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YAFFE ON ATTEMPTS

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Gideon Yaffe's *Attempts* is a masterfully executed philosophical investigation of what it means to attempt something. Yaffe is obviously motivated by the fact that the criminal law punishes attempted crimes, and he believes that his philosophical analysis can shed light on and be used to criticize the law's understanding of those crimes. I focus exclusively on the relevance of Yaffe's philosophical analysis of attempts to the criminal law of attempts. I assume that Yaffe's account of what it is to attempt something is basically correct and ask whether the criminal law uses "attempt" in the way Yaffe uses it, and whether it should use Yaffe's conception of an attempt. I conclude that a lot of criminal-law doctrine, including, very importantly, the influential *Model Penal Code*'s treatment of attempts, is inconsistent with Yaffe's conception of attempts. Because Yaffe is principally interested in what it means to attempt something rather than in the criminal law's treatment of attempts, I believe he misanalyzes the problem of factual versus legal impossibility. And Yaffe's chapter on inherently impossible attempts concludes by positing a quite paradoxical type of criminal attempt, one that is indeed an attempt but for which the defendant should not be convicted because the evidence of its commission is insufficient. I find Yaffe's argument to this effect opaque and therefore unconvincing.

I.

Gideon Yaffe's *Attempts*[1] is a masterfully executed philosophical investigation of what it means to attempt something. Yaffe is obviously motivated by the fact that the criminal law punishes attempted crimes, and he believes that his philosophical analysis can shed light on and be used to criticize the law's understanding of those crimes. Indeed, the book is rich in examples drawn from criminal cases and codes.

In this essay, I focus exclusively on the relevance of Yaffe's philosophical analysis of attempts to the criminal law of attempts. I am assuming that Yaffe's account of what it is to attempt something is basically correct. What I am asking is whether the criminal law uses "attempt" in the way Yaffe uses it and whether it should use Yaffe's conception of an attempt. My conclusion is that a lot of criminal-law doctrine, including, very importantly, the influential *Model Penal Code*'s treatment of attempts, is inconsistent with

1. Gideon Yaffe, Attempts: In the Philosophy of Action and the Criminal Law (Oxford University Press, 2010). All references to pages in the book appear in the text in parentheses.

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Yaffe's conception of attempts. On the other hand, were the criminal law's conception of an attempt to conform to Yaffe's conception, that would represent an improvement. However, that improvement would be inferior to another doctrinal change that would render the notion of an attempt irrelevant to criminal liability.

Two final points: because Yaffe is principally interested in what it means to attempt something rather than in the criminal law's treatment of attempts, I believe he misanalyzes the problem of factual versus legal impossibility. And Yaffe's chapter on inherently impossible attempts concludes by positing a quite paradoxical type of criminal attempt, one that is indeed an attempt but for which the defendant should not be convicted because the evidence of its commission is insufficient (254). I find Yaffe's argument to this effect opaque and therefore unconvincing.

II.

For Yaffe, to attempt to do X is to "try" to do X. And to try to do X is to intend to do X and, by taking steps in furtherance of that intention, to be "rationally committed" to doing X (68–70).

I accept Yaffe's account of the concept of attempting. In doing so, I confess to having some lingering worries. One worry is about conceptual analysis. We have a word in the English language, "attempt." Is it also true that we have a single "concept" of what an attempt is that we invariably mean, or should mean, when we use the word? I am putting this worry aside.

A second worry, which I am also putting aside, concerns the intending of X that forms the basis of attempting X. Is A, who intends to tear B's heart out, which he realizes will kill B, *intending* to kill B and thereby *attempting* to kill B? Is C, who intends to detonate a bomb on a plane in midair to collect on the property insurance on the plane, an act that he believes will kill the passengers, *intending* to kill the passengers and thereby *attempting* to kill them? Yaffe has views about these cases that, as I understand him, put him at odds with the law of attempts pre–*Model Penal Code*. (The common-law view is that the person who wants to tear the victim's heart out but is indifferent as to whether that kills the victim and the airplane bomber who just wants to collect on the property insurance are not guilty of the attempted murder of their victims; the *Model Penal Code*, in section 5.01 (1) (b),[2] changes that result, and Yaffe would presumably approve of that change (123–124). However, I believe it is an open question which view better captures "our

2. "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he . . . when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing *or with the belief that it will cause such result* without further conduct on his part." MODEL PENAL CODE §5.01 (1) (b) (emphasis added).

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concept" of an "attempt," though for me that is immaterial to how the criminal law should respond.)

III.

Let me now turn to Yaffe's most important deviation from the *Model Penal Code*. Assume the jurisdiction aggravates the crime of murder if the murder victim is the governor. And assume also that the element of the *actus reus* of the crime of "murder of the governor" that pertains to the victim's status as the governor is a strict liability element. That is, to convict someone of this crime the prosecution need not prove that the defendant wanted to kill "the governor" (that his intention was transparent to its object, "the governor"); that he was aware that the victim was the governor; that he realized there was a substantial risk that the victim was the governor; or that he should have realized there was a substantial risk that the victim was the governor. In other words, in order to convict the defendant of the crime of "murder of a governor," the prosecution need not prove the defendant had purpose, knowledge, recklessness, or negligence with respect to the victim's status as governor.

Suppose, then, that Al shoots at Betty and kills her, not having any inkling that Betty is the governor. Al will be guilty of "murder of the governor" notwithstanding his justifiable ignorance of Betty's status.

Now suppose that the bullet misses Betty. Has Al *attempted* "murder of the governor"? The *Model Penal Code*'s answer is affirmative. Al has acted with "the kind of culpability otherwise required" for the crime of "murder of the governor."[3] Nor is the language in the Code "under the circumstances as he believes them to be" ever meant to be exculpatory. Rather, it is meant only to be inculpatory.[4]

The logic of the *Model Penal Code* is clear. When Al pulled the trigger, he committed the final act he believed necessary to kill Betty. If he had killed her, he would have been guilty of "murder of the governor." Therefore, given that he has the identical culpability when the bullet misses Betty, he should be guilty of "attempted murder of the governor."

Now change the example from a "result crime" like murder, completed attempts of which are treated in the *Model Penal Code* in section 5.01(1)(b), to a so-called "conduct crime," such as statutory rape, completed attempts of which are treated by the code in section 5.01(1)(a).[5] Suppose Adam tries

3. *See id.*

4. "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he purposely engages in conduct which would constitute the crime *if the attendant circumstances were as he believes them to be*." MODEL PENAL CODE §5.01(1)(a) (emphasis added). The Commentary to the Code makes it clear that the emphasized language is meant to be inculpatory only. *See* MODEL PENAL CODE AND COMMENTARIES, PART I, GENERAL PROVISIONS §§3.01 to 5.07 (American Law Institute 1985), 301–302.

5. *See id.*

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to have sex with Barb, whom Adam reasonably believes to be over the age of consent but who is in fact underage. If the age of the girl is a strict liability element of the crime of statutory rape, then if Adam does have sex with Barb, he will be guilty of the crime notwithstanding his justified belief that Barb is of age.

Suppose now that the "sex" element of the crime requires vaginal penetration, and suppose Adam believes, *incorrectly*, that he has achieved penetration. (This is a hypothetical, remember.) Adam will not have committed statutory rape. Will he have committed attempted statutory rape? The *Model Penal Code* again answers in the affirmative. Adam had the culpability otherwise required for statutory rape. And had the circumstances been "as he believed them to be," he would have committed the element of penetration. (Remember, that language is a one-way ratchet: it inculpates but does not exculpate.[6] Therefore, the fact that Adam believed he had penetrated a girl who was of age inculpates him with respect to the penetration but does not exculpate him with respect to her age.)

The same analysis applies if "murder of the governor" requires negligence on the element of the victim's status and if statutory rape requires negligence regarding the girl's being underage. If Al does not realize but should realize that Betty is the governor, and if Adam does not realize but should realize that Barb is underage, Al and Adam will have committed the crimes of attempted murder of the governor and attempted statutory rape, respectively, if Al has fired the bullet, which misses, and if Adam believes, incorrectly, that he has achieved penetration.

Yaffe dissents from the *Model Penal Code*'s verdict in these cases (154). For Yaffe, neither Al nor Adam "attempted" the crimes in question. Neither was "committed" to killing "the governor" nor to having sex with an "underage" girl.

I am assuming Yaffe is correct with respect to whether Al and Adam have really attempted the crimes that the *Model Penal Code* would convict them of having attempted–that is, whether the correct philosophical analysis of "the concept" of attempting would concur with the *Model Penal Code*. My question is: So what? The *Model Penal Code* is concerned with criminal liability, not with the philosophical analysis of concepts. An "attempt" in criminal law need not be an "attempt" in philosophical conceptual analysis. Al and Adam are just as culpable as their counterparts who successfully commit the crimes, so why should they not be held guilty of attempting the crimes? If they are really committing "shmattempts" rather than attempts, why should it matter?

IV.

The better complaint against convicting Al and Adam is not that they did not really attempt the crimes but is instead that those crimes can be committed

6. *Id.*

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without any culpability (in the case of statutory rape) or without added culpability (in the case of the aggravated murder of the governor). Al is no more culpable than an ordinary murderer, and Adam may not be culpable at all. That is the real problem, not the fact that Al and Adam may not be engaging in what correct philosophical analysis would conclude is an attempt.

This is easy to see if we shift the examples from completed attempts to incomplete ones–that is, to attempts in which the defendant has not taken what he believes to be the last step necessary for committing the crimes. So suppose that when he is arrested, Al has not yet fired his gun at Betty but is lying in wait for her, intending to shoot her when she comes near. Or suppose that Adam, at the point when he is arrested, has undressed Barb but has not yet gone further. And suppose, as before, neither has any culpability with respect to their victim's status (as governor, as underage). They could still be convicted of attempts under the *Model Penal Code*'s section 5.01(1)(c), which covers incomplete attempts.[7] And the Commentary to the Code makes it clear that defendants like them are indeed guilty of attempts.[8]

Again, Yaffe dissents from the Code's verdict, and I agree with him. But my reasons are not his. He dissents because, again, Al and Adam are not "attempting," as Yaffe analyzes the concept (154).

I dissent for two different reasons. First, I do not believe criminal liability should be imposed without culpability or in excess of culpability. That means I would get rid of both strict liability elements and elements that require only a mens rea of negligence. Strict liability is, of course, the absence of culpability. And Kim Ferzan and I argue elsewhere and at length that inadvertence to risk (negligence) is not itself culpable, an argument I do not repeat here.[9]

So in my ideal world, there would not be crimes like statutory rape that had strict liability elements nor crimes like "murder of the governor" that aggravated the underlying crime through strict liability elements. (Nor would there be such crimes if the strict liability elements were replaced by negligence elements.) So I would not convict Al and Adam of attempting to "murder the governor" and attempting statutory rape *because I would not convict them of committing those crimes were their attempts successful.*

V.

That is reason number one for why Yaffe and I would agree and not convict Al and Adam of the incomplete attempts–in Yaffe's case, because they

7. "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." MODEL PENAL CODE §5.01(1)(c).

8. *See supra* note 4.

9. *See* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009), at 69–85.

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have not really "attempted"; in my case, because I would eliminate strict liability and negligence elements of the completed crimes. Reason number two is that I would eliminate incomplete attempts altogether. Again, Kim Ferzan and I have written at length on this, so here I will only gesture at our reasons.[10] Basically, we reject incomplete attempts because until the defendant takes what he believes is the last act necessary to complete the crime, he can always change his mind, and *he always has conclusive reason to change his mind*. That is so no matter how "rationally committed" he is to committing the crime. Al may come to realize in the time that remains before he pulls the trigger that Betty is the governor, and that may cause *him* to change his mind. Perhaps Al's and Adam's practical reasoning up to that point in time was: (1) kill Betty if and only if she is not the governor/have sex with Barb if and only if she is of age; (2) Betty is not the governor/Barb is of age; therefore, (3) kill Betty/have sex with Barb. If, in the time remaining, they discover that their second premises are incorrect, the conclusions of their practical syllogisms will change.

Indeed, even if Al knows that Betty is the governor, and Adam knows that Barb is underage, they may still reconsider in the time remaining. And again, that is what they have most reason to do. So even when strict liability and negligence elements are eliminated, Ferzan and I would still not convict for incomplete attempts.

Ferzan and I have reasons to oppose liability for incomplete attempts in addition to the always revocable nature of criminal intentions prior to their execution. For one thing, culpability is, for us, a function of (1) the risks to legally protected interests that the actor believes he has unleashed beyond his ability to alter, and (2) the reasons that the actor believes exist, discounted by his estimate of their probability, that might justify unleashing those risks.[11] But when the actor has not unleashed the risks but only intends to do so in the future, his assessments of risks and reasons that will exist at that future moment will vary over time. If the actor is guilty of an incomplete attempt at T_A, then at times T_{A+1} through T_{A+N}, up to the time of unleashing the risk, his estimates of risks and reasons may vary and thus his culpability may vary depending upon when he is arrested for the incomplete attempt, even if he has done nothing during that period. (Assume he is just lying in wait at all of these times.)[12]

Second, the time period between when the defendant first becomes liable for an incomplete attempt and the time when he unleashes the risk that he

10. *Id.* at 198–216; *See also* Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM. L. 637, 642–658 (2012); Larry Alexander & Kimberly Kessler Ferzan, *Risk and Inchoate Crimes: Retribution or Prevention?*, in SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS (G.R. Sullivan & I. Dennis eds., 2012), 103, 105–119.

11. *See* ALEXANDER & FERZAN, *supra* note 9, at 25–65.

12. *See id.* at 203–206; Alexander & Ferzan, *Danger*, *supra* note 10, at 647–652; Alexander & Ferzan, *Risk and Inchoate Crimes, supra* note 10, at 111–115.

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intends to unleash can vary in duration. Does the duration affect the defendant's culpability? Both possible answers to this question are problematic.[13]

Suppose Al has been lying in wait for Betty for an hour when he is joined by Alex, who also intends to kill Betty. A half hour later, both are arrested and charged with an incomplete attempt. Is Al more culpable than Alex because he has been in the process of attempting to kill Betty for a longer time than has Alex? It is difficult to see why that would be so: In some cases, the duration of a criminal act surely does affect its culpability. The longer one drives recklessly, the more harm is risked. The longer the kidnapper holds his victim, the more harm is done; likewise, the longer the rapist rapes and the batterer batters. But it is difficult to see why, for incomplete attempters like Al and Alex, the duration of their incomplete attempts affects their culpability. So an affirmative answer to our question seems ruled out.

But so, too, does a negative answer. For suppose that while lying in wait, Al keeps changing his mind about whether to kill Betty, though his changes of mind are not for reasons that are exculpatory. Let us suppose he does so ten times, whereas Alex never wavers. Alex has committed one incomplete attempt and for a much longer time period than the duration of any of Al's periods intending to kill. By hypothesis, the duration of their intendings to kill does not matter. But it seems then that Al must therefore be guilty of ten incomplete attempts to kill Betty. Each new intention to kill her, formed while lying in wait, was a new attempt. And the previous attempts, though abandoned, were not exculpatorily abandoned.

The conclusion that Al has committed ten attempts to kill Betty while Alex has committed only one seems absurd. But that is the result one gets if one concludes that the duration of incomplete attempts should not matter. Yet we conclude above that duration should not matter. We have only two choices here, and they both lead to absurd results.

The problem is with the notion of an incomplete attempt. As I said, the above "proof" of that is a very, very telescoped version of arguments that Ferzan and I give elsewhere at much greater length. But you get the picture.

VI.

Let me now turn to Yaffe's view of impossibility and attempts (129–171). There is impossibility involved in every attempted crime. In the precise circumstances in which the attempt occurred, the crime attempted was impossible to commit. That is why it was only an *attempt*, a failure to commit the crime attempted. The way the gun was aimed, the physical condition of the victim, the fact that the gun jammed or was unloaded, and so on—something prevented the defendant from committing the crime he attempted and

13. *See* ALEXANDER & FERZAN, *supra* note 9, at 206–208; Alexander & Ferzan, *Danger, supra* note 10, at 652–655; Alexander & Ferzan, *Risk and Inchoate Crimes, supra* note 10, at 115–117.

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made the crime impossible to commit in the precise circumstances in which it was attempted.

The current state of the law, as reflected in the *Model Penal Code*, is in line with what I am saying here.[14] The only form of impossibility that defeats a charge of attempt is what is called pure legal impossibility. Pure legal impossibility occurs when there is no criminal law prohibiting what the defendant is attempting to do.[15]

The distinction between pure legal impossibility and factual possibility is frequently illustrated by reference to the iconic hypothetical of Mr. Fact and Mr. Law.[16] Both are hunters who go out deer hunting on October 15, which is the first day of the deer-hunting season. Each, we shall assume, shoots a deer, believing he has broken the law by doing so. Mr. Fact believes he has broken the law because he has misread his calendar and believes it is October 14, the day before hunting season begins. Mr. Law believes he has done so because he has misread the law concerning the hunting season for deer and believes the season begins on October 16 rather than the 15th. The conclusion one is supposed to draw and which the *Model Penal Code* endorses is that Mr. Fact has committed an attempt to violate the hunting season law, but Mr. Law has not. Mr. Fact believed correctly that the hunting season began on the 15th but made a factual mistake regarding the date on which he was hunting. His attempt to hunt out of season was factually but not legally impossible. Mr. Law, on the other hand, made a mistake about what was legally prohibited. He believed, incorrectly, that the law forbade his hunting on October 15. His was a case of pure legal impossibility because the law he was attempting to violate did not exist.

Yaffe, in his chapter on impossibility, discusses two prominent cases involving completed attempts, *Jaffe* and *Dlugash* (129–30).[17] Both were attempts rather than "successes" because of factual impossibility. Jaffe believed he was buying stolen goods when the goods were not in fact stolen. He was convicted of attempted receipt of stolen goods. Had the goods been stolen, he had sufficient mens rea for the crime of receipt of stolen goods. The case is an easy one under the *Model Penal Code*'s approach.

In *Dlugash*, the defendant fired shots into an already dead Geller. If the defendant had believed Geller was alive, then had things been as Dlugash believed them to be, he would have committed murder. Similarly, even if Dlugash believed that Geller *might* be alive and acted with the purpose of killing Geller were he still alive, then had Geller been alive, Dlugash would have committed murder. If Dlugash acted with either of those mental states, then, given that Geller was dead and could not be murdered, Dlugash committed attempted murder.

14. *See* MODEL PENAL CODE AND COMMENTARIES, *supra* note 4, at 315–320.
15. *Id.* at 318.
16. The source of the hypothetical is S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES (3d ed. 1975), at 367.
17. People v. Jaffe, 185 N.Y. 497 (1906); People v. Dlugash, 41 N.Y. 2d 725 (1977).

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Neither *Jaffe* nor *Dlugash* are difficult cases.[18] Neither raises the kind of legal impossibility issue that has proved vexing. To see what such cases are like, let us return to Mr. Fact and Mr. Law, but this time assume the law reads as follows: "It is a crime, punishable by a $500 fine, to hunt any of certain animals out of season. To find out to which animals this applies and the specific hunting seasons for such animals, see the monthly circular published by the Fish and Game Department."

Suppose now that our Mr. Law reads the circular, sees that deer are animals for which there is a season, but because of his astigmatism, misreads the beginning day of the season as October 16 rather than the correct date of October 15. When he kills the deer, his belief that he is violating the hunting law is a mistake of law based upon a factual mistake (that the numeral on the circular is a 6 rather than a 5). But his mistake of law does not mean there is no law that he can be charged with having attempted to violate, for there is such a law—the general law banning hunting out of season.

The curiosity here is that whether Mr. Law can be convicted of an attempt depends upon how the criminal law is drafted–its form rather than its substance. If there is a specific statute setting forth the dates of the hunting season for deer, and its violation results in punishment P, Mr. Law's reading error results in his acquittal on the charge of attempt because the statute he imagined he was violating does not exist. If, however, there is a general "no hunting out of season" law carrying punishment P, Mr. Law can be convicted of attempting to violate *that* law, *even though the two laws appear to be functional equivalents.*

Such examples abound. The famous fictitious smuggler of criminal-law fame, Lady Eldon,[19] smuggles French lace past Customs mistakenly

18. One might disagree with this conclusion with respect to *Dlugash* for the following reason. If Dlugash believed Geller was most likely dead, then he could not have had the intention to kill him. An assassin's taking a shot at his intended victim—whom he wants to kill—a shot that the assassin believes has only a 10 percent chance of killing the victim, is an intentional killing if the shot does kill the victim; however, that is different from the assassin's taking a shot that he believes will be certain to kill a victim if the victim is alive when the assassin believes the victim is only 10 percent likely to be alive. The assassin's estimates of the probabilities of killing are identical in both cases, but only the first is an intentional killing if it succeeds. Therefore, if the shots fail to kill in both cases, only in the first has the assassin *attempted* murder.

I believe this argument is in error. Because the odds of killing (from the assassin's viewpoint) are the same in both cases, and the assassin's reasons for firing the shot are the same in both cases, both cases should come out the same way—intentional homicide if the victim is killed; attempted homicide if he is not, whether because the bullet misses or because he is already dead.

If Dlugash acted not with the purpose of killing Geller but only with the belief that were Geller alive, the shots fired would kill him, then Dlugash is no different from one who fires a shot that he believes might kill someone but who lacks the intent to kill. In the absence of a sufficient justification for imposing the risk, he is reckless in firing whether or not the shot kills, and if it does not, whether because it misses a live victim or penetrates a victim who was already dead.

19. Lady Eldon is the creation of Sanford Kadish. *See* KADISH & PAULSEN, *supra* note 16, at 362–366.

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believing it to be a dutiable item. She therefore believes, incorrectly, that she is guilty of the crime of failing to declare dutiable items. If there are specific statutes for each dutiable item, and thus no statute requiring that French lace be declared, then Lady Eldon cannot be charged with an attempt as there is no specific crime that she can be charged with having attempted to violate. This is true even if the penalties prescribed are the same for smuggling each dutiable item. On the other hand, if there is one master smuggling statute and the dutiable items it covers are on a list published by the Customs Bureau, Lady Eldon can be charged with attempting to violate *that* statute even if it is functionally equivalent to having separate statutes for each dutiable item, each carrying the same penalty.

Or consider the following drafting problem. The legislature proscribes a drug—say, heroin—by reference to its chemical compound: "It is illegal to possess chemical X, Y, Z." Defendant possesses a substance which is chemically A, B, C. He mistakenly believes A, B, C is heroin, which he knows is illegal. Is he guilty of an attempt? Not under the statute as written, for he does not believe he possesses X, Y, Z. If, however, the statute proscribed possession of "heroin," he *would* be guilty of attempting to violate *that* statute. These are two functionally equivalent ways of drafting a ban on heroin, but defendant will be guilty of an attempt under only one of them.

Then there are the so-called "other law" mistakes, mistakes that are not mistakes about the content of the criminal law but mistakes about laws that affect the application of the criminal law. (The examples of the master hunting season law, with monthly circulars issued by the Fish and Game Department, and the master smuggling statute, with monthly lists of dutiable items published by the Customs Bureau, are examples of "other law" mistakes.) Thus, if someone believes he is destroying the property of another, which the criminal law proscribes, but he is not actually doing so because according to the law of property, the property belongs to the defendant rather than to another, defendant can be convicted of an attempt. His mistake is one of property law, not criminal law. Likewise, if "consent" for legal purposes is defined in civil law, and the defendant believes he is having sex, taking another's property, and so on, "without consent" and thus in violation of the criminal law, if he is mistaken about lacking consent because he is mistaken about the legal definition of consent, he has committed an attempt.[20] His mistake is one of "other law" rather than criminal law.

What makes this criminal law/other law distinction perplexing is that it again appears formal rather than substantive. Consent could, after all, be defined in the criminal statutes that turn on its absence. Indeed, it is theoretically possible for the criminal law of theft to spell out in all the detail of property law what does and does not belong to others. There are reasons of economy and learnability to draft the criminal law one way rather

20. *See* Larry Alexander, *Facts, Law, Exculpation, and Inculpation: Comments on Simons*, 3 CRIM. L. & PHIL. 241, 243–245 (2009).

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than another, but it is difficult to see why attempt liability would be affected by what is in the "criminal law" rather than in the "other law" that governs how the criminal law applies.[21]

Yaffe has a brief discussion of Mr. Fact and Mr. Law and of Lady Eldon (167–171). His Lady Eldon, like the original hypothetical but unlike my Lady Eldon, knows what the dutiable items are but makes a factual mistake about the nature of the item that she is smuggling. That is an easy case of factual impossibility. Yaffe's discussion of Mr. Fact and Mr. Law misses what I believe is the real problem with legal impossibility, the problem that I am discussing here (171).

VII.

The final aspect of Yaffe's treatment of criminal attempts that I want to focus on is his discussion of "inherently impossible attempts." Because, as I note above (see pp. 130–31), all attempts are impossible given the precise circumstances existing at the time they are committed, it is difficult to understand what "inherent impossibility" can be such that it applies to only a subset of attempts.

The usual example is that of the defendant charged with attempted murder having been caught sticking pins in his "victim's" effigy. The defendant believed in the power of voodoo, wanted to kill his victim, and believed he had done so when he stuck the pins in the effigy. He satisfied all the elements of attempted murder.

Nonetheless, Yaffe believes the voodoo defendant should be acquitted of the attempt charge. He does not deny that the defendant committed an attempt. Rather, the defendant should be acquitted despite that, or so Yaffe argues. The reason is that although the defendant has really attempted murder, we cannot possess sufficient evidence that he has done so (254).

I confess that I cannot grasp what Yaffe means by this. We can surely acquire evidence sufficient to satisfy proof beyond a reasonable doubt that the defendant (1) really wanted to kill the victim, (2) believed wholeheartedly in the efficacy of voodoo, and thus (3) believed that he had killed the victim by means of voodoo. Because I can see no obstacle in principle to acquiring such evidence, I cannot understand Yaffe's contention that we cannot have sufficient proof of an attempt in such cases.

Many commentators, and the *Model Penal Code* itself,[22] argue against attempt liability in cases like that of voodoo. Their arguments tend to stress the lack of dangerousness of such defendants.[23] Those arguments are unconvincing, however. The voodoo practitioner, aware that his attempt with

21. *See* Larry Alexander, *What's Inside and Outside the Law?,* 31 LAW & PHIL. 213, 219–224 (2012).
22. *See* MODEL PENAL CODE §5.05(2).
23. *See* MODEL PENAL CODE AND COMMENTARIES, *supra* note 4, at 490–491.

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voodoo failed, may turn to guns, knives, poison, or explosives. On the other hand, the defendant who pulled the trigger of a jammed gun may never figure out why his attempt failed and may continue futilely pulling the trigger.

To his credit, Yaffe rejects these bad arguments against attempt liability in the voodoo case (244). Yet he seems to believe that those who argue against attempt liability are on to something, so he looks for a better reason to reach the same conclusion. But in my humble opinion, the "no sufficient evidence" reason is not a better reason, for I cannot make sense of it.

Yaffe's "no sufficient evidence" ground for acquittal goes something like this. The voodoo practitioner has taken an act which he believes is sufficient to kill his victim. He thus satisfies all the elements of attempted murder. However, his belief in voodoo raises doubts about his practical competence. And if we doubt his practical competence, we must doubt that he will take the steps necessary to complete the crime successfully. *And that is true even if the voodoo practitioner, after failing at voodoo, fired a gun and killed his victim* (250). For Yaffe contends that Carole Hargis and her lover, Teri Depew, should not have been convicted of attempted murder when they tried to kill Carole's husband by baking a tarantula in a blackberry pie, even though, after that attempt failed, they later beat him to death (250).

The problems with Yaffe's approach are that mere failure tells us nothing about practical competence, and practical competence tells us nothing about desert. The would-be murderer who believes sugar is poison may or may not be practically competent. Did he put arsenic in a sugar packet and fail to notice when the waiter replaced the sugar packets with new ones? Did he read somewhere that sugar placed in red wine was toxic? Is he any different from the would-be murderer who forgets to load his gun or forgets to clean it? And how are either of them different from the person who believes in voodoo, or from Carole Hargis and Teri Depew, who believe a baked tarantula to be deadly poisonous?

Moreover, why should we care whether the person attempting the crime is "practically competent"? Practical competence seems to bear on what we can expect of these people in the future. But why is that relevant? After all, we are dealing here with *completed* attempts, not incomplete ones. The voodoo practitioner and Hargis and Depew have taken the last steps they believe to be necessary to kill their victims. We are grateful for their incompetence, but no more grateful than we are for a misaimed bullet. What we can expect of them in the future is neither here nor there, for what we should care about is what they have already done. We would not acquit an assassin of attempted murder even if the person whom he was paid to kill and whom he tried unsuccessfully to kill later died of natural causes, making any future assassination of him impossible.

For these reasons, I cannot understand Yaffe's desire to acquit the voodoo practitioner and Hargis and Depew. They are as culpable as ordinary attempted murderers and can be just as dangerous—as David Hargis's death by beating shows.

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