Melvin Dlugash, Joe Bush and Michael Geller went drinking together one night. Geller repeatedly demanded that Bush give him $100 towards the rent of Geller’s apartment, where Bush was staying. Bush repeatedly refused. When Geller pressed the point one last time, Bush, angry with him, shot him three times. Geller lay motionless for several minutes, and showed no signs of life. At that point, Dlugash fired five bullets into Geller’s head. It is not clear why Dlugash did this, although one possibility is that he did it to demonstrate to Bush that he was in league with him, and not an innocent witness whom Bush would have a motive to kill. But whatever his motive, did Dlugash murder Geller? If Geller was dead when Dlugash shot him, then Dlugash did not commit murder, but merely mutilated a corpse—a crime, perhaps, but a far lesser crime than murder. And since the prosecution cannot prove beyond a reasonable doubt that Geller was alive, they choose to charge Dlugash with attempted murder.¹ One question one needs to answer to resolve the case is whether an attempted murder requires that the victim is alive at the time of the attempt; if so, then the prosecution’s inability to establish that fact undermines their case against Dlugash not just for completed murder, but also for attempted. We also need to know what attitude Dlugash needs to have had towards the question of whether his victim was alive or dead in order to be guilty of an attempted murder. If Dlugash was intending to finish Geller off, then he would not have fired had he been certain that Geller was already dead. Is that the attitude he needs to have had to have attempted murder? Or is it
enough for the attempt that Dlugash believed that Geller was alive? Or is uncertainty about the question, together with a willingness to go ahead whatever the facts, enough for attempted murder? It is quite possible, that is, that Dlugash was at the time no more certain than we can be in retrospect whether Geller was alive. If that’s right, did Dlugash attempt murder?

As it is in Dlugash, so it often is: where the question of the defendant’s mental state with respect to his circumstances arises in an attempt case, there is often a question also about whether the relevant feature of the circumstances needs to be in place. This paper offers an account of how to answer both questions. It offers principled grounds for deciding what attitude an attempter must have towards what are called “the circumstantial elements of the completed crime”: roughly, those standing conditions that must be present for guilt.² And the paper provides principled grounds for deciding when the circumstantial elements of the completed crime need to be in place for the attempted.³ As we will see, the solutions offered here require appreciation of a key concept from the philosophy of language, namely the distinction between de dicto and de re referential descriptions. Some implications of this distinction allow us to see what facts do and do not contribute, and under what conditions, to the content of a person’s intention, and that turns out to be the crucial issue here.

Issues of this sort are not at all uncommon in the law of criminal attempts. In another well-known example of such a case, which has occupied the imagination of many a criminal law theorist, People v. Jaffe (185 N.Y. 497, 78 N.E. 169 (1906)), the defendant, a suspected “fence”, was charged with an attempt to receive stolen property after he purchased some fabric that he believed to be stolen but which was in fact falsely represented to him as stolen as part of a sting operation.⁴ Since the fabric Jaffe received was not stolen, Jaffe did not succeed in receiving stolen property; but did he attempt the crime? Or consider United States v. Crow (164 F.3d 229 (5th Cir. 1999)). Crow had
multiple conversations in an internet chatroom with someone going by the name of “StephieFL”. During the course of their conversations, StephieFL claimed to be a 13-year old girl. In fact, the messages were written by an undercover (adult) police officer. Crow tried to convince StephieFL to send him sexually explicit photographs of herself and was charged with attempting sexual exploitation of a minor. The completed offense requires a showing to the effect that the person exploited is indeed a minor. Did Crow attempt sexual exploitation of a minor, or does the fact that it was an adult he was actually in contact with show that he did not?

The position to be defended here does not imply that it is always relevant what the circumstances of the defendant charged with an attempt were like; it does not always matter whether the victim was alive, or underage, or whether the property was stolen. The fact that the defendant believed these things, even falsely, is sufficient for criminal liability for attempt. But nor does the position defended here imply that it is always irrelevant how things actually were. Under the view to be defended here, if the defendant has a particular sort of intention, a sort to be identified with some precision and which is consistent with uncertainty about how things are, then whether or not he has committed an attempt turns on how things actually are. As we will see, the position allows us to identify the crucial features of particular cases that determine whether the facts about the circumstances matter, and what mental attitude the defendant needs to have had with respect to them in order to attempt the crime. One lesson of the application of the de re-de dicto distinction to these questions is that the two issues are not entirely separable.

1. Background: Attempt, Intention and Mens Rea Standards
What we are seeking here is what is referred to in the criminal law as a “mens rea standard”. Crimes consist of various components that need to be shown beyond a reasonable doubt by the prosecution in order to establish the case against the defendant. These are divided, typically, into those that constitute the “actus reus” of the crime, and those that constitute “mens rea”. For our purposes, the actus reus consists of anything that needs to be shown other than the mental states of the defendant, while the mens rea of the crime consists of all and only those mental states the defendant needs to be shown beyond a reasonable doubt to have had for guilt. Often a crime’s mens rea consists of several distinct mental states. Say the actus reus of arson, for instance, involves the lighting of a fire that causes damage to some property. The mens rea of the crime might include an intention to light the fire, a belief that damage to some particular object is a likely, although not certain, result (assuming some other conditions are met, the legal term for such a mental state is “recklessness”) and certainty that one is not justified in burning the object in question (what the law typically calls “knowledge”, or “belief to a practical certainty”). Typically, where there are separable components of a crime’s actus reus, there are separable and corresponding components also of the crime’s mens rea.

Typically, a variety of possible mental states will serve for components of the crime’s mens rea. In arson, as imagined above, for instance, either intent or foresight or recklessness that damage will result from the fire will suffice for mens rea with respect to that component of the completed crime. The idea of a “mens rea standard” is the idea of the minimal mental state with respect to a particular component of the crime that is required for guilt for that crime. From the criminal law’s point of view, mental states stand in a hierarchy based on how bad the behavior is of someone who has them. It is worse to cause damage to something with intention, than it is to cause it with foresight and without intent. Hence foresight is the lesser mental state. Similarly, it is worse to
cause such damage while foreseeing it than it is to do so while merely thinking that it’s likely to happen, but might not. Hence recklessness is the lesser mental state. Negligence—absence of awareness of a substantial risk of which one should be aware—is lesser still. Thus, recklessness constitutes the *mens rea* standard for arson, as defined above; that mental state, or any worse mental state, will suffice for guilt for the crime when all the other components of the crime are also shown beyond a reasonable doubt (and the defendant lacks an affirmative defense).

So, when we seek, as we are here, a *mens rea* standard for attempt with respect to circumstances involved in completion—circumstances like the victim’s being alive or underage, or the property’s being stolen—what we are after is a description of the least bad mental state that a person can be in with respect to that circumstance while still having attempted the crime. It seems clear that were it merely true that a reasonable person in the defendant’s shoes would have thought it likely that the victim was alive, in a case like Dlugash’s, even though the defendant himself positively believed the victim to be dead, the defendant falls short of attempting murder. Firing a gun into what one flat-out believes to be a dead body is not an attempted murder, even if one is wrong. But, on the flip side, to require that the defendant is positively certain that the victim is alive is to require too much; a person who fires bullets into another’s head with less confidence than this that he is thereby injuring someone living, but with intent to kill, nonetheless attempts murder. The question is what the nature is of the crucial mental state in the middle, the mental state that both qualifies the act of the person who has it as an attempt, and, at the same time, is less bad than all other mental states that would so qualify his act.

The solution to this problem offered in the next section builds on a particular view of what it is to try to act in the sense of “trying” that is relevant to the criminal law, a view that I have defended elsewhere. Under what I call “The Guiding
Disagreement View”, to try to do something is to be committed by one’s intention to each of the components of success and to be guided in one’s behavior by each of these commitments. Say that a completed fraud involves (a) an act of deceiving someone which (b) thereby injures him. Fraud, on this view, is harmful lying. A person who attempts fraud, but fails, might fail to deceive, or might fail to injure, or both. A person who attempts fraud, under the Guiding Commitment View, has an intention that commits him to (a) and commits him to (b). In addition, he is moved by these commitments. He might, for instance, be moved to say something false to a potential victim.

The word “try” can be used in a variety of different ways and the Guiding Commitment View only aligns with one of them. For instance, consider someone who intends to kill his dying parent out of mercy while believing falsely that euthanasia is legal. Is this person trying to commit murder? Or to put the same question another way, does the phrase “to commit murder” correctly describe what this person is trying to do? The answer is that in some senses of the term “try” it does and in others it does not. Under one narrow conception of trying to act what a person is trying to do is determined entirely by the content of his intention in acting. Thus, the narrow conception implies that the mercy killer is not trying to commit murder since part of what it is for a killing to be murder is that it is illegal, and the mercy killer does not intend to commit an illegal killing since, after all, he does not even believe that the killing he will commit if he does as he intends is illegal. By contrast, a very broad conception of trying to act allows that anything that is true of the act that the agent would perform were he to do as he intends can be appealed to in describing what he is trying to do. In this sense, the mercy killer is trying to commit murder. In this sense, he is also trying to empty a hospital bed, for were he to do as he intends a hospital bed would be emptied. The Guiding Commitment View aligns with neither the narrow nor
the broad sense, and there are other sense of trying still with which it does not align. Under the Guiding Commitment View, the mercy killer is trying to commit murder. The reason is that he is committed by his intention to each and every component of the completed crime of murder. The illegality of the killing is not one of the components of murder since the prosecution need not show beyond a reasonable doubt that the killing was illegal in order to show that a murder has taken place. It is enough, instead, that the killing is illegal, quite independently of the prosecution’s ability to convince a jury of that. (This is why questions of law of this kind are to be decided by judges prior to trial.) Any qualities of the completed act that are not components of it—things that the prosecution must show beyond a reasonable doubt—can be appealed to, under the Guiding Commitment View, in a description of what the agent is trying to do. By contrast, the Guiding Commitment View implies that the mercy killer is not trying to empty a hospital bed. A component of that act is that a hospital bed is emptied and nothing about the mercy killer’s intention commits him to that; he would not have fallen short of doing as he intends if his parent is buried with the bed in which he is killed. Qualities of the completed act that are components of it cannot be appealed to in an account of what an agent is trying to do unless he is committed to them by his intention, while qualities of the completed act—such as its being illegal—that are nonetheless not components of it can be.

That the Guiding Commitment View aligns with one ordinary sense of trying is, I believe, indisputable. That it aligns with the ordinary sense that is of relevance to the criminal law is much harder to show. Showing it requires showing that the Guiding Commitment View provides the right resolution of a wide variety of very different sorts of cases in which defendants are charged with attempted crimes. Notice that the Guiding Commitment View provides precisely the correct resolution of the euthanasia case just described. After all, the would be mercy killer who falsely believes that the
killing he intends is legal is attempting murder in the sense that matters to the criminal law and is not attempting to empty a hospital bed. If the latter were a crime, he would not have committed an attempt of it. So, in this one hypothetical case, the Guiding Commitment View yields the correct result and neither the narrow nor the wide views described briefly above do. Still, to fully defend the Guiding Commitment View we would need to show that it yields the correct resolution of many more kinds of cases than this. I have tried to show this elsewhere and cannot do so here. Instead, I will take the Guiding Commitment View as a fixed point in what follows.

A full defense of the Guiding Commitment View requires elaboration on many different aspects of it. Notably, for instance, such a defense requires an account of “guidance”. What, exactly, is it to be guided by a commitment? Does that which one is committed to play a role in determining what it is to be guided by the commitment? For instance, is it different to be guided by one’s commitment to acting a particular way than it is to be guided by one’s commitment to a particular result of one’s action coming to pass? As it turns out, the issue that we are concerned with here does not require an account of the guidance involved in trying, and so does not require an answer to these questions. The problem to be solved here requires only consideration of the intention involved in trying under the Guiding Commitment View.

The Guiding Commitment View implies that trying always involves intending. One cannot try to act unless one has an intention that commits one to each of the components of success. This claim requires some unpacking. First, what one’s intention commits one to must be distinguished from what one intends. Our intentions have a particular, primary function. Their primary function is to make the world match their content—to make the world as intended—as a result of their playing their proper causal role in our psychology. The function of a person’s intention to deceive another into handing over his money is to make it the case that both the person deceives the
victim and that the victim hands over his money. In the ordinary case, the intention serves its function by motivating the agent, in the normal way, to behave in ways that will succeed in making the world as intended. The intention, for instance, motivates the agent to think up a story about how it came to pass that he is in possession of the Brooklyn Bridge and must sell it immediately for a song. Concoiting such a story is believed by the agent to bring him closer to the world’s coming to match his intention’s content, and so the intention motivates him to concoct it.

What one is committed to by one’s intention is the conjunction of what would necessarily be true were the world to match the intention’s content and what would necessarily be true were the intention to play its proper causal role in making it the case that the world matches the intention’s content. It is common, then, for one to be committed to something by one’s intention even though one does not intend it. This happens whenever the condition is one that would necessarily come to pass were the intention to play its proper causal role, but is not represented in the intention’s content. Consider someone who intends that his neighbor’s house burn to the ground. In having this intention, he is thinking only about the event of his neighbor’s house burning down. He is not thinking about how it comes to pass that his neighbor’s house burns down. He may be thinking about that, but his intention is not, itself, a thought about that. In particular, he is not thinking about whether he, or someone else instead, causes the neighbor’s house to burn down. His intention will come to match the world even if someone else burns the house down, without any encouragement, even, from him. Is this person committed by his intention to causing the house to burn? Yes, for although his causing it is not in the content of his intention, he would cause the house to burn were his intention to play its proper causal role. If it were to play its proper causal role, it would motivate him to burn the house down, and, in that case, he would be the cause of the house’s burning. Hence his intention commits him to something that is not
represented in its content, namely his causing his neighbor’s house to burn. As will become important later, it is not generally the case that we are committed to causing all those conditions that are represented by our intentions. But it is more common to be so committed than not to be. For now what matters is only that such a commitment need not derive from explicit representation in one’s intention of oneself as cause; the commitment can derive, instead, from the proper causal role of an intention lacking any causal content.

Now, the Guiding Commitment View implies that the commitment to each of the components of success of a person who attempts derives from his intention. A person who is committed to some component of success by his desires, his hopes, his beliefs, or any other aspects of his psychology distinguishable from his intentions, is not thereby committed to that component in the way that is required in order to try to act. Since, as just noted, we are typically committed by our intentions to causing those conditions that are represented by them, it can seem that the advocate of the Guiding Commitment View is committed to an implausible position with regard to the mens rea standard of attempt with respect to the circumstances of the completed crime. After all, the completed crime of sexual exploitation of a minor, for instance, does not require that the defendant caused his victim to be a minor. This is something that a person could cause, not (ordinarily) by causing someone to have a particular age but, instead, by choosing someone to be the victim who is believed to be a minor while ready to switch victims should it turn out that the victim is not a minor after all. But a person who knows that his victim is a minor, but would not have switched victims had he been an adult is nonetheless guilty of sexual exploitation of a minor. However, if intentions that represent conditions, such as the victim’s being a minor, typically constitute a commitment to causing those conditions, then it would seem that to require for an attempt of the crime an intention-based commitment to the victim’s being a minor is to
require a commitment to causing that. Why should an attempt require a commitment to something—namely, causing the victim to be a minor—that is not required for completion? In short, the Guiding Commitment View seems to impose too lenient a mens rea standard when it comes to the attitude of the attempter to the circumstances involved in the completed crime. One important aim of this paper is to show that this is merely an appearance. The reason, as we will see, is that it is possible for a person’s intention to commit him to a condition without committing him to causing that condition. Such an intention is all that is required to meet the mens rea standard with respect to circumstances in attempt. Hence the Guiding Commitment View does not imply too lenient a mens rea standard in the relevant respect.

Given this background, we can narrow our discussion here to the following questions: Under what conditions is a person committed by his intention to his circumstances being a certain way without thereby being committed to causing his circumstances to be that way? And, is it ever the case that how the world actually is determines whether or not his intention commits him to the world’s being a certain way? Or, put in the context of our lead example, what do we need to know about what was in Dlugash’s mind, and what if anything do we need to know about the state of Geller’s health, to know whether Dlugash was committed by his intention to killing Geller? This is the crucial question, since without an intention that constitutes such a commitment, Dlugash did not attempt murder.

2. The Solution

The strategy undertaken in this section can be summarized, schematically, like so: First, the section identifies two different things that someone might be asserting when he says of himself that he has a particular intention, as when he says “I intend to
A the thing that is $P$.” For now, call one of these “the de dicto interpretation” and the other “the de re interpretation” saving for later the description of what these interpretations involve and why they are labeled as such. Correlatively, the intention the agent has, when such an assertion is true is to be called “a de dicto intention” or “a de re intention”, depending on how the assertion is to be interpreted. It is then argued that a de re intention to A the thing that is $P$ commits the agent who has that intention to the thing he A’s being $P$. It is further argued that this is the minimal commitment to that which is needed for the *mens rea* of attempt, assuming that a circumstantial element of the completed crime is the thing’s being $P$. If the thing’s being $P$ is one of the circumstantial elements of the completed crime, then it suffices for the *mens rea* of attempt with respect to that circumstantial element that the defendant has a de re intention to A the thing that is $P$. Thus, the de re interpretation of assertions of sentences in which people attribute intentions to themselves gives us what we need in order to construct the *mens rea* standard that we seek. The rest of the section considers the implications. It is argued that given the *mens rea* standard identified, belief that the circumstance obtains frequently suffices for attempt. And it is further argued that, given the *mens rea* standard identified, there are conditions under which a defendant meets the *mens rea* standard for the attempt only if the circumstance actually obtains.

2.1 The De Dicto and the De Re

Sentences attributing mental states to people, including intentions, are frequently subject to so called “scope ambiguity”: ambiguity about what parts of a sentence are and are not under the semantic or syntactic control of an operator such as “intends to”, “intends that” or “believes that”.
(*) He intends to enter the house on the corner.

is ambiguous between

(**) He intends to enter the house, and intends that the house that he enters is on the corner.

(***) He intends to enter the house, and the house he intends to enter is on the corner.

The person described in (***) intends to enter a house, but the world would not come to match his intention if it turned out that the house he enters is not (perhaps as he thought) on the corner. (Perhaps if he does not enter the house on the corner he fails to signal his confederates as he plans to.) By contrast, the man described in (***) will succeed in doing what he intends even if the house that he enters is not on the corner. He is aiming to enter a house which is, in fact, on the corner but that fact is not part of what he aims to realize in having the intention that he has. To avoid scope ambiguity, it is helpful when writing of intention to place the content of an intention in square brackets so that (**) and (***) can be represented, respectively, like so:

(**’) He intends [to enter the house on the corner].

(***)’ He intends [to enter the house] on the corner.
This convention serves merely as a shorthand way of indicating which of the two relevant meanings of the sentence—in our example, (** or (***)—is intended. I will use this shorthand in what follows.

However, even after we have eliminated scope ambiguity other ambiguities remain. This is best illustrated by a somewhat complicated analogy. To see this consider, first, the following sentence:

(a) The governor of California makes more than $1,000,000 a year.

Under one interpretation, the sentence expresses the same proposition as that expressed by one of the following two sentences:

(b1) Anyone who is governor of California makes more than $1,000,000 a year.

(b2) Someone who is governor of California makes more than $1,000,000 a year.

Someone who asserts (a) and expresses the same proposition as that expressed by (b1) is making a claim to the effect that two properties—namely being governor of California and making more than $1,000,000 a year—are always found together. This is the kind of thing that someone might say who believes (falsely, as it turns out) that the state of California pays the governor more than $1,000,000 each year to do the job. Someone, by contrast, who asserts (a) to express the same proposition as that expressed by (b2), makes an existence claim. Say that I have not yet heard the outcome of the election and you assert (a) in order to give me a clue about who won. I learn from your assertion that there is a person who has the two properties in question and so, if I know that only one of the candidates makes more than $1,000,000 a year, I am able to determine who
won. However, your assertion will be false if the person who is governor does not make more than $1,000,000 a year. Therefore, if (a) is to be interpreted as expressing the same proposition as either (b1) or (b2), it is true only if at least one person who makes $1,000,000 a year is also the governor of California.

However, these are not the only ways of interpreting (a), nor are they the most important for our purposes. If, for instance, we assume that the speaker of (a) is using the phrase “the governor of California” in just the way in which he uses the proper name “Sylvester Stallone”—he mistakenly thinks Stallone is governor—then (a) expresses the same proposition as the following sentence:

(c) Sylvester Stallone makes more than $1,000,000 a year.

When so interpreted, (a) asserts something about the income of the person referred to by the speaker with the phrase “the governor of California”. When (a) is understood in such a way that it expresses the same proposition as (c), the properties referred to in the description “the governor of California” are not used to determine whether or not the sentence is true. After all, (c)’s truth value does not turn on whether or not Sylvester Stallone is governor; so if (a) is interpreted as expressing the same proposition as (c), then neither does (a)’s truth value turn on that. What this implies is that when a person asserts (a) and is rightly taken to express the proposition that (c) expresses, he can be mistaken in his belief that the description he uses applies to the object he refers to with it and still assert something true. The person who asserts (a) while falsely believing that Sylvester Stallone is governor of California might be asserting no more than that Sylvester Stallone makes more than $1,000,000 a year, which is perfectly true, despite the fact that he is not governor of California.
Philosophers of language frequently draw the distinction between de dicto interpretations of referential descriptions, like “the governor of California”, and de re interpretations. Although there is controversy about how, exactly, that distinction is drawn, for our purposes, to interpret (a) as expressing the same proposition as either (b1) or (b2) is to interpret the description as it appears in (a) de dicto, while to interpret (a) as expressing the same proposition as (c) is to interpret that description de re. When a descriptive phrase is interpreted de re, it contributes only its referent to the truth conditions of the sentence. When it is interpreted de dicto, by contrast, the properties referred to in the description contribute to the sentence’s truth conditions independently.

A sentence like (a) is, when asserted, usually correctly construed as an expression of a belief that the speaker holds. How we characterize what the speaker believes will depend at least on whether we interpret the phrase “the governor of California” de dicto or de re. Let’s say, however, that we interpret the description de re. Further, let’s imagine that the speaker, as in the case just mentioned, falsely believes that Sylvester Stallone is governor of California and uses the phrase “the governor of California” to refer to Stallone. By asserting (a) he expresses the belief that Stallone makes more than $1,000,000 a year, and this belief has a particular kind of primacy: the question of whether what he said is true or false turns only on the question of whether this belief is true or false. However, typically we learn more about his psychology from his assertion of (a) than merely that he believes that Stallone makes more than $1,000,000 a year. If the circumstances cooperate—say he’s watching Stallone give an interview on television and pointing at the screen when he utters (a) and circumstances are otherwise normal—we also learn, perhaps among other things still, that he believes that Stallone is governor of California.
Is there a psychological difference between the person who asserts (a), understood de re, and the person who asserts (c), assuming that both falsely believe that Stallone is governor of California? There are, to be sure, differences between what we would need to do in order to reconstruct each one’s beliefs. In order to reach the conclusion that the person who asserts (a) believes that Stallone makes more than $1,000,000 a year we need to learn, somehow, that he uses the description “the governor of California” in the same way that he uses the name “Stallone”. No such step is required in order to determine that the person who asserts (c) believes that Stallone makes more than $1,000,000 a year. But does a difference of this sort speak to a difference in the psychology of these two people, or only a difference in what we need to do in order to reconstruct their psychologies? Happily, we do not need to answer this very difficult question. As stated, this question concerns de re belief while our ultimate concern here will be with de re intention. Further, as we are about to see, the question is easier in the case of de re intention.

To see this, consider what is involved in intending [to A the thing that is P], where A is an act and P is a property. Imagine that the person who has an intention of this sort asserts the following sentence:

(d) I intend [to pay the governor of California $1,000,000].

Like (a), (d) admits of a de dicto or de re interpretation. Under its de dicto interpretation (and assuming that the speaker envisions a one-time payment, rather than a payment to all who will ever be governor of California) it expresses the same proposition as the following sentence:
(e) I intend [that someone is both the governor of California and paid $1,000,000 by me].

However, if (d) is interpreted de re it expresses the same proposition as the following sentence, assuming that the speaker falsely believes Stallone to be governor and so is using “the governor of California” in the same way in which he uses “Stallone”:

(f) I intend [to pay Stallone $1,000,000].

The parallel question to the one asked above is this: Is there a psychological difference between the person who asserts (d), understood de re, and the person who asserts (f), assuming that both falsely believe that Stallone is governor of California? There must be. The reason is that the world does not match the intention of the person who asserts (d) unless Stallone is governor of California, while that is irrelevant to the question of whether the intention of the person who asserts (f) matches the world. Notice, and this is important, for this to make sense there must be a difference between the world matching an intention, on the one hand, and the person doing as intended, on the other. Both the person who asserts (d), de re, and the person who asserts (f) do as intended when each gives the money to Stallone. But only the latter’s intention matches the world. Thus, the person who asserts (d) is not aptly characterized as having a belief that Stallone is governor and an intention to give Stallone $1,000,000. If that were correct, then his intention would match the world in all respects when he gives the money to Stallone (although his belief would not). So whatever we ought to say about the belief case—perhaps there is no psychological difference there—we must not say that there is no psychological difference between the person who asserts (d), de re, and the person who asserts (f). The psychological difference consists in the fact that a role is
played by the description in the first’s intention but that description plays no role in the
intention of the second. Put, perhaps, more intuitively, the person who asserts (d) can
point to the fact that Stallone, to whom the money is given, is not governor and say, “In
this respect, things have not turned out as I intended.” The person who asserts (f) can
only say, “That’s not what I believed” for there is no sense in which the fact that
Stallone is not governor indicates a failure of his intention to match the world.

Intentions set two different standards of success by which the future world can
be judged. They set a standard for the agent’s act, and they set a standard for the world
as a whole, including, but not limited to, the act. In the typical case, if the world lives
up to the first standard, it also lives up to the second. This is the case when the person
asserts (d), de re, believes Schwarzenegger to be the governor of California, and gives
$1,000,000 to Schwarzenegger who is, indeed, the governor of California. His act has
succeeded to meet the standard set by his intention since he gave the money to the
person he had in mind, namely Schwarzenegger. And the world has lived up to his
intention as a whole because the person to whom he gave the money met the
description that he used, in his intention, for thinking of that person—namely, “the
governor of California”. In the case, however, in which the person asserts (d), de re, but
falsely believes Stallone to be governor, and gives the money to Stallone, the world has
lived up to the first standard set by his intention, but not the second. He has given the
money to the person he had in mind, but in doing so he has not given the money to
someone who meets the description included in his intention. And there is a third case
to consider too, namely, the case in which the person asserts (d), de dicto, falsely
believes that Stallone is governor, and gives the money to Stallone. In that case, the
world has fallen short of both of his intention’s standards because, in essence, the
standards collapse into one another. In such a case, his act succeeds only if the person
to whom he gives the money is, in fact, the governor of California, and the second standard is met only if this same thing is true.

2.2 The Commitments Constituted by De Dicto and De Re Intentions

As indicated earlier, for convenience, the term “de dicto intention” will be used to refer to the intention of the person who asserts a sentence like (d) de dicto, and the term “de re intention” to refer to the intention of the person who asserts a sentence like (d) de re. The difference between de dicto and de re intentions marks a difference in the commitments of the people who have those intentions. To see this, consider the difference between an event’s occurring, on the one hand, and the defendant being the cause of the event’s occurring, on the other. The latter includes the former plus more. Typically, as mentioned earlier, including a reference to an event in the content of one’s intention is sufficient for generating two commitments: a commitment to the event’s occurring, and a commitment to being the cause of the event’s occurring (since one would be the cause were the intention to play its proper causal role). In a large class of cases, we are to interpret de dicto the description of the relevant event employed in a sentence stating that the defendant includes the event in the content of his intention. In fact, it is so natural to give the de dicto interpretation of the descriptions of acts and results that appear in the contents of intentions that it sometimes takes some mental gymnastics to even see what it would be to interpret them de re. What this indicates is that when a description appearing in the content of an intention is to be interpreted de dicto, the agent has two commitments: (1) a commitment to its being the case that the object with respect to which he acts falls under the description, and, also, (2) a commitment to causing this to be the case. For instance, when (d) is interpreted de dicto, the intention that it asserts the speaker, D, to have brings with it two
commitments: a commitment to its being the case that the person who receives $1,000,000 from D is the governor of California, and a commitment to causing this to be the case. In this example, D can cause this to be the case in one of two ways. He could, in theory, cause a particular person to be the governor of California—perhaps by fixing the election—and then give that person $1,000,000; or, what is far more likely, he could see to it that he only gives $1,000,000 to the person who is, in fact, the governor of California when the money is given. If he follows the latter strategy, then he would switch the target of his money when he learns that the person at whom it is aimed is not, in fact, the governor of California. If (d) is true, then, and the description is interpreted de dicto, the person who asserts it has an intention that commits him to doing one of these two things.

By contrast, the agent with the de re intention has merely the first of the two commitments. The de re intention, that is, commits the agent to its being the case that the object with respect to which he acts falls under the description, but does not commit the agent to causing this to be the case. This is why, when (d) is to be interpreted de re, and the person who has the relevant intention gives $1,000,000 to Stallone falsely believing him to be the governor of California, the right way to diagnose the failure of the intention to match the world is to say that although the act succeeded, the intention misrepresented the world in which that success was to take place. The intention represented the world in which success of the act takes place as a world in which the governor of California is given $1,000,000, when, in fact, in one such world someone, namely Stallone, who is not the governor of California, is given the money.

The very idea of being committed to a condition’s obtaining, without being committed to causing that condition can seem quite puzzling. You are not really committed to it, we might say, if you are not willing to take steps to see to it that it obtains. You need to at least be ready to cause it should that be needed, and so you
need to be committed to causing it. The very idea of commitment to the condition, the thought is, brings with it the idea of commitment to causing the condition. But the puzzlement is dissolved when we recognize the range of ways in which a person can be committed to a condition by his intention. Although there may be further senses yet, consider two different ways in which one can be committed by one’s intention to the world being a certain way without being committed thereby to causing it to be that way:

Commitment to Non-Reconsideration: The commitment to not reconsider one’s intention on the grounds that one believes the condition to hold.

Commitment to Not Complaining: The commitment to not complaining that the world fails to be as intended in light of the fact that the condition holds.

In both of these cases, to fail to live up to what one is committed to is to be in violation of a norm of rationality to which one is subject thanks to the fact that one has the intention. (As we will see later, a person can have a commitment to not complaining with respect to a condition while lacking a commitment to non-reconsideration with respect to that same condition.) Commitments to non-reconsideration involve norms of rationality that apply to agents after intention formation and before what we might call “plan’s end”, the moment at which the world has come to match their intentions in all respects. Commitments to not complaining, by contrast, involve norms of rationality that apply to agents at and after plan’s end. Consider a person, for instance, who has the de re intention [to receive stolen cloth] but reconSIDers that intention. When asked why he reconsiderS he says, “Well, I think the cloth I intended to receive is stolen!” This explanation falls flat because the fact that the agent cites in explanation was already
represented by his intention. He can no more cite the fact that he thinks the cloth is cloth in explanation of his decision to reconsider than he can cite the fact that the cloth is stolen. He is equally irrational to reconsider for that reason in both cases. He might rationally decide to reconsider on the grounds that the cloth’s being stolen is a weightier consideration than he thought at the time of intention formation; or he might rationally decide to reconsider on the grounds that he just learned that it is illegal to receive stolen cloth. But what he cannot do in full rationality is to reconsider merely on the grounds that he believes the cloth is stolen. Similarly, if he succeeds in receiving the cloth, he cannot without irrationality complain that the world is not as he intended it to be in light of the fact that the cloth he received is stolen; that is part of what he intends and so the world has not fallen short of being as he intended to be in light of that fact.

A person with a de re intention [to A the thing that is P] has both a commitment of non-reconsideration with respect to the thing he A’s being P and a commitment not to complain with respect to that same condition. Since one can have either or both of these commitments without being committed to causing the thing to be P, or to selecting a thing to A that is P, these commitments are independent of any commitment to cause the thing one A’s to be P.

2.3 The Mens Rea Standard and Beliefs About Circumstances

Circumstantial elements of crimes are conditions that must be shown to have held at the time of the crime. But they are different from other elements of crimes in that the prosecution need not show either that the defendant caused the condition to obtain or that he selected a time to act, or an object with respect to which to act, in part because the condition held at that time or with respect to that object. It can be an accident, caused by no one at all, that the condition holds, or it can be caused in one or
the other sense, or both, by some third party. Recall that under the Guiding Commitment View to try to do something is to be committed by one’s intention to each of the components of success and to be moved by those commitments. Circumstantial elements of crimes are components of success. But since success does not require that the defendant cause them, an attempt requires no more than an intention-based commitment to their occurrence that falls short of commitment to causing their occurrence. When we put this together with the view of de re intention just offered, we reach the following result: to have the commitment to the circumstantial elements involved in an attempted crime, it is sufficient for the defendant to include the circumstantial elements of the completed crime in the content of his intention as part of a de re description. De dicto descriptions will do, but since such intentions constitute a commitment to causing the circumstances to obtain, they are more than is required for attempt. We, therefore, have identified the mens rea standard that we sought.

When we add to this the idea that an intention that includes a de re description (such as the intention \([\text{to pay the governor of California $1,000,000}]\)) involves a commitment of non-reconsideration and a commitment to not complaining, we are tempted to hold that a person who merely believes a circumstantial element of the completed crime to be in place, and has the relevant accompanying intention, is sufficiently committed to that circumstance for attempt. This isn’t quite true, although there is a live possibility, to be discussed shortly, that it is close enough to being true for the government’s work of assessing the mens rea of attempt. To see why it is not strictly true, consider (d) again, together with the following two sentences:

(g) Arnold Schwarzenegger is the star of The Terminator.

(h) I intend [to pay the star of The Terminator $1,000,000].
Now imagine that (d) is true when “the governor of California” is interpreted de re, and that the person who asserts it, D, uses the phrase “the governor of California” in the same way he uses the name “Schwarzenegger”. He would point to the man at the podium, who is Schwarzenegger, and say things like, “There’s the governor of California!” And imagine that (g) could be asserted by this same person in order to express his belief. The question is whether, in such a case, we can, without exception, conclude that (h) is true (or, rather, would be if uttered by D). We cannot.

There are at least three kinds of cases in which (d) and (g) are true and (h) is false. First, there are so called “Frege Puzzles”: imagine that D believes that Arnold Schwarzenegger and the governor of California are different people. In that case, (h) does not follow from (d) and (g), even though (d) and (g), both of which are to be interpreted de re, concern the very same person, namely Arnold Schwarzenegger.

Second, there are failures “to put two and two together”: imagine that D’s belief that Arnold Schwarzenegger starred in The Terminator is entirely dispositional. He pays little attention to the movies, and a great deal of attention to politics, and just never has occurrent thoughts about movies except in special circumstances. Were you to ask him if Schwarzenegger starred in that film he would assert (g), but he would not have an occurrent thought that it would be proper for him to express by uttering (g) in the absence of prompting. In having the intention [to pay the governor of California $1,000,000], D simply is not thinking about the movies that the governor of California starred in. But if he is not thinking about that, then he very well may not have the intention [to pay the star of The Terminator $1,000,000]. Perhaps he has it in some purely dispositional sense; but he does not have it occurrencely. Such an intention includes an occurrent thought about the movies that a particular person has starred in and we are stipulating that D just isn’t thinking about that when he has the intention he
attributes to himself with (d). But on the assumption that it is occurrent intentions, and not dispositional ones, that actually motivate token actions, it follows that (h) is not true in the sense of relevance to the criminal law.

There is a third category of cases in which sentences like (d) and (g) are true and a sentence like (h) is false, and it is in some ways the most important of the three for legal purposes. For reasons that will become clear, call these cases “insalience cases”. To appreciate this category, consider someone who has the de re intention [to pay the governor of California $1,000,000], who also has the occurrent belief that the governor of California has an Austrian accent, and who believes, truly, that the person whom he intends to give the money and the person he believes to have an Austrian accent are one and the same person, namely Arnold Schwarzenegger. His is neither a Frege puzzle case, nor a failure to put two and two together. Now let’s further imagine that this person could not care less that Arnold Schwarzenegger has an Austrian accent. He takes this fact to give him no reason whatsoever to refrain from giving him the money, nor a reason to give him the money, nor does he see it as in any way a salient fact about Arnold Schwarzenegger in any other respect pertaining to the act he intends to perform. Does this person have the de re intention [to pay the Austrian-accented person $1,000,000]? He does not. In asking about the de re intention, we are assuming that a person who has this intention uses the description “the Austrian-accented person” analogously to a proper name in order to refer to Arnold Schwarzenegger. The man in the example very well might be willing to use that phrase in that way. But even if he is, that does not mean that he has the relevant de re intention. In having the intention that he attributes to himself in asserting (d), he is not thereby thinking of Arnold Schwarzenegger as an Austrian-accented person, despite the fact that at that very moment he has another thought, namely his occurrent belief that Arnold Schwarzenegger has an Austrian accent, that does involve thinking of Schwarzenegger
in that way. The intention and the belief remain distinct thoughts that represent the same object in different ways. Only the belief, in this case, represents Schwarzenegger as having an Austrian accent. In this case the insalience of the fact that Schwarzenegger has an Austrian accent blocks the inference from the intention and belief to the further intention [to pay the Austrian-accented person $1,000,000].

Frege puzzle cases, failures to put two and two together, and insalience cases are cases in which the agent falls short of a commitment to not reconsider the intention in the face of the belief that the relevant condition holds. In Frege puzzle cases, the agent could without irrationality reconsider his intention at the moment that he discovers that the object of his intention and the object of his belief are one and the same. D might without any form of irrationality give up his intention [to pay the governor of California $1,000,000] when he realizes that the person he has in mind is the very one who is drawing large sums every year from the residual income that he gains thanks to having been the star of The Terminator. Because he would not be irrational in any sense in such a case, he does not have the intention he would ascribe to himself with (h). The same is true if the case is a failure “to put two and two together”. The agent in such a case lacks the commitment to non-reconsideration constituted by the de re intention [to pay the star of The Terminator $1,000,000]. At the point that he puts two and two together and comes to have an occurrent belief that the man whom he intends to pay the money is the star of The Terminator, he can without irrationality reconsider his intention [to pay the governor of California $1,000,000]. And, similarly, the person for whom the movies the governor has starred in is completely insalient can, nonetheless, reconsider an intention [to pay the governor of California $1,000,000] on the grounds that Schwarzenegger starred in The Terminator. In some such cases, the person will have come to recognize this fact as providing him with reason not to pay Schwarzenegger the money. But even if he does not change his mind about that, his
intention is not rationally stable in the face of the relevant belief. It might be factually stable in the face of that belief—perhaps he will not, in fact, reconsider his intention in the face of the belief—but he would not be in violation of a commitment constituted by his intention were he to do so. This is the sense in which his intention does not place him under any rational pressure to not reconsider in the face of the belief and hence he does not have a commitment of non-reconsideration with respect to the condition that the person he gives the money to starred in The Terminator.

Still, despite the fact that sentences like (d) and (g) do not entail sentences like (h), it is also the case that the truth of sentences like (d) and (g) can provide powerful evidence in favor of the truth of a sentence like (h), especially when conjoined with other evidence to the effect that the case is not a Frege puzzle case, a failure to put two and two together, or an insalience case. To see this, consider again United States v. Crow (164 F.3d 229 (5th Cir. 1999)), in which the defendant falsely believed himself to be chatting with a 13-year old girl whom he asked to send him sexually explicit photographs of herself; he was actually chatting with a detective. Crow has the de re belief that the person he is chatting with is a minor. He also appears to have the intention [to sexually exploit the person he is chatting with]. It is a bit unclear whether this intention is de dicto or de re—does it matter to Crow whether the person he sexually exploits actually chats with him, or not? Is it part of what he is after that he convinced the minor whose photos he enjoys to send them, or would it be enough for success merely that, at the end of the day, he has her photo? We do not know enough about Crow to know the answers to these questions. But let’s assume that the relevant intention is de re. The question is whether we can infer that Crow intends [to sexually exploit a minor]. If he does have that intention, then he is sufficiently committed to his target’s being a minor for an attempt to sexually exploit a minor.
We cannot deduce that Crow has the intention [to sexually exploit a minor]. It is possible that his is a Frege puzzle case: perhaps he falsely believes that the person he intends to sexually exploit and the person he believes to be a minor are different people. We would need a complicated story to make this plausible, but imagine that we have it; perhaps he mistakenly thinks that he is chatting with two different people, one of whom is a minor and one of whom is not, who happen to be using the same screen name. Or perhaps he is like the person whose relevant belief is dispositional. Perhaps, that is, although he believes that the person he is chatting with is a minor he doesn’t have an occurrent thought to that effect and so cannot have formed the intention [to sexually exploit a minor]. These things are possible, but they are highly unlikely. They are so unlikely, in fact, that the doubt that their possibility supplies could hardly be thought reasonable in the absence of compelling evidence in their favor. It seems much more likely that Crow believes that the person he intends to sexually exploit and the person that he believes to be a minor are one and the same. And, given that the detective explicitly claimed to be a minor, it is hard to imagine that Crow did not have the occurrent belief that the person he was chatting with was a minor. Further, there is little reason to think that the person’s status as a minor was not extremely salient to Crow. He knows, for instance, that there are criminal penalties for the sexual exploitation of minors that do not apply to the sexual exploitation of adults. And there may be reason to think that he is positively in search of sexually explicit photographs of minors, and so, assuming that he has reason to believe that the pictures he hopes to receive are of the person he is chatting with, that person’s minor status is extremely important to Crow. Given all of this, chances are that he intends [to sexually exploit a minor]. At the least, it seems that if the prosecution has proven beyond a reasonable doubt that the defendant has a de re intention [to A a thing] and a de re belief that the thing he intends to A is P, then the burden switches. At this point, it seems, we are
justified in assuming that the defendant has a de re intention [to A the thing that is P], and is thus committed by his intention to its being P, unless the defendant is able to provide us with compelling reason for thinking that we ought not to reach this conclusion. What this implies is that we ought to hold that proof beyond a reasonable doubt that the defendant had the de re belief that the circumstantial element of the crime is in place, together with a relevant intention, creates a rebuttable presumption that he has an intention that commits him to the circumstantial element of the completed crime.

Although it is an empirical question, it seems that insalience cases are likely to be far more commonly found in courtrooms than are the other sorts of conditions that block the inference from the belief to the intention that commits the defendant to the circumstantial element of the completed crime. For instance, imagine an 18-year old defendant who tries and fails to have sex with a 15-year old in a jurisdiction in which the age of consent is 16. Let’s imagine that the defendant has a de re intention [to have sex with Victim], and an occurrent de re belief that Victim is 15. And let’s further imagine that the two are of comparable emotional maturity when it comes to sex. If this is an attempted statutory rape, the defendant must, at least, have a de re intention [to have sex with a minor]. But does the defendant have this intention? We need to know much more about him in order to answer this question. The question is whether he takes the minor status of his would-be partner to be at all salient. Given the small age difference between them, the stipulated small difference in emotional maturity, and, even, perhaps, some rather foggy-headed ideas on his part about what his legal obligations are, it is perfectly possible to imagine that the victim’s age just isn’t salient at all and so prevents the content of his belief from making its way into the content of his intention. This is why, when he says, on the stand, “But I really love her!” what he says is of relevance to his case. What he is saying is that her age was not relevant to him. It
was as irrelevant to him as was Schwarzenegger’s accent in our example earlier. But irrelevant facts, even those which one believes to be present, often do not make their way into the contents of our intentions, even in the face of occurrent belief that they are present. By contrast if the facts are the same except that the defendant is 50 years old, then our perception of the case changes radically. Here we are much more likely to see him as having intended, de re, [to have sex with a minor]. The reason is that it is hard for us to imagine that the minor status of one’s partner would be entirely insalient to a person of that age. It could be so; the conceptual possibility remains. But it seems extremely unlikely given a few basic assumptions about human psychology.

There is a fourth way in which a defendant could rebut a presumption to the effect that he has the intention needed for attempt given that he has a relevant belief and a de re intention. He could show that his belief is de dicto. In the case in which Crow’s belief is de dicto, he might not intend [to sexually exploit a minor]. The de dicto belief that the person he is chatting with is a minor amounts to the belief that two properties co-occur—the property of being the person he is chatting with and the property of being a minor. It is awkward, although possible, to try to imagine having this belief. Other similar beliefs are more familiar. Consider, for instance, a woman who has the de dicto belief that the man she is dating resembles her father. She may not see the resemblance herself. She may, in fact, have the de re belief that the man she is dating does not resemble her father. But she also might know herself well enough to know that she always ends up dating men who resemble her father. She believes that two properties co-occur: the property of being dated by her, and the property of resembling her father. Imagine that Crow’s belief is like that. He believes that it so happens that he always finds himself chatting with minors. There is little reason to think that Crow, in such a case, intends [to sexually exploit a minor]. Note that it is clear that even if the woman in our example intends [to marry the man she is dating],
she does not intend [to marry a man who resembles her father]. How could she intend that given that she has the de re belief that the man she is dating does not resemble her father, and it is he that she intends to marry? Similarly, there are reasonable grounds for doubting that Crow, when he has the de dicto belief, intends [to sexually exploit a minor]. Of course, given that StephieFL told Crow she was a minor, it seems very unlikely that his actual belief is de dicto.

What we have shown, then, is that the position enshrined in Model Penal Code §5.01(1), and accepted in many jurisdictions, is too strong. Under that section, belief that a circumstantial element of a crime is present suffices for the mens rea of the attempt with respect to that element. Under such a position, the relevant mens rea is present even in cases in which the defendant lacks an intention that commits him to the circumstantial element of the completed crime because of one of the conditions that would block the relevant inference. The correct policy is that such a belief creates a rebuttal presumption that there is mens rea, provided that the defendant has been shown to have an appropriate intention. The defendant can rebut this presumption by showing that his case is a Frege puzzle case, a failure to put two and two together, an insalience case, or, even, by showing that his relevant belief is de dicto. These are all hard roads for any defendant to follow, and so typically all the prosecution will need to show is that the defendant had a relevant belief. But law should not close possible roads to a showing of innocence, no matter how unlikely they are to be open to any given defendant.

2.4 Disjunctive Descriptions of Circumstances

So far we have no reason to think that the circumstantial elements of the completed crime need actually to be in place for the attempted. We have identified a
minimal condition for the commitment to circumstances involved in attempt: the defendant has a de re intention that includes the circumstantial element. We have also identified a distinct condition that creates a rebuttable presumption that this is the case: the defendant has a de re belief that the circumstance obtains, together with an intention that serves for commitment to performing the act involved in the completed crime. But, in fact, there is one class of cases in which a defendant charged with attempt probably has an intention that incorporates a circumstantial element of the completed crime only if that circumstance is actually present. These are cases in which the property included in the de re description in his intention is a disjunctive property one of the disjuncts of which includes the circumstantial element. I explain.

Say that I’m offered a choice between two boxes. One of the boxes contains $5, the other contains either $100 or a small amount of marijuana with equal probability, although I’m not certain which it contains. I see no attraction to possessing marijuana and recognize that were I to possess it, I would incur, let’s say with certainty, a fine of $50. Assuming my only motive is profit, I calculate the expected value and act accordingly thereby forming the intention to take the box containing either $100 or marijuana; that box has an expected value of $25. So, were I to utter the following sentence it would be true:

(i) I intend [to take the $100-or-marijuana box].

Let’s assume that “the $100-or-marijuana box” is to be interpreted de re: I have in mind a particular box, the very one that I currently believe contains either $100 or marijuana, and I intend to take it. Imagine that I act on this intention although I fall short of taking the box I have in mind because I am arrested and charged with an attempt to possess marijuana. Whether I have committed this crime turns on whether
or not the intention I report with (i) committed me to the following condition: The box I intended to take contains marijuana. Did my intention commit me to that?

The first thing to see is that I do not have a commitment of non-reconsideration with respect to the box’s containing marijuana. After all, imagine that before I can take the box I come to believe that it contains marijuana. At this point, I know that the box I intend to take promises nothing but a $50 fine, while the other box promises me $5. There is no irrationality in reconsidering my intention in the face of this belief. In fact, rationality may even require reconsideration in this case. Hence, I am not committed in the sense involved in a commitment of non-reconsideration, to the box containing marijuana.

But this does not show all by itself that I am not sufficiently committed to the box’s containing marijuana for the attempt to possess it. Recall that an intention might also constitute a commitment to not complain about a particular condition; one might be irrational, that is, were one to cite the fact that a condition is met in order to support a complaint to the effect that the world is not as intended. I would be sufficiently committed to the box containing marijuana if my intention constitutes a commitment to not complain with respect to that condition. As I will now argue, I do have this commitment if the box contains marijuana. Appreciating this requires further reflection on the nature of commitments not to complain about conditions.

Start with the following observation: A reasonable complaint is, by its nature, about some actual fact. A person’s complaint can always be neutralized by noting that the world is not actually the way that the person is complaining about its being. If I complain that I repeatedly am given the short end of the stick, my complaint has no bite in the face of the fact that I am not, in fact, repeatedly given the short end of the stick. What this implies is that each and every one of us is committed to not complaining about unactualized conditions. We all have that commitment simply because of what
complaints are. Any complaint about an unactualized condition is, by its nature, misplaced, and therefore we are all committed to not offering such complaints. But it is possible for people to have commitments to not complaining that go beyond this. People can have commitments to not complaining that are special to them, and, in particular, that are special to them thanks to their intentions. It is natural to characterize their situation as involving some kind of conditional commitment. A person who is committed to not complaining about condition K, in the sense of interest, is someone who is committed to not complaining if K.

The claim that D is committed to not complaining if K admits of scope ambiguity. Is that to which D is committed conditional in its nature, or is the presence of D’s commitment conditional? We find, that is, that there are two kinds of conditional commitments, which the recent philosophical literature has labelled “wide scope” and “narrow scope”.

Wide Scope Commitment to Not Complaining: The commitment to not complaining that the following conditional is true: If K, then the world fails to be as intended.

Narrow Scope Commitment to Not Complaining: If K, then one is committed to not complaining that, in light of K, the world fails to be as intended.

The first thing to see is that a Wide Scope Commitment to Not Complaining with respect to condition K does not amount to any kind of commitment to K. The commitment involved there is a commitment to the conditional of which K is the antecedent, but it is not a commitment to K itself. However, those who have Wide Scope Commitment to Not Complaining with respect to a particular condition also, typically, have Narrow Scope Commitment to Not Complaining with respect to that
very condition. However, Narrow Scope Commitments to Not Complaining also fall short of commitment to K all by themselves. To say that a person would be committed to something if a particular condition were met is not to say, *ipso facto*, that he’s committed to anything at all given the way things actually are. After all, the condition might not be met. But those who have the Narrow Scope Commitment are committed by their intentions to K itself under one particularly important circumstance: the circumstance in which K is realized.

So, this is what we have learned: A person who has the de re intention [to A the thing that is P] has, at least, a Narrow Scope Commitment to Not Complaining with respect to the following condition: the thing he A’s is P. He may also have the Wide Scope Commitment to Not Complaining. In fact, that he has that Wide Scope Commitment might be why he has the Narrow. But, whatever the reason he has the Narrow Commitment to Not Complaining, nothing of interest yet follows about his commitment to the thing he A’s being P. However, if the thing he A’s is P, then he is committed by his intention to not complaining about that. Hence, his intention commits him to that condition when the thing he A’s is P, and it does not commit him to that if that is not so.

Now return to our example involving the de re intention [to take the $100-or-marijuana box]. In having this intention, I am not committed to not reconsidering with respect to the condition that the box I take contain marijuana. But I do have the Narrow Commitment of Not Complaining with respect to that condition. Thus, if the box contains marijuana, I am committed by my intention to not complaining that the world has, on those grounds, fallen short of being as intended. Whether I am committed by my intention to that condition, then, turns on whether or not that condition is actually in place. Notice that if the box turns out to contain methamphetamine, I am not committed by my intention to its containing
methamphetamine. In that case, I can without irrationality complain that the world has failed to be as intended since my intention did not represent the box, even disjunctively, as containing methamphetamine.

Notice, and this will turn out to be of some importance when applying what we have learned to cases like Dlugash, it is perfectly possible for the disjuncts involved in the disjunctive representation of the object on which one intends to act to fill logical space. A person can intend [to receive the stolen or unstolen cloth], for instance. To have such an intention is to represent the cloth one intends to receive as having some relevant legal status or other, without representing it as being stolen, and without representing it as being unstolen. The property of being stolen or unstolen, despite being possessed by every object, might or might not be included in the representation of the object in one’s intention. Every object is made in China, or not made in China; every object has that disjunctive property. But for someone for whom the belief that the object is or is not made in China is entirely dispositional, or for someone for whom the fact that the object possesses that property is entirely insalient, this property is unlikely to be included in the intention to receive the object, or to steal it, or to act in some other way with respect to it. That is, everything that we learned above about the ways in which the properties of an object are and are not found in an agent’s intention when he has the belief that the object possesses that property apply to disjunctive properties in which the disjuncts fill logical space.

As we saw, the fact that a person’s case is a Frege puzzle case, a failure to put two and two together, or an insalience case defeats the otherwise safe inference from the fact that he believes de re that a thing is P and has a de re intention [to act on it] to the conclusion that he has a de re intention [to act on a thing that is P]. Similarly, in the absence of one of these same defeaters, a person who believes de re that a thing might have a property and has a de re intention [to act on that thing] has a disjunctive de re
intention [to act on a thing that has or lacks the property]. For instance, if a defendant has a de re belief that the cloth might be stolen and might not be, and intends [to buy the cloth], then chances are that he intends [to buy the stolen or unstolen cloth]. This further intention is not entailed by the relevant intention and belief: the case might be a Frege puzzle case, a failure to put two and two together, or an insalience case. But we are nonetheless safe in assuming that the person has the relevant disjunctive intention in the absence of evidence supportive of the claim that his case is of one of these three sorts. As before, the intention and belief support a rebuttable presumption that the agent has the relevant further intention.

2.5 The Position in Action

It is worth summarizing the position offered here. In the preceding parts of this section, we have reached the following four, interconnected results. Here A is an act involved in crime C, P is a property such that some thing’s being P is a circumstantial element of C, and Q is an alternative property that is incompatible with P. So, for instance, A might be the act of receiving goods, while P might be the property of being stolen, and Q the property of not being stolen. In that example, the circumstantial element of C is that the goods received are stolen.

(1) If D intends [to A the thing that is P], then D has the mens rea with respect to the thing being P needed for an attempt to C, whether his intention is de re or de dicto.

(2) If D has the de re intention [to A] and the de re belief [that the thing that he intends to A is P], then there is very good evidence that D intends [to A the thing
that is P]. There is, therefore, very good evidence, given (1), that D has the mens
rea with respect to the thing being P needed for an attempt to C.

(3) If D has the de re intention [to A the thing that is P or Q] and the thing is P,
then D is committed by his intention to the thing’s being P. Therefore, given (1),
in such cases D has the mens rea with respect to the thing’s being P needed for an
attempt to C.

(4) If D has the de re intention [to A] and the occurrent de re belief [that it is at
least likely that the thing is either P or Q], then there is very good evidence that
D has the de re intention [to A the thing that is P or Q]. Therefore, given (3), if
the thing is P there is very good evidence that D has the mens rea with respect to
the thing’s being P needed for an attempt to C.

These results provide us with sufficient resources to resolve both the Jaffe case
and the Dlugash case, and others like them. Jaffe has a de re belief that the cloth that he
is buying is stolen. And he intends [to buy the cloth]. His is not a “Frege Puzzle” case.
He does not falsely believe that the cloth he intends to buy and the cloth that he believes
to be stolen are distinct. Nor is his likely to be a case of failure “to put two and two
together”. Further, given the salience of the status of the cloth as stolen or unstolen, it
seems very likely that he has its status in mind when he buys it. Further evidence, such
as evidence that he took precautions to avoid detection, would support this contention.
His case, in other words, is to be handled exactly the same way as the Crow case
disussed above. In both, the defendant has a de re belief (that the cloth is stolen, that
the person he is chatting with is a minor) and a relevant intention (an intention [to buy
the cloth], an intention [to sexually exploit the person he is chatting with]). And in both
there is no reason to think that the special conditions that defeat an inference to the conclusion that the defendant has the intention needed for attempt (the intention [to buy stolen cloth], the intention [to sexually exploit a minor]) are present. Because of these defendants’ de re beliefs about the presence of the circumstantial element, we are in a position to say that they are sufficiently committed to those elements for attempt without any inquiry into the question of whether those elements are in fact present.

To resolve the Dlugash case we must draw on the lesson provided by reflection on the hypothetical involving the box containing either $100 or marijuana. Start with a prior question: What, exactly, did Dlugash intend? Given what little we know of the case, the answer to this question is surely indeterminate. But the answer to a closely related question might not be: Consistent with what we do know, what characterization of Dlugash’s intention will paint him in the best possible light? It is tempting to characterize Dlugash’s intention as conditional. Perhaps he intended [to kill Geller, if Geller was alive & to mutilate Geller’s corpse, if Geller was already dead]. If this was Dlugash’s intention, then the case is a relatively easy one to resolve, although not through appeal to the principles presented here, but, instead, through principles for determining the conditions under which a conditional intention serves to meet an unconditional intention mens rea standard. That is, if this is Dlugash’s intention, then the question is just whether an intention [to kill if Geller was alive] should serve to meet the mens rea standard for a crime that requires intent to kill. I have developed an account of how to answer such questions elsewhere. Under both the account that I advocate, and under the rival account to be found in the Model Penal Code, the conditional intention under consideration would suffice for mens rea for attempted murder. So if that was Dlugash’s intention, he is guilty of attempted murder. This is why a showing to the effect that Dlugash was firing insurance shots—a showing to the effect that he was seeing to it that Geller was dead while recognizing that he might be
wasting ammunition—would be enough to show that he had the intention needed for attempted murder.

So the characterization of Dlugash as possessing the conditional intention [to kill if...] does not paint him in the best possible light. There is, in other words, a characterization of his intention that is less bad and is consistent with what we know of Dlugash. To see this, let’s assume that Dlugash takes shooting Geller to be a necessary means to some end of his, and let’s further assume that the end is not, itself, killing Geller. For instance, perhaps Dlugash believes that shooting Geller is the necessary means to impressing Bush. Let’s further assume, as seems plausible, that Dlugash occurrently believes Geller to be alive or dead and his is not a Frege puzzle case, a failure to put two and two together, or an insalience case. Assume, yet further, that Dlugash intends the consequences of his act. He does not merely foresee, for instance, that Geller will be in some condition following the shooting; he positively intends that Geller be in that condition. So understood, it seems that Dlugash intends [to put the person who is dead or alive into the condition that results from his shooting him several times in the head]. This is different from the conditional intention discussed above since Dlugash is not under pressure from his intention to do one thing if Geller is alive and another if Geller is dead. There is just one thing that Dlugash’s intention commits him to doing: bring about a further condition in Geller by shooting him in the head. What he does not know is what condition that will be; but he intends it either way. So characterized, Dlugash’s intention is similar to that of the person who intends [to take the $100-or-marijuana box]. Both such a person and Dlugash intend an act (shooting, taking) and intend a result of that act (putting Geller into the resulting condition, placing oneself in possession of the box’s contents). But both think of the result under a disjunctive description. In Dlugash’s case, and not in the other case, the disjuncts fill logical space, since Geller is either alive or dead. But that difference needn’t detain us.
So, for our purposes, Dlugash intends [to put the person who is dead or alive into the condition that results from his shooting him several times in the head]. But it follows, then, for the reasons discussed above, that Dlugash’s intention commits him to Geller’s being alive at the time he is shot only if Geller is alive at the time he is shot. In representing Geller as dead or alive in his intention Dlugash has a narrow scope commitment to not complain with respect to Geller’s being alive; he is thus committed to not complaining that Geller is alive if he is alive. Thus whether or not Dlugash is committed to Geller’s being alive at the time of the shooting—whether he is committed by his intention to shooting someone living—turns on whether or not Geller was, in fact, alive when Dlugash shot him. Thus, the question of what Dlugash’s intention commits him to turns on the facts. It follows, then, that Dlugash attempted murder only if Geller was alive. Since the prosecution cannot show this beyond a reasonable doubt, they cannot show beyond a reasonable doubt that Dlugash attempted murder.

In this case, because Dlugash’s intention is disjunctive and only some of the disjuncts represent the property (being alive) that figures in the circumstantial element, the actual presence or absence of that element is crucial for determining whether or not Dlugash had the intention required for the attempted crime. At least, so it is provided that we are willing to ascribe Dlugash with the disjunctive intention and not a conditional intention that would inculpate him for the crime.¹⁴,¹⁵

Conclusion

The sense that inclusion of a circumstance in the content of one’s intention is more than is required for attempt arises from a failure to recognize that there are intentions, namely de re intentions, that include circumstances in their content without thereby constituting a commitment to causing them. When we overlook that fact we
are likely to be moved by our recognition that attempters needn’t be committed to causing circumstances to think that they needn’t include circumstances in the contents of their intentions at all. This would, in turn, contradict the implication of the Guiding Commitment View that all the commitments needed for an attempt must spring from the attempter’s intention. Once we avoid the error, however, the dominoes fall and we are able to identify the minimum intention-based commitment to circumstances that is required for attempt: inclusion of the circumstance in a de re description appearing in the content of one’s intention. Add to this that on rare occasions the facts determine the content of our de re intentions, and we are able to identify those rare occasions in which the circumstantial elements of the completed crime must be in place for the attempted. At least, so it has been argued in this paper.

When one thinks of the ways in which philosophy of language might be relevant to the law, one is naturally drawn to the guidance that the discipline might give to those in the law tasked with interpreting words, whether spoken in courtrooms, hearings or on the floor of the Senate, or written in judicial opinions, statutes, contracts or constitutions. And, to be sure, this is one very important way in which philosophy of language promises to be of relevance to the law. However, this is not the only way, as I hope to have demonstrated here. Philosophers of language have developed powerful conceptual tools, of which the de re-de dicto distinction is one, for systematically thinking about a particular class of content-bearing entities, namely linguistic entities like words, sentences and utterances. But these are not the only content-bearing entities with which the law is concerned. In virtually every area of law, but particularly in criminal law, the contents of our thoughts is of crucial importance. Just as tools from philosophy of language have been used with great effect in the philosophy of mind, such tools can be used with great effect in systematizing territory where the law has been working with the blurriest of maps. This is true, as shown here, in at least one
area of criminal law in which the precise contents of a defendant’s thoughts can make the difference between guilt and innocence, namely in the law governing attempted crimes.

Works Cited


__________, (forthcoming) *Trying and Attempted Crimes*, Oxford University Press.

1 *People v. Dlugash* (41 N.Y.2d 725 (1977))

2 More carefully, the circumstantial elements of the completed crime are those facts that must be proven beyond a reasonable doubt by the prosecution but which need not be shown to have been caused by the defendant. Murder requires a showing that the victim was alive prior to the defendant’s act, but does not require any showing to the effect that the defendant caused the victim to be alive (what would that even amount to?). Similarly, theft requires a showing to the effect that the defendant did not have permission to take the property he took, a fact that the defendant need not have caused in order to be guilty. Or, to give one final example, various sex crimes with child victims require a showing that the victim was under a certain age, but do not require even a showing to the effect that the defendant would have selected a different victim had he believed the victim not to be a child. The defendant need not have caused his particular victim to be underage, nor to have caused it to be the case that his victim was a child by selecting a victim on the basis of age.

3 The task undertaken here has been undertaken by many others. I discuss many such efforts, and contrast them with the approach taken here, in Yaffe (forthcoming, ch. 5, section 1). See, for instance, Stannard (1987), Duff (1996), Fletcher (1986), Williams (1991).

4 The court in *Jaffe* conceptualizes the case as one in which the defendant tried to receive stolen property but could not possibly have succeeded, since the property was not stolen, and then struggles with the question of whether success was impossible in the right sense of “impossible” for acquittal. The literature that cases like *Jaffe* has spawned is very large and most of it engages directly with the question that the court in *Jaffe* takes to be crucial: the question of the sense, if any, in which it must be possible to succeed if one is to be guilty of an attempt. (There is too much literature on this topic to list it all. Some of the best-known early discussions include Strahorn (1930); Skilton
(1937); Keedy (1954); Smith (1957); Hall (1960), pp. 586-99; Williams (1961), pp. 633-53; Smith (1962); Hart (1981). Helpful recent discussions include Duff (1996), pp. 76-115, 378-85; Hasnas (2002.) There is a very thin sense in which attempt requires the possibility of success; so called “inherent impossibility”, when properly specified, does indeed provide a sound basis for acquittal; consider the person who attempts murder by incantation. (For a defense of this claim see Yaffe (forthcoming, ch. 9) But there is no need to tackle the issue of impossibility’s relevance to attempt in connection with cases like Jaffe. If it was possible, in some given sense, for the fabric that Jaffe bought to have been stolen, then it was possible, in that sense, for Jaffe to have successfully received stolen property. But the Jaffe court does not inquire whether it was possible, contrary to fact, for that property to have been stolen; that’s not what concerns the court. What concerns the court, whether it knows it or not, is not the possibility that the fabric was stolen but the simple fact that it was not. But if that is their concern, then the question of the possibility of success just isn’t the crucial question even by their own standards.

5 See Yaffe (forthcoming, ch. 3)
6 Fraud is, in fact, more complicated than this. To note just one complexity, the victim must be injured because he relies on the truth of the perpetrator’s deceptive statements, and not for other reasons. To note another, typically the lie must not be so outrageous that only an unreasonable person would believe it.

7 Yaffe (forthcoming, ch. 3)
8 This notation is used, also, by R. A. Duff. See Duff (1996), p. 6.
9 The term refers to Gottlob Frege, who introduced puzzles of this sort in his famous Frege (1948).
10 Robin Jeshion helped me to recognize this third category and its importance. Many of the examples that I use to illustrate it are thanks to her, as well.
11 The terminology appears to have been introduced in Schroeder (2004). The concept of wide and narrow scope was present in the philosophical literature far before the introduction of those terms. Sometimes, for instance, philosophers would refer to the Wide Scope cases as “internally conditional” and the narrow scope as “externally conditional”.
12 Yaffe (2004)
13 §2.02(6).
Notice that for parallel reasons the prosecution cannot show that Dlugash attempted to mutilate a corpse without showing beyond a reasonable doubt that Geller was dead when Dlugash shot him. Does this imply that Dlugash is guilty of no crime? No. The reason is that when a person can be shown beyond a reasonable doubt to have committed either crime 1 or crime 2, he has been shown to be guilty of the lesser crime. This is a principle governing guilt attribution independently of proof of commission of a crime. For further discussion of such principles see Yaffe (forthcoming, esp. ch 4).

Another kind of case which is often raised in discussion of these issues is that in which some object that would have to exist for the completed crime to take place does not exist at all. What should we say, to use the standard example, of the person who, intending [to pick a pocket], reaches into a pocket and finds it empty? Here the relevant circumstantial element of the crime is that there is something in the pocket. This is a circumstantial element of the crime since to show that the completed crime took place, the prosecution must show beyond a reasonable doubt that something was stolen from the pocket, and so must show beyond a reasonable doubt that the pocket held something, but the prosecution need not show that the defendant caused the pocket to hold something, or would have selected a different pocket to put his hand into had he known the one he did choose was empty. This last is quite likely to be true. But the prosecution need not show it to be true in order to establish that the crime was completed; it is not a component of the completed crime. The consensus view is that the mere fact that the pocket is empty is irrelevant to the question of whether there was an attempt. The view offered here has that same implication in the standard case. In the standard case, the defendant has an intention [to take something from the pocket]. If the description “something” is interpreted de re, then such an intention constitutes commitments of both non-resconsideration and non-complaint with respect to the condition that there is something in the pocket. Whether the intention is de re or de dicto, that there is something in the pocket is in the content of the intention. The defendant thus has an intention-based commitment to that, and so the fact that the pocket is empty is no obstacle to his commission of an attempted theft.

However, not all missing object cases are like the standard ones in this respect. Imagine, for instance, that the defendant has the de re intention [to take the contents of an empty or not-empty pocket]. Such a person is intent on taking the contents of this very pocket, the one he reaches into, and he thinks of it through the disjunction “empty or not empty”. This might be the mental state of the person who, for instance, is just as
interested in the thrill of “taking” the contents of an empty pocket as he is in taking something of value from someone else’s pocket. For him, knowing that he would have taken something of value, had there been anything of value in the pocket, is good enough for success. If, in such a case, the pocket is empty, there is no attempted theft because the person is then committed by his intention to the pocket’s being empty and so does not intend to take anything of value at all. Notice, however, how very peculiar such cases are. To be convinced that a particular defendant met this description, one would have to be convinced that the defendant’s act would have succeeded even if the pocket were empty. To learn, for instance, that the person would not have reached into the pocket had he known that it was empty would support the claim that he had, instead, the intention [to take something from the pocket], which is sufficient for an attempt even if the pocket is empty.