defendant could be convicted of attempted theft although the property had not actually been stolen. \textit{id.} at 483. The court in \textit{Logan} also relied on a decision of a Florida appellate court that included the Kansas statute in a list of 32 state statutes that entirely eliminated the impossibility defense. \textit{Logan}, 232 Kan. at 650, 656 P.2d at 780 (citing \textit{State v. Rios}, 409 So. 2d 241, 244-45 (Fla. Ct. App. 1982)).
\textsuperscript{316} See \textit{Logan}, 232 Kan. at 647, 656 P.2d at 778.
\textsuperscript{317} The Minnesota and Kansas statutes, like the New York and Pennsylvania statutes, are unclear whether an objective or subjective analysis will be applied under the general attempt provision. The general attempt provision of the Minnesota statute requires that the defendant perform an act that is a "substantial step." \textit{Minn. Stat.} § 609.17.1 (1982). Reference would have to be made to the Minnesota case law to determine whether the state applies an objective, subjective, or hybrid approach to criminality. The court in \textit{Bird}, 285 N.W.2d 481, did acknowledge the particular problem of proving intent in legal impossibility cases and stated that it would "carefully scrutinize the evidence of intent in any appeal challenging the conviction of attempt in which the defense of legal impossibility traditionally would have applied." \textit{id.} at 482 n.1 (citing Enker, \textit{supra} note 81).

Oregon has also enacted an attempt provision that precludes the impossibility defense when it is "impossible" to commit the crime. \textit{Or. Rev. Stat.} § 161.425 (1981). Unlike the Kansas and Minnesota statutes, however, the Oregon statute includes the phrase "if the circumstances were as the actor believed them to be." \textit{id.} In this respect, the Oregon statute is similar both to subsection 5.01(1)(a) of the Model Penal Code and to the New York statute. \textit{See supra} notes 244--50, 282--88 and accompanying text (discussing analogous phrasing in Model Penal Code and New York statute). The cases

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Although the New York, Pennsylvania, and Kansas statutes represent important steps toward eliminating the impossibility defense, they address the problem incompletely. Courts, legislatures, and commentators agree, almost without exception, that factual and legal impossibility should not be a defense. The more difficult question, however, is how these attempts should be analyzed. The drafters of the Model Penal Code, perhaps unknowingly, devised a system in which legal impossibility cases could be analyzed under a purely subjective approach while factual impossibility cases (as well as all other attempts) are subject to a hybrid test. Under the New York, Pennsylvania, and Kansas statutes, the approach is equally haphazard. Once the statute returns the defendant to the general attempt provision, his conduct may be analyzed under either a subjective or a hybrid approach. Which approach is ultimately adopted has little to do with impossibility. It is instead a function of whether the legislature defined substantial step and the extent to which the courts have permitted the inference of intent. In most cases, this determination is made without reference to the particular problems that impossible attempts—especially those that are characterized as mixed fact/law cases—raise.

C. Recommendations

Each of the approaches to abolishing the impossibility defense through legislation has resulted in problems. As discussed

decided under the Oregon statute have found that the Oregon legislature intended to eliminate both the legal and factual impossibility defenses. See State v. Korelis, 21 Or. App. 813, 819, 537 P.2d 136, 139 (impossibility defense to the crime of attempted theft eliminated), aff'd, 273 Or. 427, 541 P.2d 468 (1975); State v. Niehuser, 21 Or. App. 33, 38, 533 P.2d 834, 837 (1975) (actor liable in all impossibility situations).

See supra notes 241–76 and accompanying text (discussing Model Penal Code).

See supra notes 277–95 and accompanying text (describing mechanics of New York type of attempt statute).

Legislation outside of the United States abolishing the impossibility defense has also been found to be imperfect. In England, for example, the Criminal Attempts Act of 1981 was adopted in response to the decision in Haughton v. Smith, [1975] A.C. 476 (H.L.). The defendant in Haughton had been found not guilty of attempting to handle stolen property (cartons of corned beef) that the police had recovered by the time the defendant obtained the goods. To reverse the result in Haughton, Parliament passed the Criminal Attempts Act of 1981, adopting the subjective approach to attempt. The statute provides:

(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.
above, the Model Penal Code provision seems to treat mixed fact/law cases differently from other attempts without explaining

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where
(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
(b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then ... he shall be regarded as having had an intent to commit that offence.

Criminal Attempts Act, 1981, §§ 1(1)-(3). One commentator criticizes the Act's provision that the person "may be" guilty of an attempt, because this ambiguity would allow counsel to manipulate his argument accordingly, see Dennis, The Criminal Attempts Act of 1981, 1982 Crim. L. Rev. 5, 10, thereby suggesting that there is still some room for discretion by judges to circumvent the Act.

The statute was most recently applied in Anderton v. Ryan, [1985] 2 All E.R. 355 (H.L.), which presents a predicament that is analogous to that of Lady Eldon and her lace, see 1 F. Wharton, supra note 1, § 225, at 304 n.9. Defendant Bernadette Ryan bought a video recorder that she believed was stolen. Although the recorder was not in fact stolen, Ryan was convicted under section 1(1) of the Act, supra, of dishonestly attempting to handle goods believed to be stolen. 2 All E.R. at 359–60. The House of Lords reversed the conviction. Lord Roskill reasoned that section 1(3), supra, and not section 1(1) provided the applicable law. Id. at 363–64, 365. He concluded that, "if the action is innocent and the defendant does everything he intends to do, [section 1(3)] does not compel the conclusion that erroneous belief in the existence of facts, which, if true, would have made his completed act a crime makes him guilty of an attempt to commit that crime." Id. at 364. Even though the Act was intended to alter the state of attempt law that was reflected in Haughton v. Smith, it was not "necessarily designed to reverse the decision in [Haughton's] case on its own facts." Id. at 366 (Lord Bridge). Absent explicit statutory language, such "manifestly absurd results" could not have been intended. Id. at 363 (Lord Roskill). For the most recent literature in the debate on the Criminal Attempts Act of 1981 and a critique of the result in Anderton, compare Hogan, The Criminal Attempts Act and Attempting the Impossible, 1984 Crim. L. Rev. 584 and Hogan, Attempting the Impossible and the Principle of Legality, 135 New L.J. 454 (1985) with Williams, Attempting the Impossible—The Last Round?, 135 New L.J. 337 (1985) and Williams, The Lords Achieve the Logically Impossible, 135 New L.J. 502 (1985).

The Act has sparked debate in other Commonwealth countries as well. One commentator notes that the New Zealand Court of Appeals, in Regina v. Donnelly, [1970] 1 N.Z.L.R. 980 (N.Z. Ct. App.), a case on which the Haughton court relied, interpreted section 72(1) of the New Zealand Crimes Act of 1961 as applying to those situations in which there is some factual obstruction to success. Section 72(1) of the Crimes Act of 1961 provides that:

Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

Crimes Act of 1961, § 72(1), 1 N.Z. Repr. Stat. 671 (1979). The commentator notes that, under this interpretation of section 72(1), legal (mixed fact/law) impossibility is not rejected as a defense to an attempt charge. This result, the commentator warns, could be reached with a similar interpretation of England's Criminal Attempts Act of 1981, which would "certainly frustrate the Law Commission's aim to overrule [Haughton]." Case and Comment, The Criminal Attempts Act of 1981, 41 Cambridge L.J. 21, 26 (1982). It has also been suggested that Haughton and Donnelly might have been decided differently had they both not involved statutes that decriminalized the receiving of recovered stolen goods. See Police v. Jay, [1974] 2 N.Z.L.R. 204, 212 (N.Z.S.C.);
why such different treatment is necessary. The New York statute avoids any ambiguity concerning whether legal or factual impossibility remains a defense, but it fails to take the next step and decide how these attempts should be dealt with.\textsuperscript{321} Those statutes that do not specifically provide that "legal and factual impossibility are no defense" and simply state that "impossibility is no defense" could be confined to factual impossibility.\textsuperscript{322} Although this problem, when it has arisen, has been easily remedied by the courts,\textsuperscript{323} a statutory solution would ensure predictability—and therefore fairness to the defendant—in criminal prosecutions of attempt crimes.

The ideal statute that eliminates the impossibility defense will specifically state that neither legal nor factual impossibility is a defense. Then, in the manner of the New York statute, it will require that all attempts be analyzed under the general attempt statute.\textsuperscript{324} Unlike the New York statute, however, the ideal statute would not end with the application of a general attempt analysis. Assuming that the Oviedo approach is correct and that the defendant's conduct must manifest his intent, the general attempt provision should define substantial step as conduct that strongly corroborates the requisite intent.

The following suggested statute would result in the adoption of the hybrid approach:

\textbf{ATTEMPT}

(1) (a) A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he purposely does or omits to do anything that, under the circumstances as a reasonable person would believe 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.


Section 4 of the Queensland Criminal Code, 3 QUEENSL. STAT. 221–22 (1964), has not been amended since 1964; it thus continues to rely on the rationale behind the holding in \textit{Haughton}, despite the fact that the case has been superseded by the Criminal Attempts Act of 1981. See Criminal Attempts Act, 1981, § 1 general note.

\textsuperscript{321} See \textit{supra} notes 277–95 (describing mechanics of New York type of attempt statute).

\textsuperscript{322} See \textit{supra} notes 296–319 and accompanying text (discussing statutes that abolish impossibility).

\textsuperscript{323} See \textit{id}.

\textsuperscript{324} See \textit{supra} notes 282–95 and accompanying text (discussing application and mechanics of New York's general attempt statute).
(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime that was the object of the attempt.

(2) Conduct shall not be held to constitute a substantial step under this section unless it is strongly corroborative of the actor's criminal purpose.

(3) Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;
(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
(c) reconnoitering the place contemplated for the commission of the crime;
(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
(e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

This proposal, although it is similar to other statutes, makes three significant changes in existing codifications. First, it eliminates the confusion in Model Penal Code jurisdictions by ensuring that all impossibility cases are analyzed under the hybrid approach. Second, unlike those states that have adopted the New York attempt statute, this proposal, through its definition of substantial step, prohibits convictions that are based on entirely neutral acts. Third, drawing on the language of the Minnesota and New Jersey attempt statutes, this proposal prevents convictions of actors who unreasonably believed that their actions could result in the intended crime.

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325 Subsections (2) and (3) of this proposed statute are based on section 5.01(2) of the Model Penal Code, set forth at supra note 254; see also supra note 124 (citing statutes).
326 See MINN. STAT. § 609.17.2 (1982) ("unless such impossibility would have been clearly evident to a person of normal understanding"); N.J. STAT. ANN. § 2C:5-1a(1) (West 1982) ("if the attendant circumstances were as a reasonable person would believe them to be"); see also supra notes 243 and 313 (discussing inherent impossibility).
A great deal has been written about the impossibility defense and numerous solutions have been offered to the problems that it engenders. One court has written that the defense is "so fraught with intricacies and artificial distinctions that [it] has little value as an analytical method for reaching substantial justice." Finally, however, the law appears to be moving toward a clear and defensible approach. This approach endeavors to accommodate two valid and competing interests: the need to evaluate conduct based on the intent with which it was performed and the danger of inferring too much from neutral acts. The hybrid approach, by requiring that the conduct attain a certain threshold before other extrinsic evidence can be considered, seeks to balance these concerns.

That the hybrid approach strikes the appropriate balance is demonstrated by the growing trend among legislatures, courts, and commentators to adopt this approach. There remains a need, however, to recognize that a consensus is in fact building. Several states continue to be mired in what is no more than a random approach to attempt. Much of the uncertainty in the application of many state statutes was fostered by the imprecision of the Model Penal Code. Until these statutes are clarified and the hybrid approach codified, it will be impossible to deal with the impossibility defense without substantial confusion.

327 State v. Moretti, 52 N.J. 182, 189, 244 A.2d 499, 503 (1968); see also United States v. Thomas, 13 C.M.A. 278, 286–87, 32 C.M.R. 278, 286–87 (1962) (impossibility doctrine has become "a source of utter frustration," plunging the state courts into a "morass of confusion"). In another area of criminal justice in which designating an issue one of fact, one of law, or one of both fact and law can have important consequences, Justice O'Connor recently wrote: "Perhaps much of the difficulty . . . stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact,' is sometimes as much a matter of allocation as it is of analysis." Miller v. Fenton, 106 S. Ct. 445, 451–52 (1985) (habeas corpus case concerning deference to state-court findings of fact but not to conclusions of law or applications of law to facts) (citing Monaghan, Constitutional Fact Review, 85 COLUM. L. Rev. 229, 237 (1985)).