WHEN IS AN ATTEMPT TO COMMIT AN IMPOSSIBLE CRIME A CRIMINAL ACT?

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Criminal liability for an effort to commit a crime, the successful completion of which is "impossible,"[1] is criticized, principally because such liability is based on intent or thoughts. Stated concisely, the arguments against liability for attempted crimes are several:[2] a legal system should not punish

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1. "The usual approach in dealing with such fact situations has been to distinguish what is called 'legal impossibility' from 'factual impossibility,' in the sense that what the defendant set out to do is not criminal, then the defendant is not guilty of attempt. On the other hand, factual impossibility, where the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant, is not a defense." W. LAFAVE & A. SCOTT, CRIMINAL LAW 439 (1972). This distinction has been cited in a number of cases and serves as the starting point for a discussion of liability for impossible attempts. *See, e.g.*, United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); Booth v. State, 398 P.2d 863 (Okla. Crim. App. 1964); United States v. Conway, 507 F.2d 1047 (5th Cir. 1975); Darnell v. State, 92 Nev. 680, 558 P.2d 624 (1976); United States v. Darnell, 545 F.2d 595 (8th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); People v. Dlugash, 41 N.Y.2d 725, 363 N.E.2d 1155, 395 N.Y.S.2d 419 (1977); United States v. Everett, 700 F.2d 900 (3d Cir. 1983); Gargan v. State, 436 P.2d 968 (Alaska 1968); State v. Guffey, 262 S.W.2d 152 (Mo. App. 1953); United States v. Hair, 356 F. Supp. 339 (D.D.C. 1973); United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y. 1973); Commonwealth v. Henley, 474 A.2d 1115 (Pa. 1984); Commonwealth v. Johnson, 312 Pa. 140, 167 A. 344 (1933); State v. Logan, 232 Kan. 646, 656 P.2d 777 (1983); State v. Lopez, 100 N.M. 291, 669 P.2d 1086 (1983); State v. McElroy, 128 Ariz. 315, 625 P.2d 904 (1981); United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976); United States v. Quijada, 588 F.2d 1253 (9th Cir. 1978); People v. Rollino, 37 Misc.2d 14, 233 N.Y.S.2d 580 (1962); State v. Sommers, 569 P.2d 1110 (Or. 1977); United States v. Thomas, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962); Waters v. State, 2 Md. App. 216, 234 A.2d 147 (1967); United States v. Wilson, 565 F. Supp. 1416 (S.D.N.Y. 1983).

However, courts in three jurisdictions have, in dicta, suggested a third type of impossibility, "inherent impossibility." *See* State v. Bird, 285 N.W.2d 481 (Minn. 1979); State v. Logan, 232 Kan. 646, 656 P.2d 777 (1983); People v. Elmore, 128 Ill.App.2d 312, 261 N.E.2d 736, *aff'd*, 50 Ill. 2d 10, 276 N.E.2d 325 (1970).

2. The courts in this country have allowed only the defense of legal impossibility. United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); Booth v. State, 398 P.2d 863 (Okla. Crim. App. 1964); State v. Guffy, 262 S.W.2d 152 (Mo. App. 1953); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906); Marley v. State, 58 N.J.L. 207, 33 A. 208 (1895); Nemecek v. State, 72 Okla. Crim. 195, 114 P.2d 492, (1941); United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976); People v. Rollino, 37 Misc.2d 14, 233 N.Y.S.2d 580 (1962); State v. Sterling, 230 Kan. 790, 640 P.2d 1264 (1982); State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939); People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909).

See also Enker, *Impossibility in Criminal Attempts-Legality and the Legal Process*, 53 MINN. L. REV. 665 (1969); Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967); Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422 (1957); Weigend, *Why Lady Eldon Should be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231 (1977).

people solely for their thoughts;[3] persons taking steps toward the commission of an impossible crime have not criminally acted, but instead have only conceived a criminal enterprise;[4] therefore, liability for efforts to commit an impossible crime is for thoughts, not for acts and especially not for criminal acts.[5] The proposition that a person attempting the commission of an im-

3. "The criminal law of the United States was never intended to punish states of mind except when they resulted in substantial overt acts." Commonwealth v. Johnson, 312 Pa. 140, 167 A. 344, 347 (1933) (Maxey, J., dissenting). "[I]t is fundamental to our law that a man is not punished merely because he has a criminal mind." *Booth*, 398 P.2d at 863. *See also* Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 30 (1968); Enker, *supra* note 2, at 675; G. FLETCHER, RETHINKING CRIMINAL LAW, § 3.3.6 (1978).

However, in a few cases judges have rejected the premise that the law ought not and does not punish persons solely for states of mind, and have not mentioned the need to find that the defendant acted. "[I]f the prisoner puts them off with the intent to defraud, the intent is the essence of the crime which exists in the mind, although from circumstances which he is not apprised of, the prosecutor cannot be defrauded by the act of the prisoner." R. v. Holden, Russ. & Ry. 168 E.R. 734, 735 (1809). "[W]e choose to focus our attention on the question of the specific intent to commit the substantive offense." *Darnell*, 92 Nev. at 682, 558 P.2d at 625. "The apparent reason is to punish his culpable intent." State v. Davidson, 20 Wash. App. 893, 584 P.2d 401, 404 (1978). "The basic premise of the [Model Penal] code provision is that what was in the actor's own mind should be the standard for determining his dangerousness to society and, hence, his liability for attempted criminal conduct." *Dlugash*, 41 N.Y.2d at 725, 363 N.E.2d at 1161, 395 N.Y.S.2d at 419. "This crime [i.e., attempt] as defined in the statute depends upon the mind and intent of the wrongdoer, and not on the effect or result upon the person sought to be coerced." People v. Gardner, 144 N.Y. 119, 38 N.E. 1003 (1894). "Criminal liability should attach . . . because the actor's mental frame of reference reflects the requisite dangerousness to society to justify that result." *Henley*, 474 A.2d at 1119-1120. "In such a case, the requisite intent is present. The means are adapted to the end, and, the purpose of the criminal laws being to protect society against those whose intentions are to injure it or its members, no sound reason exists why an attempt such as that here made, the purpose of which was by means of pretensions which were false to obtain money, should not lead to punishment." *Johnson*, 312 Pa. at 140, 167 A. at 346.

4. The argument that there is no act seems to mean that acts the person has taken are not in furtherance of his criminal scheme because it could not succeed; they are for all intents and purposes not acts at all. Courts have differed in their explanations of this point: "Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime to which, unless interrupted, they would have led; but steps on the way to doing something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime." R. v. Percy Dalton (London), Ltd., 33 Crim. App. 102, 110 (1909). *See also* People v. Jaffe, 185 N.Y. 497, 78 N.E. 169, 170 (1906); Marley v. State, 58 N.J.L. 207, 33 A. 210 (1895). "It is necessary to have more than a specific intent to commit a crime. There must be an overt act that would, if uninterrupted, amount to the first step toward the accomplishment of the crime." *Nemecek*, 72 Okla. Crim. at 205, 114 P.2d at 497. "The choice is between punishing intent without regard to objective acts, and punishing objective acts, regarding intent as immaterial." *Oviedo*, 525 F.2d at 884. *See also* Beale, *Criminal Attempts*, 16 HARV. L. REV. 491, 493 (1903); STEPHEN, 3 HISTORY OF THE CRIMINAL LAW OF ENGLAND 225 (1883); F. WHARTON, CRIMINAL LAW § 225 (14th ed. 1912).

5. Compare the following: "The criminal law of the United States was never intended to punish states of mind except when they resulted in substantial overt acts." *Johnson*, 312 Pa. at 149-50, 167 A. at 347; "The statute under which the charge in this case is brought does not make the intent to obtain money by false pretenses a crime; nor does it make a futile and dishonest gesture, coupled with such intent, a crime. There must be an overt act, coupled with the intent, that will at least start the consummation of a crime." *Nemeck*, 72 Okla. Crim. at 195, 114 P.2d at 497.

In contrast, however, other judges find that there is an act: "Although the law does not impose punishment for guilty intent alone, it does impose punishment when guilty intent is coupled with action that would result in a crime but for some fact or circumstance unknown to the defendant." People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903, 906 (1959) (lawyer's representation to client that money was required to bribe officials was held to be attempted grand theft even though client collaborated with police). "There is the criminal intent, and an effort made to carry out the intent to the point of completion, interrupted by some unforeseen impediment or lack [sic] outside of himself, special to the particular case. . . ." Clark v. State, 86 Tenn. 511, 517, 8 S.W. 145, 147 (1888). "Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or pur-

possible crime has not acted criminally is the most controversial of these arguments. I call this proposition the "No Act Thesis."

This Article argues that the debate over the No Act Thesis confuses two issues: 1) When does an effort which is intended to be a commission of a complete crime, but which cannot succeed due to circumstances unknown to the actor, endanger the interest that is protected by the law proscribing the completed crime? This is the danger issue. 2) When should criminal liability for an effort to commit a crime, whether or not its success is possible, be imposed? This is the liability issue. This writer argues that by separating these two questions we will better understand the arguments for and against liability for impossible attempts.

WHEN IS AN EFFORT TO COMMIT A CRIME DANGEROUS?

Writers and jurists often approach the subject of impossible attempts by examining the aims of the criminal law.[6] From a general statement about the aims of the criminal law, they make deductions about the aim of the law of criminal attempts, and then deduce a claim about the law in relation to impossible criminal attempts. Others begin with a discussion of the concept of the act, since its definition is necessary to an argument that criminal liability for an impossible attempt is or is not for an act.[7] Still others start with the ordinary meaning of words, like *attempt* and *act*, which are supposed to guide, if not determine, the legal meaning of such words.[8] I will not examine

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pose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." *Jacobs*, 91 Mass. at 275. "An attempt is made when an opportunity occurs, and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition." People v. Moran, 123 N.Y. 254, 258, 25 N.E. 412, 413 (1890). "The intent was being made manifest and his acts directed towards its consummation being "overt" according to the definition. . . ." State v. Nicholson, 77 Wash. 415, 463 P.2d 633 (1969) (effort by impotent defendant to rape held an "overt" act). "[E]ndeavoring to traffic in stolen property does not require [that the goods be stolen] . . . but is complete . . . upon proof of an overt act manifesting criminal intent directed toward committing the substantive crime of trafficking." State v. Rios, 409 So.2d 241, 243 (Fla. Dist. Ct. App. 1982). "But if a person formulates the intent and then proceeds to do something more which in the usual course of natural events will result in the commission of a crime, the attempt to commit that crime is complete." People v. Siu, 126 Cal. App. 2d 41, 43, 271 P.2d 575, 576 (1954) (purchase by defendant of talcum powder which he believed was narcotic held to be attempted possession). "[A]n 'attempt' necessarily includes the intent, and also 'an act of endeavor' adapted and intended to effectuate the purpose." State v. Wilson, 30 Conn. 500, 503 (1862) (defendant's act of putting hand in another's empty pocket was an overt act of endeavor).

6. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 77-78 (1930); Beale, *supra* note 4, at 493; Dutile & Moore, *Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners*, 74 NW. U. L. REV. 166, 185 (1979); Elkind, *supra* note 3, at 28-29; Enker, *supra* note 2, at 687-89; H. GROSS, A THEORY OF CRIMINAL JUSTICE 423, 425 (1979); Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 828-29 (1940); Hughes, *supra* note 2, at 1020; Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U. L. REV. 1170, 1174 (1957); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 850 (1928); Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 967-68 (1930); Weigend, *supra* note 2, at 265; G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART § 207 at 638-53 (2d ed. 1961); Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 578 (1961).

7. Smith, *supra* note 2, at 427-28.

8. Elkind, *supra* note 3, at 28-29; Enker, *supra* note 2, at 687-89; Hall, *supra* note 6, at 828-29;

these differing approaches, but instead will examine the moral and policy issues in the criminal law of attempts.

This Article focuses on the political relations among members of a community, and between the community and those who administer the criminal justice system. When a legislator enacts a rule of liability, he is likely to consider the arguments for and against the rule as well as the meaning of the terms in which the rule is formulated. A subject who is expected to take note of the rule, because it imposes a duty upon him or her, will also know something about the meaning of the terms of the rule, though he or she may not know its exact language. A court that administers the rule will also concentrate upon the rule's terms, together with principles of statutory interpretation and criminal justice. Legislators, judges, and subjects may not appreciate how such a rule forms a pattern of relations among subjects or between subjects and officials. For example, a law prohibiting murder informs subjects that a basic standard of conduct in a community is restraint from culpable killing of one person by another. A close examination of the meaning of the rule to determine when a killing is a murder will explain this standard of conduct in detail. The rule also establishes a social and political relation between subjects by imposing a burden upon individuals to avoid culpable interference with each others' enjoyment of their lives. This Article examines how the law relating to impossible attempts creates political relations between subjects and between subjects and officials.

NATURE OF CRIMINAL JUSTICE

The two dominant features of criminal law, the offense and principles of criminal liability, perform two quite different tasks, which must be appreciated to understand criminal law as a political institution. The offenses, which are primarily rules of obligation,[9] prescribe standards of conduct that must be met. Compliance with these standards usually means self-restraint, though sometimes it requires that a person act affirmatively. Compliance imposes restraints or burdens on citizens' liberties. The allocation of burdens will be called the distributive justice function of criminal law. Principles of liability prescribe the conditions where officials can find that persons breached obligations and, accordingly, deserve punishment. The principles provide for the enforcement of the burdens. In other words, they allow officials to seek to maintain the order of distributive justice, within limitations. This will be called the corrective justice task of the criminal law.[10]

Criminal Offenses and Attempts

A logical or descriptive account[11] of the distributive justice task of the criminal law (hereafter the offenses) will identify the nature of the burden

Weigend, *supra* note 2, at 265; G. WILLIAMS, *supra* note 6, at § 207; Wechsler, Jones & Korn, *supra* note 6, at 578.

9. H. HART, THE CONCEPT OF LAW 89 (1961).

10. Spjut, *The Relevance of Culpability to the Punishment and Prevention of Crime*, 19 AKRON L. REV. 197, 202-05, 222-27 (1985).

11. For an account of this claim, see Quinton, *On Punishment*, 14 ANALYSIS 133 (1954), *reprinted in* PHILOSOPHY, POLITICS AND SOCIETY (P. Laslett ed. 1956); Flew, *The Justification of*

that the law imposes and the corresponding benefit, if any. Only the imposition of a burden is an essential feature of the offense, for a rule of obligation could require that individuals refrain from doing or thinking something without their restraint actually yielding benefits to others. That burden is a cost for individuals continuing to live in the community which is governed by the institutions that enact laws proscribing the offenses. Usually, however, the burdens favor other persons, because the self-restraint, which the law requires in order to comply with a standard of conduct, is noninterference with other persons' enjoyment of a sphere of liberty. By conferring this benefit, the law tacitly recognizes that the beneficiary of a rule should enjoy the sphere of liberty which the standard protects. That sphere of liberty is the individual's interest, for example, in his life, bodily integrity, or property. Even where an interest already exists because it is recognized by another branch of the law (like torts), the enactment of a standard of conduct in the criminal law augments the protection and security it enjoys. That incremental security is the particular interest which the criminal law confers upon the beneficiary of the offense. That security, and the burdens which are imposed to create it, are the order of distributive justice that is effected by the criminal law.[12]

When a person commits an offense he declines to carry his burden, and where that burden yields a corresponding benefit, he also deprives another of that benefit. This deprivation, or harm,[13] is central to criminal law and, though a few writers have explained its importance to a discussion of the law of criminal attempts,[14] it has not been developed as fully as it warrants. Beale's discussion illustrates how the normative features of harm are confused with its empirical ones: Using the example of D putting poison in V's drink, he describes the harmful physiological effects of the poison on the bodily tissues as the "physical harm" and the "criminal act."[15] Obviously, a thing must exist to be protected, but the existence of a thing is not synonymous with its protection, as Beale supposes. What the law protects is an individual's liberty to enjoy the thing free from interference by others. A person who appropriates an abandoned object interferes "physically" with it, but as he does not deprive another of a liberty to enjoy it, he has not violated another's interest in it; no harm results from his act. Following Ryu, we may describe the thing as the object of conduct and describe the normative relations among individuals viz the thing, or the liberty of one or more persons to enjoy it without interference from another or others, as the object of protection.[16] An offense usually imposes a burden in favor of another or others, so that the latter will enjoy a benefit the nature of which includes

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Punishment, 29 PHIL. 291 (1954), *reprinted in* THE PHILOSOPHY OF PUNISHMENT (H. Acton ed. 1969); Benn, *An Approach to the Problems of Punishment*, 33 PHIL. 325 (1958).

12. For accounts of interests, see H. GROSS, *supra* note 6, at 116-17 (1979); Fletcher, *The Right To Life*, 63 MONIST 135-36 (1980).

13. For discussion of the importance of harm generally to the criminal law, see Hall, *supra* note 6, at ch. 7; H. GROSS, *supra* note 6, at ch. 4.

14. H. GROSS, *supra* note 6, at 427-30; Hall, *supra* note C 6, at 828-29; Enker, *supra* note 2, at 694-98; Ryu, *supra* note 6, at 1190; Weigend, *supra* note 2, at 258-65.

15. Beale, *supra* note 4, at 493.

16. Ryu, *supra* note 6, at 1175-78.

objects of conduct and protection. A harm occurs when an act violates both the objects of conduct and protection.

Scholars and penal codes typically divide criminal offenses into complete and inchoate, though the relationship between the two classes is not thoroughly explained. The nomenclature *complete*,[17] *consummated*,[18] *major*,[19] and *offense-in-chief*,[20] suggest that a transgression results in harm, whereas inchoate suggests otherwise. Criminal attempts are described as relational[21] and relative[22] to the complete offenses. In an inchoate offense no harm occurs, but an effort is related to the harm most likely because the accused has done sufficient acts to threaten harm. The division between complete and inchoate crimes is between crimes that prohibit acts that harm and acts that might, but do not actually, harm.[23]

Criminal attempts impose burdens, like complete offenses, and yield corresponding benefits by expanding the security of an interest which is recognized and protected by a complete crime. A criminal attempt makes it an offense to engage in conduct which risks inflicting a harm that a complete offense prohibits. The law of criminal attempts also performs a distributive justice function by imposing burdens so that those who enjoy interests protected by complete offenses will enjoy a further increment of security, from certain risk-taking acts.

The above account of offenses and attempts is logical, not moral, inasmuch as it explains how political and legal institutions can, if they desire, use offenses to recognize and protect individual interests. I have already stated that the only essential feature of a primary rule of obligation is that it imposes a burden by prescribing conduct which a subject must do or not do in given conditions. A moral account of the distributive justice task of the criminal law will identify the principles which ought to guide the recognition of interests. It is not within the scope of this Article to examine how utilitarian and rights-based moral theories would produce principles that might overlap. The writer will assume that there is no moral justification for a rule that imposes a burden without yielding a benefit for another person.[24] It follows that a criminal attempt offense should also yield a benefit by protecting an interest from a risk-taking act. Where an effort to commit a crime

17. Strahorn, *supra* note 6, at 968.

18. Ryu, *supra* note 6, at 1174.

19. Strahorn, *supra* note 6, at 964.

20. G. FLETCHER, *supra* note 3, at 132.

21. Hall, *supra* note 6, at 815; Enker, *supra* note 2, at 674.

22. Strahorn, *supra* note 6, at 963; G. FLETCHER, *supra* note 3, at 132.

23. A prohibition on risk-taking which also prevents harm should not be confused with a measure that directly prevents harm. A prohibition on risk-taking is a standard of conduct which serves as a reason for condemnation of a breach; prevention is an incidental effect. *See* H. GROSS, *supra* note 6, at 427-30 for a discussion of the difference between harmful and dangerous conduct.

24. The liberal thesis that the law ought to prescribe a duty only when it will protect an interest has been widely discussed in another context, the enforcement of morals. P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); H. HART, LAW, LIBERTY, AND MORALITY (1963); Rostow, *The Enforcement of Morals*, 31 CAMBRIDGE L.J. 174 (1960); Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962); Williams, *Authoritarian Morals and the Criminal Law*, CRIM. L. REV. 132 (1966); Blackshield, *The Hart-Devlin Controversy in 1965*, 5 SYDNEY L. REV. 441 (1967); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966).

poses no risk, or only a negligible risk of harm, there is no moral reason to proscribe and punish it.

Techniques of Control

A legal system will seek to maintain the order of distributive justice in the criminal law by empowering its officials to prevent individuals from committing harms, or, where harm is committed, imposing punishments or penalties. These two methods of protection, prevention and punishment, are often cast as examples of the opposition between utilitarian and retributive moral justifications of punishment and criminal law.[25] A particular proposal for a principle of criminal liability, criminal attempts included, will depend largely upon whether utilitarianism or retributivism is favored. The danger issue becomes obscured, if not altogether lost, in this approach. This dichotomy between punishment and prevention, which is supposed to reflect a wider opposition between utilitarianism and retributivism, is mistaken, though a careful explanation of why this is so is outside the scope of this Article. It will suffice here to note that Kant, the most celebrated exponent of respect for persons and retributivism, accepted the idea that certain preventive measures, like self-defense, are compatible with punishment.[26] Prevention, or more specifically preventive restraint, protects an interest by restricting the liberty of a person whose conduct is likely or certain to result in a harm to it. Punishment protects interests indirectly, if at all, by imposing odium and suffering upon an offender for his breach of a rule.[27] In a genuine blaming practice it is no business of those whose task it is to decide blame and to apportion it, where apportionment is required, to take into account how others are likely to react to their judgment, for once they begin to assess the probable consequences of their judgment they also turn from their concern with retribution.[28] Still, it may be assumed that blaming has an affect upon the subjects of a community, even if no one knows for certain what that affect is.

Harm and danger are relevant to a blaming practice, for when the law imposes liability for an offense it implicitly imposes it for the harm the individual inflicts when he breaks a rule. The law might impose liability because the subject has broken a rule, without regard to the interest the rule protects or whether it protects any interest at all. I will examine this possibility later in this section. What is important in this context is that when a rule protects an interest and imposes liability for its culpable breach, liability and punishment is for culpably inflicting harm. By analogy, liability for a criminal attempt is for endangering an interest, at least where the rule prohibits risk-taking conduct. If harm is a feature of a just complete offense, and danger is

25. For discussion of the concept of retribution, see J. HONDERICH, PUNISHMENT, THE SUPPOSED JUSTIFICATIONS 26-34 (1965).

26. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 120-22 (trans. Ladd 1965). *See also* J. FINNIS, FUNDAMENTALS OF ETHICS 129-32 (1983).

27. Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

28. H. GROSS, *supra* note 6, at 457-61; Charvet, *Criticism and Punishment*, 75 MIND 573 (1966).

a feature of a just criminal attempt offense, liability and punishment are just only when they are imposed for harm or danger, respectively.

Harm and danger are also relevant to preventive restraint. With a preventive measure, such as self-defense, a person may restrain an assailant to avert the latter's infliction of harm to the former. Similarly, defense of others allows a person to restrain an assailant whose actions threaten to harm another.[29] In a regime where the courts assess offenders with a view to imposing preventive restraint, the likelihood that an offender will inflict harm in the future would be important. Otherwise, there would not be a need to impose a restraint. The fact that a person broke the law would be an item of evidence which would be given appropriate consideration by a court, but it would not be conclusive that the offender is dangerous or likely to inflict harm in the future. Indeed, the very concept of dangerousness would have to be refined so that a court would focus on a specific type of offense which the accused would likely commit in the future. A court in a preventive regime would impose criminal liability for a complete offense because that offense, taken together with other factors, shows that the offender is likely to commit a specific harm in the future. This is also true of criminal attempts which may be equally as good as complete offenses in providing evidence of a criminal propensity.[30] While the harm or danger which an offender commits when he breaks the rule is only evidence of dangerousness in a preventive regime, it also identifies the conditions which are the business of the political and legal systems to avoid, if there is adequate information and forecasting ability. In a preventive regime, a just preventive measure would be imposed to avoid a specific harm which there is reason to believe will occur in the future.

The danger issue will be formulated differently for blaming than for preventive restraint. In the former, where criminal liability and punishment are imposed because a person has inflicted a harm or threatened to inflict a harm, the question is whether an effort poses such a threat? In the latter, where an offense helps to identify criminal inclinations, the issue is when is an effort to commit a crime reliable evidence of such an inclination?

ENDANGERING CONDUCT

A number of tests proposed by jurists and writers for determining when the law should impose liability for an impossible attempt may be grouped into two general theories of endangering conduct. These I will call the dangerous conduct, and risk-taking conduct theories. The former requires that the dangers associated with an effort, for which there may be liability for an attempt, should be considered in light of all the particular circumstances in which the effort was made. The latter seeks to abstract from the particular circumstances in which the effort was made, the conditions where such efforts are generally made.

29. Finnis, *supra* note 26.

30. E. FERRI, CRIMINAL SOCIOLOGY 413-14 (trans. Kelly & Lisle 1967); Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 463-66 (1928).

Dangerous Conduct

A narrowly constructed theory of danger, the theory of dangerous conduct, holds that, unless a person has a realistic chance of succeeding at his intended crime, his efforts do not endanger the interest which he seeks to harm, thus he ought not to be held criminally liable for an attempt.[31] First, where the object of conduct is absent or does not exist, no harm can occur and thus there is no danger. For example: a pickpocket thrusts his hand into an empty pocket;[32] a thief breaks into a house[33] or a safe which does not contain the goods he seeks; a person shoots at a spot where he believes his victim to be but no one is there;[34] a person buys a parcel which he believes contains a controlled substance, but it is empty; or a person deceptively procures what he thinks are goods, whereas none exist.[35] Second, the object of conduct may be present, but not be an object of protection, thus no threat of harm occurs. For example, a person shoots at a stump believing it is his enemy;[36] a man has intercourse with a woman whom he incorrectly believes is under the age of consent or is a mental defective;[37] a person buys or sells a substance which he incorrectly believes is a controlled substance; a person obtains goods by a representation which he wrongly believes is false;[38] a person attempts to steal property wrongly believing that it belongs to another, but it belongs to him.[39] Finally, while both the objects of conduct and protection are present the actor cannot succeed because he adopts a method wholly unsuited to his criminal object. The hypothetical voodoo witchdoctor who attempts to kill his enemy by incanting magic is a classical example.[40] An inadequate means is adopted where: a person tries to kill by poison and uses an insufficient amount or a non-poisonous substance;[41] a sexually impotent male who tries to rape; a person, in an effort to kill, fires

31. The narrow theory assimilates factual impossibility with legal impossibility, and denies criminal liability in both cases. Stephen is the most celebrated exponent of this theory. 3 HISTORY OF THE CRIMINAL LAW OF ENGLAND 225 (1886).

32. R. v. Collins, 169 Eng. Rep. 1477 (1864).

33. R. v. McPherson, 169 Eng. Rep. 975 (1857).

34. "A man goes to a place intending to commit a murder, but when he is there he does not find the man he expected to find. How can he be said to have attempted to commit the murder? He merely attempts to carry an intention into effect." *Id.* at 976.

35. R. v. Scudder, 172 Eng. Rep. 565 (1828) (S administered a drug to C whom he wrongly believed was pregnant. S intended to procure an abortion. S's conviction was not upheld because C was not pregnant as the judges believed the statute required). Under the successor act (1 Vict. ch. 85) regulating abortions, a conviction of D for using an instrument on S whom he wrongly believed was pregnant was upheld. R. v. Goodall, 2 Cox C.C. 41 (1846); R. v. Goodchild, 175 Eng. Rep. 121 (1846).

36. *McPherson*, 169 Eng. Rep. at 975; R. v. Osborn, 84 J.P. 63, 64 (1919).

37. D.P.P. v. Head, 1 All E.R. 679 (1958). No reference is made to the possibility of conviction for attempt. See G. WILLIAMS, *supra* note 6, at 653; SMITH & HOGAN, CRIMINAL LAW 200 (3d ed. 1973); Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905). *See also* Strahorn, *supra* note 6, at 987.

38. R. v. Percy Dalton (London), Ltd. 33 Crim. App. 102 (1949).

39. R. v. Collins, 169 Eng. Rep. 1477 (1864).

40. Atty. Gen. v. Sillem, 159 Eng. Rep. 178, 221 (1863); Commonwealth v. Johnson, 312 Pa. 140, 149-150, 167 A. 344, 347 (1933).

41. "[W]here a man is never on the thing itself at all—it is not a question of impossibility—he is not on the job although he thinks he is . . . [I]f the thing was not noxious though he thought it was, he did not attempt to administer a noxious thing by administering the innoxious thing." R. v. Osborn, 84 J.P. 63 (1919).

an unloaded firearm; a person fires a loaded firearm at his victim who is well out of range; or a person tries to obtain property by a deception that is too incredible for belief.[42] It is conceivable that, in a single case, the object of conduct and protection may be absent and the actor may choose a means ill-suited for his enterprise. A theory of dangerous conduct, however, holds that conduct is innocuous when the object of conduct or protection is missing, or the means chosen are inadequate. Put another way, conduct endangers a protected interest where an effort is directed towards both objects of conduct and objects of protection, and the means chosen for inflicting harm are adequate for doing so.

One objection to the theory of dangerous conduct is that the theory appears to assume impossibility is absolute, whereas it is relative, or a matter of degree, in nearly all cases.[43] The probability of success is clearly evident in the third type of case where the actor adopts inadequate means. It may be, for example, that a would-be murderer who uses an unloaded firearm has the bullets in his pocket, but in haste has forgotten to load them. Firing at a victim who is out of range illustrates the relative character of impossibility even more clearly because the victim may have been within range but moved out of range shortly before the firearm was discharged.[44] The missing object of conduct may have been present only moments before the effort is made to commit the crime, as where a victim switches his valuables from one pocket to another only seconds before the pickpocket thrusts his hand into the empty pocket. Similarly, the object of protection may have lost its legal protection only moments before the attempted crime. This is often so where a thief is caught with stolen goods and informs on the intended receiver: the goods were stolen shortly before their planned presentation to the receiver, but because they are recovered, they are no longer objects of protection under the law which prohibits the receiving of stolen goods.[45]

A second and related objection is that the theory of dangerous conduct too strictly defines the criteria of danger and allows acts which imperil protected interests to escape criminal liability. In fact, the theory has never been fully accepted by a single jurisdiction in this country.[46] The absence of an object of conduct is denominated "factual impossibility," which is no defense to criminal attempt: a pickpocket is guilty of attempt, though the pocket,[47] or other container[48] is empty;[49] a person who shoots at a spot,

42. D.P.P. v. Nock, 2 All E.R. 654 (1978) (conspiracy to make controlled substance out of substance from which the controlled substance could not be produced was not criminal object and, hence, no conspiracy).

43. Hall, *supra* note 6, at 835; Williams, *The Lords and Impossible Attempts, or Quis Custodiet Ipos Custodes?*, 45 CAMBRIDGE L.J. 33, 48 (1986).

44. Kunkle v. State, 32 Ind. 220 (1869); State v. Mitchell, 139 Iowa 455, 116 N.W. 808 (1908).

45. Haughton v. Smith, 3 All E.R. 1109 (1974) (conviction for attempted receipt of stolen goods quashed because the goods were not stolen at time of receipt).

46. English courts have more fully adopted the narrow theory than any other jurisdiction. *See Haughton*, 3 All E.R. at 1109; *Nock*, 2 All E.R. at 654; THE CRIMINAL ATTEMPT ACT OF 1981, § 1, abolishes the defenses of factual impossibility. *See* Anderton v. Ryan, 2 All E.R. 355 (1985).

47. In re Appeal No. 568, September Term, 1974 From the Circuit Court of Baltimore City Sitting As A Juvenile Court, 25 Md. 218, 333 A.2d 649 (1975); People v. Fiegelman, 33 Cal. App. 2d 100, 91 P.2d 156 (1939); Commonwealth v. McDonald, 59 Mass. 365 (5 Cush. 1850); People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890); State v. Wilson, 30 Conn. 500 (1862).

48. State v. Beal, 37 Ohio St. 108 (1881); Clark v. State, 86 Tenn. 511, 8 S.W. 145 (1888);

believing his victim to be there, commits attempted murder;[50] a person who undertakes to procure a miscarriage of a woman whom he incorrectly believes is pregnant, commits attempted abortion.[51] Furthermore, while there is some dicta indicating that means obviously unsuited for the commission of a contemplated crime amount to inherent impossibility and a defense,[52] no jurisdiction has ever allowed the defense: a person who tries to kill by firing an unloaded gun commits attempted murder;[53] a sexually impotent man who tries to rape is guilty of attempted rape;[54] a person who uses innocuous drugs to procure an abortion is guilty of attempted abortion;[55] a person who tries to obtain property by a false statement which the victim does not believe is guilty of attempted deception.[56] A number of jurisdictions allow a defense of legal impossibility where the object of protection is absent: a person attempts to steal his own property;[57] a person attempts to receive goods no longer stolen;[58] a person attempts to kill[59] or rape[60] a corpse; a person

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Gargan v. State, 436 P.2d, 968 (Alaska 1968); State v. Meisch, 86 N.J.Super. 279, 206 A.2d 763, *cert. denied*, 44 N.J. 583, 210 A.2d 627 (1965); State v. Utley, 82 N.C. 482 (1880).

49. The English decisions on this point are inconsistent: R. v. McPherson, 169 Eng. Rep. 975 (1857); R. v. Ring, 17 Cox C.C. 491 (1892); R. v. Collins, 169 Eng. Rep. 1477 (1864).

In this country, the courts have consistently held that a defendant who tries to pick an empty pocket has done an act connected with his intent. "There is the criminal intent, and an effort made to carry out the intent to the point of completion. . . ." *Clark*, 86 Tenn. at 513, 8 S.W. at 147. "He [the defendant] has taken the first step; he has taken it with the intent to commit the crime. . . ." Hamilton v. State, 36 Ind. 280, 286 (1871). "A man may make an attempt, an effort, a trial, to steal, by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still, he remains nevertheless chargeable with the attempt, and with the act done towards the commission of the theft." *McDonald*, 59 Mass. at 367. "An attempt is made when an opportunity occurs, and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition." *Moran*, 123 N.Y. at 258, 25 N.E. at 413.

50. People v. LeeKong, 95 Ca. 666, 30 P. 800 (1892); State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902).

51. People v. Huff, 339 Ill. 328, 171 N.E. 261 (1930).

52. In a few cases, however, judges have suggested, in dicta, that there may be a defense of inherent impossibility: State v. Bird, 285 N.W. 481 (Minn. 1979); People v. Elmore, 128 Ill. App. 2d. 312, 261 N.E.2d 736 (1970), *aff'd.*, 50 Ill.2d. 10, 276 N.E.2d 325 (1971); State v. Logan, 232 Kan. 646, 656 P.2d 777 (1983).

53. State v. Damms, 9 Wis.2d. 183, 100 N.W.2d 592 (1960); State v. Wiley, 52 S.D. 110, 216 N.W. 866 (1927).

54. Berg v. State, 41 Wis.2d 729, 165 N.W.2d 189 (1969); People v. Coston, 187 Mich. 538, 153 N.W. 831 (1915); Huggins v. State, 41 Ala. App. 548, 142 So.2d 915, *cert. denied*, 273 Ala. 708, 142 So.2d 918 (1962); State v. Nicholson, 77 Wash. 415, 463 P.2d 633 (1969); Preddy v. Commonwealth, 184 Va. 765, 36 S.E.2d 549 (1946).

55. State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888).

56. People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903 (1959); People v. Elmore, 128 Ill. App. 2d 312, 261 N.E.2d 736 (1970), *aff'd.*, 50 Ill.2d 10, 276 N.E.2d 325 (1970); State v. Franco, 153 N.J.Super. 428, 379 A.2d 1292 (1977); Franczkowski v. State, 239 Md. 126, 210 A.2d 504 (1965); People v. Gardner, 144 N.Y. 119, 38 N.E. 1003 (1894); State v. Greenberg, 154 N.J.Super. 564, 382 A.2d 58 (1977); People v. Grossman, 28 Cal. App. 2d 193, 82 P.2d 76 (1938); Commonwealth v. Johnson, 312 Pa. 140, 167 A. 344 (1933); People v. Lavine, 115 Cal. App. 289, 1 P.2d. 496 (1931); State v. Phillips, 36 Mont. 112, 92 P. 299 (1907); State v. Peterson, 109 Wash. 25, 186 P. 264 (1919); People v. Wallace, 78 Cal. App. 2d 726, 178 P.2d 771 (1947).

Other cases in which a defendant adopts a means so inadequate that success is impossible might include Osborn v. United States, 385 U.S. 323 (1966) (attempt to influence juror); People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903 (1959) (attempted extortion); People v. Gardner, 144 N.Y. 119, 38 N.E. 1003 (1894) (attempted extortion); People v. Lavine, 115 Cal.App. 289, 1 P.2d 496 (1931) (attempted extortion).

57. Application of Varona, 38 Wash. 2d 833, 232 P.2d 923 (1951).

58. Booth v. State, 398 P.2d 863 (Okla. Crim. App. 1964); United States v. Hair, 356 F. Supp. 339 (D.D.C. 1973); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906). The overwhelming authority

shoots a stuffed dummy while hunting out of season;[61] a person buys, sells or receives a substance which is not a controlled substance, though he thinks it is;[62] a person attempts to corrupt another whom he believes has been summoned, but in fact has not been.[63] This partial support for the theory of dangerous conduct appears arbitrary, for there is no reason why efforts to commit a crime where the object of protection is missing are less a threat than where the object or conduct is missing, or the means used ill-suited.[64] In some cases, the distinction between a missing object of conduct, and a missing object of protection, is extremely fine to say the least. There is no moral or legal ground for classifying a stump or stuffed dummy as an object of conduct; both could just as easily be regarded as objects of protection. The fact that no jurisdiction has seen fit to fully adopt the theory of danger-

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holds the defendant criminally liable. State v. Bird, 285 N.W.2d 481 (1979); State v. Carner, 25 Ariz. App. 156, 541 P.2d 947 (1975); Darnell v. State, 92 Nev. 680, 558 P.2d 624 (1976); Darr v. People, 193 Colo. 445, 568 P.2d 32 (1977); Faustina v. Superior Court, 174 Cal. App. 2d 830, 345 P.2d 543 (1959); Commonwealth v. Henley, 504 Pa. 408, 474 A.2d 1115 (1984); State v. Korelis, 273 Or. 427, 537 P.2d 136 (1975); State v. Logan, 232 Kan. 646, 656 P.2d 777 (1983); State v. Mack, 31 Or. App. 59, 569 P.2d 624 (1977); *Ex parte* Magidson, 32 Cal. App. 566, 163 P. 689 (1917); State v. Niehuser, 21 Or. App. 33, 533 P.2d 834 (1975); Padgett v. State, 378 So.2d 118 (Fla. 1980); State v. Rios, 409 So.2d 241 (Fla. 1982); People v. Rojas, 55 Cal.2d 252, 10 Cal. Rptr. 465, 358 P.2d 921 (1961); United States v. Rose, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); State v. Skinner, 397 So.2d 389 (Fla. 1981); State v. Sommers, 569 P.2d 1110 (Utah 1977); Steiner v. Commissioner of Correction, 490 F. Supp. 204 (S.D.N.Y. 1980); State v. Vitale, 23 Ariz. App. 37, 530 P.2d 394 (1975); United States v. Waldron, 590 F.2d 33 (1st Cir. 1979), *cert. denied*, 441 U.S. 934 (1970).

59. State v. Guffey, 262 S.W.2d 152 (Mo. App. 1953), *but see* People v. Dlugash, 41 N.Y.2d 725, 363 N.E.2d 1155, 395 N.Y.S.2d 419 (1977) (defendant held liable for attempted murder where he believed corpse was alive).

60. United States v. Thomas, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962) (defendant held liable for attempted rape where he believed corpse was alive at time of intercourse).

61. State v. Guffey, 262 S.W.2d 152 (Mo.App. 1953) (defendant's conviction for attempt to hunt out of season reversed where object which he shot was stuffed deer).

62. United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976), is the only case to reverse a conviction for attempted sale of a controlled substance which, in fact, was not such. This case supports the equivocality theory and cannot be cited for support for the narrow theory. The rest of the cases favor liability. State v. Cohen, 409 So.2d 64 (Fla. 1982); United States v. Darnell, 545 F.2d 595 (8th Cir. 1976); United States v. Everett, 700 F.2d 900 (3d Cir. 1983); United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y. 1973); United States v. Hough, 561 F.2d 594 (5th Cir. 1977); State v. Lopez, 100 N.M. 291, 669 P.2d 1086 (1983); State v. McElroy, 128 Ariz. 315, 625 P.2d 904 (1981); United States v. Quijada, 588 F.2d 1253 (9th Cir. 1978); People v. Siu, 126 Cal. App. 2d 41, 271 P.2d 575 (1954).

63. State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939). Analogous cases include: United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973) (conviction for attempted smuggling of letters out of prison without warden's consent reversed where warden knew of prisoner's illicit communications); State v. Lawrence, 178 Mo. 350, 77 S.W. 497 (1903) (conviction for attempt to obtain money by deception reversed where the warrant obtained by the defendant was void); Nemecek v. State, 72 Okla. Crim. 195, 114 P.2d 492 (1941) (conviction for attempt to obtain property by deception reversed where the defendant's claim for insurance included goods that did not exist but were also immaterial to the claim); Ventimiglia v. United States, 242 F.2d 620 (4th Cir. 1957) (conviction for conspiracy to make illicit payments to union official reversed where person purporting to act as employees' representative for limited purposes was not such).

64. Commentators agree that while legal and factual impossibility differ, there is no reason for denying the latter a defense if it is permitted in the former. *See* ARNOLD, *supra* note 6, at 69-70; Dutile & Moore, *supra* note 6, at 197-200; Hughes, *supra* note 2, at 1013; Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 466-67; Elkind, *supra* note 2, at 25-27; R. PERKINS AND R. BOYCE, CRIMINAL LAW 628, 629 (3d ed. 1982); Sayre, *supra* note 6, at 849-50; Smith, *Two Problems in Criminal Attempts Re-examined—II*, CRIM. L. REV. 212 (1962); Strahorn, *supra* note 6, at 997-98; J. HALL, GENERAL PRINICPLES OF CRIMINAL LAW 594-95, n.132 (2d ed. 1960); Weigend, *supra* note 2, at 256-66.

ous conduct suggests that the theory is not understood[65] and, if it were, it would probably be regarded as failing to adequately identify conduct that endangers protected interests.[66]

A theory of absolute impossibility seeks to avoid these objections by restricting the defenses to cases where there was never any hope of success from the outset of the accused's efforts to commit his intended crime, whereas the theory of relative impossibility focuses on the moment when the accused commits the act for which he is liable for attempt.[67] The theory of absolute impossibility has the obvious merit of recognizing the difficulties that surround the theory of dangerous conduct generally (of which relative impossibility is a version). The result under the theory of absolute impossibility is paradoxical. On one hand, a court must find that the defendant took steps sufficient to satisfy the "substantial act" or some equivalent requirement. On the other, it antedates the assessment of criminal liability by looking to the moment when the accused initiated his enterprise. At that moment an object of conduct or protection must be absent or the defendant must have chosen an ill-suited means; otherwise, the impossibility defenses are foreclosed. While the absolute impossibility theory seeks to expand the concept of danger in the law of criminal attempts, it does so by adopting an artificial determination of the *actus reus* of the crime. Perhaps the true utility of the theory of absolute impossibility is that it brings into sharp focus the stringency of the criteria of danger in the theory of dangerous conduct.

The most powerful objection to the theory of dangerous conduct is that it fails to distinguish between simple failure to commit a crime and impossibility, though it purports to define the latter. It goes without saying that no court will allow a defendant to escape liability for a criminal attempt because he was inept and failed. Certainly, his failure does not mean that his efforts did not endanger a protected interest. Yet, as the theory of dangerous conduct requires that a court consider all the circumstances in which a defendant acted, factors that impeded or prevented success must be explained. This is especially important where a defendant owes his failure to something he overlooked such as a cross wind that skewed the trajectory of the bullet which he fired at his victim. It may be said that the cross wind, and the

65. Courts which have held that there is no basis for allowing the defense of legal, but not factual, impossibility have rejected both defenses. United States v. Butler, 204 F. Supp. 339 (S.D.N.Y. 1962); People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903 (1959); State v. Carner, 25 Ariz. App. 156, 541 P.2d 947 (1975); Darnell v. State, 92 Nev. 680, 558 P.2d 624 (1976); United States v. Darnell, 545 F.2d 595 (8th Cir. 1976); Faustina v. Superior Court, 174 Cal. App. 2d 830, 345 P.2d 543 (1959); United States v. Everett, 700 F.2d 900 (3d Cir. 1983); United States v. Heng Awkak Roman, 356 F.Supp. 434 (S.D.N.Y. 1973); State v. Korelis, 537 P.2d 136 (Or.App. 1975), *aff'd.*, 541 P.2d 468 (Or. 1975); *Ex parte* Magidson, 32 Cal. App. 566, 163 P. 689 (1917); United States v. Quijada, 588 F.2d 1253 (9th Cir. 1978); State v. Rios, 409 So.2d 241 (Fla. 1982); People v. Rojas, 55 Cal.2d 252, 10 Cal. Rptr. 465, 358 P.2d 921 (1961); People v. Siu, 126 Cal. App. 2d 41, 271 P.2d 575 (1954); State v. Skinner, 397 So.2d 389 (Fla. 1981); United States v. Thomas, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962); State v. Vitale, 23 Ariz. App. 37, 530 P.2d 394 (1975).

66. Support for different results in analogous cases might be drawn from Craven v. United States, 22 F.2d 605 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928) (conviction for conspiracy to import liquor affirmed even though liquor was domestically produced), and Commonwealth v. Jacobs, 91 Mass. 274 (9 Allen 1864) (conviction for soliciting a person to leave the Commonwealth to join armed forces of another country affirmed even though the person solicited would not be accepted by the armed forces of the other country).

67. Hall, *supra* note 6, at 835.

defendant's firearm skill, made success impossible. The same may be said of a defendant whose aim is poor. So many factors bear upon the defendant's ability to succeed that one may justifiably say in hindsight that, given all the facts, failure was inevitable; but in so saying we are left with no criteria to distinguish cases where the means were adequate from those where they were not, i.e., dangerous and innocuous conduct.[68] We must ignore some of the peculiar circumstances that had some bearing upon the defendant's failure so that we can say that he could have succeeded. The theory of dangerous conduct does not allow such discrimination among all the facts that affect the defendant's ability to commit the crime, at least if the theory is rigorously elaborated and applied. This defect is fatal because, unless a theory of endangering conduct can distinguish impossibility and failure, it cannot supply a criteria for defining endangering conduct.

Risk-taking Conduct

A broadly construed theory of endangering conduct evaluates conduct according to its type or class, not in the context of all the peculiar circumstances in which it is performed. Such a theory examines the features of acts which have been found relevant to the occurence of a harm in the past. This assessment does not consider whether a person's conduct would actually have resulted in harm in a particular case. The inquiry is similar to predictions about dangerousness except that the theory is concerned with how conduct, not personality, is associated with a risk. A judgment that conduct poses a risk identifies a significant association between one or more conditions in which a person acts, and a harm. The assessment is analogous to an actuarial estimate which enables insurers to evaluate risks connected with insuring a project or person. An assessment correlates factors which in the past have been associated with the occurrence of an insured event and quantifies the likelihood that it will happen in the future. The assessment is an account of the statistical relationship or correlation between specific factors and an event; it is not a prediction that an event will occur. Whereas the theory of dangerous conduct could not acknowledge probability or degrees of failure or success, the theory of risk-taking recognizes that efforts at crime are probabilistic. The law of criminal attempts reflects an assessment that the benefits with which conduct are associated are less than the costs associated with the risk; accordingly, conduct is proscribed as a criminal attempt. A reduction of the incidence of risk-taking increases the security of legally protected interests.[69]

The risk-taking theory has not been adopted by any jurisdiction and is largely the product of a few scholars. Perkins, who argues that a person is not guilty of an attempt until he or she has taken a substantial step toward the complete crime, defines as substantial an act that "frequently results in" the complete crime.[70] For example, a person who shoots at a stump commits

68. Williams, *supra* note 43, at 48.

69. *See, e.g.*, Michael and Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 733-46 (1937); Arnold, *supra* note 6, at 970-71.

70. R. PERKINS AND R. BOYCE, *supra* note 64, at 337.

attempted murder because his firing of a gun at what he believes is a person is an act which frequently results in death, though in the particular instance the victim is absent.[71] Hall argues that, "if the risk is great in such situations generally, there is liability for attempt regardless of insufficient conditions in any particular case. Risk is a function of the relevant probabilities, hence only slightly affected by any specific situation."[72] Like Perkins, Hall finds that a person who shoots at a stump endangers life, though he does not threaten any particular victim.[73] Fletcher, who calls his a theory of aptness, explains that "the problem of aptness is one of assessing whether in the long run the type of conduct involved is likely to produce harm."[74] All these tests require a court to consider whether the class of conduct, not the particular act, would generally lead to the commission of a complete offense.

A common objection to the risk-taking theory is that it fails to supply two sets of criteria. First, we require criteria by which we generalize about acts so that we can identify the types of acts. Second, we need further criteria by which to identify the features of a particular act so that we can say it is of one type, not another. A court is expected to have both sets of criteria when a defendant appears before it on a charge of criminal attempt; otherwise it cannot say whether his particular act is one which "tends to" or "frequently results in" harm. In the hypothetical where D fires at a stump believing it is his enemy, Perkins and Hall find it a dangerous act, though they do not explain how they decide that D is shooting at a person rather than an inanimate object. No reason is given to prefer one characterization over another. The theory of risk-taking appears fatally ambiguous because it fails to supply criteria for distinguishing between harmful and innocuous acts.[75]

However, the defect is limited in part to the present general offense of criminal attempt which supplies an *actus reus* that covers attempts to commit all complete crimes. Such a general offense is necessarily formulated in broad terms. Indeed, one commentator has remarked that the offense is so wide that it is better described as a residual law-making power that has been retained by the couts: the courts formulate specific rules for attempts to commit each offense under the guise of deciding the content of the *actus reus* of a general attempts crime.[76] In this context, the risk-taking theory adds yet another broad test of liability to the general attempts crime[77] to decide when efforts really endanger a protected interest. The difficulty is that a court is not really in a position to conduct an inquiry into patterns of criminality and, accordingly, to identify the types of conduct often associated with a type of harm. This more systematic study is best conducted by a legislative committee which has the necessary resources. It is certainly inappropriate for a court, which develops the law piecemeal, to identify types of

71. *Id.*
72. Hall, *supra* note 6, at 837.
73. *Id.* at 828.
74. C. FLETCHER, *supra* note 3, at 150.
75. Elkind, *supra* note 3, at 24; G. FLETCHER, *supra* note 3, at 153; Enker, *supra* note 2, at 684; Weigend, *supra* note 2, at 259.
76. Arnold, *supra* note 6, at 77-78.
77. W. LAFAVE AND A. SCOTT, *supra* note 1, at 431-38.

conduct that are associated with particular harms. The discussions of the hypotheticals in the literature and cases do not help a court to focus on patterns of criminality. It invites conjecture and speculation.

There are numerous examples of what are called relative[78] criminal attempts in the common law and statutes, and these offenses illustrate how the risk-taking theory may be developed. The common law judges developed the offense of unlawful assembly and riot as punishable acts which ran the risk of resulting in a riot.[79] The courts have held that a person who administers a noxious substance, or uses an instrument with an intent to procure an abortion, may be convicted of the statutory offense of administering such substance or instrument with intent though the woman was not pregnant;[80] her pregnancy is immaterial under such an act which presumes that the administration of such a substance or thing is itself dangerous.[81] Sexually impotent males have been convicted for assault with intent to rape; their impotence is irrelevant.[82] A pickpocket was convicted of assault with intent to steal in an early case; the fact that the pocket was empty is immaterial.[83] Recipients of goods previously stolen but recovered, or never stolen at all but believed to be so, have been convicted of trafficking in stolen goods.[84] The likelihood that a harm will occur—a riot, abortion, rape, theft or the receiving of stolen goods—is immaterial, for these offenses prohibit acts because these acts run a risk of harm.[85]

DANGEROUS PERSONS

Whereas in a punitive regime criminal liability for attempt is imposed because a person endangered a protected interest, in a preventive regime liability is imposed to prevent a person from committing a harm in the future. Supporters of the Model Penal Code argue along these lines when they write, "one of the functions of penalizing attempts is to make amenable to the corrective process of the law persons who manifest a certain dangerousness . . . unless the means chosen are so inappropriate as to negate dangerousness."[86]

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78. G. FLETCHER, *supra* note 3, at 132. Strahorn, *supra* note 6, at 963.

79. For an account of the historical development of relative criminal attempt crimes, see Hall, *supra* note 6, at 797-805.

80. State v. Barrett, 197 Iowa 769, 198 N.W. 36 (1924); People v. Richardson, 161 Cal. 552, 120 P. 20 (1911); State v. Elliot, 206 Or. 82, 289 P.2d 1075 (1955); People v. Axelsen, 223 N.Y. 650 (1918); People v. Cummings, 141 Cal. App. 2d 193, 296 P.2d 610 (1956); State v. Stewart, 52 Iowa 284, 3 N.W. 99 (1879); Commonwealth v. Surles, 165 Mass. 59, 42 N.E. 502 (1895); Commonwealth v. Tibbets, 157 Mass. 519, 32 N.E. 910 (1893); Urga v. State, 155 Fla. 87, 20 So.2d 685 (1944).

81. *Compare* R. v. Scudder, 172 Eng. Rep. 565 (1828) and R. v. Goodall, 2 Cox C.C. 41 (1846); R. v. Goodchild, 175 Eng. Rep. 121 (1846).

82. State v. Ballamah, 28 N.M. 212, 210 P. 391 (1922); State v. Bartlett, 127 Iowa 689, 104 N.W. 285 (1905); Hunt v. State, 114 Ark. 239, 169 S.W. 773 (1914); Territory v. Keyes, 5 Dak. 244, 38 N.W. 440 (1888); Commonwealth v. Shaw, 134 Mass. 221 (1883); Waters v. State, 2 Md. App. 216, 234 A.2d. 147 (1967).

83. State v. Wilson, 30 Conn. 500 (1862). *See also* Hamilton v. State, 36 Ind. 280 (1871) (assault with intent to rob); State v. Beal, 37 Ohio St. 108 (1881) (breaking and entering with intent to steal).

84. Padgett v. State, 378 So.2d 118 (Fla. 1980); State v. Rios, 409 So.2d 241 (Fla. 1982); State v. Skinner, 397 So.2d 389 (Fla. 1981).

85. *See, e.g.*, Glazebrook, *Should We Have a Law of Attempted Crime?*, 85 LAW Q. REV. 28 (1969).

86. United States v. Butler, 204 F. Supp. 339, 344 (S.D.N.Y. 1962). "One of the purposes of

Correction may not always be available because the techniques of reform are not yet developed by psychiatrists and psychologists; preventive restraint would be appropriate. In either event, the court's supposed focus is upon dangerous persons whose criminal tendency is good evidence that they will likely endanger or harm a protected interest in the future.

Model Penal Code

The Model Penal Code provides that a person is liable for criminal attempt if he "purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[87] The provision assumes that liability should attach in all cases where a person attempts to commit a crime, even an impossible one, "because the actor's mental frame of reference reflects the requisite dangerousness to society to justify that result."[88]

This is a bold claim, as it assumes that one fact alone, the actor's intent, is strong, indeed conclusive, evidence of a dangerous personality and that such a finding of dangerousness is sufficient to warrant a further judgment that the accused should be subjected to a preventive restraint because he is likely to inflict harm in the future. In a genuine preventive regime a court would have to take into account a broad range of other facts about the accused, such as his personal history and social milieu, before reaching a conclusion that he is dangerous; it would not form a conclusion on the basis of one fact. It would certainly not rely solely upon one fact, such as intent, in every case. The importance of intent will obviously vary with the type of crime which the accused anticipated he would commit.[89] Its significance might be greater in an attempted murder than in an attempted shoplifting case. Even with a type of offense, its significance would not be uniform in all cases. The intent of a person who regularly trafficks in stolen goods to purchase a stolen commodity will most likely be more significant than that of a person who buys a television in a market at an extremely low price and, for that reason, believes it to be stolen.

Furthermore, dangerousness is not a disposition to commit any crime, but rather a predisposition to commit a particular crime or type of crime in certain conditions. A judgment that a person is dangerous would be meaningful only if it identified the type of crime that is likely to be committed and the conditions in which it would be committed; there should also be some prediction about the probability that that person will be likely to commit such a crime. Scholars have expressed serious doubt that research about crime in any area has sufficiently advanced so that we can accurately identify dangerous persons, let alone make sound predictions about the occurrence of

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the criminal law is to protect society from those who intend to injure it." People v. Camodeca, 52 Cal.2d 142, 147, 338 P.2d 903, 906 (1959).

87. MODEL PENAL CODE § 5.01(1)(c) (1962).

88. Commonwealth v. Henley, 504 Pa. 408, 474 A.2d 1115, 1119-20 (1984).

89. *See, e.g.*, Levitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578 (1922); B. WOOTTON, CRIME AND THE CRIMINAL LAW 46-47 (1963).

future crime.[90] The discussion of dangerousness in the literature on criminal attempts, however, displays remarkable naivete on these points. To begin with, the discussion uses a hypothetical, the voodoo witchdoctor who tries to kill by magic, and simply conjectures that he is dangerous because he has demonstrated his determination to kill[91] or that he is not dangerous because he failed to use a realistic method.[92] The arguments of scholars and jurists supporting the Model Penal Code appear to share this simplified view of a preventive regime, as they assume that one such fact as intent alone warrants a conclusion that a person is a menace to society and must be put away to prevent future harm.[93]

In favor of the Model Penal Code provision, it may be said that it establishes clarity in the law of criminal attempts. Confusion surrounding defenses of legal, factual, and inherent impossibility are swept away by the Code. Furthermore, compare a truly preventive regime, where courts would have to assess a broad range of facts about an accused before reaching a conclusion about his dangerousness, and there would thus be little certainty

90. This assumption is made for the sake of argument, not because it is widely accepted. For critical discussion, see H. GROSS, *supra* note 6, at 42-47.

91. R. PERKINS & R. BOYCE, *supra* note 64, at 628-29; G. WILLIAMS, *supra note 6, at 207*; Wechsler, Jones & Korn, *supra* note 6, at 585. None of these writers emphatically say the witchdoctor is dangerous to society, though they recognize that an exception would have to be made to avoid a conclusion that such a person is dangerous and ought to be held liable. *See* Dutile & Moore, *supra* note 6, at 196.

92. Sayre, *supra* note 6, at 850. *See also* Beale, *supra* note 4, at 496; Elkind, *supra* note 3, at 35; H. GROSS, *supra* note 6, at 431-32; W. LAFAVE & A. SCOTT, *supra* note 1, at 445; Strahorn, *supra* note 6, at 978, 985; Weigend, *supra* note 2, at 270.

Much of the discussion of impossible attempts uses hypotheticals to illustrate how proposed tests of liability will apply. The favorites in the literature are: (1) D shoots at a stump believing it is his enemy. Beale, *supra* note 4 at 494; G. FLETCHER, *supra* note 3, at 165; Hall, *supra* note 6, at 838; RUSSELL ON CRIME 188 (12th ed. 1964); Sayre, *supra* note 6, at 852-53; Strahorn, *supra* note 6, at 962, 983; Weigend, *supra* note 2, at 270; G. WILLIAMS, *supra* note 6, at § 207; Turner, *Attempts to Commit Crime*, 5 CAMBRIDGE L.J. 230, 246-47 (1934).

(2) Lady Eldon conceals non-dutiable lace in her suitcase believing it to be dutiable lace; a customs official discovers the lace. Enker, *supra* note 2, at 677-79; S. KADISH, S. SCHULHOFER, AND M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 604 (4th ed. 1983); Smith, *supra* note 2, at 447; Wiegend, *supra* note 2, at 272.

(3) D takes an umbrella from a stand in a restaurant which, while believing that it belongs to another, belongs to himself. RUSSELL ON CRIME, *supra* note 20, at 188; Hughes, *supra* note 2, at 1032.

(4) A voodoo witchdoctor tries to kill his enemy by incanting a spell. Beale, *supra* note 4, at 496; Dutile & Moore, *supra* note 6, at 196; Elkind, *supra* note 2, at 35; W. LAFAVE & A. SCOTT, *supra* note 1, at 445; R. PERKINS AND R. BOYCE, *supra* note 64, at 628-29; Wechsler, Jones, & Korn, *supra* note 6, at 585.

(5) D puts sugar in his enemy's cup of tea believing that the sugar is poison. Dutile & Moore, *supra* note 6, at 142-43; Hughes, *supra* note 2, at 1033; Wiegend, *supra* note 2, at 271.

93. The rule has been enacted in twenty-seven states: ARIZ. REV. STAT. ANN. § 13-1001 (1978); ARK. STAT. ANN. § 41-701 (1977); COLO. REV. STAT. § 18-2-101 (1986); CONN. GEN. STAT. § 53a-49 (West 1985); DEL. CODE ANN. tit. 11, § 531 (1979); GA. CODE ANN. § 26-1002 (1983); HAW. REV. STAT. § 705-500 (Supp. 1985); ILL. ANN. STAT., ch. 38, para. 8-4 (Smith-Hurd 1972 & Supp. 1986); IND. CODE ANN. § 35-41-5-1 (Burns 1985); KAN. STAT. ANN. § 21-3301 (1981); KY. REV. STAT. ANN. § 506.010 (1985); LA. REV. STAT. ANN. § 14.27 (West 1974); ME. REV. STAT. ANN. tit. 17-A, § 153 (1983); MINN. STAT. § 609.17 (1974); MONT. CODE ANN. § 45-4-103 (1985); N.H. REV. STAT. ANN. § 629.1 (1986); N.M. STAT. ANN. § 30-28-1 (1978); N.Y. PENAL LAW § 110.10 (McKinney 1975); N.D. CENT. CODE § 12.1-06-01 (1985); OHIO REV. CODE ANN. § 2923.02 (Page 1982 & Supp. 1985); OKLA. STAT. ANN. tit. 21, § 44 (West 1982); OR. REV. STAT. § 161.425 (1985); PA. CONS. STAT. ANN. § 18-901 (1983); TEX. PENAL CODE ANN. § 15.01 (Supp. 1987); UTAH CODE ANN. § 76-4-101 (1978); WASH. REV. CODE ANN. § 9A.28.020 (1977 & Supp. 1987); WIS. STAT. ANN. § 939.32(2) (West 1982 & Supp. 1986).

in the law. In contrast, the Model Penal Code introduces clarity. Indeed, it so emphasizes legal certainty that it appears to abandon the most important aspects of a preventive regime, a careful assessment of the many relevant facts about an accused. No doubt, legal certainty is important, but it is not in itself an end of criminal justice. More importantly, where, as under the Model Penal Code provision, the salient features of a preventive regime are subordinate to legal certainty, the law fails to provide an adequate basis for identifying dangerousness.

Equivocality and Related Tests

A few commentators have proposed modifying the Model Penal Code to include the equivocality doctrine[94] or some version of it; that is, a court will have to find that the accused's effort to commit a crime "is a step towards the commission of a specific crime, and the doing of such act can have no other purpose than the commission of that specific crime."[95] Whereas a preventive regime applying the Model Penal Code must convict an accused if he acted under the belief that he was committing a crime and presume dangerousness, a preventive regime applying the equivocality doctrine requires that the act itself be evidence of the accused's criminal intention by outwardly demonstrating that intent. Evidence of the nature of the act corroborates that of intent, which is good evidence of dangerousness; together they warrant a judgment that the accused is dangerous and should be put away where he cannot inflict the harm that he is otherwise likely to do.

As the equivocality doctrine is regarded by writers and scholars as too strict a test of the *actus reus* of attempt because an act which indicates an intent to commit more than one crime is ambiguous and insufficient,[96] weaker versions are proposed. One proposed by Hughes asks, "whether [a defendant's] . . . conduct can be viewed as trying to commit the offense by matching it against model versions of the offense implicit in the statutory description of the *actus reus*."[97] Here a court asks, does the defendant's conduct "conjure up for us," or "evoke the image" of, a complete crime which the accused is charged to have attempted?[98] A second is Circuit Judge Dyer's test in *United States v. Ovideo,*[99] where the defendant sold police officers a substance which he misrepresented to be heroin. Judge Dyer reversed the conviction for attempted sale of heroin because the defendant's conduct was "ambivalent;" it failed to provide sufficient evidence of the defendant's intent to sell a controlled substance.[100] The judge explained, "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."[101] Instead of

94. *See* SALMOND, JURISPRUDENCE 404 (7th ed. 1924).
95. *See* Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230, 236 (1934).
96. *Id.*; Hughes, *supra* note 2, at 1026-27; G. WILLIAMS, *supra* note 6, at § 202. *See also* Campbell & Bradley v. Ward, 74 N.Z.L.R. 471 (1955).
97. Hughes, *supra* note 2, at 1031.
98. *Id.* at 1030 (italics added).
99. United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976).
100. *Id.* at 885-86.
101. *Id.*

Hughes' "model of success" test, Judge Dyer proposes the "mark" as "criminal in nature" test. Both tests require that the accused's efforts to commit a crime be evidence of his intent to do so.

Both tests are objectionable on two grounds. First, while they improve upon the Model Penal Code by requiring that a court look at more than a single fact, like intent, they do not oblige a court to consider seriously all the matters that would be examined by a court in a preventive regime. The nature of the act would be considered, but other facts, especially the accused's personal history and social environment, also deserve attention. In any event, it is not at all clear why an act that approximates the "model of success," or is marked as "criminal in nature," is better evidence of dangerousness than one which lacks these appearances. Indeed, the appearance of danger is relevant where the object of the law is to prohibit acts which appear dangerous whether or not they actually are. Fear of harm is not synonymous with danger because a person may unreasonably apprehend danger where none exists. An example is where a woman believes that a male who appears to be following her may be planning to rape her.[102] It is not the business of the law to assuage such fears. Fear would be oddly relevant in a preventive regime, as acts that generate fear would be regarded as evidence of a dangerous disposition. No doubt this would improve the Model Penal Code, but it does not establish a sound basis for identifying persons whose supposed dangerousness warrants some form of preventive restraint.

Second, both tests are criticized as so vague that they do not provide clear guidance in practice. It is unclear, for example, which of the features of a complete crime are supposed to form part of the "model of success" to which efforts to commit a crime are compared.[103] In the example of a person who fires at a stump, does the model of a murder require the presence of a victim?[104] Judge Dyer's notion of a "mark" is also elusive, for what is it in the firing at a stump that "marks" the accused's conduct as criminal?[105] Whatever gains accrue to a preventive regime by virtue of adding another factor for the court's evaluation are offset by the fatally ambiguous nature of the tests.

HARM TO THE LEGAL ORDER

The criminal law also protects the legal order by instituting and enforcing an obligation to obey law generally, though how this is done is not widely understood. We have observed that a punitive regime imposes liability and punishment because an offender harmed or endangered an interest. It also imposes liability and punishment when an offender has shown disrespect for law generally.

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102. G. FLETCHER, *supra* note 3, at 145.

103. Dutile & Moore, *supra* note 6, at 191-92; Enker, *supra* note 2, at 684; Weigend, *supra* note 2, at 251.

104. *See* People v. LeeKong, 95 Cal. 666, 30 P. 800 (1892) (defendant convicted for assault with intent to commit murder for shooting at hole in ceiling above which he believed a police officer was hiding); State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902) (defendant convicted of attempted murder for shooting at bed in which intended victim usually slept; the bed was empty at the time).

105. For discussion of United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976), see Weigend, *supra* note 2, at 232-34, 236-39, 251-58.

Political Obligation in the Criminal Law

A punitive regime prescribes specific duties, which, we have seen, recognize and protect individual interests. It may enforce these duties by imposing penalties for their breach in which case the offender pays a price for his infraction. He does not, however, incur the odium which attaches to a criminal conviction because a penalty is a tariff and does not connote a solemn pronouncement by the community about the accused's actions. It may enforce a specific duty by stipulating that when a person is found to have breached a duty, he or she will be taken as having rejected his duty to obey law generally, and accordingly will be censured by the community.[106] It is not that officials directly condemn an offender for rejecting his obligation to obey law, but indirectly do so by regarding the breach of a specific duty as tantamount to a rejection of the rules by which members of the community live together. The difference between the two methods of enforcement are analogous to the rules of a game, the breach of which result in penalties for some and in expulsion for others. These latter rules are regarded by the players as so basic that their breach is a rejection of a more general duty, to play by the rules of the game. When a person is punished, not justly penalized, for his breach, a legal system tacitly stigmatizes that person as one who failed to fulfill his most basic of legal and political duties, to accept his obligation to obey law generally.[107]

Two features of the connection between a specific and general legal duty in the criminal law deserve mention here. First, a specific duty must be designated as one the breach of which will be taken to be a rejection of a general legal duty. Officials, legislators, or judges make this designation, though when they do it they most often identify crimes as 'true' crimes and others as quasi-crimes or welfare offenses. The criteria they actually use may be elusive, but they stipulate that some crimes are such that their breach is serious, or, in this writer's view, tantamount to a refusal to play by the basic rules of life in that community. Second, as a transgression is both an infliction of a harm or a threat of harm and a rejection of a general legal duty, the concept of breach limits criminal liability to cases where that harm or threat is also a rejection of a general legal duty. The principles of criminal liability must establish criteria by which courts can judge actions that harm or threaten harm as also rejecting a general legal duty. No particular principles of criminal liability are logically necessary or superior to others.[108] In modern criminal law systems, however, culpability is a well established criteria of blameworthiness, which serves as the basis for judging the extent to

106. Weigend, *supra* note 2, at 247-48. A number of writers argue that censure or condemnation by the court is perhaps the most important feature of modern criminal law. *See* Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 405 (1958); White, *Making Sense of the Criminal Law*, 50 U. COLO. L. REV. 1, 17-19 (1978); Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness*, 44 TENN. L. REV. 735, 743-45 (1977); McGinley, *An Inquiry Into the Nature of the State and Its Relation to the Criminal Law*, 19 OSGOODE HALL L.J. 267, 280-83 (1981).

107. Spjut, *Criminal Law, Punishment and Penalties*, 5 OX. J. LEG. STUD. 33, 42 (1985); RAZ, THE AUTHORITY OF LAW 234-37 (1979).

108. Quinton, *supra* note 12; Flew, *supra* note 12; Benn, *supra* note 12.

which an accused has rejected his legal obligation, if at all.[109] A non-culpable transgression does not warrant blame simply because the offender lacks moral blame, but because in so far as moral blame is embodied in the criminal law it serves as the criteria by which the courts implicitly judge that a person has failed to live up to his political obligation. When a court finds a person guilty of an offense and a judge punishes him, they do so because his infliction of harm, or threat of it, is taken by the political and legal institutions to demonstrate his unwillingness to accept his basic legal and political obligation.

Limited and Absolute Obligations

When a legal system stipulates that compliance with certain specific duties indicates an acceptance of a general legal obligation, a legal system augments the protection of individual interests by treating harm or danger to them as a challenge to its authority to make and enforce law for the community. In so backing individual interests with its authority, the system creates a legal interest of a different nature in that authority. In so far as a legal system enforces specific duties as such, there may be a moral obligation to fulfill a particular duty and a further moral obligation to fulfill whatever specific duties are imposed by law. A breach of a specific duty will be illegal and immoral if there is a moral obligation to fulfill it or whatever duties the law imposes. A breach may encourage disrespect for the law generally and, accordingly may harm whatever moral claim the law may have to respect. Any such interest is moral, because the legal system has not structured its obligations so that when a subject obeys a rule he also demonstrates respect for law generally in a manner that the law prescribes; conversely, when he breaks a rule he displays contempt for that authority. Because a punitive regime connects specific duties with a general legal obligation, it creates an institutional, or legal, interest in the authority of law.

A legal system may restrict its recognition of its interest in the authority of law to the individual interests which it protects. Following Locke's theory of government, we may say that political obligation is an instrumental value, that is, it serves to ensure respect for individual interests; beyond that it has no utility.[110] The end of a government is the enactment and enforcement of specific duties that protect individual interests; beyond that, a government's authority has no value. When a government institutionally links political obligation and individual interests by enforcing specific duties as general legal duties, it should do so only as is necessary to protect individual interests. Though a person may publicly display disrespect for the law, the legal and political institutions should take cognizance of the disrespect and regard it as a dimunition of its authority only where that display of disrespect also results in harm or danger to an individual interest. This theory of political obligation in the criminal law will be called the theory of *limited obligation* because it limits a legal system's interest in the authority of law to the individual interests, the protection of which is the end of government.

109. H. GROSS, *supra* note 6, at 139-41.
110. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 124, 131 (T. Peardon ed. 1952).

However, a legal system may expand its legal interest in the authority of law by identifying types of conduct that it regards as diminishing respect for law, though they do not harm or threaten harm to individual interests. Following Hobbes' political theory, we may say that the individual interests which the criminal laws protect are imperfect, or insecure, to the extent that the authority of the law is insecure.[111] Political obligation is ultimately an instrumental value; but whereas for Locke it is an instrumental value, for Hobbes it is not always directly connected to individual interests.[112] The separation of individual interest and political obligation implies the possibility that the latter may assume an independent value, though exactly how this is so is obscure. It further implies that while the end of government is the protection of individual interests, it may protect the authority of law without directly protecting an individual interest. Punishment may be appropriate for an act because it diminishes respect for law, though it does not harm or threaten harm to an individual interest. There is potential under Hobbes' theory for legal and political institutions to regard all challenges to their authority as contempts which should be prohibited by law and to make its authority absolute. This type of political obligation in the criminal law will be called an *absolute obligation.*

An example will illustrate the differences between limited and absolute obligations. Suppose that V promises to sell goods for $10 to B, and B promises to buy. On the date set for delivery, V refuses delivery. If B can buy the goods for $10 on the open market, he suffers no loss. Were a punitive regime that institutes a limited political obligation in the criminal law to criminally punish a breach of contract it would have no reason to punish V because his actions have not harmed B (and presumably not threatened harm). A punitive regime that institutes an absolute obligation in the criminal law might regard V's breach as a rejection of his obligation to fulfill his promises generally, and accordingly punish V even though B suffers no loss or threat of loss.

Absolute Obligation and Criminal Attempt

The law of criminal attempts can establish a limited obligation by restricting criminal liability to acts that endanger the individual interests which complete offenses protect, or an absolute obligation by extending liability to efforts that do not so endanger. No writer has specifically advanced an argument in favor of a legal principle that would establish an absolute obligation as this problem has not been previously formulated in this manner. The Model Penal Code provision could be supported by such an argument. Rather than claim that a person who intends to commit a crime is dangerous, the claim would be that a person who acts under the belief that he is committing a crime displays contempt for the law, and should be held liable and punished. Perkins' distinction between primary and secondary intent, the former of which alone is a basis of liability for attempt, suggests a narrower test of contempt. For example, a person who takes his own um-

111. *See generally,* T. HOBBES, LEVIATHAN ch. XIII, SIV, XVII, XVIII (1950).
112. *Id.*

brella, believing that it belongs to someone else, primarily intends to take an umbrella and secondarily to steal.[113] Keedy analogously distinguishes abstract and concrete intent.[114] Smith achieves the same result with his proposal that liability be limited to persons who intend to break the law: a receiver of stolen goods knows that he receives stolen goods, but his purpose is to get a good bargain.[115] Fletcher proposes a rational motivation test by which a person is liable for attempt if he would have refrained from attempting an offense had he known the facts.[116] A receiver of goods which are wrongly believed to be stolen would buy them anyway because he is motivated by the bargain. A recipient of a substance wrongly believed to be heroin would not accept it because he wants heroin, possession of which is an offense.[117]

The distinctions between primary and secondary intent, abstract and concrete intent, and purpose and intent have been criticized as vague and arbitrary.[118] Why the primary intent of the receiver of goods is to obtain a bargain and not to buy stolen goods is unclear.[119] The rational motivation test, by adopting an objective standard of the actor's mental state, avoids these difficulties because the test is whether the defendant would have accomplished his supposed rational object if the facts were disclosed to him.[120] The rational motivation test provides a clear standard by which to judge whether a person's efforts to commit a crime were due to a commitment to break the law.[121]

The narrowness of the rational motivation test may prove to be its drawback as there will be cases in which a person's efforts endanger a protected interest, but because his rational motive does not include breaking the law he should not be held liable for an attempt. For example, while walking along a cliff, D and P see a wallet and dive for it. D edges P out of the way by pushing him over the cliff. If D knows that P will fall over the cliff and likely die, D is guilty of murder.[122] If P's fall is arrested by a bush, D is guilty of attempted murder under the present law. The rational motivation test, however, asks whether D would have done what he did had he known that P would be saved by the bush. If the answer is yes, D should not be guilty of attempted murder. While the rational motivation test limits the mental element of criminal attempts to cases where breaking the law is integral to the accused's accomplishment of his objective, it will appear as exceedingly narrow and for that reason objectionable.

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113. R. PERKINS & R. BOYCE, *supra* note 94, at 626.
114. Keedy, *supra* note 66, at 466-67.
115. Smith, *supra* note 2, at 447.
116. G. FLETCHER, *supra* note 3, at § 3.3 at 161.
117. *Id.* at 182.
118. Hughes, *supra* note 2, at 1012-16; S. KADISH, S. SCHULHOFER AND M. PAULSEN, *supra* note 94, at 605-06; Elkind, *supra* note 3, at 24; Ryu, *supra* note 6, at 1185-86.
119. Hughes, *supra* note 2, at 1014-16; G. FLETCHER, *supra* note 3, at 162-63, 183.
120. G. FLETCHER, *supra* note 3, at 183.
121. The purpose and rational motivation tests create an absolute obligation only when used to the exclusion of both the narrow and wide risk tests to determine criminal liability. If, however, either of the risk tests is combined with the purpose or rational motivation tests, liability is limited to cases where a defendant's steps pose a risk of harm to a protected interest and such steps also manifest contempt for a general legal obligation.
122. This example is from G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 10, 11 (1965).

However, there is still deeper objection to the rational motivation test were it to be used alone for deciding liability for criminal attempts. A legal system would impose liability for acts that do not necessarily endanger an individual interest because by those efforts the accused has displayed contempt for the law. It would institute a legal demand for respect for the authority of law as a value in itself. Such a demand would be a step, albeit a small one, towards establishing authoritarian political and legal relations between officials and subjects. Any such relation, this writer submits, is morally repugnant.

WHEN IS THERE CRIMINAL LIABILITY FOR AN ACT?

The foregoing discussion suggests that liability for a criminal attempt is for, (i) endangering a protected interest in a manner that demonstrates a rejection of a general legal obligation in a punitive regime that institutes a limited obligation, (ii) demonstrating contempt of a general obligation in a punitive regime that institutes an absolute obligation, or (iii) posing a threat of harm in the future, the evidence of which is the efforts for which the defendant is convicted. It remains for us to consider how liability in each case is established for an act.

FORMAL AND MATERIAL GROUNDS OF LIABILITY

The meaning of the "for" in a proposition that criminal liability or punishment is "for" X requires closer examination, because it contains an ambiguity that lies at the heart of the controversy over the No Act Thesis. In the philosophical literature on the definition of the "standard case" of punishment—according to which punishment is suffering imposed "for" an offense[123]—commentators have noted that the "for" may mean quite simply that a judge has to satisfy himself that the person before him has been convicted of an offense and once he is so satisfied then he is at liberty to decide what punishment is appropriate, if any.[124] Alternatively, "for" may mean that the judge, after satisfying himself that the accused is a convicted person, considers the nature of the offense and what punishment is accordingly deserved.[125] Analogously, the proposition that punishment should be "for" an act may mean that a court need only satisfy itself that the accused acted, but found its liability on other grounds, or that a court must consider the act in some way which makes it a substantial part of its decision to impose liability.

123. Quinton, *supra* note 12; Flew, *supra* note 12; Benn, *supra* note 12.

124. An example of such a statement is Mabbot's classic remark:

> I was myself for some time a disciplinary officer of a college whose rules included a rule compelling attendance at chapel. Many of those who broke this rule broke it on principle. I punished them. I certainly did not want to reform them; I respected their characters and their views. I certainly did not want to drive others into chapel through fear of penalties. Nor did I think there had been a wrong done which merited retribution. I wished I could have believed that I would have done the same myself. My position was clear. They had broken a rule; they knew it and I knew it. Nothing more was necessary to make the punishment proper.

Mabbott, *Punishment*, 48 MIND 152, 155 (1939).

125. For critical comment on the ambiguous nature of the above definitional claim, see PACKER, THE LIMITS OF THE CRIMINAL SANCTION 21-23 (1968); G. FLETCHER, *supra* note 3, at § 6.3.

A formal basis of liability is a matter to which consideration must be given as a matter of law, but which is not crucial to a decision by an official to exercise his power, whereas a material reason determines his decision to act, or if he has decided to act, how he exercises his power, or both.[126] A court which tries an accused will have to find that a number of formalities are satisfied, for example, that he was properly arrested and speedily brought to trial. That these formalities are satisfied has no bearing upon the outcome of a trial. The court decides guilt or innocence without regard to these formalities, though their satisfaction is a prerequisite to the defendant being tried. The jury's decision to convict or acquit is governed by the rules of criminal procedure and liability which are their material reasons. When a judge decides to punish "for" an offense, the offense may be a formal condition which the judge has to satisfy before he may decide what sentence he wishes to impose, if any. Alternatively, the offense may figure prominently in his decision in which case his material reason is the harm or danger that was committed and the culpability with which it was committed.

Now, while we are unaccustomed to thinking of the elements of an offense as formal or material reasons for imposing criminal liability, they, together with the principles of criminal liability, are the reasons why a court convicts an accused. A jury's decision to convict or acquit is obviously not similar to a judge's decision to impose a sentence. A jury must acquit if it finds that any elements of the offense are not proved, whereas a judge has discretion to choose, within limits, a punishment or sentence appropriate to the offender and offense. Furthermore, a judge's decision is divisible into stages, at least logically, in which he satisfies himself that certain conditions exist, namely that the person before him has been convicted, and then proceeds to impose the sentence. A jury may proceed with each element sequentially, but its ultimate determination is not divisible into stages. It may be that a finding as to each element contributes to the stigma that attaches upon conviction. This is certainly true of grave offenses like murder, for both the nature of the harm and the offender's culpability affect the odium that attaches to the accused upon conviction. It is logically conceivable that an element of an offense might not contribute at all to this stigma and may have been included for reasons of political expediency. Many federal offenses proscribe conduct that affect interstate commerce. The interstate commerce requirement in many such offenses is included so that the federal government's power to enact the offenses is beyond question. Arguably, the element is jurisdictional and, while a jury must find the element has been proved by the prosecution, its finding does not contribute to the stigma attaching to the accused upon conviction. Such an element is a formal ground for conviction.

LEGAL IMPOSSIBILITY AND THE MODEL PENAL CODE

The No Act Thesis has been invoked to support the defense of legal impossibility and to attack the Model Penal Code provision. In the first, the

126. The writer derives this distinction from ARISTOTLE, METAPHYSICS, BOOK Z, 16-17 (H.G. Apostle trans. 1966).

argument is that, when a person has made an effort to commit a crime, but the object of protection is absent, there is no criminal act for which he can be punished; therefore, punishment for such an effort is for intent. In the second, the argument is that the Model Penal Code does not really require an act at all and imposes criminal liability and punishment for intent to commit a crime.

The Legal Impossibility Defense

Willard Bartlett's judgment in *People v. Jaffe*,[127] illustrates how jurists have argued the No Act Thesis in the first context. He says, "[a] particular belief cannot make that a crime which is not so in the absence of such a belief."[128] He also says, "the act, which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated."[129] The first statement correctly points out that Jaffe's belief that the goods were stolen does not in fact make them stolen and such belief cannot render his effort to receive stolen goods a criminal act. The second statement observes that Jaffe would not have committed the offense of receiving stolen goods by buying the goods which he intended to buy. Neither proposition bears upon the question of whether holding Jaffe liable for an attempt to receive stolen goods will also be making that a crime which would not otherwise be so except for his belief, unless we assume that all the elements, save consummation required for a complete offense, are also necessary for the attempt.[130] The obvious point is that such an assumption is precisely what is in question in a case like *Jaffe*, where the object of protection is absent.[131]

Judge Bartlett apparently assumed that the theory of dangerous conduct is valid as he seems to believe that there is no danger to an interest protected by the full offense of receiving stolen goods when the goods are no longer stolen (the object of protection is absent). Even if we assume that this theory is valid, it is not clear why only acts that endanger an interest protected by a complete crime (because the object of protection is present) are acts, but liability for acts that do not endanger is not liability for acts at all. He seems to assume that there are two extreme positions between which no intermediate ground lies: on one hand, a material ground of liability is an act that endangers a protected interest, and on the other, a material ground is the intent to commit a crime. Were both assumptions valid—that the theory of dangerous conduct is the only criteria of danger and that the only alternative to liability on that basis is liability for intent—his arguments

127. People v. Jaffe, 185 N.Y. 487, 78 N.E. 169 (1906).

128. *Id.* at 170.

129. *Id.* at 169.

130. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 594, 595 (2d ed. 1960); Smith, *supra* note 2, at 441-42; G. WILLIAMS, *supra* note 6, at 638-53.

131. The case has attracted extensive comment: Arnold, *supra* note 6, at 77-78; Dutile & Moore, *supra* note 6, at 170; Elkind, *supra* note 3, at 31-32; Enker, *supra* note 2, at 680-82; G. FLETCHER, *supra* note 3, at 162-63; Hall, *supra* note 6, at 1030; W. LAFAVE & A. SCOTT, *supra* note 1, at 442-43; Sayre, *supra* note 6, at 853-54; Smith, *supra* note 2, at 440-42; Strahorn, *supra* note 6, at 988-91; Williams, *supra* note 6, at 641 n.12, 650 n.35.

would have substance. His argument rests upon a misunderstanding about the danger issue and a confusion of that issue with the liability issue.

Another criticism, which Hart[132] and Williams[133] persuasively argue, is that a person who makes an effort to commit a crime actually acts and may be held liable for it. Hart distinguishes an extensional object, like the voodoo witchdoctor's enemy, from an intentional object, the image the witchdoctor has of his enemy. Whether or not the extensional object exists, a person acts when he makes efforts to do something regarding an intentional object.[134] These points may be accepted without conceding the more fundamental claim that liability for efforts to commit a crime in the absence of an object of protection is not liability for an act. The fact that a person has acted does not mean that the material reason why he is held liable for a criminal attempt is for that act. What must be explained are the material grounds of liability for a criminal attempt: that an act endangers a protected interest or is good evidence of a propensity to inflict harm at a future date. We come back to the assumptions made by Judge Bartlett and others who share his position. It is not enough to point out that there is an act for which a defendant might be punished; they must show that, under an alternative formulation of the law, the defendant would be punished for an act. The critics must supply their alternative criteria of danger or dangerousness. This writer has argued at length that this task has been accomplished. They must show that under such a criteria the act endangers a protected interest or is evidence of dangerousness in order for it to serve as a material reason for liability.

When Liability for an Impossible Attempt is Liability for an Act

It is not difficult to imagine criminal liability for an act alone, as strict liability crimes are obvious examples. As criminal liability does not depend upon culpable transgression, no odium attaches to conviction. Still, a penalty does attach, and it attaches to the act that deviates from the rule. The mental element is no part of a court's deliberations; it is eliminated entirely from the reasons for imposing liability and a penalty. A mental element might be incorporated into such crimes by providing that a person who does a proscribed act, under any belief whether culpable or not, commits an offense. The formulation might be altered so that prominence is given the mental element, for example, by providing that a person who has a belief, whether culpable or not, when he does a proscribed act commits an offense. Both versions appear odd, and the latter perhaps nonsensical, because it appears to emphasize the mental element while denuding it of substance altogether. The mental element in these provisions is analogous to a jurisdictional element in some of the federal offenses in as much as it is a fact which must be proved for a jury to convict, but no stigma attaches to an offender as a result of the jury finding it. It is a formal, not material reason for criminal liability.

132. H. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 386 (1983).
133. Williams, *supra* note 45, at 57-58.
134. *Hart, supra* note 134, at 386-87.

Conversely, a legal system could exclude entirely the act from a criminal offense by providing that a person who thinks certain thoughts commits an offense.[135] The obvious difficulties of enforcement do not concern us here. What is important is that the sole ground of liability is the prohibited thoughts. An act may be incorporated into the provision, for example, by making it an offense to do an act while believing certain thoughts, or to believe certain thoughts while doing an act. As before, these formulations appear peculiar because the act does not have an apparent relationship with the proscribed beliefs. There is an act requirement in both formulations, but it serves as a formal ground of liability; the prohibited beliefs remain the material ground. A connection between an act and a prohibited belief may be specified, for example, by a provision that makes it an offense for a person to believe that by doing an act he commits a crime, or by an alternative provision that makes it an offense for a person to do an act under the belief that he thereby commits a crime.[136] The latter statement emphasizes the act, but there is no significant difference between the two versions. The odium that attaches upon a conviction for the former version is because of a prohibited belief that a crime was being committed. In the latter, it is again the belief that a crime is being committed that warrants the judgment of condemnation. There is nothing significant about the act in either version that adds to the stigma attaching upon conviction. If this is correct, the act is a formal ground of criminal liability in both versions.

The object of the Model Penal Code provision, we have seen, is to identify dangerous persons who are likely to inflict harm in the future, not to punish for past harm or endangering conduct. The accused's intent to commit a crime is taken as conclusive evidence of a criminal disposition and the need to impose restraint. It might be argued that the accused's intent is evidence of the act, which is conclusive evidence of his criminal disposition.[137] The reason for criminal liability is the proven criminal propensity of the accused to inflict harm at a future date, albeit unknown. In the former version (where intent is conclusive evidence of dangerousness) the determination of dangerousness attaches from evidence of intent, whereas in the latter it is from that of an act. The difference between the two is not a semantic quibble, as liability in the former is materially grounded on the accused's beliefs; the act is a formal ground. The latter version seems an implausible account of the Model Penal Code, not only in the light of the comments by its drafters who explicitly argue that intent is evidence of dangerousness, but because it does not specify features of an act, other than the substantial act requirement, which warrant an inference of dangerousness.[138]

135. Morris, *Punishment For Thoughts*, 49 MONIST 342, 343-46 (1965).

136. This example is offered by SMITH & HOGAN, CRIMINAL LAW, CASES AND MATERIALS 5 (3d ed. 1986).

137. Hart argues that the "actus reus . . . is indirectly identified by reference to the accused's intention. In such cases the intention plays a double role: it fixes what is to count as an actus reus and is also an element of the mens rea, required for liability." H. HART, *supra* note 132, at 386-87.

138. The MODEL PENAL CODE adopts a "substantial step" test of the actus reus of attempt. "A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent." United States v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974).

In short, intent is a material ground of liability under the Model Penal Code, and the act a formal ground.

Hughes proposed his model of success test to overcome this defect in the Model Penal Code provision.[139] By requiring 1that a court consider how the act itself warrants a judgment of dangerousness, the model of success test materially grounds liability on the act. The position under the model of success test is analogous to a punitive regime where the act and intent are concurrently material grounds of liability—the harm or danger committed, and the culpability which manifests a rejection of a general legal obligation. In a preventive regime which applies a model of success test, the act and intent are concurrently material grounds of liability, though as evidence of dangerousness.

A punitive regime that institutes an absolute political obligation in the law of criminal attempts will, however, impose liability because a person demonstrates contempt for the authority of law. That contempt is ascertained by reference to the accused's culpability, not his act, though that is required. Whereas culpability is a concurrent material ground of liability in a punitive regime that institutes a limited political obligation in the law of criminal attempts, it is the sole material ground in one that establishes an absolute obligation. The restricted culpability tests, such as the rational motivation test, narrow the scope of liability, but they reinforce the point that the mental element is the material basis for liability. An act is required, but it has no special characteristics which supply further reasons for finding that the offender rejected his general legal duty. It serves as a formal ground for liability.

TOTALITY OF CRIMINAL JUSTICE

In many of the impossible attempt cases the police learn of a defendant's activities through informers or agents, then carefully plan and execute an operation in which the defendant, believing that he is conducting another of his usual criminal activities, makes an effort to commit a crime for which he is arrested and prosecuted. In attempted abortion cases, a female police officer or agent feigns pregnancy and approaches the defendant;[140] in attempted receipt of stolen goods cases, a police agent or thief tenders goods as stolen to the defendant;[141] in narcotics cases, a police officer poses as a drug

139. Hughes and Enker propose and discuss possible changes in the law: Hughes, *supra* note 2, at 1030-34; Enker, *supra* note 2, at 707-09. For discussion of these proposals, see Dutile & Moore, *supra* note 133 at 191-92; Enker, *supra* note 2, at 684; Weigend, *supra* note 2, at 242-246, 260-61.

140. People v. Cummings, 141 Cal.App.2d 193, 296 P.2d 610 (1956); State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1968).

141. State v. Bird, 285 N.W. 481 (Minn. 1979); Booth v. State, 398 P.2d 863, (Okla. Crim. App. 1964); State v. Carner, 25 Ariz. App. 156, 541 P.2d 947 (1975); Darnell v. State, 92 Nev. 680, 558 P.2d 624 (1976); Darr v. People, 568 P.2d 32 (Colo. 1977); Faustina v. Superior Court, 174 Cal. App. 2d 830, 345 P.2d 543 (1959); United States v. Hair, 356 F. Supp. 339 (D.D.C. 1973); Commonwealth v. Henley, 474 A.2d 1115 (Pa. 1984); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906); State v. Korelis, 537 P.2d 136 (Or. App. 1975), *aff'd*, 541 P.2d 468 (Or. 1975); State v. Logan, 232 Kan. 646, 656 P.2d 777 (1983); *Ex parte* Magidson, 32 Cal. App. 566, 163 P.689 (1917); State v. Niehuser, 21 Or.App. 33, 533 P.2d 834 (1975); Padgett v. State, 378 So.2d 118 (Fla. App. 1980); State v. Rios, 409 So.2d 241 (Fla. App. 1982); People v. Rojas, 55 Cal.2d 242, 10 Cal. Rptr. 465, 358 P.2d 921 (1961); United States v. Rose, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); State

dealer and sells a substance which he represents as controlled, but is not.[142] The police may have evidence of the crimes committed by their suspects, but because they desire a stronger case or do not want to reveal their sources, they stage an operation in which they collect the evidence first hand.

When the police undertake these operations to bring to justice persons whom they suspect of regular criminal activities, they have decided that the suspects are dangerous and should be removed from the community; the object of the operation is to put away these dangerous persons. The fact that the police stage an operation to compile the necessary evidence suggests that, for them, the particular offense on which a person is arrested, prosecuted and convicted does not determine their decision to act against him. It is a formal ground which enables them to take him into custody, to bring him before the courts and ultimately to have him put away. The material ground, or reasons that determine their decision to exercise their powers, is their judgment that he is dangerous and that the community should be protected from him. When a court knows about such an operation, but still convicts and imprisons a defendant, the court has relegated the offense to a formal ground of liability. The court's material reason would be its concurrence with the police judgment that the accused is dangerous and a menace to the community altogether. If however, a court is unaware of the reasons for the arrest and operation, it might frustrate the objects of the police by not convicting or by imposing a minimal sentence. Such a possibility might be overcome by careful manipulation of the judicial system, for example, by taking care that the prosecution has very strong evidence against the accused both for his conviction and his sentencing. While the court, applying the rules of criminal procedure and liability, may reach an appropriate verdict fairly, their determination would have been so manipulated that the particular offense for which the accused was convicted would still be a formal reason for his being brought before the court, convicted, and punished. The courts have recognized that where arrest and prosecution discriminatorily selects a particular racial group, the integrity of the judicial system is compromised because no matter how fairly the courts conduct each trial and convict a defendant, police and prosecutorial practices focus the criminal justice system as a whole, on a group, not offenses.[143]

None of the theories of danger or dangerousness examined in this Article will immunize the law of criminal attempts from this subtle shift from

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v. Skinner, 397 So.2d 389 (Fla. App. 1981); State v. Sommers, 569 P.2d 1110 (Utah 1977); State v. Sterling, 230 Kan. 790, 640 P.2d 1264 (1982); State v. Vitale, 23 Ariz. App. 37, 530 P.2d 394 (1975); United States v. Waldron, 590 F.2d 33 (1st Cir. 1979); *cert. denied*, 441 U.S. 934, (1979); People v. Zimmerman, 11 Cal. App. 115, 104 P. 590 (1909).

142. State v. Cohen, 409 So.2d 64 (1982); United States v. Darnell, 545 F.2d 595 (8th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1976); United States v. Everett, 700 F.2d 900 (3d Cir. 1983); United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y. 1973); State v. Lopez, 100 N.M. 291, 669 P.2d 1086 (1983); State v. McElroy, 128 Ariz. 315, 625 P.2d 904 (1981); United States v. Marin, 513 F.2d 974 (2d Cir. 1975); United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976); United States v. Quijada, 588 F.2d 1253 (9th Cir. 1978); People v. Siu, 126 Cal. App. 2d 41, 271 P.2d 575 (1954).

143. For discussion of how selective enforcement affects the judicial administration of criminal justice, see Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1132 (1961); Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717, 718-23; Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L. FORUM 88, 100-06, 118-23; Weissman, *The Discriminatory Appli-*

offenses to persons. The Model Penal Code provision and the theory of risk-taking eliminate the impossibility defenses entirely, and as the cases cited above illustrate, they are open to such use by the police. The model of success test would not fare much better. The theory of dangerous conduct reduces the scope for such manipulation because there must be a real prospect of success before the accused can be guilty of an attempt. In the attempted receipt of stolen goods cases, the police could hardly plan an operation with goods still stolen, so manipulation of this offense would be precluded by the theory of dangerous conduct. In narcotics operations, however, the police could use a controlled substance and avoid the legal impossibility defense. While the theory of dangerous conduct is most likely to reduce such police operations, the way in which it so reduces them is highly arbitrary and will appear unsatisfactory in the long run. Perhaps it lies beyond the task of drafting criminal offenses to prevent their use by the police to focus on persons and not acts. Still, if we are to understand how a criminal justice system imposes criminal liability and punishment for an act, especially where the accused is charged with an impossible attempt, we must examine the totality of the system.

CONCLUSION

A just law of criminal attempts will require that the efforts, for which a person is liable for an attempt, must endanger an interest that is protected by a complete crime for which it was the intent of that person to commit. None of the theories offers a clearly superior solution to the danger issue. While the Model Penal Code is clear, it is also extremely weak in its criteria of dangerousness. When compared to theory of dangerous conduct, which is now disfavored in preference for the Model Penal Code, the latter has little more than certainty to offer. That advantage cannot be a serious substitute for a criteria of danger or dangerousness. The neglected theory of risk-taking offers considerable promise as an approach to identifying types of endangering conduct, but it is not an appropriate test for the general criminal attempts offense. The present study concludes that a just law of criminal attempts can be fashioned only if the general offense is abandoned for specific relative attempt crimes.

Under a just law of criminal attempts, one reason for liability will be that an accused, by his efforts, endangered a protected interest, and his act will serve as a material ground for finding that he created that danger. On one hand, there are the Model Penal Code provision and criminal attempts which establish an absolute political obligation in the criminal law, both of which materially ground liability on the mental element; the act is a formal ground of liability. On the other, the theories of dangerous conduct and risk-taking, both forms of limited political obligation in the criminal law, ground liability materially on the threat posed by an act to a protected inter-

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cation of Penal Laws by State Judicial and Quasi-judicial Officers: Playing the Shell Game of Rights and Remedies, 69 NW. U.L. REV. 489, 594-501 (1975).

Selective prosecution must have a discriminatory effect and be motivated by a discriminatory purpose to amount to bad faith. Wayte v. United States, 470 U.S. 598, 608 (1985).

est. Another conclusion is that the law of criminal attempts will justly impose liability for acts if the theories of dangerous conduct or risk-taking are applied, though as we observed above, the latter will require radical changes in the present law of criminal attempts. Finally, the formulation of criminal attempts offenses, such that a material reason for liability and punishment is the threat to a protected interest which is created by a person's efforts to commit a crime, does not ensure justice, because its manipulation remains a possibility and manipulation diminishes the justice of that branch of law.