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WHY LADY ELDON SHOULD BE ACQUITTED: THE SOCIAL HARM IN ATTEMPTING THE IMPOSSIBLE

Thomas Weigend*

The difficult theoretical issue of whether criminal liability should be imposed for acts that fail to result in completed crimes only because of extrinsic circumstances has gained new practical significance in the context of traffic in drugs erroneously believed to be illegal. In this Article, Dr. Weigend examines the complex law of impossibility in criminal attempts, using as a starting point the recent Fifth Circuit decision in United States v. Oviedo. Dr. Weigend traces the development of the law of impossibility from its beginnings in the British system to its present form in the United States, and concludes with his own model, which he applies to a number of classical impossibility situations.

The law of impossibility in criminal attempts has long been a playground for legal scholars involved in ardent disputes over amusing hypothetical cases. The discussions appear to be almost exclusively concerned with the man who shoots at a tree stump believing it to be his enemy;¹ the professor who, for reasons beyond my comprehension, tries to steal someone's umbrella, but inadvertently grabs his own; and the immortal Lady Eldon, who conceals cheap English lace from the British customs officer because she believes it to be dutiable French lace.² Only occasionally would the buyer of the presumably stolen property force the criminal courts to apply the academically conceived doctrines of impossibility to real life cases.³

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1. The inventor of this hypothetical seems to be Baron Bramwell, who first discussed it in *R. v. M'Pherson*, 1 Dears & B.C.C. 197, 201 (Eng. 1857).

2. 1 WHARTON'S CRIMINAL LAW 304 n.9 (12th ed. 1932).

3. The most famous of these cases in the United States is *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906). The factual situation was similar in *Booth v. State*, 398 P.2d 863 (Okla. 1964); *People v. Rollino*, 37 Misc.2d 14, 233 N.Y.S.2d 580 (1962); *People v. Rojas*, 55 Cal 2d 252, 10 Cal. Rptr. 465, 358 P.2d 921 (1961); *Faustina v. Superior Court of Los Angeles County*, 174 Cal. App.2d 830, 345 P.2d 543 (1959); *Ex parte Magidson*, 32 Cal. App. 566, 163 P. 689 (1917). A recent English case on point is *Houghton v. Smith*, [1973] 3 All E.R. 1109. See also *R. v. Donnelly*, [1970] N.Z.L.R. 980.

Recently, however, the rough customs of the trade in illicit drugs have turned the "theorists' headache"⁴ into a very practical legal problem. The widespread practice of substituting cheap and innocuous substances for high-value illegal narcotics has, in several cases, created the "typical" impossibility situation. The accused will use, possess, or deal with what he believes to be a controlled substance but is in fact a harmless white powder.⁵ The courts have by no means proven less imaginative than the law professors before them in attacking the intricate legal problems presented by these facts. In fact, the United States Court of Appeals for the Fifth Circuit has, in *United States v. Oviedo*,⁶ undertaken to hew a new path through the thicket of factual, legal and numerous other impossibilities. This action merits respect, but the results demand careful analysis.

One purpose of this Article is to identify the exact position of the *Oviedo* court in relation to the vast number of competing impossibility theories. The source of the disagreement between different writers and courts is often hidden behind purely conceptual or linguistic arguments. This can be traced back to the lack of unanimity regarding the reasons and purposes for punishing attempts in general. This Article will offer an explanation (which is not entirely original) for the fact that the state imposes punishment, under certain circumstances, even if the actor fails in perpetrating the crime. This theory can be used by the jurist as a point of reference for the solution of the problem of attempting to do the impossible.

I. *Oviedo* IN CONTEXT

Defendant Oviedo offered to sell a pound of heroin to a federal undercover agent. After the substance had been delivered and submitted to a Marquis Reagent Field Test which showed a positive result, Oviedo was arrested and his residence searched. Two pounds of the same substance were found hidden in a television set. What so far had seemed a run-of-the-mill narcotics case suddenly changed into a

4. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20 (1968).

5. This or a similar situation formed the basis of the decisions in *United States v. Murray*, 527 F.2d 401 (5th Cir. 1976); *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976); *United States v. Marin*, 513 F.2d 974 (2d Cir. 1975); *United States v. Heng Awkak Roman*, 356 F. Supp. 434 (S.D.N.Y. 1973), *aff'd*, 484 F.2d 1271 (2d Cir. 1973); *United States v. Giles*, 7 CRIM. L. REP. (BNA) 2259 (U.S.A.F. Ct. Mil. Rev. 1970); *People v. Siu*, 126 Cal. App.2d 41, 271 P.2d 575 (1954).

6. 525 F.2d 881 (5th Cir. 1976). For comments on that case, see Note, 4 AM. J. OF CRIM. LAW 317 (1976); *Recent Development*, 13 HOUSTON L. REV. 641 (1976).

legal puzzle when chemical analysis determined that the white powder seized was not heroin. The substance was procaine hydrochloride, a harmless substance which also reacts positively to the field test performed.

Oviedo subsequently was tried for attempted distribution of heroin.⁷ The jury rejected Oviedo's protestations that he had known the true nature of the substance, and convicted him as charged. The court of appeals found no fault with the lower court's determination of the facts,⁸ but nevertheless reversed the conviction in a unanimous decision.

After discussion of the doctrines of factual and legal impossibility and of their contradictory and inconclusive application in recent federal cases, the *Oviedo* court abandoned the traditional tests and, instead, proclaimed a new one. For an attempt conviction, it is now necessary that "the objective acts performed, without any reliance on the accompanying *mens rea*, mark the defendant's conduct as criminal in nature."⁹

In accordance with that principle, the court examined the objective facts as they appeared from the record. Oviedo had told the agent that he meant to sell heroin, and had hidden two pounds of the substance actually delivered in his television set. The court regarded these facts as "ambivalent" and "consistent with a noncriminal enterprise"¹⁰ because their facially incriminating character was contradicted by the circumstance that the substance dealt with was not, in fact, heroin. According to the court, "[only] if the substance were heroin, . . . would [we] have a strong objective basis for the determination of criminal intent and conduct consistent and supportative [*sic*] of that intent."¹¹

It is not my intention at this point to quibble about Oviedo's acquittal, although the strength of the objective evidence against him creates doubts not only about the expediency but also about the internal logic of the court's decision. A strong argument could be

7. 21 U.S.C. § 846 (1972) provides:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

8. Oviedo's argument that there was insufficient evidence to establish that he thought the substance was heroin was explicitly rejected. *United States v. Oviedo*, 525 F.2d 881, 882 (5th Cir. 1976).

9. *Id.* at 885.

10. *Id.* at 885, 886.

11. *Id.* at 885.

made that the court misapplied its own test. They may have inadvertently created insurmountable barriers for future prosecutions of "false narcotics" cases by requiring, for an attempt conviction, objective facts of quality which would easily support a charge for the complete offense.¹² Perhaps the court had doubts about Oviedo's actual ignorance of the innocuous nature of the powder—doubts which were impossible to pronounce openly given the jury's unequivocal determination of the facts. Since these difficulties stem from the particular facts of the *Oviedo* case, they will be of no further interest to us here. It will be necessary to revert to them only insofar as they indicate problems typically connected with the impossibility test espoused by the Fifth Circuit.

Impossibility Doctrine before Oviedo

A brief survey of the law of impossibility as it existed prior to *Oviedo* will demonstrate that it was a most entangled kind of Gordian knot which the Fifth Circuit attempted to cut.¹³ Even the nomenclature varies, and seemingly stable concepts are guideposts of dubious reliability. Some authors devise neat distinctions between possible but thwarted, intrinsically impossible, extrinsically impossible, and legally impossible attempts.¹⁴ Others cast doubt on the heuristic value of such systematizing by asserting that, since every attempt must have been doomed to be a failure,¹⁵ no logical difference exists between the various categories of impossibility.¹⁶ Therefore it is concluded that impossibility should always¹⁷ be a valid defense to a prosecution for criminal attempt. Others feel it can never be a valid defense.¹⁸

12. *Id.*

13. The practical utility of the numerous efforts in building doctrines and distinguishing cases has justly been doubted. Kadish and Paulsen call the doctrine of impossibility "one of the biggest red herrings ever drawn across the path of the criminal law." S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 363 (3d ed. 1975).

14. Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. R. 962 (1930). Note, *Why Do Criminal Attempts Fail? A New Defense*, 70 YALE L. J. 160, 161 (1960).

15. Beale, *Criminal Attempts*, 16 HARV. L. REV. 491, 493 (1903).

16. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 589-91 (2d ed. 1960); *See also* United States v. Oviedo, 525 F.2d 881, 883 (5th Cir. 1976).

17. Bentil, *Criminal Attempt*, 118 SOLICITOR'S J. 710, 711 (1974); Haughton v. Smith, [1973] 3 All E.R. 1109, 1117 (Lord Hailsham), 1120-21 (Lord Reid), 1126 (Viscount Dilhorne).

18. English, *Did He Think It Would Do The Trick?* 1970 CRIM. L. REV. 15; Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COL. L. REV. 571, 573, 578 (1961); Curran, *Criminal and Non-Criminal Attempts*, 19 GEO. L.J. 185, 202, 316, 335 (1931). The MODEL PENAL CODE likewise abolishes the defense of impossibility: PROPOSED OFFICIAL DRAFT § 5.01(1)(a)(c) (1962). Its approach has been followed by a number of state codes. *See*,

In spite of the terminological confusion, widespread agreement seems to exist on the correct treatment of two types of cases which can appropriately be placed at the opposite ends of an imaginary impossibility scale. There are, first, the "empty pocket" cases, for which the following constellation is characteristic. The actor has done everything necessary to reach his purpose in the way prescribed by a criminal statute. However, unknown to him, the object of his criminal intention (the murderer's victim, the thief's or burglar's prospective loot) is not at the place where he expected it to be, so that the attempt fails. With the notable exception of the House of Lords,¹⁹ no one seems to have second thoughts about convicting the defendant under these circumstances.²⁰ In this Article, the attempter's (vain) defense in these cases will be referred to as "factual impossibility."

Within this class of cases, subtle distinctions sometimes have been made according to the degree of probability of the actor's success. Intrinsic or absolute impossibility was contrasted with extrinsic or relative impossibility,²¹ with the former occasionally being viewed as exonerating the defendant.²² This distinction was never applied consistently, and has tended to generate confusion rather than clarity. Moreover, Professor Hall has demonstrated its fallacy by showing that there can be no degrees of impossibility since one condition necessary for the actor's success is always "absolutely" absent.²³

The second group of relatively "clear" cases could be called "imaginary offenses."²⁴ That term stands for the empirically rare instances

e.g., Del. Code tit. 11, § 531 (1974); GA. CODE § 26-1002 (1977); ILL. REV. STAT. ch. 38, § 8-4(b) (1975); N.D. CENT. CODE § 12.1-06-01 (1977 Supp.); OHIO REV. CODE ANN. § 2923.02(B) (Page 1975); 18 PA. CONS. STAT. ANN. § 901(b) (Purdon) (1975).

19. In acquitting a defendant who had received stolen goods which had previously been recovered by the police and could therefore no longer be regarded as stolen, the House of Lords, in *Haughton v. Smith*, [1973] 3 All E.R. 1109, relied heavily on the century-old "empty pocket" decision of *R. v. Collins*, 9 Cox C.C. 497 (1864). In that case, the defendant had been acquitted—a result which was later overruled in England. See *R. v. Ring*, 17 Cox C.C. 491 [1892], *R. v. Brown*, 24 Q.B.D. 357 [1889]. The Court in *Smith* expressly reverts to the *Collins* doctrine, Viscount Dilhorne stating: "In my view, it matters not that the crime cannot be committed as a result of physical impossibility, *e.g.* the absence of the property he wants to steal, or of legal impossibility." *Haughton v. Smith*, 3 All E.R. at 1126.

20. *Gargan v. State*, 436 P.2d 968 (Alas. 1968) (empty receptacle); *People v. Lee Kong*, 95 Cal. 666, 30 P. 800 (1892); *People v. Fiegelman*, 33 Cal. App.2d 100, 91 P.2d 156 (1939) (empty pocket); *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902) (murder victim absent).

21. *Strahorn*, *supra* note 14; see also Note, *supra* note 14, at 161-63. For similar distinctions in French and German law, see J. HALL, *supra* note 16, at 589; H. JESCHECK, *LEHRBUCH DES STRAFRECHTS, ALLGEMEINER TEIL* 400 (2d ed. 1972).

22. *State v. Wilson*, 30 Conn. 500, 506-07 (1862).

23. J. HALL, *supra* note 14, at 589. See also G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 651 (2d ed. 1961).

24. Professor Ryu prefers the expression "illusory crime." Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U. L. REV. 1170, 1186 (1957). Most frequently, these cases are

in which the actor either believes that he violates a criminal prohibition which, in reality, does not exist,²⁵ or in which he wrongly expands the scope of an existing criminal statute to his disadvantage.²⁶ Among the various reasons given for the defendant's impunity in these cases, the most convincing seems to be that there is just no law under which he could possibly be convicted. Thus, the imposition of punishment would clearly contravene the principle of legality (*nulla poena sine lege*).²⁷

Oviedo, as well as most of the other cases which have puzzled courts and legal scholars for at least the last one hundred years,²⁸ does not fit neatly into either of the two categories outlined above. On the one hand, the obstacle to successful completion of the intended act of selling narcotics did not merely lie in the circumstance that the object of the transaction was not at the place where *Oviedo* believed it to be. Quite the contrary, *Oviedo* concluded the deal with the substance in his possession in precisely the way he had planned to. On the other hand, it cannot be said that *Oviedo* invented a statute prohibiting the sale of procaine hydrochloride, or wrongly construed the relevant provision of the United States Code as forbidding distribution of that substance. Rather convincing analogies to both classes of cases can be drawn.²⁹ However, the frequently recurring

subsumed under the general doctrine of "legal impossibility." See 1 BISHOP ON CRIMINAL LAW § 753 (9th ed. 1923); G. WILLIAMS, *supra* note 23, at 633-34; J. HALL, *supra* note 14, at 586. I would prefer to avoid possible confusion by reserving the latter expression for the controversial "missing element" cases treated below. See also Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 669 (1969).

25. An example would be the case of a doctor who performs a legal abortion thinking that an old statute prohibiting all abortions is still valid. See also the variation on the *Lady Eldon* hypothetical by S. KADISH & M. PAULSEN, *supra* note 13, at 365-66.

26. This happened in the much-mooted case of *Wilson v. State*, 85 Miss. 687, 38 So. 46 (1905). There the defendant, without authorization, changed the figures on a check, apparently in the mistaken belief that he would thereby fulfill the statutory requirement of altering "a material part of the document" and thus become liable for forgery. In fact, however, only the words appearing on the check are regarded as "material part," so that *Wilson's* acquittal was the correct decision.

27. THE LAW COMMISSION, WORKING PAPER NO. 50. INCHOATE OFFENCES: CONSPIRACY, ATTEMPT AND INCITEMENT 91 (1973); W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 442 (1972); G. WILLIAMS, *supra* note 23, at 633-34; J. HALL, *supra* note 16, at 586.

28. The earliest cases, dating back to the beginning of the 19th century, concern attempts to procure an abortion on a nonpregnant woman: *R. v. Phillips*, 3 Campbell 73, 76 (1811); *R. v. Scudder*, 3 Carrington & Payne 605, 607 (1828). In neither case, however, was the question of attempt expressly raised. The earliest American cases of "legal impossibility" seem to be *People v. Gardner*, 144 N.Y. 119, 38 N.E. 1003 (1894); *Marley v. State*, 58 N.J.L. 207, 33 A. 208 (1895), and *Commonwealth v. Reese*, 16 Ky. L.R. 493 (1895).

29. While Professor Hall argues that the "legal impossibility" cases cannot be logically distinguished from the "empty pocket" decisions, J. HALL, *supra* note 16, at 590-91, it is more

Oviedo and *People v. Jaffe*³⁰ situations have their own distinct and characteristic features.

Oviedo, *Jaffe* and *Lady Eldon*³¹ all aimed at violating an existing provision of the criminal law. Their actions typically are neither foiled nor interrupted. However, one additional circumstance which is part of the legal definition of the offense is, without the actor's knowledge, missing in fact.³² Thus, *Lady Eldon* could well succeed in transporting her newly acquired lace into the country without paying duty, but she was not able to smuggle *dutiable* lace because she did not possess any. Nothing prevented *Jaffe* from buying the twenty yards of cloth offered to him at a low price, but under no circumstances could he, through that transaction, acquire *stolen* cloth. Nor could Oviedo succeed in dealing with a *controlled* substance even though he would have been perfectly capable of completing the sale of the powder in his possession. These cases are characterized by a discrepancy between the probability of factual and of legal "success" of the individual's action. While the completion of his intended course of action is quite likely, fulfilling the requirements of the criminal statute which comes nearest to covering the defendant's behavior is impossible. The term traditionally used to describe the situation, legal impossibility, is therefore not inappropriate. It is misleading insofar as it may convey the wrong impression that not only the actor's success but also his criminal liability is "legally" ruled out.

Whether legal impossibility, as we have now defined it, should in fact provide a valid defense against an attempt prosecution is, however, far from clear. It has been debated with considerable verve long before Oviedo's aborted narcotics deal induced the Fifth Circuit to enter into the discussion. Originally it was thought that a purely conceptual analysis could lead to the "logical," and therefore correct, solution to the problem. A criminal attempt was defined as the proximate step toward the commission of an offense. In order to be

frequently asserted that no difference should be made between "imaginary offenses" and "legal impossibility." In both cases a person cannot be guilty of criminal attempt if "his intention, carried to its full realization, would not have resulted in consequences prohibited by the criminal law." Skilton, *The Mental Element in a Criminal Attempt*, 3 U. PITT. L. REV. 18, 181-82 (1937). See *State v. Taylor*, 345 Mo. 325, 330, 133 S.W.2d 336, 340 (1939); Smith, *Two Problems in Criminal Attempts Re-Examined, Part II*, 1962. CRIM. L. REV. 212, 222.

30. *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906), stands for the situation in which defendant receives stolen goods previously repossessed by their owner.

31. See text accompanying note 2 *supra*.

32. German legal doctrine has coined, for this type of case, the illustrative expression *Mangel am Tatbestand* ("lack of meeting the definition of the offense"). See K. BINDING, 3 DIE NORMEN UND IHRE ÜBERTRETUNG 433-37 (1918); A. GRAF ZU DOHNA, DER AUFBAU DER VERBRECHENSLEHRE 56 (4th ed. 1950).

criminally liable, the defendant had to do something which, if completed, would form the *actus reus* of a recognized crime. By reverse formulation, it followed that "if then the physical act intended is not a crime, the attempt to do it cannot be criminal."³³

In view of such convincing deduction, the legal theorists of the day could hardly be impressed by the earlier statement of the New York Court of Appeals that, in a case of legal impossibility, the defendant's guilt was just as great as if he had actually succeeded in his purpose.³⁴ Yet, the early approach to the puzzle of legal impossibility was less convincing than it seemed at first sight. It soon became clear that it was entirely dependent upon the acceptance of the attempt concept which formed its basis. Criminal attempt was seen as a diminutive version of the complete offense, sharing all of the latter's elements with the exception of the actual occurrence of harm.³⁵ The acquittal of the individual who attempted something which was not exactly on all fours with the statutory description of the completed crime was thus presupposed in the definition of attempt.

That close connection between an unquestioned image of what an attempt should "look like" and the decision of the legal impossibility problem becomes particularly evident in the writings of Professor J.C. Smith. He defends the decision in *Jaffe* as well as a number of similar English cases against all scholarly criticism, asserting that *Jaffe* had accomplished everything he intended to do and could, therefore, not have committed an attempt.³⁶ To hold otherwise would mean to defeat the policy of the law which had "specifically declared" that the act as actually done should not constitute an *actus reus*.³⁷ In a later article, Smith expressly stated his reason why a "successful" act can never be regarded as a criminal attempt:

33. Beale, *supra* note 15, at 494. Courts frequently followed that line of reasoning: *State v. Taylor*, 345 Mo. 325, 330, 133 S.W.2d 336, 340 (1939); *People v. Teal*, 196 N.Y. 372, 377, 89 N.E. 1086, 1088 (1909); *People v. Jaffe*, 185 N.Y. 497, 500, 78 N.E. 169, 170 (1906). In modern legal literature, it can be found in Perkins, *Criminal Attempt and Related Problems*, 2 U.C.L.A. L. REV. 319, 329 (1955). See Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 448 (1957): "When a man has achieved all the consequences which he set out to achieve and those consequences do not, in the existing circumstances, amount to an *actus reus*, it is in accordance both with principle and authority that that man should be held not guilty of any crime."

34. *People v. Gardner*, 144 N.Y. 119, 124, 38 N.E. 1003, 1003 (1894).

35. Beale, *supra* note 15, at 491, calls the criminal attempt "a mere shadow of the attempted offense, deriving its criminal nature entirely from the substantive offense to which it is subsidiary." Similar concepts were held by Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 838-39 (1928); J. AUSTIN, 1 LECTURES ON JURISPRUDENCE 440 (5th ed. 1885); O. HOLMES, THE COMMON LAW 65 (1881, 39th printing 1926).

36. Smith, *supra* note 33, at 437.

37. *Id.* at 447.

The law is to some extent circumscribed by the nature of the concept of an attempt. It is thought that where a man succeeds in attaining an objective and the attained objective, in the existing circumstances, is not criminal, it is contrary to the nature of this concept . . . to say that he is guilty of an attempt to commit a crime.³⁸

Critics have remarked that Smith fails to apply his attempt concept consistently,³⁹ and that his theory lets conviction depend not upon the individual's *mens rea*, but on his ulterior motives and feelings.⁴⁰ However, it is his method rather than the conclusions he draws which makes Professor Smith's views so vulnerable to criticism. He uses a naturalistic, pre-legal model of attempt and overlooks the fact that the attempt concept has a teleological role to play within the normative system of the criminal law. Because it is void of specifically legal content, Smith's construct stands defenseless against any new wave in penal policy.⁴¹ If, for instance, the emphasis is placed on the dangerousness of the attempter rather than on the dangerousness of the attempt, the differentiation between successful and unsuccessful enterprises, which is decisive in Smith's imagery, becomes hopelessly irrelevant.⁴²

The majority of the advocates for acquittal in the legal impossibility cases have gone beyond the stage of purely deductive argument. They have tried to demonstrate that, in the *Jaffe* and *Oviedo* situations, one essential requirement for criminal liability is missing. With about equal frequency, either lack of *actus reus* or absence of *mens rea* is asserted.

Absence of Actus Reus

The *actus reus* argument has been reduced to its simplest form by Professor Perkins. If a criminal statute requires the presence of certain attendant circumstances in addition to the forbidden act itself, the objective existence of these circumstances at the time of the de-

38. Smith, *supra* note 29, at 218.

39. Williams, *Criminal Attempts—A Reply*, 1962 CRIM. L. REV. 300, 305-06. For a different view of what constitutes a "complete act," see Elkind, *supra* note 4, at 27.

40. Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1014-16 (1967).

41. See the condemnation of the use of preconceived notions in attempt law by Ryu, *supra* note 24, at 1175.

42. Hughes, *supra* note 40, at 1014. For similar criticism of the exclusive emphasis put on the "success" of the act by certain German theorists, see R. MAURACH, DEUTSCHES STRAFRECHT; ALL-GEMEINER TEIL 507 (4th ed. 1971).

fendant's action must be proved to establish *actus reus*. Therefore, if the actor only imagines the circumstances to exist, he can be convicted neither of the complete offense nor of attempt.⁴³ This doctrine, which has dominated the reasoning of many courts since *Jaffe*,⁴⁴ was recently used by the United States Court of Appeals for the Third Circuit to reverse the conviction of Father Berrigan for an attempt to smuggle letters out of a federal prison.⁴⁵ In that case, the pertinent regulations⁴⁶ made it a crime to send anything into or out of a federal prison "without the knowledge and consent of the warden." It was not disputed that Berrigan had sent several letters out of the institution where he was detained. However, prison authorities had been informed of these activities and purposely refrained from intercepting the letters. The court reasoned that since the government could not prove lack of the warden's knowledge and consent, it had failed to establish the complete *actus reus* of the offense. The court felt that it would be illicit, without express statutory authorization, to turn an objective element of the offense into a merely subjective one in order to reach a conviction for attempt.⁴⁷

Had Oviedo come before the *Berrigan* court, he would not have had a difficult time winning his case. Because the objective circumstance required by the statute, namely that the substance dealt with be a controlled substance, was blatantly absent, Oviedo could,

43. R. PERKINS, CRIMINAL LAW 567-68 (2d ed. 1969).

44. "It is . . . difficult to perceive how there can be an attempt to receive stolen goods, knowing them to have been stolen, when they have not been stolen in fact." 185 N.Y. 497, 500, 78 N.E. 169, 169 (1906). The analysis of the *Jaffe* court was complicated by the fact that the "knowledge" requirement was expressly written into the relevant statute. It is, however, an implicit element of any offense requiring intent or knowledge that the defendant "know" all material parts of the *actus reus*.

The same reasoning recently was applied in *People v. Tinskey*, 394 Mich. 108, 228 N.W.2d 782 (1975), where a conviction for conspiracy to perform an abortion on a woman wrongly believed to be pregnant was overturned on the ground that the relevant statute made pregnancy of the woman a necessary element of the offense.

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

46. *See* 18 U.S.C. § 1791 (1970), which provides:

Whoever, contrary to any rule or regulation promulgated by the Attorney General, introduces or attempts to introduce into or upon the grounds of any Federal penal or correctional institution or takes or attempts to take or send therefrom anything whatsoever, shall be imprisoned not more than ten years.

28 C.F.R. § 6.1 (1976) provides:

The introduction or attempt to introduce into or upon the grounds of any Federal penal or correctional institution or the taking or attempt to take or send therefrom anything whatsoever without the knowledge and consent of the warden or superintendent of such Federal penal or correctional institution is prohibited.

47. *United States v. Berrigan*, 482 F.2d 171, 189 (3rd Cir. 1973).

under the *Berrigan* analysis, never have been convicted of attempt. Yet the *Oviedo* court refused to take such an easy road toward acquittal.⁴⁸

The *Berrigan* argument, if carried to its logical conclusion, would abolish all liability for attempt. The *actus reus* of an offense consists—insofar as the *Berrigan* court follows common understanding⁴⁹—of the defendant's act, the attending circumstances, and the consequences of the act. If it were necessary to prove the complete *actus reus* in order to obtain an attempt conviction, the prosecution would also have to show that the result of the act occurred—that the murder victim died, that money was actually obtained by defendant's false pretenses, or that the fire lit by the arsonist in fact led to the destruction of the house. No one, of course, demands such proof. But the *Berrigan* theory is unable to furnish an explanation why we can dispense with one essential part of the *actus reus*—the consequence of the act—and not with another—the attending circumstances.⁵⁰ Such generalized differentiation would be difficult to justify. For example, if the abortionist is not relieved from attempt liability because for some reason beyond his control, the fetus survives the illegal operation, why then should he go free because it turns out that the woman he operated on was not pregnant? And why should *Oviedo* be convicted of an attempt to sell narcotics if he offered heroin to a person who later abstained from the deal, but not if he concluded that sale but an innocuous substance had been substituted for the heroin? Even if a convincing answer to these queries could be found, neither Professor Perkins nor the *Berrigan* court provides us with it.

Their theory suffers from yet another flaw which affects its practical usefulness. By virtue of its total dependence on the formulation of the statute, it leads to fortuitous and unpredictable results. Professor Perkins himself points to the most striking instances of close and largely arbitrary distinctions between analogous cases. For example, the outcome of a trial for attempted discharge of an unloaded gun hinges on the question whether the legislator happened to write the word "loaded" into the statute.⁵¹ Furthermore, the introduction of each new element into the definition of an offense would open another

48. The Court explicitly rejected *Berrigan* as a valid approach. Its reasoning, however, only addressed the Third Circuit's distinction between intended and desired consequences. *United States v. Oviedo*, 525 F.2d 881, 884 (5th Cir. 1976).

49. See *United States v. Berrigan*, 482 F.2d 171, 187 (3d Cir. 1973).

50. J. HALL, *supra* note 16, at 596; Skilton, *supra* note 29, at 186-87.

51. R. PERKINS, *supra* note 43, at 567.

loophole for the unsuccessful attempter to escape conviction. Such an insight might lead a legislature to the undesirable conclusion that it ought to write its penal laws as broadly and with as little precision as possible.

It should therefore be sufficient for an attempt conviction that the *actus reus* of the crime be complete in the mind of the defendant. The courts usurp the proper function of the legislature when they "subjectivize" the attending circumstances for the purposes of an attempt prosecution.⁵² Professor Enker forcefully asserts that it is not the court's business to second-guess the legislature's decisions. If the statute requires objective existence of circumstances, judges have to accept that as the expression of the lawgiver's will. They are not authorized to adjust the words of the law to their own notions of fairness and good penal policy.⁵³

Two answers can be given to that argument. First, it assumes that "the legislature is perfectly capable of deciding in advance whether or not to require the particular element."⁵⁴ The capability of the legislature shall not be put into doubt. However, consider what monstrous and unwieldy grammatical constructions would be necessary to turn every objective element of the *actus reus* into a requirement of mere belief on the part of the actor!⁵⁵ Enker's proposal would also tend to force upon the legislature an all-or-nothing choice which would not always be adequate. If the circumstance in question is phrased in objective terms, the defendant goes free when the element is missing. If belief only is required, the offender is guilty of the completed offense even if no actual harm occurs. The possibility of an attempt punishment, which could provide a middle ground for those cases in which the defendant's evil intentions go further than his actions can reach, would be foreclosed.

Moreover, Professor Enker rests his argument on the assumption that the existing penal statutes, insofar as they contain objective elements, reflect the conscious effort of their originators to exclude liability, even for attempt, in all cases in which these elements are not actually present.⁵⁶ I seriously doubt that legislators spend much time considering the repercussions of their decisions in phrasing sub-

52. Enker, *supra* note 24, at 684-87.

53. *Id.* at 687.

54. *Id.* at 685.

55. Even a statute worded "safely" in subjective terms ("believing them to be stolen goods" as in Theft Act 1968, § .22(1)) does not always prevent a court from acquitting the defendant if the goods are not, in fact, stolen. *Haughton v. Smith*, [1973] 3 All E.R. 1109, 1112.

56. Enker, *supra* note 24, at 685-86.

stantive offenses on the law of legal impossibility. Even if they did, Enker's argument would only hold true if legislatures could have relied on an attempt doctrine which unequivocally provided for acquittal if an objective element of the definition of the crime was missing. Yet in spite of the widely shared recognition of *Jaffe* as good law, such consensus never existed.⁵⁷ And as far as recent codifications can serve to provide retrospective insight into the working of legislative minds, they tend to disprove Enker's point. The great majority of the new state codes have explicitly adopted the Model Penal Code's position that, in a trial for attempt, the defendant shall be judged according to the circumstances as he imagined them to be.⁵⁸ This, of course, does not exclude the possibility that a legislature may expressly state the requirement that a given element of an offense must in fact be present, even for liability for attempt.⁵⁹ However, if such a provision is lacking, one should be able to assume that the legislator regarded the attempter's belief in the existence of the attending circumstances as sufficient for conviction.⁶⁰

While we are engaged in such discussion of legislative power and intent, we may miss a broader and more important point. "The person who attempts the impossible," one commentator asserts, "may well be doing something perfectly lawful and it cannot be right to punish him for that."⁶¹ Doing so "would be to convict a man for his sinful thoughts, where all his actions, without those thoughts, would leave him guiltless in the eyes of the law."⁶² That line of reasoning has long been decried as faulty by the majority of legal writers. It is not true, these scholars maintain, that Lady Eldon, *Jaffe*, *Oviedo* and their like are punished for evil thoughts alone. Quite the contrary, they have done everything which they believe necessary to carry out their criminal plans.⁶³ Judicial authority for that position goes as far back as one of the first attempt cases ever decided under common law, *R. v. Scofield*, where Lord Mansfield had declared:

57. See the cases collected by Wechsler, Jones & Korn, *supra* note 18, at 579-82.

58. See note 18, *supra*.

59. That can also be done by enacting one "objective" and one "subjective" provision with different penalties, as seems to have been the case in *People v. Teal*, 196 N.Y. 372, 379, 89 N.E. 1086, 1088-89 (1909).

60. G. WILLIAMS, *supra* note 23, at 649, 651.

61. *Reformulation of Criminal Attempts*, 37 MOD. L. REV. 329, 334-35 (1974).

62. Turner, J., in *R. v. Donnelly*, [1970] N.Z.L.R. 980, 992.

63. This point has been demonstrated most convincingly by Professor Clanville Williams. G. WILLIAMS, *supra* note 23, at 642-44. See also S. KADISH & M. PAULSEN, *supra* note 13, at 364; J. SALMOND, *JURISPRUDENCE* 402 (7th ed. 1924); BISHOP, *supra* note 24, § 729.

When an act is done, the law judges, not only of the act alone, but of the intent with which it is done: and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.⁶⁴

The effect of this statement, as it has generally been understood, is the imposition of a modified *actus reus* standard for attempt convictions. There must certainly be proof of *some* act, but the act need not be unlawful in itself.

What if the revered precedent of *Scotfield* contained the original sin of attempt law? How can it be justified that, in the attempt situation, we dispense with the requirement of a wrongful act and impose punishment even though the defendant has shown perfect external conformity to society's rules of conduct?⁶⁵ Two eminent scholars have critically examined that question, and have arrived at the conclusion that *Scotfield's* deviation from usual *actus reus* doctrine is indeed untenable.⁶⁶ They argue that the subjectivism exemplified by the *Scotfield* doctrine is irreconcilable with the principle of legality (*nulla poena sine lege*).⁶⁷ Moreover, Professor Enker stresses the indispensibility of the *actus reus* requirement as the individual's most important protection against unwarranted state interference. "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."⁶⁸ If we allow Jaffe and Oviedo to be convicted, according to Enker's argument, we permit the prosecution of anyone trading in cloth or white powder on the mere suspicion that he may conduct his business with unlawful thoughts in mind.⁶⁹

Even if, in some of Professor's Enker's examples, the dangers of unjustified prosecution seem only remotely connected to the reality of law enforcement, his strong concern for the protection of the individual against unnecessary acts of official control and oppression deserves support. Yet, despite my unreserved sympathies for his cause, I am unable to agree with the inversion of an old doctrine, which, in Professor Enker's understanding, would read "*mens non facit reum nisi actus sit reus.*"

64. *R. v. Scotfield*, Cald. 397, 403 (1784).

65. See O. HOLMES, *supra* note 35, at 63.

66. Enker, *supra* note 24, at 688-89; Ryu, *supra* note 24, at 1188-89.

67. Enker, *supra* note 24, at 670, 676; Ryu, *supra* note 24, at 1189.

68. Enker, *supra* note 24, at 688.

69. *Id.* at 692.

The demands of the principle of legality, which calls for a formal statement of the limits between permissible and criminal conduct, could be satisfied by a general statutory provision excluding the defense of legal impossibility. To read into *nulla poena sine lege* the requirement of a particular amount of *actus reus* and *mens rea* in each definition of an offense would be an illicit extension of that basically formal principle.⁷⁰

Professor Enker's argument, however, cuts deeper. And it is but a feeble counter to point out that possible dangers to civil liberties must be weighed against the possible loss of public credibility which the criminal law incurs if it demands acquittal in cases in which the actor's moral blameworthiness is beyond question. But Professor Enker's proposition that only conduct which is wrongful *per se* should be made the object of penal legislation is difficult to maintain for another reason. Existing criminal law is by no means built upon so rigid a principle. A considerable number of instances can be named in which the offender's act, viewed by itself, is harmless, but is nevertheless punishable if a particular accompanying state of mind on his part can be proved. The law of conspiracy may be regarded as being too close to the attempt situation to count as evidence of this principle. However, there are other examples. It is generally unobjectionable, and often highly desirable, to enter into a room,⁷¹ to make a telephone call,⁷² to stand upon the sidewalk,⁷³ to pay money to a party in a lawsuit,⁷⁴ to travel⁷⁵ or to transport a woman across state borders.⁷⁶ Yet all these activities are punishable if done with the "proper" criminal intent.⁷⁷ The law of criminal omissions is another con-

70. See H. JESCHECK, *supra* note 21, at 98-99; W. LAFAVE & A. SCOTT, *supra* note 27, at 83-88. It is true, as Enker, *supra* note 24, at 670, points out, that the principle of legality also functions as a safeguard against arbitrariness by prosecutors and juries. While that is one purpose of that principle, it is not its substance. It therefore would be methodologically incorrect to invoke *nulla poena sine lege* whenever the danger of arbitrariness appears within the system of criminal justice.

71. N.J. STAT. ANN. § 2A:94-1 (1975) (breaking and entering or entering).

72. ILL. REV. STAT. ch. 38, § 26-1(2) (1975) (disorderly conduct).

73. TENN. CODE ANN. § 39-1210 (1975) (loitering with intent to disturb school).

74. ILL. REV. STAT. ch. 38, § 32-4(b) (1975) (communicating with jurors and witnesses).

75. 18 U.S.C. § 1073 (1970) (flight to avoid prosecution or giving testimony). See Professor Enker's critique of a similar federal statute, Enker, *supra* note 24, at 690 n. 52. While I would agree that such provisions may reveal poor draftsmanship, I would not doubt their validity.

76. 18 U.S.C. § 2421 (1970) (White Slave traffic).

77. A constitutional challenge against a New Jersey statute making it an offense to enter a school building with intent of disrupting classes was rejected in *State v. Young*, 57 N.J. 240, 255-58, 271 A.2d 569, 576-78 (1970). Structurally similar statutes were cited in *R. v. Scofield*, Cald. 397, 402 (1784).

cededly atypical example—if there exists a legal duty to act, the offender may be peacefully asleep and yet thereby incur criminal liability.⁷⁸

In sum, the problem with Professor Enker's argument is that it proves too much.⁷⁹ Exempting from the reach of the criminal law any activity which is not harmful on its face would affect not only attempt law, but would also outlaw a recognized legislative technique in defining substantive crimes. It may well be desirable to restrict the criminalization of outwardly neutral behavior, and such change could in many instances be brought about by a mere rephrasing of the statutes in question. However, it is hardly possible to deduce from present American law a principle prohibiting punishment of innocuous conduct coupled with a forbidden intent.

Lack of Mens Rea

Although the issues presented above contain more than adequate challenge for a lawyer's mind, the traditional battleground for jurists who discuss the problem of legal impossibility has not primarily been the field of *actus reus*, but rather the question of *mens rea*. The dispute was triggered by the thesis that, in the impossibility situation, the actor harbors two conflicting intentions in his mind.⁸⁰ Applied to the *Oviedo* case, this theory would maintain that, while Oviedo intends to do the criminal act of selling heroin, he also, in a narrower sense, intends the noncriminal act of selling procaine hydrochloride. While modern writers altogether discard that analytical distinction as being at variance with ordinary language,⁸¹ it has played a decisive role in shaping earlier approaches to the impossibility problem.

78. Enker, *supra* n.24, at 673 n.20, as well as Ryu, *supra* note 24, at 1196, acknowledge that crimes of omission are "exceptional." They do not explain adequately why the law can dispense with the *actus reus* requirement in these cases. It cannot be denied that criminal omissions do contain an objective element, *viz.* the relationship of duty between the offender and the victim. But that relationship bears only a faint resemblance to the "unique" *actus reus* of crimes of commission. That becomes particularly evident in those cases in which the duty to act itself is created by statute only. See W. LA FAVE & A. SCOTT, *supra* note 27, at 184. Here, the omitting defendant is criminally liable only because the law confers on him the responsibility for avoiding certain results.

79. Buxton, *The Working Paper on Inchoate Offenses: (1) Incitement and Attempt*, 1973 CRIM. L. REP. (BNA) 656, 670, suggests that an argument like Professor Enker's would apply not only to the legally impossible, but also to all unsuccessful attempts. Yet, the latter could be distinguished insofar as they at least carry the appearance of harmfulness.

80. This insight was first formulated by Beale, *supra* note 15, at 493.

81. S. KADISH & M. PAULSEN, *supra* note 13, at 363; W. LA FAVE & A. SCOTT, *supra* note 27, at 440; Hughes, *supra* note 40, at 1012. See also *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S.

Scholars differed mainly in the consequences they drew from the alleged existence of inconsistent intentions. While some writers found it sufficient for attempt liability that one of the intentions was directed at violating a criminal statute,⁸² and others preferred a case by case approach which would take the policy of the statute into account,⁸³ several distinguished authors followed a different approach. They asserted that the "natural" intention of selling the innocuous powder at hand, or, in Lady Eldon's case, of importing the non-dutiable lace in her possession, should be given priority over the actor's wish to violate the law. Since the former intention was not directed at a forbidden act, they concluded that Lady Eldon, Jaffe and, consequently, Oviedo would have to be acquitted.⁸⁴ This theory, which has recently come under heavy attack, faces the crucial task of explaining why one intention is so important that it clearly overrides the other.

The charges that not much has been done by its proponents to meet that challenge are not unjustified.⁸⁵ Professor Perkins rests his distinction between "primary" and "secondary" intent on an analogy taken from the law of sales.⁸⁶ Yet, he fails to demonstrate convincingly wherein the similarity lies between selling chattel to a wrongly identified customer and shooting at a tree stump believing it to be one's enemy.⁸⁷ Professor Keedy, who draws a distinction between (legally relevant) "intent" and (irrelevant) "motive, desire and expectation,"⁸⁸ cites a number of authorities.⁸⁹ A closer examination of these writers' opinions makes it appear doubtful that they would lend

978 (1974). In spite of all criticism, the double-intent-doctrine may still have some explanatory function. It is most questionable, however, whether it can supply valid solutions to the legal problems involved.

82. Hitchler, *Criminal Attempts*, 43 DICK. L. REV. 211, 213 (1939); Sayre, *supra* note 35, at 849.

83. Arnold, *Criminal Attempts—The Rise and Fall on an Abstraction*, 40 YALE L.J. 53, 70 (1930).

84. R. PERKINS, *supra* note 43, at 565; Beale, *supra* note 15, at 493-94; Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 466-67 (1954); Perkins, *supra* note 33, at 331; Skilton, *supra* note 29, at 187-88. Their approach has been followed in *United States v. Berrigan*, 482 F.2d 171, 188 (3d Cir. 1973).

85. W. LA FAVE & A. SCOTT, *supra* note 27, at 440, states that "no arguments in support of that curious position have been offered." See also Hughes, *supra* note 40, at 1012.

86. R. PERKINS, *supra* note 43, at 565.

87. See the criticism of Professor Perkins' views by S. KADISH & M. PAULSEN, *supra* note 13, at 364-65. Moreover, the analogy to contract law leads to curious results. It makes criminal liability depend on the contingency of whether the actor deals with an object present, or whether he makes his contract with the victim in writing. Perkins, *supra* note 33, at 332.

88. Keedy, *supra* note 84, at 466.

89. *Id.* at n.18.

support to Keedy's views.⁹⁰ The roots of his position can, however, be traced back to the particular theory of act, will and intent developed by John Austin.⁹¹

Austin, writing in the Utilitarian tradition, defined a human act as a bodily movement which immediately follows our desires.⁹² Only acts in such a narrow sense can be willed; the consequences of the act can only be expected, or, in Austin's parlance, intended.⁹³ Under such a minimalistic concept of what constitutes an act, Professor Keedy's theory would hold true. Because the actor's will relates exclusively to his bodily movements, we can hold Oviedo responsible only for willing the sale of white powder, and Lady Eldon for wanting to import cheap English lace. The further (criminal) consequences which they have imagined degenerate to mere intentions in the Austinian sense, or to "motives, desires and expectations" in Keedy's usage.

Whatever the merits of Austin's distinction for philosophical analysis, it has no place in a rational system of criminal law.⁹⁴ Its shortcomings are manifold. It is not capable of either explaining liability for omissions or for crimes of negligence,⁹⁵ or of suggesting an adequate solution for the mistake-of-fact situation.⁹⁶ Lastly, it seems

90. See G. KEETON, *THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE* 209 (2d ed. 1949): "An intention may relate either to the act or to its consequences, or to both"; F. POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 149 (1896): "We can use the extension of will to natural and intended external consequences as a mere harmless convenience of language and of compendious thinking"; W. MARKBY, *ELEMENTS OF LAW* 116 (4th ed. 1889): "When the doer of an act adverts to a consequence of his act and desires it to follow, he is said to intend that consequence"; J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 86 (1823, repr. 1907): "The intention or will may regard either of two objects: 1. The act itself; or, 2. Its consequences".

Inssofar as these writers regard the consequences of one's act as an object of the intent, their position cannot easily be reconciled with Professor Keedy's. In their view, Oviedo's and Lady Eldon's acts were intentional, while their consequences were unintentional. (Oviedo intended the act of selling the white powder in his possession, but not its consequence, the sale of procaine hydrochloride.) Thus, Bentham would not go along with Keedy's conclusion that the actors in these examples had not intended the forbidden consequences they had imagined, but rather the harmless results which actually ensued.

91. J. AUSTIN, *supra* note 35, at 418-24. The "missing link" between Keedy and Austin seems to be Professor Beale. While Keedy relies on Beale's analysis, the latter (Beale, *supra* note 15, at 493-95) is most probably influenced by Austin. Austin's views have been adopted in America by O.W. Holmes. See O. HOLMES, *supra* note 35, at 54.

92. J. AUSTIN, *supra* note 35, at 419. See J. BENTHAM, *supra* note 90, at 72-73.

93. Austin's usage of "intention" is confusing, but he makes the meaning of the term quite clear: "When I will an act, I may expect, contemplate, or intend some given event, as a certain or contingent consequence of the act which I will." J. AUSTIN, *supra* note 35, at 421.

94. With his radical exclusion of all consequences from the act concept, Austin departs from Bentham and stands almost alone, even among his contemporaries. See note 90 *supra*. See also note 16 *supra*, at 178-79; J. SALMOND, *supra* note 63, at 383-85.

95. J. HALL, *supra* note 16, at 174-76.

96. S. KADISH & M. PAULSEN, *supra* note 13, at 363-64.

incongruent with the modern criminal law's emphasis on man's goal-directed conduct and with its overriding aim of preventing harmful consequences rather than sinful acts.⁹⁷ Under a wider definition of the criminal act, which would at least include the immediate consequences of the actor's bodily movements, Professor Keedy's solution of the double intent problem is no longer defensible. The actor's will has to be thought of as comprising all parts of the act; it would, therefore, extend to the consequences as the actor imagines them to flow from his movements. Under a modern view of what constitutes an act, Oviedo would not have fared well if he had protested that he lacked the requisite *mens rea* for an attempt to sell narcotics.

Insufficient Evidence to Prove Mens Rea

While Oviedo could not successfully argue (in the light of the lower court's finding of facts) that he acted without *mens rea*, he contrived to persuade the court of appeals that the evidence for establishing his criminal intent was inherently insufficient.⁹⁸ This statement requires some elaboration.

As long as the law of impossibility was generally discussed in the form of hypotheticals, demonstrating the evil intention of the actor presented no major problem. State of mind simply could be treated as a fact. That the thievish professor "thought" the umbrella belonged to someone else, or that Lady Eldon "believed" the lace to be of French origin, could be assumed and was subject neither to proof nor to disproof. As soon as the issue appeared in "real life" cases, however, the question of how to find reliable evidence for the defendant's imagination gained crucial importance. All cases of the *Jaffe* and *Oviedo* type have one thing in common: the prosecutor is unable to produce a tangible piece of evidence, such as stolen cloth in *Jaffe*, or heroin in *Oviedo*, which would cast light on the defendant's probable interpretation of his action. It is permissible to infer, if circumstances pointing to the contrary conclusion are lacking, that a person selling heroin knows that the substance actually is heroin. However, the fact

97. J. HALL, *supra* note 16, at 178-79. See *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N.E. 770 (1897).

98. It appears somewhat contradictory that the court founded its decision on the insufficiency of the evidence although it had declared that it was legally prevented from putting in to doubt the trial court's findings as to the defendant's *mens rea*. *United States v. Oviedo*, 525 F.2d 881, 882 (5th Cir. 1976). The court tried to explain that inconsistency by saying that it reversed Oviedo's conviction "not because of any doubt of the sufficiency of evidence [regarding intent], but because of the inherent dangers such a precedent would pose in the future." *Id.* at 884.

that someone deals in white powder does not provide any indication whatsoever that he might think it is heroin.⁹⁹

The transaction, viewed by itself, usually offers no clues as to the defendant's actual state of mind. Incriminating statements made by the defendant himself often constitute the only evidence against him. Such confessions traditionally have been regarded as too unreliable a basis on which to build a conviction.¹⁰⁰ Also, confessions in the impossibility situation suffer from the additional weakness that they can never be reliably corroborated. Even if the actor's objectively observable acts can be shown to be consistent with his alleged purpose, they regain a completely innocent meaning when the interpretation given to them by the defendant is removed.¹⁰¹ The matter becomes even more dangerous if no credible confession by the actor is available. The court is then left completely to speculation and surmise based on indirect evidence of dubious value, with all the related dangers of arbitrariness and discrimination extant.¹⁰² Under such circumstances, it would be of little value to the individual that, as one commentator maintains, "the citizens' principal protection against unjustified charges of attempt is the obligation of the prosecution to prove *mens rea*."¹⁰³ The allegation of an evil intent is almost impossible for the defendant to refute.¹⁰⁴

While the dangers and pitfalls associated with probing expeditions into the defendant's mind are generally recognized, scholars differ in their suggestions for the appropriate remedy. Professor Enker advocates acquittal in all cases of legal impossibility unless the statute clearly provides otherwise.¹⁰⁵ The majority of commentators, however, propose a less radical solution to the sufficiency of the evidence problem. They only require that the prosecution initially show a "substantial nexus" between the act of the accused and the *actus reus* of the complete crime,¹⁰⁶ or conduct which "clearly manifests"¹⁰⁷ or "strongly corroborates"¹⁰⁸ criminal purpose. Once the "threshold of

99. *Id.* at 885. The point has been developed at some length by Enker, *supra* note 24, at 677-83.

100. Hughes, *supra* note 40, at 1024; Wechsler, Jones & Korn, *supra* note 18, at 590.

101. See Enker, *supra* note 24, at 709.

102. Note, *supra* note 6, at 332-33; Enker, *supra* note 24, at 682, 690-91.

103. Buxton, *supra* note 79, at 665; see LAW COMMISSION, *supra* note 27, at 92.

104. Enker, *supra* note 24, at 688.

105. *Id.* at 698, 710.

106. Hughes, *supra* note 40, at 1027.

107. R. PERKINS, *supra* note 43, at 565.

108. S. KADISH & M. PAULSEN, *supra* note 13, at 368. A different theory developed by Dr. Turner, which would exclude all extrinsic evidence of the actor's ultimate purpose, would presumably lead to similar results. 1 RUSSELL ON CRIME 184 n.53, 188 (12th ed. 1964).

connection" between the accused's act and the *actus reus* is crossed, evidence concerning the defendant's intent shall be freely admissible.¹⁰⁹

While this scheme generally provides convincing solutions to the practical and hypothetical test cases to which it is applied,¹¹⁰ it appears less satisfactory in its theoretical foundations. For one thing, it seems methodologically questionable to address an issue of penal policy exclusively as a matter of burden of proof. Moreover, the advocates of the "threshold of connection" theory are compelled either to fall back on a naturalistic "model of success"¹¹¹ or on an equally naturalistic "model of attempt." In order to decide the question of whether the prosecution has presented enough *actus reus* evidence, the judge has to compare his image of the completed offense with the image he has received of the accused's actions. Such models are highly elastic and fungible.¹¹² In particular, the height of the "threshold of connection" can be adjusted to the "needs" of the case at bar without guidance by sufficiently clear standards.¹¹³

The source of that defect of the model is not difficult to detect. Its originators assume that there exists a specific *actus reus* for each attempt to commit a crime and that that *actus reus* invariably looks somewhat similar to the complete offense. Professor Hughes writes:

We shall have to insist that an attempt must be understood as including a reference to *trying* to achieve the *actus reus* of the complete crime in some way which is apparent on the face of the *actus reus* of the attempt.¹¹⁴

The judge of every individual attempt case, we must conclude, is sent out to search for that elusive entity. Its existence is only postulated, not proved. It is rather doubtful that the assumption of a factual "model of attempt," regarded as independent of the actor's beliefs, is of great use for the purposes of the criminal law.¹¹⁵

The *Oviedo* opinion offers a fresh approach to the dilemma courts face in establishing the defendant's intent to do the forbidden. It neither declares unconditional surrender, acknowledging the impossibility of assessing reliably the accused's state of mind, nor joins in the

109. Hughes, *supra* note 40, at 1027-28.

110. *Id.*, at 1030-33.

111. *Id.*, at 1031, 1033.

112. Enker, *supra* note 24, at 684.

113. Professor Hughes freely acknowledges that his approach would introduce "greater unpredictability." Hughes, *supra* note 40, at 1028.

114. *Id.* at 1026; See RUSSELL, *supra* note 108, at 177.

115. See text accompanying notes 41 and 42 *supra*.

quest for a model of attempt. Rather, the court seeks a middle ground by announcing the following test:

We demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying *mens rea*, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.¹¹⁶

The *Oviedo* court does not claim originality for the test it proposes. Its formula for distinguishing attempts from harmless undertakings has indeed had a long and changeful history in a different context. It had been invented to solve another problem in attempt law which had haunted the courts for a long time: the distinction between mere preparation to commit an offense, and criminal attempt. After several vague formulae based on the proximity or dangerousness of the act¹¹⁷ had failed to provide firm and predictable guidelines for the decision of other than boilerplate cases, Sir John Salmond introduced what became known as the "equivocality test:"

A criminal attempt bears criminal intent upon its face. *Res ipsa loquitur*. An act, on the other hand, which is in itself and on the face of it innocent, is not a criminal attempt, and cannot be made punishable by evidence *aliunde* as to the purpose with which it is done.¹¹⁸

Although Salmond's approach was rejected by the majority of commentators,¹¹⁹ it remained to be the law in New Zealand¹²⁰ until it was expressly abandoned by statute,¹²¹ and has enjoyed considerable popularity with American courts.¹²² Its appeal apparently stems

116. *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976).

117. See *Commonwealth v. Kennedy*, 170 Mass. 18, 22, 48 N.E. 770, 771 (1897); *W. LA FAVE & A. SCOTT*, *supra* note 27, at 432-34; *O. HOLMES*, *supra* note 35, at 68-69.

118. *J. SALMOND*, *supra* note 63, at 404. Salmond applied that test in his opinion in *R. v. Barker*, [1924] N.Z.L.R. 865, 874-75.

119. *J. HALL*, *supra* note 16, at 581-83; *W. LA FAVE & A. SCOTT*, *supra* note 27, at 436; *G. WILLIAMS*, *supra* note 23, at 620, 630; *Hughes*, *supra* note 40, at 1026-27; *Stuart*, *The Actus Reus in Attempts*, [1970] CRIM. L.REP. (BNA) 505, 507; *Wechsler, Jones & Korn*, *supra* note 18, at 594. Salmond's theory has been adopted, in a slightly altered form, by *Dr. Turner*, *RUSSELL*, *supra* note 108, at 182-84.

120. See *Campbell and Bradley v. Ward*, [1955] N.Z.L.R. 471.

121. *New Zealand Crimes Act 1961*, § 972(3): "An act done or omitted with intent to commit an offense may constitute an attempt if it is immediately or proximately connected with the intended offense, whether or not there was any act unequivocally showing the intent to commit that offense."

122. See *United States v. Rivero*, 532 F.2d 450, 455 (5th Cir. 1976); *State v. Judge*, 81 S.D. 128, 133, 131 N.W.2d 573, 576 (1964); *State v. Mandel*, 78 Ariz. 226, 229, 278 P.2d 413, 416 (1954); *People v. Buffum*, 40 Cal.2d 709, 718, 256 P.2d 317, 321 (1953); *People v. Miller*, 2

primarily from the fact that it provides a rule of thumb which is comparatively simple to apply. At the same time, it leaves a court enough leeway for arriving at a fair and equitable appraisal of the accused's acts.¹²³

Critics of the equivocality test point to two major difficulties which limit its usefulness as a tool to distinguish between preparation and attempt. It arbitrarily excludes one important source of evidence, namely the defendant's own statements, from the consideration of the court. This may lead to unjustified acquittals in cases in which there can be no doubt that the accused has done everything but the very last step which he deemed necessary for the perpetration of the offense.¹²⁴ Also, under the equivocality test, it is often impossible to validly pass judgment on a person's conduct if one has no information regarding his purposes and intentions.¹²⁵

Do these objections carry equal weight if the equivocality test is used to determine criminal liability in the impossibility situation? We have seen that exclusive reliance on the defendant's own incriminatory statements form a shaky basis for an attempt conviction if the acts were harmless on their face and could never have led to harmful consequences.¹²⁶ Therefore, it might be a most welcome result that extrinsic evidence tending to show the accused's *mens rea* be excluded.

Yet the force of the second charge against the equivocality test is not diminished by that doctrine's transfer into the realm of impossibility. Though actions may sometimes speak louder than words, their message is frequently less intelligible and more ambiguous. Professor Williams' example of the man who strikes a match to light either the haystack beside him or the pipe in his mouth¹²⁷ demonstrates a sim-

Cal.2d 527, 531, 42 P.2d 308, 310 (1935); *Bell v. State*, 118 Ca. App. 291, 293, 163 S.E.2d 323, 325 (1968).

English courts have not adopted the equivocality test. See *Jones v. Brooks and Brooks*, 52 Crim. App. Rep. 614 (1968). The MODEL PENAL CODE requires, in § 5.01(1)(c)(2), a "substantial step" toward the commission of the crime which is "strongly corroborative of the actor's criminal purpose." Under that approach, however, the actor's conduct is not judged by itself, but rather in light of all the knowledge about his intent which can be acquired from secondary sources. See Wechsler, Jones & Korn, *supra* note 18, at 594-95.

123. The traditional explanation for the equivocality test is that "statements of intent made prior to equivocal acts or a confession of intent made subsequent thereto give no assurance of that firmness of purpose which manifests the actor's dangerousness." W. LA FAVE & A. SCOTT, *supra* note 27, at 436.

124. G. WILLIAMS, *supra* note 23, at 630; Wechsler, Jones & Korn, *supra* note 18, at 594; J. HALL, *supra* note 16, at 581.

125. Stuart, *supra* note 119, at 507; J. HALL, *supra* note 16, at 581, 582 n.6.

126. See text accompanying notes 100-102, *supra*.

127. G. WILLIAMS, *supra* note 23, at 630.

ple point. In order to be able to evaluate the "criminality" of an act or to pass any other ethical judgment on it, we must know about its meaning in the social context in which it is done. Acts acquire social meaning to a large extent from the goal toward which they are directed. We are frequently unable to know about their purpose unless the actor provides us with information. Hardly any human activity is *per se* reprehensible under all circumstances. Even the unprovoked shooting of another person can be perfectly lawful if that person is reasonably believed to be a dangerous fleeing felon.¹²⁸ Therefore, if the information gathered from the actor's own statements is excluded, the meaning of his acts necessarily becomes the object of the court's conjecture and speculation. The same bias, prejudice and arbitrariness against which the "objective" equivocality test was designed to protect may thus enter again through the back door.

The difficulty of finding plausible criteria for distinguishing equivocal from unequivocal behavior is evidenced by the court's painful struggle in *Oviedo* to differentiate between Oviedo's actions and the conduct of the defendant in *Mandujano*, decided by the same court only two years earlier.¹²⁹ In both cases, the defendant had promised to sell a quantity of heroin to an undercover police agent. However, while Oviedo went so far as to hand over to the agent the substance which he indicated to be heroin, Mandujano returned with empty hands, stating that he had been unable to locate his supplier. From these facts, the Fifth Circuit concluded that Mandujano's actions were unequivocally criminal, whereas Oviedo's were not.¹³⁰ To me, the opposite result would have been at least equally persuasive, particularly since there was no conclusive evidence in *Mandujano* to show that the defendant had ever actually tried to contact any narcotics dealer.¹³¹ Yet the wisdom behind Mandujano's conviction and Oviedo's acquittal shall not be put at issue here. What is more important is the fact that the equivocality test is far from providing an objective, predictable and rationally convincing answer to the problem of whose unsuccessful efforts to commit a crime shall be punished, and whose shall not.

In the preparation-attempt situation, courts using the equivocality test are occasionally faced with a particularly awkward problem. The

128. See ILL. REV. STAT. ch. 38, §§ 7-5, 7-6 (1975).

129. *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974). In *Mandujano* the legal question was the distinction between preparation and attempt. Since the Fifth Circuit uses the same test in the impossibility situation, it correctly acknowledges that the same criteria have to be applied.

130. *United States v. Oviedo*, 525 F.2d 881, 886 (5th Cir. 1976).

131. *United States v. Mandujano*, 499 F.2d 370, 371-72 (5th Cir. 1974).

accused's conduct leaves no doubt that his intentions were not innocent, yet it is impossible to determine what offense he had planned to commit.¹³² The same difficulty is bound to arise when the actor's plans are thwarted by the absence of one external factor. A silent film of the objective situation, which the court is to evaluate without the help of the participants' statements about their intentions,¹³³ would characteristically show the defendant performing perfectly harmless acts in a furtive, clandestine manner. The innocuous nature of the act usually precludes the observer from linking it to a specific offense. When he watches Lady Eldon sticking the package with the newly acquired English lace into an inconspicuous pocket of the coat and carefully covering it up with old papers, he can possibly infer that she does not have a clear conscience. Nevertheless, he is unable to say whether she means to circumvent imaginary French export regulations, whether she thinks the lace is stolen property, or whether she wants to conceal it from English customs officers.¹³⁴ Faced with that dilemma, a court has the unattractive choice between a strict application of the equivocality test—which leads to the acquittal of a defendant who clearly had acted in furtherance of criminal intentions—and its abandonment in favor of a formula which only requires "unusual" or "apparently illegal" behavior of the defendant as a sufficient *actus reus* for an attempt conviction.¹³⁵

132. One illustrative example for that situation is *Campbell and Bradley v. Ward*, [1955] N.Z.L.R. 471. In that case, one of the defendants broke into a car and was intercepted before he could carry out his intent. The court could not decide, on these facts alone, whether he wanted to steal the car or to take something from the car. Therefore, it quashed the defendants' attempt conviction.

See also *United States v. Murray*, 527 F.2d 401, 409 (5th Cir. 1976), where the factual situation was strikingly similar to that in *Oviedo*. In that case, the court refused to convict the defendant of conspiracy to distribute heroin because his acts were "equally consistent, if not more so, with an intention to sell a counterfeit substance." It must be assumed that, in a prosecution for attempted theft by false pretenses, the ambiguity of the objective facts would likewise have led to an acquittal. By such reasoning, the court awards a premium to the cunning criminal who manages not to commit himself to one avenue toward success.

133. See *Turner, Attempts to Commit Crimes* in *THE MODERN APPROACH TO CRIMINAL LAW* 273, 280-81 (Radzinowicz and Turner eds. 1945).

134. The facts make it appear as equally possible that Lady Eldon has no criminal intent at all. She may want to hide the lace from her husband because she had bought it against his will.

135. It is not easy to determine which alternative the *Oviedo* court has chosen. On its face, the *Oviedo* test requires only "unique" actions, marking the accused's conduct as "criminal in nature." *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976). But under such a broad formulation, *Oviedo's* acquittal would hardly have been justified. His actions were "unique" and "criminal in nature" regardless of his intent. If he did not mean to sell heroin, he intended to defraud his prospective customer.

It seems more likely, therefore, that the Fifth Circuit in fact requires actions indicating the defendant's intent to commit the specific crime with which he is charged. That conclusion is supported by the same court's reasoning in the later case of *United States v. Murray*, 527 F.2d 401, 409 (5th Cir. 1976). See note 132, *supra*.

Thus, the chief malady of the equivocality test is not healed by its transfer from the preparation-attempt to the impossibility situation. It acquires, through that transplantation into a new environment, an additional weakness. The borderline between harmless and criminal attempts loses its inherent justification and appears completely arbitrary.

In the preparation-attempt situation, the actor goes through a continuum of increasingly specific goal-directed acts, starting with the conception of the idea to commit the offense, and ending with the climax of the final criminal action. The equivocality test aims at identifying that one point on the path leading toward the perpetration of the crime where the actor leaves the sphere of private deliberation and planning, and makes it evident that he is now determined to commit the offense. To let criminal liability begin at that point makes sense. The actor has not only shown dangerous "constancy of purpose,"¹³⁶ but has also conducted himself in a way which tends to create alarm and apprehension.¹³⁷

In the case of legal impossibility we can, of course, observe the same continuum from planning to final action. The point on the continuum at which the actor is intercepted, or whether he is intercepted at all, has no relevance to the determination of the amount of the actor's criminal energy. In all cases of "true" legal impossibility, the defendant can well go through with his plan without ever getting closer to committing an offense. The gradual development of the action from a harmless to an objectively dangerous phase, which gives a rational basis to the equivocality test, is frequently missing. Whether the actor engages in a "unique" act which *per se* indicates a criminal mind, or whether he engages only in "commonplace" conduct, no longer depends on the strength of his determination to carry out his malicious plans. Rather, it depends on the fortuitous circumstance of the remoteness of the accused's mistaken belief from the actual facts. If the defendant grossly misconceives an element of the *actus reus*, his acts will frequently gain a harmless outward appearance. If his mistake leaves him in closer contact with reality, it will often let the "criminal" impression of his conduct remain unchanged and thus will fail to save him from punishment.

In order to illustrate that point, I will build a further complication into the Lady Eldon hypothetical. Assume that the relevant statute generally prohibits the import of valuable French lace into the coun-

136. Stuart, *supra* note 119, at 519.

137. See BISHOP, *supra* note 24, § 739.

try, but allows a traveler to bring in lace of a value of less than £10 as a souvenir. Now, if Lady Eldon commits the "big" error of mistaking cheap English lace for an expensive French product, she would be acquitted under the *Oviedo* test. Her prospects are not so good if she only makes a "small" mistake, believing her (genuine) French lace to be worth £12 while its actual value is only £8. In that situation, a court applying the equivocality test might well find that her act of concealing French lace from the British customs officers marked her conduct as criminal in nature.

A similar distinction would have to be made for the hapless poisoner. If he thinks that the water he pours into his enemy's whiskey is poison, his act will be regarded as harmless on its face and will not lead to his conviction. If he mixes into the same whiskey one drop of cyanide, believing it to be sufficient to produce the desired lethal result while five drops would have been necessary, his conduct would hardly be regarded as equivocal.

In both hypotheticals, the actors differ neither in the evil of their intentions nor in their determination to bring about the legally prohibited consequences. Also, neither of them gets into any more dangerous proximity to doing actual harm than the other.¹³⁸ Therefore, if we are to accept the difference in outcome which the equivocality test prescribes, we must look for a substantive criterion justifying the distinction. In that respect, the *Oviedo* opinion is not particularly helpful. The Fifth Circuit takes the equivocality test as it finds it in the cases which seek to draw a dividing line between preparation and attempt. Its adaptability to the intrinsically different impossibility situation is not made the subject of deeper inquiry. Moreover, the *Oviedo* court treats the unequivocality of the defendant's conduct as a formal criterion, designed to solve what is regarded merely as a problem of the sufficiency of the evidence. Under that narrow perspective, the substantive question does not come into view.

A merely formal distinction between criminal and non-criminal attempts is of little use if its results do not stand the test of substantive fairness and justice. I will therefore try to approach the problem of legal impossibility in reverse direction. The primary effort will be to identify those situations in which the actor deserves punishment. Then I will consider the formal means appropriate to assure conviction in these cases and acquittal in those in which the intervention of

138. In the second hypothetical, we can assume that one drop of cyanide is completely innocuous.

the criminal law is not deemed necessary. The key to the first issue lies in a very general question which has attracted comparatively little scholarly attention: why do we punish attempts? Alternatively, what is the social harm caused by the attempt to commit an offense?

II. SOCIAL HARM AND ATTEMPT

If it were the sole function of the criminal law to provide redress for damage done to an individual's body, his property, or to other tangible objects, attempts could never be punished. Penal liability, in spite of the actor's failure to bring about the intended unlawful result, must rest on a broader rationale for the state's punitive intervention. Different explanations have been offered for why the criminal law should extend its reach beyond those instances in which perceptible damage to a protected good has occurred.

One approach describes the harm caused by an attempt as the danger of actual damage. According to that view, some acts are reprehensible even if they miss their object, either because they put a socially valued good into jeopardy,¹³⁹ or because they impair "some related but lesser interest"¹⁴⁰ protected by the criminal law. As a consequence of that definition of the *raison d'être* of attempt law, the defendant who acts in a situation of legal impossibility cannot be punished. There is just no object which his machinations can possibly endanger.¹⁴¹

The problem with that line of reasoning is that it would extend the scope of impunity much farther than just to the legal impossibility situation. It is difficult to explain where the objective danger exists in those cases in which the victim or the desired object happened to be absent, or in which the means used by the offender was objectively inadequate. Cracking an empty safe does not jeopardize the bank customers' property,¹⁴² and neither shooting into an empty bed¹⁴³ nor trying to kill an enemy with an unloaded gun creates actual danger to anyone.¹⁴⁴ Yet, in all of these cases of mere factual impossibility, the courts have shown no hesitancy to convict the defendant.¹⁴⁵

139. Beale, *supra* note 15, at 502; Keedy, *supra* note 84, at 466, 471; Ryu, *supra* note 24, at 1190-91. See also *United States v. Berrigan*, 482 F.2d 171, 189 n. 36 (3d Cir. 1973); Epker, *supra* note 24, at 695.

140. Strahorn, *supra* note 14, at 970.

141. Ryu, *supra* note 24, at 1190; Strahorn, *supra* note 14, at 989-91.

142. See *Gargan v. State*, 436 P.2d 968 (Alas. 1968).

143. See *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902).

144. See *State v. Damms*, 9 Wis.2d 183, 100 N.W.2d 592 (1960).

145. Strahorn tries to escape the logical conclusion of his theory by defining the fear or apprehension of the intended victim as part of the legally protected interest. In his opinion, the

The objective-danger rationale leads into difficulties even when only "normal" attempts have to be adjudicated. The prosecution often can show that the intended victim only narrowly escaped the defendant's attack. However, cases of "far misses" can arise in which any statement that actual danger existed for the protected object would be a legal fiction.¹⁴⁶ Further intricate questions remain unanswered. Which is the correct perspective for determining the dangerousness of the attempt? Can the court decide *ex post* using all the information available at the trial? Or should we assess the amount of risk *ex ante* from the point of view of a "reasonable man" in the position of the defendant?¹⁴⁷

The main difficulty with the objective harm theory is that it is not consistent with its own premises. The theory is built on the assumption that we should never punish acts for their own sake, however malicious the intent behind them may be. These acts would be punished only if they have brought about actual infringement of an interest protected by statute.¹⁴⁸ For a system operating under such a principle, the most formidable objection against punishing attempts is 700 years old: "For what harm did the attempt cause, since the injury took no effect."¹⁴⁹ Only through the fiction that regards the mere danger of harm as harm can proponents of the objective theory escape the consequence of that statement, namely to let everyone go free who is lucky enough to miss his aim.¹⁵⁰ The equalization between risk and actual damage is performed as a matter of course, although the insight that a danger is not more than the *chance* of pain dates back to Bentham.¹⁵¹ The objective theory furnishes

prohibition of larceny also prohibits putting someone in fear that his property may be taken. Strahorn, *supra* note 14, at 979 *passim*. But, even assuming the correctness of such a broad interpretation of the "legally protected interest," his theory leads to strange results. Whether the unsuccessful assassin is liable for attempt ultimately depends on whether the victim notices his efforts or not. *Id.* at 982. For further criticism of Professor Strahorn's views, see Elkind, *supra* note 4, at 24-25; Curran, *supra* note 18, at 335.

146. Consequently, Professor Keedy would exempt from attempt liability cases in which effective defensive protection prevented the harm. Keedy, *supra* note 84, at 488.

147. The latter position seems to be held by Sayre, *supra* note 35, at 850. For criticism of this view, see J. HALL, *supra* note 16, at 592-93, and Arnold, *supra* note 83, at 70.

148. See Ryu, *supra* note 24, at 1174:

If no social harm has resulted from the act of the accused, although failure of the result is due to a pure accident unrelated to any merit on his part, the accident should be considered in his favor in order to safeguard his well-being to the utmost extent permissible.

149. H. BRACON, 2 DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 337 (Twiss ed. 1879).

150. Ryu, *supra* note 24, at 1180, correctly points out that it is possible to define an offense in such a way that the mere creation of a risk is sufficient for conviction. It remains unexplained why, through attempt law, every offense should be transformed into a "crime of risk."

151. J. BENTHAM, *supra* note 90, at 153.

no inherent reason why the creation of this chance should be deemed almost as grave an infraction as causing actual injury. In fact, its willingness to allow for the punishment of attempts appears as an unexplained concession to the necessities of penal policy.

The cause of all these contradictions and weaknesses may lie in the fact that the objective theory is compelled to assume the existence of a non-existent entity—the harm caused by an attempt. That, at least, is the position of a competing doctrine which has its origins in England¹⁵² but has also found distinguished followers in the United States,¹⁵³ most prominently among the authors of the Model Penal Code.¹⁵⁴ These writers freely acknowledge that, in attempt, we do not punish for any perceivable harm caused by the actor's conduct, but exclusively for the offender's criminal intention.¹⁵⁵ That intention, if its existence can be firmly established by showing that the accused did an overt act in its furtherance, demands and justifies the intervention of the criminal law because it indicates social dangerousness.¹⁵⁶

This theory leads to acceptable results in our test cases of *Jaffe* and *Oviedo* without being forced into compromising its principles. As the actor in the legal impossibility situation leaves no doubt about his antisocial tendencies, he should be treated exactly like the pickpocket who reaches into an empty pocket, and like the killer who closely misses his aim. The conviction of all these unsavory characters is the logical consequence of their demonstrated dangerousness.¹⁵⁷

But why stop there? Under the dangerousness rationale, there is no convincing reason why we should not impose punishment on the Haitian voodoo doctor of hypothetical fame who sets out to kill persons by means of incantation and witchcraft. He has clearly shown his dangerous propensities and may well use more effective means the next time. While only few proponents of the subjective theory would be ready to carry the principle that far,¹⁵⁸ the majority has great dif-

152. Its beginnings can be traced back to John Austin; see J. AUSTIN, *supra* note 35, at 441. Among its modern proponents are Buxton, *supra* note 79, at 660, 665; Stuart, *supra* note 119, at 511; G. WILLIAMS, *supra* note 23, at 632, 645.

153. S. KADISH & M. PAULSEN, *supra* note 13, at 364; W. LA FAVE & A. SCOTT, *supra* note 27, at 427; Note, *supra* note 14, at 160.

154. See Wechsler, Jones & Korn, *supra* note 18, at 572, 584.

155. "Where a criminal intention is evidenced by an attempt, the party is punished in respect of the criminal intention." J. AUSTIN, *supra* note 35, at 441.

156. LAW COMMISSION, *supra* note 27, at 46-47; W. LA FAVE & A. SCOTT, *supra* note 27, at 427; G. WILLIAMS, *supra* note 23, at 645; Wechsler, Jones & Korn, *supra* note 18, at 584-85.

157. That point has been made most forcefully by G. WILLIAMS, *supra* note 23, at 632.

158. English, *supra* note 18, at 19 n. 33. Professor Williams would make the decision of that case depend on its exact circumstances. G. WILLIAMS, *supra* note 23, at 652.

faculties distinguishing these cases of "unreal" attempts from other situations in which the actor's efforts are destined to fail and yet demonstrate his dangerousness.¹⁵⁹

The inability of the theory to cope adequately with such cases from Never-Never land¹⁶⁰ should not lead to its rejection. Yet, the subjective approach with its strong emphasis on the dangerousness of the individual appears strangely out of place in the environment of today's criminal policy. It seems as if the waves of progressing criminological knowledge and rational models of criminal justice had swilled away the ground on which the subjective theory was thought to rest safely.

The rehabilitative ideal, of which the concept of dangerousness is a cornerstone, has recently undergone a rather painful process of demystification.¹⁶¹ The optimistic view held by generations of legal reformers, that we are able to diagnose an individual's dangerous propensities and to treat him effectively if only we try hard enough, has given way to widespread skepticism. The two central assumptions of the rehabilitative ideal have been effectively undermined by hard data produced through criminological research. For example, where prognoses of dangerousness were attempted, their results tended fatally toward gross overprediction of future offenses and consequently to an unjustifiable extension of criminal sanctions to "false positives" who became the innocent victims of the inadequacy of our predictive tools.¹⁶²

The most comprehensive study undertaken so far on the effectiveness of rehabilitation programs has led its authors to the devastating

159. Both the English Law Commission and the authors of the MODEL PENAL CODE try to solve the problem by allowing for discretion in sentencing. LAW COMMISSION, *supra* note 27, at 98; MODEL PENAL CODE § 5.05(2). Sometimes it is asserted that such actors do not present real dangers. Sayre, *supra* note 35, at 850. See also S. KADISH & M. PAULSEN, *supra* note 13, at 366-67; W. LA FAVE & A. SCOTT, *supra* note 27, at 445-46.

160. The phrase is borrowed from J. HALL, *supra* note 16, at 593.

161. Dershowitz, *Background Paper* in FAIR AND CERTAIN PUNISHMENT: REPORT OF THE 20TH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 69, 70, 98 (1976); D. FOGEL, WE ARE THE LIVING PROOF . . . 180-260 (1975); E. VAN DEN HAAG, PUNISHING CRIMINALS 184-191 (1975); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS. REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION 9-36 (1975); J. WILSON, THINKING ABOUT CRIME 169-173 (1975); N. MORRIS, THE FUTURE OF IMPRISONMENT 12-34, 62-73 (1974); STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA. PREPARED FOR THE AMERICAN FRIENDS SERVICE COMMITTEE (1971). A substantial number of articles published in the recent past have reiterated and varied the main ideas proposed by the writers cited above. See, e.g., Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WISC. L. REV. 781. Professor Allen's early warning against an over-estimation of the rehabilitative ideal today appears as prophetic: Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226 (1959).

162. N. MORRIS, *supra* note 161, at 67-73; A. VON HIRSCH, *supra* note 161, at 21.

judgment that "nothing works."¹⁶³ Earlier allegations that the state, under the guise of individualized treatment, assumed unwarranted coercive control over a "dangerous" person's life¹⁶⁴ could be refuted by pointing to the promotion of the overall social good wrought by such interference. Yet, the very foundations of the belief in our ability to identify and cure socially dangerous individuals have now been shattered. The general disillusionment has led to a new and more modest assessment of the goals which the enforcement of criminal sanctions can serve. While these suggestions range from incapacitation¹⁶⁵ to handing out "just deserts,"¹⁶⁶ the idea that we can justify an infringement on a sane person's freedom by asserting that we are "curing" him is now universally rejected.

As a consequence of the decay of the rehabilitative ideal, a reorientation of the basic assumptions of attempt law seems necessary. The fairly modern idea that a psychiatrist should determine the attemptor's guilt by diagnosing the amount of subconscious internal control which helped to foil the attempt and thus indicated lesser dangerousness,¹⁶⁷ appears as rather grotesque today. Nevertheless, it is but a logical endpoint of the "rational course" proposed by Professor Glanville Williams, which is to "catch intending offenders as soon as possible, and set about curing them of their evil tendencies."¹⁶⁸

That course seems much less "rational" today as we know more about our ignorance. It is futile to ask whether an attempt indicates a higher amount of danger of recidivism than a completed crime¹⁶⁹ when we find ourselves largely unable to predict reliably anyone's future harmful behavior, let alone do something about it. Professor Enker's prescient warning, written in 1969, that "there is a difficult moral issue involved in punishing a person solely for having acted with harmful intent when he has neither caused nor risked any

163. D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); Martinson, *What Works?—Questions and Answers about Prison Reform*, PUBLIC INTEREST, Spring 1974, 22, 25. See also P. LERMAN, *COMMUNITY TREATMENT AND SOCIAL CONTROL: A CRITICAL ANALYSIS OF JUVENILE CORRECTIONAL POLICY* (1975). For more optimistic assessments of the chances of effective individualized treatment, see Warren, *Intervention with Juvenile Delinquents*, in *PURSUING JUSTICE FOR THE CHILD* 176 (Rosenheim ed. 1976); Palmer, *Martinson Revisited*, 12 J. OF RESEARCH IN CRIME & DELINQUENCY 133 (1975).

164. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 57-58 (1968); Allen, *supra* note 161, at 229.

165. J. WILSON, *supra* note 161, at 172-73.

166. A. VON HIRSCH, *supra* note 161, at 45-55.

167. Note, *supra* note 14, at 168-69.

168. G. WILLIAMS, *supra* note 23, at 632.

169. See W. LA FAVE & A. SCOTT, *supra* note 27, at 427.

harm,"¹⁷⁰ in 1978 reads like a noble understatement of the problem. In fact, if the subjective theory were correct in holding that there is an indication of dangerousness but no harm in an attempt, it would inadvertently have removed the justification for the punishment of all attempts.

If an effort to violate a provision of the criminal code causes no infringement of the interest protected by that provision, and if the actor's felonious intent alone is not sufficient to warrant punishment, are we then left without any jurisprudentially acceptable reason for penalizing attempts?¹⁷¹ A reflection on the historical origins of modern attempt law suggests an alternative justification for punishing frustrated efforts to commit crimes.

The modern doctrine that attempts are generally punishable is of relatively recent vintage. While penalties for planning crimes had been imposed in a somewhat unsystematic fashion by the court of Star Chamber,¹⁷² a coherent and useable concept of criminal attempts emerged only in the late 18th century.¹⁷³ The law of attempt was not without its precursors. Their very existence probably was a factor contributing to the delay in the development of a separate category of inchoate crimes, because they absorbed most of the functions such provisions could possibly have fulfilled.

Let us take a look at these offenses, which tended to criminalize typical attempt situations in 17th-century England. One could be punished for being a nightwalker, a rogue, or a vagabond, for being part of an unlawful assembly, a rout, or a riot, for going armed or keeping a gun in one's house, for lying in wait or for carrying a charged pistol.¹⁷⁴ All of these diverse forerunners of today's criminal attempt have one common feature: they penalize behavior which does not bring about actual harm, but which tends to cause public alarm. What made these actions appear reprehensible was not the actual

170. Enker, *supra* note 24, at 696-97.

171. Some writers assert that the main function of the law of criminal attempts is to provide a legal basis for the timely intervention by law enforcement officers to prevent the completion of a crime. See W. LA FAVE & A. SCOTT, *supra* note 27, at 426-27; Wechsler, Jones & Korn, *supra* note 18, at 572. While that is a commendable purpose, the preventive interests of the police furnish no grounds for the subsequent punishment of the would-be offender.

172. J. HALL, *supra* note 16, at 565-68; Curran, *supra* note 18, at 198; Sayre, *supra* note 35, at 828-29. It is doubtful that the ecclesiastical legal doctrine "*voluntas reputabitur pro facto*" was ever consistently applied in common law courts. See J. HALL, *supra* at 560-61; Sayre, *supra*, at 822-27.

173. The first cases in which the doctrine was applied were *R. v. Scofield*, Cald. 397 (1784), and *R. v. Higgins*, 2 East 5 (1801).

174. J. HALL, *supra* note 16, at 562. Further examples of attempts-turned-substantive-offenses are assault and burglary.

danger so much as the fact that they are apt to disturb the peace in the community and threaten the feeling of safety of all those who watch or hear about the offender's conduct.¹⁷⁵ Of the ancient offenses, only a diminishing number of odd-looking fossils remain today. But has their rationale died with them?

I think that the rationale is very much alive, expressing the underlying social purpose of great parts of our criminal law. Yet, for the purposes of this Article, it will be enough to demonstrate the usefulness of accepting that rationale as the basis of the law of attempts.

We have seen that an attempt usually does not do damage to any tangible object. But that does not mean that an attempt is harmless. It is one of Professor Jerome Hall's great achievements to have shown that the concept of criminal harm is value-oriented, and thus independent of the materiality of any object. "Penal harm," he says, "is a complex of fact, valuation and interpersonal relations—not an observable thing or effect, as is sometimes assumed."¹⁷⁶ This insight makes it easier to formulate the harm done by an attempt to commit an offense. Every such act has the potential to violate an intangible good—the public peace. The harm caused is the apprehension and fear of the victim as well as the alarm of the community about the fact that someone has set out to do serious damage to a fellow citizen and to break the accepted rules of social life.¹⁷⁷ There cannot be much doubt that such impairment of the feeling of personal safety is not an imaginary construct, but can constitute a "real" harm:

The quality of daily life is impaired by such conduct; and one need only ask whether he would want to live in a community where attempts to kill and to commit robberies and arsons were frequent, to indicate that there are harmful effects of such conduct . . .¹⁷⁸

Of course, not every attempt invariably causes an actual disturbance of the peace. Whether it does or not, however, depends on circumstances largely beyond the control of the actor. It would therefore lead to grossly unfair and arbitrary results to let attempt

175. See J. HALL, *supra* note 16, at 567; Curran, *supra* note 18, at 337.

176. J. HALL, *supra* note 16, at 217. See Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQUESNE L. REV. 345, 370-73 (1966). Eser suggests that the legal interests protected should be seen as an integrative combination of both their sociological basis and the corresponding normative value. *Id.* at 412.

177. See BISHOP, *supra* note 24, §§ 737-40; J. HALL, *supra* note 16, at 218-19; Curran, *supra* note 18, at 335. J. BRENNAN, *supra* note 90, at 153-54, regarded the "pain of apprehension" as a secondary mischief flowing from a mischievous act.

178. J. HALL, *supra* note 16, at 219.

liability hinge on the contingency of whether the offender was observed during his efforts, or whether the news of his criminal undertaking had spread and created fearful apprehension. Nor is such a showing necessary to establish the injurious character of an attempt. Even if the offender prepares the attack in complete secrecy, his actions are necessarily designed to culminate in a "visible" stage at which the unlawfulness of his behavior becomes evident. As the appearance of willful disobedience to the basic rules of society is sufficient to create alarm, the offender consciously endangers the public peace when he engages in conduct which sufficiently indicates the illegality of his purpose.¹⁷⁹

We have thus found a substantive basis for the equivocality doctrine covering the preparation-attempt situation. Preparations which are commonplace and ordinary are not punished, not so much because they present insurmountable difficulties for proving the actor's intent, but because they do not and cannot cause any social harm. The new rationale also helps us to resolve one of the major moral questions of attempt law—why attempts should be punished less severely than the complete offense, even though the actor's illegal intentions are identical. We can now state the difference. The relevant harm brought about by the criminal attempt consists in the disruption of the "good order" in the community. At least the same detriment is caused, as a side effect, by the perpetration of the crime. However, the latter entails the additional impairment of the protected personal interests of the victim, and therefore merits stronger condemnation.¹⁸⁰

The "alarm" rationale also explains why an overt act apparently suited to achieving the criminal effect is necessary for an attempt conviction. If this were not so, a person could be punished for attempt although no one could possibly have been intimidated or disquieted.

179. I admit that, under this definition, the mere danger of causing a disturbance is regarded as harm—an equalization which I had marked as one of the flaws of the objective attempt theory. See text accompanying notes 150-51, *supra*. Yet, there is a difference. While an attempt very often brings about the actual harm I have described, it never causes the damage to tangible objects which the objective theory regards as decisive. Thus, the inclusion of the mere endangering of the public peace into the reach of attempt law serves the limited purpose of avoiding fortuitous legal lacunae in atypical attempt situations. For the proponents of the objective theory, the punishability of attempts depends altogether on their regarding risk as tantamount to damage.

180. See H. HART, PUNISHMENT AND RESPONSIBILITY 129-31 (1968).

III. IMPOSSIBILITY AND PUBLIC PEACE

The last point made above brings us back, after a short detour through the jurisprudential depths lying beneath the criminalization of attempt, to the problems of Lady Eldon and Martin Molina Oviedo. How does our rationale for punishing attempts shape the issue of impossibility?

First, it provides us with a new tool which helps to distinguish malicious endeavors which create no harm from those "impossible" attempts which are similar in their effect on the legal order, and thus deserve equal punishment. The decisive substantive criterion would be the same for all kinds of attempts. Did the defendant's act create an apprehension of harm? Did it disturb the community's feeling of security? The answer to these questions does not depend on the objective existence of any danger, but solely on the appearance of dangerousness which the offender's conduct would have for a possible observer.¹⁸¹ That definition of the problem leads to the result that the majority of "impossible" attempts have to be regarded as socially harmful and thus as worthy of public condemnation through criminal punishment. Moreover, the line can no longer be drawn between "factual" and "legal" impossibility. The threatening impact of the attemptor's actions remains the same regardless of whether he does not realize that the intended victim is absent or whether, unknown to him, one necessary element of the *actus reus* is missing.

Where, then, do we draw the line? While the criteria need not be ease of application,¹⁸² it would hardly merit discussion if it did not provide usable guidelines for deciding the problematic cases which have proved so troublesome for courts and scholars. It is not difficult to identify the critical points in our definition of the harm caused by an attempt. Who is "the community" which is to feel alarmed by the actor's conduct? And, more importantly, how much does "the community" know about the defendant's actual intentions?

The first question is relatively easy to resolve. An offender generally is judged by the standards of the social environment in which he chooses to act. Therefore, we can use as an instrument for measuring the social impact of his behavior the probable reactions of any average

181. J. HALL, *supra* note 16, at 594; J. MAY'S LAW OF CRIMES § 131 (4th ed., Sears and Weihofen eds., 1938); BISHOP, *supra* note 24, §§ 737-40, 750. A similar position is held by the majority of German legal writers. See A. SCHOENKE-H. SCHROEDER; STRAFGESETZBUCH: KOMMENTAR n.23 before § 22 (18th ed., Lenckner *et al.* eds., 1976); H. JESCHECK, *supra* note 21, at 401; R. MAURACH, *supra* note 42, at 510.

182. J. MAY, *supra* note 181, at 191. See Hughes, *supra* note 40, at 1028.

member of the concrete community in which his actions took place. Under particular circumstances, it may well be that the hypothetical test person does not react "rationally" or like a "reasonable person" and thus gets disquieted by behavior which, to us, seems perfectly innocuous. Yet, that is a risk which the attempter has to take, and which he sometimes consciously makes a part of his plans.¹⁸³

Now we possess a description of the person whom we imagine as observing the defendant's actions, and the degree of whose alarm and apprehension will be decisive for the attempter's guilt. His reactions to the defendant's conduct will be determined largely by the meaning which he ascribes to them.¹⁸⁴ Therefore it becomes important to decide how much information about the actor's intent we provide our "neutral observer." If he knows everything about the defendant's criminal objectives, he will probably be alarmed by every step toward that goal, even if it appears utterly harmless on its face. If he knows nothing, on the other hand, the defendant's movements may appear incomprehensible but not threatening, even when the offender gets into close proximity to succeeding with his plans.

We can narrow down the issue by making two assumptions based on common sense. First, our hypothetical observer, if he is to be of any help at all, must be thought of as having a correct notion of all objective circumstances of the defendant's act which can be observed from outside. Thus, he must be imagined as knowing that Oviedo's white powder is *not* heroin and that Lady Eldon possesses cheap English lace. Second, since no one is able to read another person's mind, we can safely withhold from our man information about the attempter's purely mental processes.

But should he also know about verbal declarations of purpose or about confessions made by the defendant either before or after the commission of the attempt? I think that the logic of the approach taken here demands the exclusion of statements unconnected with the act itself. Such statements, however revealing they may be with regard to the true motives of the actor, tend neither to increase nor decrease the social harm flowing from the act itself. In contrast, explanatory or incriminating declarations which accompany the act and which can be regarded as part of the *res gestae* should not be withheld from our hypothetical watcher.

The alarm and disquiet created by an outwardly ambiguous behavior, such as shooting at a tree stump or discreetly selling white

183. G. WILLIAMS, *supra* note 23, at 652, points out that an attempt to kill by conjuration may be held criminal in a "backward territory."

184. See text accompanying notes 127-28, *supra*.

powder, will in most cases be greater if it is accompanied by threatening or highly suggestive remarks ("Now I am going to kill that fellow" or "Here is your heroin"). The subsequent unmasking of an intent to do harm behind an innocent-looking act will hardly arouse feelings other than surprise or astonishment. Moreover, it would seem an unnatural dissection of human conduct to excise from it the words actually spoken. Interpretations given before or afterwards, even if they are reliable, stand in a much more distant and precarious relationship with the original act.

The distinction between accompanying and unconnected statements, the practical application of which should not pose too many problems, would have an additional positive effect. The distinction would tend to exclude from the scope of the criminal law those rather ridiculous cases in which no observer would ever have the slightest inkling about illegal thoughts entertained by the accused, unless the actor later disclosed the unlawful purposes behind his seemingly lawful acts. The famous case of the absent-minded but thievish professor who takes his own umbrella from the stand, believing it to belong to a colleague, is an example.

For the practical operation of the distinction, Lady Eldon's case may again serve as an illustration. If, while British customs officers search the coach, she whispers to her husband, "I hope they don't find the expensive French lace hidden in the side pocket," that statement could be used for determining the impression her conduct would make on an objective observer. If, on the other hand, she is, after her safe arrival in London, driven by her conscience to make a confession of her evil intentions to the British police, that statement would not be taken into account as long as only the *actus reus* of the attempt is at issue.¹⁸⁵

I admit that there is only a thin line between these two situations. It is appropriate, in order to assess the amount of alarm and apprehension created by the defendant's act, to consider his conduct as a whole, and not to "shut off the sound." Nevertheless, it is impermissible to reevaluate the "hidden meaning" of objectively harmless conduct in the light of independent information.

IV. PROPOSED MODEL AND ITS APPLICATIONS

To sum up, the proposed test can be formulated by the following sentence: An attempt which cannot succeed is punishable if the of-

185. It could, of course, be used to shed light on her *mens rea*.

fender's conduct, seen in the light of his statements accompanying the acts he deemed necessary for achieving his purpose, would cause alarm, or apprehension to an average observer. It is hardly surprising that this result of the effort to find a new basis for dealing with the impossibility problem is by no means unique. In its practical operation, the alarm criterion would probably lead to solutions quite similar to those of the "model-of-success" test suggested by Professor Hughes¹⁸⁶ and to the rather complicated rules of admissibility of extrinsic evidence stated by Dr. Turner.¹⁸⁷ With these and similar proposals, the one here advanced shares one other feature. It is comparatively vague, and does not allow foolproof generalizations such as "legal impossibility is a good defense." Moreover, it does not provide unequivocal answers to all possible fact situations. Its application requires the judge or the jury to make some rather difficult and often hypothetical judgments about invisible and intangible effects of the defendant's behavior. The test appeals directly to the personal experience of the trier of fact, who is probably best able to determine what conduct tends to threaten the sense of security in his community. By asking a question which every juror is capable of answering, this test may make the decision of a trial less arbitrary than a construct which is couched in complicated legal terms.

So far, I have not addressed the procedural issue which has caused so much headache to the proponents of the subjective theory. How can an attempt conviction be avoided which is based exclusively on the defendant's confession, or on secondary evidence about his alleged *mens rea*? I think that the test proposed in this Article avoids that problem. It would under all circumstances require the prosecution to prove an overt act which by itself has caused harm, irrespective of later confessions made by the defendant. The offender would not be punished for his intent, which has to be proved in addition to the overt act. Rather, he would be punished for the disruption of the public peace caused or at least threatened by the fact that he began to carry out his plans in a way which indicated an alarming hostility to the accepted ground rules of social life.

Whether the "alarm" formula is of better practical use than any of its predecessors could reliably be tested only by applying it to the few impossibility situations which come before the courts. Moreover,

186. Hughes, *supra* note 40, at 1028, 1031.

187. RUSSELL, *supra* note 108, at 188-89. See also Curran, *supra* note 18, at 202: "The element of societal harm and not success or physical harm should be the turning point in attempt cases." Professor Curran, however, never states explicitly what he understands by "societal harm."

it is difficult to argue that it leads to correct results, because opinions about what the "correct" result is in the cases of Lady Eldon, Jaffe, and their like, seem hopelessly divided. Nevertheless, I will briefly indicate how some of the frequently discussed hypothetical and actual cases would come out under the test I have suggested. It is left for the reader to decide whether the results conform with his or her individual sense of justice.

Due to the particular nature of the "alarm" test, it is important to state at the outset that all the events I discuss are assumed to have taken place and to be adjudged in the context of modern American society.

1. *The voodoo doctor*. The self-styled magician or witch who attempts to kill or injure another person by means of voodoo, witchcraft, or similar machinations, would not impress the average, moderately enlightened observer as being a serious menace to his feeling of safety. This would be true even if the "magic formulae" used clearly indicated that unlawful results were intended. Therefore, the voodoo doctor would be acquitted.

2. *Raping a dead girl*. In *United States v. Thomas*,¹⁸⁸ the defendants had sexual intercourse with a girl whom they believed to be unconscious, but who was in fact dead. In that case, the defendants had made the acquaintance of the victim in a bar where she suddenly collapsed. They carried the unconscious girl into their car, and, after driving a short distance, took advantage of what they believed to be the young woman's drunken stupor. Here, the facts speak for themselves. Our hypothetical observer would have good reason to be alarmed by the men's evident determination to commit rape on the defenseless girl, even if he knew that she was already dead. Moreover, the conversation of the defendants which took place immediately preceding the act unambiguously indicated their intentions. Therefore, the court was correct in convicting them.¹⁸⁹

3. *Shooting at a tree stump*. The fate of the would-be killer who mistakes a tree stump for his deadly enemy would depend on the exact facts of the case. If the only evidence against the man was that he, without a reasonably apparent motive, shot at a tree stump, his conduct could hardly be viewed as causing alarm or apprehension. If, on the other hand, he told his companions, before firing, that he saw his enemy X standing near a group of trees, and that now X's last hour had come, the shooter conveyed the impression that he "meant

188. 13 C.M.A. 278, 32 C.M.R. 278 (1962).

189. The result of the *Thomas* case also finds the approval of Hughes, *supra* note 40, at 1031.

business," and that he intended to take a human life. These circumstances would, under the "alarm" formula, lead to his conviction.¹⁹⁰

4. *"Poisoning" whiskey.* This hypothetical comes in two versions. In the first variant, the defendant furtively puts an innocuous amount of cyanide into the intended victim's whiskey, believing the dose to be lethal. Our hypothetical observer would rightly feel alarmed. Whatever the actor's intention was, it constitutes most extraordinary and fright-provoking behavior to pour even a small amount of poison into an unsuspecting person's drink.¹⁹¹ In the second version, the defendant does not use cyanide, but clear water, believing it to be a poisonous substance. Under these circumstances, a person knowing the true nature of the liquid would not be able to see any danger. Pouring water into another's whiskey does not have the slightest appearance of a harmful act, even if it is done furtively. Therefore, in the absence of self-incriminating statements at the time of the act, the poisoner's mistake would save him from a conviction for attempt.¹⁹²

5. *Oviedo.* Under the standards here suggested, Oviedo's attorney would face a most difficult task. Too much evidence speaks against his client. Not only had Oviedo promised heroin to the government agent, but he had also stored a large amount of the procaine hydrochloride in his television set—certainly an odd place to keep substances which one regards as innocent. Both elements, taken together, would strongly suggest to our hypothetical observer that Oviedo intended to sell a controlled substance, particularly since the hiding of the powder is not consistent with the possible alternative purpose of "ripping off" the supposed customer. Inasmuch as the observer feels threatened by persons dealing in drugs, he would be alarmed by Oviedo's conduct. The original conviction, which was overturned by the Fifth Circuit, therefore was probably the correct decision of the case.

6. *Jaffe.* The exact facts of the Jaffe case are set forth only in the dissenter's memorandum.¹⁹³ Jaffe had repeatedly cooperated with an employee of a dry-goods firm, who stole cloth from his employer and sold it to Jaffe at a low price. When the employee was finally caught stealing a certain cloth which Jaffe had specifically requested, he was instructed to carry out the deal with the fence as it had been plan-

190. See the discussion of this case in RUSSELL, *supra* note 108, at 188.

191. See Hughes, *supra* note 40, at 1033.

192. Professor Williams, as a later proponent of the subjective theory, reaches the opposite result. G. WILLIAMS, *supra* note 23, at 642.

193. *People v. Jaffe*, 185 N.Y. 497, 503, 78 N.E. 169, 170 (1906) (Chase, J., dissenting).

ned. He delivered the cloth, and Jaffe paid him about half of its real value. With knowledge of these circumstances, no objective observer could mistake Jaffe's actions, seen in context, for an honest businessman's transaction in cloth. This would be true even if no confession were available. Apart from Jaffe's prior order of the goods, the fact that he received them from an evidently unauthorized employee at an extremely low price would be evidence enough to suggest that his acts were directed against another's lawful property rights, and were threatening the integrity of the existing legal order. Jaffe should, therefore, have been convicted.¹⁹⁴

7. *Lady Eldon*. What would our hypothetical observer, assuming he is not tired of watching so many futile attempts to commit crimes, think about Lady Eldon's smuggling adventure? He would watch her buying French lace at a high price, artfully putting it into a pocket of the Eldons' traveling coach, and could possibly see her blush faintly while she tells the British customs officer that she has nothing to declare. Does that constitute enough evidence to suggest an unlawful, threatening undertaking on Lady Eldon's part? Even if we disregard the fact that only minor social damage would be done if the offense of smuggling lace were completed,¹⁹⁵ I do not think that Lady Eldon's conduct looks dangerous enough to cause alarm. I would therefore join the ranks of those who vote for her acquittal.¹⁹⁶

CONCLUSION

Lady Eldon's case has shown the limitations of the test proposed in this article. It requires a careful evaluation of all available facts. Even when everything is said and done, much is left to the court's sensibility and to its perception of the feelings of the community. That may be a virtue as much as a fault. Convicting and punishing offen-

194. The *Jaffe* case is discussed along similar lines by Hughes, *supra* note 40, at 1030-31.

195. The "alarm" test would set the threshold of criminal attempt lower if the actor tries to commit an "outrageous" crime, and higher if the offense itself is not regarded as particularly harmful. Such a differentiation has been suggested as an independent criterion for distinguishing criminal from non-criminal attempts. See LAW COMMISSION, *supra* note 27, at 98; O. HOLMES, *supra* note 35, at 68. See also GERMAN CRIMINAL CODE, § 23 ¶ 1: "The attempt to commit a felony [Verbrechen] is always punishable, the attempt to commit a misdemeanor [Vergehen] only in those cases in which the law expressly so provides." Such a distinction certainly has its problems, particularly if it cannot be regulated by statute, but is left to the judgment of the court. I do not think that its results could be regarded as altogether unfair. If an individual sets out to commit a serious crime, he has no reason to complain if his attempt is perceived as punishable at an earlier stage than an enterprise directed at a minor infraction.

196. See Enker, *supra* note 24, at 677-79, for an extensive argument in favor of Lady Eldon.

ders should be seen as an effort to restore the social peace which the defendant's criminal acts have destroyed or disturbed. Once the law allows the adjudicator to respond to the reasonable need—or lack of need—of the community for express condemnation and retribution, the criminal process can adequately serve this social function.

