

Inculpatory Mistakes of Fact and
Inculpatory Mistakes of Law:
Attempting the Impossible

1. All attempts are in some sense attempts of the impossible -
- that's why they're attempts, not successes.
2. The MPC distinguishes factual from legal impossibility. Hybrid legal impossibility is correctly classified as factual impossibility. Pure legal impossibility does not result in attempt liability.
3. At first glance, this would indicate that Mr. Law, Lady Eldon, and Taafe are all innocent, since they made legally impossible attempts. Their mistakes were mistakes of law.
4. But things aren't so simple.
 - a. All mistakes of law are mistakes regarding facts -- those facts that are facts about the existence and meaning of the law. According to legal positivism, the existence and meaning of law are matters of fact. And the principle of legality requires a positivistic conception of the criminal law.
 - b. The line separating those facts that bear on the existence and meaning of the law and those that bear on its particular application can be drawn at an indefinite number of places -- meaning and application cannot be distinguished in a vacuum.

Consider:

The statute says "Don't hunt whenever the Fish and Game Department flies a red flag." Mr. Law? Fact? thought the flag was red; it was green.

The divorce decree's date for the divorce's becoming final, a date filled in by the judge, is December 15. Mr. Law? Fact? misreads the date as January 15 and has an affair on December 30. Attempted adultery? Factual or legal impossibility?

In Larken v. Grendel's Den, a Massachusetts town's ordinance forbids operating bars within 500 feet of churches unless the church consents. Defendant bar owner, whose bar is within 500 feet of a church, calls up the pastor, who says "it's fine with us." Defendant thinks he said "it's not fine with us." He operates the bar anyway. Legal or factual impossibility?

The customs statute defines "dutiabile item" as any item listed on a daily list published in Brussels. Lady Eldon thinks she see French lace on the list. It isn't. Legal or factual impossibility?

- c. If application were part of meaning, then factual mistakes would be legal ones, and factual impossibility would be a species of legal impossibility. Mr. Fact would have made a mistake of law (i.e., "the hunting season begins tomorrow").
- d. Now, ~~since~~ in order to distinguish factual from legal mistakes, we need a jurisprudential position regarding which facts constitute the existence and meaning of the law; but any such position will be arbitrary in a vacuum. Therefore, our jurisprudential position should be based on the policies behind distinguishing factual and legal impossibility.
- e. What policies are relevant? Not culpability, dangerousness, etc. concerns. Mr. Fact and Mr. Law are equals in those respects. The only policy that derives the distinction is that we don't want people to totally invent the statutes they're attempting to violate (e.g., Taafe).
- f. That policy dictates that we distinguish attempts where there is a criminal law that is close to what defendant imagined from those where there isn't -- what I'll call the neighborhood principle. In Mr. Law's case, the actual hunting law is very close to the one he thought he was violating. In Lady Eldon's case, the same. In Taafe's, no.
- g. Note - same basic problem applies to exculpatory mistakes (MPC, §2.04). And there is no difference in culpability, dangerousness, etc., that turns on the fact/law distinction there. On the other hand, the problem is resolved by asking what mens rea the statute requires on each element. That doesn't work for inculpatory mistakes, since the mens rea otherwise required is present.