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New Technology, Old Defenses: Internet Sting Operations and Attempt Liability

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I. INTRODUCTION

Internet sting operations to catch adults preying on children have grown as exponentially as the public's use of the Internet. These operations typically involve an adult law enforcement officer posing as a child for Internet contact with a would-be defendant.[1] Defendants caught in a sting are charged with attempt because by use of the sting operation, law enforcement has

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1. The Federal Bureau of Investigation ("FBI") started the Innocent Images National Initiative in 1995 to stop child sex exploitation through the Internet. Operating in FBI offices throughout the country, the probes have resulted in the conviction of over 3,000 individuals. Press Release, Federal Bureau of Investigation, Operation Candyman (Mar. 18, 2002) *available at* http://www.fbi.gov/pressrel/pressrel02/cm031802.htm (last visited Nov. 22, 2003). A number of states have also commenced Internet sting operations. For example, in New York, the Westchester County District Attorney's High Technology Crimes Bureau currently operates a pedophile Internet sting operation. D.T. Max, *Mouse Trapped*, N.Y. MAG., Feb. 25, 2002, at 2–3. This operation, which began in July 1999, uses investigators from the District Attorney's office who log on to the Internet and pose as minors. *See id.* at 26. The investigators log on to online chat rooms and wait for contact from possible pedophiles. *Id.* When a suspect does make contact, the investigator will then attempt to remove any possible defenses that the suspect might raise at trial, such as not having the requisite knowledge that the person he was communicating with was a minor; claiming that it was merely an Internet fantasy, and finally asserting that it was not he, the suspect, who the investigator was communicating with. *Id.* at 26, 78. *See infra* notes 149–51 and accompanying text. Once the suspect has attempted to set up a meeting with the "minor," the investigators then obtain a subpoena for the suspect's Internet Service Provider ("ISP") to obtain the subscriber's identification information. J. M. Hirsch, *Cyber-Cop Searches for Pedophiles*, SEATTLE TIMES, Sept. 6, 1998, at A20. A meeting is then set up with the suspect and when he arrives at the meeting place, he is arrested. *See* J. Allan Cobb, *Evidentiary Issues Concerning Online "Sting" Operations: A Hypothetical-Based Analysis Regarding Authentication, Identification, and Admissibility of Online Conversations—A Novel Test for the Application of Old Rules to New Crimes*, 39 BRANDEIS L.J. 785 (2001); Michael W. Sheetz, Comment, *CyberPredators: Police Internet Investigations Under Florida Statute 847.0135*, 54 U. MIAMI L. REV. 405 (2000).

prevented the commission of the underlying offense against a child.[2] These cases provide a contemporary opportunity to revisit some classic attempt liability issues. Some defendants have revived use of a defense of impossibility as they claim that it is legally impossible for them to be guilty of attempt to commit a crime against a child since no child was involved.[3] Other defendants assert that they were indifferent to the age of the victim and therefore cannot be said to have the intent necessary for attempt liability. Still other defendants claim they never believed they were dealing with a minor. These latter defenses raise the issue of the appropriate mens rea for attempt liability. Whether intent is essential for all the crime's elements or whether some mens rea less than intent is acceptable for a crime's attendant circumstances, such as the age or existence of the victim, are issues that had been relegated to narrow, abstract scholarly attention.[4] With the advent of Internet sting operations, a fresh examination of the issues is warranted.

Part II of this article addresses the general principles of attempt liability, including a description of the doctrines of factual and legal impossibility and the rationale behind the historical treatment of these defenses. Part III describes recent Internet attempt cases, and Part IV analyzes issues raised by such cases. This article suggests that the new Internet cases provide further rationale for rejecting a distinction between factual and legal impossibility that would allow the latter to be a defense. This article also discusses issues surrounding the appropriate mens rea for attempt, and its applicability to Internet cases, where the defendants claim ignorance or indifference as to the age of the target of his advances. It suggests that attempt liability is appropriate only where there is proof the defendant believed that he was dealing with a child.

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2. *See, e.g.*, United States v. Root, 296 F.3d 1222, 1223 (11th Cir. 2002) (charging defendant with attempting to persuade and entice a minor to engage in criminal sexual activity); United States v. Crow, 164 F.3d 229, 232 (5th Cir. 1999) (charging defendant with attempted exploitation of a minor); Hatch v. Superior Court, 94 Cal. Rptr. 2d 453, 458 (Cal. Ct. App. 2000) (charging defendant with transmitting harmful matter over the Internet to a child in an attempt to seduce the child).

3. *See infra* text accompanying notes 99–131.

4. *See infra* text accompanying notes 211–17.

II. GENERAL PRINCIPLES OF ATTEMPT LIABILITY

A. *The Rationale of Attempt Liability*

The crime of attempt exists to punish those who have tried, but failed, to commit a substantive offense.[5] "[T]he main rationale behind the [crime of attempt]" is preventative: to stop individuals who are bent on committing a crime by allowing early police intervention.[6] Attempt provides a basis of punishment for actors who, by mere fortuity, have not completed a crime, but who are indistinguishable in blameworthiness from those who succeed.[7] Yet, failure, which is intrinsic to attempt liability, creates the oft-noted apprehension of improper punishment.[8] Without the harm-

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5. *See generally* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 3.3 (1978); WAYNE R. LAFAVE, CRIMINAL LAW § 6.2 (3d ed. 2000).

6. LAFAVE, *supra* note 5, § 6.2(b), at 538. Other means are available to allow early police intervention. *See also* State v. Young, 271 A.2d 569, 576–81 (N.J. 1970) (upholding a law prohibiting entry into a school building "with the intent of disrupting classes or of otherwise interfering with the peace and good order of the place"); LAFAVE, *supra* note 5, § 6.2(a), at 537–38. For example, possessory crimes, such as unlawful possession of burglary tools, can allow early intervention. *See, e.g.*, N.Y. PENAL LAW § 140.35 (Consol. 2000). Similarly, other anticipatory offenses, such as stalking offenses, achieve the same goal. *See, e.g.*, CAL. PENAL CODE § 646.9 (West 1999 & Supp. 2003). These other means of early intervention are outside the scope of this article.

7. MODEL PENAL CODE art. 5, introductory cmt. (Official Draft and Revised Comments 1985); *see also* LAFAVE, *supra* note 5, § 6.2(b), at 539. LaFave points out that in certain situations, the person who fails to complete the substantive crime "may present a greater continuing danger" to the public than the person who is successful and therefore must be held liable. LAFAVE, *supra* note 5, § 6.2(b), at 539. Notwithstanding the rationale behind punishing attempts, typically, jurisdictions hold that blameworthiness differs between a crime of attempt and a completed crime, and therefore a lower penalty is affixed for an attempt crime than for that of a completed crime. *See, e.g.*, N.Y. PENAL LAW § 110.05 (Consol. 1998) (utilizing punishment classification offenses—the sentence for the crime of attempt is one classification below that of the completed crime); CAL. PENAL CODE § 664 (West 1999) (stating that the crime of attempt is punished by a sentence of one-half of the maximum sentence authorized for the completed crime). The Model Penal Code departs from this view and provides that the penalty for the crime of attempt may be the same as that of the completed crime. Exceptions are made for capital and first degree felony crimes. In those cases, they are graded as a felony in the second degree. MODEL PENAL CODE § 5.05 cmt. 2.

8. Some commentators fear that to allow the government to punish for failures might lead to overreaching on the part of the government. Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1976). Professor Robinson notes that "[i]f the criminal law is extended to punish bad intent alone or the mere possibility of harmful conduct, it goes beyond its accepted role, appears unfair and overreaching, and ultimately loses its credibility and integrity." *Id.* at 266.

Similarly, George Fletcher points out that nearly every legal system in the Western

ful result proscribed by the offense-in-chief, less certainty exists as to an individual's blameworthiness.[9]

The reluctance to punish where no outward harm exists helps to explain the relatively late common law development of the doctrine of criminal attempt.[10] Thus, commentators have noted that the earliest English law "started from the principle that an attempt to do harm is no offence."[11] It was not until the late eight-

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world punishes more severely for a successful crime. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL 82–83 (1988). He goes on to assert that "[t]he law can and should go only so far to implement a rule of reason abstracted from the sensibilities of common people." *Id.* at 83. *See generally* Andrew Ashworth, *Taking the Consequences, in* ACTION AND VALUE IN CRIMINAL LAW 106, 117–20 (Stephen Shute et al. eds., 1993); Björn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?,* 1986 BYU L. REV. 553; Michael Davis, *Why Attempts Deserve Less Punishment than Complete Crimes,* 5 LAW & PHIL. 1 (1986); R.A. Duff, *Auctions, Lotteries, and the Punishment of Attempts*, 9 LAW & PHIL. 1 (1990); FLETCHER, *supra*, at 63–83; FLETCHER, *supra* note 5, § 6.6.5, at 472–83; Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237 (1994); Judith Jarvis Thomson, *The Decline of Cause*, 76 GEO. L.J. 137 (1987).

9. *See* Commonwealth v. Peaslee, 59 N.E. 55, 56 (Mass. 1901) (stating that attempt rules must allow for a "locus poenitentiae"). *See generally* R.A. DUFF, CRIMINAL ATTEMPTS 37–38 (1996).

10. Early Roman law frequently punished criminal attempts. Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 790–91 (1940). Romans distinguished ordinary crimes from atrocious crimes, punishing attempts to commit the former only occasionally and by smaller penalties. *Id.* Punishment for atrocious crimes was dependent upon the actor's intent as manifested by behavior, but the penalty was typically based upon the gravity of the acts done. *Id.* In the sixteenth century, criminal attempt was included in recognized Roman codes, including the *Carolina* (1532) and the *Ordonnance de Blois* (1579). *Id.* at 791; *see also* Eugene Rankin Meehan, *The Trying Problem of Criminal Attempt—Historical Perspectives*, 14 U. BRIT. COLUM. L. REV. 137 (1979).

A handful of felony cases in which English courts imposed liability for conduct that fell short of a completed crime existed in medieval times. Francis Bowes Sayre, Comment, *Criminal Attempts*, 41 HARV. L. REV. 821, 826 (1928). In these cases, the courts applied the theory of *voluntas reputabatur pro facto* (the intention is taken for the deed) to rationalize the punishment of uncompleted crimes. LAFAVE, *supra* note 5, § 6.2(a), at 536. However, even in those times, mere intention alone was insufficient to subject a defendant to criminal liability. *Id.* To be culpable, "the defendant must have manifested his intent 'by some open deed tending to the execution of his intent.'" *Id.* (quoting EDWARDO COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 5 (1644)). Thus, early English law insisted upon an overt action as an essential condition of criminal liability. *See id.*

11. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 560 n.10 (2d ed. 1960) (quoting 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 508 n.4 (2d ed. 1923) (1895)). The modern doctrine of criminal attempt is generally thought to trace back to the Court of the Star Chamber. Sayre, *supra* note 10, at 828 (citing 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 223–24 (London, MacMillan 1883)). The Court of the Star Chamber was created "to correct the manifest defects and shortcomings of the common law courts." *Id.* The Star Chamber dealt with many offenses that were the equivalent of

eenth century that the common law developed a substantive crime of attempt law.[12] Even so, tension exists between the need for early intervention and the fear of punishing innocent actors.[13]

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present-day criminal attempt. LAFAVE, *supra* note 5, § 6.2(a), at 536. For example, there were numerous convictions for "lying in wait" with the intent to beat or murder, as well as the use of threats or words "tending to a challenge." Hall, *supra* note 10, at 799. There were also convictions of dangerous behavior that fell short of assault, such as where the defendant "set his hand upon his dagger" or "struck at [the complainant] with his sword but missed him narowlie [sic]." *Id.* at 799–800. While the Chamber occasionally used the words "attempt" or "endeavor" in loosely describing such situations, it never formulated a general theory or doctrine of criminal attempt. *Id.* at 803–04.

12. Following the abolition of the Court of the Star Chamber in 1640, many years lapsed before the substantive crime of attempt was actually formulated in the common law. LAFAVE, *supra* note 5, § 6.2(a), at 536. In several early common law cases dealing with uncompleted offenses, the courts continued to reflect the early English law views or statements of the Court of the Star Chamber. *Id.* The development of criminal attempt was most likely delayed by the fact that other means existed for the courts to deal with unsuccessful or uncompleted criminal schemes, such as the crime of aggravated assault. *Id.*

The closest approximation to the modern doctrine of criminal attempt was first articulated by Lord Mansfield in *Rex v. Scofield*, decided in 1784. Sayre, *supra* note 10, at 834 (citing Rex. v. Scofield, Cald. 397 (1784)) In *Scofield*, the defendant was charged with placing a lighted candle amidst combustible materials in the house he was renting with the intention of setting fire and burning the house. *Id.* The indictment contained no allegations or proof that the house was burned. *Id.* The defendant argued that an attempt to commit a misdemeanor was not itself a misdemeanor. *Id.* The court rejected this argument and Lord Mansfield declared:

> It makes a great difference, whether an act was done; as in this case putting fire to a candle in the midst of combustible matter, (which was the only act necessary to commit a misdemeanor) and where no act at all is done. The *intent* may make an act, innocent in itself, criminal; nor is the *completion* of an act, criminal in itself, necessary to constitute criminality.

Id. at 835 (quoting *Scofield*, Cald. at 400). Lord Mansfield later stated:

> In the degrees of guilt there is a great difference in the eye of the law, but not in the description of the offence. So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.

EUGENE MEEHAN, THE LAW OF CRIMINAL ATTEMPT—A TREATISE 8 (1984) (quoting Cald. at 403).

Thus, *Scofield* expressly held that a completed crime is not a necessary element of criminality, provided that the defendant possessed the intention to take otherwise innocent action in furtherance of a criminal offense.

Seventeen years later, the modern doctrine of criminal attempt was fully articulated in *Rex v. Higgins*. Sayre, *supra* note 10, at 835 (citing Rex v. Higgins, 102 Eng. Rep. 269, 275 (1801)). In *Higgins*, the defendant was charged with soliciting a servant to steal his master's property, but the indictment contained no allegation that the servant stole the goods. *Higgins*, 102 Eng. Rep. at 275. The court, "relying heavily upon" *Scofield*, affirmed the conviction and held "[a]ll offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." *Id.* The court continued, saying

Two philosophical approaches exist to address these concerns. The early development of the law of attempt reflects an "objectivist" view that concentrated on the actor's conduct or *actus reus* in assessing culpability.[14] As Professor Fletcher explains, "the act [must] conform to objective criteria defined in advance. The act must evidence attributes subject to determination *independently of the actor's intent*."[15] The objectivists reason that unless the danger is manifest, i.e., apparent to an objective viewer, a danger exists that an actor will be punished merely for bad thoughts, or improperly punished without adequate proof of harm. Objectivists repeatedly point to a fear that convictions will be based on improper evidentiary and prosecutorial tactics unless objective proof of harm exists.[16] For example, Professor Enker states that "[m]ens rea . . . is not subject to direct proof . . . . It is the subject of inference and speculation."[17] He fears that guilt will be established solely through suspect factors such as uncorroborated testimony of informants and accomplices, confessions, and prior bad acts.[18] He notes that an objectivist approach protects individuals from government intrusion on their thoughts and beliefs, which is all the more important with modern methods of intelligence gathering such as eavesdropping and surveillance.[19]

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that "[t]he offence does not rest in mere intention; for in soliciting [the servant] to commit the felony, the defendant did an act towards carrying his intent into execution. It is an endeavour or attempt to commit a crime." *Id.* Hence, the *Higgins* court formulated the present-day doctrine that the attempt to commit a crime is itself a criminal offense. *See* Sayre, *supra* note 10, at 836.

The *Scofield* and *Higgins* cases firmly established the law of criminal attempt in the common law. *Id.* Thereafter the doctrine that "all such acts or attempts as tend to the prejudice of the community are indictable" became widely accepted and repeated by both courts and commentators. *Id.*

13. This tension is ameliorated in part by the generally accepted mens rea requirement of intent as the basis of attempt liability. *See generally infra* notes 29–40 and accompanying text.

14. *See* FLETCHER, *supra* note 5, § 3.3; Ronald H. Jensen, *Reflections on* United States v. Leona Helmsley: *Should 'Impossibility' Be a Defense to Attempted Income Tax Evasion?,* 12 VA. TAX REV. 335, 365–72 (1993); Paul Kichyon Ryu, *Contemporary Problems of Criminal Attempts,* 32 N.Y.U. L. REV. 1170, 1183–84, 1188 (1957) (noting that the earliest law used a subjectivist approach, but quickly moved to an objectivist approach).

15. FLETCHER, *supra* note 5, § 3.3.1, at 138 (emphasis added).

16. *See, e.g.,* Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process,* 53 MINN. L. REV. 665, 687–88 (1969); Jensen, *supra* note 14, at 367–68.

17. Enker, *supra* note 16, at 688.

18. *See id.* at 690; Jensen, *supra* note 14, at 368–69.

19. Enker, *supra* note 16, at 703.

The drafters of the Model Penal Code were proponents of a modern, fundamental shift toward a subjectivist view of criminality.[20] "Subjectivism" focuses on an actor's state of mind. The rationale behind utilizing a subjectivist approach in attempt liability is that a defendant, who intends to commit a crime, is dangerous and worthy of punishment.[21] A subjectivist approach to attempt culpability looks to what a defendant's intentions were in undertaking certain actions and his beliefs about the circumstances surrounding his intent. The drafters of the Model Penal Code rebutted objectivist concerns that the subjective approach tends to criminalize conduct that is objectively innocent without adequate protection against improper prosecution. The drafters noted that the fear is "more theoretical than practical" because a person would rarely be prosecuted on the basis of admission alone.[22] The drafters also raised an opposite concern that assessing culpability solely on the basis of manifest criminality would "excuse persons whose contemporaneous statements plus their behavior are strongly suggestive of criminal purpose, but whose behavior alone arguably would not be strongly corroborative of that purpose."[23]

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20. *See* FLETCHER, *supra* note 5, § 3.3.5, at 167–70.

21. *See id.* at 171–74.

22. MODEL PENAL CODE § 5.01 cmt. 3(c) (Official Draft and Revised Comments 1985).

23. *Id.* at 320. As many have noted, the objective and subjective approaches have their limitations. The principle of legality is the outside boundary of attempt liability. Under this principle, there can be no punishment without law. *See* LAFAVE, *supra* note 5, § 3.1, at 205 (stating that "'the principle of legality,' is often expressed by the Latin phrase *nullum crimin sine lege, nulla poena sine lege* (no crime or punishment without law)"). Thus, criminal attempt liability cannot attach unless the defendant's conduct objectively conforms to specific criteria determined in advance. The rationale behind the principle of legality is to put a check on the state's police powers to arrest merely "undesirable" individuals. Enker, *supra* note 16, at 670; 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 85(d), at 431–34 (1984). Professor Robinson illustrates this limitation by referring to the classic example of Lady Eldon's Lace, where Lady Eldon intends to smuggle French lace into England without paying the duty on it. *Id.* at 432. The English customs officer finds the lace, but informs Lady Eldon that no tariff exists on French lace. *Id.* To punish Lady Eldon for attempting to violate the tariff law would violate the principle of legality since there is no law to be broken, and therefore no attempt. *Id. See also* FLETCHER, *supra* note 5, § 3.3.3, at 148–57 (analyzing attempt and impossibility in various cases). Enker, *supra* note 16, at 670–73. Thus, it is the concept of legality that underlies the rationale of the true legal impossibility cases. *See infra* notes 99–131 and accompanying text.

While the subjectivist approach appears to resolve the problems associated with the objectivist approach, it too has limitations. For example, under the subjectivist standard, an actor who attempts to kill by black magic or voodoo should face criminal liability because the standard requires that the facts must be taken as the actor perceives them to be. In the case of black magic or voodoo, if the actor believes that his use of the black magic is

B. *The Mens Rea of Attempt Liability*

1. Classification of Elements of Crimes

Essential to an understanding of the issues raised in assessing attempt liability is the identification of an offense's elements. The Model Penal Code's historic innovation of an "element analysis" approach to criminal law requires a culpable mental state for every material element of an offense.[24] This approach replaced the common law "offense analysis," which required simply "criminal intent" for culpability. This single state of mind requisite had been widely criticized as inadequate and unclear.[25] The Model Penal Code states that the material "element[s] of an offense" include "(i) such conduct or (ii) such attendant circumstances or (iii)

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likely to produce the desired result, then under the subjectivist approach he would be criminally liable even though the harm could never be achieved. *See* FLETCHER, *supra* note 5, § 3.3.7, at 174–75. Most commentators agree that such a result is undesirable. *See generally* LAFAVE, *supra* note 5, § 6.3, at 559–60. The Model Penal Code does not bar attempt culpability in such scenarios; instead it provides for judicial discretion to dismiss a prosecution or mitigate a sentence. *See* MODEL PENAL CODE § 5.05(2).

24. MODEL PENAL CODE § 2.02. Criminal culpability is governed by four possible mental states: purpose, knowledge, recklessness, and negligence. *See id.* The Model Penal Code defines each mental state in terms of whether it is applicable to a particular element of an offense. For example, "purposely" is defined as follows:

> A person acts purposely with respect to a material element of an offense when:
>
> > (i) if the element involves the *nature of his conduct or a result thereof*, it is his conscious object to engage in conduct of that nature or to cause such a result; and
> >
> > (ii) if the element involves the *attendant* circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

Id. § 2.02(2)(a) (emphasis added).

25. *See* Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine,* 27 SW. U. L. REV. 229, 230 (1997) (noting that the Model Penal Code's redefinition of the required mental states of defendants "obliterated ill-defined, confusing common law language and concepts and replaced them with four specifically defined hierarchical levels of culpability in relation to the three objective element types used to define crimes"); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond,* 35 STAN. L. REV. 681, 688–90 (1983) (observing that common law offense analysis continues to exist despite the confusion and ambiguity it creates); Martin T. Lefevour, Note, *Supreme Court Review: 26 U.S.C. § 5861(d) Requires Mens Rea as to the Physical Characteristics of the Weapon,* 85 J. CRIM. L. & CRIMINOLOGY 1136, 1151–52 (1995) (Lefevour criticizes the use of offense analysis for its impreciseness and ambiguity. He points out that offense analysis requires a single mental state for the whole offense and fails to take into consideration certain elements that may require differing levels of intent.)

such a result of conduct as is" included in the offense's definition.[26]

Although the Model Penal Code does not define "attendant circumstances," a definition suggested by Professor Duff that appears to comport with the intent of the Model Penal Code is that an attendant circumstance is one that "exist[s] independently of the [actor's conduct]."[27] For example, the crime of trespass, which

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26. MODEL PENAL CODE § 1.13(9)(i)–(iii). The Model Penal Code awkwardly defines "material element" in the negative by excluding elements unrelated to the "harm or evil . . . sought to be prevented by the law defining the offense." *Id.* § 1.13(10)(i). Reading subsections (9) and (10) together, the material elements of an offense are the conduct, attendant circumstances, and result as described in the description of the offense.

"'[C]onduct' means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions." *Id.* § 1.13(5). The Model Penal Code does not define the other elements. Commentators have suggested that the code's failure to define "attendant circumstances" and "result" is a major weakness in the Model Penal Code approach. *See* Robinson & Grall, *supra* note 25, at 706.

We must also differentiate conduct from result elements. This article proposes the following definition: A "result" is a harmful consequence beyond defendant's conduct–i.e., it cannot be synonymous with the defendant's conduct. Thus "result-oriented" crimes are those where there is some conduct, stated either explicitly or implicitly, and a consequence of that conduct. For example, robbery is defined as the forcible taking of the property of another. To do a proper element analysis, we must first break the statute down into its elements. Here, the defendant's conduct is the "forcible taking." The attendant circumstance, which exists independent of the actor's conduct, is "property of another." There is no result element. The effect of a successful robbery is that the victim has less property, but robbery is not a "result-oriented" crime under the above definition. There is no consequence separate and apart from the conduct, and thus, no "result" element to the offense.

Compare robbery to murder. A person is guilty of murder when he intentionally causes the death of another human being. Here there is no explicitly stated conduct element—any act or omission will suffice. The attendant circumstance element is "human being." The result element is "causes the death." The death is a consequence of the actor's conduct.

Professors Robinson and Grall propose that a result be defined as a "circumstance changed by the actor." Robinson & Grall, *supra* note 25, at 724 (emphasis removed). Yet, this definition would improperly expand the category of result-oriented crimes. For example, robbery would be a result-oriented offense because the circumstance of property was changed by the actor. Courts often improperly use the term "result" in a general manner to mean the consequences of an actor's conduct, rather than as intended by the Model Penal Code to mean a specific narrow category of crimes. *See* Holley, *supra* note 25, at 230–31 n.3; Audrey Rogers, *Attempting the Unintended: Analyzing the Scope of Criminal Attempt Laws,* N.Y. L.J., July 6, 1999, at 1.

27. R.A. Duff, *The Circumstances of an Attempt*, 50 CAMBRIDGE L.J. 100, 104 (1991) (emphasis removed). Similarly, Professors Robinson and Grall propose that an attendant circumstance be defined as those independent of the actor. *See* Robinson & Grall, *supra* note 25, at 724. Many commentators have noted the difficulty in distinguishing among the various elements, particularly between attendant circumstances and the conduct and result elements. *Id.* at 709–10; *see also* J.C. Smith, *Two Problems in Criminal Attempts,* 70 HARV. L. REV. 422, 423 (1957). Nevertheless, the Duff definition appears to work well in most instances and, in particular, for this article where the element in question will be the requirement of a "minor." This requirement is undisputedly an attendant circumstance.

is typically defined as entering the property of another without consent. In breaking the crime down to its elements, the "conduct" element is the entering. The attendant circumstances are the "property of another" and "without consent" requirements.

This article focuses on a narrow group of offenses that prohibit unlawful dealings with a "minor."[28] The requisite of a minor in the definition of an offense is an essential element of an offense, one that we categorize as an "attendant circumstance."

2. Mens Rea Requisites

A foundation of attempt law is that the actor must have the specific intent to commit an offense.[29] Yet uncertainty exists as to whether this intent requirement applies to all of the material elements of an offense. Some commentators take the position that intent is necessary for all of the material elements to be guilty of attempt.[30] One scholar suggests an approach for imposing attempt liability that requires intent for whatever element is missing, which precludes the actor from completing the offense-in-chief.[31] For example, an actor who shoots at a person but misses would be guilty of attempted murder if he intended to cause death—the missing element.[32]

Other commentators would require intent as to conduct or result for attempt culpability, but would allow something less than intent for attendant circumstances, typically a minimum of recklessness.[33] For example, a person could be guilty of attempted rape, if having been stopped before the act was completed, he in-

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28. *See infra* text accompanying note 150 (discussing a case involving the elements of unlawful conduct with a minor).

29. *See generally* Sayre, *supra* note 10; LAFAVE, *supra* note 5, § 6.2(c), at 540.

30. *See, e.g.*, Rollin M. Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L. REV. 319, 342–43 (1955).

31. *See generally* John E. Stannard, *Making Up for the Missing Element—A Sideways Look at Attempts,* 7 LEGAL STUD. 194 (1987) (discussing the principle that one can be punished for attempt without committing a crime, which is the missing element).

32. The problem with the Stannard approach is that it would not allow for attempt liability in many impossibility situations where the missing element is an attendant circumstance, but often the defendant does not have intent as to that circumstance. *See infra* notes 33–37 and accompanying text.

33. *See* Smith, *supra* note 27, at 429–33; Donald Stuart, *Mens Rea, Negligence and Attempts*, CRIM. L. REV. 647, 648–49 (1968).

tended to have sexual intercourse with a non-consenting woman and was reckless as to whether the woman consented.

In a variation of the previous approach, the Model Penal Code states that attempt liability is appropriate if the actor intends the conduct or result prohibited by the offense-in-chief, and has the same mens rea for attendant circumstances as is required by the offense-in-chief.[34] The rationale for this rule is that the dangerousness of the actor is manifested by his intent to engage in some particular conduct or to cause a particular result—elements under his control. The actor need not intend the attendant circumstances, which exist independent of his control; it is sufficient to permit the mens rea of the underlying offense to govern.[35]

One ramification of the Model Penal Code approach is that there is no logical bar to imposing attempt culpability for crimes where the attendant circumstances are defined as strict liability elements.[36] Take, for example, a jurisdiction that provides that a

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34. MODEL PENAL CODE § 5.01 cmt. 2 (Official Draft and Revised Comments 1985). Thus, the New York Court of Appeals ruled that one could attempt a crime with strict liability attendant circumstances. In *People v. Coleman*, the offense requires that a person, "'knowingly . . . [a]dvance[ ] or profit[ ] from prostitution of a person *less than sixteen years old*.'" 547 N.E.2d 69, 69 (N.Y. 1989) (quoting N.Y. PENAL LAW § 230.30(2) (Consol. 2000)). In *Coleman*, the defendant approached a twenty-four-year-old undercover officer and encouraged her to engage in prostitution, believing she was a fifteen-year-old runaway. *Id.* Convicted of attempted promoting of prostitution in the second degree, the defendant argued on appeal that since the age element in the prostitution statute was one of strict liability, the crime could not be attempted. *Id.* at 71. In rejecting the defendant's contention, the court reasoned that the essence of the prostitution offense was the promoting of prostitution, which had an intent element—"knowingly." *Id.* It explained that the strict liability component of the offense—the age of the victim—"attaches not to the proscribed result of the criminal conduct, the promoting of prostitution, but to an aggravating circumstance." *Id.* The Supreme Court of Wisconsin has made a similar ruling. *See* State v. Robins, 646 N.W.2d 287 (Wis. 2002) (finding defendant guilty of attempted child enticement despite the fact that the child is fictitious).

35. MODEL PENAL CODE § 5.01 cmt. 2.

36. *See generally* LAFAVE, *supra* note 5, § 6.2(c) at 543–44 (noting that scholarly authority is lacking on the issue, but that attempt liability should be allowed). Taking the Model Penal Code approach a step further, some states allow attempt liability for offenses which are deemed wholly strict liability offenses (as opposed to having strict liability attendant circumstances). *See, e.g.*, State v. Saunders, 648 N.E.2d 1331, 1333 (N.Y. 1995). In *Saunders*, the defendant was convicted of attempted criminal possession of a weapon. On appeal, he argued that since the underlying offense was a strict liability offense, he could not be guilty of an attempt. *Id.* The court rejected this argument, noting that although the possession statute was a strict liability offense, the definition of possession requires a voluntary act which provides the necessary mental state for attempt liability. *Id.* at 1334.

Most jurisdictions, however, hold that a person cannot attempt a crime that prohibits a wholly unintentional result. For example, attempted manslaughter is a logical impossibility in most jurisdictions because a defendant cannot attempt the unintended. *See, e.g.*,

person is guilty of statutory rape if he engages in intercourse with an underage partner, and that age is a strict liability element of the offense.[37] A person who is stopped before he has intercourse with an underage partner would be guilty of attempted statutory rape where he intends the intercourse, regardless of his mens rea as to the age of his partner.[38] Thus, even a reasonable mistake as to the victim's age would be inadmissible as a defense.[39]

State v. Holbron, 904 P.2d 912, 914 (Haw. 1995) (holding that attempted involuntary manslaughter is statutorily impossible); Stennet v. State, 564 So. 2d 95, 97 (Ala. Crim. App. 1990) ("There is no such offense as attempted manslaughter in Alabama."); State v. Barnes, 781 P.2d 69, 70 (Ariz. Ct. App. 1989) ("[T]he offenses of attempted reckless manslaughter and attempted negligent homicide are not cognizable under Arizona laws because reckless and negligent states of mind are unintentional and attempt crimes require intentional, purposive conduct."); People v. Brito, 283 Cal. Rptr. 441, 443 (Cal. Ct. App. 1991) (holding that there is no crime of attempted involuntary manslaughter because by definition it does not require the defendant to have the specific intent to kill); Commonwealth v. Hebert, 368 N.E.2d 1204, 1206 (Mass. 1977) ("[T]here is no such crime as attempted involuntary manslaughter. An attempt to commit a crime necessarily involves an intent to commit that crime. Involuntary manslaughter is homicide unintentionally caused. Hence, an attempt to commit involuntary manslaughter is logically impossible.") (citations omitted). *But see* Palmer v. People, 964 P.2d 524, 528 (Colo. 1998) (noting that although it is contrary to most jurisdictions, Colorado law provides "[i]t is possible to be convicted of attempt without the specific intent to obtain the forbidden result."); Gentry v. State, 437 So. 2d 1097, 1099 (Fla. 1983) ("If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime."). *See generally* Rogers, *supra* note 26, at 1 (analyzing New York decisions in which criteria is set forth for determining the feasibility of attempting multi-element offenses).

37. *See, e.g.,* United States v. Ransom, 942 F.2d 775, 777 (10th Cir. 1991) (rejecting the defendant's claim of reasonable mistake as to the age of the victim, holding that it was the legislature's intent that statutory rape was a strict liability offense); State v. Granier, 765 So. 2d 998, 1000–01 (La. 2000) (noting that the legislature could and did validly dispense with a scienter requirement as to the crime of carnal knowledge of a juvenile, so the provision that lack of knowledge of the victim's age was not a defense was not unconstitutional); Owens v. State, 724 A.2d 43, 56 (Md. 1999) (holding that the defendant's due process rights were not violated by the refusal to allow him the use of a reasonable mistake of age defense, the court pointed out the legislature's refusal to allow the defense was supported by its compelling interest in protecting children from sexual abuse); State v. Yanez, 716 A.2d 759, 764 (R.I. 1998) (affirming the defendant's conviction of statutory rape stating, "the plain words and meaning of § 11-37-8.1 prohibit the sexual penetration of an underaged person and make no reference to the actor's state of mind, knowledge, or belief. In our opinion this lack of a mens rea results not from negligent omission but from legislative design.").

38. *See* MODEL PENAL CODE § 5.01 cmt. 2. *See, e.g.,* State v. Chhom, 911 P.2d 1014, 1016 (Wash. 1996) (holding that the intent requirement for attempted rape of a child is the intent to accomplish the criminal result—sexual intercourse—and not the intent to have sexual intercourse with a child); Commonwealth v. Dunne, 474 N.E.2d 538, 544 (Mass. 1985). In *Dunne* the court affirmed the defendant's conviction of assault on a child under the age of sixteen with the intent to commit rape, holding:

> in a prosecution for an assault with intent to commit statutory rape . . . whether or not the defendant is aware of the victim's age is irrelevant . . . .

The Model Penal Code approach is particularly relevant to analyzing the issues surrounding attempt liability and Internet sting operations. In many jurisdictions where law enforcement has conducted Internet sting operations, the statutes under which defendants have been charged provide that the attendant circumstance of "a minor" is a strict liability element.[40] The effect of such a designation on attempt liability is discussed below.

C. *The Actus Reus of Attempts*

A tenet of criminal law is that bad thoughts alone do not constitute a crime.[41] In order to be convicted of the crime of attempt, the defendant must have engaged in some form of activity that constitutes a measurable portion of the crime. While it has been widely held that mere preparation alone is not enough to consti-

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> "[T]he fact that the defendant was ignorant of the age of [the victim] or that he did not intend the intercourse to be with a [person] of nonage would not prevent his act from constituting rape if completed, *or an attempt, if it failed.*"

Dunne, 474 N.E.2d at 544 (emphasis added) (alteration in original) (quoting State v. Davis, 229 A.2d 842, 844 (N.H. 1967)). *Cf.* State v. Jones, 21 P.3d 569, 571 (Kan. 2001) (Affirming the defendant's conviction of attempted indecent liberties with a child after being caught in an Internet sting operation, the court rejected the defendant's claim that the age of the child was immaterial to him and held "that proof of criminal intent where a defendant is charged with a crime that includes age as an essential element does not even require proof that the accused had knowledge of the age of a minor.").

39. *See supra* notes 37–38.

40. *See, e.g.*, N.Y. PENAL LAW § 15.20(3) (Consol. 1998) (stating that the age of a minor is a strict liability element). Not all jurisdictions make the attendant circumstance of "a minor" one of strict liability. *See, e.g.*, People v. Hernandez, 39 Cal. Rptr. 361, 365 (Cal. 1964) (holding that reasonable mistake of age is a defense to a charge of statutory rape); State v. Elton, 680 P.2d 727, 729–30 (Utah 1984) (holding the same). Because of First Amendment concerns, the Supreme Court of the United States has ruled that a federal statute dealing with receipt of child pornography bars strict liability for the element of "a minor." *See* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (construing 18 U.S.C. § 2252). Nevertheless, the Court noted that 18 U.S.C. § 2251, which prohibits the production of child pornography, does not contain a scienter requirement as to the element of a "minor." *Id.* at 76–77. Similarly, federal courts have ruled that federal statutes prohibiting sexual abuse of minors can have strict liability elements. *See, e.g.*, United States v. Griffith, 284 F.3d 338, 351 (2d Cir. 2002) (construing 18 U.S.C. § 2423).

41. *See, e.g.*, United States v. Muzii, 676 F.2d 919, 920 (2d Cir. 1982) ("The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts."); Proctor v. State, 176 P. 771, 773 (Okla. Crim. App. 1918) ("'Guilty intention, unconnected with an overt act or outward manifestation, 'cannot be the subject of punishment under statute.'") (quoting *Ex parte* Smith, 36 S.W. 628, 629 (Mo. 1896)); *see also* LAFAVE *supra* note 5, § 3.2, at 206 ("Bad thoughts alone cannot constitute a crime; there must be an act."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.01[B], at 82 (3d ed. 2001) ("[P]unishment for thoughts alone would be objectionable.").

tute attempt, there has been great debate over what acts do constitute a measurable portion of a crime.[42] There are no clear-cut lines of delineation between mere preparation and criminal attempt.

Currently, jurisdictions utilize several differing approaches to determine what acts are sufficient to result in a conviction of criminal attempt. The two most prevalent approaches are the proximity approach and the substantial step approach. The proximity approach focuses not on what the defendant has actually done, but what remains to be done. This test was originally formulated by Justice Holmes, who set forth the theory that in order for the defendant to be convicted of criminal attempt "[t]here must be dangerous proximity to success."[43] Factors to be considered are "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result."[44]

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42. *See, e.g.*, Sayre, *supra* note 10, at 845 ("The line between preparation and attempt, however, must at best depend largely upon the particular circumstances of each case—the seriousness of the crime attempted, and the danger to be apprehended from the defendant's conduct."); Commonwealth v. Peaslee, 59 N.E. 55, 56 (Mass. 1901) ("[P]reparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree . . . the degree of proximity held sufficient may vary with circumstances, including, among other things, the apprehension which the particular crime is calculated to excite."); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 584 (2d ed. 1960) (supporting the distinction between preparation and attempt but conceding that the difference is a "difference in degree . . . [rather than] in kind").

Some commentators assert that it is desirable to have no clear cut delineation between mere preparation and attempt:

> The exact point at which [such preliminary steps] become criminal cannot, in the nature of things, be precisely ascertained, nor is it desirable that such a matter should be made the subject of great precision. There is more harm than good in telling people precisely how far they may go without risking punishment in the pursuit of an unlawful object.

P.R. Glazebrook, *Should We Have a Law of Attempted Crime?*, 85 L.Q. Rev. 28, 35 n.36 (1969) (quoting JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 83 (London, MacMillan 1890) (alteration in original)).

Adopting an opposite view, the American Law Institute, in an effort to add clarity and definiteness to the preparation-attempt determination, has put forth "specific enumerations" of circumstances in which the defendant's conduct will not be held insufficient as a matter of law as long as the conduct is strongly corroborative of the defendant's criminal purpose. *See* MODEL PENAL CODE § 5.01(2) (Official Draft and Revised Comments 1985); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 735 (1988) (supporting the Model Penal Code approach and noting the need for authoritative examples to aid in the determination of what acts go beyond mere preparation).

43. Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting).

44. Commonwealth v. Kennedy, 48 N.E. 770, 771 (Mass. 1897).

The Model Penal Code promulgated the "substantial step" approach, which requires "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime."[45] This conduct must be "strongly corroborative of the actor's criminal purpose."[46] Approximately half the states and two-thirds of the federal circuits have adopted the substantial step test.[47] Unlike the proximity

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45. MODEL PENAL CODE § 5.01(1)(c).

46. *Id.* § 5.01(2). The Model Penal Code sets forth several categories of conduct that will not be held insufficient as a matter of law. *Id.* If such conduct is proved, it is entitled to be submitted to the jury to determine whether the defendant progressed far enough toward the commission of the crime. *See* DRESSLER, *supra* note 41, § 27.09(D)(1), at 409. Such conduct includes:

> lying in wait, searching for or following the contemplated victim of the crime . . . reconnoitering the place contemplated for the commission of the crime; [or] possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor.

MODEL PENAL CODE § 5.01(2)(a),(c),(e). For example, in *State v. Reeves*, 916 S.W.2d 909 (Tenn. 1996), the Supreme Court of Tennessee upheld the defendants' conviction of attempted murder in the second degree. *Id.* at 909. In *Reeves*, the defendants, two girls who attended middle school, agreed to bring rat poison to school intending to poison their teacher. *Id.* They were caught giggling and leaning over the teacher's coffee mug with the poison packet in their pocketbook placed next to the mug. *Id.* The court, in applying the substantial step test, upheld the defendants' convictions of attempt to commit murder in the second degree. *Id.* at 914. The court determined that the defendants' actions could be considered a "substantial step" because the girls possessed the materials to be used in the commission of the intended crime, at or near the scene of the crime, and the poison in their possession had no lawful purpose under the circumstances. *Id. But see* United States v. Joyce, 693 F.2d 838, 841 (8th Cir. 1982) (noting there was insufficient evidence of a substantial step to support an attempt conviction).

47. *See* ALASKA STAT. § 11.31.100(a) (Michie 2002); ARK. CODE ANN. § 5-3-201(a)(2) (Michie 1997); COLO. REV. STAT. § 18-2-101(1) (2002); CONN. GEN. STAT. ANN. § 53a-49(a)(2) (West 2001); DEL. CODE ANN. tit. 11, § 531(2) (2001); GA. CODE ANN. § 16-4-1 (2003); HAW. REV. STAT. § 705-500(1)(b) (1993); 720 ILL. COMP. STAT. ANN. 5/8-4(a) (West 2002); IND. CODE ANN. § 35-41-5-1(a) (Michie 1998); KY. REV. STAT. ANN. § 506.010(1)(b) (Michie 1999); ME. REV. STAT. ANN. tit. 17-A, § 152(1) (West 1982 & Supp. 2002); MINN. STAT. ANN. § 609.17(1) (West 2003); MO. ANN. STAT. § 564.011(1) (West 1999); NEB. REV. STAT. § 28-201(1)(b) (1995 & Supp. 2002); N.H. REV. STAT. ANN. § 629:1 (1996); N.J. STAT. ANN. § 2c:5-1 (West 1995); N.D. CENT. CODE § 12.1-06-01 (1997); OR. REV. STAT. § 161.405(1) (2001); PA. STAT. ANN. tit. 18, § 901(a) (West 1998); TEX. PENAL CODE ANN. § 15.01 (Vernon 2001); UTAH CODE ANN. § 76-4-101(1) (1999); WASH. REV. CODE ANN. § 9A.28.020(1) (West 2000 & Supp. 2003); WYO. STAT. ANN. § 6-1-301(a)(i) (Michie 2003). Although Maryland and Rhode Island have not codified the substantial step test, they have adopted it through judicial action. *See* Young v. State, 493 A.2d 352, 359 (Md. 1985); State v. Latraverse, 443 A.2d 890, 893 (R.I. 1982).

All the circuits, except the Federal Circuit, which does not hear criminal appeals, have adopted the substantial step test. *See, e.g.*, United States v. Herrera, 2002 U.S. App. LEXIS 6993 (5th Cir. 2002), *aff'd on reh'g*, 313 F.3d 882 (5th Cir. 2002), *cert. denied,* 123 S. Ct. 1375 (2003); United States v. Martinez-Garcia, 268 F.3d 460 (7th Cir. 2001), *cert. denied,* 534 U.S. 1149 (2002); United States v. Smith, 264 F.3d 1012 (10th Cir. 2001); Sui

test, the substantial step test focuses on how much has already been done.[48] Because of the change in focus, the substantial step test is more conducive to a finding of attempt liability than is the proximity test.[49]

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v. I.N.S., 250 F.3d 105 (2d Cir. 2001); United States v. Gracidas-Ulibarry, 231 F.3d 1188 (9th Cir. 2000), *cert. denied,* 535 U.S. 1069 (2002); United States v. Plummer, 221 F.3d 1298 (11th Cir. 2000); United States v. Hsu, 155 F.3d 189 (3d Cir. 1998); United States v. Burks, 135 F.3d 582 (8th Cir. 1998); United States v. Duran, 96 F.3d 1495 (D.C. Cir. 1996); United States v. Neal, 78 F.3d 901 (4th Cir. 1996), *cert. denied,* 519 U.S. 855 (1996); United States v. Shelton, 30 F.3d 702, 705 (6th Cir. 1994); United States v. Dworken, 855 F.2d 12, 16–17 (1st Cir. 1988).

48. MODEL PENAL CODE § 5.01 cmt. 6(a). *See generally* DRESSLER, *supra* note 41, § 27.09(D)(1), at 409; LAFAVE, *supra* note 5, § 6.2, at 550.

49. MODEL PENAL CODE § 5.01 cmt. 6(a); *See* FLETCHER, *supra* note 5, § 3.31, at 138–39 (comparing the objectivist approach to the attempt theory with the subjectivist approach and noting that while the objectivist approach "tend[s] to draw the line of liability" closer to the completed crime, the subjectivist approach "push[es] back the threshold of attempting" to an earlier stage of activity); *see also* DRESSLER, *supra* note 41, § 27.09(D)(1), at 409 (noting that the substantial step standard "broaden[s] the scope of attempt liability").
Keith Culver notes:

> The *Model Penal Code* clearly intends the 'substantial step' test to supply a means of marking at the earliest point *evidence* of formation of an intention to commit a wrong action. Unlike a 'last act' test which looks for conduct to have passed a point of no return, the 'substantial step' test requires only sufficient conduct (as evidence) to warrant the inference to an intention to commit a wrong action and in that way to endanger the public.

Keith Culver, *Analyzing Criminal Attempts*, 11 CAN. J.L. & JURIS. 441, 445 (1998) (book review).

Less prevalent approaches used by some jurisdictions to determine the line between preparation and attempts include the "probable desistance" test and the unequivocality test. *See* MODEL PENAL CODE § 5.01 cmt. 5(a)–(f); DRESSLER, *supra* note 41, § 27.06 (A)–(B) at 389–96. The probable desistance test will find an act constitutes attempt only where the act, in the ordinary course of events, would result in the intended crime unless interrupted by some intervening factors. MODEL PENAL CODE § 5.01 cmt. 5(d); DRESSLER, *supra* note 41, § 27.06(B)(6) at 394; *see also* Boyles v. State, 175 N.W.2d 277, 278 (Wis. 1970). In *Boyles*, the defendant attempted to rob a tavern owner but he was unsuccessful because his gun became stuck in his pocket which allowed the victim time to escape. *Id.* The issue before the court was whether the defendant would have committed the crime except for the intervening fact that he could not remove the gun from his pocket. *Id.* The court, after reviewing the evidence, including the testimony of several witnesses who saw part of the gun in the defendant's pocket, held that "[t]he defendant did not abandon his efforts but he was prevented from successfully carrying out the crime by circumstances beyond his control." *Id.* at 279. This approach has been criticized because it would be difficult, if not impossible, to predict when it would be improbable that the defendant desist. MODEL PENAL CODE § 5.01 cmt. 5(d)–(f). The drafters of the Model Penal Code point out that there is a sufficient empirical basis for determining such predictions and therefore, as applied, this test does not differ from the proximity test. *Id.* § 5.01 cmt. 5(d).

The unequivocality test provides that an act constitutes attempt only if, when considered alone, it firmly shows the actor's intent to commit the intended crime. SIR JOHN SALMOND, JURISPRUDENCE § 137, at 404 (7th ed. 1924). The test is also referred to as the "res ipsa loquitur" test because the act constituting attempt must "speak[ ] for itself." *Id.*

D. *Entering the "Semantical Thicket"*[50]*— Factual and Legal Impossibility*

1. Background

A multitude of reasons and circumstances can lead to the failure of a defendant to consummate a substantive crime. The impossibility doctrine in attempt law considers a distinct type of failure—those that stem from some mistake on a defendant's part as to a crime's attendant circumstances.[51] The historical reluctance to punish defendants for unconsummated crimes noted above also led to the initial development of the impossibility doctrine, which barred any culpability for physically impossible attempts regardless of the type of mistake.[52] Thus in *Regina v. Collins*,[53] the court held that a defendant who picked an empty pocket, a scenario that later became the classic example of factual impossibility, was *not* guilty of attempted larceny.[54] According to the *Collins* court, "We think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged."[55]

Although the English courts ultimately abandoned such a sweeping impossibility rule, the *Collins* court's reasoning lays a critical foundation to the next step in the development of the impossibility doctrine—the distinction between factual and legal

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In other words, the actor's statements regarding his intent before, during, or after the act are not considered when deciding attempt culpability. *Id.*

Criticism of this approach is based on its impracticality. Glanville Williams, in *Criminal Law the General Part* (2d ed. 1961), sets forth a hypothetical involving a man with a match near a haystack which might constitute a unequivocal act if he were stopped by the police at that point. *Id.* at 630. But, as Williams considers, what if the next step the actor intended was to sit down and light a cigar? Considered alone, as the test requires, the lighting of the match near the haystack would manifest criminality, but subsequent actions might render the act equivocal and as a result innocent people may be convicted using this approach. *Id.*

50. United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001).
51. *See supra* notes 26–28 and accompanying text.
52. Sayre, *supra* note 10, at 854.
53. 169 Eng. Rep. 1477 (C.A. 1864).
54. *Id.* at 1478; Sayre, *supra* note 10, at 854–55.
55. Sayre, *supra* note 10, at 855.

impossibility.[56] The very existence of a distinction again reflects judicial discomfort with punishing unconsummated crimes. Thus, the earliest development of the types of impossibility started from the *Collins* perspective, which measured culpability by looking at the completed crime and whether completion was factually possible.[57]

2. Factual Impossibility

Factual impossibility exists when a defendant's efforts to commit a crime fail because a factual or physical circumstance necessary for the crime to be completed is missing.[58] To use a classic example, had the victim's pocket been full of money, the defendant pickpocket would have successfully completed his attempt and would have stolen the victim's money. In other words, to use the *Collins* court's basic rationale, the attempt would have been carried out successfully had the facts been as the defendant intended. Therefore, the defendant will be guilty of attempt culpability under the virtually undisputed rule that factual impossibility is not a defense to a charge of criminal attempt.[59]

3. Legal Impossibility

Providing a definition of "legal impossibility" is difficult because the courts have used the term to cover more than one type of attempt that is legally impossible to complete.[60] Professor Dressler notes two different types that fall under the general

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56. *See* DRESSLER, *supra* note 41, § 27.07(B), at 397–98.

57. *See* Sayre, *supra* note 10, at 854–55. The English courts ultimately abandoned this type of impossibility rule. *Id.* at 855.

58. DRESSLER, *supra* note 41, § 27.07(C)(1), at 398.

59. *See* MODEL PENAL CODE § 5.01 cmt. 3(a)-(c) (Official Draft and Revised Comments 1985); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 632 (3d ed. 1982); DRESSLER, *supra* note 41, § 27.07(C)(2), at 399; *see also* United States v. Hamrick, 43 F.3d 877, 885 (4th Cir. 1995) (joining other circuits in holding factual impossibility is not a defense to an attempt crime); United States v. Contreras, 950 F.2d 232, 237 (5th Cir. 1991), *cert. denied,* 504 U.S. 941 ("[F]actual impossibility is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be."); Grill v. State, 651 A.2d 856, 858 (Md. 1995) ("[F]actual impossibility is not a defense to a criminal attempt charge.").

60. *See infra* notes 94–95 and accompanying text.

term "legal impossibility."[61] The first is "pure" or "true legal impossibility" which exists when what the defendant is attempting to commit is actually not a crime.[62] Notwithstanding a defendant's subjective bad intentions, he is not guilty of any crime. Pure legal impossibility is the mirror image of the ignorance of the law doctrine: while ignorance of an existing law criminalizing a defendant's conduct cannot exonerate a defendant, ignorance of the lack of a law criminalizing a defendant's conduct cannot inculpate him.[63] Pure legal impossibility is a defense in all jurisdictions.[64]

Professor Dressler's second category of legal impossibility—the more conventional category—is "hybrid legal impossibility,"[65] which he defines as follows: "Hybrid legal impossibility . . . exists if the actor's goal is illegal, but commission of the offense is impossible due to a *factual* mistake . . . regarding the *legal* status of some attendant circumstance that constitutes an element of the charged offense."[66]

The controversial but classic finding of legal impossibility occurred in *People v. Jaffe*,[67] where a defendant believed he was receiving stolen goods, when in fact the goods had been returned to their rightful owner and thus had lost their character as stolen, a required legal element. The Court of Appeals of New York reversed the defendant's conviction of attempt to receive stolen goods on the ground that the defendant could not complete the offense because the legal element of stolen goods was missing, and

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61. DRESSLER, *supra* note 41, § 27.07(D)(1), at 400.

62. For example, A engages in private homosexual activity under the mistaken belief that to do so would constitute a criminal offense in that particular jurisdiction. Although A believes he is violating the law, he cannot be held criminally liable because it is not a criminal offense to engage in private homosexual activity in that jurisdiction. Another example would be where B lies to a police officer under the mistaken belief that in doing so he is committing perjury. If lying to a police officer does not constitute perjury in that jurisdiction, it would be legally impossible for B to be criminally liable for attempted perjury. *See* FLETCHER, *supra* note 5, § 3.34, at 164. *See generally* Enker, *supra* note 16; Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 235–36 & nn.24–26 (1977).

63. *See* DRESSLER, *supra* note 41, § 27.07(D)(2), at 400. *See generally* Kenneth W. Simons, *Criminal Law: Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay,* 81 J. CRIM. L. & CRIMINOLOGY 447 (1990) (examining the mistake and impossibility defense).

64. DRESSLER, *supra* note 41, § 27.07(D)(2), at 400–01.

65. *Id.* § 27.07(D)(3), at 402–04.

66. *Id.* § 27.07(D)(3), at 402.

67. 78 N.E. 169 (N.Y. 1906).

therefore he also could not be convicted of attempt to commit the crime.[68] The *Jaffe* court reasoned that, "[i]f all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended."[69]

The term "legal impossibility" also covers a third category: the situation where it is *logically* impossible to commit an attempt. For example, courts have held that it is impossible to commit attempted reckless manslaughter because one cannot intend to cause an unintended result.[70] According to the courts, it is a contradiction in terms to attempt to cause an unplanned death.

The relatively late development of the doctrine of attempt liability correlates to the development of the legal impossibility defense. The objectivist fear of punishment without overt evidence of intent to harm can be seen as the common factor between attempt rules in general and legal impossibility in particular.[71]

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68. *Id.* at 170.

69. *Id.* (citing JOEL PRENTISS BISHOP, CRIMINAL LAW § 747 (7th ed. 1882)). California took an opposite approach to impossibility. In *People v. Rojas*, 358 P.2d 921, 924 (Cal. 1961), the Supreme Court of California was presented with facts identical to *Jaffe* and upheld the defendant's conviction of attempting to receive stolen property. Instead of focusing on what the defendant did or could not do as the court in *Jaffe* did, the Supreme Court of California in *Rojas* focused on what the defendant intended to accomplish. *Id.* The court rejected the defendant's argument of impossibility holding that impossibility is not a defense where "the defendants had the specific intent to commit the substantive offense and that under the circumstances as the defendants reasonably saw them they did the acts necessary to consummate the substantive offense; but because of circumstances unknown to defendants, essential elements of the substantive crime were lacking." *Id.* Reaffirming *Rojas'* viability, the Court of Appeal of California more recently decided *People v. Reed*, 61 Cal. Rptr. 2d 658 (Cal. Ct. App. 1996). There, the court upheld the defendant's conviction of attempted molestation of a child under the age of fourteen years. *Id.* at 660. The defendant placed an ad in a paper and a sheriff's detective responded. *Id.* at 659. The defendant argued that he could not be convicted because there was never a child under the age of fourteen and therefore it was improper to convict him of attempt where an element of the crime was missing. *Id.* at 660. The court rejected the defendant's argument, holding, "[o]ur courts have repeatedly ruled that persons who are charged with attempting to commit a crime cannot escape liability because the criminal act they attempted was not completed due to an impossibility which they did not foresee." *Id.* at 661.

70. *See supra* notes 36–39 and accompanying text .

71. *See, e.g.*, State v. Taylor, 133 S.W.2d 336, 340 (Mo. 1939). In *Taylor*, the court found that there was no liability for attempting to bribe a juror where the person was not in fact a juror. *Id.* The court noted that "[i]f the thing defendant attempted to do would not and could not, under the statute, have been a crime if accomplished, how can it be said that he attempted to commit the denounced crime, however reprehensible may have been his intent from the standpoint of morals?" *Id.* In *State v. Guffey*, 262 S.W.2d 152, 156 (Mo. Ct. App. 1953), the court found that there was no liability for attempt to shoot a deer out of season where the "deer" is a stuffed decoy. *Id.* The court held, "[i]t is no offense to at-

Thus, an early commentator opined, in reasoning that echoed the *Jaffe* court, "[i]f none of the consequences which the defendant sought to achieve constitutes a crime, surely his unsuccessful efforts to achieve his object cannot constitute a criminal attempt."[72]

Some commentators fear convictions based on suspect evidence, such as coerced confessions or uncorroborated testimony by informants.[73] Accordingly, these commentators support the legal impossibility doctrine by ignoring any evidence of the defendant's intent, focusing instead solely on what the defendant, in fact, did. For example, one scholar explained that, "[i]f a man, mistaking a dummy in female dress for a woman, tries to ravish it he does not have the intent to commit rape since the ravishment of an inanimate object cannot be rape."[74] Similarly, another commentator would acquit a defendant who, intending to kill a man, shoots at a tree stump instead on the grounds that there is no objective, independent evidence of the defendant's intent that can be inferred from the innocuous act of shooting at a tree stump.[75] These rationales led to numerous examples of attempts barred by the legal impossibility defense.[76]

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tempt to do that which is not illegal. *Id.* Neither is it a crime to attempt to do that which it is legally impossible to do." *Id.* (citations omitted). In *People v. Teal*, 89 N.E. 1086, 1088 (N.Y. 1909), the court found that there was no liability for attempted subornation of perjury where the false testimony solicited was immaterial and therefore not perjurious, "stating that an unsuccessful attempt to do that which is not a crime, when effectuated, cannot be held to be an attempt to commit the crime specified." *Id.* In *Booth v. State*, 398 P.2d 863, 872 (Okla. Crim. App. 1964), the court found that there was no liability for attempt to receive stolen property where the stolen goods were returned to the control of their true owner. *Id.* The court held, "[i]t is fundamental to our law that a man is not punished merely because he has a criminal mind. It must be shown that he has, with that criminal mind, done an act which is forbidden by the criminal law." *Id.*

72. Sayre, *supra* note 10, at 839. The *Jaffe* court stated substantially the same rationale. *See supra* note 69 and accompanying text.

73. *See generally* Enker, *supra* note 16. *But see* Weigend, *supra* note 62.

74. Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 467 (1954).

75. Perkins, *supra* note 30, at 332–33.

76. *See* cases cited *supra* note 71. In discussions of legal impossibility, these cases are repeatedly cited as examples. *See, e.g.*, State v. Lopez, 669 P.2d 1086 (N.M. 1983); People v. Dlugash, 363 N.E.2d 1155 (N.Y. 1977); *see also* DRESSLER *supra* note 41, § 27.07, at 402; LAFAVE *supra* note 5, § 6.3(a), at 552–60; R.J. Spjut, *When is an Attempt to Commit an Impossible Crime a Criminal Act?*, 29 ARIZ. L. REV. 247 (1987); Elizabeth Jean Watters, Comment, State v. Collins*: Is the Impossible Now Possible in Ohio?*, 51 OHIO ST. L.J. 307 (1990); Deborah M. Weiss, Note, *Scope, Mistake, and Impossibility: The Philosophy of Language and Problems of Mens Rea*, 83 COLUM. L. REV. 1029 (1983).

Over time the doctrine of hybrid legal impossibility has been widely criticized.[77] Most of the criticism is based on the slim semantic difference between factual and legal impossibility.[78] As aptly pointed out by Professor Dressler and others, "by skillful characterization, one can describe virtually any case of hybrid legal impossibility . . . as an example of factual impossibility."[79]

For example, one could turn the pickpocket attempted larceny scenario into a case of legal impossibility if one asks whether it is a crime to pick an empty pocket. Since a larceny cannot be committed by picking an empty pocket, employing the rationale of the legal impossibility cases, one cannot attempt a larceny by picking the empty pocket. Similarly, we can turn the legal impossibility case into one of factual impossibility simply by asking whether

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77. *See* MODEL PENAL CODE § 5.01 cmt. 3(a)–(c), at 307–17 (Official Draft and Revised Comments 1985); *see, e.g.,* United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001) ("[T]his circuit has properly eschewed the semantical thicket of the impossibility defense in criminal attempt cases."); United States v. Darnell, 545 F.2d 595, 598 (8th Cir. 1976) (refusing to address the impossibility issue and asserting that it "lurks in a semantic swamp"); People v. Rojas, 358 P.2d 921, 923–24 (Cal. 1961) (rejecting the defense and refusing to consider the distinction between factual and legal impossibility); State v. Moretti, 244 A.2d 499, 503 (N.J. 1968) ("[T]he defense of impossibility is so fraught with intricacies and artificial distinctions that the defense has little value as an analytical method for reaching substantial justice."); Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache,* 54 VA. L. REV. 20, 33–36 (1968); Hall, *supra* note 10, at 831–39 (referring to the doctrine as completely untenable and fallacious because it assumes that "because the intended harm could not be accomplished, none occurred"); John F. Preis, Note, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases,* 52 VAND. L. REV. 1869, 1898 (1999) (noting hybrid legal impossibility's implicit similarity to factual impossibility and pointing out that miscalculations involved in hybrid impossibility cases are "at heart, still factual"). *See generally* Simons, *supra* note 63; Weigend, *supra* note 62; DRESSLER, *supra* note 41. Even New York rejected the *Jaffe* rule by statute. *See* N.Y. PENAL LAW § 110.10 (Consol. 1998).

78. Part of this problem stems from the lack of parallelism in the definition of factual and legal impossibility. For example, let us examine a common explanation of the two.

> (1) Where the act if completed would not be criminal, a situation which is usually described as a "legal impossibility", [sic] and (2) where the basic or substantive crime is impossible of completion, simply because of some physical or factual condition unknown to the defendant, a situation which is usually described as a "factual impossibility". [sic]

Booth v. State, 398 P.2d 863, 870 (Okla. Crim. App. 1964).

The definitions are not parallel because the former concentrates on whether the conduct, had it been completed, would be a crime, while the latter concentrates on the reasons why the conduct was not completed. These definitions widely used by early courts, are completely unworkable for situations of hybrid legal impossibility because it does not focus on the key component of attempt liability—the defendant's intent. Rather, the definitions look to whether the completed transaction objectively is a crime, and thus merely define the "pure" legal impossibility category.

79. DRESSLER, *supra* note 41, § 27.07, at 403.

the crime of receipt of stolen goods would have been committed had the facts been as defendant intended.[80]

The drafters of the Model Penal Code took the position that the distinction between factual and legal impossibility should be abolished for a number of reasons.[81] First, the legal impossibility doctrine focuses unnaturally on what actually transpired rather than what defendant believed, leading to strained reasoning at odds with conventional understanding of terms such as intent and purpose.[82] Second, the Model Penal Code drafters opined that the proper approach to criminality should focus on the dangerousness of the actor as manifested by his intent, rather than his actions.[83] Thus, the Model Penal Code recommended a rejection of an objectivist approach in favor of a subjectivist viewpoint.[84]

Most jurisdictions, in keeping with the Model Penal Code recommendation have either explicitly abolished the distinction between factual and legal impossibility, by statute or case law, or simply avoid the distinction altogether.[85] Other jurisdictions take

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80. *See generally* Simons, *supra* note 63, at 472–74.

81. MODEL PENAL CODE § 5.01 cmt. 3.

82. *Id.* § 5.01 cmt. 3(a).

83. *Id.* § 5.01 cmt. 3(b).

84. *Id.* § 5.01 cmt. 3(a), 3(c).

85. *E.g.*, ARK. CODE ANN. § 5-3-202(b)(2) (Michie 1997); COLO. REV. STAT. § 18-2-101(1) (2002); GA. CODE ANN. § 16-4-4 (1999); 720 ILL. COMP. STAT. ANN. 5/8-4(b) (West 2002); IND. CODE ANN. § 35-41-5-1(b) (Michie 2002); KAN. STAT. ANN. § 21-3301 (2001); LA. REV. STAT. ANN. § 14:27(A) (West 1997); MINN. STAT. ANN. § 609.17 subd. 2 (West 2003); N.Y. PENAL LAW § 110.10 (Consol. 1998); OHIO REV. CODE ANN. § 2923.02 (Anderson 2002); OR. REV. STAT. § 161.425 (2001); 18 PA. STAT. ANN. § 901(b) (West 1998); UTAH CODE ANN. § 76-4-101(3)(b) (1999); WASH. REV. CODE ANN. § 9A.28.020 (West 2003); United States v. Quijada, 588 F.2d 1253, 1255 (9th Cir. 1978) ("[W]e eschew any effort to distinguish so-called *legal* impossibility from *factual* impossibility . . . ."); United States v. Darnell, 545 F.2d 595, 598 (8th Cir. 1976) ("[N]o consensus can be ascertained from the limited number of federal cases discussing the problem . . . . We decline to grasp the nettle."); United States v. Oviedo, 525 F.2d 881, 883–86 (5th Cir. 1976) (rejecting the impossibility defense and requiring instead reliance on the defendant's unique overt acts); United States v. Duran, 884 F. Supp. 577, 580 n.5, 580–82 (D.D.C. 1995) ("In any event, categorizing a case as involving legal versus factual impossibility is difficult, if not pointless."), *aff'd*, 96 F.3d 1495 (D.C. Cir. 1996); State v. Carner, 541 P.2d 947, 948–50 (Ariz. Ct. App. 1975) (rejecting the defense of legal impossibility and agreeing with "the California approach" of not being concerned with the distinction between legal and factual impossibility); State v. Curtiss, 65 P.3d 207, 211 (Idaho Ct. App. 2002) (rejecting impossibility defense and holding that Idaho section 18-306 eliminates the defense); Van Bell v. State, 775 P.2d 1273, 1274 (Nev. 1989) (declining to distinguish between factual and legal impossibility focusing on the specific intent to commit the offense); State v. Smith, 621 A.2d 493, 502 (N.J. Super. Ct. App. Div. 1993) (finding that legislature intended to preclude impossibility defense in revising state statute based on Model Penal Code); State v. Hageman, 296

a "middle ground" approach, measuring attempt liability by requiring proof that "first, that the defendant acted with the kind of culpability otherwise required for the commission of the underlying substantive offense, and, second, that the defendant had engaged in conduct which constitutes a substantial step toward commission of the crime."[86] With respect to the second requirement, these jurisdictions require further that "the objective acts performed, without any reliance on the accompanying *mens rea*, [must] mark the defendant's conduct as criminal in nature."[87]

Nevertheless, in a number of jurisdictions, legal impossibility is still a potential defense. This is so for a number of reasons. First, some courts explicitly allow the defense.[88] Second, other jurisdictions skirt the issue by finding that a particular case involves only factual impossibility, thus keeping alive the possibility that legal impossibility is a viable defense.[89]

Third, even in jurisdictions that have seemingly banned the impossibility defense by statute, courts have reasoned that legal impossibility is still a defense. For example, an Ohio attempt statute stated, "[i]t is no defense to a charge under this section

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S.E.2d 433, 441 (N.C. 1982) ("We do not believe that either legal or factual impossibility should be used as a shield . . . ."); State v. Ferreira, 463 A.2d 129, 132 (R.I. 1983) ("[A]ny type of impossibility argument, legal or factual, is not a defense to a criminal-attempt charge."); State v. Curtis, 603 A.2d 356, 358–59 (Vt. 1991) (rejecting impossibility defense and noting that the majority of jurisdictions have followed the modern trend of rejecting such a defense).

86. United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001); *see also* United States v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974) (discussing an earlier formulation of the standard).

87. United States v. Oviedo, 525 F.2d 881, 885 (5th Cir. 1976). Thus in *Oviedo*, the court held that the evidence was insufficient to establish that a defendant who sold procaine, a lawful substance, to an undercover officer, intended to sell him heroin. *Id.* at 886. The defendant's conviction for attempted sale of heroin was thus reversed. *Id.* The Fifth Circuit's approach is also used in the Ninth and Eleventh Circuits. *See United States v. Everett,* 692 F.2d 596, 600 (9th Cir. 1982); *United States v. Innella,* 690 F.2d 834, 835 (11th Cir. 1982).

88. *E.g.,* United States v. Hsu, 155 F.3d 189, 199–200 (3d Cir. 1998) (recognizing legal impossibility as a defense, but finding that Congress did not intend to allow its use in attempt crimes created by the Economic Espionage Act of 1996); United States v. Hamrick, 43 F.3d 877, 885 (4th Cir. 1995) (While the court found that the case before it involved factual impossibility, it stated that "[t]he defense of legal impossibility is available where the defendant's acts, even if fully carried out as intended, would not constitute a crime.").

89. *See, e.g.,* Chen v. State, 42 S.W.3d 926, 929 (Tex. Crim. App. 2001) ("We find it unnecessary to dispose of the legal impossibility doctrine at this time . . . . [A]ppellant's case . . . presents [a question of] factual impossibility.").

that, in retrospect, commission of the offense which was the object of the attempt was . . . impossible under the . . . circumstances . . . ."[90] Nevertheless, the Court of Appeals of Ohio in *State v. Collins*[91] ruled that the statutory language covered only factually impossible attempts. The court reasoned that the language "commission of the offense" presupposes that the offense was legally possible to commit, and therefore the statute covered only factual impossibilities.[92] In response to the *Collins* ruling, the Ohio legislature revised the statute, which now specifically bans both factual and legal impossibility defenses.[93]

The final reason for legal impossibility's apparent endurance is the inexact use of the term by the courts. When courts hold that "legal impossibility" is a defense to attempt, it is not always clear to which category of impossibility they are referring: pure, hybrid, or logical impossibility.[94] A solution to this particular problem is straightforward. Courts and commentators should specify the type of impossibility to which they are referring. If we look at existing case law under this solution, we can see that some difficulty is immediately eradicated because the cases fall into the two, non-controversial subcategories of legal impossibility—pure and logical impossibility.[95] What remains are the difficult "hybrid legal impossibility" cases that will be discussed in the particular context of the Internet sex cases.

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90. OHIO REV. CODE ANN. § 2923.02(B) (Anderson 1995).

91. 561 N.E.2d 954 (Ohio Ct. App. 1988).

92. *Id.* at 956.

93. OHIO REV. CODE ANN. § 2923.02(B) (Anderson 2002).

94. *See supra* notes 61–76 and accompanying text for definitions. *See, e.g.*, United States v. Coffman, 94 F.3d 330, 333 (7th Cir. 1996) (discussing impossibility defense without categorizing).

95. *See, e.g.*, Stennet v. State, 564 So. 2d 95, 95–96 (Ala. Crim. App. 1990) (holding the crime of attempted manslaughter is impossible because the crime of attempt requires intent while the crime of manslaughter only requires recklessness and the two terms are inconsistent); People v. Meyer, 952 P.2d 774, 776 (Colo. Ct. App. 1997) (holding that because the crime of attempt requires a culpable mental state while the crime of felony murder does not, "the offense of attempted felony murder constitutes a logical impossibility"); State v. Howard, 405 A.2d 206 (Me. 1979) (holding the crime of attempted manslaughter is a logical impossibility); State v. Zupetz, 322 N.W.2d 730, 733-35 (Minn. 1982) (holding that it is logically impossible for a defendant to be convicted of attempting to commit manslaughter involving culpable negligence); State v. Vigil, 842 P.2d 843, 848 (Utah 1992) (holding that the crime of attempted depraved indifference homicide does not exist in Utah because attempt requires intent while the intent required for depraved indifference falls short of intent).

III. THE INTERNET CASES

The Internet sting cases have generated an impressive number of arrests and convictions.[96] Defendants appealing their convictions raise defenses ranging from entrapment[97] to constitutional

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96. *See supra* note 1.

97. A full exploration of the issues surrounding the entrapment defense is outside the scope of this article because it does not specially concern mens rea issues surrounding attempt liability. A defendant who claims to have been entrapped by the government may have a valid excuse for his conduct, but the defense does not go directly to negating his intent. *See generally* LAFAVE, *supra* note 5, § 5.2(f), at 463. Nevertheless, a brief discussion of the defense is necessary because of its potential use in Internet sting operations.

Currently there are two major approaches to the entrapment defense. The majority or subjective approach is set forth in the majority opinions of *Sherman v. United States*, 356 U.S. 369 (1958) and *Sorrells v. United States*, 287 U.S. 435 (1932). The modern objective approach is set forth in the concurring opinions of *Sherman* and *Sorrells*. These two approaches reflect distinct differences in their tests and rationales.

The subjective approach utilizes a two-step test: the first inquiry is whether the defendant was induced by a government agent, and the second inquiry is whether the defendant was predisposed to commit the type of offense charged. *See Sherman*, 356 U.S. at 372–73; *Sorrells*, 287 U.S. at 451. The main focus of this approach is on the defendant's predisposition to commit the crime. *See Sherman*, 356 U.S. at 372–73; *Sorrells*, 287 U.S. at 451. Not only must the defendant be predisposed to commit the crime, it must also be established that the defendant's predisposition existed prior to his contact with the first contact by the government agent. *See* Jacobson v. United States, 503 U.S. 540, 549 (1992) (noting predisposition must be present before encountering the officer). The underlying rationale for the subjective approach is based upon the Supreme Court's holding in *Sorrells* that the legislature did not intend to include within the offense persons who were induced by the government into committing the offense. *Sorrells*, 287 U.S. at 448. The subjective approach is employed by all of the Federal Circuits and most states. *See generally* Christopher D. Moore, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151 (1995).

In contrast, the objective approach was set forth in the concurring opinions of both *Sherman* and *Sorrells*, and is promulgated by the Model Penal Code. *See Sherman*, 356 U.S. at 383 (Frankfurter, J., concurring) ("Permissible police activity does not vary according to the particular defendant concerned."); *Sorrells*, 287 U.S. at 455 (Roberts, J., concurring); MODEL PENAL CODE § 2.13 (Official Draft and Revised Comments 1985). In contrast to the subjective approach, this approach focuses not on the predisposition of the defendant but on the conduct of the agents of the government. MODEL PENAL CODE § 2.13 cmt. 3 (Official Draft and Revised Comments 1985). Entrapment will be established where a government agent induces a defendant by "employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." MODEL PENAL CODE § 2.13(1)(b). In determining whether the government agent's conduct rises to such a level, the particular circumstances of the case must be examined. *Sherman*, 356 U.S. at 384 (Frankfurter, J., concurring) ("What police conduct is to be condemned, because likely to induce those not otherwise ready and willing to commit crime, must be picked out from case to case as new situations arise involving different crimes and new methods of detection."). Conduct such as badgering, cajoling, offers of personal gain, persistent, repeated offers, appealing to friendship or eliciting sympathy from the suspect, all may provide evidence of over-zealousness on the part of the government agent. People v. Barraza, 591 P.2d 947, 955 (Cal. 1979).

Proponents of this approach hold that it is the duty of the courts to protect innocent citizens by controlling overreaching by law enforcement officials. *See* MODEL PENAL CODE §

violations.[98] This article focuses solely on the defenses that challenge convictions on the basis that the requisites of attempt liability have not been established. For example, defendants often claim legal impossibility as a defense to attempt charges that stem from Internet sting operations.[99]

Some jurisdictions have used the Internet cases to specifically reject the distinction between factual and legal impossibility. For example, in *People v. Thousand,*[100] the Supreme Court of Michigan granted leave to consider whether the doctrine of "impossibility" provides a defense to a charge of attempted distribution of obscene material to a minor.[101] The defendant was a twenty-three-year-old male who entered a chat room and began a series of conversations with a sheriff's deputy acting undercover, who

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2.13 cmt. 3. The objective approach has been adopted by several states either by statute or judicial creation. *Id; see, e.g.,* People v. Watson, 990 P.2d 1031, 1032 (Cal. 2000); State v. Valdez-Molina, 897 P.2d 993, 995 (Idaho 1995); State v. Babers, 514 N.W.2d 79, 83 (Iowa 1994); People v. Johnson, 647 N.W.2d 480, 485 (Mich. 2002); State v. Ogden, 640 A.2d 6, 12 (Vt. 1993).

For a discussion of the issues surrounding entrapment and Internet sting operations, see Sheetz, *supra* note 1; Jennifer Gregg, *Caught in the Web: Entrapment Law in Cyberspace,* 19 HASTINGS COMM. & ENT. L.J. 157 (1996); Jarrod S. Hanson, Comment, *Entrapment in Cyberspace: A Renewed Call for Reasonable Suspicion,* 1996 U. CHI. LEGAL F. 535.

The defense has had mixed results to date. *See, e.g.,* United States v. Poehlman, 217 F.3d 693 (9th Cir. 2000); United States v. Gamache, 156 F.3d 1 (1st Cir. 1998); People v. Reed, 61 Cal. Rptr. 2d 658 (Cal. Ct. App. 1996); State v. Jones, 21 P.3d 569 (Kan. 2001).

98. Defendants in Internet sting operations who have transmitted child pornography or indecent materials to undercover agents and who have been charged with violating various federal or state statutes have claimed their First Amendment rights have been violated. *See, e.g.,* People v. Hsu, 99 Cal. Rptr. 2d 184, 189 (Cal. Ct. App. 2000); People v. Foley, 731 N.E.2d 123, 126 (N.Y. 2000); State v. Robins, 646 N.W.2d 287, 288 (Wis. 2002). However, courts have generally ruled that statutes designed to prohibit unlawful conduct against minors are not constitutionally infirm regulations of speech. *See, e.g., Robins,* 646 N.W.2d at 288. In contrast, courts have struck down statutes that regulate the possession or distribution of child pornography on constitutional grounds. *See, e.g.,* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241, 256-58 (2002) (holding that certain portions of the Child Pornography Prevention Act that attempted to outlaw virtual pornography were unconstitutional).

99. *See, e.g.,* Hatch v. People, 94 Cal. Rptr. 2d 453, 466 (Cal. Ct. App. 2000); People v. Reed, 61 Cal. Rptr. 2d 658, 661 (Cal. Ct. App. 1996); Hudson v. State, 745 So. 2d 997, 1000 (Fla. Dist. Ct. App. 1999); State v. Jones, 21 P.3d 569, 571 (Kan. 2001); People v. Meyers, 649 N.W.2d 123, 131 (Mich. Ct. App. 2002); Bloom v. Commonwealth, 542 S.E.2d 18, 21 (Va. Ct. App. 2001); State v. Koenck, 626 N.W.2d 359, 363–64 (Wis. Ct. App. 2001); *see also* State v. Carlisle, 8 P.3d 391, 395 (Ariz. Ct. App. 2000); Van Bell v. State, 775 P.2d 1273, 1274 (Nev. 1989) (involving a non-Internet undercover operation where there was a promise of a fictitious child); *cf.* Laughner v. State, 769 N.E.2d 1147, 1155 (Ind. Ct. App. 2002) (conceiving attempted child solicitation).

100. 631 N.W.2d 694 (Mich. 2001).

101. *Id.* at 695.

described himself as a fourteen-year-old female named "Bekka."[102] For a week the defendant engaged "Bekka" in a series of sexually explicit conversations and sent "her" a photograph of male genitalia over the Internet.[103] The evidence demonstrated that the defendant believed "Bekka" was fourteen years old.[104] After the defendant and "Bekka" made arrangements to meet, defendant was arrested and charged with, among other offenses, attempted distribution of obscene material to a minor.[105] Following his arrest, the defendant moved to quash the information on the grounds that the evidence was legally insufficient because of the absence of a child victim.[106]

The trial court and court of appeals agreed, ruling that it was legally impossible to attempt the crimes with which the defendant was charged.[107] Relying heavily on Professor Dressler's explanation of the subtle distinction between factual and legal impossibility,[108] the court of appeals reasoned that it was legally impossible for a defendant to attempt to disseminate obscene materials to a minor, where the recipient of the materials was in fact an adult.[109] The crux of the court's analysis was that the defendant's mistake went to the legal status of a material element of the offense—the attempted distribution of obscene material to a "minor."[110] Since it is not a crime to send the material to an adult, it was impossible to commit the crime.[111] Accordingly, it was also impossible to *attempt* to commit the crime because dissemination to an adult could never be a crime.[112]

The Supreme Court of Michigan reversed.[113] Rather than engage in the same hair-splitting analysis undertaken by the court of appeals on whether the case was one of factual or legal impossibility, the supreme court ruled that neither is a defense in

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102. *Id.* at 696.
103. *Id.*
104. *Id.*
105. *Id.* at 696–97.
106. *Id.* at 697.
107. *Id.*
108. *See supra* notes 61–66 and accompanying text.
109. People v. Thousand, 614 N.W.2d 674, 679–80 (Mich. Ct. App. 2000).
110. *Id.*
111. *Id.*
112. *Id.*
113. People v. Thousand, 631 N.W.2d 694, 695 (Mich. 2001).

Michigan.[114] The court noted that nothing in Michigan common law recognizes legal impossibility as a defense.[115] Furthermore, the court examined the language and legislative history of the Michigan attempt statute and found no indication of legislative intent to create such a defense.[116]

In a similar fashion, in *United States v. Farner*,[117] the United States Court of Appeals for the Fifth Circuit recently rejected a claim of legal impossibility after a defendant was charged with attempting to "entice a minor to engage in criminal sexual activity," when in fact, the defendant was involved in internet conversations with an adult undercover FBI agent.[118] The court noted that the Fifth Circuit "has properly eschewed the semantical thicket of the impossibility defense in criminal attempt cases . . . ."[119] Instead, utilizing a test that measures whether the defendant intended to commit the underlying offense and whether his acts, viewed objectively, manifested this intent,[120] the *Farner* court ruled that the defendant's guilt was firmly established by the evidence which included his explicit e-mail communications, his acts of sending pornographic images over the Internet, his arrangement to meet the supposed minor, and his driving to the meeting spot with condoms and lubricant in his possession.[121]

In contrast, a few courts have agreed that attempt liability in Internet sting cases is legally impossible.[122] Other courts, while acknowledging the viability of legal impossibility as a defense reject its applicability in the Internet cases. Thus, in *Chen v.*

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114. *Id.* at 701.

115. *Id.*

116. *Id.* at 702.

117. 251 F.3d 510 (5th Cir. 2001).

118. *Id.* at 511; *accord* United States v. Root, 296 F.3d 1222, 1228–30 (11th Cir. 2002); State v. Laughner, 769 N.E.2d 1147, 1155 (Ind. Ct. App. 2002).

119. *Farner*, 251 F.3d at 513.

120. *See supra* notes 86–87 and accompanying text.

121. *Farner*, 251 F.3d at 511, 514; *accord Root*, 296 F.3d at 1228–30 (noting that the defendant's objective acts of initiating explicit communications in which he asked the "minor" to engage in intercourse with him, driving five hours to meet the victim, and stating that he was there to engage in sex with a 13-year-old were sufficient to establish attempt liability).

122. *See, e.g.*, State v. Taylor, 810 A.2d 964, 985 (Md. 2002) (ruling that the trial court's dismissal of attempt charges on grounds of legal impossibility barred reindictment as violative of double jeopardy principles); People v. Thousand, 614 N.W.2d 674, 679–80 (Mich. Ct. App. 2000), *rev'd*, 631 N.W.2d 694 (Mich. 2001).

State,[123] the defendant posted advertisements on the Internet for a nude dancer.[124] An adult undercover agent calling himself "Julie" responded that "she" was interested in the job but that she was thirteen years old.[125] After a series of sexually explicit e-mails,[126] the defendant arranged to meet "Julie" at a local motel.[127] When he was arrested, the defendant admitted that he was planning to show a girl how to have sex.[128] Convicted of attempted molestation of a child, the defendant claimed it was legally impossible to commit the crime when he in fact had been e-mailing an adult.[129] The Court of Criminal Appeals of Texas ruled that the case was not one of factual impossibility and rejected the defendant's appeal.[130] Nevertheless, the court stated that, "[w]e find it unnecessary to dispose of the legal impossibility doctrine at this time."[131]

Aside from claiming impossibility as a defense, the defendants in a number of Internet cases claim lack of sufficient evidence that the actus reus requirements of attempt liability have been met.[132] For example, in *State v. Robins*,[133] the defendant engaged

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123. 42 S.W.3d 926 (Tex. Crim. App. 2001).

124. *Id.* at 927.

125. *Id.*

126. Appellant had placed the following ad on an on-line bulletin board: "'A nude dancer needed for discreet pleasure. I am generous and rich. You must be very attractive and young.'" *Id.* An undercover law enforcement officer e-mailed appellant back representing himself as J. Cirello and asked appellant "'how young of a nude dancer [he was] looking for.'" The appellant responded, "'I will say between 20 and 30 or as long as you have a young looking face and tender body.'" *Id.* The officer responded that no one in that age range was available and signed the e-mail "J. Cirello." *Id.*

Again the appellant e-mailed asking, "'What age are you in?'" To this, the officer wrote, "'If you don't care about age I am 13, looking for independence. What are you looking for?'" Appellant responded that he was "looking for a girl who 'dares to be nude and watched by me while I am masturbating.'" Appellant then asked if they could "'get together' and requested her name and location." The officer e-mailed in response, stating "'My name is Julie.'" Additionally, he wrote that "'Julie' had never seen a man masturbate and did not want 'her' parents to find out." *Id.*

127. *Id.* at 928.

128. *Id.*

129. *Id.*

130. *Id.* at 930–31.

131. *Id.* at 929; *see also* Bloom v. Commonwealth, 542 S.E.2d 18, 21 (Va. Ct. App. 2001) (stating that "[l]egal impossibility is a defense; factual impossibility is not."); United States v. Crow, 164 F.3d 229, 238 (5th Cir. 1999) (stating that "Crow's arguments . . . derive from not legal, but factual impossibility."). Since the *Crow* opinion, the Fifth Circuit has stated that it does not differentiate between factual and legal impossibility. United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001).

132. *See, e.g.*, State v. Carlisle, 8 P.3d 391, 394 (Ariz. Ct. App. 2000); People v. Reed, 61

in a number of on-line conversations with an undercover agent posing as a thirteen-year-old boy.[134] During their conversations, the defendant "was persistent in setting up a meeting" between them.[135] Eventually the two agreed to meet at a local restaurant, informed each other what they would be wearing so that they could recognize each other, and planned for the defendant to find a motel for them after the initial restaurant meeting.[136] The defendant was arrested as he was walking into the restaurant[137] and charged with attempted child enticement.[138] Following a preliminary hearing, the defendant moved to dismiss the indictment on a variety of grounds, one of which was that the evidence established only mere preparation to commit an offense, and thus was legally insufficient to support an attempt charge.[139] In rejecting this claim, the Supreme Court of Wisconsin noted that the evidence was more than sufficient to support the attempt charge.[140] In particular, the court delineated that not only was there evidence of the on-line communications, but also evidence that the defendant arranged a meeting place, traveled to, and arrived at the meeting place before being arrested.[141]

Comingling the impossibility and actus reus defenses, the Indiana Court of Appeals in State v. Kemp[142] rejected attempt liability in Internet sting operations on the grounds that the defendant could never take substantial steps toward completing the crime when the victim was a fictitious child.[143] The court of appeals upheld a trial court ruling that attempted child molestation requires that the victim be an actual, not fictitious, child.[144] In *Kemp*, the

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Cal. Rptr. 2d 658, 660 (Cal. Ct. App. 1996); Dennard v. State, 534 S.E.2d 182, 186 (Ga. Ct. App. 2000); People v. Scott, 740 N.E.2d 1201, 1206 (Ill. App. Ct. 2000); People v. Patterson, 734 N.E.2d 462, 468 (Ill. App. Ct. 2000); *cf.* Van Bell v. State, 775 P.2d 1273, 1274 (Nev. 1989) (involving the defendant's attempt to sexually assault a fictitious child during a non-Internet undercover operation).

133. 646 N.W.2d 287, 289 (Wis. 2002).
134. *Id.* at 289.
135. *Id.*
136. *Id.* at 290.
137. *Id.*
138. *Id.* at 287.
139. *Id.* at 295.
140. *Id.*
141. *Id.*
142. 753 N.E.2d 47 (Ind. Ct. App. 2001).
143. *Id.* at 51.
144. *Id.*

defendant, whose Internet screen name was "Ineedyoungtight1," had sexually explicit communications with an undercover agent posing as a child.[145] The defendant agreed to meet with the "child" near a motel and had condoms with him when arrested.[146] Nevertheless, since the defendant was engaged in Internet conversations with an adult, the court found that the defendant could not be guilty of attempted child molestation because he never took a substantial step toward the completion of the offense.[147] While the Indiana Court of Appeals did not expressly use the term "legal impossibility" in affirming the dismissal of the charges against the defendant, its reasoning implicitly adopted the doctrine.[148]

Some defendants claim that they never intended to communicate with a child and that their conversations merely reflect their

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145. *Id.* at 48.

146. *Id.*

147. *Id.* at 51.

148. The *Kemp* court held that the defendant's acts did not rise to the level of attempting to molest or solicit a child. *Id.* at 52. With regard to the molestation charge, the court held that the defendant's acts only rose to the level of preparation because there was never an actual child to molest. *Id.* at 51. In considering the solicitation charge, the court held that there was nothing in the defendant's behavior to "demonstrate that the offense was to be 'immediately committed,'" as required by the statute. *Id.* at 52. Although the court did not explicitly state that the dismissal of the charge was due to the legal impossibility of having no actual child to solicit or molest, this notion was implied by the court's charge to the legislature. The court suggested that the legislature should expand the definition of child solicitation to permit a defendant to be found guilty of the offense if he or she solicits a child or another person "'believed by the defendant to be a child.'" *Id.* at 52 (quoting FLA. STAT. ch. 847.0135(3) (Supp. 1996).

The *Kemp* court's rationale relied heavily on *State v. Duke*, 709 So. 2d 580 (Fla. Dist. Ct. App. 1998). In *Duke*, the defendant communicated in sexually explicit terms over the Internet with someone whom he believed to be a child, but who in fact was an undercover detective. *Id.* at 581. Defendant was arrested at the scene of where he had agreed to meet the "child." *Id.* The Florida District Court of Appeals reversed defendant's conviction of attempted sexual battery on a child on the basis that the defendant's conduct did not progress beyond mere preparation. *Id.* at 582. The concurring opinion made clear that the lack of a victim was the basis of the reversal, in stating that, "[i]t is difficult to see how . . . an attempt to commit sexual battery could occur when the victim was not even present." *Id.* (Harris, J., concurring). The Florida legislature subsequently revised the statute under which Duke was charged. The revised statute criminalizes the use of a computer to solicit sex from a minor or from a person the defendant believes to be a minor. FLA. STAT. ch. 847.0135(3) (2000). However, in *People v. Reed*, 61 Cal. Rptr. 2d 658 (Cal. Ct. App. 1996), the California Court of Appeal rejected the defendant's assertion that the lack of a real victim precluded liability for attempted molestation of a child. *Id.* at 661. The defendant asserted that his Internet communications and meeting with an undercover detective, who posed as the mother of the would-be victim, were merely preparatory steps. *Id.* at 662. Significantly, the court also rejected the defendant's separate claim of impossibility. *Id.* at 661.

fantasies.[149] These defendants assert that role-playing is rampant on the Internet, and that they never believed that they were communicating with a child; rather they thought it was another adult pretending to be a child (which of course, ironically, it was). For example, in *People v. Scott*,[150] an undercover detective, who had responded to the defendant's instant message, contacted the defendant. The detective claimed he was twelve years old; he and the defendant engaged in a series of sexually explicit communications, and the defendant sent pornographic pictures over the Internet to the detective. A meeting was arranged, and the defendant was arrested as he approached the agreed-upon location. On appeal, the defendant raised a fantasy defense by claiming that the evidence was insufficient to prove that he intended to commit an offense against a child and took substantial steps to that end. In rejecting this claim, the appellate court upheld the trial court's finding that the evidence "is more than just a fantasy transmission over the electronic media of thoughts and desires. A child was solicited in the defendant's mind, a date was made, and he drove to meet the person. . . ."[151]

A less typical defense against attempt charges was presented in *State v. Jones*.[152] There the trial court convicted the defendant of attempted indecent liberties with a child after he was caught in an Internet sting operation.[153] On appeal, the defendant claimed

149. *See, e.g.*, United States v. Bailey, 228 F.3d 637, 640 (6th Cir. 2000) (rejecting the defendant's claim that e-mailing the three minors, urging them to meet with him, and describing how he wanted to perform oral sex on them "was all just a game"); United States v. Crow, 164 F.3d 229, 237–38, 238 n.4 (5th Cir. 1999) (rejecting defendant's claim that he was merely playing a fantasy game and did not know that the victim was a child, the court held there was sufficient evidence for a jury to conclude that his claims were not credible); People v. Hayne, No. F036401, 2002 Cal. App. Unpub. LEXIS 2650, *28–37 (Cal. Ct. App. Mar. 27, 2002) (rejecting the defendant's claim that when he was on-line he was involved in fantasy play and therefore had no knowledge of the victim's ages, the court held that a reasonable jury weighing the evidence could conclude that the defendant knew he was dealing with minors, particularly in light of the defendant's online conversations with the girls combined with his plans to meet them); People v. Scott, 740 N.E.2d 1201, 1208–09 (Ill. App. Ct. 2000) (rejecting the defendant's fantasy claim and finding "no basis to conclude that a rational trier of fact could not have found that the defendant had committed a substantial step and had possessed the requisite intent"). *See generally* Sheetz, *supra* note 1, at 424–28; Donald S. Yamagami, Comment, *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 SANTA CLARA L. REV. 547 (2001) (discussing *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997), where the fantasy defense led to an acquittal).

150. 740 N.E.2d 1201 (Ill. App. Ct. 2000).

151. *Id.* at 1208.

152. 21 P.3d 569 (Kan. 2001).

153. *Id.* at 570.

that he lacked the specific intent to commit the offense because the age of the victim was not material to him.[154] In other words, since he did not care whether the "person" with whom he communicated over the Internet was a child or not, he could not have attempted the crime of indecent liberties with a child.[155] The court rejected this defense on the ground that since the age of the child is a strict liability element of the offense-in-chief, it is immaterial to the intent needed for attempt.[156] *State v. Jones* thus raises the issue of whether one can attempt to commit a crime when one does not have intent as to all of the elements of the offense.[157]

These contemporary illustrations of defense efforts to overturn convictions call for a new examination of the rationale and requirements of attempt liability. The cases involving the impossibility defense raise questions about its rationale, the reasons for its apparent viability, and renewed reasons for its abolition.[158] In addition, the Internet cases raise new questions about the appropriate mens rea for attempt liability.

IV. THE EFFECT OF THE STING

To assess attempt liability in the Internet sting cases, we must first examine the elements of the underlying offenses. The various offenses run the gamut from child molestation, indecent liberties with a child, unlawful conduct with a child, to distribution of obscene material to a minor.[159] The common thread to each offense is the element of a "child" or a "minor." This requirement is an attendant circumstance, i.e., something that exists independ-

154. *Id.* at 571.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See supra* note 148 and accompanying text.

159. *See, e.g.*, 18 U.S.C. § 2243(a) (2000) (criminalizing the commission of a sexual act or the attempt to commit such an act with an individual between the ages of twelve and sixteen years); CAL. PENAL CODE § 288.2(b) (West 1999 & Supp. 2003) (prohibiting the seduction of a minor); 720 ILL. COMP. STAT. ANN. 5/12-14.1(a)(1) (West 2002 & Supp. 2003) (prohibiting the predatory sexual assault of a child); KAN. STAT. ANN. § 21-3503(a) (1995 & Supp. 2002) (prohibiting indecent liberties with a child); MICH. COMP. LAWS ANN. § 750.142 (West 1991) (prohibiting distribution of obscene material to a minor); TEX. PENAL CODE ANN. § 43.25 (Vernon 2003) (prohibiting sexual conduct with a child); VA. CODE ANN. § 18.2-370(5) (Cum. Supp. 2003) (criminalizing the invitation of a child to any place for sexual purposes).

ently of the defendant's conduct.[160] If the defendant believes he is dealing with a child, the issue that arises is one of impossibility.[161] If the defendant claims that he did not think he was dealing with a child, or did not care whether he was dealing with a child, the issue is whether he has the requisite mens rea for attempt culpability.[162]

A. *The Mistaken Internet User*

A defendant who believes he is communicating with a child over the Internet, not an adult undercover agent, provides the perfect situation for examining the apparent resilience of the legal impossibility doctrine. From various decisions described above, it is evident that not only are defendants raising the impossibility defense, but some courts view the Internet cases as instances where it is legally impossible to convict a defendant of attempting a crime against a fictitious child.[163] Moreover, legal scholars have shown such interest in the impossibility doctrine, that they appear to have forestalled its demise.[164]

In fact, the Internet cases represent the best rationale for rejecting legal impossibility as a defense to attempt liability. An actor who believes he is dealing with a minor in Internet communications should not be shielded from attempt liability merely because the requirement of a "minor" is missing. The classification of the "minor" requirement—as a legal element or a factual circumstance—should be irrelevant to a determination of the actor's attempt liability. Instead, the law should focus on what the defendant intended to do, rather than what it turns out he did.

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

161. *See supra* note 148 and accompanying text.

162. *See* MODEL PENAL CODE § 2.02(1) (Official Draft and Revised Comments 1985) (defining the minimum requirements of culpability); *Id.* § 1.13(12) (stating that the term "intentionally" is synonymous with "purposely"); *Id.* § 2.02(2)(a)(ii) (stating that "[a] person acts purposely with respect to [an attendant circumstance] when . . . he is aware of the existence of such circumstances or he believes or hopes that they exist").

163. *See supra* note 148 and accompanying text.

164. LAFAVE, *supra* note 5, § 6.3(a), at 552 (stating that "scholars in the field of substantive criminal law appear to be more fascinated with the subject of impossibility in attempts than with any other subject").

This is particularly true because of the well-noted difficulty in distinguishing between a legal and factual element.[165]

Aside from the practical difficulty in finding a workable tool for distinguishing between factual and legal elements, a more fundamental reason exists for eliminating the defense of legal impossibility, which is epitomized by the Internet cases. The longevity of the legal impossibility doctrine rests in part on the fears of objectivists that without it, actors will be punished for outwardly innocent acts.[166] Objectivists reason that unless the danger is manifest, i.e., apparent to an objective viewer, a danger exists that the actor will be punished on the basis of bad thoughts, improperly punished without adequate proof of harm, or convicted based on improper evidentiary and prosecutorial tactics.[167] Clearly, courts and scholars need to address the line between protected speech and illegal conduct, which might be blurred by the ease of access to the Internet. Nevertheless, the ease with which the Internet unmasks evil intentions points to the need for police intervention in the form of sting operations before harm to minors occurs.

The very nature of the Internet cases obviates concerns about improper punishment. A record of a defendant's actions and intent is contained in the Internet communications.[168] Thus, concern about improper prosecutorial tactics such as coerced confessions is unfounded.[169] Likewise, while meeting an adult in a motel may seem like objectively innocent conduct, the previous Internet communications make clear the intent behind the actor's conduct.[170] The actor's intent is patent from the Internet communica-

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165. *See supra* notes 78–79 and accompanying text.

166. Enker, *supra* note 16, at 689.

167. *See* Enker, *supra* note 16; Jensen, *supra* note 14, at 367–70; *see also supra* notes 14–19 and accompanying text.

168. An actor's predisposition towards unlawfully dealing with children is an entrapment issue. *See supra* note 97. Whether the communications reflect an intent to unlawfully deal with a child, as opposed to a fantasy game, is a separate issue. *See infra* notes 186–88.

169. *See supra* note 74.

170. Internet communications fit remarkably well with Professor Weigend's proposal that impossibility cases be judged by statements an actor makes which accompany his actions. If the statements arouse alarm or apprehension to the average observer, attempt liability is appropriate. *See* Weigend, *supra* note 62, at 267–68. He uses the infamous example of a man who shoots at a tree stump believing it to be his enemy and is subsequently cleared of attempted murder on the grounds of legal impossibility. Weigend, *supra* note 62, at 270–71. If there was no evidence other than the act of shooting, no apprehen-

tions. Thus, allowing an actor to escape liability based on legal impossibility has no foundation because its main rationale is gone.[171]

Imposing liability under a finding of factual impossibility, while allowing the legal impossibility doctrine to survive, as did the Texas court in *Chen v. State*[172] is an imperfect solution. The danger that a court will find that an Internet sex case is one of hybrid legal impossibility, as did the lower court in *People v. Thousand*,[173] would still exist.[174] Moreover, skirting the issue allows for the continuation of the imprecise terminology that has plagued the legal impossibility doctrine. At the very least, courts finding that Internet cases involve factual impossibility should use the cases as an opportunity to express the viability of the defense of pure legal impossibility and to reject in precise language the doctrine of hybrid legal impossibility.

Just as the impossibility doctrine should not shield the Internet user from liability when he mistakenly believes he is dealing with a minor, courts should reject defense claims that a defendant has not met the actus reus requirement of attempt simply because he was dealing with an undercover agent. The most troubling cases are similar to those such as *State v. Kemp*,[175] where the court rejected attempt liability in an Internet sex case based on a finding that the defendant could not have taken substantial steps toward completion of the crime when the victim was a fictitious child.[176] In fact, it would be impossible to ever complete the crime in these circumstances because no child was involved. This

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sion would occur, and there would be no attempt liability. *Id.* at 270. However, if there is evidence that, prior to the shooting, the actor told his companion that he was out to get his enemy, the act of shooting would cause alarm; the actor should be found guilty of attempted murder. *Id.* at 270–71. Using the alarm test in the context of attempted offenses against a minor—Internet communications occurring before the actor sets out to meet his victim—shows the actor's intention to meet the minor.

171. Defendants arrested through Internet sting operations have also raised the defenses of entrapment and the new "fantasy" defense. *See infra* notes 97, 186–93 and accompanying text.

172. 42 S.W.3d 926 (Tex. Crim. App. 2001).

173. 614 N.W.2d 674 (Mich. Ct. App. 2000), *rev'd in part*, 631 N.W.2d 694 (Mich. 2001), *cert. denied*, 532 U.S. 958 (2001).

174. *Supra* notes 61–66 and accompanying text.

175. 753 N.E.2d 47 (Ind. Ct. App. 2001).

176. *Id.* at 51; *see also* State v. Duke, 709 So. 2d 580, 582 (Fla. Dist. Ct. App. 1998) (barring liability based on the same reasoning); *supra* note 148 and accompanying text.

line of reasoning is a death knell to the use of sting operations in Internet sex crimes.

The *Kemp* decision is all the more alarming because it comes from a jurisdiction that has statutorily barred use of the impossibility defense.[177] Thus the case contravenes specific legislative intent that defendants not escape attempt liability when their inability to complete an offense is due to an unknown circumstance. The shift in judicial focus from the actor's mens rea, which is the root of impossibility cases, to the actor's actus reus raises new concerns and calls for different scrutiny. In order to understand the significance of the *Kemp* decision, we need to put it in the context of history and development of actus reus concerns.[178]

Significantly, disenchantment with the proximity test for assessing attempt liability was stirred by the ruling in *People v. Rizzo*,[179] a 1927 case with some parallels to *Kemp*. In *Rizzo*, four defendants were convicted of attempted robbery after they set out to rob a payroll clerk, whom they never found.[180] In reversing the attempt conviction, the New York Court of Appeals reasoned that, under the prevailing proximity test and without the presence of the victim, the defendants were not dangerously near commission of the robbery; therefore, they could not be guilty of attempt.[181] Criticism of the *Rizzo* result was one of the factors behind the Model Penal Code's adoption of the substantial step test.[182]

By analogy, and taken to its logical extreme, if the victim is fictitious, as in the Internet sting operations, a defendant could never be dangerously near completion of the intended sex offense. Defendants who contend that Internet sting cases raise actus reus issues *solely* because they employ fictitious children are simply incorrect. If this were true, every impossibility case could be

177. IND. CODE ANN. § 35-41-5-1(b) (Michie 1998 & Cum. Supp. 2002); *see also* Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002), *cert. denied*, 123 S. Ct. 1929 (2003). Florida also has barred the impossibility defense. *See* State v. Rios, 409 So. 2d 241, 243–44 (Fla. Dist. Ct. App. 1982). This makes the *Duke* rationale equally suspect. *See supra* note 148.

178. *See supra* notes 41–49 and accompanying text.

179. 158 N.E. 888 (N.Y. 1927).

180. *Id.* at 888.

181. *Id.* at 889–90.

182. MODEL PENAL CODE § 5.01(6)(b)(i), (iv) (Official Draft and Revised Comments 1985).

examined through the actus reus lens.[183] For example, one could assert that in picking an empty pocket, a defendant never came close to completing the intended offense; therefore, he is not guilty of attempted larceny.

Actus reus issues should be reserved for situations where defendants claim police intervention occurred before an attempt was established.[184] For example, if an arrest were made simply on the basis of the Internet communications and before defendant set out to meet the victim, one could argue that the defendant did not cross the preparation/attempt line.[185] But, the courts should not support a claim that a defendant could not cross the line simply because of the use of a fictitious victim.

B. *The Oblivious Internet User*

Defendants caught in Internet stings are increasingly claiming that they were just engaging in role-playing or fantasy games and had no intent to commit the underlying offense.[186] The fantasy defense in essence asks that an objectivist view of the evidence be ignored, and instead that a defendant's subjective belief that he was role-playing be accepted. This is an interesting twist on the paradigm that limits attempt liability under an objectivist approach and expands it under a subjectivist view.[187] The fantasy defense calls for the exact opposite result. As such, the fantasy cases do not represent an extension of the accepted rules of attempt liability, but, rather, question the sufficiency of the evidence to establish that the defendant believed that he was communicating with a child and not with another adult in some fantasy game.[188]

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183. Some commentators suggest that impossibility cases should be viewed as raising actus reus issues. *See, e.g.,* Perkins, *supra* note 30; Ryu, *supra* note 14, at 1189; J.C. Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 423 (1957). As discussed above, if this were the case even instances of factual impossibility would be a defense.

184. *See supra* notes 40–49 and accompanying text.

185. *See, e.g.,* People v. Scott, 740 N.E.2d 1201, 1208 (Ill. App. Ct. 2000) ("What we are necessarily concerned with is whether the communications, coupled with the defendant's act of driving to the agreed-upon location, constitute a substantial step. . . . '[I]t is more than just a fantasy transmission over the electronic media of thoughts and desires.'").

186. *See supra* notes 149–51.

187. *See supra* notes 14–23 and accompanying text.

188. *See supra* note 149 and accompanying text.

To sufficiently establish a defendant's intent, law enforcement must conduct sting operations in a manner that makes it abundantly clear that the defendant is aware that he is communicating with an apparent "child."[189] Typically, the undercover agents repeatedly state in their Internet conversation that they are underage.[190] The time frame, quantity, and content of the communications are crucial in assessing the defendant's intent.[191]

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189. *See generally* Cobb, *supra* note 1, at 813–16; Sheetz, *supra* note 1, at 425–28. These cases demonstrate how trained law enforcement officers communicate that they are "minors." It is not only stating their supposed age, but also communicating in an age-appropriate fashion. See, for example, *People v. Patterson*, 734 N.E.2d 462, 465 (Ill. App. Ct. 2000), where the following dialogue was reported between the defendant, whose screen name was "Boysneeded," and the undercover officer, "Yacoo":

> Boysneeded: having problems
> Yacoo: yep
> Boysneeded: lol
> Yacoo: must be the rain
> Boysneeded: yes not a good day but good for sex.. [sic]
> Boysneeded: would you like a blow job today?
> Yacoo: ya it would be its cold and raining out
> Yacoo: id love one
> Boysneeded: so want me to cum to you
> Boysneeded: are you home a lone
> Yacoo: i do but im scard no my moms home
> Boysneeded: oh
> Yacoo: shes up stairs
> Boysneeded: well if she is home i couldnt give a blow job then
> Yacoo: if we ment [sic] some where
> Boysneeded: where?
> Boysneeded: then how would we do anything?
> Yacoo: we could drive around and get to know each other then see
> Boysneeded: I see so do youu [sic] want to do that ?
> Boysneeded: so do you play around with any of you [sic] friends?
> Yacoo: maybe we could meet at gurnee mills, no i havnt [sic] found a friend to do
> that with
> Boysneeded: when do you want to meet.. [sic]
> Yacoo: whats good for you
> Boysneeded: don't know need to get a shower and then a 30 min drive how will i find you?
> Yacoo: you know where mcdonalds is
> Boysneeded: don't know the area that is good a littel [sic] woried about this here
> about men going to meet young men and they get arrested

Id.

190. *See supra* note 189.

191. *See* Martin G. Weinberg et al., *Internet Sexual Entrapment: The Uses & Misuses of 18 U.S.C. 2423(b)*, CHAMPION, Aug. 2002, at 12; Martin G. Weinberg et al., *Internet Sexual*

Additionally, a defendant's belief that he is dealing with a child, and not in some role-playing fantasy with an adult, is often corroborated by evidence gathered when the defendant is arrested. For example, in one case, when a defendant was arrested in the parking lot of a motel where he was to rendezvous with the undercover "child," he had small sex toys and vibrators with him.[192] To date, most courts have rejected the fantasy claim.[193] Nevertheless, it is certainly possible that a defendant will truly believe that he is communicating with an adult because it is not clear from the Internet communications that a minor, whether fictitious or not, is involved. In that instance, where a defendant believes he is communicating with an adult, he also intends to communicate with an adult, and in fact, does communicate with an adult, attempt liability is not possible.

C. *The Indifferent Internet User*

In contrast to the impossibility and fantasy defenses, the indifferent Internet user, as exemplified in *State v. Jones*,[194] claims that it was immaterial to him whether the person with whom he was communicating was an adult or a child. This situation raises another attempt issue to which "[c]ommentators have paid almost no heed. . . ."[195] The ramifications of the problem are best understood in the context of some short scenarios:

SCENARIO A: The defendant does not know that he is dealing with a child, but, in fact, the victim is a child. The underlying offense provides that mistake as to age is not a defense. If he completes the offense, the defendant is guilty, notwithstanding a lack

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Entrapment: The Uses & Misuses of 18 U.S.C. 2423(b), CHAMPION, Sept./Oct. 2002, at 26.

192. People v. Reed, 61 Cal. Rptr. 2d 658, 660 (Cal. Ct. App. 1996) (noting that the defendant had mini-vibrators, dildos in different sizes, and lubricating jelly).

193. *See* cases cited *supra* note 149. Recently, a mistrial was declared in a trial of a Navy physicist accused of using the Internet to solicit sex from a minor, because the jury was deadlocked on whether the defendant intended to deal with a minor. The defendant raised the fantasy defense, claiming that he believed he was role-playing with another adult. Allan Lengel, *Online Sex Sting Ends With Mistrial: Jury Deadlocks in Navy Physicist's Case*, WASH. POST, Dec. 7, 2002, at B1.

194. 21 P.3d 569 (Kan. 2001); *see supra* notes 149–57 and accompanying text.

195. Simons, *supra* note 63, at 478.

of knowledge as to the age of the victim, as long as the victim is in fact underage.[196]

SCENARIO B: Same as A above, except the defendant is arrested before the underlying offense is completed. Under modern attempt rules,[197] the defendant is guilty of attempt, notwithstanding his ignorance as to the age of the victim, as long as the victim is in fact underage.

SCENARIO C: The defendant believes he is dealing with a child, when in fact, he is communicating with an undercover agent. Since the defendant believed the attendant circumstance existed (even if it is a strict liability element), the impossibility of completing the underlying offense is not a defense. [198]

SCENARIO D: The defendant is indifferent as to the age of the victim, and age is a strict liability element, *but* the element is not met because no child was ever used.

The *Jones* case represents Scenario D, with the court finding that the defendant was guilty of attempted indecent liberties with a minor.[199] Yet, if the *Jones* defendant did not believe he was dealing with a minor, and no minor was involved, two impediments to attempt liability exist: lack of appropriate mens rea and impossibility. Nevertheless, the result in *Jones* may be correct.

Attempt law does not require that an actor have intent as to a crime's attendant circumstances. It is usually sufficient that the actor intends to engage in the prohibited conduct or cause the prohibited result and have whatever mens rea is required by the underlying offense for the attendant circumstances.[200] This is so, even if, as in many states, the attendant circumstance of "minor" is a strict liability element.[201] This rule is used typically in situa-

196. *See* MODEL PENAL CODE § 5.01 cmt. 1 (Official Draft and Revised Comments 1985).

197. *See supra* notes 36–39 and accompanying text.

198. *See supra* notes 100–31 and accompanying text.

199. State v. Jones, 21 P.3d 569, 570 (Kan. 2001).

200. *See* MODEL PENAL CODE § 5.01 cmt. 2.

201. *See supra* note 36 and accompanying text. By analogy, if the prosecution does not have to establish that the defendant knew the victim's age, it should likewise not have to establish that the defendant knew an actual child was involved.

tions exemplified by Scenario B: the defendant lacks a belief as to the attendant circumstances, which in fact exist.[202]

In contrast, where the underlying offense is not completed because of a failure of the attendant circumstances, usually we have an impossibility situation exemplified in Scenario C, which should not bar attempt liability, since the defendant's belief was that the attendant circumstance existed.[203] But in *Jones,* the defendant did not intend to deal with a minor, and no minor was involved; thus, two critical requirements of attempt liability were missing.[204] The case is analogous to arguing that a defendant who is indifferent as to whether a woman was consenting to intercourse could be guilty of attempted rape even if she in fact was consenting.[205] Few would argue for conviction in the rape example. The intuitive reaction in the rape situation is that there is no victim, and therefore no crime, even if the defendant risked committing a crime.[206]

Nevertheless, the Internet sting cases strike a different chord. Is the person who risks dealing with a minor in need of punishment? Many would say yes. The harm to children is so great that exceptional rules are required. Some precedent exists for this approach. Most states provide that mistake as to the age of a minor is not a defense to a sex crime, notwithstanding general rules that allow mistake of fact as a defense.[207] Defendants are thought to assume the risk when they engage in conduct that may be harmful to children. By that reasoning, a defendant who engages in Internet communication with someone should be on notice to make sure he is not dealing with a child.[208] If he is indifferent, it means he does not care whether he is dealing with a child, and

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202. *See supra* note 193 and accompanying text.

203. *Id.*

204. State v. Jones, 21 P.3d 569, 571–72 (Kan. 2001).

205. *See* Larry Alexander and Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1159 n.35 (1997); R.A. Duff, *Recklessness in Attempts (Again)*, 15 OXFORD J. LEGAL STUD. 309 (1995); Simons, *supra* note 63.

206. *See supra* notes 22–23 and accompanying text. Some might disagree and say that the person who risks forcing a woman to have intercourse is in need of punishment, particularly under a subjectivist model of punishment.

207. *See supra* note 40 and accompanying text.

208. This is the flip side of the fantasy defense raised by some defendants. *See supra* notes 149–51 and accompanying text. If, as some defendants assert, nothing is as it seems on the Internet and role-playing and fantasizing is rampant, then defendants should also be on notice that a minor could also be role-playing and fantasizing that he or she is an adult.

that should be culpable conduct. To use Professor Fletcher's rational motivation test,[209] we would ask, "what would the actor do if he knew that X was not so?"[210] In other words, what would the defendant do if he knew that the person with whom he was communicating was a child? If the defendant would continue with the communications, he manifests a danger to society that may merit punishment. This indifference was the defendant's position in *Jones*.[211] The question then becomes whether attempt liability is the appropriate punishment, or whether the defendant should be guilty of some other offense.[212]

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209. FLETCHER, *supra* note 5, § 3.3.4, at 161–66. In seeking a test to differentiate factual from legal impossibility, Fletcher proposed that one determine an actor's intent by inquiring about his motivation. *Id.* at 161. Thus, according to Fletcher, "mistaken beliefs are relevant to what the actor is trying to do if they affect his incentive in acting. They affect his incentive if knowing of the mistake would give him a good reason for changing his course of conduct." *Id.* Fletcher poses the following illustration that has strong bearing on the Internet cases: "Suppose the accused engages in sexual intercourse with a girl he takes to be under the age of consent; in fact, she is overage." *Id.* at 162. According to Fletcher, the accused should not be guilty of attempted statutory rape because "[i]n the normal case it would not be part of the actor's incentive that the girl be underage *(again, one could imagine a variation in which the youth of the girl did bear upon the actor's motivation)*." *Id.* (emphasis added). For criticism of Fletcher's test, see Jensen, *supra* note 14, at 364 n.140.

210. FLETCHER, *supra* note 5, § 3.3.4, at 163. The culpable mental state is recklessness. Strict liability would be inappropriate; otherwise anyone engaging with an adult would be guilty of attempt against a child.

211. State v. Jones, 21 P.3d 569, 570 (Kan. 2001); *see supra* notes 152–57 and accompanying text.

212. For an example of one jurisdiction that prohibits risking injury to a minor, see General Statutes of Connecticut (Annotated) section 53-21 (West Cum. Supp. 2003), which provides:

> Any person who (1) willfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony.

In *State v. Cutro*, 657 A.2d 239 (Conn. App. Ct. 1995), the defendant was masturbating in his car in a public parking lot. *Id.* at 240. A seventeen-year-old observed him and stated that she knew what he was doing. *Id.* Her fourteen-year-old sister saw him shaking, but did not know what he was doing. *Id.* The defendant was charged with public indecency and risking injury to a minor. *Id.* at 241. In upholding his convictions, the appellate court noted that the victim did not have to be aware of the defendant's actions, and that guilt could be established if the defendant's conduct demonstrated a reckless disregard of the consequences. *Id.* at 242. *See also* Krukowski v. Swords, 15 F. Supp. 2d 188, 198 (D. Conn. 1998) (rejecting constitutional challenges to CONN. GEN. STAT. § 53-21 (Supp. 1997)).

The difficulty with using this type of statute in the Internet sting cases is that, unlike the cases cited above, no child is involved in communications. Since the endangerment statute is inchoate in nature, applying it where no child is involved is problematic.

For attempt liability to lie, special rules would be needed because the defendant does not have the mens rea traditionally required in impossibility situations. One approach would be to allow attempt liability if the defendant is grossly reckless as to the existence of an attendant circumstance.[213] This new attempt statute would have mens rea requirements similar to that of depraved indifference murder, where the defendant's indifference as to the risk of death is deemed equivalent to intending the death in terms of culpability and punishment.[214]

One scholar, who stated that attempt liability is theoretically possible in situations analogous to those presented in *Jones*, suggested an alternate approach.[215] He posited that if indifference is tantamount to willful blindness, attempt liability may be appropriate.[216] Thus, attempt liability could exist "when the defendant's conduct would constitute a crime if the circumstances were either as he believed them to be, or as he would have believed them to be if he had not willfully blinded himself to the facts."[217]

Notwithstanding the theoretical possibility of supporting the result in *Jones*, formidable obstacles to doing so exist. The rules of attempt liability would be stretched far beyond their traditional bounds that rest with intent. Under a subjectivist view of criminality, a person who risks dealing with a minor has signaled some danger to society. Yet, the desire to protect children must be balanced against the risk of punishing innocent actors. While the defendant may manifest a dangerous propensity when he risks harming a child, he has neither harmed anyone with his Internet behavior, nor intended to harm anyone. The dangerousness lies closer to punishing someone solely for bad thoughts. Moreover,

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213. A new rule would have to state:

> A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he purposely engages in conduct that would constitute a crime if the attendant circumstances are as he believes them to be, or as he risks them to be, in a manner that displays gross recklessness as to the existence of the attendant circumstances.

Further, gross recklessness as to attendant circumstances would have to be required even if the completed crime had no mens rea as to its attendant circumstances.

214. *See* LAFAVE, *supra* note 5, § 7.4(a)-(b), at 666–70.

215. Simons, *supra* note 63. Other commentators appear to reject the possibility out of hand. *See* DUFF, *supra* note 9.

216. Simons, *supra* note 63, at 481–82.

217. *Id.* at 482.

we run a serious risk of violating a person's first amendment rights.[218] A person who is indifferent as to whether he is dealing with a child, and who, in fact, is not dealing with a child is well within his constitutional right of free speech when he communicates over the Internet.

A better explanation for the result in *Jones* is simply that the evidence did not support the defendant's claim that he was indifferent as to whether he was communicating with a minor. Defendants have had little success in claims that they were merely role-playing or fantasizing about dealing with a child.[219] Similarly, juries may very well reject a claim of indifference. Thus, rather than changing the rules of attempt liability, the prosecutors would still need to prove that defendants believed they were dealing with a minor. Preserving the intent element avoids the potential risk of punishing an actor merely for bad thoughts.

The doctrine of attempt liability has progressed from an objectivist view that manifested an historical hesitancy to punish those who try, but fail to commit an offense, to a more contemporary subjectivist stance that measures culpability by an actor's dangerousness to society as shown by his intentions. The Internet sting cases allow for a review of attempt doctrine in the most contemporary of settings. These cases provide new support for the rejection of the concept of legal impossibility as a defense to attempt liability. They also reaffirm the main principle of attempt liability as resting with intent. Such reaffirmation of the boundaries of the attempt doctrine will ensure that defendants are not improperly punished when they do not intend to communicate with a child, and in fact do not communicate with a child. Likewise, defendants who do believe that they are communicating with a child will be punished, notwithstanding the impossibility of their attempts.

V. CONCLUSION

The reach of the Internet has distinct influences on the development of criminal attempt law. First, as seen above, it provides

218. *See supra* note 98 and accompanying text.

219. *See, e.g.*, United States v. Crow, 164 F.3d 229 (5th Cir. 1999); *see generally* Yamagami, *supra* note 149.

contemporaneous and specific evidence of an actor's intent through his own statements captured during his communications in cyberspace.[220] Such independent evidence of intent calls for a crucial shift in attempt law. In the past, much of the rationale behind limiting attempt liability hinged on the suspect nature of the evidence of a defendant's intent, which until now has been established by inference or by evidence that was subject to attack. With that rationale now fatally weakened, attempt liability should not be limited by the defense of legal impossibility.

Second, the ability to perpetrate crimes against children by use of the Internet is unprecedented. Even at this nascent stage in the development of the Internet, the risks it poses are so great and so potentially devastating that we must emphasize special protections against harm to children. Just as pedophiles have vastly increased access to children through the Internet, law enforcement must have access to pedophiles by means of sting operations. Both of these influences call for a final renunciation of the impossibility defense. Nevertheless, the courts must protect innocent Internet conduct, and, therefore, attempt liability must be linked to intent to deal with a minor.

220. *See* MODEL PENAL CODE § 5.01 cmt. 3(c) at 319–20 (Official Draft and Revised Comments 1985); Enker, *supra* note 16.