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Impossibility in Criminal Attempts— Legality and the Legal Process

Arnold N. Enker*

Problems of criminal attempts have exerted a fascination for legal scholars far beyond their significance in terms of the number of litigated cases which actually pose difficult issues. Probably the largest volume of legal writing has dealt with what seems to be the most intractable problem of all, namely, impossibility, factual and legal.¹ Perhaps one reason we have not yet laid the dragon to rest is that we have used the wrong analytic weapons. Attempt, together with legal and factual impossibility, too often have been viewed solely as problems of mens rea.² The major thesis of this article is that when the issue of impossibility is approached as an aspect of the broader problem of understanding the role of the criminal act in the statutory definition of substantive crime, the doctrine of impossibility becomes a useful tool in forwarding legal analysis.

I. INTRODUCTION

Some words of definition are necessary. For convenience of usage the following terms shall be used as indicated: *Act*—the defendant's physical bodily movements; *Circumstances* or *attendant circumstances*—the external, objective situation which the substantive law may require be present in addition to the defendant's act before he can be convicted of the substantive crime; *Conduct*—the act combined with the circumstances regarded by the substantive law as relevant; *Consequences* or *result*—an additional occurrence caused by the defendant's act.³

A few examples of the application of such terminology will be helpful. The crime of possession of stolen goods contains among its elements an act, namely, possession of goods. It also

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1. Two recent revivals of the issue are Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20 (1968), and Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U.L. REV. 1005 (1967). Professor Hughes' effort is a more significant contribution than its title suggests.

2. *But see* Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 447-48 (1957); Smith, *Two Problems in Criminal Attempts Re-Examined-II*, 1962 CRIM. L. REV. (Eng.) 212.

3. The terminology is not original. *See* Smith, *supra* note 2; MODEL PENAL CODE § 2.02, comment at 124 (Tent. Draft No. 4, 1955).

contains an attendant circumstance, that the goods possessed be stolen. For the defendant to be guilty of the substantive crime both elements—the act and the circumstance—must be present, but the defendant's act need not cause any additional consequence or result. His act of possession combined with the circumstance that the goods possessed are stolen constitute all the objective elements of the crime.

The crime of smuggling requires the act of bringing goods into the country without paying a duty and the circumstance that customs duty be due on the goods. Again, defendant's act need not cause any additional result.

For murder, although some act by the defendant is ordinarily required—non-acts or omissions will occasionally suffice—no specific act is defined in the statute as being an element of the offense. Nor are there any attendant circumstances which must be present to constitute the substantive crime. To be guilty of murder the defendant must do an act, any act, that causes the forbidden result—the death of a human being.⁴

Admittedly, these classifications are not airtight. Murder could be defined as an act of killing or as requiring the presence of the circumstance of a living person. There are a variety of acts which could constitute a taking for purposes of theft or possession in the crime of possession of stolen goods. Nonetheless, their application to most cases is substantially free of difficulty. And since their proposed use in this article is not as a definitional basis for the application of different legal rules but as analytic tools or aids to disclose problems not always apparent in the cases, they appear useful.

The most typical group of attempt cases involves the situation in which the accused has not committed the act required by the substantive crime: he has not penetrated his intended rape victim, he has not taken the money from his robbery victim, or he has not attained possession of the goods whose possession was forbidden. Of course, since he has not committed the forbidden act, he cannot be convicted of the substantive crime. The issue of his possible guilt for attempting to commit the substantive crime usually turns on whether his acts have gone beyond the point of innocence, called preparation.

Occasionally, one of these cases will present a problem of

4. There must also be a *mens rea*, but we are here concerned with describing the components of the elements of these crimes other than *mens rea*.

impossibility. It was impossible for the defendant to penetrate his intended rape victim because he is impotent. Or it was impossible for the defendant to take the money from the robbery victim or from the person whose pocket he picked because the victim had no money at the time. If still thought of in terms of impossibility, these cases are called "factual impossibility," which is no longer regarded as a defense.

A second group of cases presents the situation in which the defendant's failure to bring about the forbidden result—the death of the intended victim, the destruction of the fetus—is what precludes conviction for the substantive crime. If the defendant has not done the last act thought necessary to cause the forbidden result, a prosecution for attempt once again will usually raise a preparation-attempt issue. If he has done that last act or one very close to it, but the circumstances are such that the apparent likelihood of success was remote or nonexistent, the issue of factual impossibility will again be raised. Occasionally, in extreme cases, it may be treated as properly raised and will succeed as a defense. I shall later examine the need for two separate doctrines, preparation-attempt and factual impossibility, and the role played by the latter doctrine.

The final group of cases presents the most controversial situation, that in which the defendant has committed the forbidden act in its narrow sense—he has forcefully penetrated his intended rape victim, or he has secured possession of the forbidden goods—but one of the external elements of the substantive crime, what I have earlier called an attendant circumstance, is absent: the woman was his wife, or the goods were not in fact stolen. Again, of course, the defendant cannot be convicted of violating the substantive crime since one of its elements, this time a circumstance, is absent from the case.

The last category describes the most famous "impossibility" cases. For example, in *Jaffe*⁵ the defendant committed the act of receiving the goods, but the circumstance that they be stolen was absent; in the "case" of *Lady Eldon*,⁶ the "defendant" committed the act of bringing the goods into the country and did not pay any duty, but the circumstance that the goods be dutiable was absent; in *Wilson*,⁷ the defendant committed the act

5. *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906).

6. 1 F. WHARTON, *CRIMINAL LAW* § 225, at 304 n.9 (12th ed. 1932). See also M. PAULSEN & S. KADISH, *CRIMINAL LAW AND ITS PROCESSES* 480-86 (1962).

7. *Wilson v. State*, 85 Miss. 687, 38 So. 46 (1905).

of altering the figures on the check, but the circumstance of materiality was absent; and in *Teal*,⁸ the defendant committed the acts of taking an oath and testifying, one attendant circumstance, falsity, was present, but again the substantive offense was not committed because the circumstance of materiality was absent.

In these cases, it is claimed by most contemporary writers, if the evidence establishes that when the defendant committed the act he believed that the missing circumstance was present, he should be guilty of attempting to commit the substantive crime.⁹ The policy grounds supporting this position are well known and do not require elaboration. Stated concisely, the defendant's mens rea is the same as that of a guilty person. By committing the proscribed act he has demonstrated his readiness to carry out his illegal venture, and therefore he has shown himself to be as deserving of conviction and as in need of correctional handling as the guilty defendant who does the act under the proscribed circumstances.¹⁰ The Model Penal Code takes this position. Section 5.01(1) provides:

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 which would constitute the crime if the attendant circumstances were as he believes them to be; or
- (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
- (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

As the draftsmen indicate in their comments to this section, these provisions eliminate the defense of impossibility by making the actor's liability turn on his purpose considered in the light of his beliefs concerning the attendant situation rather than the

8. *People v. Teal*, 196 N.Y. 372, 89 N.E. 1086 (1909).

9. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 594-99 (2d ed. 1960) [hereinafter cited as HALL]; G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 635-37, 646-51, (2d ed. 1961) [hereinafter cited as WILLIAMS]. Recent legislation is consistent with this trend. See, e.g., Wechsler, Jones, & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 COLUM. L. REV. 571, 579 nn.25-30 (1961) (references cited); MINN. STAT. § 609.17(2) (1967); N.Y. PENAL LAW § 110.10 (McKinney 1967).

10. M. PAULSEN & S. KADISH, *supra* note 6, at 483.

actual facts surrounding his act.¹¹

As a matter of convenient terminology, in this article the issue raised in this third group of cases will be called "legal impossibility." Some would prefer to call these cases "factual impossibility" just as those in groups 1 and 2, and to reserve legal impossibility for those cases in which the defendant's mistake concerns not the presence or absence of a circumstance in the defined crime but the presence or absence of any crime at all. To use the *Jaffe* example, these writers would say that if *Jaffe* possessed stolen goods believing his conduct to be a crime, but the statute declaring it a crime had been repealed the day before, *Jaffe* would not be guilty of attempting to commit the crime of possession of stolen goods because of the doctrine of legal impossibility.¹²

Of course, it does not particularly matter what it is called so long as we all understand clearly what we are talking about. Yet it does seem strange that a system that places so much stress on procedural legality should require a special, obscure and dimly understood doctrine to deal with such an elementary problem.¹³ But more important than this aesthetic consideration, to restrict the term legal impossibility to this narrow class of cases leaves the single term factual impossibility the duty of doing service for all three groups of cases described above. Since, as I shall attempt to demonstrate, the cases in our controversial last group raise some problems that are significantly different from those present in the other two groups, they deserve to be given their own identity. And since these unique problems are problems of substantive legality in the criminal process, the

11. Wechsler, Jones, & Korn, *supra* note 9, at 585.

12. HALL at 586-87; WILLIAMS at 633-35; Hughes, *supra* note 1, at 1006-07. The classification is no doubt influenced by the authors' desires to reconcile their views of the proper result in these cases with the traditional learning that legal impossibility acquits while factual impossibility is not a defense. The categories, then, are merely descriptive of the desired results. They do not further analysis of the underlying problems.

13. Williams asserts, correctly, 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.

WILLIAMS at 633 (emphasis added). Hall is equally insistent that to make such conduct a criminal attempt would violate the principle of legality. HALL at 586. The reader should consider the obvious problems that would be involved in determining the offense to be charged in the indictment or the sentence applicable to this attempt. Cf. Hughes, *supra* note 1, at 1016.

term legal impossibility seems an appropriate description for the problems raised by *Jaffe*, *Lady Eldon*, et al.

II. LEGALITY AND CRIMINAL ACT

Legality requires that the forbidden conduct be defined in advance. This is in part so that the citizen will receive advance guidance as to what conduct is forbidden. But it is well recognized that the requirement of advance definition also serves to control the discretion, and thereby minimize the bias, of those officers of the criminal process who make decisions affecting the defendant.¹⁴

The defendant's intent, his purpose, his belief or knowledge as regards external facts often may all be inferred from character and reputation. They can easily become the subject of credibility contests concerning statements and admissions allegedly made. The outcome of these contests will be influenced by the trier's assessment of the defendant's reputation. To the extent that these issues are permitted to become the determining issues in criminal trials, justice is likely to be too greatly influenced by such factors as the defendant's popularity or unpopularity in the community, his associations which accomplice testimony is likely to show to be damaging even if the accomplices are lying, and his prior convictions received into evidence ostensibly to prove his intent or motive or identity.

By requiring the presence of specified objective conduct defined in advance, the law limits the powers of police to arrest "undesirable persons" and controls the jury's power to speculate as to the defendant's intent. There must first be evidence of specific conduct. Acts extend beyond the actor. They often generate consequences and they have a degree of visibility, all of which make it more difficult to lie about them. The issues seem more precise and controlled, less speculative and inferential, when one is arguing whether the defendant committed the acts charged than when the issue is his state of mind.¹⁵

14. See *Musser v. Utah*, 333 U.S. 95, 97 (1948); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79-80 (1968); WILLIAMS at 605-06; Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 216-17, 220-24 (1967); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77-78 (1948); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

15. This is, of course, at the core of the objections to status crimes. See *Robinson v. California*, 370 U.S. 660 (1962).

The degree to which the objective conduct elements of the crime are defined in advance vary from case to case. Thus, for example, robbery is a crime in which the objective requirements are relatively precisely set forth; there must be a taking of goods belonging to another, accompanied by force or the threat thereof. No matter how anti-social or in need of rehabilitation a particular defendant may be regarded, he cannot be convicted of robbery unless it is established that he engaged in the specific conduct defined in advance by the law. We can move across a spectrum of statutory crimes and find crimes in which the objective conduct elements of the offense are less precisely set forth in advance.

An extreme case of dispensing with the requirement that the crime encompass specific conduct defined in advance is the crime of conspiracy. Theoretically, conspiracy does contain a predefined act, agreement. But actually the "agreement" requirement has little independent significance. Parallel conduct¹⁶ and spontaneous momentary collaboration for a single incident without prior consultation or planning¹⁷ have been held to constitute agreements for purposes of the conspiracy concept so that the agreement requirement may contain no more delimitation than the knowing mutually related activity of two or more persons. Perhaps more significantly, rarely is the act of agreement proved by direct evidence. Judges commonly warn juries not to expect such proof in view of the secret nature of most conspiracies. The agreement is "proved" by inference from the acts of the alleged conspirators. But this means that in reality there is no pre-specified objective act, circumstance or consequence which must be established before one can be convicted of conspiracy. Any course of conduct from which the jury may infer an "agreement" will do. With such latitude given to uncontrolled inference, the danger of ad hoc judgment based on the trier's biases concerning the defendants rapidly

16. From all accounts the issue seems squarely presented in the prosecution of Dr. Spock in the disturbing context of free speech. Compare the discussion at pages 689-90, *infra*. The large-scale federal narcotics prosecutions are a good example of the limited independent significance of the requirement of an agreement. *E.g.*, *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States v. Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States v. Bruno*, 105 F.2d 921 (2d Cir. 1939). A fairly extreme example is *United States v. Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). *But see* *United States v. Bufalino*, 235 F.2d 408 (2d Cir. 1960).

17. See the materials contained in M. PAULSEN & S. KADISH, *supra* note 6, at 519-23.

increases.¹⁸ It is no wonder that conspiracy is feared by those concerned with preserving legality.

Murder seems to be between the extremes of robbery and conspiracy. The only non-mens rea element of the offense of murder is causing death. The statutes ordinarily do not set forth in advance any specific act of the defendant or any set of external circumstances as an essential element of the offense. Any act done by the defendant will furnish a basis for conviction if that act caused death. Theoretically, this situation, as in the case of conspiracy, might be thought to present dangers of after-the-fact biased judgment imposing guilt on unpopular defendants. Since no particular act is required, and mens rea can be proved by confessions, testimony of unreliable informers, or proof of prior crimes, there may be great potential for biased prosecutor selection of cases for prosecution and prejudiced jury reliance on such relatively unreliable evidence.

But this theoretical danger is largely offset by the remaining requirements that the defendant cause and intend to cause the victim's death. First, it is rare that people in our society cause the death of others or become involved in circumstances creating such suspicion so that the opportunity for biased prosecution presented by the lack of a defined act can be expected to be extremely low. Second, while the murder statute does not limit itself to any specifically described conduct, the requirement of causation limits the acts that can be a basis for prosecution. To use two extreme examples, if the defendant had intoned mystic incantations or placed sugar in the deceased's tea immediately before the deceased's death, a jury doubtless would not be permitted to speculate concerning the defendant's mens rea because there would be no evidence that the defendant in fact caused the death. The requirement of causation, then, overcomes the absence of a defined act by limiting prosecution to those cases in which the defendant's acts bear an objective "teleological relationship"¹⁹ to the death in the case.²⁰ Finally,

18. For an example, see pages 705-06, *infra*.

19. The phrase is Jerome Hall's. See HALL at 195-98. Compare the following Biblical verses defining the objective elements of murder: Anyone, however, who strikes another with an iron object so that death results is a murderer; the murderer must be put to death. If he struck him with a stone tool [literally—"a stone of the hand"] that could cause death, and death resulted, he is a murderer; the murderer must be put to death. Similarly, if the object with which he struck him was a wooden tool [literally—"a wood of the hand"] that could cause death, and death resulted, he is a murderer; the murderer must be put to death.

the requirement of intent ordinarily requires evidence of purposive conduct, of the kind of conduct one would expect from someone who deliberately kills as distinguished from an apparently accidental killing.

III. ATTEMPT—THE NEED FOR LEGISLATIVE DELEGATION TO THE COURTS, THE PROBLEM OF LEGALITY, AND THE TECHNIQUE OF ANALOGY AS A SOLUTION

Attempt is a crime in which no precise act requirement is defined in advance. By definition, attempt involves a situation in which at least one of the objective elements of the substantive crime was lacking. That, after all, is the reason the defendant is not guilty of the substantive crime. The problem in attempt is to define what objective elements may be dispensed with and which, if any, are necessary to constitute the crime.

Probably the most common attempt case is that in which the defendant has not committed the act, as narrowly defined, required for the substantive crime. He has engaged "in a course

Numbers 35:16-18, in *THE TORAH, THE FIVE BOOKS OF MOSES* 318 (Jew. Publ. Soc. transl., 1962) (emphasis added).

Commenting on additional elements contained in the second and third verses, the Talmud, B Sanhedrin 76b, explains that the Bible does not fix an objective measure for an iron object because any iron object is capable of piercing the body, thereby causing death. The Babylonian Talmud, 2 Sanhedrin 519 (Soncino trans. 1935).

20. This analysis suggests some of the reasons our law hesitates to punish omissions. Since it is the element of causation that introduces neutrality and objectivity into the proceedings by insisting upon an objective or apparent causal relationship between the act and the death, omissions—which cannot themselves cause death, but do so only in conjunction with external circumstances—do not provide an objective limit to prosecutable cases. To establish such an objective limit we must define the relationship between the defendant's failure to act and the external circumstances. But just as the acts which may cause death are so varied that they cannot be defined in advance, so too the situations in which a passive person "cooperates with" external circumstances to bring about death are too varied to be defined in advance. A substitute the legal system has found for the undefinable pattern of relationships between omissions and death-causing acts is the defined patterns of relationships between the passive party and the deceased—*e.g.*, parent-child, doctor-patient, husband-wife—expressed in the notion of duty. These duty relationships are more susceptible of definition than the act relationships, although even here there are severe limits.

The old argument that omissions cannot "cause" death does, then, express an insight, however inadequately. Omissions do pose special legality problems apart from problems of proving the *mens rea*. *But* see HALL at 194-98, 208.

of conduct planned to culminate in²¹ the forbidden act, but he was stopped short of culmination. The robber was overcome before he took the money, the rapist was stopped before he penetrated the woman, or the "fence" was arrested before he acquired possession of the stolen goods.

These cases can cover a broad spectrum of possible acts beginning with the defendant's very first act in the planned illegal "course of conduct" and ending with the very last act short of that act which constitutes the substantive crime. For well known reasons, we are unwilling to regard every single act along this spectrum adequate for an attempt. Our problem, then, is to define the point along this spectrum at which the act requirement for the crime of attempt is satisfied. But because of the infinite variations in fact patterns that may occur short of the consummated substantive crime, it is usually impossible for the legislature to state in advance which acts or group of acts should be classified as attempts and which should not. The only technique available is a broad legislative delegation of power to the courts to extend the policies underlying the substantive crimes to individual cases of attempt.

Because attempt is a relational crime—it is defined in relation to the statutorily defined substantive crime allegedly attempted—there is available a judicial technique for deciding individual cases, namely the technique of analogy. Cases arising along the preparation-attempt spectrum are handled in terms of their similarities to and differences from the substantive crime attempted, and in terms of analogy to previously decided or hypothetical attempt cases.²² In deciding, the court weighs several factors, principally: whether the act at issue is sufficiently close to the substantive crime or close enough to potential irreparable harm so as to preclude any further postponement of official intervention; whether the defendant's conduct has progressed to the point that one may be reasonably certain that he is firmly committed to a specific illegal venture rather than merely contemplating the possible future commission of a crime; and whether the act is sufficiently unambiguous to demonstrate the actor's illegal intent.

In light of our earlier discussion of the relationship between legality and the requirements that the act element of the crime be defined in advance, prosecution for attempt contains potential

21. Model Penal Code § 5.01(1)(c) (Proposed Official Draft, 1962).

22. See Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930).

for arbitrary ex post facto judgments. But in large measure this danger is mitigated by the following factors: (1) The requirement that the defendant intend to commit the substantive crime: while recklessness or negligence may be adequate for certain substantive crimes, they are not adequate for attempts. This has the effect of limiting the acts which can be held to be attempts to those which appear to be intentionally directed toward the acts defined in the substantive crime, or toward bringing about the illegal result, a process similar to that noted above in the case of murder.²³ (2) The requirement that the act evidence commitment to the criminal venture and corroborate the mens rea: to the extent that this requirement is preserved it prevents the conviction of persons engaged in innocent acts on the basis of a mens rea proved through speculative inferences, unreliable forms of testimony and/or past criminal conduct. (3) The use of the technique of analogy whereby the decision in each case must be rationalized in comparison with other more or less similar cases which presumably were decided neutrally. (4) Finally, the alternative to running the risk of occasional erroneous or arbitrary judgment is to prosecute only those attempts which can be carefully defined in advance, a rather intolerable option at least in the case of the more serious crimes.

Though it does not ordinarily occur to us, our legal system could have adopted a completely different technique for distinguishing culpable attempts from those which are not culpable but are rather, in the conventional terminology, preparations. It would have been possible to eliminate the preparation-attempt dichotomy, thereby eliminating any notion of particular indispensable acts, and simply approach each case in terms of whether the evidence at hand is sufficient to prove the necessary

23. Because negligence is a far less defined criterion of fault than intent, liability for negligently caused homicide increases the risk of biased judgment. See the illuminating collection of materials relating to the *Welansky* case [316 Mass. 383, 55 N.E.2d 902 (1944)] in R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, *CRIMINAL LAW* 587-600 (1962). If negligence were a basis for attempt liability, we would have a crime requiring no particular act or circumstance, no consequence, and no defined mens rea. The crime would be acting in a way that unreasonably risks someone's life. And, apart from the lack of definition in such a crime, the jury would be asked to evaluate the harmful tendencies of conduct that did not result in harm. If we are to have such a crime, at least the penalties should be very light. It would not do, for example, to treat certain negligent conduct as attempted manslaughter. See MODEL PENAL CODE § 201.11 (Tent. Draft No. 9, 1959) (reckless conduct a misdemeanor); Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1106-07 (1952).

intent, encompassing intent and commitment to the venture, or will.²⁴ But even the Model Penal Code resolution of the issue does not rely solely on the sufficiency of the evidence to prove intent and will. It, too, requires that the act itself be "a substantial step" toward completion of the crime and that the act corroborate "the actor's criminal purpose."²⁵

There are several reasons justifying our reluctance to substitute a sufficiency-of-the-evidence test for the act requirement. Degrees of commitment vary so that we would again lack an objective criterion in cases falling short of consummation. Accomplice testimony and alleged confessions would ordinarily meet the sufficiency hurdles so that this would be an inadequate technique for controlling the jury unless corroboration standards were tightened.²⁶ Defendants with prior criminal records for similar crimes would be particularly vulnerable under such an approach.²⁷ And the technique of analogy would be considerably less significant, possibly resulting in less judicial objectivity.

To summarize, then, the determination of a rule for these cases is necessarily delegated by the legislature to the court. The court must then define the objective conduct essential to a conviction for attempt on a case-by-case basis by employing the judicial technique of analogy.

IV. LEGAL IMPOSSIBILITY

A. THE ACT AND PROOF OF MENS REA

The preparation-attempt-substantive-crime continuum presents a workable model for the identification and solution of the problems posed by those attempts in which the defendant has not yet committed the act element of the substantive crime. But let us turn to that group of cases which raises the issue we have called legal impossibility.

Consider the now infamous Lady Eldon.

Lady Eldon, when traveling with her husband on the Continent, bought what she supposed to be a quantity of French lace, which she hid, concealing it from Lord Eldon in one of the pock-

24. The thought has occurred to Dr. Glanville Williams. See Williams, *Police Control of Intending Criminals*, 1955 CRIM. L. REV. (Eng.) 66, 69.

25. MODEL PENAL CODE §§ 5.01(1)(c), (2) (Proposed Official Draft, 1962).

26. See page 709, *infra*.

27. See the examples discussed at pages 690-91, *infra*.

ets of the coach. The package was brought to light by a custom officer at Dover. The lace turned out to be an English manufactured article of little value and, of course, not subject to duty. Lady Eldon had bought it at a price vastly above its value, believing it to be genuine, intending to smuggle it into England.²⁸

Lady Eldon has committed the forbidden act—importing the lace and not paying duty—but a circumstance is missing—the goods are not dutiable. Preparation-attempt is clearly an irrelevant dichotomy to this case. Having done the act, the defendant has clearly gone beyond the stage of preparation. Yet some of the same concerns that required us to develop that dichotomy in the first group of cases, and caused us to hold acts of preparation inadequate for conviction, may be present in these legal impossibility cases as well. If so, we are in need of a new analytic tool to help identify and solve these problems in this context. The doctrine of legal impossibility may be that tool.

The argument that Lady Eldon should be convicted of attempted smuggling is that having gone beyond preparatory acts to the point where she has committed the very act defined by the crime—importing the lace—it is clear that she is fully committed to her illegal escapade. Only the accidental absence of an external circumstance required by the statute—that the imported goods be dutiable—precludes liability for the substantive crime. Since she thought the goods were dutiable, intended to avoid paying the duty, and did all the acts that would have supported substantive liability had the facts been as she thought, she should be guilty of an attempt.

But, we are entitled to ask, if Lady Eldon's handkerchief really is cheap linen, how do we know that she thought it was expensive dutiable lace? The facts state that she "hid" the lace, "concealing" it in a pocket, but those are loaded words that assume the very thing at issue, namely that she sought to avoid a duty she mistakenly believed due. Where there are present two objective factors—lace subject to import duty and an act of concealment—the coincidence of an objective motive to smuggle and conduct consistent with that motive and supportive of that goal is fair ground for the conclusion that Lady Eldon in fact intended to avoid paying the duty. If we remove the objective existence of the motive, the evidentiary basis for the conclusion that she intended to evade a duty believed due is correspondingly weakened.

An even more questionable assumption of Wharton's hypo-

28. 1 F. WHARTON, *supra* note 6.

thetical is that the term "concealing" has as objective a meaning as Wharton gives it. Objectively all one can say is that Lady Eldon placed the handkerchief in the seat pocket. To say that she "concealed" it there is to assume that she intended to hide something, to avoid paying a duty believed due, the very motive which must be proved. Once this is recognized, the probative relationship between the circumstance of dutiability and intent to avoid the duty can be made clearer.²⁹

Suppose, instead of placing the handkerchief in the seat pocket, as in Wharton's hypothetical, Lady Eldon had simply kept it in her purse and had not declared it in her customs declaration. We all know that customs inspectors almost never examine the arriving traveler's person. Had the handkerchief been dutiable, Lady Eldon would have been under a duty to declare it and her failure to declare it would have been an objective act of concealment corroborating any other proof of intent to avoid the duty. Thus, a returning tourist who wears his new Swiss watch on his wrist as he enters the country presumably "clandestinely introduces"³⁰ that watch into the country if he does not declare it. If, however, the goods are not in fact dutiable, failure to declare them is of no significance. The elimination of the circumstantial element that the goods in fact be subject to duty not only eliminates the objective basis for positing a motive to conceal the goods but it also deprives us of a simple and convenient reference point for evaluating the "clandestine" character of the defendant's act.

In the situation, then, where Lady Eldon keeps the handkerchief in her purse, we have no objective basis for concluding either that she has a motive to smuggle or that she acted clandestinely. Of course, one can suppose a case in which the lace is placed in the false bottom of Lady Eldon's suitcase. The evidence of *mens rea* would be quite strong. But if Lady Eldon could be convicted of attempted smuggling under the facts of Wharton's hypothetical or in the case of the false bottomed suitcase even though the goods are not in fact dutiable, she can also

29. Hughes, *supra* note 1, at 1024-26, recently trod a somewhat different path to the same argument.

30. This is one of the operative terms of the federal smuggling statute, 18 U.S.C. § 545 (1964). Note that the statute permits an inference of guilt from possession of such goods. The inference clearly would have no rational basis in an attempt prosecution where the goods were in fact legally in the country but the defendant allegedly thought there were unimportable or dutiable. See *Sherman v. United States*, 268 F. 516 (5th Cir. 1920); *United States v. Lot of Jewelry*, 26 F. Cas. 994 (No. 15,626) (C.C.S.D.N.Y. 1875).

be convicted of attempted smuggling when she keeps them in her purse, for we have dispensed with the need to establish dutiability as an element of the crime. To convict Lady Eldon in either case is to substitute a sufficiency-of-the-evidence-to-prove-intent test for an indispensable objective element of the crime, an approach our law rejects in the preparation-attempt cases.

Let us apply a similar analysis to another famous legal impossibility case, *People v. Jaffe*.³¹ It will be recalled that in that case a thief had in his possession certain goods stolen from their true owner and had arranged to deliver them to defendant Jaffe. Before Jaffe actually came into possession of the goods the thief was arrested by the police and the goods were recovered. Having decided to cooperate with the police who wanted to catch Jaffe, the thief, with the consent of the owner of the goods and under police surveillance, delivered the goods to Jaffe as arranged. Jaffe was then arrested with the goods in his possession. Jaffe was charged in two presumably alternative counts with possession of stolen goods and attempted possession of stolen goods. The court held that Jaffe was not guilty of possession of stolen goods because the elements of that crime include the requirement that the goods possessed be stolen in fact, whereas at the time they were delivered into Jaffe's possession they had been recovered and hence were not stolen goods. It also held him not guilty of attempt. Disregarding the court's often criticized and rather mechanical line of reasoning, let us consider the attempt issue afresh.

Those who would eliminate the defense of legal impossibility from the legal lexicon and would convict Jaffe of attempted possession of stolen goods because he thought they were stolen presumably would convict any other defendant of the same crime with respect to goods that had never been stolen if it could be proved that the defendant thought they were stolen. Having dispensed with the need for establishing the circumstance that the goods are stolen, they must permit this result if there is evidence of guilty belief. Assume two cases in which the sole direct evidence of the defendant's alleged belief that the goods are stolen is a confession or the testimony of an informer or an accomplice. In one case the goods possessed are in fact stolen; in the other they are not. It is reasonably clear that most of us would rest easier with a conviction in the first case than in the second although we might have a difficult time articulating rea-

31. 185 N.Y. 497, 78 N.E. 169 (1906).

sons for this distinction. Some of the reasons for this distinction are explored below,³² but it may also be that possession of stolen goods furnishes some evidence of belief that they are stolen while, clearly, possession of goods not in fact stolen furnishes no reason to believe that the defendant thought they were stolen.

This requires some elaboration. Concededly, the probative relationship between the fact that the goods are stolen and the possessor's knowledge that they are stolen differs from the probative relationship between, say, the fact that certain goods are machine guns or narcotics and the possessor's knowledge of their nature. Ordinarily, knowledge that goods are within one's possession carries with it knowledge of their physical nature. Where the defendant is proved to have had in his possession certain objects, say, narcotics, it seems reasonable to conclude that he knew the physical nature of those objects and to cast on him the risk of conviction if he does not adduce some evidence to dispel this normal inference.³³ It is clear, then, that to convict someone of attempted possession of narcotics for possessing non-narcotic goods which he allegedly believed were narcotics would be to redefine the crime of possession of narcotics to eliminate an objective element that had major evidentiary significance and to increase the risk of mistaken conclusions that the defendant believed the goods were narcotics.

The change is less clear in the case of possession of stolen goods. Physical possession of goods does not readily carry with it knowledge of their non-physical qualities, such as where they were made, who made them or whether they were stolen. But there is a change. Where the defendant is proved to have possessed goods recently stolen, the law permits the jury to infer that he knew they were stolen.³⁴ Although the stolen quality of the goods is not apparent upon observation, there is a rational basis for this inference.³⁵ In the first place there exists, or is believed to exist, a significant statistical correlation between possession of recently stolen goods and knowledge of the fact that they have been stolen. If we can say that in a given percentage of the cases the possessor knows the goods are stolen, then possession of stolen goods is probative of knowledge that

32. See pages 687-92, *infra*.

33. See, e.g., *Yee Hem v. United States*, 268 U.S. 178 (1925).

34. I F. WHARTON, *CRIMINAL EVIDENCE* § 191, at 199 (11th ed. 1935); 9 J. WIGMORE, *EVIDENCE* § 2513 (3d ed. 1940).

35. While the literature considers the scope and effect of this presumption, there is a remarkable dearth of discussion of its rational basis.

the good are stolen at least in the sense that proof of possession of such goods makes it more likely that the defendant knew the goods were stolen than if there is no proof of possession.³⁶ What is more important for our purposes, however, is that whatever the statistical relation between possession and knowledge may be, the percentage of persons possessing unstolen goods who believe the goods are stolen is clearly much lower.³⁷

Moreover, stolen goods normally enter the stream of commerce through illegal channels. If the goods have been recently stolen, the illegal channel through which they entered commerce is relatively proximate to the defendant's source of the goods and it is not unreasonable to draw inferences adverse to the defendant when he does not identify his source so that the channels of distribution may be traced back. Since goods not in fact stolen never entered the market through illegal channels, little or nothing is accomplished by forcing the defendant to explain his acquisition of the goods, particularly when it is recalled that creating presumptions which force a defendant to explain his conduct raises due process and fifth amendment problems.³⁸

36. C. McCORMICK, EVIDENCE § 152, at 317-19 (1954); 1 F. WHARTON, CRIMINAL EVIDENCE § 224 (11th ed. 1935).

37. J. MAGUIRE, EVIDENCE OF GUILT § 2.09, at 99 (1959), points out that the presumption arises after the corpus delicti has been established. A recent decision of the Supreme Court of Israel, discussed in Feller, *The Application of Presumptions to the Derivative Forms of an Offence*, 3 ISRAEL L. REV. 562 (1968), held that the statutory presumption of illegality arising from the possession of foreign currency did not apply when the defendant, apparently much to his surprise, was found possessing counterfeit foreign currency. The court thereby avoided discussion of the attempt issues. The author of the article criticizing the decision is certainly wrong in asserting broadly that "where a certain presumption has been introduced with regard to a specific offence, it applies not only to the completed offence but to all forms of criminal conduct derived therefrom [*e.g.*, attempt, solicitation]," *id.* at 569, or that "there are as a rule no grounds for distinguishing [with respect to presumptions] between attempts where it is impossible to complete the intended offence, because of the absence of a circumstance relevant to its commission, and attempts where the conduct constituting the offence is not in fact completed." *Id.* at 568. Where the rational basis for the presumption is rooted in the presence of one or more of the circumstantial elements required for the substantive offense, application of the presumption in the absence of the objective element would be arbitrary. When the defendant commits the forbidden act and the required circumstance is present, there may be a rational basis for a "presumption" that he knew the circumstance was present. But when the circumstance is absent, mere performance of the act (possession of goods, importing goods, etc.) furnishes by itself no basis for a presumption that the defendant thought the circumstance present. See also note 30, *supra*.

38. See J. MAGUIRE, *supra* note 37, § 209, at 98-100; cf. *United States v. Grainey*, 380 U.S. 63, 71, 74 (1965) (dissenting opinions).

This analysis indicates that the elimination of the objective elements of the crime, such as that the goods possessed were in fact narcotics or were in fact stolen, creates new problems of proving the relevant mens rea just as the elimination of the requirement that the goods be in fact dutiable made proof of intent to evade the duty more problematic.

This is not to say merely that it makes it more difficult to prove the crime. If that were the sole problem, it could still be insufficient ground to argue against eliminating these elements, for we might still wish to convict those against whom we have adequate evidence. The point is, however, that by eliminating these objective elements we create newly defined crimes in which we replace the statutorily defined fixed reference points for judging the defendant's mens rea with an open-ended sufficiency-of-the-evidence test which may include the less reliable forms of evidence such as questionable admissions, the testimony of informers and accomplices, and proof of prior convictions.

The draftsmen of the Model Penal Code have argued that while eliminating legal impossibility as a defense, the Code adequately takes care of these problems by its separate provision requiring that the defendant's act corroborate his mens rea.³⁹ But the Model Penal Code's requirement that the act corroborate the mens rea applies only to cases in the preparation-attempt continuum. Cases such as *Jaffe* and *Lady Eldon* are covered by a separate provision which provides that where the defendant does any act which would constitute a crime under the circumstances as he thought them to be, he is guilty of an attempt. The corroboration requirement of section 5.01(2) does not apply to this section.⁴⁰ Perhaps the draftsmen assumed that doing the act defined in the substantive crime will always supply at least as much corroboration of mens rea as is present in the substantive crime itself. If so, what they have failed to see is that the act in its narrow sense of the defendant's physical movements can be perfectly innocent in itself—possession of goods, bringing goods

39. Wechsler, Jones, & Korn, *supra* note 9, at 584.

40. Impossibility cases are dealt with in paragraphs (1)(a) (what we have called factual impossibility) and (1)(b) (what we have called legal impossibility) of § 5.01. Paragraph (1)(c) deals with attempt-preparation cases. The corroboration requirement is contained in the first sentence of § 5.01(2) which is limited to defining the term "substantial step" under paragraph (1)(c). Indeed, paragraphs (1)(a) and (1)(b) do not require a "substantial step." And while some impossibility cases will fit under § (1)(c), the requirement of substantiality is judged there, too, by reference to "the circumstances as [the defendant] believes them to be . . ."

into the country—and that what gives the act character as corroborative of mens rea is often the objective element or the attendant circumstances that the goods possessed are in fact stolen, or that the goods brought into the country are in fact dutiable, or that the goods possessed are in fact narcotics.

B. LEGAL IMPOSSIBILITY: A PROBLEM FOR THE COURT OR THE LEGISLATURE?

As we have seen, in all three cases—Lady Eldon, *Jaffe*, possession of narcotics—elimination of the objective circumstance required by the definition of the substantive crime would remove a stable focal point in the proof of the mens rea. Ultimately, of course, the issue to be decided is whether the costs outweigh the gains, whether the number of “dangerous” Lady Eldons and Jaffes whom we would like to convict but cannot because of the impossibility defense justifies such a loosening of the definition of the offenses as results from the elimination of legal impossibility from the lawyer’s brief. But we are not yet ready to decide that issue. At this point it is appropriate to ask which agency of the community ought to resolve that question, the court or the legislature.

If the court is to resolve this problem, what techniques of judicial decision-making are available to aid it? It was indicated earlier that in the preparation-attempt cases the court looks to the statute defining the substantive crime and to other cases along the spectrum extending from commencement to completion of the criminal act and applies analogy as a tool in deciding whether to extend guilt to the attempt. But analogy is not a very useful technique in the Lady Eldon or *Jaffe* cases. There is no spectrum of numerous cases of varying degrees of similarity to the substantive crime. Vary the facts as we may, no Lady Eldon case will approach the substantive crime. We can speak of the defendant coming ever closer to the act of importing the lace, but we cannot speak of a series of cases in which the goods are ever more dutiable. We can, of course, construct a series of cases in each of which the proof of Lady Eldon’s belief that the goods are dutiable becomes stronger but nothing in this group of cases helps the court decide analogically whether and when it should dispense with the objective element of the offense and allow to be substituted in its stead proof that defendant thought it existed. Similarly, one cannot speak of *Jaffe* and other such cases in which the goods are not in fact stolen as being more or less similar to the substantive crime.

One recent study of the problem suggests that such a comparison can be made. In an article largely in accord with the views here offered, Professor Graham Hughes talks of the court "matching [the defendant's] conduct with a model of success in completing the crime."⁴¹ But notice the shift. In the preparation-attempt cases, where the defendant did not commit the required act, the attempt formula using the technique of analogy compares the defendant's acts to the act set forth in the statute defining the substantive crime. In these impossibility cases, where a required circumstance is missing, the proposal would compare the defendant's conduct not with the statutorily defined conduct but with an undefined "model of success." Nor is the notion of a "model of success" very helpful in deciding these cases. The "model of success" for the crime of possessing stolen goods is really nothing more than the simple act of possession. But this merely returns us to the problems already considered. If the "model" be broadened to include purchase at a low price and conversations between the thief and the fence, it becomes in effect a sufficiency-of-the-evidence-of-intent test in different garb, particularly since this evidence will most often come from the thief. So, too, in the case of smuggling where the "model of success" is importing goods clandestinely. But, as shown, the term "clandestinely" derives its relatively clear meaning from the fact that the goods are dutiable. Here perhaps the model can be broadened to include clearcut acts of concealment such as the rare case of the false bottomed suitcase. It is no longer clear, however, whether Lady Eldon should be convicted, that is, whether the presence of an inexpensive handkerchief in the seat cushion fits a "model of success" for smuggling. Abandonment of the defense of legal impossibility, then, cuts the court adrift by severing the ties between the *actus reus* of attempt and that of the substantive crime attempted, at the same time furnishing the court no new tools for deciding individual cases.

Further, the substantive smuggling statute not only furnishes a court no basis for concluding that Lady Eldon should be convicted of attempted smuggling, but the inclusion in the substantive statute of the objective element that the goods be subject to duty at least suggests that the legislature may not want to dispense with this element of the offense for any case. After all, it would have been equally simple for the legislature to have drafted the substantive smuggling statute in terms of importing goods believed to be dutiable rather than in terms of

41. Hughes, *supra* note 1, at 1030-34.

goods in fact dutiable. So, too, in drafting the substantive statute involved in *Jaffe*, nothing prevented the legislature from defining the crime as the possession of goods in the belief that they are stolen without also requiring that they be in fact stolen. As earlier suggested, a crucial factor justifying legislative delegation of the power to define the act element of attempts in the preparation-attempt cases was the inability of the legislature to provide for the infinitely varying acts in advance. In the case of the circumstantial elements of the crimes here considered—whether the goods are in fact dutiable, are stolen, or are narcotics—the legislature is perfectly capable of deciding in advance whether or not to require the particular element. There is no need to delegate that power to the courts under the attempt rubric.⁴²

It may be helpful at this point to consider one additional legal impossibility case, *People v. Teal*.⁴³ The defendant had solicited false testimony to an alleged act of adultery in connection with a divorce proceeding. Since the solicited testimony related to an act other than that alleged in the divorce complaint, the court concluded that the testimony was immaterial. Materiality being one of the elements—an attendant circumstance in the terminology of this article—required by the substantive statute, defendant could not be convicted of subornation of perjury. She was, however, convicted in the lower court of attempted subornation of perjury, apparently on the ground that she thought the testimony was material. Her conviction was reversed on appeal by a divided court.

The draftsmen of the Model Penal Code provisions which dispense with the doctrine of impossibility question the decision on the ground that “rather than engaging in an exercise in futility, defendant sought to induce false testimony which he [*sic*] thought would be material.”⁴⁴ The trouble with this argument is that the inference or assumption is equally true of just about every other case in which the false testimony is immaterial, yet the legislature required that the testimony in fact be material, not that the defendant think it is material. If the argument is accepted, what the legislature sought to exclude from

42. It seems reasonably clear that the real issue in *Jaffe* is whether once stolen goods now recovered are “stolen” within the meaning of the statute defining the substantive crime. This issue should be resolved in the context of that count of the indictment charging the substantive offense, not in an attempt context.

43. 196 N.Y. 372, 89 N.E. 1086 (1909).

44. Wechsler, Jones, & Korn, *supra* note 9, at 579 n.32.

the substantive crime, by imposing the requirement of materiality, the court would reintroduce by convicting the defendant of attempt.

The point is not merely that the legislature should be understood to have expressed a policy that persons who testify falsely to immaterial matters should not be convicted of crime. This might be challenged; after all, in the preparation-attempt cases we did not regard the legislative inclusion of an act requirement in the substantive crime as a declaration of policy inconsistent with the conviction for attempt of some persons who do not commit the otherwise required act. But in those cases the legislature was incapable of defining all the required acts in advance; it had no choice but to define the modal crime, leaving other cases to the courts under the attempt rubric. Here the legislature is perfectly capable of declaring a contrary view for *Teal* and every other case in which the false testimony is immaterial simply by striking the word material from the substantive crime. Here there is no need to leave matters in an undefined state and delegate decision of the issue to the court.

Indeed, there are policy grounds for taking the substantive statute at face value and limiting guilt to cases in which the testimony is material. One such ground again concerns the relationship between the circumstance, this time materiality, and proof of the mens rea. One is much more readily, and more reasonably, led to the inference that the falsification is deliberate when it concerns a material matter than when it is immaterial.⁴⁵

We may, therefore, characterize the issue presented by legal

45. The Model Penal Code definition of perjury, § 208.20(1), retains the requirement of materiality. The draftsmen offer other reasons. MODEL PENAL CODE § 208.20, comment at 104-05 (Tent. Draft No. 6, 1957). Nonmaterial false testimony is covered by the separate substantive crime of false swearing, in § 208.21. See *id.* at 103. It appears that the real objection to *Teal* was the court's narrow definition of materiality. See *id.* at 105-06. This certainly is no basis for invoking the attempt doctrine. Cf. note 42, *supra*. It is not entirely clear whether "the attendant circumstances as [the defendant] believes them to be," MODEL PENAL CODE § 5.01(1)(a), include the circumstance of materiality or circumstances such as those from which the draftsmen inferred Mrs. *Teal*'s belief that the testimony was material. Their criticism of the decision implies an affirmative answer. If so, in addition to the false swearing statute, Mrs. *Teal* could be convicted of attempted perjury, and, punishment for attempt being the same as for the substantive offense attempted, *id.* § 5.05(1), there turns out to be no difference between material and nonmaterial false testimony except that nonmaterial false testimony can be prosecuted as a felony or a misdemeanor. This seems an awkward way to construct a penal code, to say the least.

impossibility thus: the legislature has defined the substantive crime to require the presence of a particular circumstance; there is no reason why—for cases in which that circumstance is absent but the defendant allegedly thinks it is present—the legislature should delegate to the courts the power or the duty to decide whether that circumstance may be dispensed with; if the legislature were to delegate the issue to the courts—or the courts were to assume it—the courts would have no analytic tools for deciding the issue; delegation to the court of the power to define the elements of a crime after the act raises serious issues of legality, particularly when such analytic tools are lacking; and there are in any event good policy reasons favoring retention of the circumstance as an element of the crime.

It is not the burden of this article to argue that the legislature must preserve the objective element of the crime in all instances. The point is that the defense of legal impossibility is a device which enables the court to return the ball to the legislature to resolve for each crime separately what are its appropriate objective elements and which objective elements may be safely dispensed with. And if, as suggested above, the significance of the objective element may vary from crime to crime, there is reason for the legislature to make discriminating choices to retain the objective element in certain crimes and eliminate it in others rather than deal with the issue in the attempt context which has the unfortunate tendency to generalize its results indiscriminately across the entire spectrum of crimes.⁴⁶

The problem of legal impossibility, in the final analysis, is not really an attempt problem at all. It is rather a problem of the proper definition of the objective elements of specific crimes, a peculiarly legislative task.

C. THE ACT REQUIREMENT AND THE RESTRICTION OF OFFICIAL POWER

We have seen that the objective elements of certain crimes, including both acts and circumstances, serve as something more than merely evidence of resolution, of will to act, but also introduce an element of neutrality into the criminal decision-making process by restricting prosecution to those cases in which the defendant's conduct furnishes objective evidence of the illegality of his will and by furnishing a fixed reference point to aid us in determining how far to extend attempts. These ob-

46. Cf. Arnold, *supra* note 22.

jective elements serve a perhaps even more important function in setting an objective limit to those situations and persons that can become the objects of official assertions of control. The requirement that the defendant's acts be themselves unlawful, rather than commonplace and permitted, establishes a formidable barrier between the organs of state and private citizens.

Professor H. L. A. Hart has made a similar point with respect to the mens rea elements of criminal offenses. Among the virtues of a system of criminal law that recognizes the absence of mens rea as a defense, Hart lists, "[f]irst, we maximize the individual's power to predict the likelihood that the sanctions of the criminal law will be applied to him."⁴⁷ It is the function of the criminal law to promote the security and well being of members of society by securing for them a high measure of protection from harmful acts. But since society achieves such protection by inflicting harm on those who would commit such acts, it must take care not to offset this gain in security by unduly increasing the risks that persons will be subjected to official harm unpredictably. Acts can occur accidentally, but the state of mind that accompanies one's acts is entirely within the individual's control. Thus, by recognizing mens rea as an indispensable element of crimes, we substantially increase the individual's power to control his freedom from punishment.

But it would be shortsighted to think that only the mens rea element serves this function. Mens rea is within one's control but, as already seen, it is not subject to direct proof. More importantly, perhaps, it is not subject to direct refutation either. It is the subject of inference and speculation. The act requirement with its relative fixedness, its greater visibility and difficulty of fabrication, serves to provide additional security and predictability by limiting the scope of the criminal law to those who have engaged in conduct that is itself objectively forbidden and objectively verifiable. Security from officially imposed harm comes not only from the knowledge that one's thoughts are pure but that one's acts are similarly pure. So long as a citizen does not engage in forbidden conduct, he has little need to worry about possible erroneous official conclusions about his guilty mind.

In his Jerusalem lectures, replying to Lady Barbara Wootton's proposals to eliminate mens rea as an element of the offense

47. Hart, *Legal Responsibility and Excuses*, in *DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE* 99 (S. Hook ed. 1965).

and treat it as a matter relevant solely to the choice of an appropriate disposition of the offender,⁴⁸ Professor Hart warned us that:

In a system in which proof of *mens rea* is no longer a necessary condition for conviction, the occasions for official interferences with our lives and for compulsion will be vastly increased. Take, for example, the notion of a criminal assault. If the doctrine of *mens rea* were swept away, every blow, even if it was apparent to a policeman that it was purely accidental or merely careless and therefore not, according to the present law, a criminal assault, would be a matter for investigation under the new scheme, since the possibilities of a curable or treatable condition would have to be investigated and the condition if serious treated by medical or penal methods. No doubt under the new dispensation, as at present, prosecuting authorities would use their common sense; but very considerable discretionary powers would have to be entrusted to them to sift from the mass the cases worth investigation as possible candidates for therapeutic or penal treatment. No one could view this kind of expansion of police powers with equanimity, for with it will come great uncertainty for the individual: official interferences with his life will be more frequent but he will be less able to predict their incidence if any accidental or careless blow may be an occasion for them.⁴⁹

Similarly, the objective elements of the crime—those definitional elements of the crime relating to conduct as distinguished from the *mens rea*—serve to identify and limit those cases which are to be the objects of prosecutorial and judicial interest. The police, of course, when informed that someone is planning a crime, must take steps to investigate the matter before any criminal acts have been committed; they must ordinarily seek to prevent the crime, or at least catch the culprit while committing it. But the exercise of prosecutorial and judicial discretion to investigate the existence of *mens rea* and invoke the severe penal sanctions regarded as punishment should ordinarily be limited to those cases in which the alleged *mens rea* accompanies objectively defined illegal conduct.

Ordinarily, then, the criminal act itself, as distinguished from the act with its accompanying *mens rea*, should set off the actor from the rest of society. The act should be unique rather than so commonplace that it is engaged in by persons not in violation of the law. In the case of uncompleted conduct, this is a key factor that distinguishes preparation from attempt.⁵⁰

48. B. WOOLTON, *CRIME AND THE CRIMINAL LAW* (1963).

49. H. HART, *THE MORALITY OF THE CRIMINAL LAW* 26 (1964).

50. See the well-known case of *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927), in which the court, although convinced that the defendants intended to commit a robbery, held that the acts of driving about in search of the victim were insufficient to constitute an attempt. Un-

It is interesting in this regard to examine the following statutory definition of those guilty of criminal syndicalism:

Any person who shall . . . have in his possession or control anything with intent to destroy life or property, in the pursuance or furtherance of any of the doctrines of criminal syndicalism as defined in this chapter . . .⁵¹

The statute provides punishment of one to 25 years in prison and/or a fine of \$1000 to \$10,000. The vice in this statute, aggravated of course by its setting in the context of protected speech, is that the only act required by the statute is the possession of "anything." Since everyone possesses some "thing," everyone has committed the proscribed act. The prosecution can bring anyone within this statute if it can persuade a jury that he possesses the necessary mens rea. And since mens rea may be proved by prior acts as well as by the defendant's statements and expressions of belief, the opportunities for biased prosecution are great.⁵² In such a context, the right to jury trial is not likely to be significant protection from official bias.

One context in which similar problems have arisen is that

doubtedly the court was influenced by the fact that the defendant's acts objectively were the ordinary acts of innumerable innocent persons. *But see* page 707, *infra*.

51. S.D. CODE § 13.0801 (1939).

52. Consider the following recently enacted federal statute:

Whoever travels in interstate or foreign commerce . . . with intent—

- (A) to incite a riot; or
- (B) to organize, promote, encourage, participate in, or carry on a riot; or
- (C) to commit any act of violence in furtherance of a riot; or
- (D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;

and who either during the course of any such travel . . . or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph—

Shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

Civil Rights Act of 1968, ch. 102, § 2101(a), 82 Stat. 73. Considering the fact that almost all of our unpopular "agitators" frequently travel in interstate commerce in connection with their activities, the statute does not contain any significant act requirement. The requirement of some "other overt act" will not be very meaningful unless the courts interpret it to require an act closely related to and evidencing one of the listed illicit purposes. Compare the rule in treason cases that the overt act must show that defendant gave aid and comfort to the enemy, *Cramer v. United States*, 325 U.S. 1 (1945), with the much more relaxed rule in conspiracy cases that any overt act will do, no matter how commonplace and innocent, so long as it can be proved by other evidence to have been a step in the furtherance of the conspiracy. *E.g.*, *Carlson v. United States*, 187 F.2d 366 (10th Cir.), *cert. denied*, 341 U.S. 940 (1951).

relating to the possession of burglar's tools. Most such tools are capable of innocent as well as illegal use. The broader the definition of the category of implements encompassed by the statute, the greater the danger that persons not intent on committing burglaries may be convicted. Persons with prior burglary convictions and co-called "professional burglars" are in a particularly exposed position since the determination of intent to use the implements is likely to be based, in large measure at least, on the evidence of prior convictions or alleged professionalism.

*People v. Taylor*⁵³ illustrates the point well. Taylor was in possession of tools that could be used to commit a burglary, and while walking in an area where several burglaries had recently occurred he was arrested for possession with intent to break and enter. His testimony—that he used these tools on a temporary job from which he was returning at the time of his arrest, and that he had sought to leave the tools at the place but had been dissuaded by the lady of the house—was corroborated by the persons for whom he did the work. Nonetheless Taylor was convicted. Prosecution evidence, in addition to the ambiguous act of possession, included a conviction for burglary some 17 years earlier and recent irregular employment. On appeal, the Supreme Court of Illinois held the evidence of intent insufficient, discounting the earlier conviction because of the long lapse of intervening time. Taylor was eventually protected by the Illinois Supreme Court. Defendants have fared less well in such cases before the Michigan Supreme Court.⁵⁴ And one may question what would have been Taylor's fortune if his burglary conviction had been of recent vintage. Even then, in each of these situations the statute did not encompass the possession of anything and everything as does the syndicalism statute quoted above.

Considered in this light, the defense of legal impossibility takes on still further meaning. In the case of *Lady Eldon*, for example, if the substantive crime is defined to include as an element of the offense the fact that the goods were subject to duty, the more limited group of acts of importing dutiable goods is separated from the mass of acts of bringing goods into the coun-

53. 410 Ill. 469, 102 N.E.2d 529 (1951); see 30 CHL.-KENT L. REV. 278 (1952).

54. See *People v. Howard*, 73 Mich. 10, 40 N.W. 789 (1888); accord, *People v. Jefferson*, 161 Mich. 621, 126 N.W. 829 (1910). Compare *State v. Ingram*, 237 N.C. 197, 74 S.E.2d 532 (1953), with *McQuirter v. State*, 36 Ala. App. 707, 63 So. 2d 388 (1953).

try and official intervention is limited to the narrower class. If we were to eliminate the element of dutiability from the offense, the criminal act would become simply the importation of any article. All travelers would be potentially subject to prosecution and conviction under the statute, their only protection being review of the sufficiency of the evidence of mens rea. And, as discussed above, while broadening the class of persons and acts potentially subject to this criminal provision, we would be eliminating the objective basis for evaluating the mens rea, the one remaining means of distinguishing those to be punished.

In the case of *Jaffe*, elimination of the requirement that the goods in fact be stolen would redefine the act element of the crime to the mere possession of goods. But as indicated above in connection with the syndicalism statute, everyone in our society possesses goods. Under this redefined crime, everyone may now become the subject of official control if the authorities can gather a minimum of evidence relating to mens rea. And, again, we have simultaneously eliminated a crucial objective factor in the proof of that mens rea.

The point is still clearer in the case of possession of narcotics. If possession of any innocuous substance in the belief that the substance is heroin is an attempt to possess narcotics, everyone who possesses any substance may be convicted of that crime without the extremely probative objective basis for evaluating the sole remaining significant factor, the mens rea.

The narcotics case illustrates an additional point. Suppose there existed a rare substance similar in appearance to heroin. If the crime of attempted possession were limited to possession of this substance we might still preserve both an objective basis for our conclusion as to the existence of mens rea and an objective limit to those persons subject to prosecution. In other words the narcotics case offers an opportunity for drawing a line short of possession of *any* goods in the belief that they are narcotics by limiting criminality to the act of possessing certain specified goods in such a belief. This is not true of the *Jaffe* case, however. Whereas some goods could more readily be confused with heroin than others, any goods could reasonably be thought to be stolen, there being nothing in their physical nature that reflects the possessor's belief, or mens rea.

This again suggests that the problem of legal impossibility is in reality a problem of the proper definition of the act element of the offense. It also reinforces the thought that there is no single solution which cuts across all substantive crimes, but

rather than the definition of each crime presents an opportunity for discriminating legislative judgment.

Tested in this light, the Model Penal Code provisions may once again be shortsighted. Not only have the draftsmen assumed that a single across-the-board solution to the problem is proper, but they actually deprive the court of any vehicle to control the jury in individual cases. In a preparation-attempt case, the court exercises such power in its determination whether the act is "a substantial step" toward consummation of the crime. But where the defendant has done the act absent an attendant circumstance, no other objective element need be established. All that is necessary is a showing that the defendant thought the circumstance was present, judicial control being limited to review of the sufficiency of the evidence.⁵⁵

This approach is surprising in light of the Model Penal Code's considerable sensitivity to this problem in the preparation-attempt context. In formulating specific instances of conduct that go beyond preparation the Code specifies:

possession of materials to be employed in the commission of the crime, *which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances.*⁵⁶

Another section defines the separate crime of possessing instruments of crime more broadly as possession of instruments "commonly used for criminal purposes . . . under circumstances which do not negative unlawful purpose."⁵⁷ This provision still does not reach the breadth of across-the-board elimination of objective circumstances as results from the elimination of the notion of impossibility. Moreover, this latter offense is only a misdemeanor.⁵⁸

All of this illustrates once again the preferability of legislative handling of these situations, with its greater flexibility and capacity for a discrete approach, rather than the use of the

55. Under the Model Penal Code provision a person who testifies to the truth can be convicted of attempted perjury on proof that he thought his testimony was false. Or one who has intercourse with a girl over the age of consent can be convicted on proof that he believed her to be under age. And a soldier performing his duties could be convicted of attempted treason on proof that he incorrectly thought he was performing them for the enemy. *But see* *Respublica v. Malin*, 1 U.S. (1 Dall.) 33 (1778).

56. MODEL PENAL CODE § 5.01(2) (e) (Proposed Official Draft, 1962) (emphasis added). *See also id.* § 5.01(2) (f).

57. *Id.* § 5.06(1) (b).

58. For discussion of these considerations see AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Council Draft #29, at 131-32 (1961).

judicial technique of attempt with its necessarily generalizing tendencies.⁵⁹

If we are correct in our analysis up to this point two conclusions emerge. First, in the absence of statutory treatment of the problem, retention of the defense of legal impossibility is an appropriate judicial device to shift or leave to the legislature the burden of defining the actus reus of the crime. Secondly, the doctrine says something significant to the legislature as well, namely, that it is not forced to choose between the extreme alternatives of always or never basing criminality on mistaken belief of objective facts. The legislature has the freedom, indeed the duty, to consider separately as to each offense category the needs of law enforcement and the dangers of drafting the substantive criminal provisions broadly to encompass too many people.

D. ATTEMPT AND THE NOTION OF HARM

One of the least developed of the general concepts of Anglo-American criminal law is the notion of harm and its role in the definition of crime.⁶⁰ Although it is sometimes stated that harm is essential to criminal conduct,⁶¹ and there are a few cases which suggest that there are some constitutional limits to the legislature's power to forbid harmless conduct,⁶² there has been very little exploration of what does and what does not constitute harm.⁶³

To add to the confusion, it has frequently been asserted that the punishment of attempts is an exception to the principle that conduct which does no harm is not criminal.⁶⁴ The supporting argument is that since attempt necessarily involves a failure to commit the harmful act or cause the harm forbidden by the substantive crime, it follows that no harm has been done.

59. For other such illustrations, see notes 23 & 45, *supra*, and page 707, *infra*.

60. Mueller, *Criminal Theory: An Appraisal of Jerome Hall's "Studies in Jurisprudence and Criminal Theory,"* 34 *IND. L.J.* 206, 220 (1959).

61. HALL at 213; R. PERKINS, *CRIMINAL LAW* 7 (1957).

62. *E.g.*, Benton v. United States, 232 F.2d 341 (D.C. Cir. 1956); State v. Birdsell, 235 La. 396, 104 So. 2d 148 (1958); People v. Munoz, 9 N.Y.2d 51, 172 N.E.2d 535, 211 N.Y.S.2d 146 (1961); People v. Bunis, 9 N.Y.2d 1, 172 N.E.2d 273, 210 N.Y.2d 505 (1961).

63. See HALL at 212-46; Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 *Duquesne U.L. Rev.* 345 (1966).

64. The leading quotations are collected in Morris, *Punishment for Thoughts*, 49 *THE MONIST* 342, 354 n.14 (1965).

Punishment for attempt, then, is really punishment for a mens rea. The act of the attempt, this view continues, is not harmful; it is relevant merely as evidence of the firmness of defendant's resolve to commit the crime and hence furnishes reason to believe that the defendant will commit the crime on some future occasion. If this argument is correct, it follows that the extension of criminal liability for attempt to cases traditionally held not to involve criminality due to the defense of impossibility is not a departure from accepted notions regarding the relevance of harm to attempts.

On the other hand, others assert that the conduct prosecuted in attempts does constitute harm. They would argue that it does not follow that no harm has occurred simply because the harm sought to be prevented by the substantive statute has been avoided. The conduct denominated an attempt did create a risk that harm would result and that alone is a harm that justifies punishment. Each attempt carries with it a risk that the ultimate harm sought to be prevented will occur, so that an increase in the number of attempts means an increase in the number of cases in which the attempt will succeed.⁶⁵

The latter view does remind us of an important difference between the types of harm, or risks, involved in ordinary attempts—those fitting the preparation-attempt formula—and those raising the issue of legal impossibility. In ordinary attempts the risk is that the defendant will cause the harm by the very activity for which he is being prosecuted. In the legal impossibility cases, since the goods Lady Eldon sought to smuggle were not subject to duty and the false testimony solicited by Mrs. Teal was immaterial, there was no risk that the harm sought to be prevented by the substantive statute would in fact occur.⁶⁶ The risk is, rather, that if not prosecuted successfully now the defendant may repeat his conduct and cause the harm on some future occasion.

This distinction supports the position taken earlier that analogy is a useful technique in the one group of cases but not in the other. One can speak of the degree to which conduct on

65. HALL at 217-18, 591-94; MORRIS, *supra* note 64, at 359; STRAHORN, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962 (1930).

66. If the harm sought to be prevented—obstruction of the proceedings—was risked in *Teal*, then the court was merely wrong in declaring the testimony immaterial. But, that is a problem of the correct interpretation of the substantive statute; it is not an attempt issue. Cf. notes 42 & 45, *supra*.

a specific occasion risks certain harm and can compare the risk of harm with the harm itself. It is far more difficult to make such a comparison in the case of conduct that does not risk the harm it is being compared with, but which is only predictive of future harmful conduct.

There is another way to describe this difference which avoids the definitional controversy whether risk of harm is harm. In the ordinary attempt cases, since the defendant's conduct risks harm we wish to prevent, we cannot wait until he is completed and then prosecute him for the substantive crime. It is this need to stop the defendant before he commits the criminal act that prevents us from prosecuting him for the substantive crime and forces us to fall back upon the crime of attempt with its undefined act element. There is no reasonable alternative.

Legal impossibility cases, however, pose no risk of harm requiring intervention before the defendant completes his acts. If the defendant's conduct does not violate the statute defining the substantive crime, it is not because we had to intervene before he had a chance to commit the crime. It is because the statute as drafted does not cover this conduct. There is, then, a reasonable alternative to applying undefined attempt concepts to this defendant. Attend to the statute defining the substantive crime. As indicated above, that is the more appropriate place to consider the issue.

This distinction between the risk of harm in ordinary attempt cases and legal impossibility cases suggests still another matter. We have certainly not yet thought through the implications of this shift from the criminal act as an act that we wish to prevent to one that we have no particular interest in preventing but consider significant solely because of its evidentiary capacity to identify persons likely to commit future anti-social acts.⁶⁷ I shall not explore the moral aspects of the question except to note that there is a difficult moral issue involved in

67. It is conceded that the proposal to eliminate the defense of legal impossibility is quite different from the notion that prediction of future criminality based on the defendant's social environment and childhood conduct be made a basis for isolation from the community and curative or preventive efforts. In the legal impossibility case the defendant has or is assumed to have a specific mens rea of a defined crime and has acted pursuant to that mens rea. In other predictive situations, there is as yet neither the specific mens rea nor evidence of readiness to act on it. In the impossibility cases we are predicting a future repetition of the act as the defendant assumedly understood it, a less far reaching prediction. This is in part what makes the rejection of the defense plausible. But it is still a departure from traditional views, the unexplored implications of which are being considered in the text.

punishing a person solely for having acted with harmful intent when he has neither caused nor risked any harm. Actually, the goal in such cases would not be punishment but rather rehabilitative and preventive treatment. Still, it is one thing to subject one who has merited punishment to coercive, rehabilitative and preventive measures. It is quite another matter to impose such harm on a person who has not earned punishment.⁶⁸

This shift in the function of the act has implications for the administration of justice as well. Where acts are defined in terms of that conduct which society regards as harmful and seeks to prevent, law enforcement officials have a strong duty and motive to prevent criminal conduct. The community has an equally strong claim upon these officials not to encourage such conduct, or in the parlance of entrapment cases, not to create crimes. If the act, however, is itself harmless but is significant because of its predictive relevance, not only is there no motive or ethical claim upon law enforcement officers not to encourage the commission of such acts, but the encouragement of such conduct seems to be a logical follow through. After all, our goal now is to identify those who will in the future be dangerous and we can do so without encouraging harmful or wrong conduct but by encouraging perfectly harmless conduct.⁶⁹

Indeed, it may well be that absence of harm is one of the reasons entrapment is a recurring problem in certain crimes more than others. Because of the risks of harm, it would be rare

68. Our present system functions on a dual level. It convicts people largely on the basis of wrongful conduct, while at the sentencing stage there is greater emphasis on future-oriented goals. For a discussion of the tensions that arise from this dualism, see Silving, "Rule of Law" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 77 (G. Mueller ed. 1961). Although perhaps not a logically "neat" package, this dualism may be a reasonable accommodation of the different interests at stake—protection against overly broad definitions of criminal conduct and punishment that is disproportionate to the seriousness of the crime, and recognition of the interest in shaping our sentencing policies toward rational future-oriented social goals. The elimination of legal impossibility as a defense may be logically neat but it may also overlook the need to accommodate interests other than crime prevention.

Much of recent discussion of the criminal law has considered the dangers involved in completely severing correctional treatment from the notions of punishment and responsibility. *E.g.*, H. HART, *PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY* (1962); Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 *J. CRIM. L.C. & P.S.* 226 (1959); Hart, *Prolegomenon to the Principles of Punishment*, in 1959-1960 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 1; Lewis, *The Humanitarian Theory of Punishment*, 6 *RES JUDICATAE* 224 (1953); Morris, *Persons and Punishment*, 52 *THE MONIST* 475 (1968).

69. Morris, *supra* note 64, at 349.

that an officer would seek to entrap a suspect into committing a homicide or an armed robbery. But since the officer sees no harm done when he buys heroin from a dealer—indeed some good is done since the heroin is withdrawn from circulation—entrapment is a common practice in such cases.⁷⁰ The policies considered here are not uniquely relevant to attempts. Certainly we should be equally careful about defining substantive crimes to cover conduct we do not wish to prevent. The point is that the doctrine of legal impossibility alerts us to the presence of that very issue every time we seek to extend attempts to cover cases in which a required circumstantial element of the substantive crime is missing.

None of the foregoing is intended to suggest that our legal system never punishes harmless acts. Sometimes an act, itself harmless, may appear so similar to a harmful act that the legislature may reasonably conclude that administrative considerations warrant forbidding the harmless act as well. This judgment is particularly acceptable when there is no strong social interest in encouraging or even allowing the harmless act. The example of the substance that appeared similar to heroin could fit this situation. Assuming there was no strong countervailing reason to permit the distribution of this commodity, it would be reasonable for the legislature to forbid its possession in order to prevent those prosecuted for possessing heroin from asserting in defense that they thought they were possessing Brand X. This would be a sort of prophylactic rule, a "fence about the law."⁷¹ But once again, this is a uniquely legislative judgment. It is the kind of judgment that should be made separately for each crime rather than in the attempt context with its generalizing tendencies.

Thus, once again, we find that "legal impossibility" can be a useful term to alert us to certain dangers in overextending criminality and to encompass a group of cases more appropriate to legislative than judicial decision-making.

V. FACTUAL IMPOSSIBILITY

Thus far, we have considered the notion of legal impossibility. Let us now consider again the same matters treated above, this time in the context of so-called factual impossibility.

70. The relationship between entrapment and impossibility is further explored in section VI, *infra*.

71. The BABYLONIAN TALMUD, *Mishnah Aboth*, ch. 1, mishnah 1 (1935).

To use two common hypotheticals, suppose defendant *A* pours sugar in another's tea believing that the sugar is deadly poison, and defendant *B* pours an inadequate quantity of poison into the tea, both intending to kill the victim. Both cases would be thought of as posing factual impossibility issues although some writers would say that case *A* presents an issue of absolute impossibility which would constitute a defense whereas the act of defendant *B* was only relatively impossible, which is no defense.⁷²

Approaching the two cases in accordance with our previous analysis, case *A* seems to pose many of the same problems as are posed by the "mere preparation" and legal impossibility cases. Although we assumed that defendant intended to kill his victim, that intent is not evidenced by defendant's conduct. The objective facts are simply that defendant *A* placed sugar in the person's tea. From the perspective of the criminal act's function of restricting the scope of official power, again *A*'s act of putting sugar in the tea is a perfectly commonplace act that in no way distinguishes him from any other person. And finally, *A*'s act is objectively harmless. In this posture, if the case would fit the preparation-attempt formula, a court would almost certainly call defendant's act "mere preparation" and acquit him.

Case *B*, however, is completely different. Although the quantity of poison was insufficient to kill the intended victim, it certainly does furnish some objective evidentiary basis for evaluating *B*'s intent. While the evidence of intent to kill is less clear than it would have been had the dose been sufficient, that is usually a problem in unsuccessful attempts. What is more significant is that the evidence of intent is certainly clearer than it was in case *A*. So too, *B*'s act is not an act that people ordinarily engage in so that making this act criminal would still preserve a discriminate and reasonable basis for identifying those activities which warrant official intervention. And finally, *B*'s act, though not risking the precise harm sought to be prevented by the homicide statute, does risk bodily injury.

We can posit any number of hypothetical cases along a scale ranging from case *A* through case *B* to violation of the substantive statute. Note, then, that as distinguished from the cases of legal impossibility, analogy is once again useful. While avoiding the definitional swamp of relative and absolute impos-

72. See *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N.E. 770 (1897); WILLIAMS at 623, 642-48.

sibility, we have discovered a tool for making appropriate distinctions between different cases quite similar to the distinctions we sought to make by use of the preparation-attempt formula.

Further, again unlike the legal impossibility cases, the legislature must delegate discretion over this group of cases to the courts. We noted above⁷³ that the crime of homicide differs from most crimes in that its actus reus is not defined in terms of specific forbidden acts but in terms of bringing about a specified result, death. Thus, to convict someone of murder, the only indispensable objective fact the prosecution must prove is the death. Any act causing that death will do. We also noted, however, that the requirements of causation and intent served to limit prosecution for murder to those acts which can cause death and which appear reasonably calculated to do so. In a prosecution for attempted murder, that one indispensable fact—death—is dispensed with, and with it goes, of course, the requirement of causation. The actus reus of a crime limited to no particular act and which does not require the causation of any particular result can hardly be defined in advance by the legislature.

The only remaining objective limit to prosecution is the requirement that the defendant's conduct *appear* capable of producing death. How much appearance is necessary the court decides by the process of analogy. At the one end is the substantive crime and its requirements, conduct that causes death. At the other end, firmly rooted by the notion of factual impossibility, is that probably hypothetical odd-ball case in which the defendant's conduct carries no risk of death. Between the two sits the court judging the case before it. Just as the preparation-attempt formula provides the court with a framework for deciding one group of attempt cases, factual impossibility alerts the court to the presence of identical problems in a different group of cases and helps to solve them.

Law professors occasionally delight in debunking the idea of factual impossibility by pointing out to their students that when defendant fires a pistol and misses his victim's head by one inch, under all the circumstances, including the precise manner in which defendant aimed the pistol, it was factually impossible for defendant to kill the intended victim. In other words, every attempt being a failure, success is factually impossible in every attempt.⁷⁴ This is largely true but irrelevant. One of the interesting aspects of the analysis of the role of factual impossibility

73. See pages 672-73, *supra*.

74. Cf. J. BISHOP, CRIMINAL LAW § 738 (9th ed. 1923).

offered here is that calling this case one of factual impossibility would in no way change the result. Alerted to the problems, the court should nonetheless conclude that the case is objectively so similar to one in which the victim was hit and killed by the bullet that the defendant should be convicted of attempted murder. Actually, of course, the case is so nearly identical to a successful killing that we do not even pause to ask such questions. The point of the analysis is that even if we did, we would reach the same result.

Similarly, it no longer matters if we call the famous old pick-pocketing cases factual impossibility because there was no money in the victim's pocket. The defendant's act of placing his hand in someone else's pocket sufficiently satisfies the act requirements set forth so that it can be prosecuted as an attempt.

One may ask at this point: If the two doctrines—preparation-attempt and factual impossibility—serve identical purposes, what is the need for two separate doctrines? A likely explanation is that the preparation-attempt formula is linguistically inadequate to alert us to the presence of these problems in those cases called factual impossibility. From a linguistic point of view it is difficult to picture either case A or B as one of preparation rather than attempt. In each case the defendant has done every act he intended to do. Since it is linguistically inappropriate for us to call A's act mere acts of preparation, if we were to apply the preparation-attempt formulation we would probably readily call A's acts an attempt and never discover that in terms of its hidden problems it is more like an act of preparation. The factual impossibility formulation furnishes an additional warning device for cases in which the language of the preparation-attempt formulation is an inadequate shorthand to identify the problem.

There is, then, one important difference between what has here been called factual impossibility and legal impossibility. Legal impossibility—the absence of one of the circumstances required for the substantive crime as defined by the legislature—prevails as a defense in the cases thus far considered because such circumstances can never be more or less present. In cases of factual impossibility, however, the objective possibility of success can vary and the court must make a separate judgment as to each particular case.

It was earlier observed that it will not always be clear whether a particular case presents an issue of factual or legal impossibility. The line between acts, circumstances and conse-

quences is not very certain. For that reason, courts should approach these notions, not as rigid conceptual categories yielding inevitable results, but as analytic tools.

*United States v. Thomas*⁷⁵ is an excellent illustration of this point. In that case several young sailors had spent an evening bar-hopping. One of the sailors was dancing with a girl at a bar when she collapsed in his arms. The three decided to drive her home. In the car, thinking she was merely unconscious, they had sexual intercourse with her. Actually, she was dead at the time. Thomas was acquitted of rape because the girl was dead, but was convicted of attempted rape. The issue on appeal was whether impossibility was a defense under these facts.

The requirement that, in order to constitute a rape, the girl be alive at the time of the acts of intercourse can be categorized either as a circumstance or as part of the definition of the act element of the offense. Defendant's own physical acts are the same regardless of whether the girl is dead or alive. Her state is external to his acts and could be called a circumstance. On the other hand, his acts take on a completely different meaning and significance if she is dead or alive, so that it is sensible to talk of the act as different. Indeed, most would consider it grotesque to regard the question whether the girl is dead or alive as an external element separate from the defendant's act.

If we go beyond the labels and consider the underlying considerations explored in this article, it is not very difficult to conclude that the court was correct in convicting the defendant of attempted rape. His conduct is objectively unique, thereby distinguishing him from other persons for prosecution. And the conduct corroborates the alleged mens rea. The only other reasonable explanation of Thomas' conduct was that he was engaging in an act of necrophelia, under the circumstances a less plausible inference than the inference that he thought the girl was alive. The one argument in favor of acquittal is that the legislature could have defined rape as encompassing intercourse with the body of a dead woman thought by the defendant to be alive. But that would be carrying the argument to grotesque extremes. The presence of objectively unique conduct that evidences the mens rea is sufficient to overcome this suggestion.

Thus, it turns out that legal and factual impossibility need not be sharply defined categories. Cases can arise or can be hypothesized in which it is difficult to distinguish the two. But

75. 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962).

for the most part they point to two readily identifiable groups of cases and alert us to the special problems present in each. If we approach these concepts thoughtfully, we should not have much difficulty dealing with those cases which cannot be so neatly categorized.

VI. IMPOSSIBILITY, ENTRAPMENT AND NEUTRAL LAW ENFORCEMENT

It was suggested earlier that there are points of intersection between the defense of impossibility and official entrapment.⁷⁶ In their commentary to the Model Penal Code's elimination of the impossibility defense, the draftsmen argue that the Code adequately deals with the entrapment issue elsewhere.⁷⁷ Actually, however, the Code's entrapment provisions are limited to one aspect of the entrapment problem, namely, officially induced attempts to persuade the defendant to commit a crime.⁷⁸ But entrapment is in reality part of a much broader problem of police surveillance and law enforcement selection bias.⁷⁹

If, as suggested above, we view the act requirement as introducing an element of neutrality in law enforcement by establishing objective external criteria to identify the class of cases that calls for official investigation and intervention, entrapment may be seen as the use of investigative techniques that undermine such neutrality. If the citizen maximizes his area of freedom from official scrutiny by taking care not to engage in the specified forbidden conduct, entrapment is an official manipulation of the act element of the offense that undercuts the citizen's ability to preserve his freedom from such scrutiny. Because the decision to put the citizen to the test is made before the illegal act has been committed, the uncontrolled use of entrapment techniques would undercut the act requirement's limitation on the persons subject to investigation.

The problem is even more significant today with the increased emphasis on intelligence gathering. At the risk of some exaggeration, we might posit two models of investigation. Traditionally, the emphasis was on the investigation of crimes rather than criminals. A crime had been committed and the

76. See pages 697-98, *supra*.

77. Wechsler, Jones, & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 COLUM. L. REV. 571, 584 (1961).

78. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962).

79. See generally Note, *Judicial Control of Secret Agents*, 76 YALE L.J. 994 (1967).

officials sought its perpetrator. Not having made up their minds in advance as to the identity of the person they sought, the direction of the investigation was undetermined; it was controlled to a significant degree by the objective facts developed.⁸⁰ More recently, in part the result of efforts to combat organized crime, there has been a greater emphasis on the investigation of individuals and the search for crimes for which the chosen individuals can be prosecuted.

Under the "crime" model, the facts of the crime determined to a degree the persons on whom official suspicion focused, whereas under the "criminal" system no such element of neutrality is introduced. The disagreement in the Supreme Court whether the appropriate criteria for the control of entrapment should be based solely on the entrapping officer's conduct or should include some reference to whether the defendant is "otherwise innocent" or "predisposed" to commit the crime⁸¹ may be understood as reflecting disagreement over the proper balance between the "crime" and the "criminal" models.

Of course, under the "criminal" model the officials must still produce evidence sufficient to convict. But many of our constitutional protections are based on the assumption that the crime model of prosecution will prevail. Double jeopardy retains its meaningfulness as a protection against harassment when a specific crime is the object of attention. It becomes a very limited protection when the government decides that X is dangerous to society and invests enormous resources to research his entire life to seek prosecutable actions. The recent series of Hoffa prosecutions is a case in point. Without judging the merits of the cases, it is clear that the double jeopardy clause, even applying a broad "same-transaction" test, would have been inadequate to protect Hoffa from repeated prosecution until his ability to resist effectively was worn down.

Both models of investigation operate within a legal system that presumes innocence and requires proof of guilt to the satisfaction of a jury. But in the "crime" model, the presumption of

80. Problems of bias did begin to enter the picture at the point at which the facts began to focus suspicion on a particular suspect whom the police would interrogate to elicit facts to fit an already fixed theory of the case. This formed a component of the police interrogation problem, see *Gallegos v. Nebraska*, 342 U.S. 71-73 (1951) (concurring opinion of Jackson & Frankfurter, JJ.), and explains in part the relevance of the "focus" test in *Escobedo v. Illinois*, 378 U.S. 478 (1964).

81. *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

innocence takes on added meaning from the fact that the prosecutor will weigh the evidence carefully before deciding to prosecute. Prosecutorial screening will eliminate cases in which the evidence, though sufficient to go to the jury, is weak or is based on witnesses of doubtful credibility. And in cases that pass such screening the jury, having no bias against the defendant, may still find reasonable doubt. These protections do not function so well in the "criminal" model. The law enforcement authorities make up their minds about the defendant before the evidence is developed, and being engaged in a search for a case that can be "made," the prosecutor will not screen out potential cases based on doubtful witnesses. And the jury, having been conditioned by the authorities for years to believe that X is a Mafia leader or a labor racketeer, is far more likely to believe the doubtful witness or draw the questionable inference against the defendant.⁸²

Entrapment, then, is merely a part of the problem of law enforcement activities such as intelligence gathering, surveillance, eavesdropping, undercover work and the use of informers in which official decisions to investigate and prosecute individuals are based on judgments of character rather than in a context controlled by objective fact or other criteria to be tested in court.⁸³ The effectiveness of the trial process as a control over prosecutorial decisions is seriously weakened in the "criminal" model.

These problems reach their height in prosecutions for conspiracy,⁸⁴ since conspiracy has no specified, predefined act requirement.⁸⁵ Moreover, because of the division of labor which conspiracies can devise, only some of the conspirators need engage in conduct that is objectively illegal or at least visibly re-

82. The writer recalls the income tax prosecution of a major figure in the financial world of Wall Street in which one of the jurors, after the defendant was acquitted, commented, "you had enough evidence to convict Frank Costello but not ———." Compare the Appalachian case, *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

83. It is not suggested that for the above reasons all of these practices must be forbidden. Some of them are useful and necessary techniques which, because of their dangers, require control. Whether such control should be judicial through use of the fourth amendment, or administrative, or something else, is of course far beyond the scope of this article. Cf. Enker, *Controls on Electronic Eavesdropping—A Basic Distinction*, 2 ISRAEL L. REV. 461 (1967).

84. Similar problems arise in the administration of plea bargaining as a result of statutes imposing mandatory minimum sentences. See Enker, *Perspectives on Plea Bargaining*, in *THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS* 108, 109-10 (1967).

85. See pages 671-72, *supra*.

lated to other illegal conduct. Defendants may be brought into the conspiracy on the basis of commonplace acts that bear no apparent or objective relationship to the other participants' acts.

I have observed at least one successful prosecution of defendants identified as major Mafia figures which illustrates these points. As to some defendants, the evidence established relatively visible and clearly criminal acts of possession and distribution of narcotics. It was corroborated by agent surveillance and the seizure of narcotics by law enforcement officers. The main defendant, an alleged high level Mafia boss, was convicted on uncorroborated testimony that he attended a secret basement meeting at which the distribution of these narcotics was discussed. This sole witness who testified to this meeting was of highly doubtful credibility: he had a series of convictions; was facing a state narcotics charge; had lied before the grand jury, and had testified before the grand jury that he had never met the defendant; then that he had met him once; and, finally, shortly before the indictment was filed, that this alleged basement meeting had occurred. Indeed, the story of the basement meeting came forward only after months of interrogation during which the prosecutor several times inquired whether the defendant was involved. By the time the witness implicated the defendant, it must have become perfectly clear to him that the Government was anxious for a case against that defendant. There is no way of knowing at this point whether the witness made up the story to satisfy the prosecutor. Instead of the facts leading to the defendant, in this case the prosecutor's prejudgment of the defendant may have developed the facts. The prosecution's decision to accept this testimony was most certainly influenced by the fact that it had been "after" this defendant for years. One can only speculate as to the impact on the jury of years of adverse newspaper publicity concerning the defendant and his alleged Mafia activities. And credibility being an issue for the jury, the defendant got nowhere on appeal. He was sentenced to serve a 15 year sentence in a federal penitentiary.

Perhaps the risks must be run in the case of conspiracies. These are the dangers that must be encountered if we are to prosecute successfully those who organize and stay in the background of criminal conspiracies. In these instances, objectively innocuous acts of low visibility, difficult to prove or disprove, can be highly dangerous, and perhaps a case can be made for defining the crime so broadly even though it eliminates the protections usually afforded by more careful definition of the

criminal act.

But no case has been made for the need to extend these problems to the attempt area. There is no peculiar danger across the board in attempts that requires dispensing with relatively precise act definitions that limit the offense to acts objectively illegal. Only in limited situations can such a case of need be made. Attempted robbery is a good example. Here we cannot wait to intervene until the defendant draws his gun in a crowded bank.⁸⁶ Presumably this justifies the federal statute making it a crime "to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank"⁸⁷ But this illustrates once again the need and the opportunity for particularized legislative consideration of such problems rather than across the board elimination of the requirement of a meaningful act.

VII. AN ALTERNATE PROPOSAL

Several persons who examined an early draft of this article suggested that the problems considered herein could be solved by requiring evidence corroborating the defendant's mens rea. If we can limit prosecution of impossibility cases to those in which there exists satisfactory and reliable evidence of the mens rea, we need not be terribly concerned that the defendant's act does not itself corroborate his mens rea or that it is so commonplace that it does not single him out for investigation. In effect, the proposal states: Assuming everything stated in this article is correct, the elimination of the entire actus reus can be compensated for by tinkering with the sufficiency-of-the-evidence test for these cases. A requirement of corroboration would furnish judges with a legal handle for greater control of the jury.

A corroboration requirement will not always solve the court's problem. In *Teal*, for example, there was little need for special evidence corroborating defendant's knowledge that the testimony was false. Corroboration of the defendant's belief that the testimony was material would not have been very significant either. The assumption or inference that defendant thought the false testimony material was fair enough; but it was equally applicable to all cases. The real problem facing the court was whether to override the legislative requirement of materiality. Corroboration would not have helped decide that issue.

86. *But see* *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927).

87. 18 U.S.C. § 2113(a) (1964).

Nor is it certain that corroboration is an adequate substitute for the fixedness and neutrality of a requirement that a designated circumstance exist as a predicate of guilt. Decisions on the sufficiency of the corroboration may retain a considerable ad hoc character. The proposal has the merit of enabling the judge to assert greater control over the jury, but it does not meet the need to insulate the local trial judge from pressure and bias.⁸⁸ In any event, the legislatures have not enacted such a corroboration requirement. And strict corroboration requirements are not always looked upon with favor.⁸⁹ Under the cir-

88. This point, indeed, the point of this entire article—that fixed act definitions are vital protection for the accused—is illustrated by two recent Minnesota prosecutions. *State ex rel. Webber v. Tahash*, 277 Minn. 302, 152 N.W.2d 497 (1967); *State v. Webber*, 266 Minn. 224, 123 N.W.2d 193 (1963). Both prosecutions of Webber arose in the same county in rural Minnesota. The first prosecution was for robbery. The “victim,” a farmer, came to town early in the afternoon and spent most of the day drinking. He met defendant and another man—a co-defendant—at a bar, and sometime after 11 p.m. they left by car “to have a good time.” Upon arriving at a farmsite after their car had become stuck, the “victim” and the co-defendant walked across a yard while the defendant remained at the car. According to the victim, “something struck me and I went down.” He later returned to the car where he and the defendant unsuccessfully attempted to move it. When complaining to the sheriff that he had been robbed, he stated that he had begun the day with \$100 and had paid about \$20 to have the car towed and to have his wounds taken care of. He still had some \$43 on his person after the “robbery.” There was no evidence that any of the “victim’s” money was found in the possession of the defendant or the co-defendant. The evidence also clearly established that the “victim” was intoxicated when he reported the “robbery” to the sheriff. On these facts, defendant, who had four prior felony convictions, was convicted of robbery and sentenced to life imprisonment. His conviction was reversed by the Minnesota Supreme Court.

The second case arose in September, 1964, just about one year after the Supreme Court’s reversal. Apparently, or allegedly, Webber broke into a farmer’s tool shed and stole some copper wire which, after burning off some of the insulation, he sold as salvage copper for \$37. Theft of goods valued at less than \$100 is a misdemeanor in Minnesota carrying a maximum prison sentence of 90 days. MINN. STAT. § 609.52 subd. 3(5) (1967). Webber was charged with burglary, convicted and sentenced to five years in prison. In habeas corpus proceedings during 1966 and 1967 this second conviction was quashed on the ground that MINN. STAT. § 609.58 subd. 1(2) (1967) requires as an element of the crime of burglary that the “building” burglarized be “suitable for affording shelter for human beings,” a requirement that the testimony of the owner of the tool shed demonstrated was clearly absent.

Both cases involved crimes with relatively specific objective elements which furnished the basis for appellate review. Such review would have been much more difficult in the absence of these requirements.

89. See 7 J. WIGMORE, EVIDENCE § 2057 (3d ed. 1940). There is no requirement of corroboration of accomplice testimony in the federal

cumstances, the judiciary may be justified in taking the position that the decision whether to substitute corroboration for *actus reus* belongs with the legislature.

It is also necessary to explore further precisely what is meant by corroboration in this context. Consider again the *Jaffe* case. Corroboration of the defendant's belief that the goods are stolen will often take the form of testimony concerning discussions of that fact and testimony of an unusually low sales price. Suppose this evidence comes entirely from the testimony of a thief. As indicated earlier, there may be valid reasons for allowing a conviction on the basis of this testimony when the goods involved are actually stolen, but those reasons disappear when the goods are only believed to have been stolen. Presumably, then, we are talking about a different type or higher degree of corroboration, a type not required for conviction of the substantive crime.⁹⁰ This would, then, entail something more than merely extending the requirement that the defendant's act be "substantial"—to use the Model Penal Code terminology for preparation-attempt cases—to all other attempts. For, having eliminated all objective conduct requirements, we are now forced to consider the quality of the evidence in terms of the reliability of the witnesses, a frame of reference not present in the substantive crime.

At this point we need not consider further whether the proposal has merit. For the proposal, so understood, validates the thesis of this article. The doctrine of impossibility has proved its significance in that it has alerted us to the need for special considerations and additional protections for a particular group of cases. In fact, if we accept the proposition that we are talking about different types of corroboration, then we have to retain the notion of impossibility or create some equivalent concept to help identify which cases need which type of corroboration.

courts. *E.g.*, *Moody v. United States*, 376 F.2d 525 (9th Cir. 1967); *United States v. Marks*, 368 F.2d 566 (2d Cir. 1966), *cert. denied*, 386 U.S. 933 (1967). For an extremely interesting case in which the court declined to require corroboration in a prosecution for violating the federal crime of entering a federally insured bank with intent to commit a felony therein, in effect an attempt crime, see page 707, *supra*, see *United States v. Audett*, 265 F.2d 837, 846-47 (9th Cir. 1959).

90. J. HALL, *THEFT, LAW AND SOCIETY* 174-89 (2d ed. 1952), describes how the difficulty of obtaining proof against "fences" led to the elimination of evidentiary protections such as the requirement of corroboration. It sounds strange to hear the resurrection of corroboration suggested in this context. And if adopted, the experience suggests it may be so effective that nothing is gained in terms of additional convictions.

VIII. CONCLUSION

It has been said that elimination of the defense of impossibility accomplishes the goal of treating similar cases alike.⁹¹ What is similar depends, of course, on the policies one pursues and the factors considered relevant for comparison. To those who would eliminate impossibility as a defense, the defendant's illegal purpose, his mens rea, is the relevant factor. Hopefully it has been demonstrated that the more traditional view was not the result of obtuseness or perversity, but was based on a belief that the defendant's conduct as well as his mens rea were to be considered in drawing the comparison. If we do include the conduct in the comparison, we find that those cases resulting in acquittal due to the impossibility doctrine no longer appear very similar to the cases that result in conviction.

The important contribution of Wharton, Hall, and Williams was their telling demonstration that the problem of impossibility was not at all a problem of logic. Perhaps, in their concentration on this issue, they overlooked the fact that there remained some serious policy determinations to be made. It is here that it might be well to remember the admonition that total law enforcement is not the goal of a democratic society which acknowledges the need to accommodate interests other than crime prevention.⁹² This admonition applies to the definition of substantive crimes no less than to the formulation of rules governing the investigation and prosecution of crime.

91. Wechsler, Jones & Korn, *supra* note 77, at 572-73.

92. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157-58 (1954).