Recommendations for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt

FIRST DRAFT OF REPORT NO. 7 SUBMITTED FOR ADVISORY GROUP REVIEW
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for a new Title 22A of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report No. 7, *Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Attempt*, is July 21, 2017 (over six weeks from the date of issue). Oral comments and written comments received after July 21, 2017 will not be reflected in the Second Draft of Report No. 7. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

§ 22A-301 CRIMINAL ATTEMPT

(a) DEFINITION OF ATTEMPT. A person is guilty of an attempt to commit an offense when that person engages in conduct planned to culminate in that offense:

(1) With the intent to cause any result required by that offense;

(2) With the culpable mental state, if any, applicable to any circumstance required by that offense; and

(3) The person is either:

(A) Dangerously close to committing that offense; or

(B) Would be dangerously close to committing that offense if the situation was as the person perceived it, provided that the person's conduct is reasonably adapted to commission of that offense.

(b) PROOF OF COMPLETED OFFENSE SUFFICIENT BASIS FOR ATTEMPT CONVICTION. A person may be convicted of an attempt to commit an offense based upon proof that the person actually committed the target offense, provided that no person may be convicted of both the target offense and an attempt to commit the target offense arising from the same conduct.

(__) PENALTY. [Reserved].

Commentary

1. § 22A-301(a)—Definition of Attempt

Explanatory Note. Subsection (a) establishes the elements of a criminal attempt under the Revised Criminal Code. It specifies the culpable mental state requirement, §§ 301(a)(1)-(2), and the conduct requirement, § 301(a)(3), governing criminal attempts. This statement of the elements of a criminal attempt is intended to uniformly apply to all criminal attempts arising under the Revised Criminal Code.

The prefatory clause of § 301(a) establishes the foundation of attempt liability: engaging in conduct with plans to commit a criminal offense. This planning requirement communicates the basic tenant that attempting to commit an offense entails, among other things, being committed to engaging in future conduct that, if carried out, would produce the harm prohibited by that offense.[1]

[1] That is, assuming the situation was as the actor perceived it. *See* § 301(a)(3)(B). Note that in the context of a prosecution for a complete attempt—that is, the situation of a person who fails to consummate an offense notwithstanding the fact that he or she carries out the entirety of his or her entire criminal scheme—this planning requirement is established by the fact that the defendant's scheme has actually been carried out.

Practically speaking, this planning requirement is implicit in the other elements of a criminal attempt.[2] Therefore, it should rarely, if ever, be the central focus of an attempt prosecution.[3] Nevertheless, the planning requirement plays an important clarifying role in the Revised Criminal Code: It helps to differentiate an actor's plans to engage in future conduct from the culpable mental state, if any, that actor possesses with respect to the consequences of carrying out those plans.[4] Only the latter issue implicates *mens rea* in the conventional sense—that is, the requisite purpose, knowledge/intent, recklessness, or negligence as to a result or circumstance necessary for a conviction.

Subsections 301(a)(1) & (2) establish the culpable mental state requirement governing criminal attempts under the Revised Criminal Code. These provisions clarify the extent to which the culpable mental states applicable to the results and circumstances of the target offense are impacted when an attempt to commit that offense is charged.

Subsection 301(a)(1) establishes a principle of *mens rea* elevation, under which the accused must have acted with "the intent to cause any result required by the [target] offense."[5] To satisfy this threshold culpable mental state requirement, the government must prove that the accused acted with either a belief that it was practically certain that the person's conduct would cause any results of the target offense, see § 206(b)(3), or, alternatively, that the person consciously desired to cause any results of the target

[2] In the context of a prosecution for an incomplete attempt—that is, the situation of a person who fails to consummate an offense because he or she is frustrated from carrying out the entirety of his or her criminal scheme—consideration of whether the defendant's conduct fulfills the dangerous proximity standard set forth in § 301(a)(3) necessarily requires consideration of the planning requirement. For example, to determine whether a defendant arrested by the police two blocks away from a bank in possession of a mask and firearm was dangerously close to committing a bank robbery entails a consideration of whether the defendant planned to engage in a future course of conduct that, but for the police intervention, would have culminated in a bank robbery. The planning requirement is similarly implicit in evaluating whether a person acted with the requisite intent to cause any results required by the target offense under § 301(a)(1). For example, to determine whether a person arrested by police just prior to pulling a firearm out of his waistband acted with the intent to kill a nearby victim entails a determination that the person planned to retrieve the firearm, aim it at the victim, and pull the trigger.

[3] *See supra* notes 2-3.

[4] Consider, for example, that an actor may be committed to carrying out a course of conduct that, if completed, would cause a prohibited result without being culpable at all—as would be the case where the police stop a demolition operator just in the nick of time from destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the resulting destruction. Conversely, that same demolition operator may know that a person resides in the building, and, therefore, act with the intent to kill, in which case the defendant would likely have committed attempted murder. Similarly consider the prosecution of an actor arrested by police just as he's about to set off an explosive device near an unmarked metropolitan police department building. In this situation, the defendant has likely committed attempted murder: the defendant clearly planned to engage in conduct that, if completed, would result in the death of the building's occupants; and the actor likely either desired to kill or was practically certain that his actions would kill the building's occupants. However, it is a separate question whether the defendant committed attempted murder *of a police officer*; that would depend upon the defendant's culpable mental state as to whether the likely victims were police officers.

[5] Note that § 301(a)(1) only constitutes a principle of *mens rea* elevation as applied to target offenses comprised of results that are subject to culpable mental state requirements less demanding than intent—for example, recklessness, negligence, or strict liability. For those target offenses that already require proof of purpose or knowledge as to any results, § 301(a)(1) does not actually elevate the applicable culpable mental state for an attempt.

offense, see § 206(e).[6] Subsection 301(a)(1) does not preclude the government from charging attempts to commit target offenses comprised of results subject to culpable mental states less demanding than intent—for example, recklessness or negligence. However, to secure an attempt conviction for such offenses, proof that the accused acted with the intent to cause those results is necessary.

Subsection 301(a)(2) states a principle of *mens rea* equivalency for circumstances, under which the accused must have acted "with the culpable mental state, if any, applicable to any circumstance required by the [target] offense." This principle establishes that, in contrast to results, there exists no threshold culpable mental state requirement for circumstances. The circumstances of an attempt are, instead, governed by the same culpable mental state requirement, if any, applicable to the circumstances of the target offense.[7]

Subsection 301(a)(3) establishes the conduct requirement governing criminal attempts under the Revised Criminal Code. It clarifies two issues central to identifying the limits of attempt liability. The first is identifying the point at which a person made enough progress toward completion of a criminal objective such that he or she crossed the line between mere preparation and actual perpetration. The second issue is determining the relevance of the fact that completion of the planned offense was impossible under the circumstances.

Subsection § 301(a)(3)(A) codifies the dangerous proximity standard currently applied by District courts as the general basis for determining when the line between preparation and perpetration has been crossed.[8] Under this standard, a person has attempted to commit an offense when that person is "dangerously close" to committing that offense.[9] This means that a person need not have completed every part of his or her criminal scheme to be held liable for an attempt. However, that person must have

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[6] For any target offense comprised of a result subject to a culpable mental state of purpose, the government is still required to prove purpose as to that result when charged as an attempt. To hold otherwise would have the practical effect of lowering the culpable mental state requirement for an attempt.

[7] When formulating jury instructions for an attempt to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance), the term "intent," as defined in § 206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* Commentary to RCC § 206(b): Explanatory Note.

[8] The standard reflected in § 301(a)(3)(A) covers all attempts that do not involve impossibility. Explicitly, this standard applies to *incomplete attempts*, which involve situations where an attempt fails solely because external events frustrate a person from carrying out all that he or she planned to do. So, for example, *incomplete attempts* include: (1) the attempted robbery prosecution of an actor unexpectedly arrested by police at the entry of a bank before he or she can make a threatening demand; (2) the attempted murder prosecution of a person whose pistol accidentally slips from that person's hand *before* he or she can pull the trigger; and (3) the attempted felony assault prosecution of a person who suffers a debilitating heart attack just as he or she is about to exit a vehicle and repeatedly beat the intended victim. By implication, however, this standard is satisfied by proof of a *complete attempt*, which involve situations where the person has, in some sense, done everything he or she plans, yet the target offense is not consummated by virtue of an accident on behalf of the person. The most common example of a *complete attempt* are attempt prosecutions involving shoot-and-miss scenarios. In this context, no further act is needed beyond firing the shot; the attempt fails only because of the inaccuracy of the shot (i.e., an accident).

[9] So, for example, an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under this standard. *See Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978).

engaged in more than a substantial step towards completion of the target offense. The focus should be placed on closeness to consummation considered in light of "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result."[10]

Subsection 301(a)(3)(B) provides an alternative formulation of the dangerous proximity standard oriented towards dealing with impossible attempts—that is, criminal undertakings that fail (either entirely or in part) because of a defendant's mistaken beliefs concerning the conditions relevant to his or her conduct.[11] This formulation authorizes the fact-finder to evaluate whether the dangerous proximity standard has been met in light of "the situation . . . as the person perceived it."[12] Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation had been accurate. Where the defendant's perspective is relied upon, however, § 301(a)(3)(B) also requires the government to prove that the defendant's conduct was "reasonably adapted to commission of the [target] offense." By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.[13]

Relation to Current District Law. Subsection (a) codifies, clarifies, and fills in gaps reflected in District law on the culpable mental state requirement and the conduct requirement of a criminal attempt.

The D.C. Code provides for attempt liability in a variety of ways. Most prominently, the D.C. Code contains a general attempt penalty provision that applies to a

[10] *Com. v. Kennedy*, 170 Mass. 18, 22 (1897) (Holmes, J.).

[11] There are two types of impossibility attempts covered by § 301(a)(3)(B): *incomplete impossibility attempts* and *complete impossibility attempts*. An *incomplete impossibility attempt* is an attempt that fails both: (1) because external events frustrate a person from carrying out all that he or she planned to do; and (2) due to a mistake on behalf of the person. So, for example, *incomplete impossibility attempts* include: (1) the attempted murder prosecution of a person arrested by the police just as he is about to pull the trigger of a gun he believes to be loaded but is actually empty; and (2) the attempted theft prosecution of a person who, for the purpose of stealing, is stopped by police immediately prior to breaking into a locked safe that he believes may contain money but that actually contain no money at all. A *complete impossibility attempt*, in contrast, is an attempt in which the person has, in some sense, does everything he or she plans, yet the attempt fails solely because of a mistake on behalf of the person. So, for example, *complete impossibility attempts* include: (1) the attempted murder prosecution of a person who shoots to kill a victim person that he or she mistakenly believes to be alive (but who is, in fact, already dead); and (2) the attempted theft prosecution of a person who absconds with property he or she mistakenly believes to be taken without the owner's consent (when the owner has, in fact, actually consented).

[12] This is in contrast to the situation as it actually existed, see § 301(a)(3)(A).

[13] An inherently impossible attempt is one "where any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (Westlaw 2017). An illustrative example is an attempt to kill implemented by means of witchcraft, incantation, or any other superstitious practice.

relatively broad group of offenses.[14] Additionally, the D.C. Code contains a variety of semi-general attempt penalty provisions, which create attempt liability for narrower groups of offenses with related social harms.[15] Finally, some specific offenses in the D.C. Code individually provide for attempt liability by incorporating the term "attempt" as an element of the offense.[16] In no place, however, does the D.C. Code define the term attempt. This statutory silence has effectively delegated to District courts the responsibility to establish the contours of attempt liability.

Over the years, the DCCA has issued numerous opinions and proffered a variety of statements relevant to determining the culpable mental state requirement and the conduct requirement of a criminal attempt under District law. The case law in this area reflects the piecemeal evolution of doctrine over more than a century: it is sometimes ambiguous, occasionally internally inconsistent, and in no place has it been clearly synthesized into a single analytical framework. Nonetheless, a holistic reading of District authority reveals that basic and fundamental principles of liability exist in this area of law. Consistent with the interests of clarity, consistency, and the preservation of District law, § 301(a) translates these principles into a clear and comprehensive statutory framework for addressing the culpable mental state requirement and the conduct requirement of a criminal attempt.

A more detailed analysis of District law and its relationship with § 301(a) is provided below. It is organized according to three main topics: (1) the culpable mental state requirement for an attempt; (2) the definition of an incomplete attempt; and (3) the treatment of impossibility.

Subsections (a)(1) & (2): Relation to Current District Law on Culpable Mental State Requirement. The DCCA has addressed the *mens rea* of an attempt on a handful of occasions. While unclear and, in at least one important sense, contradictory, pertinent case law generally supports two propositions: (1) a principle of *mens rea* elevation applies to the results of the target offense when charged as an attempt; and (2) a principle of *mens rea* equivalency applies to the circumstances of the target offense when charged as an attempt. Subsections 301(a)(1) and (2) of the Revised Criminal Code respectively codify each of these principles.

Most of the DCCA's case law on the *mens rea* of an attempt focuses on whether a principle of *mens rea* elevation applies to the result element of the target offense. On this issue, there exists two different lines of cases: one which points towards a principle of *mens rea* elevation and another in support of a principle of *mens rea* equivalency. This "inconsistency" in District law was recently recognized in, and summarized by, Judge Beckwith's concurring opinion in *Jones v. United States*.[17] Three aspects of

[14] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished . . . .").
[15] *E.g.*, D.C. Code § 22-1837 (setting forth attempt penalties for the human trafficking related offenses); D.C. Code § 22-3018 (setting forth attempt penalties for the sexual offenses).
[16] *E.g.*, D.C. Code § 22-2601 (prison escape); D.C. Code § 22-951(c)(1)(a) (forcible gang participation).
[17] 124 A.3d 127, 132–34 (D.C. 2015); *see also Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016) (discussing *Jones*).

Judge Beckwith's analysis, abstracted in the accompanying footnote, are worth highlighting.[18]

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[18] Judge Beckwith observes, in relevant part:

> In *Sellers v. United States*, 131 A.2d 300 (D.C. 1957), the Municipal Court of Appeals for the District of Columbia defined the elements of attempt as follows: "any overt act done with intent to commit the crime and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime." *Id.* at 301 (quoting 14 Am. Jur., Criminal Law, § 65, p. 813). Thirty years later, in *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987), this court upheld the appellant's conviction for attempted taking property without right after concluding that the record contained sufficient evidence that she intended to steal a dress because of her "apparent dissemblance in folding the blue dress and concealing it inside her sweater, as well as her change of story about what she had done with the dress." *Id.* at 1375. Appellant's specific intent to commit a crime was central to the court's holding, even though the underlying crime required only general intent to commit the act constituting the crime. *See Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975).
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> Then in *Ray v. United States*, 575 A.2d 1196 (D.C. 1990), we stated that "[e]very completed criminal offense necessarily includes an attempt to commit that offense." *Id.* at 1199 (holding that appellant was guilty of the "attempted-battery" type of assault even though the evidence showed a completed battery). In reaching this conclusion, *Ray* did not grapple with *Wormsley's* premise that an attempt requires specific intent. We later applied *Ray* to an attempted threats charge . . . in *Evans v. United States*, 779 A.2d 891 (D.C. 2001), holding that the government could charge attempted threats "even though it could prove the completed offense." *Id.* at 894. In other words, the government needed only to prove general intent to sustain a conviction for attempted threats. *See also Jenkins v. United States*, 902 A.2d 79, 87 (D.C. 2006) (noting that *Evans* analyzed threats as a general intent crime). While the court in *Evans* acknowledged *Wormsley's* holding on attempt, *Wormsley* did not control its analysis. Relying principally on *Ray*, the court explained that "[o]ur decisions have repeatedly held that 'a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'" *Evans*, 779 A.2d at 894 (quoting *Ray*, 575 A.2d at 1199).
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> In *Smith v. United States*, 813 A.2d 216 (D.C. 2002), this court recognized the difficulty of the attempt issue, stating that "[t]o speak of 'specific intent' in the context of a prosecution for attempted anything is, in our view, somewhat misleading." *Id.* at 219. The court reiterated *Wormsley's* premise that "[t]he only intent required to commit the crime of attempt is an intent to commit the offense allegedly attempted." *Id.* (citing *Wormsley*, 526 A.2d at 1375). But the court also stated that "[o]ur decision in *Evans* necessarily means that when an attempt is proven by evidence that the defendant committed the crime alleged to have been attempted, the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime." *Id.* (citing *Evans*, 779 A.2d at 894). The court then held that there was sufficient evidence of attempted second-degree cruelty to children when the appellant "intended to commit the acts which resulted in . . . the grave risk of injury" to the child, even though he did not intend to injure the child. *Id.* at 219–20.
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> Yet while *Evans* continues to feature prominently in our case law, other recent cases have required specific intent for an attempt conviction. For example, in *Brawner v. United States*, 979 A.2d 1191 (D.C. 2009), the court held that for an attempted escape conviction, the government must prove "the mental state of intending to commit the underlying offense," that is, "intent to escape," even though a charge for a completed escape did not involve such intent. *Id.* at 1194. And in *Dauphine v. United States*, 73 A.3d 1029 (D.C. 2013), this court held that animal cruelty is a general intent crime but nonetheless stated that "where the government charges an individual with attempt, as it did here, the government must demonstrate that the defendant possessed the intent to commit the offense allegedly attempted." *Id.* at 1033 (citation and internal quotation

First, although the discussion in Judge Beckwith's concurring opinion is framed around whether an attempt requires proof of "a specific intent to commit the unlawful act,"[19] the primary import of the relevant case law she discusses relates to whether the culpable mental state governing the result element of the target offense must be elevated to one of "intent" when charged as an attempt. So, for example, while proof of recklessness as to the alternative result elements of second-degree child cruelty[20]—actually harming a child or creating a grave risk of harm to a child—will suffice to satisfy the completed offense, must the government prove an intent to cause such harm or, at the very least, an intent to create a risk of such harm in order to secure a conviction for attempted second-degree child cruelty?[21]

Second, although DCCA case law points in different directions on this issue, the reading that best synthesizes the relevant authorities is that a principle of *mens rea* elevation applies to attempts, but that this principle is subject to an exception when the government proceeds on a theory that the offense attempted was actually completed. In support of this reading is the fact that the reported opinions that involve traditional attempt prosecutions (i.e., decisions implicating conduct that falls short of completion)—what Judge Beckwith refers to as the *Wormsley-Brawner-Dauphine* line of cases—seem to favor a principle of *mens rea* elevation, while the conflicting reported opinions—what Judge Beckwith describes as the *Smith-Evans* line of cases—involve attempt prosecutions premised upon proof that the target offense was actually completed.[22]

In the latter context, it is not surprising that the DCCA has held that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime."[23] "To hold otherwise," after all, "would create the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime."[24]

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marks omitted). We held that the record contained sufficient evidence that the "appellant acted with intent to commit the crime of cruelty to animals," and we affirmed her conviction. *Id.*

The *Wormsley-Brawner-Dauphine* line of cases requiring the government to prove specific intent to commit the crime intended appears to be in direct tension with the *Evans-Smith* line of cases that does not require such proof . . .

124 A.3d at 133–34.

[19] *Jones*, 124 A.3d at 132-33 (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

[20] *See* D.C. Code § 22-1101(b)(1) ("A person commits the crime of cruelty to children in the second degree if that person intentionally, knowingly, or recklessly . . . Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child . . . .").

[21] *See generally Smith v. United States*, 813 A.2d 216 (D.C. 2002).

[22] *Compare Jones*, 124 A.3d at 134 n.4 ("As the elements of a crime are determined by what offense the government charges, not by what evidence it presents at trial, *Evans* and *Smith* cannot be distinguished from *Wormsley*, *Brawner*, and *Dauphine* on the ground that the government proved a completed offense in the former cases and an attempted offense in the latter."), *with* D.C. SUPER. CT. R. CRIM. P. 31(c) ("A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right."). For further discussion of the relevant issues, see *infra* Commentary on RCC § 301(b).

[23] *Smith*, 813 A.2d at 219.

[24] *Id.*; *see, e.g.*, *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Jones*, 124 A.3d at 129-31.

What the *Smith-Evans* line of cases does not discuss, however, are the consequences of this position—separate and apart from ensuring that "a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'"[25]

For example, if the culpable mental state governing the result element of an attempt is identical to that of the target offense, then it means that the government may charge, and a defendant may be convicted of, reckless or negligent attempts—such as, for example, attempted depraved heart murder, attempted involuntary manslaughter, or attempted vehicular homicide. (Indeed, under the *Smith-Evans* view, wherein the government need only prove that the defendant "intended to commit the acts" that would constitute the offense, even strict liability attempts would seem to provide a viable basis for liability.[26]) However, one does not see such theories of liability, which would entail proof that the defendant recklessly or negligently attempted to kill, being raised by the government or accepted by District courts—indeed, the *Jones* court itself appears to tacitly disclaim offenses such as "attempted involuntary manslaughter or attempted negligence."[27]

Perhaps this explains why, in those cases that involve traditional attempt prosecutions, one sees the DCCA articulating a principle of *mens rea* elevation. Illustrative is *Brawner v. United States*.[28]

At issue in *Brawner* was the *mens rea* governing the result of *attempted* prison escape, the departure from physical confinement. This issue was central to the case "[b]ecause appellant was apprehended within the jail, as opposed to outside the facility," thereby requiring "the government [to proceed] on an attempted escape theory."[29] At trial, "[t]he defense's theory of the case was that appellant lacked the intent to escape and so could not be convicted of attempted escape."[30] On appeal, the defendant

[25] *Evans*, 779 A.2d at 894 (quoting *Ray*, 575 A.2d at 1199).

[26] *Smith*, 813 A.2d at 219. As discussed in the Commentary on RCC § 205(a), an intent to engage in conduct is synonymous with voluntarily having engaged in an act or omission. Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994) [hereinafter, Robinson, *Functional Analysis*]. However, requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability. *See, e.g., Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J., concurring) (noting that the "intent to act" interpretation of simple assault, if taken literally, would allow "the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability"). Consider, for example, how the intent-to-act interpretation suggested in *Smith* would play out in the context of an attempted aggravated assault prosecution premised on the following facts. Imagine that D's plan is to fire a paintball gun into what appears to be an abandoned building to impress his friends. Although D *reasonably believes* the building to be unoccupied, it is actually occupied by a family. If D fires the paintball gun into the building and causes serious bodily injury to someone inside, he couldn't be convicted of aggravated assault, D.C. Code § 22-404.01, since he does not *consciously disregard* an extreme risk of death or serious bodily injury, see *Perry v. United States*, 36 A.3d 799, 816 (D.C. 2011). Nevertheless, the intent-to-act interpretation suggested in *Smith* would appear to indicate that a conviction for *attempted aggravated assault* would be appropriate in this situation—after all, D surely "intended to engage in the acts that caused the serious bodily injury."

[27] *See Jones*, 124 A.3d at 130 (apparently agreeing with the defendant that "[i]t makes no sense to speak of attempted involuntary manslaughter or attempted negligence," but noting that "[t]his maxim is irrelevant here because the misdemeanor offense of threats *does* require intent to act—intent to utter statements that constitute a threat").

[28] 979 A.2d 1191 (D.C. 2009).

[29] *Id.* at 1193.

[30] *Id.*

"argue[d] that the trial court's failure to instruct the jury that the government was required to prove [t]his intent to leave the jail warrant[ed] reversal."[31]

In adjudicating this claim, the *Brawner* Court determined that the *mens rea* of attempted prison escape was "distinguishable" from that of the completed offense. "[A]ttempted escape, like other inchoate offenses, requires the mental state of intending to commit the underlying offense."[32] Therefore, the DCCA concluded, "in a trial for attempted escape . . . the government must prove what the defendant was attempting to do, and, therefore, must prove intent to escape."[33]

The third, and final, point is that the precise contours of the principle of *mens rea* supported by the *Wormsley-Brawner-Dauphine* line of cases is unclear in an important sense—namely, what does "intent" mean? For example, "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of belief that one's conduct is practically certain to cause a result.[34] That being said, intent is also sometimes used as a synonym for purpose, in which context proof of a practically certain belief *would not* provide an adequate basis for liability.[35]

Although the DCCA's understanding of intent (frequently referred to as "specific intent") is generally ambiguous,[36] the interpretation most consistent with the case law—as well as the policy concerns and nationwide legal trends relevant to the *mens rea* of attempts, discussed *infra*—is the traditional understanding, namely, that "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts."[37]

The DCCA's robust but conflicting body of case law on the culpable mental state requirement applicable to the results of an attempt stands in contrast with the small, but essentially uniform, body of District authority on circumstances. In this context, the relevant authorities indicate that a principle of *mens rea* equivalency applies to the circumstances of a criminal attempt.

For example, the DCCA's recent decision in *Hailstock v. United States* clarifies that the culpable mental state requirement governing the circumstance of attempted misdemeanor sexual abuse (MSA), absence of permission, is no different than that applicable to the completed version of the offense—both can be satisfied by proof of something akin to negligence[38]

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[31] *Id.* at 1192.
[32] *Id.* at 1194.
[33] *Id.*
[34] *United States v. U.S. Gypsum Co*., 438 U.S. 422, 445 (1978); *see Tison v. Arizona*, 481 U.S. 137, 150 (1987).
[35] *See* LAFAVE, *supra* note 13, at 1 SUBST. CRIM. L. § 5.2.
[36] *See, e.g.*, *Wormsley*, 526 A.2d at 1375; *Brawner*, 979 A.2d at 1194 (discussing *United States v. Bailey*, 444 U.S. 394, 405 (1980) and Model Penal Code § 2.02, cmt. at 125); *Wilson-Bey v. United States*, 903 A.2d 818, 833-34 (D.C. 2006) (*en banc*); *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984); *Perry v. United States*, 36 A.3d 799, 816-17 (D.C. 2011).
[37] *Tison*, 481 U.S. at 150.
[38] *Hailstock v. United States*, 85 A.3d 1277, 1282 (D.C. 2014). That is, both MSA and attempted MSA can be satisfied by proof that the defendant "knew or should have known that he did not have the complainant's permission to engage in the sexual act or sexual contact." *Id.*

Likewise, the DCCA's recent decision in *Fatumabahirtu v. United States* suggests the same is true with respect to the circumstance of illegal use under the District's sale of drug paraphernalia (SDP) offense—whether charged as an attempt or as a completed offense, the relevant circumstance can be satisfied by proof of something akin to negligence regarding the relevant circumstance.[39]

The District's statutory scheme applicable to child sex abuse offenses similarly support the conclusion that circumstances are not subject to a rule of *mens rea* elevation.[40] For example, whether prosecuted as an attempt or as a completed offense, "mistake of age" is not a defense to sex crimes involving children.[41] In practical effect, this means that the circumstance of age remains a matter of strict liability even when an attempt to commit a child sex abuse offense is charged.[42]

Consistent with the foregoing analysis of District law, § 301(a)(1) codifies a general principle of *mens rea* elevation, rooted in the *Wormsley-Brawner-Dauphine* line of cases, applicable to results. (The primary concern addressed by the *Evans-Smith* line of cases—avoiding "the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime"[43]—is explicitly addressed by § 301(b), discussed *infra.*) At the same time, however, § 301(a)(1) also fills in a key ambiguity left unresolved by the *Wormsley-Brawner-Dauphine* line of cases—what level of elevation is required for results. This provision establishes that acting "with the intent" to cause any results, as defined in § 206(b)(3), will suffice. Finally, with respect to circumstances, § 301(a)(2) codifies the general principle of *mens rea* equivalency reflected in pertinent District authorities.

Subsection (a)(3): Relation to Current District Law on Incomplete Attempts. It is well-established under District law that a person who plans to commit an offense must do more than "mere[ly] prepar[e]" to commit an offense; further progress toward a criminal objective is required to prove an attempt.[44] It is also clear, moreover, that once a person has carried out her criminal plans and all that remains to be seen is whether her efforts were successful (i.e., engaged in a complete attempt), liability may attach.[45] Less clear, however, is the point at which the line between mere preparation and actual perpetration has been crossed, such that police intervention prior to completion may lead to an attempt charge. On this issue of an incomplete attempt, the DCCA has, over the years, articulated a variety of standards. However, viewed as a whole and in relevant

[39] *Fatumabahirtu v. United States*, 26 A.3d 322, 336 (D.C. 2011). That is, both SDP and attempted SDP can be satisfied by proof that the defendant "knew or reasonably should have known that the buyer would use these items to inject, ingest, or inhale a controlled substance." *Id.*

[40] D.C. Code §§ 22-3008 to 22-3010.01.

[41] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.");

[42] *See In re E.F.*, 740 A.2d 547, 550 (D.C. 1999) ("Nothing in the present statutory scheme implies that the Council of the District of Columbia, in revising the definition of sexual crimes against children, meant to impose a knowledge requirement not theretofore in existence.").

[43] *Smith*, 813 A.2d at 219.

[44] *See, e.g., Johnson v. United States*, 756 A.2d 458, 463 n.3 (D.C. 2000); *Dauphine v. United States*, 73 A.3d 1029, 1033 (D.C. 2013).

[45] *See, e.g., Washington v. United States*, 965 A.2d 35, 43 n.24 (D.C. 2009); *Riley v. United States*, 647 A.2d 1165, 1172 (D.C. 1994).

context, DCCA case law indicates that the dangerous proximity standard reflects current District law. Subsection 301(a)(2) incorporates that standard into the Revised Criminal Code.

The earliest incomplete attempt standard endorsed by a local District court is the so-called probable desistance test. Originally adopted in the Municipal Court of Appeals for the District of Columbia's decision in *Sellers v. United States*, this test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime."[46]

Although the *Sellers* decision predates the creation of the DCCA, the probable desistance standard enunciated has been referenced by the DCCA on multiple occasions.[47] At the same time, the DCCA has also "often noted [that the probable desistance] formulation . . . is imperfect."[48] The DCCA's critique of this standard is understandable when viewed in relevant context: not only does the probable desistance test improperly suggest that "failure is . . . an essential element of criminal attempt,"[49] but, as a variety of legal authorities have observed, there simply "exists no basis for making . . . judgments [of] when desistance is no longer probable or when the normal citizen would stop."[50] In practice, then, the closeness of the actor's conduct to completion is ultimately the only foundation for making the threshold determination of the likelihood of desistance.[51]

Proximity of this nature is, in turn, more explicitly addressed by the second incomplete attempt standard reflected in District authorities, the dangerous proximity test. Originally adopted by the DCCA in *Jones v. United States*, this standard requires proof of an "act [that goes] beyond mere preparation and [which carries] the criminal venture forward to within dangerous proximity of the criminal end sought to be attained."[52]

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[46] *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957) (emphasis added). At issue in *Sellers* was whether the defendant had committed an attempt to arrange prostitution services on the following facts: (1) the defendant had "originated [a] proposition" to two MPD officers; (2) "specified the price per girl and the amount of [the defendant's] commission": and (3) "secured an acceptance" on that commission. *Id.* The *Sellers* court further noted, in setting forth the probable desistance standard, that whether "preparation . . . progress[es] to the point of attempt . . . is a question of degree which can only be resolved on the basis of the facts in each individual case." *Id.* at 301.

[47] *See, e.g.*, *Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers*, 131 A.2d at 301).

[48] *In re Doe*, 855 A.2d 1100, 1107 n.11 (D.C. 2004). This may explain the fact that the standard is omitted from the District's jury instructions on criminal attempts. *See* D.C. Crim. Jur. Instr. § 7.101.

[49] *In re Doe*, 855 A.2d at 1107 n.11 (citing *Evans*, 779 A.2d at 894).

[50] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.4 (collecting authorities).

[51] *See id.* As the drafters of the Model Penal Code observe: "[I]n actual operation the probable desistance test is linked entirely to the nearness of the actor's conduct to completion, this being the sole basis of unsubstantiated judicial appraisals of the probabilities of desistance. The test as applied appears to be little more than the physical proximity approach." Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 589 (1961).

[52] *Jones*, 386 A.2d at 312 (quoting D.C. Crim. Jur. Instr. § 4.04 (2d ed. 1978)). At issue in *Jones* was whether to uphold an attempted robbery conviction against multiple defendants that had planned a bank robbery, but were stopped by police prior to execution of their plan. The defendants in the case "had made careful plans as to the role of each in the robbery, including the nature of each of their disguises, and had conducted a dry run on the preceding day." *Id* Thereafter, they "launched their plans [at the appointed time], going their respective ways toward the location of the bank in three cars[,] . . . armed

Since *Jones*, the dangerous proximity test seems to have become the most authoritative standard reflected in District law. For example, this standard is routinely relied upon by the DCCA.[53] And it is also central to the District's jury instructions on criminal attempts, which, apart from the general statement that the accused "must have done more than prepare to commit" the target offense, makes the dangerous proximity standard the District's sole approach to dealing with incomplete attempts.[54]

Jury instructions aside, however, there is one additional conduct requirement that is occasionally referenced in District case law, the substantial step test. Originally developed by the drafters of the Model Penal Code to expand attempt liability beyond that provided for under the proximity-based standards, this test would allow for an attempt conviction to rest upon proof of a "substantial step in a course of conduct planned to culminate in his commission of the crime."[55]

The earliest reference to the substantial step test was made in the 2004 case of *In Re Doe*, where the DCCA observed by way of dicta in a footnote that "the day may come when we reexamine and, perhaps, reformulate, the way we speak of the kind of 'act' that is required for a criminal attempt," in adherence to "the formulation favored by the Model Penal Code and adopted in a number of jurisdictions . . . ."[56] Thereafter, a decade later, the DCCA specifically referenced the substantial step test in the course of formulating the standard governing an incomplete attempt in a pair of 2014 decisions, *Hailstock v. United States*[57] and *Mobley v. United States*.[58] However, neither of these references appears to have changed District law's reliance on the dangerous proximity test.

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with shotguns and other weapons as they entered a busy downtown area in the middle of a business day, and had disguised themselves as construction workers." *Id.* at 312-13. At the point in which the defendants were apprehended, one defendant was "approaching the target bank and was but a block away when the police intervened," while another "was proceeding toward the bank according to plan and was no further than four blocks away, turning back only when he heard police sirens and concluded that something had gone wrong." *Id.* at 313. Applying the dangerous proximity test, the DCCA determined that an attempt had occurred. *See id*. The *Jones* court further clarified that this test "does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended." *Id.* at 312.

[53] *See, e.g., Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005); *Nkop v. United States*, 945 A.2d 617, 620 (D.C. 2008); *Johnson*, 756 A.2d at 463 n.3; *Euceda v. United States*, 66 A.3d 994, 1000 (D.C. 2013); *Fortune v. United States*, 59 A.3d 949, 960 (D.C. 2013); *Gee v. United States*, 54 A.3d 1249, 1271 (D.C. 2012).

[54] As § 7.101 of the District's criminal jury instructions reads:

> The elements of the crime of attempted [specify crime], each of which the government must prove beyond a reasonable doubt, are that . . . . [Name of defendant] did an act reasonably adapted to accomplishing the crime of [specify crime]. [Name of defendant] must have done more than prepare to commit [specify crime]. **His/her act must have come dangerously close to committing the crime.** [You may convict the defendant of an attempt to commit a crime even if the evidence shows the crime was completed.]

For discussion of the requirement of reasonable adaptation, see *infra*, notes 80-87 and accompanying text.

[55] Model Penal Code § 5.01(1)(c). For further discussion of the substantial step test, see *infra* notes 155-63 and accompanying text.

[56] 855 A.2d at 1107 n.11.

[57] *Hailstock v. United States*, 85 A.3d 1277, 1283 (D.C. 2014).

[58] *Mobley v. United States*, 101 A.3d 406, 425 (D.C. 2014).

Perhaps most notable is the fact that both of these decisions reference the substantial step test in the context of *defining the dangerous proximity test*. For example, in *Hailstock*, the DCCA explained that:

> [t]he test of dangerous proximity of completing a crime is met where, except for some interference, a defendant's overt acts would have resulted in commission of the completed crime . . . or where the defendant has taken a substantial step toward commission of the crime[.][59]

Thereafter, the DCCA in *Mobley* articulated precisely the same standard quoting from *Hailstock*.[60]

The intended meaning of the hybrid formulation announced in *Hailstock* and *Mobley*—which appears to be a novelty both inside and outside of the District—is far from clear. Traditionally, for example, the dangerous proximity test and substantial step test are understood to constitute distinct and competing approaches to resolving the same issue.[61]

At minimum, it is unlikely that either decision intended to supplant the dangerous proximity test with the substantial step test. It is well established under District law, for example, that the DCCA does not "give opinions upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it."[62] Yet the relevant conduct in both *Hailstock*[63] and *Mobley*[64] appears to easily satisfy the traditional understanding of the dangerous proximity test reflected in prior case law. Therefore, neither decision seems appropriately situated to supplant that test with a broader standard.

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[59] *Hailstock*, 85 A.3d at 1282-83.
[60] *Mobley*, 101 A.3d at 424-25.
[61] *See, e.g.*, Model Penal Code § 5.01 cmt. at 329; PETER W. LOW, CRIMINAL LAW 459 (3d ed. 2009).
[62] *In re D.T.*, 977 A.2d 346, 352 (D.C. 2009) (quoting *Alpert v. Wolf*, 73 A.2d 525, 528 (D.C. 1950)).
[63] At issue in *Hailstock* was, *inter alia*, whether the evidence supported a finding of attempted sexual contact in a situation where "[a]ppellant entered the bedroom where [the victim] was resting and got onto the bed with her," and, "[e]ven after [the victim] said 'no' to appellant's expressed intent to 'get down' with her and even after she pushed him away, appellant continued in his efforts, pulling on her robe and touching her breast in the process." 85 A.3d at 1283. On these facts, the defendant came dangerously close to "engag[ing] in a sexual act or sexual contact" with the victim under circumstances in which the defendant "should have [had] knowledge or reason to know that the act was committed without [the victim's] permission," D.C. Code § 22-3006. *See Hailstock*, 85 A.3d at 1283 ("The evidence in this case satisfied these tests.").
[64] At issue is *Mobley* was, *inter alia*, whether the evidence supported a finding of attempted tampering in a situation where appellant, after speaking with a co-defendant spoke over the phone about the specific location of a gun that had been used in the commission of multiple crimes and was thereafter tossed away in the vicinity of a housing complex, went to the spot and expended significant effort searching for the gun with the intent of disposing of it. 101 A.3d at 424-25. On these facts, the defendant was dangerously close to "alter[ing], destroy[ing], mutilat[ing], conceal[ing], or remov[ing]" the gun "with intent to impair its integrity or its availability for use in the official proceeding," D.C. Code § 22-723—assuming, at least, the situation was as the person perceived it, see *Mobley*, 101 A.3d at 425 ("[R]easonable jurors could infer that except for Mr. Bartlett finding a gun, Mr. Thompkins's act of searching for it in the spot where it was thrown would have been successful.")

Finally, any inference that the foregoing references to the substantial step test were intended to change District law is belied by more recent decisions, which clearly endorse the standard articulation of dangerous proximity test—without reference to the substantial step test—as reflecting current District law.[65]

Consistent with the foregoing analysis of District authorities, the dangerous proximity test appears to most accurately reflect current District law. It is directly codified by § 301(a)(3)(A).

Subsection (a)(3)(B): Relation to Current District Law on Impossibility. Under District law, two basic propositions concerning the limits of attempt liability seem clear. First, impossibility is generally not a defense to an attempt charge—i.e., the fact that a criminal undertaking fails because of a defendant's mistaken beliefs concerning the situation in which he or she acts is generally irrelevant for purposes of attempt liability. Second, and perhaps in potential conflict, is a requirement that a person's conduct must be reasonably adapted to commission of the target offense in order to support attempt liability. Subsections 301(a)(3)(B) codifies both of these principles in a manner that clarifies their interrelationship.

The most significant decision on impossibility is the DCCA's opinion in the 2004 case of *In re Doe*, where the court rejected the applicability of an impossibility defense to the offense of attempted enticement of a child through an exceptionally circuitous route.[66] Procedural issues aside, at the heart of the case is the defendant's

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[65] For example, the DCCA in *Corbin v. United States* recently explained that the court has "adopted the 'dangerous proximity' theory of attempt," summarizing the current state of District law as follows:

> An attempt consists of an act which is done with the intent to commit a particular crime and is reasonably adapted to the accomplishment of that end. The act must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained. This "dangerous proximity" test, formulated by Justice Holmes, does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended. *Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978) (footnote omitted). "[M]ere preparation is not an attempt, but preparation may progress to the point of attempt. Whether it has is a question of degree which can only be resolved on the basis of the facts in each individual case." *Id.* at 313 n.2. It is sufficient for the government to prove that "except for some interference," defendant's "overt act done with the intent to commit a crime . . . would have resulted in the commission of the crime." *Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001).

120 A.3d 588, 602 n.20 (D.C. 2015).

[66] 855 A.2d 1100, 1101 (D.C. 2004). At issue in *In re Doe* was whether the trial court's determination that the accused had to register as a sex offender under the District of Columbia's Sex Offender Registration Act of 1999 ("SORA") was appropriate. *Id.* at 1106. This determination, in turn, was based upon the court's assessment that the accused's earlier conviction in federal court for violating 18 U.S.C. § 2423(b) by traveling in interstate commerce for the purpose of engaging in a sexual act with a person under eighteen years of age "involved conduct that would constitute" or was "substantially similar" to District offense that would require registration under SORA. *Id.* at 1102; *see* D.C. Code § 22-4001(6) & (8). Notably, however, the accused's prior federal conviction arose from a sting operation: he sought to rendezvous with an undercover officer posing as a fourteen-year-old girl. *In re Doe*, 855 A.2d at 1102. Notwithstanding this wrinkle, CSOSA and the Superior Court nevertheless determined that the federal offense involved conduct that was "substantially similar" to the conduct described by, *inter alia*, the

argument that it is "legally impossible" to commit attempted enticement of a child under District law where the intended victim is (unbeknownst to the perpetrator) not a child.[67]

In resolving the appellant's claim, the *In re Doe* court was careful to distinguish, at the outset, between "factual impossibility," which arises where "the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant," and "legal impossibility," which "arises only when the defendant's objective is to do something that is not a crime."[68] Whereas the former claim is "not a defense" to an attempt charge, the latter claim "remains a defense to an attempt offense."[69] (It is important to point out, however, that this narrow construal of legal impossibility does little more than protect defendants from being convicted of attempts to commit imaginary crimes.[70])

Consistent with the foregoing classification scheme, the *In re Doe* court noted that the defendant's argument raised an issue of factual impossibility (albeit one with a legal dimension): where the actor intends to commit enticement of a child, but commission of the offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance (here, the age of the victim), should that mistake provide grounds for exoneration?

The DCCA answered this question in the negative, stating that—consistent with the general rule governing factual impossibility—the court had "no reason to think that it would be a defense in the District of Columbia to a charge of attempted enticement of a child that the defendant was fooled because his target was in reality an undercover law enforcement officer."[71] After all, as the *In re Doe* court reasoned, "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same."[72]

The broad rejection of an impossibility defense reflected in *In re Doe* is similarly in accordance with older DCCA case law construing drug statutes. For example, in *Seeney v. United States*, the DCCA clarified that "the defense of impossibility is not available to one charged with the crime of attempted [narcotics offenses] under the District of Columbia Code."[73] Which is to say, as the DCCA further clarified in *Fields v. United States*, that proof of "the defendant's belief that he was dealing in controlled

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registration offense of attempted enticement of a child in violation of D.C. Code § 22-3010 and D.C. Code § 22-3018. *Id.* at 1104. Under that District offense, a person attempts to entice a "child"—defined as "a person who has not yet attained the age of 16 years," D.C. Code § 22-3001(3)—when that person, "being at least 4 years older than a child, [attempts to] take[] that child to any place, or entices, allures, or persuade[] a child to go to any place for the purpose of committing" an act of sexual abuse, D.C. Code § 22-3010.

[67] *In re Doe*, 855 A.2d at 1106.

[68] *Id.* (citing *German v. United States*, 525 A.2d 596, 606 n.20 (D.C. 1987) and LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5).

[69] *In re Doe*, 855 A.2d at 1106. These principles are also recognized in the commentary to § 7.101 of the District's criminal jury instructions, which observes that "factual impossibility, where the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant, is not a defense" under District law, while "legal impossibility"—that is, "where a defendant's objective 'is to do something that is not a crime'"—is the only form of impossibility that may constitute an offense under District law.

[70] *See infra* notes 78-87 and accompanying text.

[71] *In re Doe*, 855 A.2d at 1106.

[72] *Id.*

[73] 563 A.2d 1081, 1083 (D.C. 1989).

substances," rather than proof that the substances implicated are in fact controlled substances, will suffice to establish an attempt conviction in this context.[74]

Also consistent with a broad rejection of an impossibility defense under District law are two District statutes, trafficking in stolen property (TSP) and receiving stolen property (RSP), which seem to legislatively endorse a similar approach to that reflected in the foregoing cases.[75] More specifically, under each statute, convictions for the completed offenses of TSP and RSP may rest on a mistaken belief that property at issue was stolen, even if it wasn't stolen (as is the case in sting operations), and, therefore, consummation of the target harm was practically impossible. This is articulated, *inter alia*, through identical provisions clarifying that for each offense "[i]t shall not be a defense . . . [that] the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be."[76]

It's important to note that while the foregoing authorities indicate that District law reflects what the DCCA has deemed "[t]he modern and better rule . . . [that] impossibility is not a defense when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law,"[77] there is one aspect of District law that potentially complicates the foregoing analysis. This is the well-established requirement of reasonable adaptation.

Originally articulated by the DCCA in *Jones v. United States* alongside the court's endorsement of the dangerous proximity test, this requirement entails proof that the defendant's conduct have been "reasonably adapted to the accomplishment of [the target offense]."[78] Since *Jones*, this "reasonably adapted" language has been recited in many DCCA attempt opinions.[79] And it is also a central part of the District's jury instructions on attempts.[80]

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[74] 952 A.2d 859, 865 (D.C. 2008).

[75] *See* D.C. Code § 22-3231(b) ("A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen"); D.C. Code § 22-3232(a) ("A person commits the offense of receiving stolen property if that person buys, receives, possesses, or obtains control of stolen property, knowing or having reason to believe that the property was stolen.").

[76] D.C. Code § 22-3231(c); D.C. Code § 22-3232(b); *see also German*, 525 A.2d at 607 (noting that, with respect to RSP, the "same acts could be punished under [the District's general] attempt statute" even without the foregoing subjective specification reflected in D.C. Code § 22-3232(b), on the grounds that impossibility is not a defense to an attempt charge).

[77] *In re Doe*, 855 A.2d at 1106 (quoting LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5).

[78] More specifically, the DCCA in *Jones v. United States* endorsed the formulation provided in "Criminal Jury Instructions for the District of Columbia, No. 4.04 (2d ed. 1972)" which read:

> An attempt consists of an act which is done with the intent to commit a particular crime and is reasonably adapted to the accomplishment of that end. The act must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained.

386 A.2d 308, 312 (D.C. 1978).

[79] *See, e.g., Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Robinson*, 608 A.2d at 116; *Johnson*, 756 A.2d at 464; *Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996); *Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *Doreus v. United States*, 964 A.2d 154, 158 (D.C. 2009); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015)

[80] As § 7.101 of the District's criminal jury instructions reads:

Notwithstanding its pervasiveness, however, neither any published DCCA opinion nor the commentary to the District's criminal jury instructions appears to explain the significance of the requirement. Instead, all that District authority reveals is that: (1) the reasonable adaptation requirement seems to be part of the conduct requirement of an attempt; and (2) that it is most important where impossibility—such as, for example, attempted drug prosecutions premised upon the defendant's belief that the object possessed was a controlled substance—is at issue.[81]

Both of the foregoing general propositions are consistent with common law authorities, which more clearly describe the requirement as a limitation on the general rejection of a factual impossibility defense to an attempt charge. As one commentator summarizes the common law approach: where "the means employed are not reasonably adapted to carry out" the actor's intent to commit a crime, an attempt conviction is not justified "for in such case there can be no damage or danger of damage."[82] This means, for example, that if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result."[83] Nor, according to the same reasoning, can "[s]triking a man with a small switch [] constitute an attempt to murder him."[84]

To be sure, there's no DCCA case law specifically addressing these kinds of issues. However, this is not surprising since attempt prosecutions premised upon

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> The elements of the crime of attempted [specify crime], each of which the government must prove beyond a reasonable doubt, are that . . . . [**Name of defendant] did an act reasonably adapted to accomplishing the crime of [specify crime].**

[81] For example, in *Seeney v. United States*, the DCCA determined that the "defense of impossibility is not available to one charged with the crime of attempted possession with intent to distribute controlled substances under the District of Columbia Code." 563 A.2d at 1083. Which in turn led the court to hold the following:

> With respect to the offense of *attempted* possession with intent to distribute . . . it is not necessary to establish that the substance a defendant attempted to possess was the proscribed substance. The government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime of possession of the proscribed substance, and the requisite criminal intent.

Id. Thereafter, in *Thompson v. United States* the DCCA held that:

> [The foregoing] rule, applied in *Seeney* to attempted PWID, is equally applicable to a case involving attempted distribution . . . In an attempt case involving a purported illegal drug, what *Seeney* teaches is that the government is not required to prove the identity of the substance in question, but rather conduct by the defendant that is reasonably adapted to the accomplishment of the crime of [distribution] and the requisite criminal intent . . . This is no different from what must be proved in any case in which the defendant is charged with an attempt to commit a crime: an intent to commit the crime and the performance of some act toward its commission.

678 A.2d at 27.

[82] Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954).

[83] *Id.* at 470 (collecting citations).

[84] *Id.*

"inherently impossible" attempts of this nature "seldom confront the courts."[85] Nevertheless, the DCCA has affirmatively upheld attempt convictions in impossibility cases based upon the premise that the defendant's conduct *was* reasonably adapted to commission of an offense.[86] The implication, then, is that where a defendant's conduct is *not* reasonably adapted to commission of an offense—as would be the case with attempted murder by means of witchcraft—attempt liability could not attach.[87]

Subsection (a)(3)(B) codifies the foregoing District authorities in a manner that better clarifies the interrelationship of the relevant principles. Most importantly, § (a)(3)(B) incorporates what the DCCA has deemed "[t]he modern and better" approach to impossibility, namely, to recognize that "impossibility is not a defense [to a charge of criminal attempt] when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law."[88] It does so, however, in an accessible and simple manner: rather than relying on confusing classification-based distinctions between legal and factual impossibility, the critical issue is whether the person's conduct satisfied the dangerous proximity standard when the situation is viewed as the actor perceived it.

Subsection (a)(3)(B) also places an important, if narrow, limitation on the foregoing general rejection of impossibility: the person's conduct must, at minimum, be "reasonably adapted to commission of the offense." The latter proviso clarifies the role that the frequently articulated, yet seldom explained, requirement of reasonable adaptation plays in the context attempt liability. Consistent with its common law underpinnings (and relevant DCCA case law), this language demands that there exist some minimum correspondence between the accused's criminal plans and the objective sought to be achieved in the context of impossibility attempts. Where, in contrast, this correspondence is lacking—such as where the defendant has engaged in an inherently impossible attempt—liability cannot attach.

Relation to National Legal Trends. Subsection 301(a) is in part consistent with, and in part departs from, national legal trends.

As a matter of substantive policy, the principles of *mens rea* elevation (for results) and equivalency (for circumstances) governing the culpable mental state requirement of an attempt, as well as the broad rejection of impossibility claims, incorporated into the Revised Criminal Code generally reflect majority legal trends. In contrast, the dangerous proximity test incorporated into the Revised Criminal Code to deal with incomplete attempts reflects a minority legal trend. The latter departure is primarily based upon considerations of current District law.

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[85] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.

[86] *See, e.g.*, *Seeney*, 563 A.2d at 1083; *Thompson*, 678 A.2d at 27.

[87] This conclusion is also consistent with the DCCA's policy rationale for generally rejecting impossibility defenses. For example, in *In re Doe*, the DCCA rejected an impossibility defense on the rationale that "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same." 855 A.2d at 1106. Where, however, a person attempts to commit a crime by means not otherwise reasonably adapted to commission of the target offense—for example, where the defendant's sole means of enticing a child is by performing a witchcraft ceremony in his own home—this rationale does not hold since the person's conduct and dangerousness seem qualitatively different.

[88] *In re Doe*, 855 A.2d at 1106 (quoting LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5).

Comprehensively codifying the culpable mental state requirement and conduct requirement governing criminal attempts is in accordance with widespread, modern legislative practice. However, the manner in which § 301(a) codifies these requirements departs from modern legislative practice in a variety of ways. The foregoing departures are motivated by considerations of clarity and consistency.

A more detailed analysis of national legal trends and their relationship to § 301(a) is provided below. It is organized according to four main topics: (1) the culpable mental state requirement for an attempt; (2) the definition of an incomplete attempt; (3) the treatment of impossibility; and (4) codification practices.

Subsections (a)(1) & (2): Relation to National Legal Trends on Culpable Mental State Requirement. National legal trends relevant to the culpable mental state requirement governing a criminal attempt strongly support two substantive policies: (1) requiring an intent to cause the results of the target offense; and (2) allowing the culpable mental state, if any, governing the circumstances of the target offense to suffice for an attempt conviction. Both of these substantive policies are incorporated into the Revised Criminal Code.

There exist two basic approaches to the culpable mental state requirement of an attempt: the common law approach, which reflects offense analysis, and the Model Penal Code Approach, which reflects element analysis.[89]

The common law approach to the *mens rea* of attempts is easily summarized: to convict for an attempt to commit any offense, even one of "general intent," requires proof of a "specific intent."[90] However, the meaning of this rule is less than clear: to say that a criminal attempt is a "specific intent crime" papers over the very questions it is supposed to answer, namely, what *kind* of "intent" is required; and to *which* objective elements of the target offense does that "intent" apply?[91] By conceptualizing criminal offenses as being comprised of a monolithic *actus reus* subject to an "umbrella culpability requirement that applie[s] in a general way to the offense as a whole," the common law approach to culpability, offense analysis, is unable to provide a clear answer to these questions.[92]

What is clear from case law, however, is that the "specific intent" rule governing criminal attempts is intended to set a threshold requirement for the culpable mental state applicable to the result element in a criminal attempt, namely, the government must prove, at minimum, that the actor *intended* to cause the result elements (if any) of the target offense—regardless of whether some lesser culpable mental state will suffice for

[89] The crime of attempt is a relatively recent development in the common law, and an even more recent development in state criminal codes. *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.2. The offense first arose in its present form during the late eighteenth century; however, up until the mid-twentieth century, most states punished, but did not define, criminal attempts. Model Penal Code § 5.01 cmt. at 300. Most attempt statutes "were simply general penalty provisions [that] did not elaborate upon the term 'attempt.'" *Id.* This is still true today in some jurisdictions; however, the vast majority of reform codes have adopted comprehensive general attempt statutes, which specifically codify the culpable mental state requirement governing an attempt (among other issues). *Id.*

[90] *See* J. C. Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 429 (1957).

[91] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05 (6th ed. 2012).

[92] PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 155 (2d. 2012).

the target offense.[93] This threshold requirement is clearly reflected in the fact that the common law uniformly rejected the possibility of reckless or negligent attempts.[94]

More ambiguous, however, is the common law view on whether knowledge as to a result element constitutes a sufficient foundation for attempt liability.[95] Although attempt traditionally has been considered to be a "specific intent" crime requiring the most elevated form of mental state, the concept of a specific intent "has always been an ambiguous one and might be thought to include results that the actor believed to be the inevitable consequences of his conduct."[96] There is scant case law on this issue; nevertheless, the common law authorities that do exist are consistent with the "traditional view" of specific intent more generally, namely that it encompasses both a person who "consciously desires [a] result" as well as a person who "knows that that result is practically certain to follow from his conduct."[97]

The common law view of circumstances is similarly unclear, which is perhaps unsurprising given how poorly situated the common law approach to culpability, offense analysis, is to addressing the issue of *mens rea* as to circumstances in any context. That being said, common law authorities have occasionally stumbled across the issue, and, when they have, they appear to have taken the view that the culpable mental state, if any, governing the circumstance of the target offense similarly applies to that offense when charged as an attempt.[98]

The Model Penal Code approach to the *mens rea* of attempts is generally in accordance with the substantive policies reflected in the common law, but more clearly frames them in terms of element analysis.

Most significantly, Model Penal Code § 5.01(1)(b) establishes that a person may be convicted of a criminal attempt if he or she acts with the "purpose" of causing any results in the target offense, or, alternatively, the "belief"—which is intended to signify the non-conditional form of knowledge[99]—that the person's conduct will cause any results in the target offense.[100] This formulation explicitly establishes that acting with

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[93] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; DRESSLER, *supra* note 91, at § 27.05; *Braxton v. United States*, 500 U.S. 344, 350-51 (1991).

[94] *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 749 (1983); *People v. Viser*, 62 Ill. 2d 568, 581 (1975).

[95] *See, e.g.*, Model Penal Code § 5.01 cmt. at 305; LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3.

[96] Wechsler et al., *supra* note 51, at 577.

[97] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 5.2; *see, e.g.*, *Coleman v. State*, 373 So.2d 1254, 1256-57 (Ala. Crim. App. 1979); *Free v. State*, 455 So. 2d 137, 147 (Ala. Crim. App. 1984); *State v. Krocker*, 331 Wis. 2d 487, 489 (2010).

[98] *See, e.g.*, *State v. Davis*, 108 N.H. 158, 160-61 (1967).

[99] As Robinson and Grall observe: "'Belief' is the conditional form of 'know,' [which] is required here because in an impossible attempt the actor cannot 'know' that he will cause the result, since he in fact cannot." Robinson & Grall, *supra* note 94, at 758 n.301. In other words, "[k]nowledge would not be the proper way to describe this mental state [in the context of attempts], because it would be odd to describe the defendant as having knowledge of a result when the result does not in fact occur." Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1032 n.330 (1998).

[100] Model Penal Code § 5.01(1)(b) explicitly applies to completed attempts, where "the offender has . . . performed all of the conduct that would, if successful, constitute the target offense." Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 901 n.59 (2007) [hereinafter, Cahill, *Reckless Homicide*]. With respect to incomplete attempts, in contrast, wherein the offender is interrupted prior to carrying out his plans, the Model Penal Code states that the accused must "purposely do[] or omit[] to do anything that, under the circumstances as he believes them to be, is an act

either of the two alternative mental states that comprise the traditional understanding of intent—namely, "desir[ing] that [one's] acts cause [one or more] consequences *or* know[ing] that those consequences are practically certain to result from [one's] acts"[101]—constitutes a sufficient basis for attempt liability.[102] However, by explicitly covering purpose and the non-conditional form of knowledge, the Model Penal Code's statement on the *mens rea* of the results of an attempt implicitly excludes lesser culpable mental states, such as recklessness or negligence, as a viable basis of liability.[103] Which is to say that Model Penal Code § 5.01(b) was intended to be consistent with "the common law rule that one cannot be liable for an attempt to commit a 'crime of recklessness.'"[104]

In contrast to the foregoing intent-based approach to results, the Model Penal Code applies a principle of *mens rea* equivalency to circumstances. The relevant Model Penal Code language establishes that the government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime."[105] The Model Penal Code commentary clarifies that, pursuant to this language, the principle of *mens rea* elevation applicable to results should not be understood to "encompass all the circumstances included in the formal definition of the substantive offense. As to them, it is sufficient that he acts with the culpability that is required for commission of the crime."[106]

Finally, the Model Penal Code also tacitly recognizes the distinction between an actor's plans to engage in future conduct and the culpable mental state, if any, an actor possesses with respect to the results and circumstances related to that future conduct. Illustrative is the Model Penal Code's provision on incomplete attempts, § 5.01(1)(c), which, when read in light of other relevant Code language, requires the government to prove the following. First, that the defendant was "acting with the kind of culpability otherwise required for commission of the crime" with respect to circumstances.[107] Second, that the defendant was acting with either the "purpose" to cause, or a "belief" that his or her conduct would likely cause, any relevant results.[108] And third, that the defendant "purposely" engaged in "an act or omission constituting a substantial step in a course of conduct *planned to culminate in his commission of the crime*."[109]

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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). Some have suggested this indicates a strict purpose requirement applies to results for incomplete attempts. *See* Cahill, *Reckless Homicide*, *supra* note 100, at 900-01. However, the Model Penal Code drafters appear to explicitly rebut this reading in the commentary, clarifying that the principle reflected in § (b) extends to § (c) when both provisions are "read in conjunction with [one another]." Model Penal Code § 5.01 cmt. at 305 n.17; *see e.g.*, DRESSLER, *supra* note 91, at § 27.09.

[101] *Tison v. Arizona*, 481 U.S. 137, 150 (1987); *see, e.g.*, *State v. Smith*, 490 N.W.2d 40, 45 (Wis. Ct. App. 1992).

[102] *See, e.g.*, Wechsler et al., *supra* note 51, at 577.

[103] *See, e.g.*, Michaels, *supra* note 99, at 1031-32.

[104] Robinson & Grall, *supra* note 94, at 749; *see, e.g.*, DRESSLER, *supra* note 91, at § 27.09.

[105] Model Penal Code § 5.01(1).

[106] Model Penal Code § 5.01 cmt. 297.

[107] This language is drawn from the generally applicable prefatory clause of Model Penal Code § 5.01(1).

[108] This language is drawn from Model Penal Code § 5.01(1)(b), but is intended to be "read in conjunction with" Model Penal Code § 5.01(1)(c). Model Penal Code § 5.01 cmt. at 305 n.17; *see* DRESSLER, *supra* note 91, at § 27.09.

[109] Model Penal Code § 5.01(1)(c).

The latter planning requirement complements, but is ultimately distinct from, the culpable mental state requirements governing circumstances and results that precede it. It reflects the common-sense and intuitive notion that in order to be held liable for an attempt to commit an offense, an actor must have been committed to engaging in future conduct that, if completed, would satisfy the objective elements of that offense[110]—separate and apart from whether that actor possessed the requisite *mens rea* as to the results and circumstances of that offense.[111]

Today, American criminal law as a whole is generally consistent with the substantive policies reflected in the Model Penal Code approach to the *mens rea* of attempts (which, in large part, are also the substantive policies reflected in the common law approach).[112] This consistency is reflected in statutes, case law, and commentary.

For example, it appears that in most jurisdictions, proof of either purpose or a knowledge-like mental state as to a result will suffice for an attempt conviction.[113] So, for example, if "the actor's purpose were to demolish a building and, knowing that persons were in the building and that they would be killed by the explosion, he nevertheless detonated a bomb that turned out to be defective, he could be prosecuted for attempted murder even though it was no part of his purpose that the inhabitants of the building would be killed."[114]

This broad acceptance of knowledge/belief as to a result as an appropriate basis for attempt liability is based on the view that:

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[110] That is, "under the circumstances as he believes them to be," at least. Model Penal Code § 5.01(1)(c).

[111] So, for example, with a charge of attempted purposeful murder, "the key question is not (only) whether the actor desires the death of the victim, but whether he is committed to a course of conduct that would, if completed, bring about the death of the victim." Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 755 (2012) [hereinafter, Cahill, *Incomplete Attempt*].

[112] *See, e.g.*, Wechsler et al., *supra* note 51, at 575-76.

[113] In some jurisdictions, this is clearly established by general provisions. *See, e.g.*, Okla. Stat. Ann. tit. 21, § 44; Ark. Code Ann. § 5-3-201; Haw. Rev. Stat. § 705-500; Neb. Rev. Stat. § 28-201; Ohio Rev. Code Ann. § 2923.02; Utah Code Ann. § 76-4-101; *but see* N.J. Stat. Ann. § 2C:5-1. (One state, which lacks a general provision on the *mens rea* of attempt, specifies by statute that knowledge is an appropriate basis for attempted murder. *See* Iowa Code Ann. § 707.11.) Still other jurisdictions have codified general attempt statutes employing broad language that fail to clarify the issue. *See, e.g.*, Alaska Stat. § 11.31.100; 720 Ill. Comp. Stat. Ann. 5/8-4; Tex. Penal Code § 15.01; Ariz. Rev. Stat. Ann. § 13-1001; Colo. Rev. Stat. Ann. §18-2-101(1); Ind. Code Ann. §35-41-5-1(a); N.D. Cent. Code §12.1-06-01; Ariz. Rev. Stat. Ann. § 13-1001; Me. Rev. Stat. tit. 17-A, § 152. The state courts that have addressed the issue in these jurisdictions most frequently appear to fill in the legislative silence with a knowledge rule. *See, e.g.*, *State v. Nunez*, 159 Ariz. 594, 597 (Ct. App. 1989); *Bartlett v. State*, 711 N.E.2d 497, 499-500 (Ind. 1999); *Gentry v. State*, 881 S.W.2d 35, 40 (Tex. App. 1994); *Free v. State*, 455 So. 2d 137, 147 (Ala. Crim. App. 1984); *People v. Krovarz*, 697 P.2d 378, 381 (Colo. 1985). However, a minority appear to have adopted a purpose rule. *See People v. Kraft*, 478 N.E.2d 1154, 1160 (Ill. App. Ct. 1985); *State v. Huff*, 469 A.2d 1251, 1253 (Me. 1984).

In one jurisdiction, Utah, there has been a noteworthy dialogue between the courts and legislature on this issue. Circa 2003 Utah's attempt statute did not clarify the *mens rea* for the result elements of an attempt. *See* Utah Code Ann. § 76–4–101. Interpreting this ambiguous language in *State v. Casey*, the Utah Supreme Court held that knowledge as to a result element was an insufficient basis for an attempt conviction; only purpose would suffice. 82 P.3d 1106, 1110 (2003). The following year, the Utah state legislature amended its attempt provision to "clarify that an attempt to commit a crime includes situations where the defendant is aware that his actions are reasonably certain to cause a result that is an element of the offense . . . ." CRIMINAL OFFENSE ATTEMPT AMENDMENTS, 2004 Utah Laws Ch. 154 (S.B. 143); *see* Utah Code Ann. § 76-4-101.

[114] Model Penal Code § 501 cmt. at 305.

> the manifestation of the actor's dangerousness [by way of knowing conduct] is as great—or very nearly as great—as in the case of purposive conduct. In both instances a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur. The absence in one instance of any desire for the forbidden result is not, under these circumstances, a sufficient basis for differentiating between the two types of conduct involved.[115]

It's worth noting, however, that the foregoing policy concerning knowledge/belief-based attempts is mostly academic as cases involving the distinction rarely seem to arise.[116]

Vastly more significant, instead, is whether a lesser culpable mental state, such as recklessness or negligence, as to a result is sufficient for an attempt conviction. At stake in this issue is the legal system's treatment of a wide range of endangerment activities, including, perhaps most notably, risky driving.

For example, if recklessness as to a result element is considered to be a viable basis for attempt liability, then many instances of risky driving could be charged as multiple counts of attempted reckless homicide—or perhaps even attempted depraved heart murder—on the following theory. As to *actus reus*: the reckless driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others. As to *mens rea*: the reckless driver who speeds for the thrill of it has consciously created a substantial (or extreme) risk of death to every pedestrian he has passed.

Likewise, if negligence as to a result element is considered to be a viable basis for attempt liability, then many instances of inadvertently risky driving could be charged as multiple counts of attempted negligent homicide—or even attempted manslaughter—on the following theory. As to a*ctus reus*: the negligent driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others. As to *mens rea*: the negligent driver who inadvertently created a substantial (or extreme) risk of death to every pedestrian he has passed should have been aware of that risk.

As a matter of practice, theories of liability such as these have rarely been accepted: "Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed."[117] Consistent with this prevailing view, American legal authorities

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[115] *Id.*; *see, e.g.*, Wechsler et al., *supra* note 51, at 575-76; Cahill, *Reckless Homicide*, *supra* note 100, at 900-01.

[116] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; DRESSLER, *supra* note 91, at § 27.05.

[117] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; *see, e.g., State v. Stensaker*, 725 N.W.2d 883, 889 (N.D. 2007). In a comprehensive survey of national legal trends on non-intentional attempts Michael Cahill observes that: "In nearly all jurisdictions to consider the question, courts have held that no such offenses exist." Cahill, *Reckless Homicide*, *supra* note 100, at 882. The exception appears to be Colorado, which recognizes the offense of attempted reckless manslaughter, see *People v. Thomas*, 729 P.2d 972 (Colo. 1986), and attempted extreme-indifference murder, see *People v. Castro*, 657 P.2d 932 (Colo. 1983), but not attempted criminally negligent homicide, see *People v. Eggert*, 923 P.2d 230 (Colo. Ct. App. 1995). Cahill also observes that:

have soundly rejected offenses such as attempted depraved heart murder, attempted reckless manslaughter, attempted reckless assault, and attempted negligent homicide.[118] Which is not to say the forms of conduct that would be covered by such offenses goes unpunished; however, it is typically covered by special misdemeanor reckless endangerment statutes or other specific risk-creation laws.[119]

It's worth noting that the foregoing legal trends appear to be based upon both conceptual and public policy-based rationales.[120] The conceptual rationale emphasizes that because an attempt "seems necessarily to involve the notion of an intended consequence,"[121] the notion of recklessly or negligently attempting to achieve some consequence is—as a variety of courts have phrased it—a "logical impossibility."[122] The public policy-based rationale for rejecting reckless or negligent attempts, in contrast, is focused on keeping the "floodgates [of] attempt liability" shut.[123] It is argued, for example, that allowing for recklessness or negligence (and of course strict

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> There is authority in Florida and Louisiana suggesting that in those states, attempt may not require intent as to any resulting harm an offense requires. That authority, however, often uses the term "intent" in a way that seems to implicate the common-law distinction, now obsolete under a proper reading of most modern codes, between "specific intent" and "general intent."

Cahill, *Reckless Homicide*, *supra* note 100, at 956.

[118] For rejection of attempted depraved heart murder, see, for example, *State v. Vigil*, 842 P.2d 843, 848 (Utah 1992); *United States v. Kwong*, 14 F.3d 189, 194–95 (2d Cir. 1994). For rejection of attempted reckless manslaughter, see, for example, *Dixon v. State*, 772 A.2d 283, 288 n.9 (Md. 2001); *People v. Foy*, 587 N.Y.S.2d 111, 112 (1992); *State v. Dunbar*, 117 Wash.2d 587 (1991) (*en banc*). As the Hawaii Supreme Court observed:

> Our research efforts have failed to discover a single jurisdiction that has recognized the possibility of attempted involuntary manslaughter. On the other hand, the cases holding that attempted involuntary manslaughter is a statutory impossibility are legion . . . . We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter.

State v. Holbron, 904 P.2d 912, 920, 930 (Haw. 1995). Likewise, "[a]fter reviewing the [pertinent] legal authority," the Nebraska Supreme Court determined that "attempted *reckless* assault" is not a viable offense. *State v. Hemmer*, 3 Neb. App. 769, 777 (1995). For rejection of attempted negligent homicide, and other attempted negligence offenses, see, for example, *State v. Nolan*, 01C01-9511-CC-00387, 1997 WL 351142 (Tenn. Crim. App. June 26, 1997); *Sacchet v. Blan*, 353 Md. 87 (1999); *State v. Hembd*, 197 Mont. 438 (1982).

[119] The basis for these statutes is Model Penal Code § 211.2, which establishes that "[a] person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." As Cahill observes: "Following the Model Penal Code's lead, twenty-four states have adopted a general [reckless endangerment] offense." Cahill, *Reckless Homicide*, *supra* note 100, at 924 (collecting citations).

[120] *State v. Stensaker*, 725 N.W.2d 883, 889 (N.D. 2007) (quoting LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3).

[121] Smith, *supra* note 90, at 434.

[122] *State v. Huff*, 469 A.2d 1251, 1253 (Me. 1984); *see, e.g.*, *State v. Coble*, 527 S.E.2d 45, 48 (N.C. 2000); *State v. Grant*, 418 A.2d 154, 156 (Me. 1983); *Knapik v. Ashcroft*, 384 F.3d 84, 91 (3d Cir. 2004); *see also also* Great Britain Law Commission, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*, 102 GREAT BRITAIN LAW COMM'N REP. 1, 12 (1980) (discussing *Regina v. Mohan*, Q.B. 1, 11 (1976)); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 160 (1978).

[123] Michaels, *supra* note 99, at 1033.

liability) as to the result element of an attempt risks turning "every endangering action" into a serious felony.[124]

The circumstances of an attempt, in contrast, are viewed through an entirely different lens by American legal authorities. Consistent with the Model Penal Code approach, modern criminal codes frequently clarify that the culpable mental state requirement, if any, governing the circumstances of the target offense govern that of the attempt.[125] Case law is also in accordance with this principle of *mens rea* equivalency. Noteworthy judicial opinions on the *mens rea* for the circumstances of an attempt have held that strict liability circumstance elements in the target offense should remain a matter of strict liability for an attempt,[126] reckless circumstance elements in the target offense should remain a matter of recklessness for an attempt,[127] and so on and so forth.

The foregoing principle of *mens rea* equivalency is widely understood to achieve "common-sense result . . . in accordance with principle."[128] Here, for example, is how one state legislature has framed the issue:

> Suppose, for example, that it is an independent crime to intentionally kill a police officer and that recklessness with respect to the victim's identity as a police officer is sufficient to establish that attendant circumstance. If a defendant attempts to kill a police officer recklessly mistaken as to the intended victim's identity (e.g., the defendant recklessly believes the police officer to be a night security guard), attempt liability ought to result. . . . It would hardly make sense to hold that the defendant should be relieved of attempt liability in the situation hypothesized because the defendant did not intend that the victim be a police officer. Furthermore, it would be anomalous to hold that had the defendant succeeded, and the substantive crime been consummated, the defendant would be guilty of the substantive crime but that, upon the failure of the defendant's attempt, the defendant's lack of intent with respect to an attendant circumstance precludes penal liability for the attempt.[129]

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[124] *Id; see, e.g.*, Model Penal Code § 5.01 cmt. 303-04.

[125] As a legislative matter, endorsement of a principle of *mens rea* equivalency to circumstance elements appears to be more or less universal in modern criminal codes. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1001; Ark. Code Ann. § 5-3-201; Conn. Gen. Stat. Ann. § 53a-49; Ky. Rev. Stat. Ann. § 506.010;Me. Rev. Stat. tit. 17-A, § 152; Neb. Rev. Stat. § 28-201; N.J. Stat. Ann. § 2C:5-1; N.D. Cent. Code § 12.1-06-01; Ohio Rev. Code Ann. § 2923.02; Okla. Stat. Ann. tit. 21, § 44; Tenn. Code Ann. § 39-12-101. Likewise, judicial decisions, drawn from inside and outside of reform jurisdictions, are similarly in accord. *See, e.g., State v. Sorabella*, 277 Conn. 155, 891 A.2d 897 (2006); *Maxwell v. State*, 168 Md.App. 1 (2006); *State v. Chhom*, 128 Wash.2d 739, 911 P.2d 1014 (1996); *State v. Nunez*, 159 Ariz. 594, 596 (Ariz. Ct. App. 1989); *People v. Miller*, 87 N.Y.2d 211 (1995).

[126] *See, e.g., State v. Mateyko*, 53 S.W.3d 666, 677 (Tenn. 2001); *Neal v. State*, 590 S.E.2d 168 (Ga. Ct. App. 2003).

[127] *See, e.g., State v. Galan*, 134 Ariz. 590, 591-92 (Ct. App. 1982); *Sergie v. State*, 105 P.3d 1150 (Alaska App. 2005).

[128] Smith, *supra* note 90, at 434.

[129] Commentary on Haw. Rev. Stat. Ann. § 705-500; *see, e.g.*, Wechsler et al., *supra* note 51, at 575.

Consistent with the foregoing analysis, "virtually all commentators agree" that a principle of *mens rea* equivalency is appropriate in the context of circumstances.[130]

Finally, the Model Penal Code's recognition of the planning requirement—occasionally referred to as "future conduct intention"[131]—uniquely implicated by incomplete attempts has been well received. For example, numerous reform codes codify the requirement that, for incomplete attempts, the defendant's conduct must have been "planned to culminate in commission of the crime."[132] This basic notion has similarly been recognized by judges, too. As a variety of courts have observed, an attempt conviction requires proof that the defendant possessed an "intent to perform acts which, if completed, would constitute the underlying offense,"[133] in which context the term "intent" serves as a stand-in for the planning requirement.[134] Commentators have also been quite supportive of recognizing this planning requirement as distinct from the *mens rea* as to the results and circumstances of an attempt.[135]

Consistent with the strong majority trends relevant to the *mens rea* of attempt, as well as the compelling considerations of public policy that each rests upon, the Revised

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[130] DRESSLER, *supra* note 91, at § 27.05; *see, e.g.*, Cahill, *Reckless Homicide*, *supra* note 100, at 900.

[131] Robinson, *Functional Analysis*, *supra* note 27, at 864.

[132] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1001; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 531; Ky. Rev. Stat. Ann. § 506.010; N.J. Stat. Ann. § 2C:5-1.

[133] *See, e.g.*, *People v. Frysig*, 628 P.2d 1004, 1010 (Colo. 1981); *Bloomfield v. State*, 234 P.3d 366, 372 (Wyo. 2010); *State v. Covarrubias*, A-92-500, 1993 WL 80588, at *12 (Neb. Ct. App. Mar. 23, 1993); *State v. Adams*, 745 P.2d 175, 178 (Ariz. Ct. App. 1987).

[134] Here's how one commentator describes future conduct intention, synonymous with planning, and distinguishes it from present conduct intention, synonymous with voluntariness:

> For all commission offenses, a present conduct intention is required, satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed. For example, an actor does not satisfy this culpability requirement if he does not intend to push the victim but rather does so accidentally as he catches his balance from his own fall. A requirement of present conduct intention essentially duplicates the voluntariness requirement discussed above.
>
> The requirement of a future conduct intention, on the other hand, has a critical independent role to play. It serves to show that the actor is planning to do more than what he has already done. Most prominently, attempt liability requires that the actor must intend . . . to engage in the conduct constituting the offense. Such a future conduct intention also is present in substantive offenses that are or that contain codified inchoate offenses. Burglary, for example, requires that an actor enter a building "with purpose to commit a crime therein." Note that the requirement of a present conduct intention applies to a corresponding objective element of offense definition, the conduct element, that the actor also must satisfy, just as the requirements of a present circumstance culpability and a future result culpability typically apply to a corresponding objective element. A requirement of a future conduct intention, in contrast, by definition has no corresponding objective element but rather exists on its own; the actor need not be shown to have performed the conduct.

Robinson, *Functional Analysis*, *supra* note 27, at 864.

[135] *See, e.g.*, Robinson, *Functional Analysis*, *supra* note 27, at 864; Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1170-71 (1997); Cahill, *Incomplete Attempts*, *supra* note 111, at 755; Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173, 202-03 (2011).

Criminal Code codifies a definition of attempt comprised of: (1) a principle of *mens rea* elevation applicable to results that allows for both purpose and belief-based attempts, see § 301(a)(1); and (2) a principle of *mens rea* equivalency applicable to circumstances, see § 301(a)(2). Both of these principles are, in turn, preceded by a prefatory requirement of planning, which helps to clarify their appropriate application.

Subsection (a)(3): Relation to National Legal Trends on Incomplete Attempts. American criminal law is comprised of a variety of standards for addressing incomplete attempts each of which finds support in a range of competing policy considerations. Generally speaking, however, the substantial step test, originally developed by the Model Penal Code, is the majority approach while the dangerous proximity test, originally developed by the common law, is the minority approach. Following current District law, § 301(a)(3) incorporates the dangerous proximity test into the Revised Criminal Code.

The nature of the conduct that will support an attempt conviction has long been the subject of controversy in American criminal law.[136] At the heart of the problem is disagreement over the following issue: at what point has an actor crossed the line between mere preparation and perpetration necessary to justify attempt liability?

There is universal agreement that so-called complete attempts—where a person carries out all that he or she planned to do in order to consummate an offense[137]—constitute an appropriate basis for criminal liability.[138] There also is universal agreement that incomplete attempts—where a person is frustrated from carrying out his or her plan due to interference from external forces[139]—should, as a general category, provide a basis for criminal liability.[140] What is less clear, however, is how to define the contours of this category, a challenging task that entails deciding where in the "ebb and flow of events leading from preparation to consummation" the line between reprehensible and criminal ought to be drawn.[141]

Over the years, courts and legislatures have developed a wide range of tests to address this issue. Broadly speaking, however, there exist two main categories of approaches: the common law standards and the Model Penal Code standard.

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[136] More than a century ago, Holmes observes that "[e]minent judges" have long "been puzzled where to draw the line" of where an attempt begins, "or even to state the principle on which it should be drawn . . . ." O.W. Holmes, Jr., THE COMMON LAW 68 (1881). Since then, little has changed. *See, e.g.*, Thomas Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 79 (1940); LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3.

[137] A classic completed attempt is the shoot-and-miss scenario, where no further act is need beyond firing the shot; the attempt fails only because of the inaccuracy of the shot. Cahill, *Reckless Homicide*, *supra* note 100, at 901 n.59.

[138] *See, e.g.*, *Gray v. State*, 43 Md. App. 238, 239 (1979); *Regina v. Eagleton*, 6 Cox Crim. Cas. 559 (1855); *Rex v. Scofield*, Cald. 397 (1784).

[139] An incomplete attempt would be one where the shot has not yet been fired, but the actor has done enough to be liable for an attempt—say, buying the gun, loading it, pursuing the victim, aiming and preparing to fire. Cahill, *Reckless Homicide*, *supra* note 100, at 901 n.59.

[140] Indeed, "[n]o jurisdiction operating within the framework of Anglo-American law requires that the last proximate act occur before an attempt can be charged." Model Penal Code § 5.01 cmt. at 321 n.97; *see, e.g.*, *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950).

[141] FLETCHER, *supra* note 122, at 140.

The common law standards, as a class, tend to emphasize the relationship between the conduct of the accused and the end of the chain of criminal activity (that is, how much remains to be done). As a result, they tend to draw the line between preparation and perpetration comparatively late in the criminal timeline.

Most of the common law standards focus on closeness to completion.[142] This emphasis is most obvious under the so-called physical proximity test, which asks whether the defendant's conduct was "sufficiently near [the completed offense] to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made."[143]

Proximity is also at the heart of another influential common law standard, the so-called probable desistance test, which focuses on whether a defendant has become close enough such that it could be said that he or she was otherwise unlikely to voluntarily desist from her criminal efforts.[144] Under this test, the line of preparation has been crossed when the defendant has committed an act that in the *ordinary course of events* would result in the commission of the target crime *except for the intervention of some extraneous factor*.[145]

Perhaps the most influential of all common law standards is the "dangerous proximity" test.[146] Originally set forth by Oliver W. Holmes in a series of opinions[147] and an acclaimed book,[148] this standard likewise emphasizes closeness to completion, though it also adds an additional gloss, which focuses on dangerousness.[149] More specifically, the dangerous proximity test draws the line between preparation and perpetration at an act that is "dangerously close" to success, where such closeness is calculated by weighing "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result."[150] Under such an approach, the line between preparation and attempt is determined on a sliding scale: the greater the gravity of the offense, the larger the probability of it occurring, and the nearer the act to the crime, the more likely that act is to constitute an attempt.[151]

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[142] *See* Model Penal Code § 5.01 cmt. at 325.

[143] *State v. Dowd*, 28 N.C. App. 32, 37 (1975); *see, e.g.*, *United States v. Jackson*, 560 F.2d 112, 119 (2d Cir. 1977).

[144] *See* Model Penal Code § 5.01 cmt. at 325; *see also supra* notes 50-52 and accompanying text (discussing this test).

[145] *See, e.g.*, *Young v. State*, 303 Md. 298, 310 (1985); *Commonwealth v. Kelley*, 58 A.2d 375, 377 (Pa. Super. Ct. 1948).

[146] For an "analysis of criminal law authorities writing near the turn of the century," which "reveals that Justice Holmes' dangerous proximity approach to defining the attempt was . . . dominant," see Mark E. Roszkowski, *Attempted Monopolization: Reuniting A Doctrine Divorced from It's Criminal Law Roots and the Policy of the Sherman Act*, 73 MARQ. L. REV. 355, 389 n.189 (1990); *see, e.g.*, 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW §§ 739, 759(1), 762(4) (8th ed. 1892); 1 J. BISHOP, BISHOP ON CRIMINAL LAW §§ 739, 759(1), 762(4) (9th ed. 1923); 1 F. WHARTON, A TREATISE ON CRIMINAL LAW § 181 (8th ed. 1880); 1 F. WHARTON, WHARTON'S CRIMINAL LAW § 220 (12th ed. 1932).

[147] *See Commonwealth v. Kennedy*, 170 Mass. 18 (1897); *Commonwealth v. Peaslee*, 177 Mass. 267 (1901); *Hyde v. United States*, 225 U.S. 347 (1912) (Holmes, J. dissenting); *see also Commonwealth v. Bell*, 455 Mass. 408, 429-30 (2009) (describing the genesis of the test).

[148] *See* HOLMES, *supra* note 136, at 68–69.

[149] *See* FLETCHER, *supra* note 122, at 141-42.

[150] *Kennedy*, 170 Mass. at 22.

[151] So, for example, the Massachusetts Supreme Court in *Commonwealth v. Kennedy* (an opinion penned by Holmes) observed that where the relevant act was attempted murder by poisoning, the gravity of the

There exists one additional common law standard worth noting, which does not emphasize proximity, the "unequivocality test" or "*res ipsa loquitur* test."[152] Under the unequivocality test, conduct oriented towards commission of an offense does not constitute a criminal attempt unless it is "of such a nature that it is itself evidence of the criminal intent with which it is done, i.e., an act that bears criminal intent on its face, an act that can have no other purpose than the commission of that specific crime."[153] Which is to say that under such an approach the person's *conduct* must, standing alone, unambiguously manifest her criminal intent to commit an offense.[154]

The common law standards can be contrasted with the approach developed by the Model Penal Code, the substantial step test. This relevant standard emphasizes the relationship between the conduct of the accused and the beginning of the chain of criminal activity (that is, how much has been done), and, therefore, draws the line between preparation and perpetration comparatively early in the criminal timeline.

The substantial step test specifically allows for an attempt conviction to rest upon proof that the accused engaged in an "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime."[155] By using the terminology of a substantial *step*, this formulation, like the various proximity approaches, maintains an emphasis on distance. However, it flips the orientation: rather than emphasizing closeness to consummation, it focuses upon how far from the beginning of the chain of criminal activity an actor has gone.[156] "That

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crime, coupled with the great harm likely to result from poison, would warrant finding attempt liability at an earlier stage than might be the case with less dangerous crimes. *Kennedy*, 170 Mass. at 22. Applying this reasoning in *Bell v. State*, the Georgia Supreme Court held the "potentially and immediately dangerous circumstances" presented by D's entry of a company's premises carrying dynamite with intent to destroy one of the company's buildings justified drawing the line between preparation and attempt earlier on in the chain of criminal conduct. 118 Ga. App. 291, 293 (1968).

[152] *See* Model Penal Code § 5.01 cmt. at 325.

[153] *Laster v. State*, 275 S.W.3d 512, 526 n.12 (Tex. Crim. App. 2009); *see, e.g.*, *Young*, 303 Md. at 310.

[154] The true import of the unequivocality test is its robust evidentiary implications, namely, it limits the factfinder to a consideration of external conduct in its evaluation of whether the line between preparation and perpetration has been crossed, thereby excluding from consideration any oral or written communications of the accused, such as a verbal confession or one articulated in writing. In practical effect, this means that:

> It is as if the jury observed the conduct in video form with the sound muted (so as not to hear the actor's potentially incriminating remarks), and sought to decide from the conduct alone whether the accused was attempting to commit the offense for which she was prosecuted.

DRESSLER, *supra* note 91, at § 27.06. "If there is only one reasonable answer to this question then the accused has done what amounts to an 'attempt' to attain that end." J.W. Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230, 236 (1934). But if, in contrast, "there is more than one reasonably possible answer, then the accused has not yet done enough." *Id.* It's worth noting that under this test the government may still prove that the accused satisfied the culpability requirement for an attempt by relying upon any evidence; however, the government may only make its case regarding the conduct requirement under such an approach by relying on outwardly observable behavior. For further discussion, see ROBINSON & CAHILL, *supra* note 92, at 453; J. SALMOND, JURISPRUDENCE 404 (7th ed. 1924).

[155] Model Penal Code § 5.01(1)(c).

[156] Model Penal Code § 5.01 cmt. at 329. For further discussion, see ROBINSON & CAHILL, *supra* note 92, at 451-452; 1 RUSSELL ON CRIME 182, 184 (J.W. Cecil Turner ed., 12th ed. 1964).

further major steps must be taken before the crime can be completed," as the MPC drafters, explained, "does not preclude a finding that the steps already undertaken are substantial."[157] The Model Penal Code drafters intended the substantial step test to "broaden[] liability" beyond that provided for under the common law standards.[158]

The comparative breadth of these tests can be observed through the following variations on a burglary scenario involving a locksmith who decides to steal a safe that he's been working on.[159] Here is the first scenario:

> Ray, a locksmith, recalls working on a safe in a coin shop. The safe was kept in a back room and always contained valuable coins. Ray decides that he will rob the safe in the coin shop. To make sure that the safe is still there, Ray goes to the coin shop and checks out the situation before the robbery. Ray tells a friend what he has decided to do.[160]

On these facts, Ray's conduct would likely provide the basis for an attempt conviction under the substantial step test. For example, the drafters of the Model Penal Code explicitly clarified that this kind of "reconnoitering" behavior should be included within the auspices of the substantial step test.[161] Their view, in turn, is reflected in contemporary judicial application of the substantial step test, which reaches both

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[157] Model Penal Code § 5.01 cmt. at 329; *see, e.g., People v. Hawkins*, 311 Ill.App.3d 418, 428 (Ill. 2000) (Under the Model Penal Code, "[a] substantial step can be the very first step beyond mere preparation. That more steps could conceivably have been taken before actual commission of a crime does not render that first step insubstantial.").

[158] Model Penal Code § 5.01 cmt. at 331. At the same time, the Model Penal Code drafters were also cognizant of the fact that broadening attempt liability in this way enhanced the risk of convicting innocent actors given that attempt prosecutions may uniquely center around innocuous conduct that is susceptible to being misconstrued. *See* ROBINSON & CAHILL, *supra* note 92, at 467; Robinson, *Functional Analysis*, *supra* note 27, at 866. In order to address the increased risk of false positives inherent in the expansion of attempt liability under the substantial step test, then, the Model Penal Code drafters devised a strong corroboration requirement, which provides that an actor's conduct may not "constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose." Model Penal Code § 5.01(2).

This requirement effectively constitutes a modified version of the evidentiary limitation imposed by the unequivocality test. "Rigorously applied," for example, "the res ipsa loquitur doctrine would provide immunity in many instances in which the actor had gone far toward the commission of an offense and had strongly indicated a criminal purpose." Model Penal Code § 5.01 cmt. at 331. The Model Penal Code's corroboration requirement, in contrast, recognizes that "an actor's conduct may be incriminating in a general way without showing beyond a reasonable doubt that the actor had the purpose of committing a particular crime." *Id.* It would therefore allow for other forms of extrinsic evidence, such as confessions, to be considered as part of the fact-finder's overall analysis of whether conduct requirement is met, so long as the conduct being analyzed is not itself wholly equivocal. *See id.*; Wechsler et al., *supra* note 51, at 590.

[159] This scenario is drawn from PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995) (Study 1).

[160] *See* ROBINSON & DARLEY, *supra* note 159.

[161] More specifically, "reconnoitering the place contemplated for the commission of the crime" is considered to a fact pattern that, "if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law" under Model Penal Code § 5.01(2). In practical effect, this means that where such circumstances are present, the judge "cannot directly acquit the defendant," while the prosecutors are automatically allowed "to discharge their burden of production whenever evidence of the specified acts is present." Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1238-39 (2007).

reconnoitering behavior[162] and other comparable forms of preparation.[163] In contrast, fact patterns merely involving reconnoitering behavior, as well as various other situations wherein important contingencies remain to be fulfilled, tend to fall short of satisfying the common law standards as a matter of case law.[164] Before upholding an attempt conviction reached under the common law standards, appellate judges typically require proof of further progress.

To illustrate the nature of the progress necessary to satisfy the common law standards, consider the following developments to the burglary scenario discussed earlier:

> Ray, having spoken with his friend, decides to make a special tool to crack the safe. Thereafter, he travels to the coin shop, parks his car in the adjoining lot, and exits his vehicle. Ray is then stopped by the police who—having been informed of Ray's plans by Ray's friend—arrest him.[165]

On these facts, Ray's conduct would likely satisfy all of the common law standards. That Ray is sufficiently close to the site of the job would, based upon prevailing case law, indicate that he has satisfied the physical proximity test, dangerous proximity test, and the probable desistance test.[166] And the fact that Ray made a special tool to crack the safe would likely provide the basis for satisfying unequivocality test.[167]

Today, both the common law standards and the Model Penal Code approach have been endorsed by American legislatures and, in those jurisdictions where the legislature has not clearly spoken, by the courts. However, these two different approaches have not been endorsed in equal measure: the Model Penal Code standard appears to reflect the majority approach, while the common law standards appear to reflect the minority approach.

On the legislative level, twenty-four reform codes have adopted a comprehensive general attempt provision that incorporates the substantial step test.[168] Although some

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[162] *See, e.g.*, *United States v. Wesley*, 417 F.3d 612, 620 (6th Cir. 2005); *United States v. Ivic*, 700 F.2d 51, 67 (2d Cir. 1983); *United States v. Rahman*, 189 F.3d 88, 129 (2d Cir. 1999).

[163] *See, e.g.*, *United States v. Spencer*, 439 F.3d 905, 916 (8th Cir. 2006); *United States v. Jessup*, 305 F.3d 300, 304 (5th Cir. 2002); *United States v. Felix*, 867 F.2d 1068, 1071 (8th Cir. 1989); *United States v. Haynes*, 372 F.3d 1164, 1168-9 (10th Cir. 2004); *United States v. Piesak*, 521 F.3d 41, 44–45 (1st Cir. 2008).

[164] *See, e.g.*, *People v. Rizzo*, 246 N.Y. 334, 338-39 (1927); *People v. Volpe*, 122 N.Y.S.2d 342, 348 (Cty. Ct. 1953); *State v. Christensen*, 55 Wash. 2d 490, 493 (1960); *People v. Youngs*, 122 Mich. 292, 293 (1899); *Commonwealth v. Bell*, 455 Mass. 408, 425 (2009).

[165] *See* ROBINSON & DARLEY, *supra* note 159.

[166] *See, e.g.*, *Bell v. State*, 118 Ga. App. 291, 293 (1968); *People v. Acosta*, 609 N.E.2d 518, 521-22 (N.Y. 1993); *Cody v. State*, 605 S.W.2d 271, 273 (Tex. 1980); *People v. Mahboubian*, 74 N.Y.2d 174, 191 (1989); *see also* ROBINSON & DARLEY, *supra* note 159.

[167] *See, e.g.*, *People v. Staples*, 6 Cal. App. 3d 61, 68 (Ct. App. 1970); *Laster v. State*, 275 S.W.3d 512, 526 n.12 (Tex. Crim. App. 2009); *see also* ROBINSON & DARLEY, *supra* note 159.

[168] *See, e.g.*, Alaska Stat. § 11.31.100; Ark. Code Ann. § 5-3-201; Colo. Rev. Stat. Ann. § 18-2-101; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 531; Ga.Code Ann. § 16-4-1; Haw. Rev. Stat. § 705-500; 720 Ill. Comp. Stat. Ann. 5/8-4; Ind. Code Ann. § 35-41-5-1; Ky. Rev. Stat. Ann. § 506.010; Me. Rev. Stat. Ann. tit. 17-A, § 152; Minn. Stat. Ann. § 609.17; Mo. Ann. Stat. § 564.011; Neb. Rev. Stat. § 28-201; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-1; N.D. Cent. Code § 12.1-06-01; Or. Rev.

of these jurisdictions modify the substantial step test in one or more ways, the core of the relevant legislative provisions reflects the Model Penal Code's more expansive approach to drawing the line between preparation and perpetration.[169] Outside of reform jurisdictions, moreover, courts have also been quite receptive to the Model Penal Code standard: various appellate courts on the state[170] and federal[171] level have adopted the substantial step test by judicial pronouncement.

Notwithstanding the contemporary popularity of the Model Penal Code standard, however, its adoption has not been uniform.[172] For example, a handful of criminal codes reflect—either explicitly or as interpreted—the common law standards. Illustrative is the Wisconsin Code, which, by requiring "acts toward the commission of the crime which demonstrate *unequivocally*, under all the circumstances, that the actor formed that intent and would commit the crime *except for the intervention* of another person or some other extraneous factor," explicitly mandates *both* unequivocality *and* proximity.[173] In contrast, the general attempt statutes in other states—for example, California, Massachusetts, and New York—are comprised of vague language that bears the influence of the common law tests,[174] and have been interpreted by the state courts in a manner that reflects their common law origins.[175]

Stat. § 161.405; Pa. Cons. Stat. Ann. tit. 18, § 901; Tenn. Code Ann. § 39-12-101; Utah Code Ann. § 76-4-101 Wash. Rev. Code § 9A.28.020; Wyo. Stat. § 6-1-301.

[169] For example, the North Dakota Criminal Code defines a "a 'substantial step' [as] any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime." N.D. Cent. Code § 12.1-06-01. Or similarly consider the Delaware Criminal Code, which defines a substantial step as "an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which the defendant is charged with attempting." Del. Code Ann. tit. 11, § 532.

[170] *See, e.g.*, *State v. Ferreira*, 463 A.2d 129, 132 (R.I. 1983); *Young*, 303 Md. at 312-13; *State v. Glass*, 139 Idaho 815, 819 (2003); *see also* Ernest G. Mayo, *The Model Penal Code and Rhode Island: A Primer*, R.I. B.J., January/February 2004, at 19, 23.

[171] *See, e.g.*, *United States v. Lam Kwong-Wah*, 924 F.2d 298, 301 (D.C. Cir. 1991); *United States v. Doyon*, 194 F.3d 207, 210 (1st Cir. 1999); *United States v. Ivic*, 700 F.2d 51, 66 (2d Cir. 1983); *United States v. Cruz-Jiminez*, 977 F.2d 95, 101-02 (3d Cir. 1992); *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996); *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir.1974); *United States v. Williams*, 704 F.2d 315, 321 (6th Cir. 1983); *United States v. Leiva*, 959 F.2d 637, 642 (7th Cir. 1992); *United States v. Watson*, 953 F.2d 406, 408 (8th Cir.1992); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1096 (9th Cir. 2011); *United States v. Prichard*, 781 F.2d 179, 181 (10th Cir. 1986); *United States v. McDowell*, 705 F.2d 426, 427 (11th Cir. 1983). *See also United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007); *Braxton v. United States*, 500 U.S. 344, 349 (1991). *But see infra* note 177 (discussing variances in application of the substantial step test, which accord with the common law approach).

[172] *See, e.g.*, Robert Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 694-96 (2004).

[173] Wis. Stat. Ann. § 939.32.

[174] For example, the California Code requires proof of "a direct but ineffectual act done toward . . . commission" of the target offense. Cal. Penal Code § 21a. Likewise, the Massachusetts Code requires proof of "any act toward . . . commission" of the target offense. Mass. Gen. Laws Ann. ch. 274, § 6. And the New York Code requires proof of "conduct which tends to effect the commission of such crime." N.Y. Penal Law § 110.00. Under the common law, phrases such as these were similarly understood to mean proximity. *See, e.g., United States v. Jackson*, 560 F.2d 112, 119 (2d Cir. 1977).

[175] *See, e.g.*, *Rizzo*, 246 N.Y. at 336-37; *People v. Warren*, 66 N.Y.2d 831, 832-33 (1985); *People v. Luna*, 170 Cal. App. 4th 535, 540-41 (2009); *People v. Dillon*, 668 P.2d 697, 702 n.1 (1983); *Commonwealth v. Bell*, 455 Mass. 408, 425 (2009); *Commonwealth v. Ortiz*, 408 Mass. 463, 472 (1990); *State v. Henthorn*, 581 N.W.2d 544, 547 (Wis. Ct. App. 1998); *State v. Thiel*, 515 N.W.2d 847, 861 (1994).

One important caveat to the foregoing survey bears notice: the influence of the substantial step test may be overstated, and the influence of the common law standards understated, by looking solely at the express formulations offered by a given jurisdiction. For example, it is not uncommon for appellate courts—whether at the state[176] or federal level[177]—to construe and apply the substantial step test in fashion so narrow and proximity-focused that it is the equivalent of the common law standards.[178]

The foregoing variance and disagreement over how to deal with incomplete attempts is not surprising when viewed in light of the conflicting policy considerations implicated by this area of law. Drawing the line between preparation and perpetration implicates the classic divide between effective crime prevention and the protection of individual rights.[179]

For example, it is argued that the *broader* the conduct requirement (i.e, the farther the conduct must be to the completion of the offense), the *greater* the risk that "equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime"[180]—or that a person with a less than fully-formed criminal intent will be arrested before she has had the opportunity to reconsider and voluntarily desist.[181] On

[176] Illustrative is the experience in Indiana. The Indiana Criminal Code clearly endorses the substantial step test. *See* Ind. Code Ann. § 35-41-5-1 ("A person attempts to commit a crime when, acting with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime"). However, in *Collier v. State*, the Court of Appeals of Indiana deemed that the following conduct "did not constitute a substantial step toward commission of the crime of murder": (1) the defendant repeatedly told his neighbor he was going to kill his wife; (2) then drove to his wife's place of employment with an ice pick, a box cutter, and binoculars; (3) then parked outside the door through which he knew his wife would exit; (4) then fell asleep or passed out. 846 N.E.2d 340, 345-50 (Ind. Ct. App. 2006). In justifying its decision, the court explicitly relied on the principle of dangerous proximity, which had previously been endorsed by the Indiana Supreme Court. *Id.* at 345 (citing *Ward v. State*, 528 N.E.2d 52, 53 (Ind. 1988)) (quoting HOLMES, *supra* note 136, at 68 (1881) and Francis B. Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 846 (1928)).

[177] Illustrative is the experience in the Ninth Circuit, which, like all federal courts of appeal, has endorsed the substantial step test by case law, but seems to apply it in a manner consistent with the common law approach. Under governing Ninth Circuit precedent, "[a]n attempt conviction requires evidence that the defendant intended to violate the statute and took a *substantial step* toward completing the violation." *E.g.*, *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Yet, "to constitute a substantial step" in the Ninth Circuit a defendant's actions must "unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *E.g.*, *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). This framing effectively defines a substantial step by reliance on the common law's unequivocality and probable desistance standards. *See supra* notes 144-54 and accompanying text. Not only that, but this reliance, in turn, appears to have produced outcomes in the case law that are consistent with common law standards. Consider, for example, the following trio of bank robbery decisions, where the Ninth Circuit rejected attempt liability under circumstances which quite clearly seem to satisfy the substantial step test: *United States v. Buffington*, 815 F.2d 1292, 1301 (9th Cir. 1987); *United States v. Still*, 850 F.2d 607, 608 (9th Cir. 1988); and *United States v. Harper*, 33 F.3d 1143, 1147 (9th Cir. 1994). *See also United States v. Yossunthorn*, 167 F.3d 1267, 1271 (9th Cir. 1999). For relevant discussion, see Batey, *supra* note 172, at 694-96.

[178] For similar variance in the application of the substantial step test in other jurisdictions, see Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 444-45 (1988).

[179] *See, e.g.*, Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 611 (2012).

[180] Model Penal Code § 5.01 cmt. at 294.

[181] DRESSLER, *supra* note 91, at § 27.01.

this view, a narrow conduct requirement—for example, any of the common law standards—is most desirable because it limits the risk that suspicious looking, but innocent, conduct will be punished,[182] while, at the same time, providing people with a reasonable window of time within which to abandon their criminal enterprise.[183]

Conversely, it is argued that the *narrower* the conduct requirement (i.e., the closer the conduct must be to the completion of the offense), the *longer* police will have to abstain from intervention, and the *greater* the risk that an actor will successfully complete an offense.[184] On this view, a broad conduct requirement—for example, the substantial step test—is most desirable because it can help to ensure that police do not "confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge."[185]

The foregoing tension between collective security and individual liberty runs parallel to an even deeper policy dispute pervading the criminal law: what is the appropriate basis of, and justification for, criminal liability?[186] On this issue, there are two competing viewpoints: objectivism and subjectivism.[187] "At the heart of the dispute" between these two theories is "[t]he distinction between requiring a dangerous act and searching for dangerous persons goes to the heart of the dispute."[188]

Objectivism posits that the criminal law, in determining guilt and calibrating punishment, ought to primarily focus on the dangerousness of an act. Such dangerousness, moreover, ought to be "objectively discernible at the time that it occurs," even without "special knowledge about the offender's intention."[189] This focus on dangerous acts, in turn, supports a narrow conduct requirement, such as any of the common law standards. "Objectivists begin with the commission of some substantive offence as the paradigm of criminality, and seek to capture only conduct that comes

[182] This is because "[t]he farther that one moves from the paradigm of a completed act—as one moves backwards successively through attempt, to advanced planning, to initial planning, and so forth—the more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated." Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 435 (2007); *see* Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 842 (2011).

[183] The argument here is that "a system of law must treat its citizens as autonomous agents [that provides them with] as much freedom as possible to determine their own conduct," which, in the context of criminal attempts, requires a meaningful *locus poenitentiae*. R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.*, Garvey, *supra* note 135, at 212.

[184] DRESSLER, *supra* note 91, at § 27.01.

[185] Model Penal Code § 5.01 cmt. at 322; *see, e.g.*, Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299, 328 (1996); *Young*, 303 Md. at 308.

[186] *See* DRESSLER, *supra* note 91, at § 27.03.

[187] *See, e.g.*, FLETCHER, *supra* note 122, at 173-174; Garvey, *supra* note 135, at 183; Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L REV. 363 (2004).

[188] FLETCHER, *supra* note 122, at 173-174.

[189] *Id.* at 116.

close to that paradigm by the general law of attempts: conduct that is 'proximate' to the completion of that offence."[190]

Subjectivism, in contrast, posits that the underlying concern, or gravamen, of a criminal offense is an actor's culpable-decision making—that is, his or her intention to engage in or risk harmful or wrongful activity.[191] This focus on dangerous persons in turn supports a broader conduct requirement, such as the substantial step test. "Subjectivists begin with the assumption that any conduct directed towards the commission of a substantive offence is a candidate for criminalization, and then ask how far beyond the 'first act' the intending criminal needs to have progressed before we can safely and properly convict her."[192]

In sum, while the Model Penal Code approach reflects the majority practice in American criminal law (variance in application aside), there exists a strong minority of jurisdictions that appear to apply the common law standards, including, most notably, the dangerous proximity test at the heart of current District law. Furthermore, this variance among jurisdictions is driven by difficult and conflicting considerations of public policy and penal theory. It is therefore unclear which standard for an incomplete attempt is "best," all things considered. What is clear, however, is that the conduct requirement of attempt currently applied in the District, the dangerous proximity test, falls within the boundaries of American legal practice, is justifiable, and represents a longstanding policy reflected in District law.

Subsection (a)(3)(B): Relation to National Legal Trends on Impossibility. The strong majority trend within American criminal law is to broadly reject the relevance of impossibility claims to attempt liability. However, there also appears to be one generally accepted, if infrequently litigated, exception to this broad rejection of impossibility claims: the situation of inherent impossibility, which may constitute a defense to a criminal attempt. Subsection 301(a)(3)(B) incorporates both of these principles into the Revised Criminal Code.

The central question posed by the topic of impossibility is as follows: what is the relevance of a defendant's claim that, by virtue of some mistake concerning the conditions he or she believed to exist at the time he or she acted, the target offense could not have been completed?[193] Typically raised as a defense to an attempt charge, claims of this nature assert that impossibility of completion should by itself—and without regard to whether the defendant acted with the requisite culpable mental states and engaged in significant conduct—preclude the imposition of attempt liability.[194]

Anglo-American criminal law has long struggled to deal with impossibility claims.[195] Part of the reason for the confusion, however, is a general failure on behalf of both courts and commentators to clearly distinguish between the different varieties of

[190] DUFF, *supra* note 183, at 386.
[191] FLETCHER, *supra* note 122, at 172.
[192] DUFF, *supra* note 183, at 386.
[193] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07.
[194] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07.
[195] As Dressler phrases it: "Many pages of court opinions and scholarly literature have been filled in a largely fruitless effort to explain and justify the difference between factual and legal impossibility. Perhaps no aspect of the criminal law is more confusing and confused than the common law of impossible attempts." DRESSLER, *supra* note 91, at § 27.07.

impossibility claims.[196] Consider, for example, that there exist four basic categories of impossibility claims with which any legal system seeking to proscribe the limits of attempt liability must grapple.[197]

The first category of impossibility is *pure factual impossibility*, which arises when a person whose intended end constitutes a crime is precluded from consummating that crime because of circumstances unknown to her or beyond her control.[198] Impossibility of this nature may result from the defendant's mistake as to *the victim*: consider, for example, a pickpocket who is unable to consummate the intended theft because, unbeknownst to her, she picked the pocket of the wrong *victim* (namely, one whose wallet is missing).[199] Alternatively, impossibility of this nature may also result from the defendant's mistake as to *the means of commission*: consider, for example, the situation of a murderer-for-hire who is unable to complete the job because, unbeknownst to him, his murder weapon malfunctions.[200]

The second category of impossibility is *pure legal impossibility*, which arises where a person acts under a mistaken belief that the law criminalizes his or her intended objective.[201] For an illustrative scenario presenting impossibility of this nature, consider the situation of a 44-year-old-male who has consensual sexual intercourse with a 17-year-old female in a jurisdiction that sets the age of consent for intercourse at 16. Imagine that this male acts under a false belief that the age of consent is actually 18. On these facts, the actor clearly has not committed statutory rape, but what about attempted statutory rape—that is, might attempt liability be premised on the fact that the man thought he has was committing statutory rape?[202]

The third category of impossibility is *hybrid impossibility*, which arises where an 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.[203] Illustrative scenarios of hybrid impossibility involve defendants caught in police sting operations. Consider, for example, the prosecution of a defendant who sends illicit photographs to a person he believes to be an underage female, but who is actually an undercover police officer, for attempted distribution of obscene material to a minor.[204] Or similarly consider the prosecution of a defendant who makes plans to engage in illicit sexual activity with a person he believes to be an underage female, but who is actually an undercover police office, for attempted sexual performance by a child.[205]

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[196] *See* DRESSLER, *supra* note 91, at § 27.07; LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.
[197] This general framework and breakdown is drawn from DRESSLER, *supra* note 91, at § 27.07.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] As Dressler observes, "this is a mirror image of the usual mistake-of-law case, in which an actor believes that her conduct is lawful, but it is not." *Id.* In this context, "D believed that he was violating a law, but he was wrong," thereby raising the following question: "If ignorance of the law does not ordinarily exculpate, may it nonetheless inculpate?" *Id.*
[203] *Id.*
[204] *See People v. Thousand*, 631 N.W.2d 694 (Mich. 2001).
[205] *See Chen v. State*, 42 S.W.3d 926 (Tex. Crim. App. 2001); *see also United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006).

The fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought."[206] Inherent impossibility can take the form of pure factual impossibility: consider, for example, the situation of a person who attempts to kill by witchcraft[207] or by throwing red pepper in the eyes of another.[208] And it can also take the form of hybrid impossibility, such as where a person attempts to kill what is obviously a statue.[209] The common denominator underlying inherent impossibility, then, is that the "attemptor's actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances."[210]

As a matter of legal practice, there exist two main approaches to dealing with impossibility claims: the common law approach and the Model Penal Code approach.

The common law approach to impossibility primarily revolves around two main rules: (1) factual impossibility is not a defense to an attempt charge; and (2) legal impossibility is a defense to an attempt charge.[211] Although it is not always clear what, precisely, the import of these two common law rules is (given the existence of four categories of impossibility claims), at minimum they support two general propositions.

First, *pure factual impossibility* claims generally do not constitute a defense to an attempt charge under the common law approach.[212] For example, relying on the common law's rule that factual impossibility is not a defense, courts have upheld attempt convictions in the following situations: (1) a pickpocket who puts her hand in the victim's pocket only to discover that it is empty;[213] (2) a male rapist trying to engage in nonconsensual sexual intercourse only to discover that he is impotent;[214] (3) an assailant shooting into the bed where the intended victim customarily sleeps only to discover that it is empty;[215] and (4) an individual pulling the trigger of a gun aimed at a person who is present only to discover that the gun is unloaded.[216]

Second, *pure legal impossibility* claims do constitute a defense to an attempt charge under the common law approach.[217] So, for example, an actor is not guilty of a criminal attempt if, unknown to her, the legislature has repealed a statute that the actor believes that she is violating, such as when an actor attempts to sell "bootleg" liquor after the repeal of the Prohibition laws.[218] All the more so, actors are not guilty of attempts to violate laws that are purely the figments of their guilty imaginations, such as

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[206] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).
[207] *See Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933) (Maxey, J., dissenting).
[208] *See Dahlberg v. People*, 80 N.E. 310, 311 (Ill. 1907).
[209] *See Trent v. Commonwealth*, 156 S.E. 567, 569 (Va. 1931).
[210] Brodie, *supra* note 206, at 244-45.
[211] DRESSLER, *supra* note 91, at § 27.07.
[212] *See id.*
[213] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).
[214] *See Waters v. State*, 234 A.2d 147 (Md. Ct. Spec. App. 1967).
[215] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).
[216] *See State v. Damms*, 100 N.W.2d 592 (Wis. 1960).
[217] *See* DRESSLER, *supra* note 91, at § 27.07.
[218] DRESSLER, *supra* note 91, at § 27.07.

when an actor fishes in a lake without a license believing that he needs a license for that lake though in fact he does not.[219] The common law approach to these kinds of situations is not at all surprising, however, once one considers what cases of pure legal impossibility really amount to: "perform[ing] a lawful act with a guilty conscience," that is, acting with a mistaken belief that one is committing crime.[220]

Less clear, and more controversial, under the common law approach to impossibility is the disposition of *hybrid impossibility* claims, which, as noted earlier, arise where three conditions are met: (1) the actor's goal is illegal; (2) commission of the target offense is impossible due to a *factual mistake* (and not simply a misunderstanding of the law); and (3) this factual mistake relates to the *legal status* of some attendant circumstance that constitutes an element of the charged offense.[221] Impossibility of this nature is viewed in varying ways under the common law approach.

For example, some courts view hybrid impossibility as a form of legal impossibility, and, therefore, accept such claims as a viable defense to attempt liability. This perspective is reflected in the following judicial holdings: (1) a defendant has not attempted to receive stolen property if the defendant's belief that the goods were stolen was in error;[222] (2) a defendant has not attempted to take deer out of season if he shoots a stuffed deer believing it to be alive;[223] (3) a defendant has not attempted to bribe a juror when he offers a bribe to a person he mistakenly believes to be a juror;[224] and (4) a defendant has not attempted to illegally contract a valid debt when he believes the debt to be valid but where it was unauthorized and a nullity.[225]

Other courts, in contrast, view hybrid impossibility as a form of factual impossibility, and, therefore, reject such claims as a viable defense to attempt liability. This perspective is reflected in the following judicial holdings: (1) a defendant has attempted to receive stolen property where he mistakenly believed that the property received was stolen;[226] (2) a defendant has attempted to commit a narcotics offense where he mistakenly believed that the substance sold,[227] received,[228] or smoked[229] was an illegal drug; and (3) a defendant has attempted to commit rape when he mistakenly believes the girl with whom he had sexual intercourse is alive.[230]

On one level, the foregoing split over treatment of hybrid impossibility under the common law approach can be understood to reflect a substantive policy disagreement:

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[219] *See Commonwealth v. Henley*, 474 A.2d 1115, 1119 (Pa. 1984).

[220] DRESSLER, *supra* note 91, at § 27.07. The common law's recognition that legal impossibility will provide a defense to an attempt charge accordingly amounts to little more than a necessary extension of the legality principle—the well-accepted prohibition against punishing people for conduct that did not violate a duly-enacted law at the point in time in which he or she acted. *See, e.g.*, ROBINSON & CAHILL, *supra* note 92, at 514; Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles*, 12 LAW & PHIL. 33, 46 (1992).

[221] *See* DRESSLER, *supra* note 91, at § 27.07.

[222] *See People v. Jaffe*, 185 N.Y. 497 (1906); *Booth v. State*, 398 P.2d 863 (Okla. Crim. App. 1964).

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

[224] *See State v. Taylor*, 133 S.W.2d 336 (Mo. Ct. App. 1939); *State v. Porter*, 242 P.2d 984 (Mont. 1952).

[225] *See Marley v. State*, 33 A. 208 (N.J. 1895).

[226] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).

[227] *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).

[228] *See People v. Siu*, 271 P.2d 575 (Cal. Ct. App. 1954).

[229] *See United States v. Giles*, 42 C.M.R. 960 (A.F. Ct. Mil. Rev. 1970).

[230] *See United States v. Thomas*, 32 C.M.R. 278 (C.M.A. 1962).

recognition of hybrid impossibility as a defense to an attempt charge is arguably aligned with objectivist legal principles,[231] while rejection of hybrid impossibility as a defense to an attempt charge is arguably aligned with subjectivist legal principles.[232] That being said, the impetus behind the disparate outcomes under the common law approach may be more directly rooted in a basic confusion surrounding how to characterize situations involving hybrid impossibility under its binary factual/legal categorization scheme.

Consider, for example, a case involving a defendant who shoots a corpse, believing it to be a living human being. On these facts, the defense would describe the situation as one of legal impossibility under the common law approach: "As a matter of law, shooting a corpse is not, and never can, constitute murder, because the offense of criminal homicide, by definition, only applies to the killing of human beings."[233] The prosecutor, however, would frame with situation in terms of factual impossibility: "If the factual circumstances had been as the defendant believed them to be—that the 'victim' had been alive when the defendant shot him—he would be guilty of murder."[234] As these examples illustrate, skillful lawyering can frame hybrid impossibility claims as either factual or legal impossibility under the common law approach.[235]

One final aspect of the common law approach to impossibility bears notice: broad acceptance of inherent impossibility as a viable basis for defending against an attempt charge.[236] This is reflected in the fact that "where the means chosen are totally ineffective to bring about the desired result,"[237] courts that subscribe to the common law approach generally seem reluctant to impose attempt liability.[238] So, for example, if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations,

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[231] That is, an objectivist might argue that hybrid impossibility should constitute a defense to an attempt charge because "only the attempter may know of his mistake as to the circumstance," which means that "such conduct is less likely to be known by others and, therefore less likely to be socially disruptive." ROBINSON & CAHILL, *supra* note 92, at 516. This is particularly true, the objectivist might argue, where hybrid impossibility scenarios "involve objectively innocuous conduct," such as, for example, where "a person shoots at a tree stump believing it to be a human or where a person receives non-stolen property believing it to be stolen." DRESSLER, *supra* note 91, at § 27.07.

[232] That is, the subjectivist would argue that the actor who intends to commit an offense but is unable to do so due to hybrid legal impossibility is no less dangerous than the actor whose inability is the product of factual impossibility. *See, e.g.*, Wechsler et al., *supra* note 51, at 578. What's the difference, for example, between the child rapist who arranges a meeting with what turns out to be an undercover officer and the child rapist who arrives at the wrong meeting spot? Surely not one of dangerousness, the subjectivist would point out, given that both evidence the same propensity for wrongdoing. *See* DRESSLER, *supra* note 91, at § 27.07.

[233] DRESSLER, *supra* note 91, at § 27.07.

[234] *Id.*

[235] DRESSLER, *supra* note 91, at § 27.07.

[236] *See, e.g.*, LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07; John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999).

[237] *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973).

[238] *See, e.g.*, *Dahlberg v. People*, 225 Ill. 485, 490 (1907); *Attorney General v. Sillen*, 159 Eng. Rep. 178, 221 (1863). For cases generally recognizing the defense, see, for example, *United States v. Lincoln*, 589 F.2d 379, 381 (8th Cir. 1979); *United States v. Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973); *Parham v. Commonwealth*, 347 S.E.2d 172, 174-75 (Va. Ct. App. 1986); *State v. Logan*, 656 P.2d 777, 779-80 (Kan. 1983); *People v. Elmore*, 261 N.E.2d 736, 737 (Ill. App. Ct. 1970); *People v. Richardson*, 207 N.E.2d 453, 456 (Ill. 1965).

maledictions, hexing or voodoo," that person would be excluded from the scope of attempt liability under the common law approach.[239]

The rejection of inherently impossible attempts reflected in the common law approach rests upon two basic rationales: (1) the relevant conduct is not sufficiently dangerous to merit criminalization; and (2) it's hard to know whether people who engage in such conduct actually intend to commit the target offense in the first place.[240] While the rationales underlying the common law approach are fairly uniform, however, the actual legal standards developed by American courts, legislatures, and commentators to articulate it vary substantially.[241]

For example, some legal authorities address inherent impossibility through a requirement that the actor's conduct have been "reasonably adapted,"[242] "intrinsically adapted,"[243] or "apparently adapted"[244] to commission of the offense to support an attempt conviction. Others would limit their general rejection of the impossibility defense with a requirement that completion of a crime at least have been "apparently

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[239] Keedy, *supra* note 82, at 469 (collecting citations). As one judge phrases it:

> "[H]exing" with lethal intent, belongs to the category of "trifles," with which "the law is not concerned." Even though a "voodoo doctor" just arrived here from Haiti actually believed that his malediction would surely bring death to the person on whom he was invoking it, I cannot conceive of an American court upholding a conviction of such a maledicting "doctor" for attempted murder or even attempted assault and battery.

Commonwealth v. Johnson, 167 A. 344, 348 (Pa. 1933) (Maxey, J., dissenting).

[240] One commentator lays out these two rationales as follows. First, it is argued that inherently impossible attempts, in contrast to standard impossible attempts, do not even present a *risk* of harm:

> The impossible attempt—the person shooting at an empty bed—still creates a risk that some harm might occur. The obviously impossible attempt, however—the person casting a spell on another—does not. Where the act constituting the attempt does not invoke criminal sanction, the actor is being punished only for his dangerous mental state.

Brodie, *supra* note 206, at 245. Second, but related, is the fact that, where an inherently impossible attempt is at issue, it can be hard to determine whether the defendant even possessed this "dangerous mental state" in the first place:

> For example, it is difficult to be sure that the person using aspirin to kill actually wanted the victim to die; if he did, why did he use such objectively ineffective means? In determining the actor's intent, we start with his actions, and then swing across a canyon of inference, landing at his probable intent; if the actions are absurd, then the gap between action and intent becomes too wide to cross.

Id. at 245-46. *See, e.g.*, *United States v. Oviedo*, 525 F.2d 881, 885 n.11 (5th Cir. 1976) ("Mens rea is within one's control but . . . it is not subject to direct proof . . . It is not subject to direct refutation either. It is the subject of inference and speculation.")

[241] *See, e.g.*, Jeffrey F. Ghent, Annotation, *Impossibility of Consummation of Substantive Crime as Defense in Criminal Prosecution for Conspiracy or Attempt to Commit Crime*, 37 A.L.R. 3d 375 (1971); J. H. Beale, Jr., *Criminal Attempts*, 16 HARV. L. REV. 491, 492 (1903).

[242] *E.g.*, *Seeney*, 563 A.2d at 1083; *Robinson*, 608 A.2d at 116; *Johnson*, 756 A.2d at 464; *In re N*-----, 2 I. & N. Dec. 201, 202 (B.I.A. 1944).

[243] *E.g.*, *State v. Wilson*, 30 Conn. 500, 506 (1862).

[244] *E.g.*, *Collins v. City of Radford*, 113 S.E. 735, 741 (Va. 1922); *People v. Arberry*, 114 P. 411, 415 (Cal. Ct. App. 1910).

possible," and, therefore, the likelihood of failure not patently "obvious."[245] Where, in contrast, the defendant employs "an absurd or obviously inappropriate selection of means,"[246] or the "impossibility would [otherwise] have been clearly evident to a person of normal understanding,"[247] other legal authorities would hold that attempt liability simply may not attach. Communicative differences aside, however, all of the foregoing standards share a fundamental similarity: they render a basic connection between means and ends an essential component of attempt liability.[248]

The common law approach to impossibility can be contrasted with the Model Penal Code approach, which generally eschews categorization and instead broadly renders irrelevant impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[249]

Illustrative is the Model Penal Code's formulation of the substantial step test, which establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person "purposely does or omits to do anything that, *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."[250] The inclusion of the foregoing italicized actor-oriented language effectively abolishes impossibility defenses premised on pure factual impossibility or hybrid impossibility.[251] It does so, moreover, in a manner that obviates the need for courts to rely upon the common law's classification scheme.[252] That is, by broadly recognizing that an "actor can be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders distinctions between pure factual impossibility and hybrid impossibility immaterial.[253]

The Model Penal Code approach to impossibility also departs from the common law approach with respect to its treatment of inherent impossibility. Whereas the common law approach recognizes an inherent impossibility defense (by essentially making non-inherent impossibility an element of an attempt), the Model Penal Code views inherent impossibility to be, at most, a matter of sentencing mitigation. That is,

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[245] Wechsler et al., *supra* note 51, at 583 (citing *State v. McCarthy*, 115 Kan. 583, 589 (1924); *State v. Block*, 333 Mo. 127, 131 (1933)).

[246] Wechsler et al., *supra* note 51, at 583–84 (citing *Commonwealth v. Kennedy*, 170 Mass. 18, 21, (1897)).

[247] *E.g.*, Minn. Stat. Ann. § 609.17; Iowa Code Ann. § 707.11.

[248] *See, e.g.*, Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 273-74 (2014); Preis, *supra* note 236, at 1902-04.

[249] Model Penal Code § 5.01 cmt. at 297.

[250] Model Penal Code § 5.01(1)(c).

[251] *See* Model Penal Code § 5.01 cmt. at 318; Wechsler et al., *supra* note 51, at 579.

[252] *See* Model Penal Code § 5.01 cmt. at 318; Wechsler et al., *supra* note 51, at 579.

[253] ROBINSON & CAHILL, *supra* note 92, at 514. Model Penal Code § 5.01(c) could also be read to abolish the defense of pure legal impossibility. *See id.* However, the Model Penal Code commentary indicates that the drafters intended that pure legal impossibility remain a defense:

> It is of course necessary that the result desired or intended by the actor constitute a crime. If . . . the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.

Model Penal Code § 5.01 cmt. at 318; *see* Wechsler et al., *supra* note 51, at 579.

"[t]he approach of the Code is to [generally] eliminate the defense of [inherent] impossibility," but to thereafter authorize the court to account for the relevant issues at sentencing.[254]

The relevant provision, Model Penal Code § 5.05(2), establishes that "[i]f the particular conduct charged to constitute a criminal attempt . . . is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense," then the court has two alternatives at its disposal.[255] First, the court may "impose sentence for a crime of lower grade or degree."[256] Second, and alternatively, the court may, "in extreme cases, [simply] dismiss the prosecution."[257] In neither case, however, does § 5.05(2) or "the commentaries to Model Penal Code . . . attempt to define what constitutes an 'inherently unlikely' attempt."[258]

Today, the heart of the Model Penal Code approach to impossibility—namely, the Code's broad rejection of factual and hybrid impossibility claims through application of an actor-centric approach that focuses on the situation as the defendant viewed it—appears to constitute the majority American approach.[259] In reform jurisdictions, this is frequently achieved by codifying statutory language modeled on Model Penal Code § 5.05(1)(c), which requires the fact-finder to consider the relevant "circumstances as [the

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[254] Model Penal Code § 5.01 cmt. at 318. In rejecting the common law approach, the drafters of the Model Penal Code reasoned that:

> Using impossibility as a guide to dangerousness of personality presents serious difficulties. Cases can be imagined in which it might be argued that the nature of the means selected, say black magic, substantially negates dangerousness of character. On the other hand, it is probable that one who tries to commit a crime by inadequate methods and fails will realize the futility of his conduct and seek more efficacious means . . . .
>
> The approach of the Code is to eliminate the defense of impossibility in all situations. The litigated cases to date have not presented instances in which the actor's futile efforts indicate that he is not likely to succeed in the future in committing the crime contemplated or some similar offense. Nor is it likely that attempts of this nature, if they do occur, will be detected or prosecuted. Nonetheless, to provide a method of coping with any such case should one arise, article 5 provides, in its sentencing provision, that in "extreme cases" where "neither [the] . . . conduct nor the actor presents a public danger," the court may dismiss the prosecution.

Wechsler et al., *supra* note 51, at 585. The Model Penal Code drafters specifically rejected a reasonableness-based test "[s]ince it can not be affirmed that those who make unreasonable mistakes are not potentially dangerous." *Id.*

[255] Model Penal Code § 5.05(2).

[256] *Id.*

[257] *Id.*

[258] Brodie, *supra* note 206, at 247. Indeed, "the accompanying commentaries only restate the rule," namely, "In 'extreme cases' under Section 5.05(2), the court is authorized to 'dismiss the prosecution.'" *Id.* (quoting Model Penal Code § 5.05(2) cmt. 3).

[259] For example, as one commentator observes: "[m]ost states have abolished the defense of hybrid [] impossibility on the subjectivist ground that an actor's dangerousness is 'plainly manifested' in such cases." DRESSLER, *supra* note 91, at § 27.07; *see, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2017).

defendant] believes them to be.[260] However, reform jurisdictions also achieve the same policy outcome by codifying more general rules that broadly state that "impossibility"[261] or "factual and legal impossibility" [262] are not defenses.

Comparable trends are also reflected in the case law outside of reform jurisdictions.[263] For example, notwithstanding the absence of a general federal attempt statute, most federal courts seem to reject defenses premised on either factual or hybrid impossibility.[264] This also appears to be the case in similarly situated non-reform states, where the prevailing trend appears to be the rejection of factual and hybrid impossibility defenses by way of decisional law.[265] At the same time, many courts also seem to agree that the categories of impossibility attempts are themselves so are so "fraught with intricacies and artificial distinctions that the[y] [have] little value as an analytical method for reaching substantial justice."[266] As a result, various courts have "declined to participate in the sterile academic exercise of categorizing a particular set of facts as representing 'factual' or 'legal' impossibility," and instead have applied a non-categorical approach that bears the influence of the Model Penal Code.[267]

Notwithstanding the broad influence of the Model Penal Code approach to impossibility, however, the Code's treatment of inherent impossibility has not been widely followed. Instead, the common law approach—which views "inherent impossibility [as] an accepted defense in attempt cases," and not as a matter of sentencing mitigation—appears to constitute the majority trend in America.[268]

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[260] *See, e.g.*, Ky. Rev. Stat. Ann. § 506.010; Conn. Gen. Stat. Ann. § 53a-49; Neb. Rev. Stat. Ann. § 28-201; Ariz. Rev. Stat. Ann. § 13-1001; Ark. Code Ann. § 5-3-201; Del. Code Ann. tit. 11, § 531; N.H. Rev. Stat. Ann. § 629:1; Wyo. Stat. § 6-1-301; Haw. Rev. Stat. § 705-500; Tenn. Code Ann. § 39-12-101; Okla. Stat. Ann. tit. 21, § 44; La. Rev. Stat. Ann. § 14:27. *See also* Ind. Code Ann. § 35-41-5-1(b) ("It is no defense that, *because of a misapprehension of the circumstances* . . . it would have been impossible for the accused person to commit the crime attempted.").

[261] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/8-4; Ind. Code Ann. § 35-41-5-1; Kan. Stat. Ann. § 21-5301; Minn. Stat. Ann. § 609.17; Mont. Code Ann. § 45-4-103; Or. Rev. Stat. Ann. § 161.425; 18 Pa. Cons. Stat. Ann. § 901.

[262] *See, e.g.*, Ala. Code § 13A-4-2; Alaska Stat. Ann. § 11.31.100; Colo. Rev. Stat. Ann. § 18-2-101; Ga. Code Ann. § 16-4-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 562.012; N.Y. Penal Law § 110.10; N.D. Cent. Code Ann. § 12.1-06-01; Ohio Rev. Code Ann. § 2923.02; Utah Code Ann. § 76-4-101; Wash. Rev. Code Ann. § 9A.28.020.

[263] For an overview, see *People v. Thousand*, 465 Mich. 149, 157-162 (2001).

[264] *See, e.g.*, *United States v. Farner*, 251 F.3d 510, 512-13 (5th Cir. 2001); *United States v. Everett*, 700 F.2d 900, 907 (3d Cir. 1983); *United States v. Johnson*, 767 F.2d 673, 675 (10th Cir. 1985); *United States v. Pennell*, 737 F.2d 521, 525 (6th Cir. 1984); *United States v. Reeves*, 794 F.2d 1101, 1105 (6th Cir. 1986).

[265] *See, e.g.*, *State v. Latraverse*, 443 A.2d 890, 894 (R.I. 1982); *State v. Curtis*, 603 A.2d 356, 358 (Vt. 1991); *State v. Rios*, 409 So. 2d 241, 244-45 (Fla. Dist. Ct. App. 1982); *Duke v. State*, 340 So. 2d 727, 730 (Miss. 1976); *State v. Lopez*, 669 P.2d 1086, 1087-88 (N.M. 1983); *State v. Hageman*, 296 S.E.2d 433, 441 (N.C. 1982).

[266] *State v. Moretti*, 244 A.2d 499, 503 (N.J. 1968).

[267] *Thousand*, 465 Mich at 162 (citing *Darnell v. State*, 558 P.2d 624 (Nev. 1976); *State v. Moretti*, 244 A.2d 499 (N.J. 1968); *People v. Rojas*, 358 P.2d 921 (Cal. 1961)).

[268] Preis, *supra* note 236, at 1902; *see, e.g.*, CHARLES E. TORCIA, 4 WHARTON'S CRIM. L. § 698 (15th ed. Westlaw 2017); *see also* FLETCHER, *supra* note 122, at 166 ("The consensus of Western legal systems is that there should be no liability, regardless of the wickedness of intent, for sticking pins in a doll or chanting an incantation to banish one's enemy to the nether world.").

On a legislative level, a majority of jurisdictions have declined to codify general provisions addressing inherent impossibility—presumably, because "the likelihood of prosecution under such circumstances [is] too unrealistic to make such a provision necessary."[269] Among those that have addressed the issue, moreover, there is a split between Model Penal Code and common law-based statutory approaches. On the one hand, the Model Penal Code's mitigation-based sentencing provision intended to deal with inherent impossibility, § 5.05(2), "has only been adopted by some three states."[270] On the other hand, a similar number of jurisdictions codify the common law approach to inherent impossibility by incorporating "a reasonableness element in[to] their definition of attempt crimes."[271] In the absence of applicable general provisions, however, "the defense of inherent impossibility is frequently recognized by state and federal courts."[272] And it is also widely supported by legal literature.[273]

Viewed collectively, then, "case law[,] legislative pronouncements and scholarly commentary [on] inherent impossibility" indicate that the common law approach to the issue is the majority trend.[274]

Consistent with the foregoing analysis of national legal trends, § 301(a)(3)(b) is comprised of two different substantive policies relevant to impossibility. First, and most importantly, § 301(a)(3)(b) incorporates the Model Penal Code's actor-centric approach to impossibility. By focusing on the situation as the defendant viewed it, the Revised Criminal Code necessarily abolishes factual impossibility and hybrid impossibility defenses. Second, § 301(a)(3)(b) incorporates the common law approach to inherent impossibility. By requiring that the actor's conduct be reasonably adapted to commission of the target offense, the Revised Criminal Code necessarily excludes inherently impossible attempts from the scope of attempt liability. The foregoing components, when viewed as a matter of substantive policy, appear to reflect majority legal trends and current District law.

Subsection 301(a): Relation to National Trends on Codification. The Model Penal Code's general attempt provision, § 5.01, constitutes the basis for all modern legislative efforts to comprehensively codify the culpable mental state requirement and

[269] ROBINSON, *supra* note 259, 1 CRIM. L. DEF. § 85 (quoting Mich. 2d Proposed Rev. § 1001(2), Commentary (1979)).

[270] Brodie, *supra* note 206, at 247 (citing Ark. Code Ann. § 5-3-101; N.J. Stat. Ann. § 2C:5-4; and 18 Pa. Cons. Stat. Ann. § 905); *see also id.* at 247 n.54 ("Colorado also allows a dismissal of prosecutions when there is an inherently unlikely attempt, but limits this dismissal to attempted conspiracy charges") (citing (Colo. Rev. Stat. Ann. § 18-2-206). Furthermore, and "[p]erhaps because of the unpredictable definition of 'inherently unlikely' attempts," courts in these jurisdictions seem to "prefer to address questions of inherently unlikely attempts under the framework of de minimis harm" under Model Penal Code § 2.12. *Id.* at 247-48.

[271] Brodie, *supra* note 206, at 253; *see* Minn. Stat. Ann. § 609.17; Iowa Code Ann. § 707.11; N.J. Stat. Ann. § 2C:5-1.

[272] Preis, *supra* note 236, at 1902; *see* cases cited *supra* notes 237-48.

[273] *See, e.g.*, John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1, 9, 32-33 (2004); Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 544 (2008); Brodie, *supra* note 206, at 247 n.54.

[274] Preis, *supra* note 236, at 1902.

the conduct requirement for criminal attempts.[275] While broadly influential as a matter of codification, however, the Model Penal Code's definition of an attempt appears to contain a variety of drafting flaws. Consistent with the interests of clarity, consistency, and accessibility, § 301(a) endeavors to address these flaws through a variety of legislative revisions.

The Model Penal Code's approach to codification of a definition for attempt reads:

> (1) *Definition of Attempt*. 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:
>
> > (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
> >
> > (b) 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; or
> >
> > (c) purposely does or omits to do anything that, 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.[276]

Reflected in the foregoing language are three notable drafting decisions: (1) a decision to codify three different conduct requirements; (2) a decision to intersperse the culpable mental state requirement governing an attempt among distinct subsections; and (3) a decision to utilize the undefined terms "circumstances" and "belief" to serve different purposes. Each of these decisions is arguably flawed, and, when viewed collectively, they combine to produce a general provision that is confusingly organized, unnecessarily complex, and ambiguous on key issues.

Perhaps the most significant drafting flaw is the Model Penal Code's three-part approach to stating the conduct requirement of an attempt.[277] More specifically, § (a) addresses the situation of a defendant who mistakenly believes he has satisfied the objective elements of the substantive offense—as would be the case where an actor receives what he believes to be stolen property only to discover that he has been embroiled in a sting operation. Thereafter, § (b) addresses the situation of a defendant

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[275] As the Model Penal Code commentary observes:

> [Criminal statutes defin[ing] the scope of attempts with greater particularity . . . to a significant extent reflect the influence of the Model Penal Code proposals, which have formed the basis for the definition of attempt offense in most of the recently enacted and proposed codes.

Model Penal Code § 5.01 cmt. at 300.

[276] Model Penal Code § 5.01(1).

[277] The discussion of this drafting flaw is drawn from Robinson & Grall, *supra* note 94, at 745-51.

who believes he has done everything he needs to do to cause the prohibited result—as would be the case when an actor loads an explosive device and then lights the fuse only to discover that the device is inoperable. And finally, § (c) addresses the situation of a defendant who believes he has taken a substantial step towards commission of the offense—as would be the case when an actor mistakenly loads a shotgun with defective bullets, searches out the intended victim, but then is arrested prior to firing his weapon.

These three different formulations make for a lengthy and confusing definition of an attempt. They do so unnecessarily, moreover, since the first two situations are surplusage because they are covered by the third situation. For example, if the defendant believes he has completed the offense (subsection (a)), or believes he has done everything he needed to do to cause the prohibited result (subsection (b)), he necessarily has taken a substantial step towards commission of the offense (subsection (c)). Given, then, that the definition of an incomplete attempt in § (c) is by itself sufficient to create liability for the situations contemplated by §§ (a) and (b), the latter two subsections are superfluous.

The second drafting issue reflected in Model Penal Code § 5.01(1) is the intermingled and disorganized approach it applies to the *mens rea* of criminal attempts. More specifically, the prefatory clause of Model Penal Code § 5.01(1) requires the defendant to have acted "with the kind of culpability otherwise required for commission of the crime."[278] Thereafter, however, §§ (a) and (c) respectively require that the actor "purposely engage[ ] in conduct which would constitute the crime" and "purposely do[ ] or omit[ ] to do anything which [is] a substantial step in a course of conduct planned to culminate in his commission of the crime."[279] Subsection (b), in contrast, does not have a similar purpose requirement with respect to conduct, but it does apply a belief requirement to the result element: the accused must have the "purpose of causing or [act] with the belief that [he] will cause such result without further conduct on his part." [280] When this disjointed and apparently conflicting language is viewed collectively, it is very difficult to surmise—from the text alone, at least—the policy determinations that the Model Penal Code drafters actually intend to communicate.

The Model Penal Code's structural drafting flaws are exacerbated by a pair of more narrow drafting issues: the overlapping and ambiguous use of the terms "circumstances" and "belief." Consider, for example, that Model Penal Code § 5.01(1)(a) creates liability where the defendant "engages in conduct which would constitute the crime if the attendant *circumstances* were as he *believes* them to be."[281] Likewise, Model Penal Code § 5.01(1)(b) creates liability where the defendant "does or omits to do anything . . . with the *belief* that it will cause such result without further conduct on his part."[282] And Model Penal Code § 5.01(1)(c) creates liability where the defendant "does or omits to do anything that, 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."[283]

[278] Model Penal Code § 5.01(1).
[279] Model Penal Code § 5.01(1)(a), (c).
[280] Model Penal Code § 5.01(1)(b).
[281] Model Penal Code § 5.01(1)(a).
[282] Model Penal Code § 5.01(1)(b).
[283] Model Penal Code § 5.01(1)(c).

As is evident from these provisions, the terms "circumstances" and "belief" are central to understanding the intended operation of Model Penal Code § 5.01(1). At the same time, these terms are ambiguous, susceptible to differing interpretations, and are never defined in § 5.01 (or in any other general provision).[284] Further complicating matters is the fact that the terms appear to be used to serve different purposes in different contexts.

Consider, for example, that whereas the reference to "circumstances" and "belie[f]" in § (a) seem to be respectively operating as a stand in for circumstance *elements* and the actor's *mens rea* as to such elements,[285] use of the terms "circumstances" and "belie[f]" in § (c) appear to indicate a much broader scope.[286] (Just how broad, however, is unclear.[287]) And the general use of the term "belie[f]" in §§ (a) and (c) is to be contrasted with the more specialized use of the term "belie[f]" in § (b), which more narrowly deals with the *mens rea* of an attempt for result elements.[288]

When viewed collectively, then, the statutory language employed by the Model Penal Code fails to clearly communicate the intended operation of § 5.01(1). It is only by reference to the commentary of the Model Penal Code—and, in many cases,

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[284] For example, use of the term "belief" is ambiguous because beliefs come in various degrees. A belief might be as strong as "a practical certainty," which is the purely subjective form of knowledge. But beliefs can also be moderate: for example, one might "believe that something is likely true." Weaker yet, someone might possess "belief as to a mere possibility." It is, therefore, not clear just how strong a belief the Model Penal Code would require when it employs the term. Use of the term "circumstances" is similarly ambiguous because it might refer to circumstance elements, i.e., the statutory requirement that the victim of an assault be a police officer for APO. Alternatively, however, it might more broadly refer to all relevant aspects of the situation—including conduct elements and result elements as well as circumstance elements..

[285] Note, however, that the problem with this reading is that it:

> might be interpreted to mean that the only impossible attempts punished are those that arise from an actor's mistake as to an "attendant circumstance" that is an element of the offense charged. The mistake rendering an attempt impossible is often of this nature, as when an actor is prosecuted for attempted bribery when he bribes a person he mistakenly believes is a "public official," as required by one circumstance element of the offense definition of bribery. But in many cases the mistake does not concern a circumstance element of the offense definition.

ROBINSON, *supra* note 259, at § 1 CRIM. L. DEF. § 85.

[286] For example, as one commentator observes:

> Model Penal Code § 5.01(1)'s reference to "circumstances as he believes them to be" includes conduct elements and result elements as well as circumstance elements. Thus, a person who is arrested just as he is about to shoot to kill a person who, as it turns out, is already dead is guilty under Model Penal Code § 5.01(1)(c), despite the fact that the "circumstances" about which he is mistaken is the result element of "killing."

Westen, *supra* note 273, at 565 n.28.

[287] For example, the relevant circumstances presumably encompass not only "conduct elements and result elements as well as circumstance elements," Westen, *supra* note 273, at 565 n.28, but also situational facts—for example, the operability of a murder weapon—which are not elements *per se*, but facts that relate to those elements.

[288] *See, e.g.*, Model Penal Code § 5.01 cmt. at 305; Wechsler et al., *supra* note 51, at 575-76.

academic commentary building on that legislative commentary—that the meaning of the relevant terms can be understood.[289]

In accordance with the foregoing analysis, the Revised Criminal Code seeks to improve upon the Model Penal Code approach to statutory drafting in a variety of ways.

First, the Revised Criminal Code expressly states the culpable mental state requirement respectively applicable to results and circumstances. Based on a reading of the statutory text alone, the differential treatment of circumstances, subject to a principle of *mens rea* equivalency under § 301(a)(2), and results, subject to a principle of *mens rea* elevation under § 301(a)(1), is clear. And neither should be confused with the planning requirement stated in the prefatory clause of § 301(a).

Second, and relatedly, the contours of the latter principle of *mens rea* elevation governing results is communicated by the Revised Criminal Code in a more precise manner. By employing the phrase "with intent," "as defined in § 206(b)(3), § 301(a)(1) clearly communicates that a culpable mental state comparable to knowledge will provide the basis for attempt liability as to results, without any of the ambiguities associated with "belief."

Third, the Revised Criminal Code articulates the conduct requirement of an attempt through a simpler and more accessible formulation, which respectively addresses incomplete attempts, see § 301(a)(3)(A), and impossibility attempts, see § 301(a)(3)(B). This formulation provides fact-finders with the two most important standards, each of which is articulated in a manner that privileges simplicity and avoids unnecessary complexity.[290]

Fourth, and relatedly, the Revised Criminal Code abolishes the impossibility defense by incorporating actor-centric language into the latter standard, § 301(a)(3)(B) that, while substantively similar to the relevant language employed in the Model Penal Code, avoids any of the above-discussed ambiguities associated with the terms "circumstances" or "belie[f]" reflected in the Model Penal Code. At the same time, the reasonable adaptation limitation that accompanies the relevant impossibility language in § 301(a)(3)(C) effectively imports the common law approach to inherent impossibility.[291]

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[289] *See, e.g.*, Robinson & Grall, *supra* note 94, at 745-51; ROBINSON, *supra* note 259, at § 1 CRIM. L. DEF. § 85.

[290] As discussed *supra*, § 301(a)(3), by codifying the dangerous proximity test, departs from the substantive policies underlying the Model Penal Code's preferred substantial step test. However, it's worth noting that the language in § 301(a)(3) also departs from the articulation in criminal codes that similarly reject the Model Penal Code test. In the latter set of jurisdictions, the relevant general provisions are typically comprised of exceptionally language only broadly gesturing towards the common law approach. *See supra* note 174 and accompanying text. It is only by judicial interpretation, then, that these statutes have been interpreted to yield the dangerous proximity test. *See supra* note 175 and accompanying text. By clearly codifying the dangerous proximity test, in contrast, § 301(c)(a)(3) will avoid the need for this kind of judicial supplementation.

[291] As discussed *supra*, § 301(a)(3)(b), by codifying a reasonable adaptation limitation on impossible attempts, constitutes a codification departure from the majority of reform codes, which decline to codify general provisions addressing the issue of inherent impossibility—whether they follow the Model Penal Code approach or the common law approach. Furthermore, although § 301(a)(3)(b) is generally consistent with the substantive policies reflected in the majority (common law) approach to the issue, its precise language departs from the few criminal codes that do, in fact, codify this approach to inherent impossibility. For example, in these jurisdictions, the relevant statutory language relies on confusing exception clauses framed in the double negative. Illustrative is Minn. Stat. Ann. § 609.17, which reads:

The foregoing drafting revisions find support in a broad range of authorities, including modern legislative practice, [292] judicial opinions, [293] and scholarly commentary.[294] When viewed collectively, they will enhance the clarity, simplicity, and accessibility of the Revised Criminal Code.

2. § 22A-301(b)—Proof of Completed Offense Sufficient Basis for Attempt Conviction

Explanatory Note. Subsection (b) establishes that commission of the target offense constitutes an alternative basis of attempt liability. In practical effect, this means that the government may secure a conviction for an attempt to commit a given offense by proving either that the accused satisfies the elements of a criminal attempt—as defined in § (a)—with respect to the target offense, or, alternatively, by proving that the accused satisfies the elements of the target offense itself. Where, however, the government secures an attempt conviction pursuant to the latter theory of liability, the accused may not be convicted of both the completed offense and an attempt to commit the same under this subsection.

This alternative basis of attempt liability is intended to serve three related functions. First, it clarifies that failure to consummate the target offense is not an element of an attempt. Second, it avoids any procedural complications that might result from the fact that—under the general principle of *mens rea* elevation set forth in § 301(a)(1)—a criminal attempt is not always a lesser-included offense of the target

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"An act may be an attempt notwithstanding the circumstances under which it was performed or the means employed to commit the crime intended or the act itself were such that the commission of the crime was not possible, *unless such impossibility would have been clearly evident to a person of normal understanding.*" Similarly consider Iowa Code Ann. § 707.11, which reads: "It is not a defense to an indictment for attempt to commit murder that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and *the actor's expectations were not unreasonable in the light of the facts known to the actor*." Under the Revised Criminal Code, in contrast, the requirement of reasonable adaptation is articulated in the affirmative, alongside the definition of impossible attempts reflected in § 301(a)(3)(B). This departure—which is based on current District law—is intended to enhance the overall clarity of the Revised Criminal Code.

[292] For example, a majority of reform codes substantially simplify the Model Penal Code's three-tier approach to drafting. As Michael Cahill observes: "[o]nly eleven states have adopted some version of [Model Penal Code § 5.01(1)(a)]" while "[o]nly three states have adopted a version of [Model Penal Code § 5.01(1)(b)." Cahill, *Reckless Homicide*, *supra* note 100, at 916 n.103 (collecting statutory citations). Many jurisdictions instead opt for a much simpler and more straightforward formulation along the lines of the general approach to codification reflected in Model Penal Code § 5.01(1)(c). *See, e.g.*, Or. Rev. Stat. Ann. § 161.405; Wash. Rev. Code Ann. § 9A.28.020; Colo. Rev. Stat. Ann. § 18-2-101.

[293] For example, courts are apt to utilize clearer and more accessible language to describe the appropriate actor-centric perspective from which impossibility claims are to be evaluated. Rather than relying upon the Model Penal Code's problematic "under the circumstances as he believes them to be" language, Model Penal Code § 5.01(1)(c), for example, some federal judges have instead relied upon the recognition that "a defendant should be treated in accordance with the facts as he supposed them to be." *United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1978); *see United States v. Nosal*, No. CR-08-0237 EMC, 2013 WL 4504652, at *11 (N.D. Cal. Aug. 15, 2013).

[294] For broad academic criticism of the Model Penal Code approach to drafting consistent with § 301(a) across a range of issues, see, for example, Robinson & Grall, *supra* note 94; Westen, *supra* note 273; ROBINSON, *supra* note 259, at 1 CRIM. DEF. § 85; Brodie, *supra* note 206.

offense under a strict elements test. Third, it provides greater flexibility for reaching appropriate sentencing dispositions in individual cases.

Relation to District Law. Subsection (b) fills a gap in the D.C. Code and is consistent with District case law. The D.C. Code is silent on the relationship between the elements of an attempt and the elements of a completed offense, which has effectively submitted the topic to the discretion of the DCCA.[295] The relevant case law establishes that the government may secure an attempt conviction based upon proof that the target offense was actually completed. Subsection (b) expressly codifies this legal proposition in the interests of clarity, consistency, and the preservation of current District law.

Under DCCA case law, it is well-established that "a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'"[296] This policy, as promulgated by the DCCA, is understood to rest on two basic underlying principles: (1) "failure is not an essential element of criminal attempt"[297]; and (2) "[a]n attempt is a lesser-included offense of the completed crime."[298]

The DCCA's general policy of allowing proof of a completed offense to substitute for proof of an attempt is widely accepted in other jurisdictions.[299] So too is the first rationale offered by the DCCA in support of this policy; it is well established that proof of failure is not a necessary element of an attempt.[300] More problematic, however, is the DCCA's second rationale: that proof of a completed offense may substitute for proof of an attempt *because* an attempt is a lesser-included offense (LIO) of the completed crime

At the heart of the issue is the legal standard by which the DCCA determines when one offense is an LIO of another offense, the so-called elements test. [301] Under the elements test, the DCCA analyzes "whether the statutory elements of the lesser offense are contained within those of the greater charged offense."[302] Which is to say that one offense is an LIO of another offense when (and only when) "the greater offense cannot be committed without also committing the lesser."[303] In practice, "the determination [of] whether an offense is a 'lesser included' offense of an allegedly 'greater' offense is

[295] Note, however, that D.C. Super. Ct. R. Crim. P. 31(c) establishes that: "A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right."

[296] *Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001); *see, e.g., United States v. Fleming,* 215 A.2d 839 (D.C. 1966); *Ray v. United States*, 575 A.2d 1196, 1199–200 (D.C. 1990).

[297] *Evans*, 779 A.2d at 894; *see, e.g., In re Doe*, 855 A.2d 1100, 1107 (D.C. 2004); *Ray*, 575 A.2d at 1199–200 (citing *United States v. Dupree*, 544 F.2d 1050, 1052 (9th Cir.1976) and *United States v. Jacobs*, 632 F.2d 695, 697 (7th Cir. 1980)).

[298] *Evans*, 779 A.2d at 894; *see, e.g., Ray*, 575 A.2d at 1199; *Washington v. United States*, 965 A.2d 35, 42 (D.C. 2009).

[299] *See infra* notes 320-28 and accompanying text.

[300] *See infra* notes 320-28 and accompanying text.

[301] *See, e.g., Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001); *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997); *see Schmuck v. United States*, 489 U.S. 705, 716 (1989).

[302] *Mungo*, 772 A.2d at 245.

[303] *Warner v. United States*, 124 A.3d 79, 85 (D.C. 2015).

made by comparing the statutory elements of the two offenses," without regard to the facts of a case.[304]

Viewed through the elements test, an attempt often will be an LIO of the completed offense, but not always, assuming it is subject to a principle of *mens rea* elevation. Under this principle, the government must prove that the accused acted with the intent to cause any result required by the target offense, regardless of whether a lower culpable mental state, such as recklessness or negligence, will suffice to establish the completed offense.[305] Based solely on a comparison of statutory elements, then, it is not always the case that an attempt—occasionally subject to a higher *mens rea*—is an LIO of the completed offense under a principle of *mens rea* elevation.[306]

In accordance with the following analysis, the DCCA's reliance on the elements test has produced a line of cases that appear to reject a principle of *mens rea* elevation applicable to attempts in the interests of ensuring that proof of a completed offense can substitute for proof of an attempt.[307] Illustrative is *United States v. Smith*.[308] The defendant in *Smith* was prosecuted for attempted second-degree child cruelty on a theory that the defendant recklessly committed the *completed* offense.[309] On appeal, the defendant argued that, in light of the fact that an attempt was charged, "the government was required, but failed, to prove that he specifically intended to injure his child" pursuant to a principle of *mens rea* elevation.[310] The DCCA ultimately rejected this argument, deeming that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime."[311] "To hold otherwise," after all, would "create the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime."[312]

Viewed in context, the holding in *Smith* (and comparable cases) is not surprising.[313] Assuming the practice of allowing proof of the completed offense to suffice for an attempt rests upon a strict comparison of the statutory elements alone, then application of a principle of *mens rea* elevation would indeed be problematic. At the same time, however, application of the principle of *mens rea* equivalency implied in these cases in a broader context is even more problematic. Were it true, for example, that "the intent required to commit the crime of attempt can be no greater than the intent

[304] *Id.*; *see also Mungo*, 772 A.2d at 245 ("Although simple assault is not defined by the statute, analysis under the 'elements" test for lesser-included offenses is still appropriate and the elements to be examined are those found in the common law definition of assault.")
[305] *See supra* Commentary on RCC §§ 301(a)(1)-(2): Explanatory Note.
[306] *See, e.g.*, WAYNE R. LAFAVE & GERALD ISRAEL, 6 CRIM. PROC. § 24.8(e) (4th ed. Westlaw 2017).
[307] *See supra* Commentary on RCC §§ 301(a)(1)-(2): Relation to Current District Law on Culpable Mental State Requirement.
[308] 813 A.2d 216, 219 (D.C. 2002).
[309] *See id.*
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] The DCCA has likewise relied on similar reasoning to uphold convictions for attempts to commit so-called general intent crimes, such as simple assault and threats, based upon facts indicating that the completed offense had been committed—but in the absence of proof of an elevated mental state beyond the "general intent" necessary for the underlying offense. *See Ray v. United States*, 575 A.2d 1196, 199 (D.C. 1990); *Jones v. United States*, 124 A.3d 127, 129-31 (D.C. 2015).

required to commit the completed crime,"[314] regardless of the situation, then attempt charges premised on theories of recklessness, negligence, or even strict liability would be viable in the District. And this in turn would provide for expansive liability in derogation of both DCCA case law and nearly universal national legal trends.[315]

Fortunately, the foregoing tension is easily resolvable by adopting a statutory provision clarifying that proof of the completed offense is an explicitly authorized means of proving an attempt. By establishing that the elements of the completed offense constitute a viable alternative basis for establishing attempt liability, this kind of legislative statement obviates the relevant LIO-related complications arising in cases where the government seeks to prove an attempt—otherwise subject to a generally applicable principle of *mens rea* elevation, see § 301(a)(1)(A)—with evidence of the completed offense. Consistent with the interests of clarity, consistency, and the preservation of current District law, then, § 301(b) provides this legislative statement.

Relation to National Legal Trends. Subsection (b) is consistent with both common law principles and modern legislative practice.

Historically, the crime of attempt was sometimes "defined as if failure were an essential element," such that a person could not be convicted of an attempt if the crime was actually committed.[316] The basis for this principle was "derived from the old common law rule of merger, whereby if an act resulted in both a felony and a misdemeanor the misdemeanor was said to be absorbed into the felony."[317] However, the relevant "English merger rule was laid to rest by statute in 1851," at which point American legal authorities began to abandon it as well.[318] Today, "the common law rule that 'failure' is an essential element of an attempt, and that a person cannot be convicted of an attempt if the crime was actually committed, has been rejected."[319]

With the contemporary abandonment of failure as an essential element of an attempt there has been a broad acceptance that proof of a completed offense may suffice for an attempt conviction.[320] This approach to the prosecution of criminal attempts is reflected in both contemporary legislative practice and common law authorities. For example, a significant number of modern criminal codes incorporate general provisions effectively establishing that "a defendant may be convicted of the attempt even if the completed crime is proved," subject to a limitation that a person may not be convicted of both an attempt and the completed offense.[321] And "many recent cases" issued in

[314] *Evans*, 779 A.2d at 894.
[315] *See generally* Commentary on RCC § 301(a)(1): Relation to Current District Law and Relation to National Legal Trends.
[316] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see Lewis v. People*, 124 Colo. 62 (1951); *People v. Lardner*, 300 Ill. 264 (1921).
[317] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 653 (2d ed.1961).
[318] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.
[319] Commentary to La. Stat. Ann. § 14:27; *see, e.g.*, *Commonwealth v. LaBrie*, 473 Mass. 754 (2016); Model Penal Code § 1.07 cmt. at 132.
[320] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.
[321] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing Ala. Code § 13A-4-5; Alaska Stat. § 11.31.140; Ariz. Rev. Stat. Ann. § 13-110; Cal. Penal Code § 663; Colo. Rev. Stat. Ann. § 18-2-101; Ga. Code Ann. § 16-4-2; Idaho Code § 18-305; La. Rev. Stat. Ann. § 14:27; Mont. Code Ann. § 45-4-103; Nev. Rev. Stat. Ann. § 193.330; Or. Rev. Stat. § 161.485; Tenn. Code Ann. § 39-12-101; Tex. Penal Code

jurisdictions lacking such general provisions have similarly endorsed these principles by way of common law.[322] Broad acceptance of these principles has endured, moreover, notwithstanding a general recognition that "[w]hen attempt carries a more demanding *mens rea* than a completed offense," it does not necessarily qualify as "a lesser included offense" under the elements test.[323]

Legislatures and courts have offered a range of rationales in support of this "modern view" on attempt prosecutions.[324] It has been observed, for example, that "requiring the government to prove failure as an element of attempt would lead to the anomalous result that, if there were a reasonable doubt concerning whether or not a crime had been completed, a jury could find the defendant guilty neither of a completed offense nor of an attempt."[325] Furthermore, "just as where one indicted for manslaughter or battery . . . cannot escape conviction by showing that he committed the more serious offense of murder or aggravated battery," one who "is indicted for an attempt" should not be able to escape conviction by pointing to "evidence showing that the offense was actually committed."[326] And perhaps most fundamentally, a defendant convicted of an attempt based upon proof of a completed offense can hardly complain "where the determination of his case was more favorable to him than the evidence warranted."[327]

In accordance with the foregoing authorities, § (b) establishes that proof of a completed offense constitutes an alternative basis of establishing attempt liability, subject to a merger rule prohibiting convictions for both the attempt and the completed offense.

Ann. § 15.01; Utah Code Ann. § 76-4-101; Wis. Stat. Ann. § 940.46.); *but see* Miss. Code Ann. § 97-1-9; Okla. Stat. Ann. tit. 21, § 41. This is related to, but distinct from, another proposition established by some criminal codes: that "[a] person charged with commission of a crime may be convicted of the offense of criminal attempt as to that crime without being specifically charged with the criminal attempt in the accusation, indictment, or presentment." Ga. Code Ann. § 16-4-3; *see, e.g.,* Wash. Rev. Code Ann. § 10.61.003; Me. Rev. Stat. Ann. tit. 17-A, § 152; Neb. Rev. Stat. § 29-2025; Nev. Rev. Stat. Ann. § 175.501; N.C. Gen. Stat. § 15-170; Okla. Stat. Ann. tit. 22, § 916; R.I. Gen. Laws Ann. § 12-17-14; Vt. Stat. Ann. tit. 13, § 10 ; Wash. Rev. Code § 10.61.003; W. Va. Code § 62-3-18 Wyo. Stat. § 7-11-502; *see also* Model Penal Code § 1.07(4)(b) (discussed in *Commonwealth v. Sims*, 591 Pa. 506, 522–23 (2007)).

[322] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing *United States v. York*, 578 F.2d 1036 (5th Cir. 1978); *Richardson v. State*, 390 So.2d 4 (Ala. 1980); *State v. Moores*, 396 A.2d 1010 (Me. 1979); *Lightfoot v. State*, 278 Md. 231 (1976); *State v. Gallegos*, 193 Neb. 651, (1975); *State v. Canup*, 117 N.C.App. 424 (1994); *United States v. Rivera-Relle*, 333 F.3d 914 (9th Cir. 2003); *but see* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW, § 694, at 587–88 (15th ed. 1996); *People v. Bailey*, 54 Cal.4th 740, 143 Cal.Rptr.3d 647 (2012). This is related to, but distinct from, another proposition established by many courts: "that an attempt conviction may be had on a charge of the completed crime." LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing *State v. Miller*, 252 A.2d 321 (Me. 1969) and *Crawford v. State*, 107 Nev. 345 (1991)). For federal case law addressing this issue, see, for example, *United States v. Castro-Trevino*, 464 F.3d 536, 542 (5th Cir. 2006); *United States v. Marin*, 513 F.2d 974, 976 (2d Cir.1975); *Simpson v. United States*, 195 F.2d 721, 723 (9th Cir. 1952).

[323] LAFAVE & ISRAEL, *supra* note 306, at 6 CRIM. PROC. § 24.8(e).

[324] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.

[325] *LaBrie*, 473 Mass. 754, 46 N.E.3d 519 (2016) (quoting *York*, 578 F.2d 1036).

[326] Commentary to La. Stat. Ann. § 14:27.

[327] *People v. Vanderbilt*, 199 Cal. 461, 249 P. 867 (1926).