PART III

INCHOATE OFFENSES
CHAPTER 16

ATTEMPT

A. DOCTRINE

Attempt liability is a form of inchoate liability. A criminal need not complete a crime in order to be convicted. If he tries to commit the crime but fails, the law calls this a "complete attempt" and he can still be prosecuted and punished. If he starts the crime but is caught by the police before he finishes, the law calls this an "incomplete attempt" and he is also subject to criminal liability. Indeed, society wants to give police officers the incentive to intervene in a burgeoning criminal endeavor and prevent the perpetrator from consummating the offense. If intervention and thwarting the crime were a bar to prosecution, the police would wait for the criminal to finish before catching him—hardly a desirable result for the victim. Generally speaking, the requirements for a punishable attempt are that (i) the defendant has the specific intent or purpose to bring about the crime and that (ii) he starts committing the crime. Then, two defenses might apply if (iii) the crime is impossible to complete or (iv) the defendant abandoned the effort.

1. Specific Intent or Purpose

Some jurisdictions refer to attempt as a "specific intent" offense because the defendant must intend to engage in the conduct and also must intend to bring about the crime. This heightened mens rea requirement is often thought to "compensate" or "balance" the lower act requirement for attempts (which by definition does not require the defendant to complete the crime's actus reus). Another way of justifying the heightened mental requirement is that the harm associated with the crime never materializes because it is only an attempt and not a completed offense. To prevent over-criminalization, the law bumps up the
required mental element. Model Penal Code § 5.01 requires that the defendant "purposely engages in conduct that would constitute the crime..." In this regard, the "purpose" mens rea can be regarded as roughly equivalent to the older "specific intent" language that still lingers in many jurisdictions. However, the MPC purpose requirement only applies to the conduct. As for other mental elements, including attendant circumstances, the defendant only needs to act "with the kind of culpability otherwise required for commission of the crime."

Since attempt liability requires a heightened mens rea (either specific intent or purpose) for both the conduct and the result, it is unclear whether it is possible to hold a defendant responsible for attempting to commit a crime of recklessness such as involuntary manslaughter. Courts are split on this issue, though most that have considered the issue have concluded that crimes of recklessness—by definition—involve defendants who do not intend the resulting harm, such as the death of the victim. Since attempt liability requires that the defendant intend to bring about the crime, most jurisdictions regard attempted manslaughter as a non sequitur. In jurisdictions that accept this argument, there also is no such thing as attempted felony murder or attempted implied malice murder—both of which are based on the concept of recklessness.

2. Distinguishing Attempts from Mere Preparation

The law has no shortage of standards for articulating the required act for attempts: How far must the defendant get with the completed crime in order to be punished for an attempt? The six tests include:

1. The slight-acts test, which allows liability if the design of a person to commit the crime is clearly shown and the actor commits even "slight acts" in furtherance of that design.
2. The physical proximity test, where the defendant must be close in time and space to the final act that completes the crime.
3. The dangerous proximity test is more conceptual and asks whether the defendant was dangerously close to consummating the offenses—proximity here being a causal concept, not a geographic one.
4. The unequivocality test asks whether the defendant's conduct unequivocally demonstrates the defendant's intent to commit the crime—an actus reus requirement that loops back and refers to the mental element.
5. The probable desistance test requires that the defendant's conduct would result in the completed crime "in the ordinary and natural course of events" if the actor had not been interrupted by a third party (such as the police).
6. The MPC substantial step test requires that the defendant engage in a "substantial step in a course of conduct planned to culminate in his commission of the crime."
3. Impossibility

Defendants frequently assert an impossibility defense to attempt prosecutions. These arguments rarely work. In the past, courts traditionally distinguished between factual impossibility and legal impossibility, though courts have started to abandon the distinction because it proved difficult to classify particular cases into one or the other box. In any event, factual impossibility is never a defense because it simply involves a factual element that prevented the defendant from completing the crime. So if the perpetrator pulls the trigger but his gun jams, he is still guilty of attempted murder even though it was factually impossible to achieve the desired result (the death of the victim). Legal impossibility is in theory a valid defense, but only in rare and rather trivial circumstances that are sometimes labeled as cases of "pure legal impossibility." If the defendant engages in conduct that he thinks is illegal but is not, then he cannot be convicted of an attempt. For example, if the defendant trespasses in a public park at 10 p.m. after what he believes to be the curfew, he cannot be convicted of attempted trespassing if the curfew is really 11 p.m. This should not be surprising, because the defendant has done nothing wrong; he falsely believes that the law is more restrictive than it actually is.

4. Abandonment

If the criminal abandons the effort and reverses course, is he still guilty of an attempt? The abandonment defense applies if the perpetrator "voluntarily and completely" renounced his criminal purpose. However, the abandonment must be truly voluntary as opposed to pressured as a result of resistance from the victim. Also, if the defendant desists from the crime because he is motivated by a fear of apprehension by law enforcement, the abandonment will not be considered sufficiently voluntary to confer the defense. So if the perpetrator abandons the robbery after the victim fights back or because the police are responding to the scene, he cannot claim abandonment. These limitations substantially limit the number of factual situations that will qualify as abandonment. Also, not all jurisdictions recognize the defense.

B. APPLICATION
3. Impossibility

If there is no way that the defendant’s crime could succeed, can he claim a defense of impossibility? As you read the following case, try to classify it as a factual or legal impossibility and understand the difference.

State v. Smith
Superior Court of New Jersey, Appellate Division

King, P.J.A.D.

Defendant was a county jail inmate at the time of this criminal episode on June 11, 1989. He had, and knew he had, the human immunodeficiency virus (HIV). On several occasions before June 11 he had threatened to kill corrections officers by biting or spitting at them. On that day he bit an officer’s hand causing puncture wounds of the skin during a struggle which he had precipitated. The jury found him guilty of attempted murder, aggravated assault and terroristic threats. The judge imposed an aggregate 25-year term with a 12½-year period of parole ineligibility.

On this appeal each of defendant’s claims of error arises from his premises that (1) without dispute a bite cannot transmit HIV, and (2) defendant knew this when he bit the officers. From these premises defendant urges
PROBLEM CASE

In April 2014, police received a 911 call about a young male with a backpack that the caller believed was breaking into a storage unit. Police arrived and arrested a minor, J.D.L., a found him in the locker with the following bomb-making materials: a scale, packing material for red iron oxide, boxes for ammunition, and a pressure cooker. J.D.L. told the police that he had planned an elaborate series of murders: first, shoot his family to death; second, set a wildfire to distract and lure away fire and police responders; third, set off multiple bombs in the cafeteria at the local junior and senior high schools to kill as many students as possible. Police found several guns and three bombs at his house. At the time he was arrested, he told police that his preparations were still incomplete because he needed to steal a shotgun and purchase a second pressure cooker. He said that if the police had not intervened, he would have executed the plan as soon as he acquired the last two items.

Prosecutors charged J.D.L. with multiple counts of attempted murder. Is he guilty? Applying the substantial step test, the Court of Appeals of Minnesota quashed the case, concluding: “When the officers found J.D.L. in the storage unit on April 29, he was still preparing for his plan. J.D.L. told the officers that he had two things to do before he was ready. While J.D.L. planned for at least nine months, he did not engage in anything more than preparation for the commission of the crimes. The law in Minnesota does not prohibit J.D.L.’s conduct. We cannot invite speculation as to whether the acts would be carried out. At present, our attempt laws reach no further.” In re Welfare of J.D.L., 2015 WL 1014079 (Minn. 2015). Do you agree? What result under the unequivocality test?

that he was wrongfully convicted of attempted murder because he knew that his bite could not kill the officer. He insists that he was convicted of such a serious charge because of society’s discrimination against persons infected with this deadly virus. He claims that at worst he was guilty only of assaultive conduct and should have been sentenced, as a third-degree offender, to a relatively short custodial term.

From our review of this record, we conclude that neither of defendant’s two premises has been established. First, if HIV cannot possibly be spread by a bite, the evidence at trial did not establish that proposition. Indeed, we doubt that the proposition is presently provable scientifically, given the current state of medical knowledge. The apparent medical consensus is that there has never been a controlled study of a sufficiently large number
of cases to establish to any scientific certainty if transmission of HIV is possible by a bite, and if so, the percentage of likely infection. The proposition was surely disputed at this trial. Second, whether defendant actually believed that his bite could result in death was a question of his credibility, a question the jury obviously resolved against him.

We cannot and need not decide if a bite can transmit HIV. We have applied the elements of the attempted murder statute as we would in a case involving a more traditional criminal methodology. We conclude that the attempted murder verdict was supported by proof, which the jury reasonably could accept, that the defendant subjectively believed that his conduct could succeed in causing the officer’s death, regardless of whether his belief was objectively valid. For this reason, we affirm the conviction. . . .

**ADVICE** Performing research on impossibility in a particular jurisdiction can be maddening because courts use the term “legal impossibility” in different ways—further fueling the confusion regarding the doctrine. When some judges say “legal impossibility” they mean pure legal impossibility, i.e., the situation where the defendant has an overly restrictive understanding of the law. Courts always recognize this as a defense. See, e.g., United States v. Oviedo, 525 F.2d 881, 883 (5th Cir. 1976). However, sometimes judges say “legal impossibility” when they mean to refer to hybrid legal impossibility, which is generally disfavored by courts. Consequently, the first thing you should determine on seeing the term “legal impossibility” is to ascertain its definition based on the context.

**NOTES & QUESTIONS ON IMPOSSIBILITY**

1. **AIDS and impossibility.** In Smith, the court concluded that it was uncertain whether a bite could transmit HIV. The decision was written in 1993 and the court noted the inability of scientists to generate a large number of subjects for a rigorous scientific study regarding HIV transmission and saliva. Assuming the evidence conclusively demonstrated that HIV cannot be transmitted through saliva, what is the correct result? Does it remain a factual impossibility or a legal impossibility? Assuming the defendant believed erroneously that saliva can transmit HIV, would it remain a case of factual impossibility?

2. **Factual impossibility.** Some jurisdictions have statutes that specifically prohibit factual impossibility as a defense. See, e.g., 21 Kan. Stat. Ann. § 5301(b) (“It shall not be a defense to a charge of attempt that the circumstances under which the
act was performed or the means employed or the act itself were such that the commission of the crime was not possible."). Other jurisdictions employ the rule through judicial invention. Either way, there is near-universal agreement that factual impossibility is no defense. The argument for rejecting the defense is that the defendant was trying to commit a crime and from a subjective standpoint this demonstrates the perpetrator’s inner culpability. Indeed, the Model Penal Code seems to highlight this fact by noting in its general attempt provision the requirement that the defendant “purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be.” MPC § 5.01(1)(a).

3. Hybrid legal impossibility. In the past, courts had granted a defense of impossibility in some cases of legal impossibility but not in others. Some commentators have tried to explain these rare decisions by using a third label. The definition of this third category—hybrid legal impossibility—is a mistake regarding the legal status of a fact that is necessary to establish a required element of the offense. So if the defendant takes merchandise that he believes to be stolen but is not stolen, he should not be convicted of attempted possession of stolen goods, according to the doctrine of hybrid legal impossibility. People v. Jaffe, 185 N.Y. 497 (1906).

However, most jurisdictions now deny that cases of hybrid legal impossibility should be excused. In People v. Thousand, 465 Mich. 149 (2001), the defendant chatted over the Internet with an undercover police officer that he believed was an underage girl. The court upheld the conviction even though it was legally impossible for him to complete the offense because there was, in fact, no minor on the other end of the chat. Similarly, in People v. Dlugash, 41 N.Y. 2d 725 (1977), the New York State Court of Appeals upheld the attempted murder conviction of a man who shot a dead body (he thought the victim was still alive). Dlugash is best described as a case of hybrid legal impossibility, but the court still upheld the conviction because the attendant circumstances constituted a crime as the defendant believed them to be. N.Y. Penal Law § 110.10 (“If the conduct in which a person engages otherwise constitutes an attempt to commit a crime pursuant to section 110.00, it is no defense to a prosecution for such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be.”).

Courts have also consistently denied the impossibility defense when a would-be murderer hires a hitman who turns out to be an undercover police officer. See, e.g., People v. Superior Court (Decker), 157 P.3d 1017 (Cal. 2007). In general, courts today are inclined to reject impossibility defenses regardless of how they are classified. United States v. Farner, 251 F.3d 510 (5th Cir. 2001) (“distinction between factual and legal impossibility is elusive at best”);
HYPOTHETICAL

A is angry at B and plots to kill him. A’s plan is to put his vocational voodoo training to good use to accomplish the murder. A constructs the voodoo doll, crafted in B’s image, and sticks pins all over it. To A’s dismay, nothing happens to B. Although A remains a devotee of voodoo, A’s attorney argues at trial that A cannot be guilty of attempted murder because the murder could never have been completed. What result? More importantly, is there some way of classifying the crime as legal impossibility, or does it remain a factual impossibility? If the latter, should A be convicted? See United States v. Coffman, 94 F.3d 330 (7th Cir. 1996) (“There may be attempts so feeble, such as sticking a pin into a voodoo doll of your enemy in an effort to kill him, that the attempter is entitled to be acquitted, as a harmless fool. The defendants’ scheme, though harebrained, was not that harebrained.”).

The Model Penal Code, § 5.05(2), includes a special provision for this problem, and permits judges to exercise their discretion to mitigate punishment or even dismiss the prosecution if the result “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....” According to George Fletcher, the “supposition is that those who try to kill by incantations either know in their hearts that their activity is harmless, or are so out of touch that they could not competently execute a plan to kill by more rational means.” Rethinking Criminal Law 177 (2d ed. 2000).


4. Abandonment

If a perpetrator reverses course, should he still be convicted of an attempt? How does a criminal unwind his participation in a prior criminal endeavor that is not yet complete? Courts have struggled with this question, in part because they want to give criminals the incentive to give up and comply with the law.

Ross v. Mississippi
Supreme Court of Mississippi
601 So. 2d 872 (1992)

Prather, J.

This attempted-rape case arose on the appeal of Sammy Joe Ross from the ten-year sentence imposed on July 7, 1988 by the Circuit Court of Union County. The appellant timely filed a notice of appeal and dispositively raises
the issue: Whether the trial court erred in denying the defendant’s motion for directed verdict on the charge of attempted rape. This Court reverses and renders the conviction for attempted rape.

On September 16, 1987, sometime around 2:15 in the afternoon, Deputy Sheriff Edwards of the Union County Sheriff’s Department was driving on Highway 30 heading east. Before he turned south onto Highway 9, he saw an oncoming truck, a white, late-model Ford pickup, turn left onto the first gravel road. Because the truck had out-of-county tags and turned down a road on which several crimes had occurred, Edwards jotted down the tag number, which action he described as routine practice.

Dorothy Henley and her seven-year-old daughter lived in a trailer on the gravel road. Henley was alone at home and answered a knock at the door to find Sammy Joe Ross asking directions. Henley had never seen Ross before. She stepped out of the house and pointed out the house of a neighbor who might be able help him. When she turned back around, Ross pointed a handgun at her. He ordered her into the house, told her to undress, and shoved her onto the couch. Three or four times Ross ordered Henley to undress and once threatened to kill her. Henley described herself as frightened and crying. She attempted to escape from Ross and told him that her daughter would be home from school at any time. She testified: “I started crying and talking about my daughter, that I was all she had because her daddy was dead, and he said if I had a little girl he wouldn’t do anything for me just to go outside and turn my back.” As instructed by Ross, Henley walked outside behind her trailer. Ross followed and told her to keep her back to the road until he had departed. She complied.

On December 21, 1987, a Union County grand jury indicted Sammy Joe Ross for the attempted rape of Henley. On June 23, 1988, the jury found Ross guilty.

Although other issues... are raised, the primary issue here is... whether Ross abandoned his attack as a result of outside intervention. Ross claims that the case should have gone to the jury only on a simple assault determination. Ross asserts that “it was not... Henley’s resistance that prevented her rape nor any independent intervening cause or third person, but the voluntary and independent decision by her assailant to abandon his attack.” The state, on the other hand, claims that Ross “panicked” and “drove away hastily.”

As recited above, Henley told Ross that her daughter would soon be home from school. She also testified that Ross stated if Henley had a little girl, he wouldn’t do anything to her and to go outside [the house] and turn her back [to him]. Ross moved that the court direct a verdict in his favor on the charge of attempted rape, which motion the court denied.

The trial court instructed the jury that if it found that Ross did “any overt act with the intent to have unlawful sexual relations with [the complainant]
without her consent and against her will" then the jury should find Ross guilty of attempted rape. The court further instructed the jury that:

before you can return a verdict against the defendant for attempted rape, that you must be convinced from the evidence and beyond a reasonable doubt, that the defendant was prevented from completing the act of rape or failed to complete the act of rape by intervening, extraneous causes. If you find that the act of rape was not completed due to a voluntary stopping short of the act, then you must find the defendant not guilty.

Ross did not request, and the court did not give, any lesser included offense instructions. . . .

The crime of attempt to commit an offense occurs when a person “shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same.” Miss. Code Ann. § 97-1-7 (1972). Put otherwise, attempt consists of “1) an intent to commit a particular crime; 2) a direct ineffectual act done toward its commission; and 3) failure to consummate its commission.”

The Mississippi attempt statute requires that the third element, failure to consummate, result from extraneous causes. Thus, a defendant’s voluntary abandonment may negate a crime of attempt. Where a defendant, with no other impetus but the victim’s urging, voluntarily ceases his assault, he has not committed attempted rape. In Pruitt, 528 So. 2d at 830-831, where the assailant released his throathold on the unresisting victim and told her she could go, after which a third party happened on the scene, the Court held that the jury could not have reasonably ruled out abandonment.

In comparison, this Court has held that where the appellant’s rape attempt failed because of the victim’s resistance and ability to sound the alarm, the appellant cannot establish an abandonment defense. Alexander v. State, 520 So. 2d 127, 130 (Miss. 1988). In the Alexander case, the evidence sufficiently established a question of attempt for the jury. The defendant did not voluntarily abandon his attempt, but instead fled after the victim, a hospital patient, pressed the nurse’s buzzer; a nurse responded and the victim spoke the word “help.” The Court concluded, “[T]he appellant ceased his actions only after the victim managed to press the buzzer alerting the nurse.” In another case, the court properly sent the issue of attempt to the jury where the attacker failed because the victim resisted and freed herself. Harden v. State, 465 So. 2d 321, 325 (Miss. 1985).

Thus, abandonment occurs where, through the verbal urging of the victim, but with no physical resistance or external intervention, the perpetrator changes his mind. At the other end of the scale, a perpetrator cannot
claim that he abandoned his attempt when, in fact, he ceased his efforts because the victim or a third party intervened or prevented him from furthering the attempt. Somewhere in the middle lies a case such as Alexander, where the victim successfully sounded an alarm, presenting no immediate physical obstacle to the perpetrator’s continuing the attack, but sufficiently intervening to cause the perpetrator to cease his attack.

In this case, Ross appeals the denial of his motion for directed verdict; thus, he challenges only the sufficiency of the evidence, that is, whether it raised a sufficient factual issue to warrant a jury determination. Even under this rigorous standard of review, Ross’s appeal should succeed on this issue. The evidence does not sufficiently raise a fact question as to whether he attempted rape. The evidence uncontrovertibly shows that he did not, but instead abandoned the attempt.

The key inquiry is a subjective one: what made Ross leave? According to the undisputed evidence, he left because he responded sympathetically to the victim’s statement that she had a little girl. He did not fail in his attack. No one prevented him from completing it. Henley did not sound an alarm. She successfully persuaded Ross, of his own free will, to abandon his attempt. No evidence shows that Ross panicked and hastily drove away, but rather, the record shows that he walked the complainant out to the back of her trailer before he left. Thus, the trial court’s failure to grant a directed verdict on the attempted rape charge constituted reversible error. As this Court stated in Pruitt, 528 So. 2d 831, this is not to say that Ross committed no criminal act, but “our only inquiry is whether there was sufficient evidence to support a jury finding that [Ross] did not abandon his attempt to rape [Henley].” This Court holds that there was not.

Ross raises a legitimate issue of error in the sufficiency of the evidence supporting his conviction for attempted rape because he voluntarily abandoned the attempt. This Court reverses and renders.

NOTES & QUESTIONS ON ABANDONMENT

1. Abandonment and resistance. Did the court in Ross get the abandonment issue correct? The court applied a common restriction on the abandonment defense, which is that the abandonment must be voluntary and not induced by the defendant’s resistance or outside intervention. The court’s application of this standard in this case seemed guided by a distinction between verbal resistance and physical resistance. So if a victim verbally resists and convinces the defendant to abandon the crime, the perpetrator is not guilty of an attempt. But if the victim physically resists and the defendant cannot complete the crime because of it, he is guilty of attempted rape. Should the distinction between physical and verbal resistance continue to be relevant
given that verbal resistance—saying no—is now enough in some jurisdictions to make the perpetrator guilty of rape? Also, did it matter to the court how far the attempted assault had proceeded? In *State v. Mahoney*, 264 Mont. 89 (1994), the Supreme Court of Montana rejected an abandonment defense when an attempted rapist called police after he saw how much the victim was bleeding after he had stabbed her. The court rejected the abandonment defense because the victim was resisting the attack and preventing the rapist from accomplishing his criminal goal. Does it matter that the nature of the resistance in *Mahoney* and *Ross* was different?

2. Abandonment statutes. The defense of abandonment is often codified by statute. 35 Ind. Code § 41-3-10 (“With respect to a charge under IC 35-41-2-4, IC 35-41-5-1, or IC 35-41-5-2, it is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission.”); 45 Mont. Code Ann. § 4-103(4) (“A person shall not be liable under this section if, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort.”). Jurisdictions that reject the defense often do so by case law. *State v. Robbins*, 253 Wis. 2d 298, 316 (2002) (“The crime of attempt is complete when the intent to commit the underlying crime is coupled with sufficient acts to demonstrate the improbability of free will desistance; the actual intervention of an extraneous factor is not a ‘third element’ of the crime of attempt, although it is often part of the proof. There is no statutory defense of voluntary abandonment once an attempt is completed, and this court has declined to create such a defense at common law.”).

3. Abandonment and incentives. Should courts more freely grant the abandonment defense in order to give criminals an incentive to stop? For a discussion of this issue, see Murat C. Mungan, *Abandoned Criminal Attempts: An Economic Analysis*, Ala. L. Rev. (forthcoming). However, there are also non-utilitarian reasons to support an abandonment defense, based on the idea that the defendant’s voluntary change of course represents an erasure of his or her moral culpability. A third possibility is that a perpetrator’s renunciation of criminal purpose negates his dangerousness. Model Penal Code Commentaries to § 5.01, at 359. A fourth possibility is that abandonment should simply mitigate punishment but not operate as an affirmative defense. Under this scheme, judges would simply lower the penalty for criminals who abandon their crimes but not fully exonerate them. For an argument supporting this result, see Gideon Yaffe, *Criminal Attempts*, 124 Yale L.J. 92, 147 (2014) (“when the defendant has changed his mind, one reason to give a sanction of some particular size is nullified”). Do you agree?
C. PRACTICE & POLICY

Perhaps the biggest policy question regarding attempts is how they should be punished. Having mastered the basic building blocks of criminal attempts, we can now address the larger and deeper question about why and how much these attempts should be punished. The chapter concludes with a brief exegesis on the crime of assault—which was originally an attempt crime.

∞ Punishing attempts: why and how much. The first issue is why we should punish attempts at all. Gideon Yaffe has written that "the prohibition of an action is also an implicit prohibition of an attempt to engage in that action; a prohibition of causing a result is an implicit prohibition of an attempt to cause that result." Criminal Attempts, 124 Yale L.J. 92, 131 (2014). Implicitly, then, the criminalization of attempts is the criminalization of trying to commit a crime—an idea already embedded in the structure of the criminal law. Simply by trying to commit a crime, the criminal has thumbed his nose at society's rules and social order. Similarly, see Stephen P. Garvey, Are Attempts Like Treason?, 14 New Crim. L. Rev. 173 (2011) (arguing that all attempts involve a treasonous rejection of the duty to comply with the law). Even if unsuccessful, criminal attempts are an expression of defiance of established and legitimate rules of public conduct. Do you agree?

When it comes to how severely to punish attempts, there are two major—and competing—impulses. The first is that the attempts are less serious because the defendant never produced the resulting harm. Since the criminal law cares about harm and results, criminal attempts are much less serious crimes. In most cases, the victim was not harmed, or if the victim was harmed it is only because the perpetrator managed to complete some other, lesser crime in addition to the attempted crime. On the other hand, there are substantial reasons to think that attempts should be punished just as seriously as completed crimes. First, perpetrators who fail to complete the crime are usually fully committed to the crime's commission; otherwise, they should never have been convicted of the attempt in the first place. If the crime was thwarted, it was only because of the perpetrator's poor luck that the gun jammed, or he missed the target, or the police thwarted the crime and arrested him before he could complete the task. These barriers to completing the crime are all extraneous to the defendant's actions—they stem from outside the perpetrator's moral agency. Why should the criminal law give the perpetrator a discount on punishment just because the perpetrator had the misfortune (or fortune, depending on your point of view) to get caught or to have poor aim? In the end,
the inner culpability of the attempted murderer is just as severe as the murderer, because both desire the result and engage in actions to bring it about. The successful murderer does not have a deeper and more profound level of blameworthiness just because he succeeded in his endeavor.

One could appeal to the concept of dangerousness to respond to the skepticism about mitigating punishment for attempted murders. Given that the attempted murderer fails to achieve the resulting death, perhaps attempted crimes are less serious because they are less dangerous to society. This is certainly true if the inherent dangerousness of an offense comes from its immediate result or lack thereof. But perhaps dangerousness also involves the risk that the defendant will reoffend and commit more crimes. See Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. Leg. Stud. 435, 458 (1990). Under this incapacitation framework, it seems just as likely that an attempted murderer will commit another crime as it is that the successful murderer will commit another crime. Indeed, perhaps the attempted murderer has even greater incentive to reoffend, since his original crime was not successful. The only reason that a utilitarian should have for viewing an attempted murderer as less dangerous is if the attempted murderer is a hapless or truly incompetent criminal. But that presumably is a small subset of the universe of attempted murderers.

**Assault and battery.** At common law, assault was defined as an attempt to commit a battery. Many attempt cases were prosecuted under the rubric of assault because some jurisdictions defined assaults more broadly as the attempt to commit a “violent injury” of another person. Consequently, assault was one of the first inchoate crimes. This ancient pedigree has fallen out of usage and modern statutes usually define an assault as intentionally causing an injury—which basically combines assault and battery into a single provision because the inchoate nature of assault has been removed. For example, New York law simply defines third-degree assault as “with intent to cause physical injury to another person, he causes such injury to such person or to a third person; or ... he recklessly causes physical injury to another person; or ... with criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.” N.Y. Penal Law § 120.00. However, vestiges of the old common law scheme often linger in the oft-heard phrase “assault and battery”—a turn of phrase that harkens back to assault’s common law past as an inchoate offense.