

# IT'S NOT TOO DIFFICULT: A PLEA TO RESURRECT THE IMPOSSIBILITY DEFENSE

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## I. INTRODUCTION

Suppose that I go to the local mall in the hopes of stealing people's wallets. After an hour of reaching into various pockets, however, I have yet to claim any success. If a policeman were to witness my activity, he would certainly have probable cause to arrest me for attempted theft. And it would not help me either with him or with a judge to argue that all of the pockets I picked were empty and therefore that it was impossible for me actually to commit theft. The fact that external circumstances (an absence of wallets) did not "cooperate" with my intent is merely bad luck, not a good defense.

One might infer from this scenario that the "impossibility defense" is doomed from the outset. But this inference is fallacious. The impossibility defense actually works in certain kinds of situations. Still, it can be very difficult to figure out what these situations are. Indeed, the impossibility defense is one of the thorniest issues in criminal law. Some of my fellow criminal law professors have told me that they either confess their irremediable confusion to their students or simply avoid teaching the subject. Similarly, most jurisdictions have followed the Model Penal Code (MPC)<sup>1</sup> and concluded that the impossibility defense is so hopelessly confused that it should be abandoned altogether.<sup>2</sup>

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1. See *infra* Part V.A.

2. See *United States v. Aguilar*, 515 U.S. 593, 605 (1995) ("In *Osborn v. United States*, 385 U.S. 323, 333 (1966), we expressed reservations about the 'continuing validity [of] the doctrine of 'impossibility,' with all its subtleties,' in the law of criminal attempt . . . ."); *United States v. Farner*, 251 F.3d 510, 512-13 (5th Cir. 2001) ("[T]he distinction between factual and legal impossibility is elusive at best . . . . Most federal courts have repudiated the distinction or have at least openly questioned its usefulness. . . . [T]his circuit has properly eschewed the semantical thicket of the impossibility defense in criminal attempt cases . . . .") (citations omitted); *United States v. Hsu*, 155 F.3d 189, 199-200 (3d Cir. 1998) ("[W]e are the only circuit which continues

The authors of the MPC and its followers worried that courts were falling for too many defendants' bogus impossibility claims.<sup>3</sup> These defendants had typically tried to commit a crime such as selling controlled substances or committing statutory rape and failed only because the people whom they had solicited were undercover officers.<sup>4</sup> The MPC and its followers reasoned that even though the undercover officers made it im-

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to recognize a common law defense of legal impossibility.”); *id.* at 199 (“[T]he great majority of jurisdictions have now recognized that legal and factual impossibility are ‘logically indistinguishable’ . . . .”) (citations omitted); *United States v. Berrigan*, 482 F.2d 171, 186 (3d Cir. 1973) (“[W]e are informed that elimination of impossibility as a defense to a charge of criminal attempt, as suggested by the Model Penal Code and the proposed federal legislation, is consistent with ‘the overwhelming modern view’ . . . .”) (citation and footnotes omitted); *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995) (“The doctrine of impossibility has been labeled by scholars, judges and commentators alike as one of the most evasive issues in the criminal law.”); *Commonwealth v. Henley*, 474 A.2d 1115, 1117 n.2 (Pa. 1984) (listing states that have abandoned the impossibility defense); *State v. Moretti*, 244 A.2d 499, 503 (N.J. 1968) (“The defense of impossibility in a prosecution for an attempted crime has resulted in a confused mass of law throughout the country . . . . Our examination of these authorities convinces us that the application of the defense of impossibility is so fraught with intricacies and artificial distinctions that the defense has little value as an analytical method for reaching substantial justice.”); GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 181 (1998) (“Serious people must smile at the fragility of [the distinction between cases involving factual impossibility and cases involving legal impossibility]. As critical a question as criminal liability for an attempted offense should not turn on distinctions that hardly convey a material difference.”); John Hasnas, *Once More Unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 *HASTINGS L.J.* 1, 3 (2002) (“There is little question that in most American jurisdictions the defendants would have no grounds on which to appeal their convictions. Thirty-seven states have explicitly eliminated impossibility as a defense to a charge of attempt and the federal circuits that have not done likewise have so limited the range of application of the defense as to render it virtually a dead letter.”) (footnotes omitted); Audrey Rogers, *Protecting Children on the Internet: Mission Impossible?*, 61 *BAYLOR L. REV.* 323, 347 (2009) (stating that the impossibility defense had been almost universally abolished or abandoned by the late 1990s); Robert E. Wagner, *A Few Good Laws: Why Federal Criminal Law Needs a General Attempt Provision and How Military Law Can Provide One*, 78 *U. CIN. L. REV.* 1043, 1068–69 (2010) (“The Model Penal Code would abolish the entire doctrine of impossibility for a number of reasons . . . . Many jurisdictions have already abolished impossibility by either statute or case law . . . . [M]ilitary law has done away with the impossibility defense . . . .”) (footnotes omitted).

3. MODEL PENAL CODE § 5.01 cmt. 3(a), 309 (Official Draft and Revised Comments 1985) (“[T]he courts [have] exonerate[d] defendants in situations where attempt liability most certainly should be imposed. In all of these cases the actor’s criminal purpose has been clearly demonstrated; he went as far as he could in implementing that purpose; and, as a result, his ‘dangerousness’ is plainly manifested.”).

4. *See, e.g., Booth v. State*, 398 P.2d 863, 871–72 (Okla. Crim. App. 1964).

possible for the crimes to be consummated, the defendants should still have been found guilty of attempt on the grounds that they were genuinely guilty of attempting to commit serious crimes and the standard law-enforcement practice of using undercover officers to catch criminals should be encouraged rather than discouraged.<sup>5</sup>

I agree with the MPC that these defendants should have been convicted and punished. But it does not follow that the MPC was right to abolish the impossibility defense. On the contrary, the MPC—and all the jurisdictions that followed it—threw out the baby with the bathwater. While they were right to throw out *one version* of the impossibility defense—*factual impossibility*—they were wrong to throw out *another version* of the impossibility defense: *legal impossibility*.<sup>6</sup> The fact of the

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5. See *United States v. Everett*, 700 F.2d 900, 907 n.16 (3d Cir. 1983) (“We note that if impossibility were a defense [for attempted distribution of controlled substances], the harm loosed upon the public is not merely that would-be drug dealers must be freed to try again. Allowing the defense here would also gut law enforcement efforts to infiltrate drug supply chains. The government goes undercover not only as purchaser, as in the instant case, but as seller, or as middleman . . . . If such impossibility is a defense, the government will be forced to furnish real drugs or abandon hope of obtaining attempt convictions.”) (footnotes omitted); *People v. Rojas*, 358 P.2d 921, 924 (Cal. 1961) (“[T]he criminality of the attempt is not destroyed by the fact that the goods, having been recovered by the commendably alert and efficient action of the Los Angeles police, had, unknown to defendants, lost their ‘stolen’ status, any more than the criminality of the attempt in [another case] was destroyed by impossibility caused by the fact that the police had recovered the goods and taken them from the place where the would-be receiver went to get them. In our opinion the consequences of intent and acts such as those of defendants here should be more serious than pleased amazement that because of the timeliness of the police the projected criminality was not merely detected but also wiped out.”); *People v. Jaffe*, 185 N.Y. 497, 503 (1906) (Chase, J., dissenting) (arguing that the mere fact that an undercover sting frustrated the defendant’s attempt to break the law does not mean that the defendant did *not* attempt to break the law).

6. See *Hsu*, 155 F.3d at 203 (“[W]e conclude that legal impossibility is not a defense to conspiracy.”); *State v. Salerno*, No. CR 92 0080796, 1993 WL 88327, at \*1 (Conn. Super. Ct. Mar. 23, 1993) (noting that Congress eliminated the legal impossibility defense for attempted possession of a controlled substance); Andriy Pazuniak, *A Better Way To Stop Online Predators: Encouraging A More Appealing Approach To § 2422(B)*, 40 SETON HALL L. REV. 691, 699–700 (2010) (“Courts . . . have consistently rejected legal impossibility as a valid defense to an attempt charge under [18 U.S.C.] § 2422(b) [which prohibits attempts to “persuade[ ], induce[ ], entice[ ], or coerce[ ]” a minor to engage in illegal sexual activity]. Some courts reject the defense by recharacterizing it as a factual impossibility defense, which courts generally consider an invalid defense to criminal-attempt charges. Other courts reluctantly accept the predator’s legal impossibility defense for the sake of argument and then reject it on the basis of legislative intent by holding that Congress did not intend for legal impos-

matter is that the legal-impossibility version of the impossibility defense is perfectly *valid*.

As I will explain further in Part IV, factual impossibility and legal impossibility are two different kinds of impossibility and therefore two different kinds of reasons why attempts to commit crimes are doomed to failure. A given attempt to commit a crime is *factually* impossible if an external circumstance prevents my attempt from succeeding.<sup>7</sup> In the pickpocketing example above, my attempts to steal wallets were frustrated by the absence of wallets in the pockets that I reached into. This absence is an external circumstance and therefore qualifies as factual impossibility. On the other hand, a given attempt to commit a crime is *le-*

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sibility to constitute a defense to an attempt charge under § 2422(b).”) (footnotes omitted).

7. See *Hsu*, 155 F.3d at 199 (“[F]actual impossibility is said to occur when extraneous circumstances unknown to the actor or beyond his control prevent consummation of the intended crime.”) (citation omitted); *United States v. Oviedo*, 525 F.2d 881, 883 (5th Cir. 1976) (“Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing about that objective.”) (citation omitted); *Berrigan*, 482 F.2d at 188 (“[F]actual impossibility is said to occur when extraneous circumstances unknown to the actor or beyond his control prevent consummation of the intended crime.”); *Lawhorn*, 898 S.W.2d at 891 (“Factual impossibility is generally regarded as existing where, due to a physical or factual condition unknown to the actor, the attempted crime could not be completed. Often cited examples of factual impossibility include the attempt to pick an empty pocket, attempt to kill with an unloaded or defective weapon, attempt to kill with poison that was not capable of producing death, attempt to steal from an empty house, attempt to conduct an abortion on a woman who was not pregnant.”) (citations omitted); *People v. Rollino*, 233 N.Y.S.2d 580, 582 (N.Y. Sup. Ct. 1962) (“[W]here the basic or substantive crime is impossible of completion, simply because of some physical or factual condition unknown to the defendant, [is] a situation which is usually described as a ‘factual impossibility’.”); *Grill v. State*, 651 A.2d 856, 858 (Md. 1995) (“LaFave and Scott . . . characterize factual impossibility as ‘that in which the defendant is unable to accomplish what he intends because of some facts unknown to him.’”); Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 494 (2004) (“Factual impossibility exists when a defendant’s efforts to commit a crime fail because a factual or physical circumstance necessary for the crime to be completed is missing. To use a classic example, had the victim’s pocket been full of money, the defendant pickpocket would have successfully completed his attempt and would have stolen the victim’s money. In other words, to use the *Collins* court’s basic rationale, the attempt would have been carried out successfully had the facts been as the defendant intended.”) (footnote omitted); *Wagner*, *supra* note 2, at 1066 (“Factual impossibility is where the crime cannot be committed because of some physical circumstance unknown to the actor . . .”).

gally impossible if I am trying to break a law that simply does not exist.<sup>8</sup> If, for example, I stick out my tongue at others in the belief that this is an illegal act, what renders my attempt to break the law impossible is simply the fact that this act is *not* illegal. There is no law preventing me from sticking out my tongue at whomever I want.

In Part VI.A, I will further distinguish between two kinds of legal impossibility. The first kind, which I just described, is the attempt to break a law that does not exist. The second kind, which is probably much more common, is the attempt to break a law that *does* exist by acting in a way that does not come close enough to what the law prohibits. The person who believes that she is breaking the law by sticking her tongue out at others falls into the first category if she mistakenly believes that there is a distinct Anti-Tongue-Sticking-Out statute and into the second category if she mistakenly believes that sticking her tongue out at others violates the assault statutes. Ironically, while the second version of legal impossibility is much more overlooked than the first, it is also more important. Indeed, it is this version of the impossibility defense that primarily motivates my plea for its resurrection.

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8. See *Hsu*, 155 F.3d at 199 n.16 (“Another type of legal impossibility—‘pure’ legal impossibility—occurs when the law does not even ‘proscribe the goal that the defendant sought to achieve.’”) (citations omitted); *Oviedo*, 525 F.2d at 883 (“Legal impossibility occurs when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime.”) (citations omitted); *Berrigan*, 482 F.2d at 188 (“Legal impossibility is said to occur where the intended acts, even if completed, would not amount to a crime.”); *id.* at 190 (“[A]ttempting to do that which is not a crime is not attempting to commit a crime.”) (footnote omitted); *State v. Guffey*, 262 S.W.2d 152, 156 (Mo. Ct. App. 1953) (“It is no offense to attempt to do that which is not illegal.”) (citation omitted); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 175 (2000) (describing legal impossibility as a situation in which “the actor thinks that he is engaged in a crime and yet, due to his mistaken view of the law, it turns out that his activity is perfectly legal.”); Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles*, 12 *LAW & PHIL.* 33, 55 (1993) (describing a case of “true legal impossibility” as a situation in which “if all the facts were as [a person] believed them to be, and even if he was to accomplish all that he believed necessary to complete the crime, he nevertheless would not have committed any crime.”); Rogers, *supra* note 7, at 495 (“The first [type of legal impossibility] is ‘pure’ or ‘true legal impossibility’ which exists when what the defendant is attempting to commit is actually not a crime. Notwithstanding a defendant’s subjective bad intentions, he is not guilty of any crime. Pure legal impossibility is the mirror image of the ignorance of the law doctrine: while ignorance of an existing law criminalizing a defendant’s conduct cannot exonerate a defendant, ignorance of the lack of a law criminalizing a defendant’s conduct cannot inculcate him.”) (footnotes omitted).

The validity of both versions of the legal-impossibility defense derives from a fundamental precept of criminal justice:<sup>9</sup> the principle of legality, which is also known as *nullem crimen sine lege* or *nulla poena sine lege*.<sup>10</sup> The principle of legality forbids punishing an individual for com-

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9. See *United States v. Lanier*, 520 U.S. 259, 265 (1997) (“[A] prosecution to enforce one application of [18 U.S.C. § 242’s] spacious protection of liberty can threaten the accused with deprivation of another: what Justice Holmes spoke of as ‘fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.’ . . . ‘The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.’”) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *McBoyle*, 283 U.S. at 27 (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. . . . [T]he statute should not be extended to [unmentioned elements or items] simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.”); *Keeler v. Superior Court*, 2 Cal.3d 619, 633–34 (1970) (“The first essential of due process is fair warning of the act which is made punishable as a crime. ‘That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.’ . . . ‘No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.’ . . . This requirement of fair warning is reflected in the constitutional prohibition against the enactment of ex post facto laws . . . . When a new penal statute is applied retrospectively to make punishable an act which was not criminal at the time it was performed, the defendant has been given no advance notice consistent with due process. And precisely the same effect occurs when such an act is made punishable under a preexisting statute but by means of an unforeseeable judicial enlargement thereof.”) (quoting *Connally v. General Contra. Co.* 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *In re Newbern*, 53 Cal.2d 786 (1960); and *Bouie v. City of Columbia*, 378 U.S. 347 (1964)); Heyward D. Armstrong, *Rogers v. Tennessee: An Assault on Legality and Due Process*, 81 N.C. L. REV. 317, 321 (2002) (“The principle of legality is a ‘basic premise’ of criminal law.”) (footnote omitted); *id.* at 334 (“[A]t the core of legality is the idea that retroactively changing the law to criminalize previously innocent conduct, or retroactively increasing the penalty for criminal conduct, is ‘unjust.’”).

10. See *Berrigan*, 482 F.2d at 186 (“Professor Williams asserts that ‘[i]t should need no demonstration that a person who commits or attempts to commit what is not a crime in law cannot be convicted of attempting to commit a crime, and it makes no difference that he thinks it is a crime.’ Professor Hall is equally insistent that to make such conduct a criminal attempt would violate the principle of legality.”) (footnotes omitted); *Lawhorn*, 898 S.W.2d at 891–92 (“[U]nless the intended end is a legally proscribed harm, causing it is not criminal, hence any conduct falling short of that is

mitting an act that the state had not designated as criminal at the time that the individual performed the act.<sup>11</sup> Likewise, the legal-impossibility

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not a criminal attempt ( i.e. the principle of legality . . . .”) (citations omitted); FLETCHER, *supra* note 8, at 178 (“English and American commentators typically approach [the problem of legal impossibility] by arguing that ‘unless the intended end is a legally proscribed harm,’ no conduct in furtherance of that end can constitute a crime. The claim is that this rule derives from the principle of legality.”) (footnote and citation omitted); Alexander, *supra* note 8, at 46 (“The principle behind the treatment of pure legal impossibility—that it cannot be the predicate of attempt liability—is that we cannot punish people under laws that are purely the figments of their guilty imaginations. Let us call this the dancing principle component of the principle of legality, a reference to our example of someone who dances believing dancing to be prohibited. The dancing principle rests not on any concerns about culpability or dangerousness—after all, those it shelters have displayed at least the willingness to be scofflaws—but on the more practical consideration that there is no actual law to charge defendant with attempting to violate and no actual punishment prescribed for its attempted violation.”).

11. There are three reasons why the principle of legality is so important. First, it is fundamentally unfair—not to mention unconstitutional—to try, convict, or punish a person for performing a certain act when she was never told that this act was against the law. Second, as a practical matter, public promulgation of the laws helps maximize social order by giving citizens the certainty that they need to plan their lives and projects. Third, clearly stated laws constrain police’s, prosecutors’, judges’, and juries’ discretion. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”); JOHN RAWLS, *A THEORY OF JUSTICE* 209 (1971) (“[I]f . . . statutes are not clear in what they enjoin and forbid, the citizen does not know how he is to behave.”); Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN’S L. REV. 129, 129 n.2 (“One of the critical functions of a criminal code is to provide notice to citizens of what conduct is prohibited . . . . Providing notice . . . has obvious practical value, for citizens can hardly be expected to obey the law’s commands if they are unaware of them, or cannot understand them.”); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 359–60 (2005) (“The Supreme Court has stated that ‘[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.’ [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing a fair warning.”) (footnote omitted) (quoting *Lanzetta*, 306 U.S. at 453 and *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *id.* at 361 (“[S]tandards allow the addressees to make individualized judgments about the substantive offensiveness or nonoffensiveness of their own actual or contemplated conduct . . . . [P]ersons will be deterred from engaging in borderline conduct and encouraged to substitute less offensive types of conduct.”) (quoting Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985)); *id.* at 362–63

version of the impossibility defense forbids punishing an individual for attempting an action that was not criminal—even if she mistakenly believed that the act *was* criminal. It follows that the status of the very crucial principle of legality depends on the status of the impossibility defense. To the extent that we abandon the latter, we also abandon the former. So if we wish our criminal justice system to live up to its name—a system that dispenses *justice*—then we need to learn what exactly the impossibility defense says, resolve all of the confusions that now plague it, and make the legal-impossibility version of it available once again.

One might argue that my plea is exaggerated and that the abolition of the impossibility defense in most jurisdictions is not a serious problem. But the impossibility defense derives from the legality principle, which—again—is one of the foundational axioms of criminal law. So abolishing a direct derivative of the legality principle is hardly a trivial matter. Of course, some might dismiss the notion that people could be accused, tried, and punished for a crime that does not even exist. But the fact of the matter is that this kind of injustice happens all too frequently. And it does not just happen in dictatorships. It happens in full-blooded democracies like the United States and the United Kingdom.<sup>12</sup>

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(“Significantly, ‘if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.’ Where the legislature fails to provide such minimal guide-lines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’”) (footnotes omitted) (quoting *Grayned*, 408 U.S. at 108; and *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

12. See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (“The Court today approves the conviction of a man for a murder that was not murder (but only manslaughter) when the offense was committed. It thus violates a principle-encapsulated in the maxim *nulla poena sine lege* . . . . Today’s opinion produces, moreover, a curious constitution that only a judge could love. One in which (by virtue of the *Ex Post Facto* Clause) the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but in which unelected judges can do precisely that. One in which the predictability of parliamentary lawmaking cannot validate the retroactive creation of crimes, but the predictability of judicial lawmaking can do so.”); *United States v. Dauray*, 215 F.3d 257, 265 (2d Cir. 2000) (“At the time of Dauray’s arrest, the statute did not forbid possession of [ ] a magazine [depicting minors engaging in sexually explicit conduct]. Nor did the statute give Dauray notice that removing several pictures from the magazine, and keeping them, would subject him to criminal penalties.”); *Commonwealth v. Mochan*, 110 A.2d 788, 791 (1955) (Woodside, J., dissenting) (“The majority is declaring something to be a crime which was never before known to be a crime in this Commonwealth. They have done this by the application of such general principles as ‘it is a crime to do anything which injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer;’ and ‘whatever openly outrages decency and is injurious to public morals is a misdemeanor.’ Not only



have they declared it to be a crime to do an act ‘injuriously affecting public morality,’ but they have declared it to be a crime to do any act which has a ‘potentially’ injurious effect on public morality.”); Jim Mustian, *Gays in Baton Rouge Arrested Under Invalid Sodomy Law*, THE ADVOCATE, July 28, 2013, <http://theadvocate.com/news/police/6580728-123/gays-in-baton-rouge-arrested> (“[A] man was handcuffed and booked into Parish Prison on a single count of attempted crime against nature. There had been no sex-for-money deal between [him and an undercover officer]. The men did not agree to have sex in the park, a public place. And the count against the man was based on a part of Louisiana’s anti-sodomy law struck down by the U.S. Supreme Court a decade ago. The July 18 arrest is among at least a dozen cases since 2011 in which a Sheriff’s Office task force used [an] unenforceable law to ensnare men who merely discussed or agreed to have consensual sex with an undercover agent . . . .”); Jamie Whyte, *The Tax Avoidance Rule that Favours Cronyism*, CITY AM, Mar. 7, 2012, <http://www.cityam.com/article/tax-avoidance-rule-favours-cronyism> (“The authorities might punish us even though we have broken no law. Last month the government passed retrospective legislation allowing it to confiscate hundreds of millions of pounds from British banks. It declared that earnings that were not taxable when made would be treated as if they were. People who were obeying the law by not paying tax on these earnings will nevertheless be punished if they do not pay them now.”); *Scandal of ‘Extremely Dangerous’ Rapist Released Two Months into Sentence after Being Prosecuted for a Crime that Does Not Exist*, MAIL ONLINE, July 19, 2011, <http://www.dailymail.co.uk/news/article-2016185/Rapist-David-James-Shields-prosecuted-crime-does-exist.html> (“An ‘extremely dangerous’ rapist was freed only two months into his sentence—because he was prosecuted for a crime that doesn’t exist. Top judge, Mr. Justice Maddison, slammed the [Crown Prosecution Service]’s mistake as ‘a woeful state of affairs’, after David James Shields was charged with an offence repealed by Parliament seven years before his trial.”); Eric Resnick, *Man Jailed for Breaking a Nonexistent Law is Cleared*, GAY PEOPLE’S CHRONICLE, Dec. 16, 2005, <http://www.gaypeopleschronicle.com/stories05/december/1216051.htm> (“A gay man who spent four months in jail for breaking a nonexistent anti-gay sex law has had his name cleared by an appeals court. Keith Phillips’ conviction of ‘importuning’ was overturned . . . . ‘In a criminal case, due process requires that the conduct underlying a finding of guilt actually be a crime,’ Judge Cynthia W. Rice wrote for the court’s three-page opinion. ‘Here, it was not.’ . . . . The city of Warren had prosecuted Phillips for importuning—asking someone of the same sex for sex, if the person asked was offended—seven months after it was declared unconstitutional by the Ohio Supreme Court . . . . Phillips was convicted of the nonexistent law twice . . . . Public records and later court filings show that [the Municipal Judge Thomas] Gysegem and Warren assistant prosecutor Traci Rose had been notified that the law had been voided, but Phillips was prosecuted anyway . . . . Gysegem sentenced him to five years probation, sex offender courses, monitoring of his computer, a six-month suspended jail sentence, and a \$600 fine . . . . Phillips says he hopes that during the upcoming suits he gets answers as to why Rose, Gysegem, and the others did what they did to him while knowing that the law had been struck.”); Armstrong, *supra* note 9, at 352 (“Because *Rogers* stopped constraining *Bouie*’s ‘unexpected and indefensible’ test with the principle of legality as embodied in the Ex Post Facto Clause, courts have more leeway to retroactively construe statutes to the detriment of defendants. In *Redmond*, the court retroactively abolished an element of a crime, which is abhorrent to legality . . . . By

Like the two other bedrock principles of criminal justice, proportionality and culpability, the legality principle is all too vulnerable to erosion and disregard. We need then, to be constantly vigilant, quick to publicize and resist any threats to it—even when these threats originate from our deepest moral sensibilities. For example, juries might be so tempted to punish a person who callously let his friend kill a young child that they disregard the fact that there is no law against bad samaritanism in that jurisdiction.<sup>13</sup> Despicable as this person's behavior was, it is still better to refrain from punishing him than to violate the legality principle.<sup>14</sup>

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removing the principle of legality from the Due Process Clause, Rogers has further legitimized retroactive judicial decision-making . . . .") (footnotes omitted); Amy Pagnozzi, *Prison Rape Too Severe a Penalty*, HARTFORD COURANT, June 15, 1999, [http://articles.courant.com/1999-06-15/news/9906150133\\_1\\_prison-madness-dr-terry-kupers-raping](http://articles.courant.com/1999-06-15/news/9906150133_1_prison-madness-dr-terry-kupers-raping) (suggesting that the American public tacitly approves of prison rape as a form of punishment "even though there is no law anywhere, federal or state, that deems rape a fit punishment for anyone whatever their age or crime."); John Caher, *Charge Doesn't Exist, So Man May Go Free*, TIMES UNION, Feb. 19, 1993, <http://alb.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=5670396> ("A Schenectady resident who shot a man may go free because the crime he was convicted of does not exist. In a terse, three-page memorandum, the state's top court on Thursday unanimously agreed to throw out the attempted first-degree manslaughter conviction of Jose Rivera Martinez. Reason: There is no such crime.").

13. I have in mind the situation in which David Cash allowed his friend, Jeremy Strohmeier, to kill seven-year-old Sherrice Iverson without trying either to stop Jeremy or to alert security to the situation. See Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 623–24 (2010); Patrick McGreevy, *City: Punish 'Bad Samaritans'*, L.A. DAILY NEWS, Sept. 16, 1998, at 3 ("Councilman Richard Alarcon said he was saddened by the whole incident. 'How he (Cash) could be arrogant and brag about his knowledge of what went on—that shows I think the very bottom of moral thinking in this country,' Alarcon said. 'We should never support, condone nor accept the actions of Mr. Cash. Frankly, I believe he should be in jail. It was wrong.'").

14. See *United States v. Bodiford*, 753 F.2d 380, 382 (5th Cir. 1985) ("It may be that conduct like [the defendant's] should be punished; however, it is elementary that a defendant may be convicted only of an offense defined by statute, not because his conduct is reprehensible. *Nulla poena sine lege* is not only an ancient maxim; it is a requisite of due process.") (footnote omitted); *Keeler*, 2 Cal.3d at 635 ("In the case at bar the conduct with which petitioner is charged is certainly 'improper' and 'immoral,' and it is not contended he was exercising a constitutionally favored right. But the matter is simply one of degree, and it cannot be denied that the guarantee of due process extends to violent as well as peaceful men. The issue remains, would the judicial enlargement of [the statute in question] now proposed have been foreseeable to this petitioner?"); *Booth*, 398 P.2d at 872 ("The defendant in the instant case leaves little doubt as to his moral guilt. The evidence, as related by the self-admitted and perpetual law violator indicates defendant fully intended to do the act with which he was charged. However, it is fundamental to our law that a man is not punished merely

Bad samaritanism is just one example. There are plenty of others just like it—acts that many in society find reprehensible but which are often not legally prohibited for one reason or another: flag-burning; spanking; indoctrinating children; pornography, including virtual child pornography and pornography depicting cruelty toward human beings or animals; bullying and cyberbullying; violating personal confidences; maliciously spreading reputation-damaging rumors that just happen to be true; publishing highly offensive remarks (such as genocide denial); participating in highly offensive activities (such as a Neo-Nazi rally or anti-gay protests near funerals); pretending to be a war hero; making counter-productive business judgments; and recklessly investing other people's money in accordance with an equally reckless industry standard. Pick whichever activity in this list upsets you the most. As long as there is no law against this activity, the legality principle prevents us from punishing individuals who engage in it.

If I am correct that we need to remain committed to the legality principle despite the understandable temptation to abandon it for purportedly reprehensible but still lawful acts, then I am also correct that we must remain committed to the legality principle's direct offshoot: the legal-impossibility version of the impossibility defense. And the only way to remain committed to the legal-impossibility version of the impossibility defense is to *restore* our commitment to it. Indeed, even the authors of the MPC Commentaries, which were published 25 years after the MPC itself, recognized as much. In a paragraph that arguably amounts to a major retraction, they stated:

It should . . . be noted that, in order to constitute an attempt under any of the subdivisions of Subsection (1), it is of course necessary that the result desired or intended by the actor constitute a crime. If, according to his beliefs as to relevant facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal. This is in accord with present authority, and follows . . . from 'the principle of legality . . . .'<sup>15</sup>

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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."); Armstrong, *supra* note 9, at 351 ("Just because conduct is reprehensible, and likely should be criminal, does not mean that defendants should be on fair notice that it actually is criminal—there must be an underlying law criminalizing the conduct.").

15. Model Penal Code § 5.01 cmt. 3(c), 318 (Official Draft and Revised Comments 1985) (footnotes omitted).

Unfortunately, however, this recognition of the validity of the legal-impossibility defense by the very people who helped to abolish it has gone almost entirely unnoticed.

This Article will attempt to change this situation and resurrect the legal-impossibility version of the impossibility defense in three steps. In Parts II through V, I will disentangle legal impossibility from factual impossibility, a non-defense with which the former has been thoroughly confused by sloppy or misguided judges. In Part VI, I will show just how vital the legal-impossibility version of the impossibility defense is to our criminal justice system. And in Part VII, I will argue that the attempt to cause criminal harm by such bizarre means as voodoo or telekinesis falls closer to legal impossibility than to factual impossibility and therefore that re-establishing the impossibility defense would help to protect the otherwise highly vulnerable group of defendants who engage in these kinds of activities.

## II. THE IMPOSSIBILITY DEFENSE

If a defendant is charged with attempting to commit a crime, then, by definition, she has failed to commit the intended crime. If she had *not* failed, then she would be guilty of the object crime itself, not attempt, because attempt and the object crime “merge” into one.<sup>16</sup>

The impossibility defense is a defense against the charge of attempt.<sup>17</sup> A defendant who invokes the impossibility defense is saying that she is *not* guilty of attempt because she could not possibly have succeeded in committing the object offense. Notice, her claim is not that she *did* not commit the object offense; her being charged with *attempt* presupposes this fact.<sup>18</sup> Again, her claim is that she *could not have* committed the object offense.

Bebhinn Donnelly argues that the impossibility defense is somewhat meaningless because it applies to every failed attempt and would therefore exonerate every defendant accused of an attempt crime. Donnelly's

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16. See Dominic T. Holzhaus, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 COLUM. L. REV. 1697, 1707 n.67 (“[A]ttempts, which may be separately prosecuted where the crime is aborted, are merged into the crime itself where the attempt is successful.”).

17. It can also be a defense against intent crimes. See *Lawhorn v. State*, 898 S.W.2d 886, 892 (Tex. Crim. App. 1995).

18. See *State v. Salerno*, No. CR 92 0080796, 1993 WL 88327, at \*6 (Conn. Super. Ct. Mar. 23, 1993) (suggesting that the defendant's claim “that the state must prove all the elements of the predicate crime before a person can be convicted of an attempt to commit that crime” amounts to the absurd claim that the state must prove the predicate crime in order to prove an attempt to commit the predicate crime).

argument rests on the following central premise: every unsuccessful attempt is unsuccessful precisely because it was impossible for the attempt to be successful.<sup>19</sup> (Of course, most attemptors do not know that their attempts are impossible; otherwise, they would not make the attempt in the first place. Only after attempts fail do attemptors then learn that they could not possibly have succeeded.)<sup>20</sup> So if impossibility per se were recognized as a defense, then there would be no such thing as the crime of attempt in the first place. Because this result is absurd—that is, because many attempts to commit crimes are and should be recognized themselves as crimes—if impossibility is to be recognized as a defense, it must be a proxy for something else, some property that not all attempts share.<sup>21</sup> And the most likely candidate for this underlying property—that is, the

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19. See Bebhinn Donnelly, *Possibility, Impossibility and Extraordinariness in Attempts*, 23 CAN. J.L. & JURIS. 47, 61 (“In mere attempts, the particular ends sought, *ex post*, are always ‘impossible’ . . . .”); *id.* at 63–64 (2010) (“Impossibility does not distinguish the blameworthy from the not so or the less so, for it just does not distinguish among attempts at all . . . . In the anatomy of attempts, it can be seen that there is just nothing that normatively distinguishes most ‘impossible’ attempts from attempts generally. In all such cases, the defendant tries to secure the prohibited end, he is fully committed to so doing and his acts are sufficiently well advanced to render him blameworthy. The ‘peripheral’ examples of attempts, deemed to be peripheral in virtue of impossibility, fall to be considered in the same way as attempts generally . . . . [Some attempts] are often described as impossible attempts but if such, unique, ‘attempts’ exist at all, then impossibility does not identify their uniqueness.”); *id.* at 69 (“[T]here is no paradox to be explained away for the category [of impossible attempts] is just largely a myth and any distinctiveness attached to ‘impossible attempts’ is . . . normatively irrelevant.”).

20. See *id.* at 59–60 (“[D]efendants . . . ordinarily attempt the possible. They do not set out to fail in their attempt to kill, they set out to succeed and, to these defendants, success is possible . . . . However impossible the particular ends, and however we learn of that impossibility, the defendant is not *trying* the impossible . . . .”); *id.* at 69 (“[P]ossibility inheres centrally in the notion of ‘attempt.’ The examples commonly thought to fall within the category of ‘impossible attempts’ are straightforward examples of attempting the possible (It may, unusually, be the case that someone sets out to achieve an end knowing that the end is impossible but here we may say that there is not really an attempt to bring about the end for the actor knows it cannot be brought about. This ‘attempt’ dissolves into self-contradiction and is not meaningfully an attempt at all.)”).

21. See *id.* at 61 (“[I]f all attempts [are impossible] *qua* attempts, impossibility is not an available characteristic for distinguishing between the criminally blameworthy and the not so. It follows that either the hesitation [to attribute blame to some attempts] is unwarranted or that reasons other than impossibility underpin it.”); *id.* at 64 (“The question . . . is whether some residual category of ‘attempts’ is of such a nature that it ought not to attract liability in the same way as attempts generally do. It happens that these attempts are often described as impossible attempts but if such, unique, ‘attempts’ exist at all, then impossibility does not identify their uniqueness. It

underlying property that impossible attempts, as opposed to undeniably criminal attempts, lack—is harmfulness or dangerousness.<sup>22</sup>

The problem with Donnelly's argument, however, is the central premise: contrary to Donnelly, impossibility explains only some, not all, failed attempts. Some attempts fail even though they could have been successful. Suppose, for example, I try to shoot and kill another person but fail because my gun sight is misaligned, I neglected to correct for this deviation, and the victim drove away before I could shoot again. It seems false to suggest that my attempt to kill could not possibly have succeeded. It certainly *could have* succeeded if I had previously corrected the sight alignment or had (deliberately or accidentally) corrected for the deviation while shooting. Many attempts, then, are possible, at least from the outset. They fail not because they could not have succeeded but because the agent did not try hard enough. Of course, this last point assumes that the agent *could have tried harder*, a point that some determinists might challenge.<sup>23</sup> But we need not resolve the problem of free will and deter-

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needs to be considered what, if anything, about the voodoo practitioner and the 'jumper' marks them as being morally different to other attempters.").

22. See *id.* at 64–65 ("Usually, a defendant who goes so far as to try to achieve a criminal end is harmful in respect of that end. Yet, it seems that harmfulness is precisely what is missing in a narrow category of extraordinary attempts . . . . [T]he defendant who attempts to kill by voodoo may lack the harmfulness that is normally present in an attempter. Both defendants intend the end and perform actions that are, to them, more than merely preparatory; but the former at least is harmless in respect of the end. There is no immediate potential for the harm to occur nor, usually, is there any obvious suggestion that these sorts of defendants will try again by more effective means . . . . [I]t appears likely . . . that in some extraordinary attempts the reasons for failure may provide evidence of/disclose *my* inability to be harmful in a criminally relevant way in the first place. Where I attempt my end by voodoo, for example, there is something about the nature of my attempt that is relevant to an understanding of my harmfulness and I may very well be in an analogous position to the person who attempts to play chess by playing snakes and ladders.").

23. See, e.g., CARL GINET, *ON ACTION* 106–17 (1990) (arguing that determinism is incompatible with the ability to do otherwise); PETER VAN INWAGEN, *AN ESSAY ON FREE WILL* 2–8, 55–105 (1983) (same). Compatibilists, however, claim that determinism is *compatible* with the ability to do otherwise; they reconcile the two by interpreting the ability to do otherwise as the ability to act in accordance with one's will, even if the will is determined. See, e.g., DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 139 (1983) ("[W]hile there are indeed times when we would give anything to be able to go back and undo something in the past, we recognize that the past is closed for us, and we would gladly settle for an 'open future.' But what would an open future be? A future in which our deliberation is effective: a future in which if I decide to do *A* then I will do *A*, and if I decide to do *B* then I will do *B*; a future in which—since only one future is possible—the only possible thing that can happen is the thing I decide in the end to do.").

minism in order to make the very safe assumption that many attempts fail because of something in agents' control such as level of effort or carefulness rather than something outside their control.

If we assume, contra Donnelly, that the impossibility defense makes conceptual sense with *or without* any proxy for impossibility, it turns out that there are actually four different ways to interpret it. First, the defendant might be making an *analytic* claim: if it was impossible for me to commit crime *C*, then it was impossible for me to *try* to commit *C*, in which case I am not guilty of an attempt to commit *C*.

Second, she might be making a *knowledge* claim: if it was impossible for me to commit *C*, then I must have known this fact, in which case I could not really be trying in good faith to commit *C* in the first place.

Third, she might be making a *consequentialist* claim: if the purpose of punishing attempt is to deter criminal activity, and if there was already zero risk of my committing *C*, then there is no reason to punish my attempt.

Fourth, she might be making a *summary-judgment-type* claim: even if my attempt had been successful, I would not have broken the law. And an attempt to do what is legal should certainly not itself be illegal.

The first (analytic) claim is weak. Even though it is impossible for me to jump to the moon, it is still quite possible for me to *try* to jump to the moon. The same, then, is true of crimes. Even if it is impossible for me on a specific occasion to commit *C*, I may very well still try—and therefore be guilty of attempt—to commit *C*.

The second (knowledge) claim fails for a similar reason: I can try to jump to the moon even though I am aware that my attempt will fail.<sup>24</sup> The knowledge claim also fails for an additional reason: just because an attempt is impossible does not mean that I must be aware of this fact. For example, if you are not carrying a wallet, it is impossible for me to steal a wallet from you. But I may not be aware that you are “wallet-less,” in which case I may still genuinely *try* to steal your wallet.

The third (consequentialist) claim is more plausible than the first two but still equally fails. Yes, one purpose of punishing attempts is to minimize the risk that these attempts will be realized. As a society, we punish attempts to murder in order to deter them. And we wish to deter these attempts precisely because we wish to minimize murder itself—that is, successful attempts to murder.<sup>25</sup> But this is not the only reason that we

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24. *But see supra* note 19 and accompanying text.

25. See ANTHONY DUFF, *CRIMINAL ATTEMPTS* 122 (1996) (“Punishing failed attempts serves . . . to deter attempts which may succeed: if failed attempts were not punished, more people would be tempted to embark on criminal enterprises (taking comfort in the thought that, if they failed, they would not be punished); and some

punish attempts. A second reason for punishing attempts is that we hope to minimize not merely the occurrence of object crimes but also the physical and psychological harms that often flow from attempts themselves.<sup>26</sup>

The fourth (summary-judgment-type) claim turns out to be the only interpretation of the impossibility defense that works. An attempt is not criminal only when the attempted act is not itself criminal. One cannot be (justly) charged with attempting to break the law when the kind of act that one is trying—and therefore intending—to commit is not illegal.<sup>27</sup>

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would succeed in completing those enterprises.”); GIDEON YAFFE, *ATTEMPTS* 22 (2010) (“[I]n threatening punishment we . . . manage to prevent some completed crimes as well as some attempts . . . ”); Eyal Zamir, Ilana Ritov, & Doron Teichman, *Seeing Is Believing: The Anti-Inference Bias*, 89 *IND. L.J.* 195, 226 (“Criminalizing attempts promotes important policy goals such as deterrence and prevention. From a deterrence perspective, it allows punishing offenders even when they fail to complete their plan, and thus cheaply raises the probability of punishment.”) (footnote omitted).

26. See DUFF, *supra* note 25, at 120 (“The [attemptor] has, of course, still done wrong; and though she has not brought about whatever ‘primary’ harm the crime’s completion would involve, she might have brought about the ‘secondary’ harms involved in attacking her victim and thus threatening his security.”) (footnote omitted); *id.* at 125 (“Failed attempts . . . may bring about such ‘secondary’ harms as the threat or fear of . . . a ‘primary’ harm . . . .”) (footnote omitted); *id.* at 130 (“If an attempt is an *attack* on a legally protected interest, an attempt to commit any substantive crime also necessarily involves secondary harm: for an interest that is attacked is normally endangered; and even radically misguided attempts which actually threaten no primary harm can be said to involve a kind of harm by virtue of being attacks.”) (footnotes omitted); Anthony M. Dillof, *Modal Retributivism: A Theory of Sanctions for Attempts and Other Criminal Wrongs*, 45 *U. RICH. L. REV.* 647, 662 (2011) (“Even in cases of failed attempts . . . society is usually harmed to some degree. Sometimes a would-be victim is aware of or learns of the attempt and suffers fear, anxiety, or other psychological harm. Sometimes members of the community learn of the attempt and suffer some sort of vicarious emotional harm or they expend resources to protect themselves against similar crimes. Other times other persons are emboldened to act in similar ways. These sorts of harms are secondary.”); Hasnas, *supra* note 2, at 72–73 (agreeing with Thomas Weigend “that the harm caused by the crime of attempt is the spread of public alarm . . . . The harm of attempt cannot be the harm of the completed offense . . . . On the other hand, attempts clearly have their own harmful effects on citizens’ ability to lead peaceful and secure lives. Attempts to kill, injure, or steal or destroy property are extremely likely to provoke violent responses when the perpetrator is known, placing both the antagonists and innocent members of the community at risk. And when the perpetrators are not known or not apprehended, attempts produce unease that causes citizens to either restrict their activities to avoid harm or expend resources on protective measures. Attempted muggings keep people off the streets and attempted burglaries boost home security system sales as much as successful muggings and burglaries.”) (footnote omitted).

27. See *supra* note 6 and accompanying text.



What underlies this seemingly obvious proposition—and therefore what underlies the only successful version of the impossibility defense—is the principle of legality. As I explained in the Introduction, the principle of legality says that individuals may not be punished for acts that the state had not, at the time of the acts, designated as crimes. Respect for the principle of legality requires the state to refrain from punishing individuals who attempt to perform acts that are not crimes *even if* these individuals *believe* that the objects of their attempts *are* crimes.

Suppose, for example, that I think that there is a law, the “State Decency Act,” which prohibits the transmission of foul language on the Internet. So, being the *badass* that I am, I go ahead and use the f-word several times by email, then wait for the police to arrest me, and start dreaming of my new life as an infamous rebel. But, alas, the police never arrive. And even after I turn myself in, they just tell me to go home.<sup>28</sup> Why? Because my attempt to violate the State Decency Act was an attempt to break a law that did not exist. And, once again, according to both the principle of legality and the valid version of the impossibility defense—what is typically referred to as *legal impossibility*<sup>29</sup>—attempts to break non-existent laws are not themselves criminal attempts.

### III. MISTAKE OF FACT AND MISTAKE OF LAW

As I argued in Part II, the impossibility defense *does* have merit. In order to fully appreciate this point, we first need to understand that the impossibility defense is a subset of the *mistake* defense. There are two kinds of mistake defense: mistake of fact and mistake of law.<sup>30</sup>

A defendant who invokes the mistake of fact defense is claiming that, because of an honest and reasonable mistake of fact, she is really not guilty of violating the law. And she is not guilty of violating the law be-

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28. See DUFF, *supra* note 25, at 3 (“[A] repentant adulterer who walked into a British police station to give herself up for this supposed crime would be told to go home.”).

29. I will discuss legal impossibility further below in Part IV.

30. See Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction*, 3 CRIM. L. & PHIL. 213, 213 (2009) (“[T]he fundamental distinction is between a mistake about the state’s authoritative statement of what is prohibited ([mistake of law]), and a mistake about whether that prohibitory norm is instantiated in a particular case ([mistake of fact]”); *id.* at 220 (“The fundamental distinction is between: (1) M Law: a mistake about what the state prohibits (including a mistake about how state officials, including judges, authoritatively interpret the prohibition); and (2) M Fact: a mistake about the instantiation of that prohibitory norm in a particular case, where the mistake does not flow from the first type of mistake.”).

cause she did not possess the required *mens rea*—either intent to commit, or knowledge that she was committing, a crime.<sup>31</sup>

The mistake of fact defense is commonly invoked, for example, in response to rape charges. A defendant charged with rape typically invokes two defenses: (a) the alleged victim consented to sex or (b) in the alternative, if she did not consent to sex, the defendant honestly and reasonably believed that she was consenting. Proposition (b) is a mistake of fact defense.<sup>32</sup>

The mistake of law defense is similar to the mistake of fact defense. Like the mistake of fact defense, one version of the mistake of law defense states that the defendant is not guilty of a crime because she did not possess the required *mens rea*.<sup>33</sup> Specifically, she did not possess the re-

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31. See *United States v. Bansal*, 663 F.3d 634, 652 (3d Cir. 2011) (“[W]e have long espoused the proposition that a mistake of fact is less culpable than a mistake of law. When judging criminal behavior, it is axiomatic that, although ‘ignorance of the law will not excuse,’ a reasonable mistake of fact is less culpable because of the absence of *mens rea*.”) (citations omitted); *United States v. Chinasa*, 789 F.Supp 2d 691, 697 (E.D. Va. 2011) (“Mistake of fact is a ‘cognizable defense negating intent when the *mens rea* requirement for a crime is at least knowledge.’”) (citation omitted); *People v. Lawson*, 155 Cal. Rptr. 3d 236, 238–39 (Ct. App. 2013) (“The mistake-of-fact defense operates to negate the requisite criminal intent or *mens rea* element of the crime, but applies only in limited circumstances, specifically when the defendant holds a mistaken belief in a fact or set of circumstances which, if existent or true, would render the defendant’s otherwise criminal conduct lawful.”); KATHRYN CHRISTOPHER & RUSSELL CHRISTOPHER, *CRIMINAL LAW: MODEL PROBLEMS AND OUTSTANDING ANSWERS* 31 (2012) (“Under both the common law and the MPC . . . whether a mistake of fact provides a defense will depend on the relationship between the type of mistake and the requisite *mens rea*. In general, even an unreasonable mistake will provide a defense to an offense with an element requiring a high level of *mens rea*—specific intent under the common law, and purpose or knowledge under the MPC. But only a reasonable mistake will provide a defense, if at all, to an offense with an element requiring a lower level of *mens rea*—general intent under the common law and negligence under the MPC. And any mistake must be honest in order to supply a defense.”).

32. See *United States v. Simpson*, 55 M.J. 674, 709 n.48 (A. Ct. Crim. App. 2001) (referencing “the long-standing line of cases holding that any mistake of fact regarding a sexual assault victim’s consent must be honest and reasonable.”); *Commonwealth v. Lopez*, 745 N.E.2d 961, 967 (Mass. 2001) (noting that a “majority of . . . jurisdictions” accept an honest and reasonable mistake of fact about consent as a defense to rape); see also STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 63–65, 257–60, 263–64 (1998) (discussing the difficulties with defining and evaluating the reasonableness of a man’s belief that his female partner is consenting to sexual relations).

33. See CHRISTOPHER & CHRISTOPHER, *supra* note 31, at 47 (“Three principal exceptions to the general rule [denying mistake of law defenses] have emerged: (i) reasonable reliance on an official statement of law that is afterward determined to be

quired intent or knowledge. But the reason is different: she honestly and reasonably believed that a specific *law* was otherwise. Normally, ignorance of the law is no excuse. But ignorance of the law *can* be an excuse when the ignorance is honest *and reasonable*. And it is reasonable generally if, and only if, the law was either so ambiguous or so complicated that a reasonable person could have misinterpreted it.<sup>34</sup>

For this reason, the mistake of law defense is not usually successful in defending against *malum in se* crimes—that is, acts that are criminalized primarily because they are morally wrong. *Malum in se* crimes are considered to be so clear and obvious that citizens should and do know about them even if they have never read the corresponding statutes. Instead, the mistake of law defense is generally successful only in defending against intricate *malum prohibitum* crimes (for example, white collar crimes), the correct interpretation of which tends to divide the legal community.<sup>35</sup>

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invalid or erroneous, (ii) ignorance or mistake of law that negates the mens rea of the charged offense, and (iii) lack of fair notice.”).

34. See *Lambert v. California*, 355 U.S. 225, 229–30 (1957). (“Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is printed too fine to read or in a language foreign to the community.”); *United States v. Furey*, 491 F.Supp. 1048, 1059 (E.D. Pa. 1980) (“[I]gnorance of the law may be an excuse where the statute requires an act be done ‘knowingly’ . . . .”) (citations omitted); *State v. Guice*, 621 A.2d 553, 557 (N.J. Super. Ct. Law Div. 1993) (“‘Implicit in these two [United States Supreme Court] cases [*Raley* and *Cox*] is a holding that when individuals rely on an official but erroneous representation of law they cannot be expected to know the law is otherwise, and thus can have no notice or fair warning of what the law actually requires or proscribes.’ It is this due process aspect of the mistake of law defense which counterbalances the strong public policy behind the maxim ‘ignorance of the law is no excuse.’”) (citation omitted); see also Adam L. Alter, Julia Kernochan, & John M. Darley, *Morality Influences How People Apply the Ignorance of the Law Defense*, 41 L. & SOC’Y REV. 819, 848 (2007) (“The official statement exception is broadly consistent with the lay intuitions revealed in our studies, which suggest that people should sometimes be afforded the right to present evidence to prove a claim of legal ignorance. This doctrine is far closer to the lay intuitions identified in our studies than the old, inflexible rule that ignorance of law never excuses. The official statement exception reflects the view that when a defendant could not have known better, the moral judgment inherent in criminal conviction is not an appropriate societal response.”); Armstrong, *supra* note 9, at 323 (“Of course, with the ever increasing body of statutes and cases construing those statutes, it is now virtually impossible for everyone truly to be on notice of whether his conduct is criminal—the maxim that everyone is presumed to know the law’ is, therefore, a legal fiction.”) (footnote omitted).

35. See *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1164 (7th Cir. 1997) (“[C]riminal law is more intuitive [than civil law]—and where it is not, proof of knowledge of the illegality of the act is often required.”); *United States v.*

## IV. FACTUAL IMPOSSIBILITY AND LEGAL IMPOSSIBILITY

How, then, does the impossibility defense relate to these two mistake defenses? The impossibility defense also involves mistake. But it is important to understand which kind of mistake it involves and which kind of mistake it does *not* involve. Once we achieve this level of understanding, much of the conceptual mystery and complexity surrounding the impossibility defense disappears.

Assume the following facts:

- (1) There are four 25-year-old men: Adam, Boris, Craig, and Dante.
- (2) Adam and Boris have been charged with statutory rape for having sex with an underage minor—Amber and Blanche respectively.
- (3) Craig and Dante have been charged with *attempted* statutory rape for attempting to have sex with an underage minor—Cindy and Dolly respectively.
- (4) Amber was 14 (a minor), and Adam honestly believed that she was 19.
- (5) Blanche was 19, and Boris honestly believed that she was 14 and therefore a minor.<sup>36</sup>
- (6) Craig knew that Cindy was 14, and Craig honestly believed that 14 year-olds are legal adults, not minors.
- (7) Dante knew that Dolly was 19, and Dante honestly believed that the age of majority for the purpose of giving consent to sexual relations is 25.

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Ehrlichman, 376 F.Supp. 29, 35 (D.D.C. 1974) (“[M]istake of law often is a defense to *malum prohibitum* crimes requiring specific intent, such as those created by the federal tax laws.”) (citation omitted); *Shao v. Commissioner of Internal Revenue*, 100 T.C.M. (CCH) 182, 2010 WL 3377501, at \*17 (Aug. 26, 2010) (“We have . . . found it inappropriate to penalize taxpayers where a mistake of law was in a complicated subject area without clear guidance.”); *City of Ontario v. Superior Court of San Bernardino County*, 466 P.2d 693, 700 (Cal. 1970) (“It is settled that an honest and reasonable mistake of law on [a ‘complex and debatable’ issue] is excusable and constitutes good cause for relief from default . . .”); CHRISTOPHER & CHRISTOPHER, *supra* note 31, at 47 (“[W]ith the proliferation of offenses numbering in the thousands and the rise of *malum prohibitum* crimes, the hard and fast rule denying mistake of law defenses has softened.”); Dan M. Kahan, *Ignorance of Law Is an Excuse-But Only for the Virtuous*, 96 MICH. L. REV. 127, 150 (1997) (“[C]ourts permit mistake of law as a defense . . . selectively across *malum prohibitum* crimes . . .”).

36. For cases involving a similar fact pattern, see *People v. Doe*, 515 N.Y.S.2d 982 (Crim. Ct., 1987); *United States v. Farner*, 251 F.3d 510, 512–13 (5th Cir. 2001).

The following chart makes it easier to see how each of these situations overlaps with, and differs from, the others:<sup>37</sup>

	Underage victim	No underage victim
Mistake of fact	Adam. Honestly believed that Amber was 19 and therefore that it was legal to have sex with her. But Amber was 14.	Boris. Honestly believed that Blanche was 14 and therefore that it was illegal to have sex with her. But Blanche was 19.
Mistake of law	Craig. Knew that Cindy was 14 but honestly believed that it was legal to have sex with 14 year-olds.	Dante. Knew that Dolly was 19 but honestly believed that it was illegal to have sex with 19 year-olds.

It is important to note a few things about this chart. First, there are two different kinds of mistake of fact defense and two different kinds of mistake of law defense. Each differs in terms of the kind of goal that they fail to attain. On the one hand, Adam and Craig are trying *not* to break the law but still end up breaking it.<sup>38</sup> On the other hand, Boris and Dante are trying *to* break the law but *fail* to break it.

Second, there are two kinds of impossibility defenses—factual and legal.<sup>39</sup> What thwarts Boris’s attempt to commit statutory rape is the absence of an external circumstance—namely, Blanche’s being over 18 years old. Blanche’s age did not cooperate; Boris thought that she was 14, but she was really 19. Therefore it was *factually* impossible for Boris to commit statutory rape. In contrast, what thwarts Dante’s attempt to com-

37. This chart has been inspired by a similar one in Simons, *supra* note 30, at 216–17.

38. Because statutory rape is a strict liability crime in many states, a mistake defense will not work. *See* United States v. Rodriguez, 711 F.3d 541, 557 (5th Cir. 2013) (“[T]wenty-three jurisdictions characterize ‘statutory rape’ (or its equivalent) as a strict-liability offense, whereas eighteen jurisdictions allow for a mens rea defense and limit strict liability to situations in which there is a specific age differential between the victim and the defendant.”) (citations omitted); United States v. Gomez-Mendez, 486 F.3d 599, 604 (9th Cir. 2007) (“In most jurisdictions, statutory rape is a strict liability crime.”) (citations omitted). In the other non-strict-liability states, it might work as long as the defendant can establish to the factfinder that his mistake about his partner’s age or the law was honest and reasonable.

39. Because this Article concerns the impossibility defense, we need not analyze further the left column—that is, the non-impossibility mistake defenses. They are included only to show how the impossibility defense relates to, and differs from, them. We may now concentrate fully on the right-hand column—specifically, factual impossibility and legal impossibility.

mit statutory rape was not the absence of an external circumstance but rather the absence of a law designating the age of majority to be over 19 years old.<sup>40</sup> The law on statutory rape did not cooperate; Dante rightly believed that Dolly was 19 but mistakenly thought that the law prohibited sex with women under 25 years old. Therefore it was *legally impossible* for Dante to commit statutory rape.<sup>41</sup>

When I have shown my criminal law students this chart, most of them have the intuition that Boris is, and Dante is not, guilty of *attempted* statutory rape—in other words, that only legal impossibility, not factual impossibility, is exculpatory. As it turns out, their intuition mirrors the common law.<sup>42</sup> (It does not, however, mirror the relatively small amount

40. See John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: *The Failure Of The “Non-Consent” Reform Movement In American Rape And Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1167 (2011) (“[U]pon reaching adulthood—sixteen or seventeen in most states—adolescents and young adults are free to engage in sex with anyone, unprotected from and exposed to unwanted sex.”); Moin A. Yahya, *Deterring Roper’s Juveniles: Using a Law and Economics Approach to Show that the Logic of Roper Implies that Juveniles Require the Death Penalty More than Adults*, 111 PENN ST. L. REV. 53, 85 n.179 (2006) (“The age of majority actually varies from sixteen to nineteen . . .”).

41. Larry Alexander argues that on a positivist view of the law, the distinction between factual mistake and legal mistake (and therefore factual impossibility and legal impossibility) breaks down. See Alexander, *supra* note 8, at 36–43, 52. Positivism suggests that there is no clear distinction between facts and laws because laws themselves reduce to complicated sets of facts. So to suggest that only factual, not legal, mistakes involve getting facts wrong is both unhelpful and false. In response to Alexander, I suggest that we may, for the sake of argument, accept positivism and still distinguish between factual mistakes and legal mistakes: while legal mistakes are misinterpretations of cases, statutes, or other sources of law, factual mistakes are mistaken beliefs about anything else—that is, about anything that does not constitute a source of law (as certified by H.L.A. Hart’s “rule of recognition”). As with every distinction, there will inevitably be difficult borderline examples—in this case, facts that seem to straddle the proposed divide between the pronouncements of legal sources and all other facts. But these difficult cases should not really affect, no less undermine, the conclusions that I draw in this Article.

42. See *United States v. Sims*, 428 F.3d 945, 959–60 (10th Cir. 2005) (“‘Factual impossibility is generally not a defense to criminal attempt because success is not an essential element of attempt crimes.’”) (citations omitted); *United States v. Root*, 296 F.3d 1222, 1227 (11th Cir. 2002) (“The fact that Root’s crime had not ripened into a completed offense is no obstacle to an attempt conviction. Root’s [mistaken] belief that a minor [as opposed to an undercover officer] was involved is sufficient to sustain an attempt conviction under 18 U.S.C. § 2422(b).”); *United States v. Heng Awkak Roman*, 356 F.Supp. 434, 438 (S.D.N.Y. 1973) (“‘All courts are in agreement that what is usually referred to as ‘factual impossibility’ is no defense to a charge of attempt.’”) (citations omitted); *People v. Thousand*, 631 N.W.2d 694, 698 (Mich. 2001) (“It has been said that, at common law, legal impossibility is a defense to a charge of

of post-MPC jurisprudence, which has gutted the impossibility defense.<sup>43</sup>) How, then, might the students' intuition—and therefore the common law—be justified?

A. *First Justification: Criminal Justice*

There are three justifications. The first justification is that Dante is not guilty because he is like a saint who strayed. He had a much higher legal (and moral) standard for consensual sex than the rest of society. While the law—and therefore the operative social standard—says that women above 18<sup>44</sup> are adult enough to have sex with 25 year-old men,

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attempt, but factual impossibility is not.”); *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995) (“Impossibility is commonly categorized as either factual or legal. Usually applied in the context of attempt crimes, the former is not held to be a defense, while the latter has been viewed as a valid defense.”); *State v. Salerno*, No. CR 92 0080796, 1993 WL 88327, at \*2 (Conn. Super. Ct. Mar. 23, 1993) (“At common law, a distinction is made between factual and impossibility and legal impossibility. Usually, with respect to an attempt prosecution, the latter is a defense while the former is not.”) (citations omitted); *Commonwealth v. Henley*, 474 A.2d 1115, 1116 (Pa. 1984) (“Factual impossibility has never been recognized as a defense to an attempt charge by any American Court . . . . Legal impossibility had been recognized in many jurisdictions as a defense to attempt charges . . . .”) (citations omitted); *Booth v. State*, 398 P.2d 863, 869–70 (Okla. Crim. App. 1964) (“In this country it is generally held that a defendant may be charged with an attempt where the crime was not completed because of ‘physical or factual impossibility’, whereas a ‘legal impossibility’ in the completion of the crime precludes prosecution for an attempt.”) (citations omitted); *People v. Rollino*, 233 N.Y.S.2d 580, 582 (Sup. Ct. 1962) (“In this country it is generally held that a defendant may be charged with an attempt where the crime was not completed because of ‘physical or factual impossibility’ whereas a ‘legal impossibility’ in the completion of the crime precludes prosecution for an attempt.”) (citations omitted); *People v. Siu*, 271 P.2d 575, 576 (Cal. Dist. Ct. App. 1954) (“[I]f a person formulates the intent and then proceeds to do something more which in the usual course of natural events will result in the commission of a crime, the attempt to commit that crime is complete. And even though the intended crime could not have been completed, due to some extrinsic fact unknown to the person who intended it, still he is guilty of attempt.”); FLETCHER, *supra* note 8, at 180 (“[M]istakes of law exculpate rather than inculpate; and mistakes of fact inculpate rather than exculpate.”) (footnote omitted). *But see* FLETCHER, *supra* note 2, at 181 (“The exemption for legally impossible attempts is hardly convincing. [There] are cases in which the actor has displayed hostility toward the legal order and for that reason is as dangerous as someone who for strictly factual reasons could not commit perjury or statutory rape.”); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 683 n.18 (1994) (suggesting that some scholars and courts have been under the impression that factual impossibility is just as exculpatory as legal impossibility).

43. See *supra* note 2 and accompanying text.

44. See *supra* note 39 and accompanying text.

Dante thought that the age of majority was higher. So when he tried to have sex with Dolly, the law that he was trying to break was not the actual law. Rather, the law that he was trying to break involved a *higher* standard than the actual law. One might fault Dante for straying from his higher standard. But that is not a crime any more than violating our own high standards for altruism or kindness are crimes.

Criminal law—at least *just* criminal law—does not penalize personal moral failings. It does not require us all to be saints or even to remain true to our less-than-saintly codes. Unlike virtue ethics,<sup>45</sup> it does not set an aspirational bar that we are all required to reach. Indeed, if it did, most of us would end up in jail. Rather, it establishes only a lower bar, a *basement* level of conduct that everybody is required to stay above. If they satisfy this minimum threshold, they stay out of trouble. But if they fall below this minimum threshold, then they are considered to be even worse than the rest of us sinners—at least the vast majority of the public who manage to stay above it (or not get caught for straying below it).<sup>46</sup>

All of this explains not only why Dante is not guilty but also why Boris is guilty. Once again, Dante did not fall beneath society's minimum threshold when he tried to have sex with Dolly. Instead, he fell beneath only what was in his own head—a legal standard (far) surpassing society's. So while he might scold or punish himself for his self-transgression,

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45. See K. Craig Welkener, *Possible But Not Easy: Living the Virtues and Defending the Guilty*, 26 *GEO. J. LEGAL ETHICS* 1083, 1085–86 (2013) (“Instead of seeking to formulate a rule or set of rules that determine the morality of action, virtue ethics focuses on the character of the actor to determine the morality of action, emphasizing vice and virtue. Virtue ethicists ask different questions than a deontologist or a consequentialist, such as: how can an attorney be faithful to his client, and also honest? What do justice and integrity require? . . . [V]irtue ethics brings a new perspective to old questions. Because virtue ethics as theory has only become prominent somewhat recently, applied virtue ethics is a very small field, and there has not been a significant application of virtue ethics specifically to criminal defense of the guilty.”) (footnotes omitted).

46. See Ken Levy, *Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System*, 66 *RUTGERS L. REV.* 630, 671 (2014) (“[T]he criminal justice system does not hold us to an impossibly high standard. The criminal justice system does not require us all to be saints. If it did, then most of us would be in jail. Instead, the criminal justice system does just the opposite. It establishes a floor, not a ceiling. It tells individuals within its jurisdiction the minimum that they cannot drop below, not a threshold that they must rise above. We are all free to be jerks; we just cannot be *supreme* jerks. That is, we are all free to do such morally wrong things as lie to friends, send angry emails, and ‘flip the bird’ at other drivers. We will not go to jail for these acts even though they fall below a proper standard of virtue. But we will go to jail if we injure or attempt to injure others in much more serious ways—ways that fall below a minimum standard of care that we owe everybody else.”).



society would not have the right to do the same. Boris, on the other hand, is guilty of attempt even though it was (factually) impossible for him to commit the object crime (statutory rape) on that particular occasion because he attempted to descend below the minimum threshold for legal conduct. As the Tenth Circuit stated, “[I]t is not a defense to an offense involving . . . exploitation of minors that the defendant falsely believed a minor to be involved.”<sup>47</sup>

*B. Second Justification: Dangerousness*

The second justification for our intuition that only Boris, not Dante, is guilty is that Boris is more dangerous than Dante.<sup>48</sup> Yes, it is true that neither of them had sex with an underage girl. Indeed, not only did they not commit the object crime; it was *impossible* for them to commit the object crime. While Boris was trying to have sex with a person whom he believed to be 14 years old, he just could not make it happen on this particular occasion because Blanche was 19 years old. Likewise, while Dante was trying to break the law—that is, what he understood to be the law—he just could not make it happen on this particular occasion because Dolly was 19 and therefore above the actual age of majority. The difference, however, is this: given Boris’s and Dante’s behavior in these situations, we may infer that Boris is much more likely to commit statutory rape than Dante.<sup>49</sup>

If Boris is trying to have sex with a person whom he believes to be 14 years old on this particular occasion, he has demonstrated a propensity that is likely to be realized sooner or later. This fact alone makes Boris a very dangerous man. We cannot, however, say the same about Dante.

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47. *United States v. Sims*, 428 F.3d 945, 960 (10th Cir. 2005). *See also* Kadish, *supra* note 42, at 688 (“Do the hunters who shot the dummy believing it was a deer, or Professor Moriarty, who shot the shadow thinking it was Sherlock Holmes, deserve no punishment because they were mistaken?”).

48. *See* FLETCHER, *supra* note 8, at 172 (“Virtually all the proponents of subjectivity in the law of attempts stress the value of their approach in identifying and convicting dangerous persons. The typical argument is: If the ultimate test is the dangerousness of the actor, then there is no point to exempting inapt attempts from liability. A man who shoots at a tree stump might well be just as dangerous as someone who shoots at his intended victim’s bed. So, if the ultimate test is indeed dangerousness, the subjectivists are right.”) (footnote omitted); Kadish, *supra* note 42, at 685 (arguing that people who commit impossible attempts are just as dangerous as people who commit successful attempts and therefore should be punished equally). *But see* Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 542–43 (2008) (arguing that the dangerousness rationale “falls short”).

49. *Cf.* Westen, *supra* note 48, at 546 (framing this justification not in terms of the future threat that attemptors pose but rather the threat that attemptors posed at the time that they made the attempt).

The most we can infer about him from the current situation with Dolly is that he will continue to try to have sex with women around the age of 19 years old and will think each time that he is breaking the law. But nothing about this propensity is actually dangerous, even if Dante believes that it is.

One might argue that Dante *is* dangerous as evidenced by the fact that he is willing to break what he believes to be the law. But this point is false. There must be evidence that Dante intended to break not merely *an imagined* law but rather *the actual* law. In case the reader is in doubt, compare two people who know more or less about laws prohibiting use of firearms against other individuals without justification. One tries to violate these laws with a water pistol, the other with an assault rifle. Only the latter is dangerous; the former is not—at least not until he manifests an intent to fire something much more potent than a water pistol.

### C. *Third Justification: Malum in Se*

The third justification for our intuition that Boris is guilty and Dante is not is that only Boris's action is *malum in se*. Engaging in sexual relations with a 14 year-old is not merely *legally* wrong but also *morally* wrong. It is morally wrong because a 14 year-old, no matter how intelligent and mature, is very likely going to be physically and psychologically harmed by sexual relations. He/she is simply not ready for this kind of intimate contact with another human being.<sup>50</sup> As he/she gets older, the potential harm from sexual relations becomes less until she reaches the age of majority, at which point it is assumed that, abnormal physical or psychological limitations aside, he/she *can* give sufficiently rational con-

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50. See *United States v. Lopez-Solis*, 447 F.3d 1201, 1209 (9th Cir. 2006) (“[W]e [have] held that consensual sexual contact with a minor under 14 necessarily involve[s] psychological abuse because a child that young cannot understand the nature of an adult’s sexual advances.”) (footnote omitted); *C.D.B. v. State*, 81 So.3d 399, 409 (Ala. Crim. App. 2011) (“Certainly very young children do not understand the ramifications of sexual activity but can be emotionally scarred for life when victimized . . . . I believe that child victims of young and tender years do not understand the nature and consequences of sexual relations . . . .”); *State v. J.A.S.*, 686 So.2d 1366, 1369 n.2 (Fla. Dist. Ct. App. 1997) (“[O]ne under 16 . . . is supposed to be protected from the sexual advances of others because of his or her age and inability to fully consent to sex.”); Andrea Erwin Potter, *Sexting and Louisiana’s Punishment for the Children the Law Intends to Protect from Prosecution Under Child Pornography Statutes*, 45 FAM. L.Q. 419, 427–28 (2011) (“[M]inors lack the maturity to understand sexual behavior especially resulting from coercion by adults.”).

sent to sexual relations without necessarily suffering any physical or psychological harm.<sup>51</sup>

Boris was trying to have sex with a person whom he believed to be at an age that society regards as incapable of consent. This act, this aiming to do something *malum in se*, is itself *malum in se*—just slightly less than statutory rape because it is arguably worse to commit the object crime itself than to try to commit the object crime.<sup>52</sup> Therefore, given his mens rea (plus the actus reus required for attempt), he is guilty of attempted statutory rape.

Dante's act, on the other hand, was not *malum in se*—except in his own head. He was trying to have sex with a person who, contrary to his belief, was legally capable of consent. Had he realized his goal, Dolly would not have been harmed. (At least he was legally entitled to this presumption.) What he was trying to do—have sex with Dolly—was not only not *malum in se* but not even *malum prohibitum*. Therefore his act—his trying—was not *malum in se* or *malum prohibitum* either.

#### D. Conclusion: Legal Impossibility Is a Valid Defense

Putting the three arguments above together, we may conclude that only legal impossibility, not factual impossibility, is a successful defense.<sup>53</sup> On the one hand, if there is a law prohibiting what I am trying to do, then even if I could not have broken this law on a particular occasion because external facts were not cooperating, I am still guilty of trying to break the law. Factual impossibility will not exonerate me. Perhaps the clearest example of this point is the failed pickpocket, which I mentioned in the Introduction. As long as there is a law against what I am trying to do—in this case, a law against theft—my attempt to break this law is against the

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51. See *State v. Zeh*, 1986 WL 4787 at \*2 (Ohio Ct. App. 1986) (“The law does not prohibit any and all sexual conduct between adults who are ready, willing and able . . .”); Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 UMKC L. REV. 241, 244 (2009) (“In the context of sex, ‘[t]he age of consent is the age at which a young person is legally able to understand and agree to consensual sex.’”) (citation omitted).

52. Cf. Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1056 (2007) (“On the one hand, if a particular threat is sufficiently dangerous or wrong to be criminalized, then surely the threatened action—which is arguably even more dangerous and therefore more wrong than the threat—should be criminalized as well. On the other hand, if a particular action is not sufficiently dangerous or wrong to be criminalized, then surely the threat of such an action—which is arguably even less dangerous and therefore less wrong than the threatened action itself—should not be criminalized either.”) (footnotes omitted).

53. See *supra* note 41 and accompanying text.

law as well. It does not matter if my particular attempt under the circumstances could not have been successful. On the other hand, if there is no law prohibiting what I am trying to do, then—even if I think there is—there is nothing to charge me with. I cannot justly be charged with trying to break a non-existing law. So unlike factual impossibility, legal impossibility *does* qualify as a legitimate defense.

## V. THREE REASONS FOR CONFUSION

Given Part IV, I conclude that there are several good reasons for thinking that legal impossibility is exculpatory. The law should continue to excuse defendants who are charged with attempt and properly plead legal impossibility. To deprive them of this defense simply because the legal establishment cannot resolve the complexities surrounding the factual-impossibility/legal-impossibility distinction, complexities that I just clarified in Part IV, is entirely unjust.

Still, in order for my proposal to advance, we must first understand why the legal establishment has tied itself into such embarrassing knots of confusion about the impossibility defense in the first place. In this Part, I will offer three explanations. My ultimate goal is to show that (a) the impossibility defense is not at all *hopelessly* confused, therefore (b) the legal-impossibility version of the impossibility defense is still viable, and therefore (c) courts should once again recognize it.

### A. *The Model Penal Code*

The Model Penal Code (MPC) adopts a “subjectivist” approach.<sup>54</sup> It suggests that what matters for attempt is what is in the person’s head—the person’s beliefs and intent—rather than the likelihood of success:

- (1) A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be . . . .<sup>55</sup>

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54. See Rogers, *supra* note 2, at 342 (“[S]ubjectivists focus on the actor’s intent—if he intends to commit a crime he is dangerous and should be punished, even if he fails. His actions merely confirm his intent. Subjectivist theory tends to expand culpability because the defendant’s bad intent governs.”) (footnotes omitted); *id.* at 346 (“[T]he Model Penal Code recommended a rejection of an objectivist approach in favor of a subjectivist viewpoint.”) (footnote omitted).

55. MODEL PENAL CODE §5.01 (Official Draft and Revised Comments 1985).

If, for example, Person A reaches into Person B's pocket with the intent of stealing the latter's wallet, this intent plus the actus reus of reaching is sufficient for attempted theft. It does not matter whether Person B's pocket actually contained a wallet and therefore how likely it was that Person A would succeed.<sup>56</sup>

This subjectivist approach to attempt was largely calculated to abolish the impossibility defense altogether:

Subsection (1) is . . . designed to reject the defense of impossibility . . . It does so . . . by providing that the defendant's conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact.<sup>57</sup>

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56. See *United States v. Williams*, 553 U.S. 285, 300 (2008) ("As with other inchoate crimes—attempt and conspiracy, for example—impossibility of completing the crime because the facts were not as the defendant believed is not a defense. 'All courts are in agreement that what is usually referred to as 'factual impossibility' is no defense to a charge of attempt.'") (citations omitted); *People v. Siu*, 271 P.2d 575, 576 ("[I]f a person formulates the intent and then proceeds to do something more which in the usual course of natural events will result in the commission of a crime, the attempt to commit that crime is complete. And even though the intended crime could not have been completed, due to some extrinsic fact unknown to the person who intended it, still he is guilty of attempt."); FLETCHER, *supra* note 8, at 169 ("[T]he prestigious Model Penal Code adopted the subjectivist principle that liability should depend on the circumstances as the actor 'believes them to be.'") (footnote and citation omitted); Stephen P. Garvey, *Are Attempts Like Treason?*, 14 *NEW CRIM. L. REV.* 173, 195–96 (2011) ("[S]ubjectivists and objectivists rightly disagree about impossibility. Objectivists insist on an impossibility defense for those actors who cross the line into attempt but nonetheless fail to cause the reasonable person to believe that an unjustifiable risk of harm is in the air. Subjectivists see things differently. If the actor made the choice to do that which he believes will cause or unjustifiably risk harm, then the fact that it turns out that the attempt was impossible is neither here nor there. Choice is what matters, and the impossible attempter has made the choice subjectivists say he should not have made. If it turns out that the world refuses to be an accomplice in his plans, so what?") (footnote omitted).

57. MODEL PENAL CODE § 5.01 (Official Draft and Revised Comments 1985); see also *People v. Rollino*, 233 N.Y.S.2d 580, 588–89 (Sup. Ct. 1962) ("Tentative Draft No. 10 of the Model Penal Code (p. 25) makes obvious the reason and necessity for the adoption of the proposed Article 5.01 when it says: '. . . It should suffice, therefore, to indicate at this stage what we deem to be the major results of the draft. They are: '(a) to extend the criminality of attempts by sweeping aside the defense of impossibility (including the distinction between so-called factual and legal impossibility) and by drawing the line between attempt and non-criminal preparation further away from the final act; the crime becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose . . . .'").

In other words, by relocating the essence of attempt from the external world to the actor's head, the external world was rendered mostly irrelevant to attempt liability. So even if the actor was simply unlucky and the external world made her intent impossible to realize, she could still be said to have attempted the crime and therefore to be guilty of attempt. Impossibility—the external world's failure to cooperate—no longer helps to exonerate her.

The subjectivist approach to attempt is plausible. But contrary to the quotation above from the MPC Commentaries, the invalidity of the impossibility defense does not follow from MPC §5.01. Like factual impossibility, legal impossibility equally involves trying—intending—to break the law. So by MPC §5.01, which focuses on what is in the person's head rather than in her environment, legal impossibility should be just as invalid a defense as factual impossibility.<sup>58</sup> But it *isn't*; this conclusion sweeps too broadly. Even though legal impossibility also involves an intent to break the law, it still remains a valid defense simply because the law that the person intends to break does not exist. Given the principle of legality, we cannot justly convict and punish a person who did everything she could to violate a law that is nothing more than a figment of her imagination. So to the extent that the MPC is thought to entail that people who try to break non-existent laws are just as guilty of attempt as people who try to break existing laws (but fail because of an external circumstance), the MPC is mistaken. The MPC should instead have distinguished between two kinds of subjective impossibility: inculpatory factual impossibility and exculpatory legal impossibility.

### *B. Factual and Legal Impossibility*

The second reason for so much confusion about the impossibility defense is that courts and scholars consistently misuse terms. What many of them refer to as *legal* impossibility is actually *factual* impossibility.<sup>59</sup> It

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58. See FLETCHER, *supra* note 8, at 175 (“The consensus in Western legal systems is that there ought to be an exemption from punishment for attempts . . . in cases . . . of legal impossibility . . . Yet within the framework of the [Model Penal Code’s] subjective standard that the facts should be taken as the actor perceives them to be, it is by no means easy to explain why . . . legally impossible attempts should be exempt from punishment . . . . In the case in which [the actor] takes his lying to a police officer to be a case of perjury, he believes that he is violating the law, and therefore he should be held accountable as though he were.”) (footnotes omitted); FLETCHER, *supra* note 2, at 180 (“The . . . extreme concern about dangerous hostility to the legal order should lead to the punishability of those who think that they are committing offenses when they are not.”).

59. Some cases and scholarship that confuse the two concepts include: *United States v. Hsu*, 155 F.3d 189, 199 (3d Cir. 1998); *State v. Condon*, 919 A.2d 178, 183

is a mistake to conflate factual impossibility with legal impossibility, and it is a double mistake to conclude from this conflation that legal impossibility is no more exculpatory than factual impossibility.

Consider one of the earliest and most famous impossibility cases, *People v. Jaffe*.<sup>60</sup> While Jaffe believed that he was committing the crime of receiving stolen property, he was mistaken because the property was not in fact stolen.<sup>61</sup> But the question remained: was Jaffe guilty of *attempting* to receive stolen property? The *Jaffe* court said no on the grounds that it was legally impossible for Jaffe to receive stolen property.<sup>62</sup> And it was

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(N.J. Super. Ct. App. Div. 2007); *State v. Taylor*, 810 A.2d 964, 970 (Md. 2002); *People v. Thousand*, 614 N.W.2d at 676; *State v. Salerno*, No. CR 92 0080796, 1993 WL 88327, at \*3 (Conn. Super. Ct. Mar. 23, 1993); *People v. Cecil*, 179 Cal.Rptr. 736, 739 (Cal. Ct. App. 1982); *People v. Dlugash*, 41 N.Y.2d 725, 733 (1977) (suggesting that two factual-impossibility cases, *Guffey* and *Taylor*, were legal-impossibility cases); Pazuniak, *supra* note 5, at 700 n.51 (mistakenly claiming that the court in *United States v. Brand*, 467 F.3d 179, 202 n.20 (2d Cir. 2006) summarized “circuit court decisions rejecting the legal impossibility defense in § 2422(b) cases” when the *Brand* court in fact summarized circuit court decisions rejecting the *factual* legal impossibility defense in § 2422(b) cases). *See also* *Booth v. State*, 398 P.2d 863, 870 (Okla. Crim. App. 1964) (“What is a ‘legal impossibility’ as distinguished from a ‘physical or factual impossibility’ has over a long period of time perplexed our courts and has resulted in many irreconcilable decisions and much philosophical discussion by legal scholars in numerous articles and papers in law school publications and by text writers.”); *State v. Taylor*, 133 S.W.2d 336, 340 (Mo. 1939); FLETCHER, *supra* note 8, at 177–78 (listing examples that are difficult to identify as factual impossibility or legal impossibility because they seem to involve elements of both); *Rogers*, *supra* note 2, at 324 (mistakenly suggesting that the *Jaffe* case involved legal impossibility); *Simons*, *supra* note 30, at 217 n.4 (“Confusingly, many courts employ the term ‘legal’ impossibility for a much broader category of cases, many of which involve only [mistakes of fact.]”); *Wagner*, *supra* note 2, at 1066 (“[T]he impossibility defense is often applied inconsistently, at times because the distinction between factual and legal impossibility becomes unworkable in practice.”).

60. 185 N.Y. 497 (1906).

61. *See id.* at 500.

62. *See id.* at 500 (“The crucial distinction between the case before us and the pickpocket cases, and others involving the same principle, lies . . . in the fact that, in the present case, the act, which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated.”). The *Jaffe* court also claimed that it is impossible to attempt to commit a crime that is itself impossible to commit: “It is . . . difficult to perceive how there can be an attempt to receive stolen goods . . . when they have not been stolen in fact.” *Id.* at 500. This inference is fallacious for the same reason that I gave in Part II: just because it is impossible to jump to the moon does not mean that it is impossible to *attempt* to jump to the moon. *See also Booth*, 398 P.2d at 871–72 (fallaciously reasoning that because the object crime, knowingly receiving stolen property, could not be achieved, the defendants could not have attempted to commit this crime).

legally impossible because the property in question did not bear the legal status of being stolen.

This reasoning, however, was fallacious. Jaffe should have been found guilty of attempting to receive stolen property. He was much more like Boris than Dante; he failed to commit the crime of receiving stolen property because his attempt was foiled by an absent circumstance—the property of not being stolen—rather than by the absence of a law against receiving stolen property.<sup>63</sup>

As it turns out, Jaffe is hardly the only case to confuse factual impossibility and legal impossibility. Just consider this list in *Lawhorn*:

Cited examples of legal impossibility include attempt to receive stolen property that was not stolen, attempt to murder a corpse . . . attempt to bribe a public official for purposes of securing a particular vote when the official had no authority to vote on the matter, attempt to bribe a person believed to be a juror when that person is not actually a juror.<sup>64</sup>

All of these supposed examples of legal impossibility are really examples of *factual* impossibility. They all involve a mistake of fact about another person and therefore factual impossibility rather than a mistake of law (notably, a belief in a non-existent law) and therefore legal impossibility.

Once again, factual impossibility involves a person doing everything she could to commit a crime and failing *because an external fact did not cooperate*. On the other hand, legal impossibility involves a person doing everything she could to commit a crime and failing *because the law did not cooperate*. In the former case, the defendant *would have* committed the crime had just *one external circumstance* been different. In the latter case, the defendant would have committed the crime had *another very different kind of external circumstance*—namely, the legal status of the object of the agent's attempt—been different.

The main reason why courts like *Jaffe* have confused factual impossibility and legal impossibility is because they amount to the same thing at a very general level of description: both involve a person's doing every-

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63. See *Commonwealth v. Henley*, 474 A.2d 1115, 1116–17 (Pa. 1984) (“The reasoning in the *Jaffe* line of cases has come under considerable criticism in the last twenty-five years, and in response to the criticism the defense has been uniformly rejected by the highest courts of most states where the issue has been raised. Additionally, many states have passed legislation which specifically abrogated the defense. The suggested abrogation of the impossibility defense through legislation was first introduced to most state legislatures via the Model Penal Code.”) (footnotes omitted).

64. *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995) (citing JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 595 (2nd ed. 1960)).



thing she could to commit a crime and failing because of an external fact. At a more specific level of description, however, this identity disappears,<sup>65</sup> and it is *this* divergence that too many courts have overlooked.

### C. Hybrid Impossibility

The third reason for so much confusion about the impossibility defense is closely related to the second: courts and scholars have mistaken straightforward factual impossibility cases for “mixed” or “hybrid” impossibility cases—that is, cases that equally involve both factual impossibility and legal impossibility and therefore make the question of the defendant’s guilt a matter of arbitrary choice.<sup>66</sup>

Consider one of the earliest and most glaring examples: *State v. Guffey*.<sup>67</sup> In *Guffey*, Judge Vandevanter reversed the conviction of defendants for attempting to hunt a deer out of season because the target of their shot was a “dummy” deer.<sup>68</sup> Judge Vandevanter argued that the defendants were eligible for the impossibility defense because their mistake—and therefore the nature of the impossibility—was legal rather than factual.<sup>69</sup> While they thought that they were shooting a real deer out of season and therefore breaking the law, they were in fact shooting a fake deer, which was, at that time, not against the law. In terms of the chart in Part IV above, Judge Vandevanter thought that the defendants were much more like Dante than Boris—that is, guilty more of a legal mistake than of a factual mistake—and therefore not guilty on the basis of a strong legal impossibility claim rather than guilty on the basis of a weak factual impossibility claim.

Judge Vandevanter’s reasoning, however, was fallacious. Even if it was not illegal to shoot fake deer, it *was* illegal to shoot real deer. It was *this* law, not any law about fake deer, that the defendants were trying to break. So this was not at all a case of legal impossibility. Instead, because they well understood the law prohibiting hunting out of season and mistakenly thought that they were shooting a real deer, this was purely a case of factual mistake and therefore factual impossibility—that is, trying to kill a real deer but failing because of a factual mistake that rendered it

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65. If the external fact is the absence of an applicable law, then the situation is legal impossibility. If the external fact is a circumstance that thwarts the object crime, then the situation is factual impossibility.

66. Hasnas, *supra* note 2, at 5 (“[W]hether an attempt is legally or factually impossible appears to depend more on the way the court chooses to characterize the defendant’s actions than on the defendant’s actions themselves.”).

67. 262 S.W.2d 152 (Mo. Ct. App. 1953).

68. *See id.* at 156.

69. *See id.* at 156.

impossible for their goal to be realized. And because factual impossibility is not a viable defense—again, Boris rather than Dante—it follows that the defendants should have been convicted of attempting to hunt a deer out of season.

Some have gone so far as to claim that *all* impossibility cases can be characterized as involving *both* factual impossibility *and* legal impossibility and therefore that *all* impossibility cases involve *hybrid* impossibility.<sup>70</sup> I argue, however, that just the opposite is true: there is *no such thing* as hybrid impossibility.<sup>71</sup> If I am correct, then *Guffey* and every other decision that claims to be dealing with hybrid impossibility is deeply flawed.

Whenever there is both an attempt to break the law and a hybrid mistake—that is, a legal mistake that derives from a factual mistake—the impossibility resulting from this hybrid mistake will still fall clearly into either the factual-impossibility (Boris) category or the legal-impossibility (Dante) category. The person will be unable to break the law either because (a) she does not correctly understand the content or scope of the actually existing (and relevant) law or (b) she is blocked by at least one fact outside her control other than the content or scope of the law. Situation (a) is legal impossibility; situation (b) is factual impossibility.

One might try to come up with an example in which both (a) and (b) are satisfied. But any such example will still fall clearly into only one of the two categories. To prove my point, I offer two examples:

*Example #1.* Marksman reads a recent homicide case from her jurisdiction, accidentally overlooks a few key words, and—as a result of her sloppy reading—mistakenly believes that the case, and therefore law, categorically prohibits killing in self-defense. The

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70. *United States v. Hsu*, 155 F.3d 189, 199 (3d Cir. 1998) (“[T]he distinction between factual and legal impossibility is essentially a matter of semantics, for every case of legal impossibility can reasonably be characterized as a factual impossibility.”); *Booth v. State*, 398 P.2d 863, 870 (Okla. Crim. App. 1964) (“Detailed discussion of the subject is unnecessary to make it clear that it is frequently most difficult to compartmentalize a particular set of facts as coming within one of the categories rather than the other.”); Westen, *supra* note 48, at 534 (“[E]very impossibility case is both an instance of factual impossibility and legal impossibility, depending upon how it is characterized. Thus, instead of describing [an] attempted poaching as a legal impossibility and [an] attempted pick pocketing as factual impossibility, [a court could say] the opposite. It could . . . describ[e] the former as factual impossibility and the latter as legal impossibility.”)

71. *Cf.* Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 470–71 (1990) (rejecting the notion that there is “an ‘intermediate’ category between law and fact” or a category “of ‘mixed’ questions of fact and law” that threatens the distinction between mistake of fact and mistake of law).

next day, Mugger accosts Marksman and points a gun in Marksman's face. Instantly, Marksman draws her own gun, which she was legally carrying; points it at Mugger's head; and pulls the trigger. But no bullets come out because Marksman had forgotten to load them. Mugger then runs away. Was Marksman's attempt to break the law legally impossible or factually impossible?

The answer is that it was legally impossible because Marksman fundamentally misunderstood the law of self-defense. Yes, she made a factual mistake—overlooking some words—while reading the homicide case. But it was not this factual mistake that made her attempt to break the law impossible. (Nor was it the fact that she had forgotten to load the gun, another factual mistake.) Rather, what made her attempt to break the law impossible was simply the fact that, whatever she may have thought about it, the law does *not* prohibit killing in justified self-defense in the first place.

What if the person makes a hybrid mistake—again, a legal mistake that derives from a factual mistake—but, contrary to Example #1, her legal mistake amounts only to a misapplication, not a content or scope misunderstanding, of the law? Consider the following hypothetical—Example #2—from Larry Alexander:

The hunting season begins October 15 according to a fish and game regulation. There is a penal statute prohibiting hunting except during hunting season . . .

. . . [T]he regulations, instead of giving the date of the hunting season, state that hunting is allowed on any day that a green flag is displayed at the Fish and Game Department office, but not on any day when a red flag is displayed there. Mr. Fact/Law, who is colorblind, sees the green flag but thinks it is red. He goes hunting, believing he is hunting out of season.<sup>72</sup>

Mr. Fact/Law clearly makes two kinds of mistake—factual and legal. Mr. Fact/Law's factual mistake is a misperception of the flag's color; it is green, but because of his colorblindness, he perceives it as red. Mr. Fact/Law's legal mistake is a resulting misinterpretation of his misperception; he believes hunting is forbidden (because he mistakenly perceives the flag to be red) when it is actually legal (because the flag is actually green). Mr. Fact/Law, then, is making a hybrid *mistake*—that is, a mistake of law that derives from a mistake of fact.

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72. Alexander, *supra* note 8, at 50 (citing Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* (1989)).

It does not follow, however, that there is any hybrid *impossibility*. Instead, this situation is clearly one of factual impossibility. Mr. Fact/Law is like Boris, not Dante. Once again, Boris tried to violate the statutory rape law, a law that actually exists and which he correctly understood, but failed because he made a factual mistake—underestimating his partner’s age. Likewise, Mr. Fact/Law tried to violate the law forbidding hunting out of season, a law that actually exists and which he correctly understood, but failed because he also made a factual mistake—again, misperceiving the flag to be red instead of green.<sup>46</sup>

Put another way, both Boris and Mr. Fact/Law tried to break the law but failed *not* because they misunderstood the law—they both understood it perfectly well—but because they *misapplied* the law. And they misapplied the law not because of a legal mistake—again, they understood the law perfectly well—but because of a factual mistake. Had they both been *right* about the facts—respectively, Blanche’s age and the flag’s being green—they would have known that their attempts, if successful, would not have violated the law. And that is what separates both Boris and Mr. Fact/Law from Dante. Dante *did* know Dolly’s age, but he still thought that he was breaking the law. Why? Because he completely misunderstood its scope. Again, he thought that the statutory rape law protected everybody under 25 when it protected only everybody under 18.

I conclude that hybrid impossibility—impossibility that falls equally into both the factual-impossibility and legal-impossibility categories—just does not exist. So the courts that claim that situations involving solicitation of an undercover officer to commit a crime—for example, a drug or sex crime—involve hybrid impossibility and therefore that the defendants might not be guilty are simply mistaken. These cases do *not* involve any legal impossibility or therefore any hybrid impossibility; they involve only factual impossibility. The defendants in these cases are not attempting to break laws that do not exist or that they do not understand. They are attempting to break laws that *do* exist and that they *do* understand. Yes, these cases involve hybrid mistakes—the factual mistake of thinking that the undercover officer is a good-faith collaborator and the resulting legal mistake that the supposed collaborator is not legally authorized to enforce the law. But, once again, hybrid mistakes do not entail hybrid impossibility. Indeed, it is the failure to recognize this point that explains why so many courts and scholars have perceived hybrid impossibility where it simply does not exist.

Likewise, as long as we are discussing non-entailment, it is important to remember that a legal *mistake* does *not* necessarily entail legal *impossibility*. Recall Craig from the chart in Part IV. Craig had sex with Cindy, knew that Cindy was 14, and honestly believed that it was legal to

have sex with 14 year-olds. Craig, then, made a legal mistake. But there was no *impossibility* involved; he *succeeded* in having sex with a minor. This is one of the two main distinctions between Craig and Dante, who *failed* to have sex with a minor.<sup>73</sup>

## VI. WHY IT IS SO IMPORTANT THAT WE RESURRECT THE IMPOSSIBILITY DEFENSE?

The central thesis of this Article is that we should resurrect the legal-impossibility version of the impossibility defense. Against this thesis, however, one might raise two objections. The first objection is that most, if not all, courts already recognize legal impossibility.<sup>74</sup> The second objection is that legal-impossibility cases are much rarer than factual-impossibility cases.<sup>75</sup> In the remainder of this Part, I will argue that both objections are dubious.

### A. Two Kinds of Legal Impossibility

In response to the first objection—again, the objection that legal impossibility is already recognized in most, if not all, jurisdictions—I offer two responses. First, the evidence points in the very opposite direction. The fact of the matter is that most jurisdictions have *abolished* the legal-impossibility version of the impossibility defense.<sup>76</sup>

Second, even if some courts still (tacitly) accept the legal-impossibility version of the impossibility defense, mere acceptance is not sufficient. The legality principle—again, a foundational principle of criminal justice which says that people may be punished only for acts that are explicitly prohibited at the time that they perform these acts<sup>77</sup>—calls for *official statutory recognition* of the impossibility defense. Otherwise, defendants who have a solid legal-impossibility defense remain vulnerable to the whims, prejudices, and ignorance of various players in the criminal justice

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73. The second distinction involves their different beliefs about the law. While Craig believed that the age of majority (for the purpose of giving consent to sexual relations) falls below 14 years old, Dante believed that the age of majority (for the purpose of giving consent to sexual relations) is 25 years old.

74. See *Hsu*, 155 F.3d at 199 n.16 (“Pure legal impossibility is always a defense”); Rogers, *supra* note 6, at 495 (claiming that “[p]ure legal impossibility is a defense in all jurisdictions.”) (footnote omitted).

75. See, e.g., *United States v. Farner*, 251 F.3d 510, 513 (5th Cir. 2001) (“We need not hold that there can never be a case of true legal impossibility, although such a case would be rare.”); DUFF, *supra* note 25, at 93 (“Cases of *purely* imaginary crime are unlikely to come to court . . .”).

76. See *supra* note 2 and accompanying text.

77. See *supra* notes 9–10 and accompanying text.

system. In fact, defendants remain especially vulnerable to jurors who (a) believe that there *should have been* a law prohibiting the defendant's (despicable) act *and* (b) are aware that the defendant herself mistakenly believed that there *was* just such a law. Too many jurors will be all too tempted to convict the defendant on the basis of (a) and (b) simply by pretending that a certain law, real or fictional, prohibits these acts. It is precisely this temptation against which the legality principle has been erected.<sup>78</sup>

Lest one think that this situation—a situation in which a person is arrested, tried, and punished for committing an act that was not explicitly prohibited—is farfetched, just the opposite is true.<sup>79</sup> Many defendants have been, or are, in this unfortunate situation. There are two facts in support of this generalization, one simple, the other more complicated. The simple reason is that history is full of examples.<sup>80</sup> Just because the legality principle is foundational does not mean that it is always respected.

The more complicated reason requires us to distinguish between two different kinds of legal impossibility. According to the first kind of legal impossibility, there is no law *even close* to what the individual imagines. According to the second kind of legal impossibility, there *is* a law close enough to what the individual imagines, but there is still an

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78. Cf. Hasnas, *supra* note 2, at 62 (“[W]hether a defendant’s conduct looks like an attempt is highly relevant to the question of whether the effort to punish it will create too great a risk of enforcement error or abuse. Empowering state enforcement agents to punish those whose conduct is indistinguishable from that of innocent citizens solely because of what is in their minds provides the enforcement agents with more power and temptation to interfere with the liberty of citizens than can be justified by the added security that would be achieved. Thus, the common law impossibility defense is normatively justified not because the defendants who utilize it do not deserve punishment, but because it is necessary to protect law-abiding citizens from the risk of enforcement error and abuse.”); *id.* at 68–69 (“Requiring the prosecution to establish an element beyond merely what the defendant was thinking reduces the opportunity and the temptation for state enforcement agents to bring unfounded charges of attempt for ulterior reasons, thereby reducing the risk of enforcement abuse. It also decreases the likelihood that charges will be mistakenly brought on the basis of false or ambiguous information regarding the defendant’s state of mind, e.g., on the basis of informer testimony, thereby reducing the risk of enforcement error.”).

79. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER CAROL S. STEIKER, & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 162 (9th ed. 2012) (“[C]ourts create new crimes, not within the ambit of any existing statute, to reach situations that are considered *analogous* to ones already covered. The doctrine of criminal law by analogy is often associated with totalitarian regimes, but . . . it is not unknown to the common law.”).

80. See *supra* note 11 and accompanying text.

unrealistic distance between the kinds of acts that this law prohibits and the act by which the individual attempts to violate it. This mistaken application of the law—that is, thinking that an actually existing law prohibits a particular act when it simply does not—amounts to legal rather than factual impossibility because, *ex hypothesi*, the mistake is about the scope of the law rather than about the nature of the act being performed or some contingency in the external world.

Consider again the individual who thinks that sticking his tongue out at people is illegal.<sup>81</sup> Call this person Sam. Sam falls into the first category of legal impossibility if he believes that there is a distinct Anti-Tongue-Sticking-Out statute. Sam falls into the second category of legal impossibility if he believes that this insulting gesture with his tongue is covered by the local statutes prohibiting assault.

Given this distinction, Dante (in Part IV) arguably falls into the second category of legal impossibility. It is not as though he thinks that there is a distinct law out there that covers sex with people under 25. Rather, he is aware that there are statutory rape laws and just radically misunderstands them in at least one respect, the element about age of majority. It is therefore misleading to suggest that legal impossibility involves nothing more than trying to break a law that does not exist. This characterization captures only the first kind of legal impossibility. It is more accurate to suggest that some, if not many or even most, legal-impossibility cases involve not so much trying to break a law that does not exist as trying to break a law that *does* exist by acting in a manner that falls well outside the scope of the law.

It is very important that we recognize this second kind of legal impossibility. If we were to think of legal impossibility in only the first way—as the defense of “crazy” people who simply make up laws and then project them on to the world—my plea to resurrect the impossibility defense would be less urgent. There would not be any law under which to charge them in the first place. And even if there were, the insanity defense would often apply more accurately than the impossibility defense. Once we realize that very *normal* people might be aware of various criminal laws and yet significantly misunderstand them—as both Dante and Sam in the second situation do—the case for reinstating the legal-impossibility version of the impossibility defense becomes much stronger.

Indeed, the whole reason that the MPC and most jurisdictions abolished the impossibility defense is because there was so much confusion about the distinction between factual impossibility and legal impossibil-

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81. *See supra* Part .

ity.<sup>82</sup> This abolition makes complete sense if their only worry was that defendants who had committed factually impossible attempts were confusing juries or judges into buying their bogus legal-impossibility defenses. But this should not have been their only worry. If factual impossibility and legal impossibility are so easy to confuse, then there is an equal and opposite threat that defendants who have committed *legally* impossible attempts are being unfairly *charged, tried, and/or punished* because police, prosecutors, judges, and juries mistake this *legal* impossibility for *factual* impossibility. To address *this* injustice, then, the answer is not to abolish or abandon the impossibility defense altogether. On the contrary, it is to *resurrect* the defense and make very clear the distinction between factual and legal impossibility (as I have in Part IV) so that judges and juries will no longer have such difficulty applying them.

### *B. Importance Is Not a Function of Frequency*

Regarding the second objection at the beginning of this Part—again, the objection that legal-impossibility cases are much rarer than factual-impossibility cases—I offer two responses. First, as I argued in the previous section, while there is no precise evidence about how frequently people are charged, tried, and convicted for breaking laws that either do not exist or that do exist but do not cover their supposedly despicable acts, there is good reason to think that the number is high—at least high enough that our criminal justice system should make the legal-impossibility defense available to them.<sup>83</sup>

Second, even if legal-impossibility cases were rare, this would hardly be a good reason not to take them seriously. Consider two analogies. First, since 1976, there have been fewer than 1400 executions.<sup>84</sup> This is a very small number as compared with the hundreds of thousands of homicides that have occurred during the same time period.<sup>85</sup> But the fact that capital punishment is so rarely exercised does not at all mean that it does not raise serious ethical, legal, and international issues. Second, only a very small percentage of defendants invoke the insanity defense, and only a very small percentage of this already very small percentage are actually

82. See *supra* note 2 and accompanying text.

83. See *supra* note 11 and accompanying text.

84. See *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Oct. 2, 2014).

85. See James Alan Fox & Marianne W. Zawitz, *Homicide Trends in the United States* (1976-2005), BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/content/pub/pdf/htius.pdf>; Erica L. Smith & Alexia Cooper, *Homicide in the U.S. Known to Law Enforcement*, 2011, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/content/pub/pdf/hs11.pdf>.



acquitted on the basis of insanity.<sup>86</sup> Yet it is still very important for jurisdictions to determine whether or not they will offer the insanity defense and, if they do, how exactly they will define and apply it.<sup>87</sup>

## VII. PUTTING THE IMPOSSIBILITY DEFENSE TO WORK (SORT OF): CAUSATION IMPOSSIBILITY

There is one last problem in the impossibility domain that needs to be resolved: the problem of how to handle the “Voodoo” scenario. I will argue in this Part that practitioners of witchcraft and other forms of psychic causation are excellent candidates for something like the legal-impossibility version of the impossibility defense and therefore just one more reason why it needs to be resurrected.

Consider Cheney. Cheney is an associate at a law firm and happens to believe in such paranormal phenomena as voodoo and telekinesis.<sup>88</sup> On January 5, 2014, Ray, a partner, told Cheney that he is not as smart as he thinks and needs to improve his writing. Cheney, who cannot take criticism, thought that these comments were completely uncalled for. Several days later, Cheney informed several associates both in person and by email that, in reaction to this incident, he made a voodoo doll, which he named “Ray”; that he had been poking the Ray doll with pins on a nightly basis since January 5 while chanting a curse; and that the goal of this activity was to cause Ray an early death.

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86. See Heather Leigh Stangle, *Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide*, 50 WM. & MARY L. REV. 699, 728 (2008) (“[T]he insanity defense ‘has been estimated to be successful in less than 0.1 [percent] (1 in 1000) of all criminal trials.’”) (footnote omitted); Stephen G. Valdes, Comment, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1723 (2005) (“While surveys have shown that the public believes the [insanity] defense is raised in as many as 50% of all trials, in reality the defense is raised infrequently, with one study reporting its use in only 0.9% of all felony indictment cases tried. That same study further reports that only 26% of those seeking the defense are acquitted; the majority are sent to a mental hospital. This survey’s results, while not limited to trial settings, parallel these statistics . . . . [T]he reported occurrence and success rates for insanity defenses are 0.87% and 23.55%, respectively—which places this study’s findings in the same range of findings by other studies.”) (footnotes omitted).

87. See generally Walter Sinnott-Armstrong and Ken Levy, *Insanity Defenses*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 299 (John Deigh & David Dolinko eds., 2011).

88. I draw much of this example from Ken Levy, *Dangerous Psychopaths: Criminally Responsible but Not Morally Responsible, Subject to Criminal Punishment And to Preventive Detention*, 48 SAN DIEGO L. REV. 1299, 1382 (2011).

On January 12, two of Cheney's fellow associates became worried and contacted the local police. Officer Corbett called Cheney in and talked with him for about twenty minutes. After hearing Cheney's side of the story, Officer Corbett instructed Cheney to "give it up," try not to "blow things out of proportion," and focus instead on his work. Cheney agreed. But that same night, Cheney resumed trying to kill Ray with his voodoo doll.

On January 19, after fourteen straight days of practicing voodoo, Cheney was getting frustrated that his efforts to kill Ray were unsuccessful. So he changed his tactics. He now tried to kill Ray through a different technique: *telekinesis*. Specifically, Cheney sat in his office and concentrated very hard on causing a flower vase on Ray's shelf to fall on Ray's head and kill him. The same two associates who had previously called the police saw Cheney concentrating deeply and asked him why. Cheney explained, at which point they immediately called the police once again. This time, the police traveled to Cheney's office and took him down to the station for questioning.

Officer Corbett asked Cheney what he would do if his efforts continued to fail. Would he "resort to something more direct, like using a gun, a knife, a bomb, or even another person like a friend or a hit man to do the 'dirty work'?" Cheney answered, "Absolutely and unequivocally no. Never! There is no way I would let myself get caught. I'm too smart for that and have too much to lose. That's why I was trying to use 'action at a distance.' Besides, there is no law against this." Still, Officer Corbett decided to arrest Cheney for attempted murder.

Is Officer Corbett right? Is Cheney guilty of attempted murder? This is a tough call. Our intuitions are seriously conflicted. On the one hand, Cheney did try to kill Ray, and there was plenty of evidence—notably his admissions—that he satisfied both the *actus reus* and *mens rea* for attempt. On the other hand, most of us do not believe in telekinesis or voodoo and therefore think that it was impossible for his attempts to succeed.

Does the latter point constitute a successful defense? Many people's intuition *before* learning much about the impossibility defense and the distinction between factual and legal impossibility is that it *does* constitute a successful defense, that Cheney is *not guilty*.<sup>89</sup> They reason that his attempts were so far from possible success—so *absurd*—that, whether or

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89. See Westen, *supra* note 48, at 536 ("My students disagree about whether all instances of Voodoo are exculpatory. However, when they are asked to pass judgment on [a person, Mildred, who tries to kill her ex-husband using Voodoo] as if they were prosecutors, they agree that, whether or not Mildred deserves God's punishment for endeavoring to kill an innocent person, the state would be abusing its power if, given

not they technically meet the criteria for attempt, Cheney really has *done* nothing wrong, that he could not have been very serious about killing Ray,<sup>90</sup> that he is not dangerous,<sup>91</sup> and therefore that it would be unjust to punish him.<sup>92</sup> Indeed, to punish Cheney for trying to kill Ray with voodoo is almost as unjust as punishing him merely for *hoping* that Ray would die.<sup>93</sup> After learning about impossibility, however, some people's intuitions might shift. They might reason that because Cheney's mistake—specifically, his mistaken belief that voodoo and telekinesis work—is factual, not legal, he *is* guilty of attempted murder.

Still, this latter response is problematic for two reasons. First, once again, it conflicts with our pre-theoretical intuition—that is, the intuition

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Mildred's mistake of fact, the state officially declared her to be an 'attempted murderer' and made it part of her public record.”).

90. See Hasnas, *supra* note 2, at 65 (“Pushing needles into voodoo images, casting spells, or even firing toy phasers at one's intended victim may adequately demonstrate the defendant's desire for the victim's death. However, such actions do not demonstrate the fixity of purpose usually required for criminal punishment.”).

91. See FLETCHER, *supra* note 8, at 177 (“A more convincing subjectivist argument is that superstitious actors are not dangerous. . . . The supposition is that those who try to kill by incantations either know in their hearts that their activity is harmless, or are so out of touch that they could not competently execute a plan to kill by more rational means.”); Hasnas, *supra* note 2, at 74 (arguing against “liability for irrational attempts because even though the conduct of one engaged in an irrational attempt may suggest that he or she desires a criminal end, such conduct ‘would not impress the average, moderately enlightened observer as being a serious menace to his feeling of safety.’”) (citation omitted).

92. See *United States v. Lange*, 312 F.3d 263, 269 (7th Cir. 2002) (“[S]ticking pins in voodoo dolls [is not] attempted murder. Booksellers and practitioners of the occult pose no social dangers, certainly none of the magnitude of those who are tricked into shooting bags of sand that have been substituted for targets of assassination.”); MODEL PENAL CODE AND COMMENTARIES § 5.01 cmt. at 315–16 (Official Draft and Revised Comments 1985) (“[I]f the means [of an attempt] selected were absurd, there is good ground for doubting that the actor really planned to commit a crime. . . . Using impossibility as a guide to dangerousness of personality presents serious difficulties. What is needed is a guideline that can inform judgment in particular cases. . . . Such a vehicle is provided in Section 5.05(2), which authorizes the court to reduce the grade of the offense, or dismiss the prosecution, in situations where the conduct charged to constitute an attempt is ‘so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting’ the normal grading of the offense as an attempt. Section 5.05(2) thus takes account of those cases where neither the offender nor his conduct presents a serious threat to the public.”) (footnotes omitted).

93. See Levy, *supra* note 13, at 631 n.56; see also Rogers, *supra* note 2, at 341 (“[H]istorical reluctance to punish defendants for unconsummated crimes led to the late development of attempt as a crime. This reluctance stemmed from a fear of punishing for thoughts alone when no outward harm occurred.”) (footnotes omitted).

we have before learning about the distinction between factual and legal impossibility—that Cheney is *not guilty*. (I will defend this intuition below.)

Second, the notion that Cheney is making a factual mistake does not seem quite right. We cannot be that confident that Cheney is making a factual mistake because, for all we know, voodoo and telekinesis (and other forms of “bizarre causation”) may in fact work for some people on some occasions.<sup>94</sup> *Many* people all around the globe believe that these techniques *can* work.<sup>95</sup> So it would be arrogant and close-minded to dismiss them out of hand. Instead, we would need to *prove* that these techniques can *never* work. And it is unclear how we would prove this negative. Perhaps with more talent or skill in the paranormal arts, Cheney might have succeeded in killing Ray.<sup>96</sup> Indeed, one wonders just how some judges or juries would regard these practices if Ray *had* in fact died between January 5 and January 20 because of a sudden accident—especially the vase falling on his head.

I conclude that Cheney is not necessarily making a factual mistake. But, strangely enough, he does not seem to be making a legal mistake either. When he stated in his conversation with Officer Corbett that the techniques he was using to kill Ray did not themselves violate the law, he may very well have been right. I do not believe that any jurisdiction bans the practice of voodoo or telekinesis. (These practices are likely permitted simply because most people—at least most judges and legislators—do not believe that they work.) For this reason alone, Cheney may not be guilty.

So instead of forcing Cheney into the factual-impossibility category or into the legal-impossibility category—a task that, either way, amounts to jamming a square peg into a round hole—we should recognize a third category to handle him, a category that has been referred to as *inherent*

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94. Cf. MICHIO KAKU, *PHYSICS OF THE FUTURE: HOW SCIENCE WILL SHAPE HUMAN DESTINY AND OUR DAILY LIVES BY THE YEAR 2100* 62–64 (2011) (predicting that, with technological advances, human beings will eventually have telekinetic powers).

95. See, e.g., Christine A. Corcos, *Prosecutors and Psychics on the Air: Does a ‘Psychic Detective Effect’ Exist?*, in *IN LAW AND JUSTICE ON THE SMALL SCREEN* (Jessica Silbey and Peter Robson eds., 2012) (explaining how psychic detective and reality shows manipulate their large audiences into believing that certain individuals have special, paranormal powers that enable them to solve murder mysteries).

96. See FLETCHER, *supra* note 8, at 177 (“We have so little experience with black magic in modern industrial society that it is difficult to know whether [the supposition that those who practice black magic could not competently execute a plan to kill by more rational means] is correct.”).

*impossibility*<sup>97</sup> and *intrinsic impossibility*<sup>98</sup> but which I will refer to more transparently as *causation impossibility*.

If we accept causation impossibility as a third kind of impossibility in addition to factual impossibility and legal impossibility, then Cheney did not really make a factual or legal mistake. Instead, he made a *theoretical* mistake. He adopted—and tried to implement—a *weak theory of causation*, specifically the theory that (a) voodoo and telekinesis work and (b) he was one of the few people in the world who could make them work. Both of these propositions are implausible.<sup>99</sup> Proposition (b) is especially implausible given Cheney's track record between Jan. 5 and Jan. 20.

Given the implausibility of (a) and (b), it seems to follow that Cheney is more like Dante than Boris. Just as Dante overestimated the age of majority, Cheney overestimated the power of voodoo. Both are living in their own worlds—in “bubbles”—completely out of touch with reality. Cheney's resemblance to Dante, then, may explain many people's initial (and final?) intuition that Cheney cannot be guilty of attempted murder. He is too far “out there” to be considered culpable.<sup>100</sup>

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97. See *United States v. Heng Awkak Roman*, 356 F.Supp. 434 at 438 (S.D. N.Y. 1973) (“‘Inherent impossibility’ is where the means chosen are totally ineffective to bring about the desired result . . .”).

98. See *People v. Rollino*, 233 N.Y.S.2d 580, 584 (Sup. Ct. 1962) (describing intrinsic impossibility as “‘arising when the means used by the actor are ineffectual in themselves. . . (shooting with defective gun).’”) (citation omitted).

99. See Donnelly, *supra* note 19, at 67–68 (“The person who sets out to do something that they know cannot be done—the absurd actor whose attempt at the impossible is self-contradictory—does not understand the basic relations of cause and effect. Indeed, he thinks something like: ‘I can bring something about without bringing it about.’ Attempts (involving voodoo for example) are not self-contradictory in this way but come close to the same level of absurdity. In these attempts, the attempter understands cause and effect but is incapable of connecting the reasons for the failure of his attempt to that failure. More so these are the same reasons which prompt the attempter to act in the first place. . . . In the voodoo example . . . the defendant will not appreciate that the attempt is bound to fail when told of the facts that lead to failure. The latter defendant may well know that society at large does not believe that voodoo can cause death, but he is not interested in how other people treat cause and effect; he has his own interpretation of the physical world that operates just through mere belief rather than understanding.”) (footnote omitted).

100. See *Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933) (“Even though a ‘voodoo doctor’ 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 . . . . A malediction arising out of a murderous intent is not such a substantial overt act that it would support a charge of attempted murder.”); FLETCHER, *supra* note 2, at 180 (“The real reason for ex-

Some might argue that Cheney should still be punished for attempted murder simply because he has proven himself to be a dangerous person.<sup>101</sup> What makes him dangerous is the fact that he wanted Ray to die and tried to make this happen. Indeed, if Ray learned about Cheney's behavior between Jan. 5 and Jan. 20, we would not at all consider him to

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empting black magic attempts from liability is that these superstitious techniques amuse rather than disturb the average person."); FLETCHER, *supra* note 8, at 166 ("The consensus of Western legal systems is that there should be no liability, regardless of the wickedness of intent, for sticking pins in a doll or chanting an incantation to banish one's enemy to the nether world. Against the background of the fears and taboos prevailing in modern Western society, objectivist theorists take these cases to be inapt attempts, therefore exempt from punishment.") (footnote omitted); *id.* at 177 ("The supposition is that those who try to kill by incantations either know in their hearts that their activity is harmless, or are so out of touch that they could not competently execute a plan to kill by more rational means."); Donnelly, *supra* note 18, at 68 n.44 ("[W]here the actor is not prepared to kill by more conventional means [than voodoo] there should be no liability for attempted murder."); John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1903-04 (1999) ("[T]he defense of inherent impossibility has been recognized, if not always applied, by many state and federal courts. Many state legislatures have joined the judiciary in deciding that inherently impossible attempts should not be punished. . . . In addition to courts and legislatures, major criminal law commentators have recognized the existence of an inherent impossibility defense.") (footnote omitted). *But see* Wagner, *supra* note 2, at 1067-68 ("[R]ather than asking whether something was inherently impossible, courts should treat all attempts the same and simply examine whether the requisite mens rea and an overt act were present. If there is genuinely no doubt that the defendant truly intended to commit the crime (for instance, killing the voodoo victim . . .), then the defendant indeed poses a threat to society as he might resort to other means once the initial method fails. If the intent to harm is present, why should law enforcement be forced to wait until these defendants find a more effective way to carry out their plans? The most consistent approach is to hold such individuals criminally liable, even though it may be difficult to demonstrate that defendants who take 'silly' actions to cause harm truly had the requisite mens rea."); Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 444 ("Sticking pins in a voodoo doll is attempted murder if the actor believes such action will kill the person the doll represents. Such extreme lack of any objective risk is to be taken into account, if at all, only as a matter of a court's sentencing discretion.") (footnote omitted).

101. See MODEL PENAL CODE § 5.01 cmt. 3(b) n.88 (Official Draft and Revised Comments 1985) ("Cases can be imagined in which it might well be accurate to say that the nature of the means selected, say black magic, substantially negates dangerousness of character. On the other hand, there are many cases as well where one who tries to commit a crime by what he later learns to be inadequate methods will recognize the futility of his course of action and seek more efficacious means."); FLETCHER, *supra* note 8, at 175-76 ("The Model Penal Code boldly suggests that cases in which the act is 'inherently unlikely to result' in the commission of a crime should be resolved by a judicial inquiry into whether the actor 'presents a public danger.'") (footnote and citation omitted).

be irrational or overreacting if he sought a restraining order against Cheney. Even if Ray did not believe in voodoo or telekinesis, he would have every reason to worry that Cheney would resort to different, more effective techniques (such as shooting a gun) once he became frustrated with his ineffective techniques.<sup>102</sup>

While this concern about dangerousness certainly has merit, dangerousness alone is not a sufficient basis for criminal punishment. Dangerousness may serve as an aggravating factor that warrants *additional* punishment, but it may not serve as the predicate crime itself.<sup>103</sup> Yet it is precisely this precept that would be violated if Cheney were punished for

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102. See Hasnas, *supra* note 2, at 41 (“[T]here are many cases as well where one who tries to commit a crime by what he later learns to be inadequate methods will recognize the futility of his course of action and seek more efficacious means. There are, in other words, many instances of dangerous character revealed by ‘impossible’ attempts . . . .”) (quoting Model Penal Code §5.01 cmt. 3(b) n.88); Keith L. Alexander, *D.C. Man Who Used Voodoo To Try to Kill His Wife Sentenced to 4 Years in Prison*, WASHINGTON POST, March 26, 2013, [http://www.washingtonpost.com/local/dc-man-who-used-voodoo-to-try-to-kill-his-wife-sentenced-to-4-years-in-prison/2013/03/26/31770ad0-962f-11e2-8b4e-0b56f26f28de\\_story.html](http://www.washingtonpost.com/local/dc-man-who-used-voodoo-to-try-to-kill-his-wife-sentenced-to-4-years-in-prison/2013/03/26/31770ad0-962f-11e2-8b4e-0b56f26f28de_story.html); Area Freeper, *Lesbian Couple Pleads Guilty of Attempted Murder*, FREE REPUBLIC, Aug. 12, 2004, <http://www.freerepublic.com/focus/f-news/1190147/posts>. But see Donnelly, *supra* note 18, at 64–65 (“[T]he defendant who attempts to kill by voodoo may lack the harmfulness that is normally present in an attempter . . . . [He is] at least is harmless in respect of the end. There is no immediate potential for the harm to occur nor, usually, is there any obvious suggestion that these sorts of defendants will try again by more effective means. In contrast, the defendant who attempts to shoot his intended victim, not knowing that the target is just out of range, is likely to try again and succeed. . . . [I]t appears likely . . . that in some extraordinary attempts the reasons for failure may provide evidence of/disclose my inability to be harmful in a criminally relevant way in the first place.”); *id.* at 67 (“This defendant is insufficiently harmful because (a) even with full knowledge, he cannot understand that such an attempt will lead to failure and (b) he performs his attempt because of those factors that lead inevitably to failure. An attempter of this sort is ineffective . . . .”); Hasnas, *supra* note 2, at 66 (“Whatever the number of irrational attemptors, it can be only a very small percentage who actually have the will to try again with more effective means.”).

103. See FLETCHER, *supra* note 2, at 180 (“[A] basic principle of liberal jurisprudence [is] that criminal law and punishment should attach to actions as abstracted from the personal histories and propensities of those who engage in them. People make themselves subject to punishment because of what they do, not by virtue of their inherent potential to do harm.”) (footnote omitted); Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 363 (1991) (making the analogous point that while hatred alone cannot be punished, it can serve as an aggravating factor for certain crimes) (footnotes omitted); Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 551 (1986) (“Blackstone’s familiar declaration that ‘to make a complete crime . . . there must be both a will and an act’ expressed a funda-

practicing voodoo. His punishment would be not for committing a dangerous act but for exhibiting a dangerous character. And exhibiting a dangerous character by itself simply does not qualify as attempted murder, no less probable cause for arrest.

Even the subjectivist MPC agrees with this point. Recall MPC §5.01(1) from Part V.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: (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be . . . .<sup>104</sup>

By itself, this provision seems to imply that Cheney is guilty of attempted murder simply because he purposely engaged in conduct that would have killed Ray if his belief in the effectiveness of (his) voodoo had been correct. But MPC §5.05 makes a qualified exception to this subjectivist approach for causation impossibility:

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 . . . enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.<sup>105</sup>

The MPC, then, is not suggesting that Cheney should get off scot-free. It is suggesting only that if he is punished at all, he should be punished for a lesser offense than attempted murder.<sup>106</sup>

Still, the problem remains: what offense? If not attempted murder, what? Attempted *voodoo* murder? While this characterization would be more accurate, there are two problems with this proposal. First, the legal-

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mental principle, the refusal to punish or detain for dangerous propensities alone.") (footnotes omitted).

104. MODEL PENAL CODE § 5.01(1) (Official Draft and Revised Comments 1985).

105. MODEL PENAL CODE § 5.05(2) (Official Draft and Revised Comments 1985).

106. See Hasnas, *supra* note 2, at 41 ("[T]he authors of the [MPC] would argue that . . . cases [involving causation impossibility] should not be viewed in isolation. [A voodoo practitioner's] attempt may have been irrational in that it employed means that a reasonable person would know could not accomplish his objective, but it demonstrated his willingness to take another's life and hence his dangerousness. Since, according to the [MPC], the purpose of punishing attempts is to subject those who pose a danger to their fellow citizens to criminal sanction, [the voodoo practitioner] is a proper candidate for punishment.").



ity principle would prevent the state from charging this crime unless it had previously drafted a statute explicitly prohibiting attempted murder by means of implausible causal theories. Second, it is difficult to see how a state could justify criminalizing such an attempt in the first place. Criminalizing attempted murder by means of implausible causal theories seems dangerously close to criminalizing the sincere hope that somebody dies accompanied by the slightest act in this direction—for example, a diary entry. And this kind of infringement on a person's thoughts is not only unjust; it is unconstitutional.<sup>107</sup>

## VIII. CONCLUSION

The impossibility defense has baffled legal scholars, courts, and attorneys. This defense is especially difficult for two main reasons. First, it is not obvious which kinds of attempts it exculpates, which kinds of attempts it does *not* exculpate, and *why* it works only for the former and not the latter. Second, courts that have not resolved the first set of difficulties have only compounded the confusion by misstating and misapplying the impossibility defense. In particular, they have mistaken factual impossibility for legal impossibility and have interpreted certain factual-impossibility situations as hybrid-impossibility situations. As I explained in the Introduction, all of this confusion led the MPC to give up on the impossibility defense, and most jurisdictions then followed the MPC.<sup>108</sup>

It is important to clarify these matters partly for theoretical tidiness but mostly to encourage the many jurisdictions that have effectively buried the legal impossibility defense to open up their jurisprudential coffins and release this excuse back into their statutes. It is one thing to reject a defense because it is invalid. It is another thing to reject a defense because it is conceptually difficult. The latter reason is unjustified and especially unwarranted in a system that prides itself on the creation, development, refinement, and application of far more complicated legal concepts and theories than legal impossibility.

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107. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The government ‘cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.’ First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”) (citation omitted); Jennifer B. Siverts, *Punishing Thoughts Too Close to Reality: A New Solution to Protect Children from Pedophiles*, 27 T. JEFFERSON L. REV. 393, 416 (2005) (“Clearly, the Court cannot constitutionally punish a person based on thoughts alone.”).

108. See *supra* note 2 and accompanying text.

To be sure, the few defendants who believe in non-existent laws are probably not much at risk. If they are even charged with trying to break entirely non-existent laws, the courts will more likely question their sanity than their guilt. Instead, the defendants who are much more at risk are the ones who have an unrealistic understanding of *existing* laws. Consider, for example, an individual who is aware of harassment laws and believes—mistakenly—that these laws prohibit denying the Holocaust on Facebook. If she were then charged with harassment, she might very well have a legitimate legal-impossibility defense (not to mention a legitimate First Amendment defense). Remarkably, however, she would not be permitted to invoke this defense in most jurisdictions.

More generally, suppose that an individual commits what many people would consider to be a heinous act and that there is no law against the performance of this act. Idealists assume that the criminal justice system will simply leave her alone. After all, *nullem crimen sine lege*. But this kind of idealism is naïve and unrealistic. The police may arrest her anyway, the prosecutor may focus entirely on the defendant's moral weakness, and the jury may reason that, even though no law really covers the act in question, some other law that the legislature never passed *should have* covered the act, especially considering that the defendant *believed* that this law existed. In other words, the jury may actually end up using the defendant's mistaken belief that she was breaking a law *against* her when this is precisely what the legal-impossibility version of the impossibility defense was designed to protect against. In order to prevent this kind of injustice, courts and legislatures need to abandon the MPC and restore the impossibility defense to its rightful place among the traditionally recognized excuses.