Background for Lady Eldon's Lace

1 The traditional treatment of mistakes in the law

The traditional treatment of mistakes in Anglo-American jurisprudence has been as follows.[3] If one engages in the prohibited conduct by mistake (as to what conduct one is engaging in), or causes the harm the law seeks to avoid by mistake (as to the riskiness of one's conduct), then, unless the crime requires the specific intent to engage in the particular conduct or cause the harm, in which case a mistake entails the absence of such an intent and therefore the absence of the prohibited conduct, one is excused from criminal liability if one's mistake is "reasonable". On the other hand, if one makes no mistake about what one is doing, or one's mistake is unreasonable (and no specific intent is required), then one has violated the criminal prohibition regardless whether one knew or was negligent in not knowing that such conduct was illegal. In other words, a mistake over the meaning or existence of the criminal law itself is no excuse no matter how reasonable the mistake might be.[4]

Inculpatory mistakes are treated under the law of attempts, for they become an issue only when the conduct has proven to be harmless or less harmful than the actor believed it would be. Traditionally, the law has treated inculpatory mistakes under the rubrics of factual and legal impossibility.[5] An inculpatory factual mistake — I mistakenly think the gun is loaded when I point it at you and pull the trigger — results in attempt liability. An inculpatory legal mistake — I mistakenly think the goods I purchase from you are stolen and thus that I am committing the offense of receiving stolen property[6] — does not result in attempt liability.

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[3] See generally J. Dressler, *Understanding Criminal Law* (1987): 127–33.
[4] Id., 141–44.
[5] Id., 348–55.
[6] See *People v. Jaffe*, 185 N.Y. 497 (1906).

L. Alexander, *Law and Philosophy* 12:1 (1993), pp. 33–4

2 The traditional approach to inculpatory mistakes

Under the traditional approach to inculpatory mistakes, the law distinguished between cases of pure factual impossibility, pure legal impossibility, and hybrid legal impossibility. A case of pure factual impossibility is a case where defendant makes a mistake regarding the nature or efficacy of the means chosen to accomplish the crime. Some examples of factual impossibility include picking an empty pocket,[27] firing an unloaded gun,[28] trying to have unconsented-to intercourse while impotent,[29] and shooting into an empty room where the intended victim usually slept.[30]

Pure legal impossibility cases are those where, according to Joshua Dressler's formulation, "the criminal law does not prohibit . . . [defendant's] conduct or the result that she has sought to achieve".[31] Our hypothetical defendant who dances thinking dancing to be illegal when it is not has engaged in a legally impossible attempt of the pure variety. More problematic as examples of pure legal impossibility are cases such as *People v. Teal*[32] and *Wilson v. State*.[33] In *Teal*, defendant attempted to suborn false testimony on a matter that was immaterial to the proceedings believing that she was committing the (real) crime of suborning perjury. The crime of perjury, however, required that the false testimony be about a material matter. Similarly, in *Wilson*, the defendant altered an immaterial part of a check believing that he was committing forgery. The crime of forgery, however, required that the alteration be of a material part of the check.

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[26] See Robbins, 'Attempting the Impossible: The Emerging Consensus', *Harvard Journal on Legislation* **23** (1986): 377, 397.

[27] *People v. Twiggs*, 223 Cal. App.2d 455 (1963).

[28] *State v. Damms*, 9 Wis.2d 183 (1960).

[29] *Preddy v. Commonwealth*, 184 Va. 765 (1946).

[30] *State v. Mitchell*, 170 Mo. 633 (1902).

[31] J. Dressler, supra note 3, at 352.

[32] 196 N.Y. 372 (1909).

[33] 85 Miss. 687 (1905).

L. Alexander, *Law and Philosophy* 12:1 (1993), pp. 45–6