

Note

DEFINING ATTEMPTS: MANDUJANO'S ERROR

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ABSTRACT

The law of attempt requires a court to determine when trying to commit a crime is, in itself, conduct that deserves criminal punishment. Common-law courts were cautious not to push the boundaries of attempt crimes too far, and early definitions of attempt required that a defendant come very close to the completion of an intended crime before he could be convicted. As Congress has codified criminal law, it has created attempt statutes without defining attempt, presumably believing that courts would continue to use common-law meanings as they had always done. This is exactly what happened until the late twentieth century, when federal courts began to adopt a new, harsher formulation that had been proposed in the American Law Institute's Model Penal Code (MPC). This Note examines the strange process through which federal courts expanded the definition of a background principle of criminal law, and argues that they were wrong to do so. Judges who ignore such deep common-law roots usurp the legislature's role in defining crimes, and create confusion as to the true meaning of criminal statutes.

INTRODUCTION

Establishing a crime of attempt requires proving two elements: the intent to commit a crime and some conduct toward the commission of that crime.¹ “Much ink has been spilt” by courts, lawyers, and scholars seeking to define just how far a defendant's

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1. EUGENE MEEHAN & JOHN H. CURRIE, *THE LAW OF CRIMINAL ATTEMPT* 3–4 & n.21 (2d ed. 2000) (“As made abundantly clear in . . . American cases, *mens rea* and *actus reus* must exist *pari passu*” to establish a crime of attempt.).

conduct can progress before amounting to an attempt.² The law of attempt requires a court to distinguish the conduct of law-abiding citizens from conduct deservedly deemed criminal. Common-law courts developed a number of ways to resolve this quandary, all of which required that a defendant's conduct come very close to the completion of the intended crime.³ After almost 200 years of common-law efforts to define the crime of attempt,⁴ the American Law Institute's 1962 Model Penal Code (MPC)⁵ included a definition of attempt intended to catch would-be wrongdoers earlier in their wrongdoing.⁶ Less than ten years later, federal courts began to adopt the MPC's definition.⁷ By 1998, every circuit had done so.⁸ This Note examines the unusual process by which a federal court adopted this part of the MPC, and argues that federal courts should revise the current interpretation of criminal attempts.

This Note proceeds in three Parts. Part I discusses two possible sources of federal attempt law: the common law and the MPC's "Criminal Attempt" provision.⁹ Part II examines how federal courts have developed the definition of attempt, argues that the courts had no justification for adopting the MPC's "substantial step test," and describes how federal courts should have conducted their analyses. Part III argues that the erroneous application of the substantial step test is a serious error that has created unnecessary confusion and led to unjust outcomes.

2. *Mims v. United States*, 375 F.2d 135, 148 (5th Cir. 1967); *see also* *Cunningham v. State*, 49 Miss. 685, 701 (Miss. 1874) ("[The] doctrine of attempt to commit a substantive crime is one of the most important, and at the same time most intricate, titles of the criminal law. . . . [T]here is no title, indeed, less understood by the courts, or more obscure in the text books, than that of attempts.").

3. *See infra* Part I (describing common-law attempt doctrines).

4. Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 238 (1995) (citing *R v. Scofield*, (1784) Cald. 397 (K.B.), as the first common-law attempt case).

5. *Past and Present ALI Projects*, AM. LAW INST. 5 (Mar. 2015), https://www.ali.org/media/filer_public/a5/a9/a5a914ef-396a-4b28-96c5-b0dd932176a6/past_present_aliprojects.pdf [<http://perma.cc/R3ZB-JEJW>].

6. *See* MODEL PENAL CODE § 5.01 (1962) (defining "Criminal Attempt"); AM. LAW INST., MODEL PENAL CODE & COMMENTARIES PART I, § 5.01, 331-32 (1985) (discussing the justification for expanding attempt liability through section 5.01).

7. *See* *United States v. Mandujano*, 499 F.2d 370, 377 n.6 (5th Cir. 1974) (adopting the MPC's substantial step test).

8. *See infra* note 111.

9. MODEL PENAL CODE § 5.01.

I. SOURCES OF ATTEMPT LAW

This Part provides an overview of attempt law in the United States. Section A discusses the various common-law attempt doctrines that grew out of the initial English creation of attempt as a crime. Section B discusses the MPC's definition of substantial step, created by the American Law Institute as a proposed rejection of common-law attempt jurisprudence.

A. *Attempt at Common Law*

The common-law crime of “attempt” required both intent to commit a crime and an act in furtherance of that intent.¹⁰ Courts describing the conduct requirement generally distinguished between attempts and acts that were merely “preparatory.”¹¹ This distinction, by itself, offered little guidance when deciding a particular case.¹² Rather, the attempt/preparation distinction defined the question courts were required to answer: Once a defendant decided to commit a crime, how much conduct in furtherance of that intent was required to convict the defendant of an attempt? Common-law courts answered this question using three tests: proximity, probable desistance, and *res ipsa loquitur*.¹³

1. *Proximity*. Many common-law definitions of attempt distinguished between “preparation” and “attempt” by determining

10. WAYNE LAFAYE, CRIMINAL LAW 622–23 (5th ed. 2010).

11. *Id.* (collecting common-law attempt cases). Although some courts find “preparatory” acts to be sufficient, this difference rests on differing views of what conduct is “preparatory,” rather than any substantive difference in the scope of attempt law. *See id.* at 622 (“Precisely what kind of act is required is not made very clear by the language traditionally used by courts and legislatures. It is commonly stated that more than an act of preparation must occur . . . although the situation is confused somewhat because courts occasionally say that preparatory acts will be enough under certain circumstances.”).

12. *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) (“The decisions [distinguishing preparation from attempt] are too numerous to cite, and would not help much anyway, for there is, and obviously can be, no definite line . . .”).

13. When discussing common-law definitions of attempt, this Note will often refer to state court cases interpreting state criminal attempt statutes. Although these are not “common law” crimes because they are codified by the legislature, many attempt provisions are so broad as to retain all the relevant aspects of common-law offense definition. *See, e.g.*, N.Y. PENAL LAW § 110.00 (McKinney 2014) (“A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.”). This broad formulation has been interpreted to incorporate the state’s common-law attempt jurisprudence. *E.g.*, *People v. Omwathath*, 965 N.Y.S.2d 687, 689 (N.Y. App. Term 2013).

how close the defendant came to completing the underlying crime.¹⁴ This test sounded in the belief that criminalizing attempts could help deter the harm caused by completed criminal conduct.¹⁵ Under almost all common-law definitions, a defendant was guilty of an attempt if he engaged in the “last proximate act,” that is, if he had done everything he believed necessary to commit the predicate crime.¹⁶ Although no common-law court *required* there to be a last proximate act,¹⁷ proximity doctrines generally required the defendant’s actions to “advance very near to the accomplishment of the intended crime.”¹⁸

Many common-law courts used *physical* proximity to distinguish attempts from preparation. Courts focused on physical proximity would ask how close a defendant had come to “the time and place at which the intended crime [was] supposed to occur.”¹⁹ These analyses tended to place the boundary between attempt and preparation fairly far along the timeline of a defendant’s activity. For example, in *People v. Rizzo*,²⁰ an influential case decided using a physical proximity analysis,²¹ a man sought to rob a bank messenger carrying a “pay roll.”²² Rizzo and his armed accomplices drove to various locations where they thought the messenger might be found, but could not find him.²³ The police observed the behavior of Rizzo and

14. Other sources describe three distinct “tests” within the common-law proximity approaches: the physical proximity test, the dangerous proximity test, and the indispensable element test. AM. LAW INST., *supra* note 6, at 321–29; LAFAVE, *supra* note 10, at 623–28. For the purposes of this Note, there need be no distinction between these tests, because they function according to the same general principles. For example, in *People v. Rizzo*, the case cited by both Professor Wayne LaFave and the Commentators as an example of the “physical proximity test,” the court explicitly asked if the defendants’ acts came “dangerously near to” the commission of the crime. *People v. Rizzo*, 158 N.E. 888, 889 (N.Y. 1927). It is therefore probably more accurate to say that physical proximity, dangerous proximity, and indispensable element are simply different considerations within the same test.

15. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 62–63 (1881) (stating that the purpose of punishing attempts is “to prevent some harm which is foreseen as likely to follow” if the defendant were allowed to continue with his plan).

16. LAFAVE, *supra* note 10, at 623–24.

17. See AM. LAW INST., *supra* note 6, at 321 n.97 (stating that no court had ever required the last proximate act, and refuting the notion that English courts had ever truly supported this requirement).

18. *Rizzo*, 158 N.E. at 889.

19. LAFAVE, *supra* note 10, at 625.

20. *People v. Rizzo*, 158 N.E. 888 (N.Y. 1927).

21. *Id.* The case continues to be cited by New York courts as a source of attempt law. *E.g.*, *People v. Omwathath*, 965 N.Y.S.2d 687, 689 (N.Y. App. Term 2013).

22. *Rizzo*, 158 N.E. at 888.

23. *Id.* at 888–89.

his counterparts and arrested the men before they found the messenger or came close to anyone in possession of a pay roll.²⁴ The New York Court of Appeals reversed the defendants' convictions, holding that they had not come physically close enough to their target to commit an attempt, just as a man who "armed himself and started out to find the person whom he had planned to kill" would not be guilty of attempted murder if he could not find his intended target.²⁵

In *Commonwealth v. Peaslee*,²⁶ Oliver Wendell Holmes, then of the Massachusetts Supreme Judicial Court, employed a "dangerous proximity" analysis to distinguish between attempts and preparation.²⁷ The dangerous proximity test considered a number of factors, including the gravity of the attempted offense, the nearness of the defendant to completing the crime, and the probability that the defendant's acts would result in the commission of the crime.²⁸ Relying on an imprecise multifactor test instead of a bright-line rule, however, created an unforgiving test for prosecutors. In *Peaslee*, the court held that a defendant's conduct was insufficient for a conviction of attempted arson when the defendant had: (1) created a pile of "combustibles . . . in such a way that . . . if lighted would have set fire to the building";²⁹ (2) offered to pay an employee to light the combustibles using a candle already placed in the same room; and (3) drove that employee some distance toward the building.³⁰ Despite the defendant's extensive and unequivocal conduct, he had not completed an attempt because he lacked "a present intent to accomplish the crime without much delay," and did not have "[the] intent at a time and place where he was able to" complete the planned crime.³¹

Courts applying proximity approaches sometimes distinguished attempts from preparation by asking whether the defendant had gained control of all elements that were "indispensable" to

24. *Id.*

25. *Id.* at 889.

26. *Commonwealth v. Peaslee*, 59 N.E. 55 (Mass. 1901) (Holmes, C.J.).

27. *Id.* at 55. *Peaslee* continues to be controlling law in Massachusetts, and was cited as recently as 2009 in *Commonwealth v. Bell*, 917 N.E.2d 740, 746 (Mass. 2009).

28. *Commonwealth v. Kennedy*, 48 N.E. 770, 771 (Mass. 1897) (Holmes, J.). *Peaslee* referred to *Kennedy* for the proposition that the proximity test includes the consideration of multiple factors to determine the requisite dangerous proximity. *Peaslee*, 59 N.E. at 56.

29. *Peaslee*, 59 N.E. at 55.

30. *Id.* at 56.

31. *Id.* at 57.

commission of the crime.³² Under this approach, if condition X must exist before the defendant can commit his intended crime, there can be no attempt before condition X exists.³³ Justice Holmes referenced this rule in *Peaslee* by holding that the defendant must have intended to commit the crime “at a time and place where he was *able* to carry it out.”³⁴ In common-law opinions, the indispensable condition took various forms, including the cooperation of a third party,³⁵ the possession of contraband,³⁶ or the possession of a weapon.³⁷

Proximity tests had two important features in common. First, as indicated by cases like *Peaslee* and *Rizzo*, these tests precluded prosecution of attempters who were not very close to achieving their criminal goals. Second, all proximity tests asked how far the defendant was from completing an intended crime, rather than looking to how much the defendant had done in pursuit of a criminal intent.³⁸

2. *Probable Desistance*. Under the common-law probable desistance test, a defendant’s actions constituted attempts, and not mere preparation, if “in the ordinary and natural course of events, without interruption from an outside source, [they] would result in the crime intended.”³⁹ Courts determined probability of desistance through an objective test: whether any person who had gone as far as the defendant would likely stop before completing the crime.⁴⁰ For example, in one case using the probable desistance test, the court held that a defendant who fashioned “tools adapted to jailbreaking” had not yet moved his attempt beyond “abeyance” and therefore could not be found guilty of attempted escape from jail.⁴¹ Although this test was well tailored to punishing only those criminal actors who are truly

32. See AM. LAW INST., *supra* note 6, at 323–24 (describing the “Indispensable Element Approach”).

33. *Id.*

34. *Peaslee*, 59 N.E. at 57 (emphasis added).

35. *State v. Block*, 62 S.W.2d 428, 431 (Mo. 1933).

36. *United States v. Stephens*, 12 F. 52, 56 (C.C.D. Or. 1882).

37. *State v. Wood*, 103 N.W. 25, 26 (S.D. 1905).

38. See *United States v. Jackson*, 560 F.2d 112, 119 (2d Cir. 1977) (describing “what remains to be done” as the “chief concern of the [common-law] proximity tests”).

39. AM. LAW INST., *supra* note 6, at 324 (citing cases which followed the probable desistance test).

40. *Id.* at 324–25.

41. *State v. Hurley*, 64 A. 78, 79 (Vt. 1906).

dangerous,⁴² it was entirely impracticable. On what basis can anyone know the probability of another's future actions?⁴³ In practice, courts do not seek to read a defendant's mind.⁴⁴ Instead, the test functioned as a reworded proximity approach, under the theory that a person who had come very close to committing a crime would be unlikely to turn back.⁴⁵

3. *Res Ipsa Loquitur*. The *res ipsa loquitur* test required that a defendant's conduct unambiguously demonstrate criminal intent.⁴⁶ Under this test, purchasing a pen with plans to commit forgery, or even purchasing a hunting rifle with plans to commit a murder, would have been an insufficient act to support an attempt conviction because such acts are of an equivocal or "ambiguous nature."⁴⁷ As was true for all common-law tests, the *res ipsa loquitur* test excluded from attempt liability a wide range of actions taken in pursuit of a criminal intent. This was by design, as the test was most concerned with the "firmer state of mind" that exists once someone "perform[s] acts that he realizes would incriminate him."⁴⁸ This test has been described as the "stop the film" test,⁴⁹ because it looked at the defendant's actions as though viewed on a silent film, without the defendant's confession or other statement of intent.⁵⁰ This test made convictions more difficult to obtain because it focused exclusively on the defendant's *acts* toward commission of the crime.⁵¹ A confession of intent to commit a crime could not be considered when determining whether the defendant's conduct spoke for itself.⁵²

42. See AM. LAW INST., *supra* note 6, at 324–25 (describing the probable desistance test as "[o]riented largely toward the dangerousness of the actor's conduct").

43. See LAFAVE, *supra* note 10, at 626 (explaining criticisms of the probable desistance test).

44. See AM. LAW INST., *supra* note 6, at 325.

45. *Id.*

46. See *id.* at 326–29 (describing the *res ipsa loquitur* test); LAFAVE, *supra* note 10, at 626–28 (same).

47. *People v. Coleman*, 86 N.W.2d 281, 285 (Mich. 1957).

48. AM. LAW INST., *supra* note 6, at 329.

49. *State v. Stewart*, 420 N.W.2d 44, 50 (Wis. 1988).

50. J.W. Cecil Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230, 237–38 (1933).

51. LAFAVE, *supra* note 10, at 627–28.

52. *Id.*

B. *The MPC's Definition of Attempt: Section 5.01*

The MPC, promulgated in 1962 by the American Law Institute,⁵³ included a general attempt provision in section 5.01, "Criminal Attempt."⁵⁴ The MPC provided three avenues through which prosecutors could establish attempt liability.⁵⁵ Two overlapped with common-law definitions, essentially requiring the defendant to perform the last proximate act toward the completion of the predicate crime.⁵⁶ In the third category, the MPC's definition deviated from the common law, requiring that the defendant take only a "substantial step" toward the completion of the underlying offense.⁵⁷ A substantial step must be "strongly corroborative of the actor's criminal purpose."⁵⁸ Although the definition of substantial step "retain[ed] the element of imprecision found in most of the [common-law] approaches to the preparation-attempt problem,"⁵⁹ it provided some guidance by listing examples of conduct that, *if* strongly corroborative of criminal purpose, would not be insufficient as a matter of law.⁶⁰

The substantial step test's most significant feature was its expansion of attempt liability beyond the common law's standards.⁶¹ Many of the examples of conduct listed by the MPC as sufficient to prove a substantial step include conduct that would have been insufficient at common law.⁶² For example "searching for . . . the

53. *Past and Present ALI Projects*, *supra* note 5. The American Law Institute is an "independent organization" devoted to "producing scholarly work to clarify, modernize, and improve the law." *About ALI*, AM. LAW INST., <https://www.ali.org/about-ali> [<http://perma.cc/3HTR-EMAW>].

54. MODEL PENAL CODE § 5.01 (1962).

55. *Id.*

56. *See id.* § 5.01(1)(a) (encompassing "conduct that would constitute the crime if the attendant circumstances were as [the defendant] believes them to be"); *id.* § 5.01(1)(b) (applying only to result crimes, encompassing conduct done "with the purpose of causing or with the belief that it will cause [the criminal] result without further conduct on [the defendant's] part").

57. *Id.* § 5.01(1)(c).

58. *Id.* § 5.01(2). The authors of the Code believed that this would expand the scope of attempt law, writing: "It is expected, in the normal case, that this approach will broaden the scope of attempt liability [compared to the proximity approaches]. . . . [T]he requirement of proving a substantial step generally will prove less of a hurdle for the prosecution than the *res ipsa loquitur* approach . . ." AM. LAW INST., *supra* note 6, at 329–30.

59. AM. LAW INST., *supra* note 6, at 329.

60. MODEL PENAL CODE § 5.01(2).

61. *See* LAFAVE, *supra* note 10, at 628 (describing the Model Penal Code's rejection of common-law attempt doctrines).

62. *See* MODEL PENAL CODE § 5.01(2) (listing examples).

contemplated victim of the crime” would have been conduct sufficient to prove an attempt under the substantial step test,⁶³ in contrast to common-law cases like *Rizzo*, in which such conduct would have been insufficient as a matter of law.⁶⁴ The would-be arsonist whose actions were held preparatory in *Peaslee* would also face conviction under the Code’s test, which included the “collection . . . of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such . . . collection . . . serves no lawful purpose of the actor under the circumstances.”⁶⁵ Unlike the probable desistance test, the substantial step test would apply regardless of the probability that a particular defendant would desist; unlike the *res ipsa loquitur* test, it would not require the defendant’s actions to unequivocally indicate criminal intent.

The MPC’s Commentaries acknowledged that the substantial step formulation would broaden attempt liability beyond the scope of common-law attempt doctrines.⁶⁶ This broader definition was included in the MPC itself to facilitate the “apprehension of [certain] dangerous persons” and allow law enforcement to intervene earlier to reduce the risk of harm caused by the criminal conduct “without providing [the] immunity” from prosecution that the offender would enjoy under common-law approaches.⁶⁷

II. THE DEVELOPMENT OF FEDERAL ATTEMPT LAW

This Part discusses how federal courts have defined the act requirement of federal attempt crimes. Section A begins by discussing the current consensus, to the extent that one exists, that has formed around the MPC’s substantial step test. Section B discusses how the courts arrived at this consensus, and the influence of *United States v. Mandujano*⁶⁸ on the development of federal attempt jurisprudence. Section C analyzes *Mandujano*, arguing that it was wrongly decided because it failed to follow traditional methods for interpreting statutory language with a common-law background. Section C also describes an alternate analysis for cases like *Mandujano* that would

63. *Id.* § 5.01(2)(a).

64. *People v. Rizzo*, 158 N.E. 888, 889–90 (N.Y. 1927).

65. MODEL PENAL CODE § 5.01(2)(f).

66. *See* AM. LAW INST., *supra* note 6, at 329–31 (describing how the substantial step test would reach more conduct than the common-law tests).

67. *Id.* at 331.

68. *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974).

allow courts to arrive at a more defensible definition for federal attempts.

A. *The Status of Federal Attempt Law*

Federal criminal law includes no general attempt provision,⁶⁹ unlike many state codes,⁷⁰ the MPC,⁷¹ and the Uniform Code of Military Justice.⁷² Liability for attempt to commit a federal crime exists only when Congress has explicitly criminalized an attempt.⁷³ Although the word “attempt” appears many times throughout the federal law’s various criminal provisions,⁷⁴ federal law does not define the term.⁷⁵

Defining the conduct element of attempt crimes, federal courts have “rather uniformly adopted the standard found in [s]ection 5.01 of the American Law Institute’s MPC.”⁷⁶ That is, courts have held that an attempt requires only a substantial step toward committing the substantive crime.⁷⁷ Most federal appellate courts have included the Code’s requirement that a substantial step “strongly corroborat[e]” the defendant’s criminal purpose.⁷⁸

69. See, e.g., *United States v. Anderson*, 89 F.3d 1306, 1314 (6th Cir. 1996) (“[T]o attempt a federal crime is not, of itself, a federal crime.”); *United States v. Berrigan*, 482 F.2d 171, 185 (3d Cir. 1973) (“Federal criminal law is purely statutory; there is no federal common law of crimes.”).

70. See, e.g., FLA. STAT. § 777.04 (2014); MASS. GEN. LAWS ch. 27A, § 6 (2014); N.Y. PENAL LAW § 110.00 (McKinney 2014); TENN. CODE ANN. § 39-12-104 (2014).

71. MODEL PENAL CODE § 5.01 (1962).

72. Uniform Code of Military Justice art. 80, 10 U.S.C. § 880 (2012).

73. *United States v. Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983) (“[A]ttempt is actionable only where a specific criminal statute outlaws both its actual as well as its attempted violation.”).

74. E.g., 18 U.S.C. § 1751(c) (2012) (prohibiting attempts to kill the President of the United States or certain other members of the executive branch); 18 U.S.C. § 1951 (2012) (containing an attempt provision for Hobbs Act robbery and extortion); 18 U.S.C. § 2422 (2012) (containing an attempt provision for conduct of certain illegal sexual activity through channels of interstate commerce); 21 U.S.C. § 846 (2012) (containing an attempt provision for a number of drug crimes).

75. *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir. 1977) (“[T]here is no comprehensive statutory definition of attempt in federal law.” (quoting *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 437 (S.D.N.Y. 1973))).

76. *Rivera-Sola*, 713 F.2d at 869; *United States v. Joyce*, 693 F.2d 838, 842 (8th Cir. 1982). For a list of the cases by which circuit courts have adopted this test, see *infra* note 111.

77. MODEL PENAL CODE § 5.01(1)(c) (1962).

78. *Joyce*, 693 F.2d at 841; *United States v. Snell*, 627 F.2d 186, 188 (9th Cir. 1980); *Mandujano*, 499 F.2d at 376; see also *United States v. Monholland*, 607 F.2d 1311, 1320 (10th Cir. 1979) (quoting *Mandujano* for its use of the “strongly corroborative” standard, but basing its conclusion on the requirement of an “overt act pointed directly to the commission of the crime charged”).

B. The Development of Federal Attempt Law

The current interpretation of the conduct required to prove an attempt in federal law is derived almost entirely from the Fifth Circuit's decision in *United States v. Mandujano*. Although a number of earlier federal cases addressed the distinction between attempts and preparation,⁷⁹ the present consensus derives directly from *Mandujano*.⁸⁰

Roy Mandujano's conviction for an attempt to distribute heroin arose from his interactions with an undercover narcotics officer who was pretending to search for drugs to purchase.⁸¹ Mandujano asked the officer "if he was looking for 'stuff,'" and the officer said he was.⁸² Mandujano indicated that he had access to a certain type of heroin for a specific price, if the officer could wait.⁸³ The officer said he could not.⁸⁴ Mandujano said he could procure the heroin immediately from a contact if the officer provided money "out front."⁸⁵ The officer gave the money to Mandujano, who left in an apparent attempt to locate the contact.⁸⁶ After about an hour, Mandujano returned, said he could not find the contact, and gave back the officer's money.⁸⁷ Mandujano said he could procure the heroin if the officer called him an hour and a half later.⁸⁸ The officer left, but when he called Mandujano's phone number at the designated time, someone else answered the phone and said that Mandujano was unavailable.⁸⁹ The officer had no further contact with Mandujano before his arrest.⁹⁰ At trial, a jury found

79. *E.g.*, *United States v. Noreikis*, 481 F.2d 1177, 1181 (7th Cir. 1973); *Mims v. United States*, 375 F.2d 135, 148, 149 n.41 (5th Cir. 1967); *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950); *Gregg v. United States*, 113 F.2d 687, 690 (8th Cir. 1940); *Heng Awkak Roman*, 356 F. Supp. at 437, *aff'd*, 484 F.2d 1271 (2d Cir. 1973); *United States v. Butler*, 204 F. Supp. 339, 344 (S.D.N.Y. 1962); *United States v. Robles*, 185 F. Supp. 82, 85 (N.D. Cal. 1960); *United States v. De Bolt*, 253 F. 78, 81 (S.D. Ohio 1918).

80. *See infra* notes 101–11 and accompanying text (describing the post-*Mandujano* development of attempt law).

81. *Mandujano*, 499 F.2d at 371.

82. *Id.* at 371.

83. *Id.*

84. *Id.*

85. *Id.* at 371.

86. *Id.* at 371–72.

87. *Id.* at 372.

88. *Id.*

89. *Id.*

90. *Id.*

Mandujano guilty of an attempt to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846.⁹¹

On appeal, Mandujano argued that the evidence showed only preparation, not an attempt, to distribute heroin.⁹² The court had to determine the scope of the word “attempt” as used in § 846, an attempt provision for a variety of drug crimes. The court began its analysis by noting “there is no legislative history indicating exactly what Congress meant when it used the word ‘attempt’ in section 846.”⁹³ The court then discussed federal cases that had grappled with the limits of attempt.⁹⁴ *Mandujano* cited a number of federal cases that explicitly relied upon state decisions using common-law tests.⁹⁵ The Fifth Circuit, however, made no effort to determine whether it should define attempt according to its common-law meaning. Instead, the court wrote that “[a]lthough the . . . [federal] cases give somewhat varying verbal formulations, careful examination reveals fundamental agreement about what conduct will constitute a criminal attempt.”⁹⁶ According to the “fundamental agreement,” a defendant has committed an attempt if, acting with the mental state required for the underlying crime, the defendant takes a “substantial step toward commission of the crime.”⁹⁷ In a footnote, the court acknowledged that its “definition is generally consistent with and [its] language is in fact close to” the MPC’s definition of attempt.⁹⁸ Holding that Mandujano’s conduct constituted a substantial step toward the distribution of heroin, the court affirmed his conviction.⁹⁹

After *Mandujano*, other circuit courts followed the Fifth in adopting the MPC’s “substantial step” test, explicitly or implicitly relying upon *Mandujano*’s reasoning. The Seventh Circuit, a year after *Mandujano*, adopted that case’s substantial step test in *United States v. Green*¹⁰⁰ with no explanation for why *Mandujano*’s reasoning

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 372–76.

95. *See id.* at 372–76 (citing, *inter alia*, cases that relied upon the dangerous proximity test, including *United States v. Coplton*, 185 F.2d 629, 632–33 (2d Cir. 1950), and *Gregg v. United States*, 113 F.2d 687, 690 (8th Cir. 1940)).

96. *Id.* at 376.

97. *Id.*

98. *Id.* at 377 n.66.

99. *Id.* at 379–80.

100. *United States v. Green*, 511 F.2d 1062 (7th Cir. 1975).

was persuasive.¹⁰¹ In *United States v Stallworth*,¹⁰² the Second Circuit adopted the Fifth Circuit's standard noting that *Mandujano*'s rule was "properly derived from the writings of many distinguished jurists."¹⁰³ However, in support of that contention, *Stallworth* cited opinions that used common-law approaches to attempt based on proximity rather than approaches similar to that of the MPC.¹⁰⁴

Shortly after *Stallworth*, the Second Circuit solidified its adoption of the MPC's test in *United States v. Jackson*,¹⁰⁵ citing the text of section 5.01 in its entirety and extensively quoting to the Code's Commentaries to section 5.01.¹⁰⁶ Though *Mandujano* and *Stallworth* had suggested that the substantial step test was merely "generally consistent with" the MPC's,¹⁰⁷ having been "derived from the writings of many distinguished jurists" such as Cardozo and Holmes,¹⁰⁸ *Jackson* acknowledged that *Mandujano*'s test had been "derived in large part from the MPC's standard."¹⁰⁹ The court did not explain why the MPC should be used to define a federal crime.

In 1979, the Tenth Circuit adopted *Mandujano*'s test, reasoning only that the Fifth Circuit in that case had "summarize[d] virtually all of the federal cases on the subject, and although some of them stated the requirement of overt act in somewhat different terms, the standard in most instances was virtually the same."¹¹⁰ Over the next two decades, every circuit adopted *Mandujano*'s substantial step test; however, none explained why it had adopted the MPC's definition of an attempt beyond a citation to the circuits that had already done so.¹¹¹

101. See *id.* at 1072 (laying out the test and concluding that it "was clearly met in this case").

102. *United States v. Stallworth*, 543 F.2d 1038 (2d Cir. 1976).

103. *Id.* at 1040.

104. See *id.* at 1040 n.4 ("According to [Justice] Cardozo, a suspect's conduct must 'carry the project forward within dangerous proximity to the criminal end . . .'" (quoting *People v. Werblow*, 148 N.E. 786, 789 (N.Y. 1925))).

105. *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977).

106. *Id.* at 117–20.

107. *United States v. Mandujano*, 499 F.2d 370, 377 n.6 (5th Cir. 1974),

108. *Stallworth*, 543 F.2d at 1040.

109. *Jackson*, 560 F.2d at 120.

110. *United States v. Monholland*, 607 F.2d 1311, 1320 (10th Cir. 1979).

111. *United States v. Hsu*, 155 F.3d 189, 202 n.19 (3d Cir. 1998) ("We adopt the Model Penal Code . . . test for attempt because it is consistent with our own caselaw and with the great weight of modern precedent."); *United States v. Duran*, 96 F.3d 1495, 1508 (D.C. Cir. 1996) (using *Mandujano*'s substantial step test); *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984) (discussing *Mandujano* and section 5.01 in detail, and using the substantial step test); *United States v. Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983) (citing every circuit which had adopted

C. Criticism of *Mandujano* and its Progeny

This line of attempt cases demonstrates that, if *Mandujano*'s holding was incorrect, then the widespread case law defining criminal attempts according to the MPC's substantial step test should be reevaluated.

1. *Mandujano*'s *Analysis*. The cases *Mandujano* cited were not dispositive of the definition of an attempt. Many were district court cases, and none were binding upon the Fifth Circuit.¹¹² Further, the court's claim that the cases revealed "fundamental agreement"¹¹³ was an overstatement. Indeed, the cases cited revealed a fundamental *disagreement*. For example, in support of the conclusion that a "substantial step" must be "strongly corroborative of the firmness of the defendant's criminal intent,"¹¹⁴ the court cited federal cases covering the full range of possible stances on the corroboration question, from a case that required no corroboration¹¹⁵ to one that required that the act unequivocally demonstrate criminal purpose.¹¹⁶ When explaining its use of the phrase "substantial step" as opposed to "overt act,"¹¹⁷ the *Mandujano* court said only that this language was meant to separate the conduct of attempt from "remote

the substantial step test); *United States v. McDowell*, 705 F.2d 426, 427–28 (11th Cir. 1983) (citing only *Mandujano*); *United States v. Williams*, 704 F.2d 315, 321 (6th Cir. 1983) (quoting numerous cases, including *Mandujano*); *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982) (citing every circuit which had adopted the substantial step test); *United States v. Snell*, 627 F.2d 186, 187–88 (9th Cir. 1980) (citing every circuit which had adopted the substantial step test).

112. See *Mandujano*, 499 F.2d at 372–76 (citing six circuit court cases and six district court cases).

113. *Id.* at 376.

114. *Id.*

115. *Id.* (citing *United States v. Robles*, 184 F. Supp. 82, 85 (N.D. Cal. 1960), for the definition of an attempt as requiring the *de minimis* standard of "[a]ny effort or endeavor to effect the act" without any reference to a corroboration requirement).

116. See *id.* at 377 (citing *Mims v. United States*, 374 F.2d 135, 148 n.40 (5th Cir. 1967), for the proposition that mere corroboration is insufficient: "there must be some appreciable fragment of the crime . . . the act must not be equivocal in nature").

117. Some of the federal attempt cases cited by *Mandujano* used the "overt act" formulation. *Mandujano*, 499 F.2d at 372–74 (citing *United States v. Noreikis*, 481 F.2d 1177, 1182 (7th Cir. 1973); *Lemke v. United States*, 211 F.2d 73, 75 (9th Cir. 1954); *Wooldridge v. United States*, 237 F. 775, 778–79 (9th Cir. 1916); *United States v. Baker*, 129 F. Supp. 684, 685 (S.D. Cal. 1955); *United States v. De Bolt*, 253 F. 78, 80 (S.D. Ohio 1918)). By themselves, the words "overt act" would seem to indicate that *any* conduct, even preparation, would be sufficient to establish an attempt. However, the cases make clear that an "overt act" must still proceed beyond preparation. See, e.g., *Wooldridge*, 237 F. at 779 (applying the rule that an overt act "must be some act directed toward the commission of the offense *after the preparations are made*" (emphasis added) (quoting *State v. Taylor*, 84 P. 82, 83 (Or. 1906)).

preparation.”¹¹⁸ But the cases cited in *Mandujano* did not agree that attempts encompassed everything except remote preparation; the two cases *Mandujano* directly cited for this point relied upon common-law proximity analyses.¹¹⁹

Regardless of the *Mandujano* court’s reasoning, its holding required leaving behind traditional common-law definitions of attempt in favor of the MPC’s substantial step test. *Mandujano*’s conduct certainly would have failed to establish an attempt under the strict proximity approaches.¹²⁰ He would not have moved beyond preparation under an “indispensable element” analysis because he never gained possession of the heroin he was “attempting” to distribute.¹²¹ The evidence showed that *Mandujano* searched for, but never found, the heroin he was attempting to distribute, mirroring the failure of the defendant’s preparatory acts in *Rizzo*.¹²² Like the defendant in *Peaslee*, *Mandujano* never possessed an “intent [to distribute the heroin] at a time and place where he was able to carry it out.”¹²³ Although the “probable desistance” test may have been difficult to apply in a large number of cases,¹²⁴ this case is not one of them. There was no need to ask whether desistance was probable, because *Mandujano* actually gave up his initial attempt to secure the heroin, and was unwilling to engage in further conversation with his intended customer.¹²⁵

It is arguable that *Mandujano*’s conduct moved beyond preparation under a *res ipsa loquitur* analysis on the theory that the act of agreeing to locate and sell the heroin “can have no other purpose than”¹²⁶ distribution of the heroin. Such an analysis misses other potential motivations. For example, *Mandujano* could have

118. *Mandujano*, 499 F.2d at 377.

119. *United States v. Coplion*, 185 F.2d 629, 633 (2d Cir. 1950) (quoting *Commonwealth v. Peaslee*, 59 N.E. 55, 56 (Mass. 1901) (Holmes, C.J.)); *Gregg v. United States*, 113 F.2d 687, 690 (8th Cir. 1940) (quoting *People v. Werblow*, 148 N.E. 786, 789 (N.Y. 1925) (Cardozo, J.)).

120. *See supra* Part I.A.1 (describing the scope and limitations of the proximity approaches).

121. *See supra* notes 32–38 and accompanying text (discussing the indispensable-element approach).

122. *See supra* notes 20–25 and accompanying text (discussing *Rizzo*).

123. *See Peaslee*, 59 N.E. at 57.

124. *See AM. LAW INST., supra* note 6, at 323 (describing the test as “unacceptable as a working rationale”); *LAFAVE, supra* note 10, at 626 (repeating with approval the criticism of the probable desistance approach that “there exists no basis for making such judgments as when desistance is no longer probable or when the normal citizen would stop”).

125. *United States v. Mandujano*, 499 F.2d 370, 372 (5th Cir. 1974).

126. *Turner, supra* note 50, at 237–38.

been trying to scam a naive customer out of money the customer was willing to pay “out front.” Further, *Mandujano* provides no indication that the Fifth Circuit intended to adopt, or even seriously consider, the *res ipsa loquitur* test. The court mentioned the test only once, in a footnote summarizing the MPC Commentators’ review of common-law doctrines.¹²⁷ None of the cases upon which *Mandujano* relied used the *res ipsa loquitur* test. The fact that Mandujano’s conduct might have satisfied the *res ipsa loquitur* test should not indicate that *Mandujano* stood for something other than a full adoption of the Code’s substantial step test.¹²⁸

2. *Statutory Interpretation Analysis of Mandujano.* The court in *Mandujano* stated that there was “no legislative history indicating exactly what Congress meant when it used the word ‘attempt’” in the relevant statute, 21 U.S.C. § 846.¹²⁹ The statute contained an attempt provision¹³⁰ but neither § 846 nor any other federal statute defines attempt.¹³¹ Without the benefit of a statutory definition or legislative history, the court sought to cobble together a definition from the decisions of federal circuit and district courts, and ultimately the MPC.¹³² In doing so, the court failed to consider the common-law meaning of “attempt,” which should have guided its analysis.

As the Third Circuit has explained, “[i]t is . . . well settled that when a federal statute uses a term known to the common law to designate a common law offense and does not define that term, courts

127. *Mandujano*, 499 F.2d at 373 n.5.

128. However, perhaps this fact explains why the Fifth Circuit was willing, two years after *Mandujano*, to employ a version of the *res ipsa loquitur* test in *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976) (“[W]e demand that . . . the objective acts performed, without any reliance on the accompanying *mens rea*, mark the defendant’s conduct as criminal in nature.”).

129. *Mandujano*, 499 F.2d at 372.

130. The statute punished “[a]ny person who attempts . . . to commit any” of the drug-related offenses contained in Subchapter I, Title 21, Chapter 13 of the United States Code. 21 U.S.C. § 846 (2012).

131. *United States v. Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983) (“[N]owhere in federal law is there a comprehensive statutory definition of attempt.”); *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982) (“[T]here is no comprehensive statutory definition of attempt in federal law.”). It is worth noting that these statements are technically incorrect. There is a statutory definition of attempt in the Uniform Code of Military Justice. Uniform Code of Military Justice art. 80(a), 10 U.S.C. § 880(a) (2012); see Robert E. Wagner, *A Few Good Laws: Why Federal Criminal Law Needs a General Attempt Provision and How Military Law Can Provide One*, 17 U. CIN. L. REV. 1043, 1053 (2010) (describing this provision).

132. See *Mandujano*, 499 F.2d at 371–74.

called upon to construe it should apply the common-law meaning.”¹³³ The term “attempt” was known to the common law; attempt crimes were recognized by early Roman law codes;¹³⁴ and in English common law the crime dates back to 1784.¹³⁵ Distinguished American jurists, such as Justices Holmes and Cardozo developed the common law of attempt when they sat on state supreme courts.¹³⁶ The drafters of the MPC extensively catalogued the common-law interpretation of attempt when explaining why the Code rejected common-law approaches.¹³⁷

Although there are a few exceptions to the general rule of applying common-law meaning, they do not apply to the common law of attempt. One exception applies when the “history and purposes” of a particular statute provide “grounds for inferring [an] affirmative instruction” to deviate from a common-law definition.¹³⁸ Another applies when common-law rules have become so unworkable that Congress could not have intended to adopt them.¹³⁹

The “history and purposes” exception would require a statute-by-statute analysis and would be wholly inapplicable to any statute in which the language of “attempt” was introduced before the MPC had been drafted and widely circulated.¹⁴⁰ Because there is no legislative history whatsoever indicating what Congress intended by the word “attempt,”¹⁴¹ there can be no affirmative inference that Congress intended to deviate from the word’s traditional common-law meaning.

133. *United States v. Patton*, 120 F.2d 73, 75 (3d Cir. 1941); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952) (suggesting that “[c]ongressional silence as to . . . elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law” may warrant an inference that Congress intended to adopt the common-law definition).

134. MEEHAN & CURRIE, *supra* note 1, at 10 (discussing the history of attempt crimes).

135. Brodie, *supra* note 4, at 238 (citing *R v. Scofield*, (1784) Cald. 397 (K.B.)).

136. *Commonwealth v. Peaslee*, 59 N.E. 55 (Mass. 1901) (Holmes, C.J.); *People v. Werblow*, 148 N.E. 786 (N.Y. 1925) (Cardozo, J.).

137. AM. LAW INST., *supra* note 6, at 321–29.

138. *Morissette*, 342 U.S. at 263–73.

139. *See United States v. Everett*, 700 F.2d 900, 904–06 (3d Cir. 1983) (explaining how the doctrine of impossibility became unworkable and “a source of utter frustration” (quoting *United States v. Thomas*, 32 C.M.R. 278, 288 (C.M.A. 1962))).

140. *E.g.*, Hobbs Act, Pub. L. 80-772, § 1951, 62 Stat. 683, 793–94 (1948) (codified as amended at 18 U.S.C. § 1951 (2012)).

141. *United States v. Mandujano*, 499 F.2d 370, 372 (5th Cir. 1974).

Indeed, the opposite may be the case, as indicated by the occasional use of the word “endeavor” in criminal statutes.¹⁴² Courts have interpreted the word “endeavor” as “connot[ing] a somewhat lower threshold of purposeful activity than ‘attempt.’”¹⁴³ In *United States v. Russell*,¹⁴⁴ the Supreme Court accepted a broad definition of “endeavor” when interpreting an obstruction-of-justice statute.¹⁴⁵ The Court was persuaded by legislative history that indicated Congress’s intention to “g[e]t rid of the technicalities which might be urged as besetting the word ‘attempt’” by using the word “endeavor.”¹⁴⁶ The Court’s interpretation reinforces that the word “attempt” has traditionally been read to include certain “technicalities” that limited its scope.¹⁴⁷ When Congress used “endeavor” it gave prosecutors free rein but when Congress used “attempt” it adopted the common law’s limitations. This makes any argument for an affirmative instruction to construe “attempt” *more* broadly than at common law even less plausible.

Nevertheless, one court identified an affirmative legislative instruction to deviate from the common law based on the history and purpose of 21 U.S.C. § 846, which provided an attempt provision for a wide range of drug offenses.¹⁴⁸ According to the Sixth Circuit in *United States v. Reeves*,¹⁴⁹ Congress’s intent in fashioning the attempt provision was unquestionably broad, and designed to “eliminate technical obstacles” to law enforcement and prosecution.¹⁵⁰ *Reeves*

142. *E.g.*, 18 U.S.C. § 1503 (2012) (punishing endeavors to influence jurors or court officials); 18 U.S.C. § 2192 (2012) (punishing endeavors to incite mutiny on a United States ship).

143. *United States v. Lazzerini*, 611 F.2d 940, 941 (1st Cir. 1979). The Fifth Circuit held that an endeavor included even “experimental approaches” to committing the underlying offense. *Overton v. United States*, 403 F.2d 444, 446 (5th Cir. 1968).

144. *United States v. Russell*, 255 U.S. 138 (1921).

145. *Id.* at 143.

146. *Id.*

147. *Id.* For example, the Court held that defendants could not avail themselves of the common-law defense of impossibility when charged with an endeavor to commit a substantive crime. *Osborn v. United States*, 385 U.S. 323, 333 (1966) (citing *Russell*, 255 U.S. at 143).

148. 21 U.S.C. § 846 (2012). Though other courts deviated from the common law by adopting the MPC’s substantial step test, they did not do so based on a perceived congressional instruction. *See supra* Part II.B.

149. *United States v. Reeves*, 794 F.2d 1101 (6th Cir. 1986).

150. *Id.* at 1104 (“[T]here can be no question that the Congressional intent in fashioning the attempt provision as part of an all-out effort to reach all acts and activities related to the drug traffic was all inclusive and calculated to eliminate technical obstacles confronting law enforcement . . .”).

relied on another court's statement that the statute "makes it apparent that Congress . . . intended to encompass every act and activity which could lead to a proliferation of drug traffic. Nothing in the statute indicates any congressional intent to limit the reach of this legislation, which is described in its very title as 'Comprehensive.'"¹⁵¹ This logic is tenuous at best, essentially asserting that because Congress criminalized a broad range of activity courts should extend the statute whenever reasonably possible. The reverse could just as easily be inferred from the same legislative history: Congress specified a broad range of activity to criminalize, which it found to be "[c]omprehensive," and therefore any activity not unambiguously included in the statute was not meant to be criminalized. Surprisingly, despite finding an affirmative instruction to read the statute more broadly, the court also referred to one of the narrow common-law formulations of attempt, a version of the *res ipsa loquitur* test.¹⁵²

Courts are also willing to deviate from common-law definitions without an explicit legislative instruction when the common-law definitions are burdened by "hair-splitting"¹⁵³ or "unworkable distinctions."¹⁵⁴ Whatever confusion might have accompanied common-law attempt jurisprudence, there is no indication that common-law act requirements were ever so unworkable that Congress could not possibly have meant to adopt them. That level of unworkability is reserved for cases like the impossibility defense to attempt, an area of law "fraught with intricacies and artificial distinctions," and described as "an illusory test leading to contradictory, and sometimes absurd, results."¹⁵⁵ By contrast, common-law formulations of attempt's conduct requirement continue to be the law in some jurisdictions, where judges presumably find their standards workable.¹⁵⁶ Although the MPC's drafters rejected the

151. *Id.* (quoting *United States v. Gomez*, 593 F.2d 210, 212–13 (3d Cir. 1979)).

152. *See id.* (applying the rule that a defendant's acts must, by themselves, "mark the defendant's conduct as criminal in nature").

153. *United States v. Bailey*, 444 U.S. 394, 406–07 (1980).

154. *United States v. Everett*, 700 F.2d 900, 904–05 (3d Cir. 1983).

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

156. Massachusetts continues to use the proximity analysis codified in *Peaslee*. *E.g.*, *Commonwealth v. Bell*, 917 N.E.2d 740, 746 (Mass. 2009). New York similarly continues to rely on *Rizzo* and the common-law proximity analysis. *E.g.*, *People v. Omwathath*, 965 N.Y.S.2d 687, 689 (N.Y. App. Term 2013).

common-law tests, they did so due to policy considerations, not a belief that the common-law tests were unworkable.¹⁵⁷

Analyzing the word “attempt” according to its common-law meaning poses a challenge because the word had multiple meanings at common law.¹⁵⁸ If federal courts should define attempt according to the common law, should they use a proximity approach, the *res ipsa loquitur* test, or the probable desistance test? To begin, the answer is not “the MPC.” The existence of multiple common-law definitions of attempt did not give courts license to apply a definition unknown to the common law. When multiple common-law meanings exist at the time a statute was drafted, “it [is] more appropriate to inquire which of the common-law readings of the term best accords with the overall purposes of the statute.”¹⁵⁹ The *Mandujano* court and the circuits that followed did not inquire which common-law definition of attempt best fit the purposes of the predicate statutes, but instead adopted a uniform standard across all attempt statutes that was substantially different from any common-law definition.¹⁶⁰

3. *Conducting the Appropriate Analysis.* Well-established tools of statutory interpretation should guide any court faced with a statute containing an attempt provision. That is, the court should attempt to ascertain legislative intent as embodied in the language of the particular statute. This analysis may be problematic in that it requires the courts to accept as true certain fictions: that a given legislature possessed an unstated intent for the law’s meaning, or that a deliberative body made up of multiple people can even *have* an intent.¹⁶¹ By asking what the enacting legislature intended, judges must essentially read the minds of past legislators with few tools to

157. See AM. LAW INST., *supra* note 6, at 329–31 (discussing the policy considerations guiding the Code’s rejection of common-law tests in favor of the substantial step test).

158. LAFAVE, *supra* note 10, at 622–28.

159. *Moskal v. United States*, 498 U.S. 103, 116 (1990); see also *United States v. Turley*, 352 U.S. 407, 411–13 (1957) (stating that, if Congress uses a term with multiple common-law meanings in a criminal statute, the term should be interpreted according to the meaning which is supported by the term’s historic usage as well as the purpose of the law and its legislative history).

160. See *supra* Part I.B (discussing the differences between the substantial step test and common-law tests).

161. See Eric A. Johnson, *Dynamic Incorporation of the General Part: Criminal Law’s Missing (Hyper)Link*, 48 U.C. DAVIS L. REV. 1831, 1869–76 (2015) (criticizing the use of statutory interpretation techniques that focus on a legislature’s intent).

guide them.¹⁶² Further, courts may be put in the position of claiming to “discover” the answer to questions of law that could not have existed during the time of the enacting legislature.¹⁶³

A statutory interpretation analysis that focuses on the common law as it existed at the time of a statute’s enactment can perhaps be best justified as a default rule.¹⁶⁴ Courts interpreting statutes will eventually be forced to apply default rules; the alternative would be to fill legislative gaps with personal policy judgments.¹⁶⁵ “Normally, this will (and does) dictate applying some form of default rule that estimates the preferences of the enacting or current government.”¹⁶⁶ An interpretation that is ascertained by use of a default rule “must be within the range of plausible statutory meanings” in order to be fair and effective.¹⁶⁷ Legislators cannot be said to legislate *ex ante* around the application of a default rule if they do not know what the default rule will be.

Some theories of default rules suggest that statutes should be construed to elicit legislative response, rather than to reflect legislative preferences.¹⁶⁸ The general concept is that courts interpreting ambiguous statutory language should interpret the statute in a way that discourages ambiguity.¹⁶⁹ Even those theories, however, do not “justify adopting interpretations that parties were entitled to assume lay outside the range of possible statute meanings.”¹⁷⁰ In the case of attempt provisions enacted before the MPC, all relevant parties were perfectly entitled to assume that such provisions would not be interpreted according to some yet-unknown definition of attempt. They would have been particularly unable to guess that the novel interpretation did not come from judges, but

162. *See id.* at 1874 (describing how static incorporation may be “extraordinarily complex”).

163. *See id.* (explaining that, for crimes that did not exist when Congress adopted a particular statute, “[t]he Court probably would have been pretending, then, if it had claimed to ‘discover’ a definitive answer in the judge-made law”).

164. *See generally* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2254 (2002) (describing the use of default rules in statutory interpretation).

165. *Id.* at 2164–65.

166. *Id.* at 2165.

167. *Id.* at 2170.

168. *Id.* The rationale behind these theories is that courts should interpret ambiguous statutory language in a way that discourages ambiguity. *Id.* at 2169–70.

169. *Id.* at 2169–71.

170. *Id.*

rather from the American Law Institute, an unelected private group that proposed substantial changes to state criminal law codes.¹⁷¹

An analysis that focuses on the meaning of the statute's text should therefore govern the interpretation of the conduct requirement for attempts. That meaning can be best ascertained by reference to the common law. Under this analysis, courts would choose one of the common-law approaches: proximity, probable desistance, or *res ipsa loquitur*. Choosing among these approaches presents two questions. First, should the meaning of attempt be uniform across the criminal law, or might each attempt provision be interpreted differently? Second, how should courts determine which of the common-law approaches "best accords with the overall purposes"¹⁷² of attempt law generally, or of any particular attempt provision specifically?

a. How Many Definitions of Attempt? When Congress uses the same word in multiple statutes, courts do not necessarily assume that it carries over across statutes.¹⁷³ Although no court has stated that the definition of attempt may vary from statute to statute, one has considered the context of a particular statute when interpreting an attempt provision.¹⁷⁴ It seems to be the common practice for courts to assume that attempts are the same across federal criminal statutes.¹⁷⁵

171. See PAUL H. ROBINSON & MARKUS DIRK DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 3, <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf> [<http://perma.cc/UH34-XK2D>] ("When the Institute undertook its work on criminal law, however, it judged the existing law too chaotic and irrational to merit 'restatement.' What was needed, the Institute concluded, was a model code, which states might use to draft new criminal codes.").

172. *Moskal v. United States*, 498 U.S. 103, 116 (1990).

173. See, e.g., *Atl. Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even the same section."). But see *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 155 (D.C. Cir. 1990) (interpreting the word "requirements" by reference to its use in other statutes).

174. See *supra* notes 150–52 and accompanying text (discussing *United States v. Reeves*, 794 F.2d 1101 (6th Cir. 1986)).

175. See, e.g., *United States v. Mandujano*, 499 F.2d 370, 373–76 (5th Cir. 1974) (quoting and analyzing cases that interpreted attempt under various statutes); *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984) (applying *Mandujano's* standard to an attempt provision in a bank robbery statute, 18 U.S.C. § 2113(a)); *United States v. Snell*, 627 F.2d 186, 187–88 (9th Cir. 1980) (applying *Mandujano's* test to an attempted Hobbs Act robbery, under 18 U.S.C. § 1951, without explaining why the definition of attempt should be transferrable); *United States v. Monholland*, 607 F.2d 1311, 1319–20 (10th Cir. 1979) (applying *Mandujano's* standard to an attempt provision in a statute that prohibited attempting to damage property involved in interstate commerce, 18 U.S.C. § 844, and treating definitions of attempt as transferrable across

That Congress has consistently declined to define attempt by statute indicates that the definition of attempt should apply generally rather than on a statute-by-statute basis. Without any internal reference, the definition of attempt must come from outside the statutory text, from some broader idea of attempt law that Congress understood as contained within the word “attempt.” Assuming Congress intended for attempt to have any meaning at all, only one source could have provided that meaning when attempt provisions were first enacted: the common law of attempt. By consistently referring to attempt without defining the term, Congress suggests that attempt law exists apart from statutory definition, and that each usage refers to the same root concept. The common law is the only viable “root.”

When Congress intends for the act requirement of a generally applicable criminal provision to vary across statutes, it may say so. Courts have held that this is what Congress did for federal conspiracy provisions.¹⁷⁶ In 1948, Congress enacted a general conspiracy provision for the federal law under which liability would not be imposed unless “one or more of [the conspirators] do any act to effect the object of the conspiracy.”¹⁷⁷ This was a deviation from the common law of conspiracies, which held that “a conspiracy was punishable even though no act was done beyond the mere making of the agreement.”¹⁷⁸ When Congress subsequently enacted conspiracy provisions for individual crimes that punished only “conspiracies” without including the additional act requirement in the statute’s text, courts inferred an affirmative legislative instruction to apply the broader common-law act requirement to the conspiracies Congress had singled out.¹⁷⁹ There are no comparable signals from Congress that it intended the act requirement of attempt provisions to vary across statutes.

Another approach that supports a uniform interpretation of attempt provisions is the belief that Congress would never have intended to make a fundamental change in the nature of attempt law without saying so explicitly. The Supreme Court has referred to this

statutes); *United States v. Stallworth*, 543 F.2d 1038 (2d Cir. 1976) (applying *Mandujano*’s standard to an attempt provision in a bank robbery statute, 18 U.S.C. § 2113(a)).

176. LAFAVE, *supra* note 10, at 661.

177. 18 U.S.C. § 371 (2012).

178. LAFAVE, *supra* note 10, at 661.

179. *See id.* (citing *United States v. Shabani*, 513 U.S. 10 (1994); *Singer v. United States*, 323 U.S. 338 (1945); *Nash v. United States*, 229 U.S. 373 (1913)).

idea as the “dog that didn’t bark.”¹⁸⁰ Before the MPC was promulgated, attempt crimes were defined exclusively by the common law. Had Congress ever intended to define one particular attempt provision differently from all others, it surely would have said so. But Congress has never given any indication that it intended to change the meaning of attempt. Indeed, when Congress did intend to punish activity that was similar to attempt while avoiding the common-law rules that limited the scope of liability, it used the word “endeavor.”¹⁸¹ Therefore, if courts seek to interpret the elements of attempt provisions in accordance with congressional intent, they must do so uniformly across statutes.

b. Which Definition? Whether or not courts define attempt uniformly across statutes, courts operating under a statutory interpretation analysis should determine which of the common-law attempt definitions to apply. In so doing, they must be guided by the purposes of the criminal law.¹⁸² Whichever approach they choose, courts must select from the common-law tests: a proximity approach, a probable desistance approach, or *res ipsa loquitur*.¹⁸³

Courts should adopt a proximity approach to attempt if they believe the purpose of punishing an attempt is “to prevent some harm which is foreseen as likely to follow . . . under the circumstances.”¹⁸⁴ Proximity approaches are well tailored to this purpose because they do not punish a defendant “until the defendant has come dangerously

180. See *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17–18 (1987) (reasoning that “[a]ll in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle’s ‘dog that didn’t bark,’” that significant legislative change would have garnered more substantial congressional comment); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (“In a case where the construction of legislative language . . . makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”). The phrase refers to a Sherlock Holmes story in which the detective deduces the villain’s identity from a watchdog’s silence. See SIR ARTHUR CONAN DOYLE, *SILVER BLAZE* (Baker Press 2012).

181. See *supra* notes 142–46 and accompanying text (explaining Congress’s use of the word “endeavor”).

182. See *Moskal v. United States*, 498 U.S. 103, 116 (1990) (“[I]t [is] more appropriate to inquire which of the common-law meanings of the term best accords with the overall purposes of the statute”); *United States v. Turley*, 352 U.S. 407, 411–13 (1957) (stating that, if Congress uses a term with multiple common-law meanings in a criminal statute, the term should be interpreted according to the purpose of the law and its legislative history).

183. See *supra* Part I.A. (discussing categories of common-law attempt definitions).

184. HOLMES, *supra* note 15, at 64–65.

close to accomplishing the completed crime.”¹⁸⁵ If “the primary purpose of punishing individuals is to neutralize dangerous individuals and not to deter dangerous acts,”¹⁸⁶ however, the proximity approaches are poorly suited to the task. Consider the defendants in *Peaslee* or *Rizzo*.¹⁸⁷ From *Peaslee* and *Rizzo*’s actions, one can readily determine that they were “dangerous” individuals. There is every reason to believe that both men would have carried out their intended crimes had they not been intercepted by law enforcement. The ability of such dangerous individuals to evade conviction represents the greatest weakness of the proximity approach.

Proximity approaches have one distinct advantage over the other common-law approaches, and even over the MPC’s substantial step test: flexibility. Under the dangerous proximity analysis described by Justice Holmes, one factor for determining an attempt is “the gravity of the crime” attempted.¹⁸⁸ Given the wide scope of attempt provisions within the federal law, an ability to tailor the conduct requirement of attempt crimes to the dangerousness of the predicate crime could be beneficial. For example, consider the defendant who unsuccessfully searches for the intended victim of his crime. Should it matter whether the defendant’s intended crime is a scheme to defraud the victim of money¹⁸⁹ or a scheme to commit sexual abuse of a minor?¹⁹⁰ Judges may well be inclined to make such a distinction.

The courts should not accept the probable desistance approach, as its infirmities are too great. The justification of the probable desistance approach is that it bases attempt liability on the dangerousness of the actor.¹⁹¹ The difficulty of implementation, however, weighs against the use of this standard.¹⁹² Courts would have to decide whether the test referred to: (1) the specific probability that a particular defendant would give up his criminal plan; or (2) the general probability that any person who has gone as far as the

185. LAFAVE, *supra* note 10, at 625.

186. AM. LAW INST., *supra* note 6, at 323.

187. See *supra* Part I.A.1 (describing common-law proximity doctrines).

188. Commonwealth v. Kennedy, 48 N.E. 770, 771 (Mass. 1897).

189. 18 U.S.C. § 1341 (2012) (criminalizing mail fraud and including an attempt provision).

190. 18 U.S.C. § 2243 (2012) (criminalizing sexual abuse of a minor or ward and including an attempt provision).

191. AM. LAW INST., *supra* note 6, at 324–25.

192. See *id.* (criticizing the probable desistance approach as impractical); LAFAVE, *supra* note 10, at 626 (same).

defendant had would give up their criminal plan.¹⁹³ If courts accepted the first, jurors would be asked to read the mind of an individual defendant. Given this instruction, jurors might base their decisions on beliefs that people of a certain race, age, or gender are more likely to be criminals. If courts accepted the second choice, jurors would have little basis for their decision, as “there exists no basis for making such judgments as when the desistance is no longer probable or when the normal citizen would stop.”¹⁹⁴ Further, one may ask whether *anyone* who has undertaken a criminal endeavor is likely to voluntarily give up their plan before completion.¹⁹⁵

The *res ipsa loquitur* test is well tailored to the goal of punishing dangerous persons. “[O]nce [an] actor must desist or perform acts that he realizes would incriminate him . . . in all probability a firmer state of mind exists.”¹⁹⁶ The MPC’s Commentaries illustrate this by the example of a hunter. He brings “extra supplies to facilitate an escape in the event he resolves to kill his companion” on his hunting trip; he also brings poison.¹⁹⁷ By bringing extra supplies, he may merely be *thinking* about committing murder, but by bringing poison he probably has *decided* to do so and is therefore more dangerous.¹⁹⁸ Judges may also favor the *res ipsa loquitur* test because it is relatively similar to the test currently used. The “substantial step” test requires conduct that is strongly corroborative of criminal intent, similar to the *res ipsa loquitur* test’s requirement that a defendant’s conduct be completely corroborative of criminal intent.¹⁹⁹

193. LAFAVE, *supra* note 10, at 626 (criticizing the probable desistance approach as impractical).

194. *Id.* (citing Donald Stuart, *The Actus Reus in Attempts*, 1970 CRIM. L.R. 505, 509).

195. *See* Parker v. State, 113 S.E. 218, 219 (Ga. Ct. App. 1922) (describing that it is a question of fact for the jury whether the defendant would have “turned away from the consummation of the crime”). *But see* Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937) (“All of us, or most of us, at some time or other harbor what may be described as criminal intent . . . Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens.”).

196. AM. LAW INST., *supra* note 6, at 329.

197. *Id.*

198. *Id.*

199. *See id.* at 326 (describing the *res ipsa loquitur* test as requiring that “the actor’s conduct unequivocally manifest an intent to commit a crime” (emphasis added)); *id.* at 330 (“The basic rationale of the requirement that the actor’s conduct shall strongly corroborate his purpose is, of course, the same as that underlying the *res ipsa loquitur* view.”).

Two weaknesses of the *res ipsa loquitur* test are the exclusion of confessions and the stringent nature of its act requirement.²⁰⁰ Because attempt crimes inherently punish noncriminal activity made criminal by the defendant's state of mind, confessions or other statements by the defendant can often play an important role in attempt cases.²⁰¹ Consider "the case of a defendant who goes up to a haystack, fills his pipe, and lights a match."²⁰² Due to the strict requirement of an unequivocal act, those acts alone could not support a conviction of attempted arson, even if the defendant later confessed his plan to burn the haystack.²⁰³ Judges may find that the highly restrictive nature of the *res ipsa loquitur* test, along the total exclusion of confessions, is inconsistent with attempt law's goal of incarcerating dangerous actors and punishing dangerous acts.

Are there any arguments based on statutory interpretation for interpreting attempt provisions according to the substantial step test? Moving forward from *Mandujano*, one plausible argument is that Congress has now, by its silence, accepted the new judge-made definition. This theory has the same general justification as the principle of interpreting undefined statutory terms according to their common-law meaning: that Congress legislates against the background of judicial decisions, and can deviate explicitly from those definitions if it desires.²⁰⁴ This theory poses a number of problems. First, if this position were to be accepted, it would not be clear when Congressional silence amounted to acceptance, other than that it occurred some time after *Mandujano*. Surely Congress could not be expected to respond immediately to a single circuit court decision. How many circuit court decisions are necessary to constitute a "new common law" that overrides the old? Second, this position is troublesome because it rests on the notion that the appropriate response to a serious judicial error is acceptance. This should not only prove worrisome to those who believe that judges have a duty to answer legal questions correctly; it should also worry those who see

200. LAFAVE, *supra* note 10, at 626–27.

201. *See id.* at 626–28 (discussing the *res ipsa loquitur* test and the exclusion of confessions).

202. *Id.* at 627 n.58 (citing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 630 (2d ed. 1961)).

203. WILLIAMS, *supra* note 202, at 630.

204. *See Mendelovitz v. Vosicky*, 40 F.3d 182, 184 (7th Cir. 1994) (referencing "the judicial presumption that Congress legislates against the background of prior judicial interpretations of statutes that it uses as models").

undelegated judicial lawmaking as a usurpation of the legislature's exclusive power to create and define crimes.

c. Incorporation. The statutory interpretation analysis assumes that courts interpreting attempt provisions engage in statutory analysis at all. Under theories of "incorporation," courts are not engaged in statutory interpretation, but are incorporating concepts of judge-made law that exist in the ether, separate from statutory text or legislative intent.²⁰⁵ According to these theories, when legislatures create statutes they sometimes "incorporate" preexisting bodies of law.²⁰⁶ A static incorporation analysis is identical to a statutory interpretation analysis; it involves looking to the state of the common law as it existed when particular statutory language was drafted and "incorporating" that body of common law by reference.²⁰⁷

Under a dynamic incorporation analysis, a statute that references common-law concepts incorporates not only the boundaries of that concept as they existed when the statute was enacted, but creates a "hyperlink" which incorporates by reference any future changes to the common law.²⁰⁸ Because the judges interpreting the common law are the same ones changing it, dynamic incorporation is not so much a method of statutory interpretation as it is a form of legislating delegated to the courts.²⁰⁹ Therefore, a court analyzing a concept that it believes has been dynamically incorporated will not look to the state of the common law as it existed at the time a statute was

205. See generally Johnson, *supra* note 161 (describing the theory of "dynamic incorporation" as a form of delegated lawmaking).

206. *Id.* at 1850.

207. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 3.02[A], at 29 (5th ed. 2009) (describing statutory interpretation by incorporation of common law).

208. See Johnson, *supra* note 161, at 1855–56 ("Just as the content of a hyperlinked website does not depend on the words or symbols in which the hyperlink is embedded, the content of the dynamically incorporated body of judge-made law does not depend on the words by which the incorporation is accomplished.").

209. *Id.* at 1854–56; see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 472 (1996) ("[F]ederal criminal law should be viewed as a system of delegated common law-making."). Federal Rule of Evidence 501 provides an explicit example of statutory language that calls for dynamic incorporation. The rule provides that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege." FED. R. EVID. 501; see also 42 U.S.C. § 6928(f)(4) (explicitly incorporating common-law defenses as "determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience").

enacted, but will look to the current state of the common law and its own policy judgments, informed by “reason and experience.”²¹⁰

Mandujano’s analysis can be best explained by dynamic incorporation, even if that analysis cannot justify the outcome. The court discussed federal cases interpreting the meaning of attempt under § 846, and held that “fundamental agreement” among federal courts justified adopting the substantial step standard.²¹¹ Viewed in the light of a dynamic incorporation analysis, the *Mandujano* court’s reasoning makes sense. Without legislative history or a statutory definition, the court believed dynamic incorporation was appropriate. The court did not look to traditional common-law meanings of attempt because it was dynamically incorporating the concept of attempt. The *Mandujano* court perceived that attempt law had changed or should change, and based its holding on that perception.

The First Circuit, in *United States v. Dworken*,²¹² articulated a rationale for adopting the MPC’s substantial step test that essentially mirrors the dynamic incorporation analysis. According to the First Circuit, because attempt has always been left to judicial definition, the court was free to adopt the definition of attempt that “seem[ed] to [it] to make the most sense.”²¹³ The court stated that it would be willing to reconsider the definition of attempt if it were “persuaded that some other standard would better reflect the *purposes* of the criminal law,” and made no mention of legislative intent or of statutory interpretation.²¹⁴

Even accepting dynamic incorporation as the proper analytical method, *Mandujano*’s holding was still incorrect on two grounds. First, it misstated the holdings of the cases on which it claimed to rely. The cases *Mandujano* cited for the proposition that a defendant’s conduct need only “be more than remote preparation” required that a defendant’s conduct advance significantly further than that.²¹⁵

210. Johnson, *supra* note 161, at 1849–51.

211. *United States v. Mandujano*, 499 F.2d 370, 372–76 (5th Cir. 1974).

212. *United States v. Dworken*, 855 F.2d 12 (1st Cir. 1988).

213. *Id.* at 17 n.4.

214. *Id.* (emphasis added).

215. See *Mandujano*, 499 F.2d at 376–77. The first case cited by *Mandujano* on the remote preparation question, *Gregg v. United States*, 113 F.2d 687 (8th Cir. 1940), *rev’d on other grounds*, 116 F.2d 609 (8th Cir. 1940), quotes an enumeration of the dangerous proximity test. *Gregg*, 113 F.2d at 690. In *Gregg*, the court was analyzing the attempt provision of a statute that prohibited transportation of liquor across state lines. *Id.* at 690. The court in *Gregg* rejected the defendant-appellant’s arguments because it held that the conduct of transporting liquor across state lines was a “continuing act not confined in its scope to the single instant of passage across a

Although many of the attempt cases cited by *Mandujano* used the phrase “overt act” to describe the conduct requirement, they demonstrated a uniform agreement that an “overt act” must advance beyond the conduct required by the substantial step test.²¹⁶ If the *Mandujano* court was trying to use an attempt definition that had already been widely accepted by federal courts, it failed to do so.

Although no previous court had adopted the substantial step test, under dynamic incorporation the court may arguably have been authorized to do so by delegation of lawmaking authority.²¹⁷ Even accepting that a delegated-lawmaking approach is analytically appropriate for attempt provisions, one must still determine how much lawmaking authority has been delegated. And even if Congress delegated to courts the authority to choose between and refine common-law concepts, there is no reason to believe Congress delegated the authority to change attempt law entirely. Judge Pierre Leval has suggested that a court engaged in this type of analysis should be guided and restricted by “the same considerations that

territorial boundary.” *Id.* at 691. Therefore, although the defendant was not dangerously proximate to any state boundary, the defendant was still “dangerously proximate” to the conduct of interstate transportation of liquor. *See id.* (“[W]hen he loaded the liquor into his car and began his journey toward Kansas, . . . he was engaged in an attempt to transport liquor into Kansas . . .”).

The holding of the second case, *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), provides no indication that the conduct of attempt need only be more than remote preparation. The court there merely held that the “last proximate act” was not necessary to sustain an attempt conviction. *Coplon*, 185 F.2d at 633.

In *People v. Buffum*, 256 P.2d 317 (Cal. 1953), *overruled on other grounds* by *People v. Morante*, 975 P.2d 1071 (Cal. 1999), the third case cited by *Mandujano* for the proposition that a substantial step must only “be more than remote preparation,” the court held that the defendants’ conduct was insufficient as a matter of law because their conduct did not amount to “a direct, unequivocal act done toward the commission of the offense.” *Buffum*, 256 P.2d at 321.

216. For example, in *Wooldridge v. United States*, 237 F. 775 (9th Cir. 1916), the defendant was charged with attempt to commit statutory rape. *Wooldridge*, 237 F. at 775. The evidence showed that the defendant had procured the agreement of a sixteen-year-old girl to meet at a specific place to have intercourse, that he did meet her at that time and place with the intent to have sexual intercourse with her, but that he was “prevented and intercepted in the execution of his purpose.” *Id.* Although this would undoubtedly be sufficient as a matter of law under the MPC’s definition, which includes “enticing . . . the contemplated victim of the crime to go to the place contemplated for its commission,” MODEL PENAL CODE § 5.01(2)(b) (1962), the court held that there was no evidence “of an overt act toward the commission of the crime charged.” *Wooldridge*, 237 F. at 779. *Wooldridge* is discussed in *Mandujano*, 499 F.2d at 373–74.

217. Johnson, *supra* note 161, at 1854–57 (“Under dynamic incorporation, the statute’s command to the courts is not ‘[t]ry to figure out what we would have done in your place’ but, rather, ‘decide for yourself.’”).

governed the development of the [common-law] doctrine.”²¹⁸ Of course, in many cases, analyzing such “considerations” will require an analysis that is essentially identical to a statutory interpretation analysis, that is, looking to the common law to derive general principles that are applicable to a particular case.

What were the “considerations” guiding the creation of the common-law tests? By punishing attempts, rather than only completed conduct, the common-law attempt doctrines recognized some of the considerations that justify the MPC’s substantial step formulation: deterrence,²¹⁹ retribution,²²⁰ the intervention of law enforcement,²²¹ and the prevention of future crimes.²²² By only punishing conduct that brings the defendant very close to the end of a particular attempt timeline,²²³ and by punishing those attempts to a lesser degree than completed crimes,²²⁴ the common law revealed that it was also guided by a profound discomfort with the notion of imposing criminal penalties against someone who had not yet committed the conduct of a substantive offense.²²⁵ If the *Mandujano* court felt the same type of restraint described by Judge Leval, it would not have adopted the substantial step test, which fails to fully capture the common law’s unwillingness to punish individuals or acts without a clear demonstration of dangerousness.

Even accepting that the *Mandujano* court was engaged in “dynamic incorporation” or “delegated lawmaking” rather than

218. Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 197 (2004).

219. See Paul R. Hoerber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CALIF. L. REV. 377, 387–89, nn.36–46 (1986) (analyzing the claim that attempt law is justified by the goal of deterring attempts, which are themselves dangerous).

220. See MEEHAN & CURRIE, *supra* note 1, at 31–33 (explaining that “[a]lmost all countries allot a greater punishment to the completed crime than to the attempt,” because society is less retributive toward an individual who attempted a crime than one who committed the crime).

221. See C. HOWARD, CRIMINAL LAW 286 (4th ed. 1982) (“[T]he object of the law of attempt is to justify the arrest and prosecution without waiting for the defendant to commit the crime.”).

222. See AM. LAW INST., *supra* note 6, at 490 (stating that “danger[] presented by the actor” justified punishment of attempts).

223. See *supra* Part I.A (describing the common-law attempt doctrines, all of which required a defendant’s conduct to come quite close to the completed crime).

224. AM. LAW INST., *supra* note 6, at 490 (stating that attempts are to be punished less than completed crimes).

225. See Skilton, *supra* note 195, at 309–10 (describing the common law’s unwillingness to impose sanctions on those engaged in mere preparation).

impermissible judicial definition and expansion of criminal law,²²⁶ its decision was misguided. By adopting a substantial step test, the *Mandujano* court failed to create a rule that was guided by the same principles that had guided the development of the common law.

III. WHY *MANDUJANO*'S ERROR MATTERS

This Part will discuss the problems created by *Mandujano*. Section A will describe how, by adopting the MPC's definition of attempt, courts expanded the scope of attempt liability beyond what Congress had made criminal. This, in itself, is an injustice that warrants a remedy.²²⁷ Further, adopting the substantial step test has also caused confusion among courts that have struggled to understand how to adopt a concept from the MPC, rather than from a statute or the common law. Section B discusses one instance of this confusion, as federal courts have had difficulty defining the limits of the substantial step analysis. Section C considers another area of doctrinal confusion, wherein courts have struggled to understand what to make of renunciation, subjecting defendants to the MPC's expanded attempt liability without the counterbalance of an affirmative defense.

A. *Separation of Powers*

The creation of federal crimes is the exclusive province of Congress, not the courts.²²⁸ Considered against the background of the common law, *Mandujano* and its progeny have expanded criminal liability beyond that created by the legislature. Under common-law attempt doctrines, certain conduct—like assembling a stack of combustibles and placing a candle in the room with intent to commit arson—was merely preparation and not subject to criminal liability.²²⁹ *Mandujano* took a segment of the legal activity of “preparation” and

226. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (“It is the legislature, not the Court, which is to define a crime . . .”).

227. *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[L]egislatures and not courts should define criminal activity.”); Alex Kozinski, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1877 (1999) (“[W]e are not common law judges; we are judges in an age of statutes. For us, justice consists of applying the laws passed by the legislature, precisely as written by the legislature. Unlike common law judges, we have no power to bend the law to satisfy our own sense of right and wrong.”).

228. *United States v. Hudson & Goodwin*, 11 U.S. 32, 33 (1812).

229. See *supra* Part I.A (describing the conduct covered by common-law attempt crimes).

subjected that segment to criminal penalties.²³⁰ In so doing, the court rewrote attempt law “under the guise of construing it.”²³¹

B. *Defining Substantial Step*

Despite the assertions of circuit courts that they have adopted the MPC’s standards,²³² the extent to which they have done so is unclear. For example, just one year after *Mandujano*, the Fifth Circuit held that a defendant’s acts must, by themselves, be “unique” and “mark the defendant’s conduct as criminal in nature.”²³³ These requirements amount to an adoption of the *res ipsa loquitur* test.²³⁴ Adopting that test does not merely refine or narrow *Mandujano*’s holding, it applies a radically different test;²³⁵ however, the court did not say that it was overturning or narrowing *Mandujano*. One explanation could be that the court was not actually referring to the act requirement of attempt, but rather expressing “a concern with the need for adequate proof of criminal intent *in addition to* proof of the act.”²³⁶

The Eighth Circuit, in the same case in which it adopted the “substantial step” test, indicated that a defendant’s acts would only constitute a substantial step if his conduct, when “not interrupted

230. See *supra* Part II.C (describing *Mandujano*’s holding and arguing that the case represented a deviation from common-law attempt doctrines).

231. See *Keeler v. Superior Court*, 470 P.2d 617, 633 (Cal. 1970) (warning against judicial encroachment upon the legislature’s role of creating criminal offenses).

232. United States v. Hsu, 155 F.3d 189, 202 n.19 (3d Cir. 1998) (“We adopt the Model Penal Code (‘MPC’) test”); United States v. Rovetuso, 768 F.2d 809, 821 (7th Cir. 1985) (applying *Mandujano*’s substantial step test); United States v. Johnson, 767 F.2d 673, 675 (10th Cir. 1985) (using the “substantial step” test and applying *Mandujano*); United States v. McFadden, 739 F.2d 149, 152 (4th Cir. 1984) (using the “substantial step” test and discussing section 5.01 and *Mandujano*); United States v. Rivera-Sola, 713 F.2d 866, 869 (1st Cir. 1983) (“[F]ederal courts have rather uniformly adopted . . . Section 5.01 We also adopt this standard.”); United States v. McDowell, 705 F.2d 426, 427–28 (11th Cir. 1983) (adopting the *Mandujano* test); United States v. Joyce, 693 F.2d 838, 841 (8th Cir. 1982) (“[F]ederal courts have rather uniformly adopted the standard set forth in Section 5.01 of the American Law Institute’s Model Penal Code”); United States v. Jackson, 560 F.2d 112, 120 (2d Cir. 1977) (stating that its test was “derived in large part from the Model Penal Code’s standard”); United States v. Mandujano, 499 F.2d 370, 377 n.6 (5th Cir. 1974) (“Our definition is generally consistent with and our language is in fact close to the definitions proposed by the . . . Model Penal Code.”).

233. United States v. Oviedo, 525 F.2d 881, 885 (5th Cir. 1976).

234. See *supra* Part I.A.3 (discussing the *res ipsa loquitur* test).

235. AM. LAW INST., *supra* note 6, at 329–32 (describing how and why the MPC’s test differed from the common-law tests).

236. LAFAVE, *supra* note 10, at 627.

extraneously” would “result in a crime.”²³⁷ This language appears to be consistent with the probable desistance approach, as it focuses on the likelihood that the defendant would have actually completed his crime.²³⁸ The Eighth Circuit cited two pre-*Mandujano* cases in support of this rule: one described, in part, a probable desistance approach²³⁹ while the other avoided defining attempts at all and simply reiterated that preparation was insufficient to establish an attempt.²⁴⁰

Courts’ vacillation between the substantial step test and more restrictive common-law tests reflects the confusion inherent in “adopting” a private source of law like the MPC. That courts do not even seem to acknowledge that any confusion exists, or that they are referencing two entirely different standards for the same crime, reinforces the notion that judges are not expressing disagreement over how attempt should be defined. These judges are instead grappling with the aftermath of *Mandujano* and the problems of defining offenses according to the MPC.

C. Renunciation

In its definition of criminal attempts, section 5.01 includes an affirmative defense of renunciation.²⁴¹ Although courts operating under the common law mentioned the concept,²⁴² there was traditionally no renunciation defense at common law.²⁴³ Under the MPC’s definition, a defendant is entitled to the affirmative defense of renunciation if “he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting

237. *Joyce*, 693 F.2d at 841–42 (quoting *United States v. Monholland*, 607 F.2d 1311, 1319 (10th Cir. 1979)).

238. See *supra* Part I.A.2 (discussing the probable desistance approach).

239. *Joyce*, 693 F.2d at 842 (citing *People v. Miller*, 42 P.2d 308, 309 (Cal. 1935)). *Miller* required that “[t]here must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.” *Miller*, 42 P.2d at 309 (quoting 1 FRANCIS WHARTON, WHARTON’S CRIMINAL LAW 280 (12th ed. 1932)).

240. *Id.* (citing *Mims v. United States*, 375 F.2d 135, 148 n.40 (5th Cir. 1967)). *Mims* stated that “[p]reparation alone is not enough, there must be some *appreciable fragment* of the crime committed.” *Mims*, 375 F.2d at 148 n.40 (emphasis added) (quoting *People v. Buffum*, 256 P.2d 317, 321 (Cal. 1953)).

241. MODEL PENAL CODE § 5.01(4) (1962).

242. See, e.g., *Hamiel v. State*, 285 N.W.2d 639, 645 (Wis. 1979) (discussing voluntary abandonment of an attempt using a test similar to the *res ipsa loquitur* test).

243. LAFAVE, *supra* note 10, at 642 (“The traditional view as expressed by most commentators is that abandonment is *never* a defense to a charge of attempt.”).

a complete and voluntary renunciation of his criminal purpose.”²⁴⁴ A “complete and voluntary” renunciation must satisfy two factors: (1) it must “originate with the actor,” and not be brought about by circumstances that make the crime more difficult or dangerous to commit; and (2) it must be “permanent and complete, rather than temporary or contingent.”²⁴⁵

The Commentaries describe two policy considerations for adopting the renunciation defense.²⁴⁶ First is a belief that a “complete and voluntary” renunciation tends to indicate that the attempter was less dangerous.²⁴⁷ One purpose of the MPC’s requirement that a substantial step strongly corroborate criminal intent is to show that the actor’s criminal purpose was so serious as to indicate that the defendant was dangerous.²⁴⁸ The defense of renunciation gives defendants the opportunity to demonstrate that their criminal intent lacked the seriousness that warrants criminal punishment.²⁴⁹ Second, the Commentaries express a belief that the defense of renunciation would encourage would-be criminals to renounce, “diminishing the risk that the substantive crime will be committed.”²⁵⁰

Despite the fact that every federal circuit has held that the MPC’s “substantial step” test defines the act requirement,²⁵¹ no circuit has recognized a renunciation defense. The Sixth and Eighth Circuits have explicitly rejected it.²⁵²

At one point, it seemed the Eighth Circuit was inclined to recognize renunciation. In *United States v. Joyce*,²⁵³ the defendant was convicted of, *inter alia*, one count of attempt to possess cocaine.²⁵⁴ Michael Dennis Joyce communicated with a drug dealer who was actually an undercover police officer.²⁵⁵ The officer told Joyce, located

244. MODEL PENAL CODE § 5.01(4).

245. AM. LAW INST., *supra* note 6, at 358.

246. *Id.* at 356–62.

247. *Id.* at 359.

248. *Id.* at 331.

249. *Id.* at 359.

250. *Id.*

251. *See supra* note 232 (listing cases).

252. *United States v. Young*, 613 F.3d 735, 745 (8th Cir. 2010) (“We hold today that a defendant cannot abandon an attempt once it has been completed.”); *United States v. Shelton*, 30 F.3d 702, 706 (6th Cir. 1994) (“We . . . hold that withdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime.”).

253. *United States v. Joyce*, 693 F.2d 838 (8th Cir. 1982).

254. *Id.* at 839.

255. *Id.*

in Oklahoma City, that drugs would be available for purchase in St. Louis.²⁵⁶ Joyce flew to St. Louis, met an undercover officer posing as a cocaine dealer, and asked to be shown the cocaine.²⁵⁷ The officer left the room, and returned with a wrapped package, claiming that it contained cocaine.²⁵⁸ Joyce refused to produce any money unless the officer opened the package, and the officer refused to open the package unless Joyce produced his payment.²⁵⁹ Realizing that the two had reached an impasse, the officer told Joyce to leave, and Joyce left, “with no apparent intention of returning at a later time to purchase any cocaine.”²⁶⁰ Joyce was apprehended as he left his meeting with the officer, and a search of his luggage revealed \$22,000 in cash.²⁶¹ A jury convicted Joyce of attempted possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846.²⁶²

Surprisingly, the Eighth Circuit reversed Joyce’s conviction, holding that he had not taken a “substantial step” toward the completion of the crime.²⁶³ A defendant who, like Joyce, travels interstate with a suitcase full of money, meets with a drug dealer, expresses a desire to exchange drugs for money, and holds the cocaine he intends to buy in his hands has taken a substantial step that is strongly corroborative of his attempt to possess cocaine. Under the MPC, it is legally sufficient to establish a substantial step if the defendant possesses “materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession . . . serves no lawful purpose of the actor under the circumstances.”²⁶⁴ Joyce possessed \$22,000 in cash near the hotel room where he intended to use that money to purchase \$20,000 worth of cocaine.²⁶⁵ Although money by itself could serve a lawful purpose under most circumstances, \$22,000 in cash could have served no other purpose at the hotel. Further, the same rationales that justify considering other examples of conduct to be substantial steps justify

256. *Id.* at 839–40.

257. *Id.* at 840.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 839.

263. *Id.* at 841.

264. MODEL PENAL CODE § 5.01(2)(f) (1962).

265. *Joyce*, 693 F.2d at 840.

finding Joyce's conduct to be a substantial step.²⁶⁶ Taken as a whole, Joyce's actions are certainly "strongly corroborative" of his intent to possess cocaine.

The court's reasoning and language are much easier to understand under a renunciation analysis.²⁶⁷ The court held that although unsuccessful or aborted attempts can support an attempt prosecution, Joyce's case was different because "generally the abortion of the attempt occurs because of events beyond the control of the attemptor."²⁶⁸ This reasoning does not speak to any test for finding a substantial step; however, it mirrors the requirement of "a complete and *voluntary* renunciation of . . . criminal purpose" for the renunciation defense.²⁶⁹ If the court was looking for actions which "negative[d]" the defendant's dangerousness—a consideration for renunciation under the MPC—then his eventual refusal to purchase the cocaine would have been relevant.²⁷⁰ It would have shown that his criminal intent was insufficiently firm to warrant criminal punishment. Despite the seeming endorsement of the renunciation defense in *Joyce*, the Eighth Circuit effectively overturned that decision in *United States v. Young*,²⁷¹ which held that "a defendant cannot abandon an attempt once it has been completed."²⁷²

266. For example, consider section 5.01(2)(a) and (c), which state that "searching for . . . the contemplated victim of the crime" and "reconnoitering the place contemplated for the commission of the crime" can amount to a substantial step by themselves. MODEL PENAL CODE § 5.01(2)(a), (c). Although there is no specific "victim" of possession of cocaine, Joyce did search out the drug dealer and the cocaine he intended to possess. *Joyce*, 693 F.2d at 839–40. Though there is no evidence that Joyce "reconnoiter[ed]" the place where the transaction was supposed to occur, he went even further by actually entering the hotel room with the drug dealer. *Id.* at 840.

267. See *Joyce*, 693 F.2d at 841–43 ("Whatever intention Joyce had to procure cocaine was abandoned prior to commission of a necessary and substantial step to effectuate the purchase of cocaine.").

268. *Id.* at 841.

269. MODEL PENAL CODE § 5.01(4) (emphasis added).

270. See AM. LAW INST., *supra* note 6, at 359 (describing the negation of an actor's dangerousness as a motivating factor behind MPC renunciation).

271. *United States v. Young*, 613 F.3d 735 (8th Cir. 2010).

272. *Id.* at 745. The Eighth Circuit, between the publication of *Joyce* and *Young*, decided an unusual case on renunciation. In *United States v. Ball*, 22 F.3d 197 (8th Cir. 1994), the defendants were convicted of entering a bank with intent to commit robbery in violation of 18 U.S.C. § 2113(a). *Id.* at 198. The defendants argued that the jury should have been instructed on a renunciation defense, because after the defendants entered the bank with intent to commit a robbery, they "abandoned or withdrew . . . when they left the bank without pointing a gun or announcing a stick-up." *Id.* at 199. The court held that the renunciation defense has no application except to attempt crimes. *Id.* A statute criminalizing the act of entering a bank with intent to commit a robbery covers similar ground as a statute criminalizing an attempted bank

The two cases that explicitly rejected the renunciation defense, *Young* and *United States v. Shelton*,²⁷³ employed similar reasoning.²⁷⁴ The two courts did not ask whether the word “attempt” as used in the statute carried with it an affirmative defense of renunciation. Rather, both courts indicated that the defense of renunciation²⁷⁵ was logically impossible. According to both courts, “the attempt crime is complete with proof of intent together with . . . a substantial step” after which a defendant “can withdraw only from the commission of the substantive offense” and not the attempt.²⁷⁶

That a crime has been “completed” does not logically preclude the possibility of an affirmative defense. Indeed, the legal question of an affirmative defense is only relevant if the prosecution can show that the defendant met all other elements of the crime. Criminal sanctions can attach in whatever circumstances the law dictates, and the renunciation defense merely excludes some circumstances from the reach of attempt law.²⁷⁷ There is no requirement, logical or legal, that criminal sanctions be imposed regardless of what the defendant does after satisfying the elements of a crime. Whatever policy reasons there may be for rejecting the defense of renunciation, the defense should not be rejected on a mistaken belief that the defense could not logically exist.

Should courts adopt the renunciation defense? As long as the courts persist in defining attempts according to the MPC, the answer is “yes.” As an intuitive matter, it seems unfair to defendants that courts would expand criminal liability for attempt by adopting section 5.01(1), (2), and (3) from the MPC, but refuse to narrow the scope of that liability through the affirmative defense in section 5.01(4). As Justice Felix Frankfurter said, “if a word is obviously transplanted from another legal source, whether the common law or other

robbery, and is probably based upon similar policy considerations. However, by moving beyond a simple “attempt” statute and prohibiting specific conduct, Congress demonstrated an intent to remove questions of the sufficiency of the act or of renunciation from this particular type of attempt.

273. *United States v. Shelton*, 30 F.3d 702 (6th Cir. 1994).

274. *See Young*, 613 F.3d at 745–46 (quoting extensively from *Shelton*).

275. The renunciation defense was characterized as “withdrawal” from the attempt in *Shelton*, 30 F.3d at 705, and as “abandonment” of the attempt in *Young*, 613 F.3d at 743–44.

276. *Young*, 613 F.3d at 745 (quoting *Shelton*, 30 F.3d at 706).

277. For further discussion of the logical underpinnings of the renunciation defense and of the policy arguments in favor of adopting the defense, see Hoerber, *supra* note 219, at 383–403.

legislation, it brings the old soil with it.”²⁷⁸ The Code’s drafters believed that there is significantly less justification for imposing criminal sanctions upon a defendant who takes a “substantial step” but renounces that attempt, and codified that belief by including a renunciation defense.²⁷⁹ By refusing to recognize the defense of renunciation, federal courts have stripped the substantial step test of a significant piece of its “soil.”

The concerns that weigh against a federal court adopting the MPC’s substantial step test do not apply in the case of the renunciation defense. Affirmative defenses are traditionally created through judicial decisions, and many are still defined solely by the common law.²⁸⁰ Although the background of adopting the MPC is itself problematic, there is no corresponding reason for courts to refuse to adopt the Code’s renunciation defense.

There is no clear legal doctrine governing how courts should adopt rules from the MPC. This should not be an invitation for courts to cherry-pick parts of ideas from private sources like the MPC at will. In fact, many courts have indicated in dicta that they intended to adopt section 5.01 in its entirety, not that they intended to adopt section 5.01(1), (2), and (3), but not (4).²⁸¹ The problem of renunciation typifies the confusion caused by deviating from the normal practice of interpreting common-law language according to common-law definitions absent clear legislative instructions to the contrary. Affording defendants the renunciation defense may be the most fair choice once the substantial step test has already been adopted because it applies the provisions of section 5.01 that help defendants as well as those that help prosecutors. However, these problems only exist because courts have improperly interpreted attempt statutes, and the proper course of action should be to revert to a common-law test, rather than simply “completing” the error by adopting section 5.01 in its entirety.

278. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

279. AM. LAW INST., *supra* note 6, at 356–62.

280. *See, e.g.*, *United States v. Peterson*, 483 F.2d 1222, 1230–38 (D.C. Cir. 1973) (discussing the common-law “body of doctrine” defining federal self-defense law).

281. *E.g.*, *United States v. Hsu*, 155 F.3d 189, 202 n.19 (3d Cir. 1998) (“We adopt the Model Penal Code (“MPC”) test for attempt”); *United States v. Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983) (adopting “the standard found in Section 5.01” of the MPC).

CONCLUSION

Perhaps the most surprising aspect of the federal courts' universal adoption of the MPC's definition of attempt after *Mandujano* is that no court appears to have seriously considered any other path.²⁸² The absence of judicial opinions or scholarly literature on this point indicates that few lawyers may be aware that *Mandujano* and its progeny could be challenged based on the arguments set forth here. Defense lawyers should be aware that they could plausibly argue their clients should benefit from of a more lenient legal standard.²⁸³ But defense lawyers can only be successful if federal appellate courts are willing to remedy the now-entrenched mistake of "adopting" the MPC into the federal law. Courts must be willing to view their role as the one stated by Judge Kozinski: "[W]e are not common law judges; we are judges in an age of statutes. For us, justice consists of applying the laws passed by the legislature, precisely as written by the legislature. Unlike common law judges, we have no power to bend the law to satisfy our own sense of right and wrong."²⁸⁴

282. Research has uncovered only one instance in which a federal circuit court addressed whether the MPC's formulation was properly adopted: *United States v. Dworken*, 855 F.2d 12 (1st Cir. 1988). In *Dworken*, the court noted that counsel for the defendant only raised the issue at oral argument, and therefore that it need not have been considered, "especially where, as here, the issue is one that demands extensive briefing and argument." *Id.* at 17 n.2.

283. Although this Note has primarily discussed appellate cases, trial attorneys should be aware of this issue so that it may be preserved for appeal. If a defendant does not object to a trial court's jury instruction, the appellate court can review only for plain error. *See* FED. R. CRIM. P. 30(d), 52(b). A defendant would have difficulty arguing that the trial court's error was "plain" when it was consistent with the current precedent of every circuit.

284. Kozinski, *supra* note 227, at 1877.