DECODING THE IMPOSSIBILITY DEFENSE

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I. INTRODUCTION

Impossible attempts were first officially recognized as non-criminal in 1864.[1] Not that they needed official recognition. Because "[t]he easiest cases don't even arise,"[2] that 1864 ruling literalized what then had to be a given: a person whose anti-social bent poses no appreciable risk of harm is no criminal.

Over 150 years later, scholarly output on the subject persists,[3] marked by thoughtful takes on the inner and outer worlds and an odd preoccupation with "imaginative hypotheticals"[4] like "Lady Eldon,"[5] a difficulty as unlikely to arise in the experience of lawyers as it was in 1912 when Wharton cooked it up.[6] To reassure myself the subject doesn't "smell of the lamp,"[7] before undertaking this Essay I tapped "impossibility" into Westlaw, which designated over 3,000 criminal cases as on point, 1,200 or so more recent than 1999. From that I take that impossible attempts are not, as some courts and commentators have insinuated, merely a professorial hobby horse.[8] Instead, impossible attempts express a non-trivial tension between risk-taking and harm-causing within the very real world of criminal litigation.

Impossibility also merits continued study because it seemingly began to erode as a defense to a charge of attempt as soon as fifteen years after its 1864 discovery.[9] Now it is hornbook that impossible attempts *are* punishable as

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[1] Regina v. Collins (1864) 169 Eng. Rep. 1477.

[2] K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) (Posner, J.).

[3] *See* WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 11.5, n.1 (2016).

[4] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07, at 399 (7th ed. 2015); *see* Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 524 (2008) ("[S]cholars devote attention to a few problematic cases that are so lacking in practical importance that scholars are obliged to invent fanciful hypotheticals to discuss them.").

[5] Lady Eldon smuggled English lace in from the continent, taking it in error to be contraband French lace. *See* Audrey Rogers, *Protecting Children on the Internet: Mission Impossible?*, 61 BAYLOR L. REV. 323, 347–48 (2009) (noting that Lady Eldon is "mental gymnastics" for first-year students).

[6] 1 WHARTON'S CRIMINAL LAW § 225, n.8 (James M. Kerr ed., 11th ed. 1912).

[7] Loughney v. Hickey, 635 F.2d 1063, 1071 (3d Cir. 1980) (Adisert, J., concurring).

[8] Commonwealth v. Bell, 853 N.E.2d 563, 564–65 (Mass. App. Ct. 2006); *see* Neil P. Cohen, *Teaching Criminal Law: Curing the Disconnect*, 48 ST. LOUIS U. L.J. 1195, 1197–98 (2004) ("The Criminal Law course I taught dealt with the traditional subjects, including such esoterica as impossible attempts. . . . During my relatively brief tenure as a prosecutor . . . I did not encounter any impossible attempt cases, but I did see a significant number of assault-related incidents.").

[9] *See* Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 484 n.122

crimes.[10] Specifically, "[t]hirty-seven states have explicitly eliminated impossibility as a defense to a charge of attempt and the federal circuits that have not done likewise have so limited the range of application of the defense as to render it virtually a dead letter."[11] Beyond such rhetoric that impossibility is no longer a defense,[12] that it still has a place in the law of attempt was evident in the digests and law reviews long before Graham Hughes touted it fifty years ago as an area that repays close study.[13] Agreement that the impossibility defense has a way of rehabilitating itself from criticism continues. What continues more precisely is a sense of a difference between failing at larceny by picking the empty pocket of a passerby on a sidewalk and by picking the empty pocket of a mannequin in a department store.[14] What remains up in the air is what *accounts* for that difference. Despite two absolutist positions on this—1) impossibility is a defense to a charge of attempt; and 2) it is not a defense—we have a lingering sense that *some* cases should come out one way and some another. But because we have evolved no language to account for the difference, we live in a state of uneasiness about it.

Here I rehearse an argument meant to help decode the impossibility defense by "hounding down the minutiae"[15] of what it means to make a mistake. I am certainly not the first to insist that the impossibility defense lives on.[16] I am, however, the first to base such a claim on the grammar or criteria of mistakes, which can get us closer to the bottom of what makes attempts impossible and why it matters.

Extant impossibility cases and scholarship take mistakes as a given.[17] But what *is* a mistake? Is the answer considered too obvious to mention? Kenneth Simons, to take just one leading authority, has written 164 law-review pages

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(1954).

[10] *See* PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 85(a), at 423, § 85(c), at 427–31 (1984 & Supp. | 2016).

[11] John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1, 3 (2002).

[12] *See* John F. Preis, Note, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1896–98 n.164 (1999) (noting that factual and hybrid impossibility, if not legal impossibility, are no longer defenses).

[13] *See* Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1005 (1967).

[14] *See* Westen, *supra* note 4, at 523.

[15] J.L. AUSTIN, *A Plea for Excuses: The Presidential Address*, 57 PROC. ARISTOTELIAN SOC'Y 1, 1 (1956).

[16] *See e.g.*, Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995); Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225 (2014); Westen, *supra* note 4, at 523.

[17] *See, e.g.*, State v. Freeman, 267 N.W.2d 69, 69–70 (Iowa 1978) (reversing trial court for failure to adequately explain mistake of fact in jury instructions).

about mistakes of law and fact embedded in the impossibility defense,[18] tossing in just once that a mistake is a sort of "perception" or "empirical judgment" at odds with the world.[19] He does not elaborate. Nor do others engaged in like projects.[20]

Within the "stock hypotheticals" of impossible attempts,[21] a man shoots a tree stump or a corpse, each having been mistaken for a live person,[22] or he administers to a live person an innocuous substance he has mistaken for poison.[23] These stick-figure hypotheticals pose whether attempted murder has occurred. But because it is *stipulated* that each action owes to mistake, we are told so little about what happened that of course the question is hard to answer. Any chance of making sense of the hypotheticals is stymied by an absence both of facts and of any concern for what can *count as* a mistake. My contribution here to the considerable work of others is to locate the impossibility defense within an actual context of human action and concern, which is the only way we can become clear for ourselves what *is* a mistake and what is not. We will find the situations in which the law deploys the notion of mistake are not always situations in which we would find the use of that term natural or responsive to our human need to locate mistakes in the world.

II. EXCULPATORY MISTAKES

Our interest in mistakes, like our interest in all excuses, is in assessing our responsibility for the harms we inflict on others. Like accidents, mistakes excuse us for the harms we bring about unless the legislature intended "strict liability," which is legally permissible only when the offense is not *malum in se*: read, is not a pre-legal wrong.[24] In other words, when accused of doing something a good person would not do, the accused must be given a chance

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[18] Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487 (2012) (57 pages); Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction*, 3 CRIM. L. & PHIL. 213 (2009) (35 pages); Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447 (1990) [hereinafter Simons, *Mistake and Impossibility*] (72 pages).

[19] Simons, *Mistake and Impossibility*, *supra* note 18, at 469.

[20] *See, e.g.*, Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Balyes*, 12 L. & PHIL. 33 (1993); Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?*, 72 U. COLO. L. REV. 507 (2001).

[21] Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1102 (1992).

[22] *See* Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2070 (2016) (describing the corpse hypothetical); Keedy, *supra* note 9, at 467 (describing the stump hypothetical).

[23] Hasnas, *supra* note 11, at 2 n.1.

[24] *See* Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 840–41 (1996).

to elaborate the factual background of the incident. It follows that accusations of being a "common thief"[25] (a pre-legal wrong)[26] or that threaten lengthy prison sentences (a proxy for a pre-legal wrong)[27] oblige courts to hear the accused's story about how the action misfired. In the telling of those stories, mistakes of fact generally excuse the accused, whereas mistakes of law generally do not.[28] Likewise, with general-intent offenses, mistakes must be reasonable to get the accused off the hook, whereas with specific-intent offenses, so-called unreasonable mistakes suffice.[29]

For example, self-defenders who unnecessarily but reasonably respond forcibly to perceived threats are mistaken about facts, which, if they were as perceived by self-defenders, would render the self-defensive actions noncriminal.[30] The same can be said of accused rapists,[31] whose mistake about the fact of consent negates the wrongfulness (though not harmfulness) of the act.[32] And when age is an element of a crime, as in sex with a minor, a mistake of fact—taking a minor for an adult—excuses the accused.[33]

An illustration of a plea of mistake of fact is the Arkansas Supreme Court's ruling in *Flippo v. State*.[34] Robert L. Flippo, Jr. and his son Bobby were hunting out of season in the woods of Lawrence County, Arkansas where, in the poor visibility of dusk, Bobby fatally shot Roy Ralph Sharp, a 225-pound man whom Bobby took for a deer from 140 yards away.[35] Evidence suggested the fatal shot ricocheted off a low branch obscuring Sharp, whose death was hastened by the Flippos' delay in summoning help.[36] Properly understood, Bobby's defense in his manslaughter trial was that he shot Sharp by mistake.[37] Concluding that Bobby's aim was good, but that he

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[25] James v. United States, 366 U.S. 213, 251 (1961) (Whittaker, J., concurring in part and dissenting in part).

[26] *See generally* Andrew Comford, *Preventive Criminalization*, 18 NEW CRIM. L. REV. 1, 16–20 (2015) (discussing pre-legal wrongs).

[27] *See* Staples v. United States, 511 U.S. 600, 616–18 (1994).

[28] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *1, *27 ("For a mistake in point of Law, which every person of discretion . . . is bound and presumed to know, is in criminal cases no sort of defense.").

[29] *See* People v. Russell, 51 Cal. Rptr. 3d 263, 270–72 (Ct. App. 2006), *abrogated on other grounds by* People v. Covarrubias, 378 P.3d 615 (Cal. 2016).

[30] *See* Commonwealth v. Scott, 73 A.3d 599, 603–05 (Pa. 2013).

[31] *See* People v. Mayberry, 542 P.2d 1337, 1347 (Cal. 1975) (reversing for trial court's failure to instruct on mistake of fact in rape case where consent was plausible).

[32] *See id.* at 1344–46; Thaddeus M. Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 452 n.145 (2000) (discussing how not all harm entails wrong and not all wrong entails harm).

[33] *See* People v. Hernandez, 393 P.2d 673, 678 (Cal. 1964).

[34] 523 S.W.2d 390, 391–92 (Ark. 1975).

[35] *Id.*

[36] *Id.* at 392–93.

[37] *Id.* at 391, 393.

aimed at and shot an improvident target, the jury convicted him for his gross negligence in hunting out of season from considerable distance when "not sure of his target."[38] Simply put, Bobby's plea of mistake was rejected. Another way of saying this is that while Sharp might have been taken for a deer, he was not shot "by mistake."[39] For if he had been, there would be nothing to do but excuse Bobby for the killing.

Bobby's plea was based on a mistake about a fact—whether Sharp was man or deer.[40] Absent a favorable, authoritative pronouncement of law in force before the act in question, mistakes of *law* are entertained as excuses only if the statute is specifically designed to that end.[41] An example of such a statute is in *Cheek v. United States*, where an American Airlines pilot argued he did not "willfully evade taxes" because he owed no taxes, given his baseless belief that the Internal Revenue Code did not treat wages as income.[42] Although mistake or ignorance of law is normally no excuse, in this case Congress had built the excuse into the offense by requiring not just a failure to pay tax, but a willful failure,[43] which could occur only with Cheek's knowledge of his obligation to pay tax. Had Congress intended otherwise, the statute would refer merely to a failure to pay tax, not a willful failure.[44] The Supreme Court agreed, "as incredible as such misunderstandings of and beliefs about the law might be."[45] The source of Cheek's beliefs? A group of lawyers, who conducted seminars denouncing the federal tax system as unconstitutional and declaring wages as non-income.[46] The high court's solution was to order a new trial at which the trial court was barred from imposing a reasonableness requirement on Cheek's beliefs about the Internal Revenue Code.[47]

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[38] *Id.* at 393 (citing State v. Green, 229 P.2d 318 (Wash. 1951) (taking a 15-year-old boy with a red hat for either a bear or a "three-point buck" at 102 feet) (citing State v. Newberg, 278 P. 568 (Or. 1929) (taking a man on horseback for a deer at 125 feet))).

[39] *Id.*

[40] *Id.*

[41] *See* United States v. Barker, 546 F.2d 940, 947–48 (D.C. Cir. 1976) (analyzing mistake of law as it relates to public policy). Because theft involves property *known* to be that of another, it is excused if the accused takes under an erroneous claim of right based on permission, gift, or abandonment. KY. REV. STAT. ANN. § 514.020(1) (West 2018); *cf.* Picotte v. Mills, 203 S.W. 825, 826 (Mo. Ct. App. 1918) (holding that ownership is mixed question of law and fact).

[42] 498 U.S. 192, 203 (1991).

[43] *Id.* at 200.

[44] *Id.*

[45] *Id.* at 203–04.

[46] *Id.* at 195–96.

[47] On remand, after the *pro se* Cheek filed eccentric pre-trial motions, see United States v. Cheek, No. 87 Cr 161, 1991 WL 287034 (N.D. Ill. Dec. 5, 1991), his subsequent re-conviction was upheld by the Seventh Circuit. *See* United States v. Cheek, 3 F.3d 1057, 1063 (7th Cir. 1993). Cheek was sentenced to 366 days in prison, which led American Airlines to deny him a leave of absence, instead firing him (after

Although *Flippo* and *Cheek* are very different in one being about fact, one about law, that distinction conceals what they have in common. Notably absent in both *Flippo* and *Cheek* is any consideration of *why* each believed what they did: who would take a man for a deer at 140 yards, or at any distance for that matter? Where were the target's telltale antlers, tail, and spindly legs? And if wages aren't income, then what are they? How can a pilot earn a big salary for two decades and continue to believe his wages aren't income, even after repeatedly litigating the issue without success, once suffering Rule 11 sanctions to boot?[48]

III. THE CONCEPT OF MISTAKE AND ITS LIMITS

Mistakes involve the idea of a wrong alternative—taking one thing for another or taking one tack rather than another.

> You have a donkey, so have I, and they graze in the same field. The day comes when I conceive a dislike for mine. I go to shoot it, draw a bead on it, fire: the brute falls in its tracks. I inspect the victim, and find to my horror that it is your donkey. I appear on your doorstep with the remains and say—what? "I say, old sport, I'm awfully sorry. I've shot your donkey by accident?" Or "by mistake?" Alternatively, I go to shoot my donkey as before, draw a bead on it, fire— but as I do so, the beasts move, and to my horror yours falls. Again the scene on the doorstep—what do I say, "by mistake" or "by accident"?[49]

With accidents, something befalls ("I didn't mean to shoot a donkey—any donkey"—or "that was not the donkey I was aiming at"). With mistakes, you take the wrong one when you have both the competence and commitment to take the right one ("I meant to shoot that donkey, but thought it was mine, not yours"). This last qualification is most important and most frequently overlooked in published decisions.

Neither Cheek nor Flippo made a mistake, even though both took one thing for another. If getting things right is unlikely, guesswork, or random, then getting them wrong is not by mistake. Only if you have knowledge in

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20 years on the job) for his imminent unavailability to fly. *See* Cheek v. American Airlines, Inc., No. 94 C 5763, 1995 WL 115510, at *1 (N.D. Ill. Mar. 14, 1995), *aff'd*, 89 F.3d 838 (7th Cir. 1996), *cert. denied* 519 U.S. 993 (1996). Cheek lost a suit to get his job back, served six months in prison followed by three more in a Salvation Army half-way house in Chicago, and never worked for American again, a disposition evidently justified by the airline's collective-bargaining agreement with its pilots. *See id.*

[48] *See* Cheek v. Doe, 828 F.2d 395, 398–99 (7th Cir. 1987) (reducing sanction from $11,500 to $5,000, while adding on another $1,500 for bringing a frivolous appeal).

[49] AUSTIN, *supra* note 15, at 11 n.4.

the first place can your knowledge fail and count as a mistake as opposed to a wrong belief owing to something—carelessness, recklessness, fantasy, delusion—other than mistake. When you make a mistake, you mean to do exactly what you do, at least to a point. It is just that you misinterpret your situation: you take someone else's property for yours, a minor for an adult, silence for consent, a harmless prank for a deadly threat.

> [S]uppose the order is "Right turn" and I turn left: no doubt the sergeant will insinuate that my attention was distracted, or that I cannot distinguish my right from my left—but it was not and I can, this was a simple, pure mistake. As often happens. Neither I nor the sergeant will suggest that there was any accident, or any inadvertence either.[50]

A mistake can be made only by someone who could have gotten it right, tried to get it right, but failed—not by someone who can get it right only randomly or cares little about getting it right. If our unfortunate soldier really didn't know his left from his right, then his turning left cannot be something he did "by mistake." Again, if you tell me "fetch my umbrella," and on seeing several in the designated area I grab an umbrella clueless as to which is yours, I am not mistaken if it turns out to be someone else's.

Two criteria for the correct deployment of our concept of mistake seem essential. First, for me to fetch the wrong umbrella by mistake, I would need a basis for knowing which one is yours. If I am merely guessing, then mistake drops out as a description of what goes wrong. Thus, it would be eccentric for me to say "I made a mistake" after guessing the wrong lottery numbers. When success is only random, mistake is never the explanation of the unhappy outcome.

Second, I must have a commitment to getting things right. Even if I have reason to know which umbrella is yours, if I grab just any old umbrella, then you might have been mistaken to rely on me to fetch it for you by taking me for considerate and careful. But my lack of commitment to take the right one precludes my explaining that I have taken the wrong umbrella by mistake. I cannot fail at something at which I have not even tried.

Still, we must not be too finicky in establishing the criteria of mistakes, lest nothing would qualify and the word would cease to have any specific application in the world. An example of a too finicky notion of mistake is deployed by the sophist Thrasymachus, who challenges Socrates:

> [D]o you call a man who makes mistakes about the sick a doctor because of the very mistake he is making? Or a man who makes mistakes in calculation

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[50] *Id.* at 26 n.15.

> a skilled calculator, at the moment he is making a mistake, in the very sense of his mistake? I suppose rather that this is just our manner of speaking—the doctor made a mistake, the calculator made a mistake, and the grammarian. But I suppose that each of these men, insofar as he is what we address him as, never makes mistakes. Hence, in precise speech, . . . none of the craftsmen makes mistakes. The man who makes mistakes makes them on account of a failure in knowledge and is in that respect no craftsman. So no craftsman, wise man, or ruler makes mistakes at the moment when he is ruling, although everyone would say that the doctor made a mistake and the ruler made a mistake.[51]

To Thrasymachus, know-how fails whenever a mistake is made.[52] When know-how fails, he goes on, then the activity to which the know-how pertains ceases to occur.[53] The craftsman (doctor, calculator, grammarian, ruler) no longer "is what we address him as" when he makes a mistake because if he really is a craftsman, then his knowledge will never fail.[54] Because on that account knowledge is infallible, when you make a mistake you cannot be acting "on the basis of your knowledge."[55]

On that account, someone who is not trained in medicine cannot make a medical mistake (thus the hilarity of the Sprite soft drink commercial that asks whether you would want a pro basketball player operating on you).[56] Someone who is trained in medicine, contrariwise, cannot not make a medical mistake because medicine is not occurring at the moment of the lapse since failures of knowledge are false to the activity itself ("you call yourself a *doctor*?").[57]

Such an account misreads mistakes in the opposite direction from *Flippo* and *Cheek*. In those and other cases, *all* failures of knowledge, of whatever kind, are counted uncritically as mistakes.[58] For Plato's Thrasymachus, *no* failure of knowledge is counted as a mistake, since knowledge by its very nature can never fail.[59] Neither of these two extremes can be right. Mistakes are made only by competent agents, whose successes depend on the possibility of mistakes. That is, mistakes are, and must be, inherent in any

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[51] PLATO, THE REPUBLIC 18 (Allan Bloom, trans., Basic Books 2d ed. 1991) (c. 380 B.C.E).

[52] *See id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See* DANIEL YEAGER, J.L. AUSTIN AND THE LAW: EXCULPATION AND THE EXPLICATION OF RESPONSIBILITY 75 (2005).

[57] *See id.*

[58] *See, e.g.*, Cheek v. United States, 498 U.S. 192 (1991); Flippo v. State, 523 S.W.2d 390, 393 (Ark. 1975).

[59] *See* PLATO, *supra* note 51.

successful enterprise. Despite what Thrasymachus may say, we *do* "call a man who makes mistakes about the sick a doctor because of the very mistake he is making."[60] Mistakes must be possible or it would mean nothing to refer to a surgery (or anything for that matter) as "well done," "successful," or "correct." Incompetent or indifferent agents do not make mistakes.[61] Instead, they fumble around, their failures predictable and their successes dumb luck. Indeed, that only a competent, committed agent may make a mistake explains why it is such a good excuse.

Although mistakes are by definition reasonable, lawyers see the matter differently, chalking up *all* wrong beliefs to mistakes, calling some reasonable and the rest unreasonable.[62] Under such a view, unreasonable mistakes fully excuse, *inter alia*, attempt, theft, and burglary, and can partially excuse murder.[63] According to the Model Penal Code, unreasonable mistakes are at worst reckless and at best negligent.[64] In other words, actions based on faulty, poorly formed beliefs are partially excused under the Code. The residue of the action—that which is not excused—is a criticism of the agent's belief itself. As a result, a killing done in the unreasonable belief that it was necessary would not be murder, but manslaughter (if the mistake was reckless) or negligent homicide (if the mistake was negligent).[65]

Significantly, no Code text or commentary contains a single example of an unreasonable mistake.[66] There is an example in a footnote borrowed from Glanville Williams, who identifies the self-inflicted condition of intoxication and any other "abnormal mental state" as the "only common situation in which a person makes an unreasonable mistake."[67] This, even though intoxication is already an extant, separate defense.[68] Williams offers no further explanation.[69]

In California, which has not adopted the Model Penal Code, an unreasonable mistake of fact is

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[60] *Id.*

[61] *See* YEAGER, *supra* note 56 ("The entire idea of a success, however, depends on the possibility of a mistake.").

[62] *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 725–32 (1983).

[63] *See, e.g.*, People v. Braslaw, 183 Cal. Rptr. 3d 575, 584–86 (Ct. App. 2015).

[64] *See* MODEL PENAL CODE AND COMMENTARIES § 210, explanatory note (AM. LAW INST. 1985).

[65] *Id.* § 3.09, n.10.

[66] *Id.* §§ 3.02(2), 3.04(1), 3.09(2); *see also* Robinson & Grall, *supra* note 62, at 725–32 (discussing unreasonable mistakes while providing no examples).

[67] *See* MODEL PENAL CODE AND COMMENTARIES § 3.09(2), n.10 (AM. LAW INST. 1985); *see also* YEAGER, *supra* note 56, at 38, 172 n.29.

[68] *See, e.g.*, MODEL PENAL CODE AND COMMENTARIES § 2.08 (AM. LAW INST. 1985).

[69] *Id.* § 3.09(2), n.10.

> predicated upon a negligent perception of facts, not, as in the case of a delusion, a perception of facts not grounded in reality. A person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality. That may be insanity, but it is not a mistake as to any fact.[70]

In fact, no state recognizes delusion as a defense except within a claim of insanity.[71] When a misguided belief is not correctible by more information, the actions that follow are based on delusion or fantasy, not mistake. Illusions can be the basis of mistakes; delusions cannot.[72] Examples of illusions include when a ventriloquist's dummy appears to talk, amputees feel pain in lost limbs, or a straight stick looks bent in water. In these cases, it is not that something unreal is conjured up. That would be a delusion, as in a delusion of persecution or of grandeur. Because delusions are without foundation, they are a much more serious matter.[73] Something is wrong—wrong with the person who has them.[74] That deluded persons are *impervious* to more information is what makes delusions so serious. There is nothing wrong with someone who falls for an optical illusion. It is public, anyone can see it, and we can develop procedures for testing it.[75] Because "[w]e are not . . . quasi-infallible beings, who can be taken in only where the avoidance of mistake is completely impossible,"[76] if we are not to be taken in, we need to be on guard. But it is no use to tell the sufferer from delusions to be on guard. He needs to be cured.

Even after separating the excuse of mistake from the excuse of delusion, borderline cases remain. For example, ghosts may be conjured up in the mind (delusion) or they may be just a giving-in to shadows, reflections, or a trick of the light (illusion). So too can we fairly characterize a mirage as either invented by the crazed brain of a thirsty and exhausted traveler or as an instance of atmospheric refraction, whereby something below the horizon appears to be above it.[77]

If a defendant "who makes a factual mistake misperceives the objective circumstances," while a "delusional defendant holds a belief that is divorced

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[70] People. v. Mejia-Lenares, 38 Cal. Rptr. 3d. 404, 414–15 (Ct. App. 2006).

[71] *See* People v. Elmore, 325 P.3d 951, 955 (Cal. 2014); People v. Gregory, 124 Cal. Rptr. 2d 776, 796–98 (Ct. App. 2002).

[72] *See* J.L. AUSTIN, SENSE AND SENSIBILIA 22–23 (1962).

[73] *See id.* at 21–23.

[74] *See id.* at 23–24.

[75] *See id.* at 20–23.

[76] *Id.* at 52.

[77] *See id.* at 20–32.

from the circumstances,"[78] what, then, is objectively verifiable in the *unreasonable* mistake? If someone "who misjudges the external circumstances may show that mental disturbance"—not amounting to insanity—"contributed to the mistaken perception of a threat,"[79] what lies between the non-excuse of delusion and the operative excuse of "mental disturbance?" It makes only misleading sense to state that such "persons operating under a mistake of fact are reasonable people who have simply made an unreasonable mistake."[80] Indeed, this explication of such a phenomenon has an otherworldly vibe, which if not just a re-description of delusion, is hard to make sense of.[81]

Unsurprisingly, a solid example of an unreasonable mistake, or what Jerome Hall dubbed "extreme mistake,"[82] has yet to show up anywhere. Even unrepresentative examples are few.[83] Those include a home-invader "defending" himself therein by killing a random 79-year-old woman with a claw hammer in the presence of police—a self-authenticating instance of delusion, not of a reasonable person lapsing into unreasonably "making a mistake."[84] The home-invader could not possibly have justifiably taken his victim as a real threat. Also held out as unreasonable mistakes are cases better understood as straight-up provocation (as where a defendant in mutual combat over the victim's wife resorts to a fatal stabbing)[85] or perfect self-defense (as where years of abuse evidenced by Battered Women's Syndrome leads the defendant to shoot her sleeping abuser-husband on the very evening he had threatened to kill her).[86] No wonder New York repudiated the unreasonable-mistake category in its version of the Model Penal Code.[87] Mistakes, after all, are not merely psychological, internal events in which some are reasonable and some are not. Instead, they are all by nature reasonable lapses, which occur, are elaborated, and are responded to in the public, observable world. Adherence to this insight is crucial to a process by

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[78] People v. Elmore, 325 P.3d 951, 960 (Cal. 2014).

[79] *Id.* at 966–67.

[80] People. v. Mejia-Lenares, 38 Cal. Rptr. 3d. 404, 416–17 (Ct. App. 2006).

[81] An illustration of a claim of unreasonable mistake purporting to owe to a mental affliction *not* amounting to insanity is *People v. Wells*, 202 P.2d 53 (Cal. 1949).

[82] JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 592 (2d ed. 1960).

[83] *See* People v. Gregory, 124 Cal. Rptr. 2d 776, 795 (Ct. App. 2002) (citing cases of unreasonable mistake while upholding schizophrenic's guilty plea).

[84] People v. Hardin, 102 Cal. Rptr. 2d 262, 268 (Ct. App. 2000).

[85] *See* Seidel v. Merkle, 146 F.3d 750, 756–57 (9th Cir. 1998).

[86] *See* DePetris v. Kuykendall, 239 F.3d 1057, 1060, 1063, 1065 (9th Cir. 2001).

[87] *See People v. Goetz, 497 N.E.2d 41, 49–50 (N.Y. 1986); see also* People v. Reese, 815 N.W.2d 85, 98–99 n.62 (Mich. 2012) (purporting to follow Vermont and New Jersey in repudiating imperfect self-defense).

which mistakes are assessed, a process by which human action can be understood, and as a result, responded to.

IV. INCULPATORY MISTAKES

While so far here our interest in mistakes has been in their capacity for excusing harm-causing action, mistakes also have point in converting harmless action into punishable instances of criminal attempt. Criminal attempts are punishable even though the intended crime is unconsummated.[88] Although the intended crime fails because in one way or another the attempter gets caught before he can pull the crime off,[89] the attempter remains partially on the hook, though less than if he had succeeded. Failure, accordingly, is a partial excuse, which (for the most part) mitigates punishment below that meted out for the successful offense.[90] Attempts are said to be impossible when a criminal's efforts fail due to factors *apart from* getting caught. That is, an attempt is impossible when the means selected for its execution are so shabby that we could have predicted the failure of the criminal effort even before the plan was put into action.[91]

For example, murder is *not* impossible when the accused intentionally shoots a victim who survives through the intervention of life-saving surgery. Nor is theft impossible when a victim fights off the accused, who obtains no property. Although a thief cannot pick an empty pocket, if the thief does not know the pocket is empty, does that mean he has not attempted theft? No, the would-be thief is still punishable for attempted theft.[92] Next time, the argument runs, he may figure out who has money and who does not. Thus, for deterrence purposes he should this time be only partially excused for having fallen short.[93] The case of the failed pickpocket therefore is not a case of impossibility.[94]

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[88] *See* R.A. DUFF, CRIMINAL ATTEMPTS 221–28, 363–74 (1996); Douglas Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 151–52, 178–82 (1995).

[89] *Cf.* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. LEGIS. 1, 60–61 n.303 (1989) ("The elements of attempted tax evasion are the same as those for tax evasion itself, combined only with the fact that the actor was caught.").

[90] *See* CAL. PENAL CODE § 664 (West 2011); MODEL PENAL CODE § 5.05(1) (AM. LAW INST., Official Draft 1962).

[91] *See* Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435, 451 (1990).

[92] *See, e.g.*, People v. Rojas, 358 P.2d 921, 923–24 (Cal. 1961); Commonwealth v. McDonald, 50 Mass. 365, 367–68 (1850). *But see* Regina v. Collins, (1865) 169 Eng. Rep. 1477, 1478 (holding that no attempted larceny occurred when defendant put his hand into an empty pocket), *overruled by* Regina v. Ring, (1892) 17 Cox C.C. 491, 66 L.T. (NS) 306.

[93] Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1217–18 (1985).

[94] Some have taken the position that after the fact, all attempts may be dubbed "impossible." *E.g.*,

But what if someone intends to commit rape or murder, but fails because his would-be rape or murder victim is already dead?[95] Or his would-be murder victim is alive but sleeping in another room when the "murderer" shoots through a window, striking a pillow, which is taken for the victim?[96] And what about someone who intends to take a deer out of season, but the deer turns out to be a stuffed decoy?[97]

The answer to each question posed above is embedded first in an answer to a prior question: is the defendant trying to commit what really is a crime?[98] If it is, then his failure—which manifests nothing redeeming about him—is something for which he deserves only partial credit: bad intention, lucky result. If he *meant* to rape or shoot a dead person (not a live one), shoot a pillow (not an enemy), or take a stuffed deer (not a real one) out of season, then he is not *attempting* anything.[99] He *is* violating or shooting a corpse, shooting a pillow, or taking a stuffed deer, actions whose criminality, if any, has nothing to do with rape, murder, or preservation of deer from overzealous hunters.

Even if defendant owns up to having tried to commit what really is a crime, there must—because of the limits of what it means to fail due to a mistake—be some instances where he should get off scot-free. Those limits explain how the term "impossibility" insinuated itself into the law of attempt: blame has no place when the prohibited harm never had a chance to occur. As such, an impossible plan (if plan there be) lacks the proximity to success that justifies a conviction of attempt. Success is impossible when these would-be thieves, rapists, murderers, and scofflaw hunters go about things in such an unlikely way as to make their failure the inevitable upshot of delusion or fantasy, not mistake.[100] They give us doubt about whether they intended to commit a crime or take the requisite "substantial"[101] or "direct but ineffectual"[102] step toward its completion. Though they well may need some sort of reprogramming, because they are too disconnected from reality to

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Alexander, *supra* note 20, at 45; J.H. Beale, Jr., *Criminal Attempts*, 16 HARV. L. REV. 491, 496–97 (1903).

[95] *See* Doyle v. State, 921 P.2d 901, 912–15 (Nev. 1996) (holding that sexual assault presupposes a live victim), *overruled on other grounds* by Kaczmarek v. State, 91 P.3d 16 (Nev. 2004); People v. Dlugash, 363 N.E.2d 1155, 1159 (N.Y. 1977) ("Whatever else it may be, it is not murder to shoot a dead body.").

[96] *See* State v. Mitchell, 71 S.W. 175, 177 (Mo. 1902).

[97] *See* State v. Guffey, 262 S.W.2d 152, 156 (Mo. Ct. App. 1953).

[98] *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 3.3, at 178 (1978).

[99] *See* Levy, *supra* note 16, at 254–57.

[100] *See* MODEL PENAL CODE & COMMENTARIES § 5.01, at 314–15 (AM. LAW INST., Proposed Official Draft and Revised Comments 1985) (calling "the relative appropriateness of means to end" an "important aspect of the impossibility problem").

[101] MODEL PENAL CODE § 5.01(1)(c), at 81 (AM. LAW INST., Proposed Official Draft 1962).

[102] People v. Dillon, 668 P.2d 697, 701, 704 (Cal. 1983).

have "made a mistake," they are not to be dealt with in the same way we deal with fully responsible agents who barely fall short of the harms they threaten.[103]

For example, what are the conditions under which someone could think a decoy deer is a real deer? A convincing decoy deer in the woods staged there by the game warden should lead to the conviction of someone who shoots at it of attempting to take a deer out of season:

> The State's evidence shows that conservation agents, about two weeks before the alleged offense, had procured the hide of a 2½ year old doe which had been killed by an automobile in Pulaski County. They had taken it to a taxidermist, who soaked it to soften it, stuffed it with excelsior and boards, inserted rods in the legs so it would stand upright and used the doe's skull in the head part of the hide so it would hold its former shape. For eyes, which had not been preserved, two small circular pieces of scotchlight reflector tape of a 'white to amber color', had been placed over the eyeless sockets.[104]

The Missouri statute which conservation agents sought to enforce criminalized unauthorized pursuit, taking, killing, possession, or disposing of all wildlife, not just deer.[105] In fact, defendants were in search of a wolf they saw run across a road they took en route to a frog-hunting expedition.[106] Thus they attempted to take a wolf out of season by shooting at a decoy deer that they took—on these facts justifiably—for a wolf.[107] But move the decoy deer to the end of a grocery-store aisle or any other place where deer are unlikely to appear, or lower the quality of the decoy so that it looks fake from any distance, and a conviction of attempt becomes manifestly absurd.[108]

Of course, the deer was not in a grocery-store aisle, but staged in a place and manner where anyone might be taken in and mistake it for live, off-limits wildlife. This makes it all the more remarkable that Guffey's conviction of attempt was reversed. To the appellate court, Guffey's project was not an illegal attempt to take protected wildlife, but a perfectly legal taking of an unprotected stuffed deer by way of a shotgun blast.[109] Because by his own account Guffey took the stuffed decoy for alive, it is hard to locate the

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[103] Hasnas, *supra* note 11, at 41.

[104] State v. Guffey, 262 S.W.2d 152, 153 (Mo. Ct. App. 1953).

[105] *Id.* (quoting MO. ANN. STAT. § 252.040 (West 1945)).

[106] *Id.* at 154.

[107] *Id.*

[108] *Cf.* FLETCHER, *supra* note 98, § 3.3, at 151–52 (discussing that attempt liability in *Guffey* should turn on "how deceptive the dummy was").

[109] *See Guffey*, 262 S.W.2d at 156.

appellate court's ruling within any notion of attempt, impossible or otherwise.[110]

As for shooting a pillow, we would need thorough knowledge of the episode: did the enemy really resemble a pillow? In the actual case, where Newton Mitchell's conviction of attempted murder of John Warren was upheld by Missouri's high court, Mitchell, who had known Warren at least twenty years, had at one time boarded at Warren's house where the attempt occurred, thus educating himself on the layout.[111] Moreover, when he shot twice through the window at the downstairs bed (one shot striking the pillow, the other the dresser), Mitchell was unaware that Warren, who had seen Mitchell and another man skulking around his grounds, had taken the precaution of retiring to the upstairs where his wife and children slept.[112] Plus, Mitchell had a well-publicized motive for the attack: he fancied Warren's wife, whom he had pledged, apparently without encouragement, to extricate from her marriage by any means necessary.[113] There is nothing impossible about that attempt.

J.L. Austin once put to students in a seminar at Harvard: "if a man hacks away with an axe at a pile of logs under the bedclothes, thinking it to be a man in his bed, isn't this attempted murder, despite the fact that the courts hold that it is not?"[114] Austin's question was rhetorical. After all, elsewhere he criticized a judge whose instructions to the jury made the defendant, by comparison, stand out as an "evident master of the Queen's English."[115] As for the judge,

> "he probably manages to convey his meaning somehow or other. Judges seem to acquire a knack of conveying meaning, and even carrying conviction, through the use of a pithy Anglo-Saxon which sometimes has literally no meaning at all. Wishing to distinguish the case of shooting at a post in the belief that it was an enemy, as not an "attempt," from the case of picking an empty pocket in the belief that money was in it, which is an "attempt," the judge explains that in shooting at the post "the man is never on the thing at all."[116]

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[110] *See* Levy, *supra* note 16, at 258 ("*Guffey* . . . is deeply flawed.").

[111] State v. Mitchell, 71 S.W. 175, 176–78 (Mo. 1902).

[112] *Id.* at 176.

[113] *Id.* at 177–78.

[114] George Pitcher, *Austin: A Personal Memoir*, *in* ESSAYS ON J.L. AUSTIN 17, 20 (1973); *cf.* JAMES FITZ-JAMES STEPHEN, DIGEST OF THE CRIMINAL LAW 41 (5th ed. 1894) ("If *A*, mistaking a log of wood for *B*, and intending to murder *B*, strikes the log of wood with an axe, *A* has not attempted to murder *B*.").

[115] AUSTIN, *supra* note 15, at 23.

[116] *Id.* at 23 n.12 (emphasis added); *cf.* Commonwealth v. Kennedy, 48 N.E. 770, 770 (Mass. 1897) (Holmes, J.) (referring to "the classic instance of shooting at a post supposed to be a man" as no attempt).

Austin is right: the expression may be meaningless at the literal level, but the judge does manage to get his point across somehow. What would make the man take a post for an enemy, anyway? Without good grounds for taking the one for the other, the man "is never on the thing at all," the "thing" being the successful shooting of an enemy, a risk so remote that the man is never "on" it. His means (shooting at a post) are so poorly selected for the desired ends (shooting a man) that success is too unlikely from the get-go to treat the project as a serious attempt. There is something wrong with *him*, not with what he saw; he is not mistaken (missing a bit of information), but delusional (at odds with reality). Before we could consider this shooting an attempted murder, we would need to know more about the incident, more than the stick-figure sketch that Austin—a lover of facts—gave us.[117] Only then could we be in a position to say that the man had a basis for taking the post for an enemy; only then could we be in a position to say that in shooting at the post "by mistake" did he attempt to kill a man.

Another way of saying this is that we *can* imagine situations in which shooting a post would be an attempt, just as we can imagine situations in which shooting a stuffed deer (in, say, the grocery store) would not be an "attempt to take a deer." For example, shooting a bare post sticking in the ground from three feet is not an attempt to commit murder, though it may conceivably be an attempt to commit murder to shoot a very realistic scarecrow from 150 yards. What we need is a process for distinguishing the one from the other.

And what would be the conditions under which one could take a dead person for a live one? Narrow indeed, such as when the would-be killer, without checking for signs of life, shoots a man in the head with a .25 caliber bullet a few minutes after the man had died from shots to the chest by another person with a .38.[118]

But how, exactly, could someone sexually penetrate a dead person, taken for alive? Consider in this vein *United States v. Thomas*, where McClellan (a Navy airman, age nineteen) began dancing at a bar with a young woman he had just met when she promptly collapsed on the dance floor, dead from "acute interstitial myocarditis," a heart disease.[119] With help from Thomas (a Navy airman, age twenty) and Abruzzese (a Navy airman, age eighteen), McClellan loaded the woman in his car, where he recommended they violate

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[117] For example, in Donald Siegel's 1979 film *Escape from Alcatraz*, lifer Frank Morris (played by Clint Eastwood) masked his prison escape by arranging his bedding, replete with papier-mâché head, in a way that justifiably persuaded the night guard peering into the cell with a flashlight that Morris was asleep therein. ESCAPE FROM ALCATRAZ (Paramount Pictures 1979).

[118] *See* People v. Dlugash, 363 N.E.2d 1155, 1156 (N.Y. 1977).

[119] 32 C.M.R. 278, 280 (C.M.A. 1962).

her because she "was just drunk" and "would never know the difference."[120] After each took his exploitive turn therein, McClellan and Thomas dropped off Abruzzese at the USO before taking the woman to a gas station,[121] where an attendant called police, who arrived soon after and declared her dead.[122] Because evidence indicated she had died on the dance floor, rape was precluded.[123] Convictions of attempted rape, however, were upheld on the ground that defendants took the deceased for alive when they penetrated her.[124]

In two opinions taking up twenty-two pages in the Court Martial Reports, the only allusion to what led defendants to think the deceased was alive is the coroner's remark that *rigor mortis* had not set in before the multiple penetrations.[125] That offhand remark, however, is a weak basis for concluding that defendants made a mistake about life and death. Can the line between the two states be that fine? The whole thing seems fishy, too fantastic to count as a mistake. As "sordid and revolting a picture" of human action as it is,[126] *Thomas* does not bespeak an attempt, not without more than the scant factual development that the court provides.

Violating a corpse is a perversion quite apart from anything like real rape. In fact, someone who violates a corpse very likely does so *because* the person is dead ("and I will kill thee, and love thee after").[127] Such an action should provoke negative reaction sure enough, but not the same as to someone who has put himself to commit rape and failed due to, say, resistance on the would-be survivor's part.[128]

One *could* conceivably take a barely dead person for a barely live person on facts like those of *Doyle v. State*, where three men had intercourse with a profoundly intoxicated twenty-year-old woman, who then threatened to accuse them of rape before being kidnapped to an area outside Las Vegas and murdered.[129] Either just before or just after she expired from being choked, beaten, and smashed in the face with a brick, a four-inch twig was inserted in

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[120] *Id.*

[121] Abruzzese flipped, testifying for the prosecution in exchange for dropped charges. *See id.*

[122] *Id.*

[123] *Id.* at 280–81.

[124] *Id.* at 280–81, 292.

[125] *Id.* at 280.

[126] *Id.*

[127] WILLIAM SHAKESPEARE, OTHELLO 5.2.18–.19 (David Bevington ed., New York: Bantam 1988) (1622).

[128] *E.g.*, State v. Martinez, 230 P. 379, 383 (N.M. 1924); *cf.* Waters v. State, 234 A.2d 147, 153–54 (Md. Ct. Spec. App. 1967) (upholding attempted-rape conviction of 80-year-old who doubted his capacity to achieve erection).

[129] 921 P.2d 901, 906–07 (Nev. 1996), *overruled on other grounds by* Kaczmarek v. State, 91 P.3d 16 (Nev. 2004).

her rectum.[130] To conspiracy, kidnapping, and murder charges was consequently added sexual assault, Doyle's conviction of which was reversed for lack of proof as to whether penetration with the foreign object occurred before death.[131] Although Nevada is among those states that condition rape on a live victim,[132] the state high court noted in dictum that felony murder may be predicated on attempted rape, which may lie when a would-be rapist justifiably takes a barely dead victim for alive.[133]

This distinction between earnest and stillborn gestures—between failures owing to mistake (attempts) and delusion (non-attempts)—is what the Model Penal Code trades on when reasoning that attempt law should not punish persons who demonstrate insufficient "dangerousness."[134] For the Code drafters, "[t]he innocuous character of the particular conduct becomes relevant only if the futile endeavor itself indicates a harmless personality, so that immunizing the conduct from liability would not result in exposing society to a dangerous person."[135] The Code cites "black magic" (aka voodoo) as a means that indicates non-dangerousness,[136] at once acknowledging that "it is by no means clear that those who make unreasonable mistakes will not be *potentially* dangerous."[137] Indeed, anyone out of touch enough to take just any old pillow for a person may in fact be dangerous.[138] Dangerous or not, no progress can be made by declaring, as many do, the "black magic" scenario a mistake.[139]

Black magic has nonetheless become a "stock example" of the staying power of the impossibility defense, despite the universally-held official

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[130] *Id.* at 905–07.

[131] *Id.* at 912–15.

[132] *Id.* at 912–13 n.6. For rulings that the death of the victim prior to penetration does *not* necessarily preclude a conviction of rape, see *People v. Gomez*, 959 N.E.2d 1178, 1194 (Ill. App. Ct. 2011) and *State v. Collins*, 585 N.E.2d 532, 536 (Ohio Ct. App. 1990) ("[T]he fact that the victim may have been dead when the sexual conduct occurred does not, in itself, lessen defendant's culpability herein, nor does the state have to prove in this case, as an element of the offense of rape, that the victim was alive when sexual conduct occurred.").

[133] Doyle v. State, 921 P.2d 901, 914 (Nev. 1996) (citing NEV. REV. STAT. § 200.030(1)(b) (1995)), *overruled on other grounds by* Kaczmarek v. State, 91 P.3d 16 (2004). *But cf.* Nay v. State, 167 P.3d 430, 435 (Nev. 2007) ("Robbery does not support felony murder where the evidence shows that the accused kills a person and only later forms the intent to rob that person.").

[134] MODEL PENAL CODE & COMMENTARIES § 5.01, at 316 (AM. LAW INST., Official Draft and Revised Comments 1985).

[135] *Id.*

[136] *Id.* § 5.01, at 316 n.88.

[137] *Id.* (italics added).

[138] *Cf.* DRESSLER, *supra* note 4, § 27.07, at 401 (discussing that a misguided agent "may later commit some other irrational and dangerous act, or . . . come upon a more sensible way to accomplish her criminal task").

[139] *See, e.g.*, Westen, *supra* note 4, at 535–36.

position that impossibility is no longer a defense to a charge of attempt.[140] As a clear and high example of a stillborn attempt, these cases of "incantations"[141] are deployed by courts and commentators to demonstrate "some validity to decisions that distinguish the tree stump from the empty pocket case."[142] Accordingly, exertions that are "inapt"[143] or "doomed"[144] "ex ante"[145]—where failure is an "intrinsic"[146] or "inherent"[147] feature of an "unreasonable"[148] criminal design that is too unlikely in a causation-sense to amount to much[149]—are feeble gestures, not criminal attempts. The method by which this exemption from the law of attempt is explicated, however, devolves too often into whacky,[150] admittedly "ridiculous"[151] hypotheticals, which, while entertaining to a point, cut us off from our principal job of decoding what was done: from the factual background of the incident or the *why* of it all.

Why hypotheticals (Sanford Kadish's "Mr. Law and Mr. Fact" comes to mind)[152] are substituted for the abundant real-life criminal cases on hand is opaque. The stick-figure nature of the hypotheticals boils things down sure enough, but the upshot of this activity does more harm than good by impeding

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[140] *See* Alexander, *supra* note 20, at 48 n.40 (collecting sources).

[141] Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 685 (1994) (arguing against conviction when "the impossibility would be obvious to any sane person . . . or where the evidence of criminal intent is doubtful").

[142] Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 836 (1940).

[143] FLETCHER, *supra* note 98, § 3.3, at 149–52 n.59 ("If the type of conduct would produce harm in the long run, then the defendant's act is apt and a punishable attempt, even though it is impossible under the circumstances.").

[144] H.L.A. Hart, *The House of Lords on Attempting the Impossible*, 1 OXFORD J. LEGAL STUD. 149, 152 (1981), *reprinted in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 367, 372 (1983).

[145] Shavell, *supra* note 91, at 451.

[146] John S. Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 971–78 (1930) ("The three typical situations of intrinsic impossibility . . . include that of an attempt at rape by a man who is impotent, that of an attempted homicide with firearms which are mechanically incapable of causing death, and that of an attempt at poisoning by the administration of a substance actually not poisonous.").

[147] *See* MODEL PENAL CODE § 5.05(2), at 87 (AM. LAW INST., Proposed Official Draft 1962); Douglas Husak, *Why Punish Attempts at All? Yaffe on the "Transfer Principle,"* 6 CRIM. L. & PHIL. 399, 405 (2012) (describing reluctance to punish "inherent factual impossibility," such as in cases of attempting to use magic to carry out a crime).

[148] Brodie, *supra* note 16, at 252–56.

[149] Levy, *supra* note 16, at 265–74.

[150] *See e.g.*, State v. Logan, 656 P.2d 777, 779 (Kan. 1983) (posits "trying 'to sink a battleship with a pop-gun'"); Levy, *supra* note 16, at 229 (posits attempting to violate Anti-Tongue-Sticking-Out law).

[151] Kevin Cole, *The Voodoo We Do: Harm, Impossibility, and the Reductionist Impulse*, 5 J. CONTEMP. LEGAL ISSUES 31, 53–54 (1994).

[152] SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 599 (7th ed. 2001).

assessments of whether a mistake has been made.[153]

Take, for example, Clarissa, a cheated-on spouse who, after enduring "the final straw, . . . stirs what she believes to be a spoonful of the arsenic she had purchased for this eventuality into his coffee," only to realize "that she mistakenly added sugar to his coffee, just as she does every morning."[154] As an act of repentance, Clarissa then turns herself in, apparently as attempted murderer.[155]

On that lean backstory, frankly, it is hard to have any reaction at all to Clarissa. We are to take it as given that she "mistakenly" took sugar for poison. But how? Any amateur student of the mind would conclude that Clarissa did not want her husband dead (not, at least, by her own hand). Imagine the trembling hands, racing mind, and complex of emotions leading up to the contemplated act. If genuinely committed to doing him in, what went wrong? Did someone switch the sugar and arsenic containers? Did Clarissa have two identical containers side by side with no distinguishing markings and then simply guess which was the deadly one? What kind of murderer does *that*? No mistake occurs where no precautions are taken.[156] That she would turn herself in manifests a justifiably guilty conscience, but at the level of action she "was never on the thing at all."[157]

John Hasnas finds this bare-bones hypothetical "apparently derived from" *State v. Clarissa*,[158] which he characterizes as a "classic illustrative . . . . case . . . in which a slave attempted to poison her master with an innocuous substance."[159] George Fletcher concurs with that characterization.[160] In the real case, the real Clarissa dropped two ounces of Jamestown (aka Jimson) weed in the coffee of two "free white persons," one her "overseer" Nelson Parsons, who consequently found himself "so near dying," but not dead.[161] Due to an inartfully pled indictment and an inadmissible confession that Parsons coerced from Clarissa, her capital conviction of "'attempt to poison' a white person" was reversed.[162]

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[153] *But cf.* LEO KATZ, BAD ACTS AND GUILTY MINDS 276–93 (1987) (presenting a fourteen-page hypothetical impossibility case, which includes separate appellate "opinions," about attempting to illegally export an authentic "native" painting later discovered to be forged).

[154] Hasnas, *supra* note 11, at 2.

[155] *Id.*

[156] *Cf.* Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1105 (1992) (posing a hypothetical in which a box of arsenic containing only sugar due to error at the arsenic factory is used to attempt poisoning by way of a cup of tea).

[157] AUSTIN, *supra* note 15, at 23 n.12.

[158] 11 Ala. 57, 60–61 (1847).

[159] Hasnas, *supra* note 11, at 2 n.1.

[160] *See* George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 522 (1976).

[161] *Clarissa*, 11 Ala. at 59–62.

[162] *See id.* at 62 (ruling that deadly properties of Jamestown weed are not so obvious as to be the subject

But this much is clear: Jamestown weed is no innocuous substance, understood both then and now as deadly if administered in more than medicinal doses.[163] Clarissa might have made a mistake pure and simple in the dosage, or maybe Parsons had a stocky constitution, but her efforts were far from doomed ex ante, quite apart from whether Parsons had it coming to him. In this respect, Clarissa's actual litigation gets us much closer than the "classic" hypothetical version to discovery or agreement about both the basis of her mistake (if mistake there be) and what to do about it.

V. CONCLUSION

Nothing is more central to the understanding of untoward human action than the operation of mistakes. And nothing is more conventional than the notion that mistakes may be unreasonable, even "extreme."[164] Indeed, Richard Singer wrote about "unreasonable mistakes" for eighty-four pages in the *Boston College Law Review*, tracing their operation in law back to Blackstone,[165] yet without pausing to consider whether all wrong beliefs, whatever their foundation, can constitute mistakes. If I have succeeded at all here, then I have made a case for the idea that they cannot. Because mistakes are tied to the public observable world and not to the inner world of privacy and psychology, they are by definition reasonable. When someone able to take the right one takes the wrong one when trying to get it right, a mistake occurs, which is to say terms like negligence and recklessness have no specific application to what was done. Mistakes may either exculpate or inculpate when competently pled. Delusions, oppositely, may have some place in the law, but they bear no relation to the meaning and operation of mistakes.

If we are any closer to discovery or agreement about the meaning and operation of mistakes, then so too are we at once closer to discovery or agreement about a tension between the punishment of excessive risk-taking as opposed to harm-causing, that is, a tension between the role of luck and desserts in ascriptions of responsibility. And these are serious matters.

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of judicial notice).

[163] *See* Pitts v. State, 43 Miss. 472, 483 (1870) (referring to Jamestown weed as "narcotic poison"); DAN J. TENNENHOUSE, 3 ATTORNEYS MEDICAL DESKBOOK § 36:6 (4th ed. 2016) (stating that properties of Jamestown weed include "agitation, death, hallucinations, hypertension, seizures, tachycardia").

[164] HALL, *supra* note 82, at 592.

[165] Richard Singer, *The Resurgence of Mens Rea: II—Honest but Reasonable Mistakes of Fact in Self Defense*, 28 B.C. L. REV. 459 (1987).