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The Relevance of Harm as the Criterion for the Punishment of Impossible Attempts

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Abstract There has been much debate about the relevance of punishment in cases of impossible attempts. This article sets out the current position in Anglo-American jurisdictions and considers the rationale behind punishment in hypothetical impossible attempt cases in order to draw out the key issues at the heart of responsibility. The cases of the inadequately prepared attempt and the attempt which is doomed to failure are compared to illustrate the relevance of the potential to cause harm in the justification for punishing such actors. The article concludes with the suggestion that the relevant criterion is the presence of the potential to cause imminent harm, as opposed to future, speculative harm.

Keywords Criminal liability; Harm as a criterion; Impossible attempts; Imminent harm; Future harm

Discussion of impossible attempts usually falls into one of two camps: discussions focused on practical issues generated by the accused who tries to import something which turns out to be innocuous or steal something which turns out not to be there; and discussions focused on theoretical issues generated by hypothetical examples of, amongst others, an accused who tries to kill his victim using voodoo. The former tends to be the remit of criminal lawyers, while the latter tends to be tackled by legal philosophers. In reality, while there are clear practical issues that need to be resolved as a matter of criminal justice policy (and in the case of drug-related offences, that have very clear policy implications), the underpinning rationale for punishment in both discussions is the same. Although the voodoo killer, doomed as he is to failure while he adheres to his delusion, presents an unrealistic example of possible *conviction* for attempted murder, his situation allows for discussion of theoretical issues which, if dealt with properly, can only serve to render the rationale for those realistic situations more robust.

It is now generally accepted that it is necessary to look subjectively at the accused's conduct when considering his liability for an impossible attempt. This is done in the name of ensuring adequate protection for society, acknowledging the potential in the accused to cause harm, and acting to prevent that harm from being actualised in the future. The focus is on what he believed he was striving towards, rather than the reality of what he would have been able to achieve had he taken his actions through to their conclusion. Thus, where the accused has tried to import drugs but has been duped into buying and 'importing' a

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non-controlled substance, the approach endorsed in modern criminal law is to focus on his perception of his acts at the time of the alleged importation. This approach focuses on what he believed he was doing (importing illegal drugs) and convicting him on that basis, rather than the objective reality that he has been caught 'importing' a non-controlled substance, and therefore has not, on the face of it, committed any crime. This contrasts with the earlier approach which tended to concentrate on what had actually been done, and acquit where that did not describe a crime known to the law.

The current law

The current approach is played out through numerous modern cases. Scots law proffers *Docherty v Brown*¹ where the accused was convicted, overruling earlier precedent, of attempted possession of Ecstasy notwithstanding that he had been duped into taking possession of an innocuous substance. He had been charged with being in possession of Ecstasy with intent to supply it to others and had raised an objection to the relevancy of the charge, arguing that it did not disclose a crime known to Scots law. He then appealed unsuccessfully to the High Court of Justiciary on the grounds that it was not possible for him to be guilty of an attempt to import drugs when he was not in possession of any drugs in the first place. The case sets out a useful overview of the development of the law, starting with Hume who classifies an attempt as the doing of an act by which the accused meant or expected to carry out his crime, where he would have carried out the crime if he had not been fortuitously interrupted or defeated.² Three classic cases then developed this principle as it applied to cases where commission of the crime would always have been impossible. In *HM Advocate v Anderson*³ the accused had been charged with attempting to carry out an abortion, but given that there was no proof that the woman had been pregnant at the time, it was classified as an attempt to do something physically impossible and as such, the charge was held to be irrelevant as it could never be considered a crime. This decision was then upheld in the later and similar case of *Semple v HM Advocate*.⁴ Even allowing for the fact that these cases represent an approach which we would now reject, the real anomaly in the High Court's interpretation of the law during this phase of its development comes in the case of *Lamont v Strathern*⁵ which was decided after *Anderson* and before *Semple*. In this case, the accused was charged with attempted theft in a situation where, although he had tried to pick his victim's pocket, there had been nothing in it to steal. This case shows an early instance of something akin to the modern subjective approach. He was convicted because he had taken his planned acts through to completion insofar as he could, and was only defeated by

1 1996 SLT 325.

2 Baron Hume, *Commentaries on the Laws of Scotland Respecting Crimes*, vol. i, 4th edn (Bell and Bradfute: Edinburgh, 1844) 27.

3 1927 SLT 651.

4 1937 SLT 48.

5 1933 SLT 118.

the fortuitous emptiness of the pocket, which could not count in his favour. This again highlights the departure from the thinking in *Anderson* where it was stated that fortuitous instances, such as the non-existence of a foetus, were relevant to liability because the accused was entitled to have charges against him construed strictly and to take advantage of any opportunity to avoid conviction.⁶ In *Docherty*, the court concluded by setting out an unambiguously subjective approach to this issue and held that *Anderson* was wrongly decided, since the accused had the intention to cause the victim to abort, whether or not this was actually possible given the facts, and had carried out acts towards that goal which went beyond preparation. *Docherty*, too, had intended to possess and supply Ecstasy, whether or not this was actually possible given the facts, and had carried out acts towards that goal which went beyond preparation.

English law, in moving away from the earlier authority of *Haughton v Smith*,⁷ gives us *R v Shivpuri*⁸ where the defendant was convicted of attempting to be knowingly involved in the fraudulent evasion of a prohibition on the importation of heroin, although, as in *Docherty*, the defendant was in fact mistaken as to the nature of the 'drugs' and was attempting to import an innocuous substance. In the earlier case of *Haughton*, the defendant had taken possession of goods he believed to be stolen, although in fact those stolen goods had already been intercepted by the police and allowed to continue on their way to trap those waiting to receive them. The defendant was acquitted of the charge of attempting to handle stolen goods on the grounds that he could not be guilty of an offence which was impossible to commit; he could not have taken steps towards the commission of the offence of receiving stolen goods when there were no 'stolen goods' present in the particular situation. Again, this adheres to an objectivist outlook, taking its lead from the facts as they existed and relying on the fortuity of the absence of a critical fact, rather than looking at the facts as the offender believed them to be. The case was relied on throughout the Anglo-American jurisdictions and set out the classic division within the so-called 'defence' of impossibility between factual and legal impossibility, where the former provided for conviction, while the latter provided a defence because the offender could never have committed the offence—here of receiving stolen goods—in a situation where the goods were no longer, in legal terms, stolen. The accused who set out to pick an empty pocket would have attempted something which was factually impossible and would still face conviction for trying to take something which was not, in fact, there. The accused who set out to import cocaine but actually imported baking soda would have attempted something which was legally impossible and would, by contrast, not face conviction given that he had imported an innocuous (if viewed objectively) substance. Distinctions between factual and legal impossibility are difficult to uphold, as the

6 1927 SLT 651 at 652.

7 [1975] AC 476, where the court held that there could be no conviction where commission of the intended offence was impossible.

8 [1987] AC 1.

distinction itself is a fine and largely semantic one. Classic examples often cited of factual impossibility involve an accused firing at a bed, intending to kill the occupant, who has just vacated it, rendering it therefore factually impossible for him to commit murder, due to events beyond his control. Legal impossibility is often illustrated by the accused who shoots at a corpse believing it to be alive and intending to commit murder. Here, it is claimed, the attempt is legally impossible because even completing the proposed acts will not lead to something covered by the definition of the crime of murder. Yet this could also be classified as factual impossibility, where the accused's 'murder' cannot succeed because of the fact that the victim is dead already, which can be described as an event beyond his control. Given this confusion, modern practice is to ignore this supposed distinction, and, indeed, in England, the situation changed, or at least appeared to change with the passing of the Criminal Attempts Act 1981. This statute specifically excluded any defence of impossibility, ensuring instead that the courts took a subjective view of the individual's conduct. In practice, however, the next major case on this issue provided commentators with a fertile source of material, given that the decision completely ignored the effect of the legislation. In *Anderton v Ryan*,⁹ the defendant had bought a cheap video recorder, wrongly believing that it had previously been stolen. She was convicted of attempting to receive stolen goods, but this was quashed by the House of Lords on the grounds that her mistaken belief about the criminality of her actions should not convict her when her acts were 'objectively innocent'. This decision maintains the objectivist position despite the intervention of the statute some four years earlier. It was not until *Shivpuri* that the court had an opportunity to rectify this, enshrine the subjective approach laid down in the statute, and overrule *Anderton*.

Elsewhere, Australian jurisdictions now also reject the objective approach from *Haughton*. In *Britton v Alpogut*,¹⁰ the Supreme Court of Victoria, in similar circumstances to *Shivpuri*, denied the relevance of impossibility and the objective innocence of the accused's acts. Alpogut had packets of a powdery substance he believed to be cannabis hidden in a secret compartment of his suitcase. In fact, the substance was neither cannabis, nor any other prohibited substance. At trial, it was held that there was no case to answer since the facts did not disclose a crime known to the law. This was rejected by the Supreme Court, noting that the *Haughton* approach had allowed the law to become sidetracked by the issue of whether the crime would be possible to complete, rather than focusing on the issue of criminal intent which should take centre stage in an attempt case. It was held that, so long as there was evidence of criminal intent, and acts which were more than preparatory towards fulfilment of that intention, then the criteria for attempt liability had been satisfied. The only circumstances in which the court was prepared to accept the relevance of impossibility was in those, no doubt extremely

⁹ [1985] AC 560.

¹⁰ [1987] VR 929.

unusual, cases where the perpetrator had carried out a course of action which he believed was a crime, when in fact it was not. Whereas the perpetrator bringing baking soda into the country believing it to be cocaine would be guilty of attempting to import cocaine, the person bringing in baking soda believing that it is a crime to import baking soda would be guilty of nothing more than naïvety. Relying on the principles set out in *Britton, R v Mai*¹¹ saw a conviction upheld on appeal in New South Wales where the appellant had been in possession of what he believed to be heroin, when in fact the original blocks of heroin had been replaced by the police with plaster of Paris. The court held that an attempted crime was made out where the accused intended the relevant acts, and had carried out acts more than merely preparatory to the fulfilment of that intention, with no regard whatsoever paid to the question of whether his crime would have been capable of completion. The authority of *Britton* was further entrenched in South Australia by *R v Irwin*¹² where the appellant failed to succeed in overturning his conviction for attempted aggravated robbery. He had demanded money from an individual who did not have any money on him at the time. Since it would have been impossible for him to rob his victim, given the lack of any cash in his pockets, the appellant relied on *Haughton* to argue that he should benefit from a defence of impossibility, and failed.

North American jurisdictions have likewise moved away from approaches which placed any significance on the alleged objective innocence of the accused's acts. In Canada, the appeal in *US v Dynar*¹³ was based on the fact that the acts could not have been carried through to the completion of the intended crime. The accused had been charged with attempting to launder money and an extradition order had been requested by the USA. However, he argued that, since the police were using an agent and clean money of their own in order to uncover his criminal activities, the money he had been asked to launder was not in fact the 'proceeds of crime' and therefore it would have been impossible for him to commit the full crime of laundering the proceeds of crime. In rejecting his appeal, the Canadian Supreme Court also emphasised the need to look for *mens rea* and *actus reus*, and disregard notions of possibility or impossibility. Among American jurisdictions, the position set out in the Model Penal Code,¹⁴ has become the widely accepted approach, denying as it does the relevance of any defence of impossibility, although development in this area has been tortuous, in

11 (1992) 60 A Crim R 49.

12 (2006) 161 A Crim R 78.

13 [1997] 2 SCR 462.

14 Section 5.01: '(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. (2) . . .'

common with other countries where notions of factual and legal impossibility were adopted.

Legislative moves across Anglo-American jurisdictions have also confirmed this shift in attitude, in favour of subjective assessments of the individual's acts and away from acknowledgement of any significance to be found in impossibility. Section 1(2) and (3) of the Criminal Attempts Act 1981 specifically excludes the so-called defence of impossibility; first, by stating in s. 1(2) that a person remains guilty of an attempt even if he or she could never have carried the commission of the offence through to completion and, secondly, by asserting, in s. 1(3), the use of a subjective test to ascertain their intentions and whether those intentions are criminal.¹⁵ Similarly in America, the Model Penal Code also sets out a position in s. 5.01(1)(c), which has met with widespread acceptance, stating that the accused is guilty of an attempt when he meets the *actus reus* and *mens rea* aspects, looking at the circumstances as he believed them to be, rather than those which actually occurred. Canadian criminal law sets out its rejection of a defence of impossibility in s. 24(1) of the Criminal Code, and the subjective approach to these cases is shown in *R v Scott*¹⁶ where, in a situation very like *Lamont*, Scott was convicted for his attempt to pick an empty pocket, on the grounds that he had the *mens rea* and had carried out acts designed to lead to the commission of the offence. Thus, both legislatures and the courts have come, over the course of a number of decades, to a position where impossibility is viewed as irrelevant to any assessment of the guilt of the accused. Having examined the position as it currently stands, I turn now to consider the underpinning rationale for the conviction of these individuals, and whether the justifications used to punish them are sufficiently robust.

Theories of punishment

Much has been written about the justification for punishing inchoate crimes in general, and impossible attempts in particular.¹⁷ The perceived difficulty lies in the fact that the individual carrying out something which is not, *ex facie*, a crime does not necessarily cause obvious and visible harm which can then be held up as justifying the imposition of punishment. However, all jurisdictions do punish inchoate crimes, and

15 Section 1(2) and (3) of the Criminal Attempts Act 1981 states: '(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible. (3) In any case where—(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence'.

16 (1964) 2 CCC 257.

17 See, e.g., H. L. A. Hart, 'The House of Lords on Attempting the Impossible' (1981) 1 *Oxford Journal of Legal Studies* 149, and G. L. Williams, 'The House of Lords and Impossible Attempts, or *quis custodiet ipsos custodes?*' (1986) 45 *Cambridge Law Journal* 33.

the modern subjective approach ensures that those carrying out impossible attempts are also punished—for what they thought they were doing. How, then, is this punishment justified? Inevitably, this rests on distinctions between retributivist and utilitarian schools of thought. Retributivism looks backwards to the attempted crime and seeks to ensure that the offender repays his debt to society—either literally in ancient ‘eye for an eye’ formulations, or metaphorically in ensuring some deprivation and unpleasantness in order to offset the harm he had inflicted on his victim and/or society. Utilitarian approaches look forward to see what measures can be taken now to prevent future recurrence of crime, and justify the imposition of punishment by reference to the benefit gained from the increase in security and reduction in crime which offsets the pain and costs involved in punishment. This is where we find the most common theory used to justify the punishment of inchoate crime—that of deterrence. Deterrence comes in two distinct guises: individual deterrence which targets the unpleasantness of punishment on the individual in order to make him think again before committing a crime in the future; and general deterrence whereby the threat and actual imposition of punishment for these crimes is seen to act as a deterrent on other unspecified members of the community who may be considering criminal activity. Punishment of the offender operates as both individual deterrence, and, where punishment is meted out to him *pour encourager les autres*, as general deterrence, both of which operate on a broader level to reduce crime and increase society’s sense of protection and well-being. Punishment of the individual is justified as a necessary evil in the face of this greater good.¹⁸

Rationalising punishment

The rationale behind conviction in all cases of impossible attempts rests on the fact that the accused has the relevant *mens rea* and has carried out the *actus reus* of the crime when considered from his perspective, and ignores the strict reality of the situation that, for example, he has an innocuous substance, rather than a prohibited drug, in his possession. This is underpinned by notions of subjective dangerousness; the accused has shown both his willingness to commit a harmful act, and that he had the potential to commit real harm, had the world turned according to his perceptions. Thus, the argument runs, it is necessary to punish him for his attempt because, if we do not, he will simply try harder next time, armed with the accurate knowledge he has gained in the process. Such an approach can be found explicitly in any number of these cases; for example, in *Dynar*, it is stated that:

... the purpose of the law of attempt is universally acknowledged to be the deterrence of subsequent attempts. A person who has intended to do something that the law forbids and who has actually taken steps towards

18 Although this approach has an understandably attractive quality, it does fall foul of Kantian thinking, in treating the infliction of punishment as a means to another end.

the completion of an offence is apt to try the same sort of thing in the future; and there is no assurance that next time his attempt will fail.¹⁹

This model for attributing blame based on assessments of dangerousness and determinations of 'harm' relies on us accepting that the deluded attempter will, at some point in the near future, carry out his criminal desires again and successfully achieve the projected criminal harm on this subsequent occasion, unless we act now to deter him. However, to function as an approach in all cases of impossible attempts, it would require that all failed attempters show a propensity to cause real harm unless prevented by punishment. Is evidence of potential future 'harm' a sufficient criterion for convicting all failed attempters?

Types of failed attempt

To illustrate the various types of failed attempt and where the evidence of potential harm presents itself, imagine the following.

Recently turned down for promotion by his employer and intent on killing her, A takes aim and pulls the trigger. His victim dies instantaneously as a result of a shot to the head.

Recently turned down for promotion by his employer and intent on killing her, B makes a wax image and drives a pin through its heart in the belief that this will cause her to die of a heart attack. His victim is unaffected, although B believed her to be dead and was more than somewhat surprised to see her the next day.

Recently turned down for promotion by his employer and intent on killing her, C makes a wax image and tries to drive a pin through its heart in the belief that this will cause her to die of a heart attack. Unfortunately, the wax is too hard and the pin will not go through. His victim is unaffected, which does not surprise C as he has already assessed his attempt at a voodoo killing as a failure.

A clearly fits the paradigm of the intentional killer who has carried out an act which caused the death of the victim, and rightly deserves conviction for murder. Whether B and C both fit the paradigm of the attempted murderer is less clear. B has attempted to kill using means which are, to the outside observer, inadequate and more to the point, fruitless and deluded. C has attempted to kill using those same fruitless and deluded means, but, whereas B has proof that his means are incompetent, C does not. However, given what has already been stated, our focus here is the level of actual or potential *harm* that the accused poses. A clearly poses *actual harm* to his victim in particular and to society in general. B also clearly poses *potential harm* both to his victim and society, in that, armed with his new-found discovery (that voodoo does not work), and still nurturing a murderous intent, he is now better prepared to go out tomorrow and, following A's example, shoot his employer in the head. B will 'try harder next time'. C, on the other hand, does not fit this pattern. All C now has is proof that he is not very good

¹⁹ *US v Dynar* [1997] 2 SCR 462 at para. 81.

at voodoo. He was intent on killing via his chosen, and deluded, means, and he is no closer to achieving that goal than he was at the outset. He now has proof that he is incompetent, but lacks the proof afforded to *B*, that it is actually the means that are incompetent, rather than his level of skill. Thus, *C*'s version of 'trying harder next time' would involve one or the other of sharper pins or softer wax, whereas *B*'s version of trying harder would involve the adoption of more conventional (and therefore potentially successful) means, which will have a real probability of causing harm.

The harm criterion

What does this say about harm as a criterion for punishment in these cases? The rationale for insisting on punishment for inchoate crimes rests on a number of premises: that the unpunished actor would go undeterred as well as unpunished, would learn from his earlier mistake and therefore become more a proficient criminal; that he has manifested sufficient potential to cause harm to deserve punishment; and that his criminality must be assessed by looking at what he thought he was doing, rather than concentrating on the objective reality. Here, *A* would be punished for the obvious actual harm he has intentionally caused. *B* would be punished for the potential he has to cause harm, and his willingness to bring that harm about. The rationale for punishing him despite his lack of success in achieving his intended aim is that he had the *mens rea* for the crime, carried out acts which went beyond preparation, and now knows better how to achieve his purpose. He would be punished less severely to acknowledge the lesser harm that he had caused, but would still be punished so that he did not unfairly benefit from the fortuitous fact that voodoo does not kill people.

To examine their acts subjectively, taking account of the facts as the accused believed them to be, is only the first step. Looking through his eyes, *A* set out to, and did, kill his employer. Looking through his eyes, *B* set out to and did kill his employer, only to have his misapprehension corrected at a later date when he realised it had not worked. Looking through his eyes, *C* had set out to kill, but had not yet achieved his purpose. Thus, they all took decisions, and put in train courses of action which were designed to lead to the death of their victim. They were all prepared, at whatever point their acts came to fruition, to cause the relevant criminal harm. While *A* caused actual harm, *B* and *C* only showed the potential to commit harm, but that potential is what is generally used to justify the need to punish them to deter them from going further next time. However, *B* and *C* do not exhibit the same level of potential. If we continue to assess *B*'s situation subjectively, he would affirm that he still harbours a murderous intention towards his victim, but is now aware that his previously chosen means are not adequate to the task in hand and, since he is now able to appreciate the true nature of things, he would choose different and more realistic means. As such he has, at the point where he becomes aware that his attempt has failed due to its incompetence, the potential to cause actual harm in an imminent sense. His potential to cause the relevant criminal harm is

now realisable; when he ‘tries harder next time’, in the knowledge that he failed because of his choice of means, he will have the same likelihood of success as any other would-be killer. It may be that the next time he tries to kill his employer, the gun jams and the bullet fails to fire and for that reason, he fails to achieve his purpose yet again, but given that his resolve to kill is still present, there is a risk that he will kill his victim at his next (conventional) attempt. The immediacy and realisable nature of the potential harm that *B* manifests following his first failed attempt to kill, is what justifies us in punishing him as a preventative measure. *C*’s situation, viewed subjectively, is somewhat different. In his eyes, while he still harbours a murderous intent towards his victim, he remains unaware of the impossibility of achieving his chosen end by those means and will therefore continue to employ them as, according to the facts as he believes them, those means are adequate and, for him, desirable. At the point where he becomes aware that his attempted voodoo killing has failed due to his (but not its) incompetence, he has the potential to cause actual harm only in a future, speculative sense—crucially, his potential to cause harm is not realisable as yet. What he lacks, in comparison to *B*, is the danger posed by his next, better equipped attempt, which has much more likelihood of success. While *B* will return to kill his employer equipped with a gun, *C* will again attempt to effect a more carefully executed voodoo killing, which will, again, fail. *C* will not manifest immediate and realisable potential harm until he reaches the same epiphany as *B*, which will not occur until he has exhausted his ability to find fault with his voodoo skills.

Assessing the attempter’s acts subjectively has been shown through numerous cases to be an effective way of measuring their potential to cause harm, by looking at their intentions and what they were prepared to carry out, regardless of the fact that they failed to achieve this. However, the examples of impossible attempts commonly found in case law are somewhat different to the often-used hypothetical of the voodoo killer. Yet, in examining how the principles behind the attribution of liability apply to the hypothetical case, light can be cast on the validity of those principles in situations which generate ‘real’ cases. What do we learn from looking through the attempter’s eyes? Attempting to pick a pocket which is actually empty, or attempting to supply drugs when the tablets do not contain any such substance shows us the intent in the attempter’s mind, and shows us the kind of criminal activity he is prepared to carry out. If not deterred at this point, there would be little, if anything, to stop him from going out tomorrow and ensuring that he selects a pocket with a wallet poking out of the top, or from being more careful about his choice of supplier, or demanding a sample to test before buying any alleged drug. Attempting to kill someone using voodoo also shows the intent in the attempter’s mind, and the kind of criminal activity he is prepared to carry out, in his distorted version of reality. For *B*, since he is now aware of the unsuitability of his chosen means, deterrence has some purpose in terms of protecting society and it is therefore worthwhile looking through his eyes to determine that he was prepared to kill. If not deterred at this point, there would be nothing

to stop him from going out tomorrow to buy a gun and shoot his employer. However, the situation is rather different for *C*. Looking through his eyes reveals that he is prepared to kill. If not deterred at this point (and there would of course be a practical issue as to how this activity would come to the attention of the authorities), there would still be little to stop him from going out tomorrow to buy sharper pins, but deterrence would have no practical effect in securing the protection of society, as, unlike the previous cases, his subsequent acts would get him no closer to the commission of criminal harm.

Immediate versus speculative future harm—a more robust approach?

Given this lack of immediate and realisable potential harm in *C*'s conduct, can there be the same justification for punishing him? Arguably, punishment here does not serve the direct purpose that it does for *B*. *B* is (hopefully) deterred from carrying out that immediate future criminal act, and actualising the harm that had already been identified in him, by the unpleasantness of his punishment. Were the law to punish *C*, it would be done to deter him from carrying out some possible future harm which is not, as yet, realisable by *C* without him passing through a further stage where he comes to appreciate his misapprehension. Since his acts do not manifest an *actus reus*, where is the justification for punishing him to deter him from the future commission of crime? Long-established doctrine dictates that there is no liability for thought crime, but where the acts relied on do not objectively amount to a crime, and were a failure even on a subjective assessment of his actions, is there sufficient for conviction? How far removed is *C* from the thwarted employee who sits at home that night drowning his sorrows and fervently wishing for the death of his ungrateful employer? In arguing that *C* should not be punished in these circumstances, I would pose the following question: if the object of punishing failed attempts is to deter those attempters from becoming full-blown criminal actors, what harm is there in allowing *C* to continue with his misapprehension, and carry out a second attempt to kill his employer, having perfected his voodoo technique? No harm will come to the employer, and there are no outward *indiciae* of his criminal activity which might alarm members of the public. Indeed, he has done no harm at all in anything other than a purely subjective sense and has, in the immediate future, no prospect of being able to cause any relevant harm, given his continued delusion. Thus, in order to apply the subjective approach endorsed in cases such as *Docherty* and *Shivpuri*, there needs to be some further refinement if cases such as *C*, hypothetical though they may be, are not to be caught when there is no basis for punishment at that stage.

Any subjective assessment of the dangerousness of attempters needs to take account of other factors beyond a straightforward assessment of their view of their own actions. It also should take into consideration the need for evidence of potential to cause harm where that harm would be realised at the next available opportunity. All currently recognised cases

of attempt liability manifest this. When Docherty was found in possession of what he thought to be Ecstasy, he would have been equipped to ensure that the very next time he bought drugs with a view to supplying them to others, he was sure about their content. Lamont would be better equipped to be careful to choose a more obviously full pocket. When Shivpuri was found in possession of something which was not heroin, and Alpoget was found in possession of the hedge clippings, they would both have learned from their mistake and ensured that, next time, they took possession of heroin and cannabis respectively. In all these situations, once the accused becomes aware of the mistake he has made, he will repeat his behaviour, correcting that mistake and causing the real harm, if not deterred from doing so by some element of punishment.

However, in *C*'s situation, once he becomes aware of his mistake, he will repeat his behaviour, correcting only what he believes his mistake to have been (blunt pins and/or hard wax), and will therefore still fail to cause any real harm. To return to the statement from *Dynar*, that the individual who has shown intent and has taken steps towards the commission of a crime will be apt to try it again, and that there would be no assurance that he would again fail, it can be seen that this statement cannot be upheld in respect of cases like *C*'s. *C* will, viewed subjectively, be carrying out acts which were designed by him to kill his victim, but will not show any evidence of potential harm which could be realised at the next available opportunity. Without this, I would contend that there is no justification for intervening to punish him at this point, and thus, hypothetical though his situation might be, it illustrates an element lacking in the standard blanket rejection of the defence of impossibility, which simply seeks to look through the individual's eyes to assess whether his conduct as he believed it to be would lead to the commission of an offence.