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How should criminal law deal with those who try to harm others by witchcraft?

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Introduction

This article explores a matter that has received almost no serious consideration in contemporary Western English language legal literature: given that it is impossible to cause harm by supernatural means, how should the criminal law in Western legal systems deal with those who try to use witchcraft to cause harm to others? The aim here is to significantly advance legal theory in relation to this important matter, drawing upon insights from the medical field, at a time when witchcraft related beliefs and practices are on the rise and 'increasingly (once again) becoming a challenge for countries in the global North'.[1] As part of this, this article aims to make a major contribution to Western legal scholarship on criminal attempt by addressing a common misperception in Western legal scholarship that justice for the victims of those accused of witchcraft is a non-issue in practice either because virtually nobody tries to practice witchcraft in Western jurisdictions or because, if they do, they are harmless.

How the law should respond to those who try to cause harm via witchcraft is not a new issue for Western legal systems; for example, as Anna Garland points out, 'During the early modern period of European history, witchcraft was seen as a very real crime and those convicted of it usually suffered the death penalty. During this time, thousands of people, usually women, were tried for the crime of witchcraft, and approximately half of those were executed'.[2] However, it is an issue that has received little serious attention in contemporary Western English language legal scholarship. This is probably because, in such scholarship, attempts to use witchcraft to cause harm to others are currently not perceived as anything more than hypothetical examples of 'impossible attempts', unlikely to occur in practice in the West. In other countries, where there is a widespread belief in witchcraft, how to protect against it is a major concern among members of the public, violence and other abuse directed against those accused of witchcraft is a significant social problem,[3] and there is often much debate about how the legal system should respond to witchcraft related issues. As Miranda Forsyth states, while such jurisdictions often criminalise attempts to harm via witchcraft, they may do so for a variety of reasons:[4] 'The first is in the context of countries such as Saudi Arabia, where Islam is said to be the justification'.[5] In contrast, as Forsyth states, in parts of Africa and elsewhere, criminalisation relating to witchcraft may be a response to concern among the public about witchcraft, 'providing a way for the state to become involved in such cases and deflecting vigilante

[1] Miranda Forsyth, 'The Regulation of Witchcraft and Sorcery Practices and Beliefs' (2016) 12 Annual Review of Law and Social Science 331, 332.
[2] Anna Garland, 'The Great Witch Hunt: The Persecution of Witches in England, 1550-1660' (2003) 9 Auckland University Law Review 1152.
[3] Miranda Forsyth, 'The Regulation of Witchcraft and Sorcery Practices and Beliefs' (n 1) 334-337, noting that statistical information is lacking.
[4] ibid 340.
[5] ibid.

violence'.[6] Further, in former colonies, 'Much of the literature also stresses the desire to indigenize the law and to chart a new path from the colonial era'.[7]

Some contemporary states punish witchcraft as a specific crime: for example, Section 251 of the 1967 Cameroonian Penal Code makes it an offence to commit 'any act of witchcraft, magic or divination liable to disturb public order or tranquillity, or to harm another person, property or substance, whether by taking a reward or otherwise'. Similarly, Tanzanian law criminalises the use of witchcraft against any person or property and related matters, such as possessing instruments to be used for witchcraft.[8] Other countries may have no specific written laws against witchcraft but punish it anyway: for instance, Saudi Arabia has a dedicated anti-witchcraft unit and prosecutes witchcraft,[9] although its criminal justice system reportedly lacks a legal definition of witchcraft and 'in almost all cases gives judges the discretion to define acts they deem criminal and to set attendant punishments'.[10]

As previously stated, where there is a widespread belief in witchcraft, violence and other inappropriate treatment against those accused of witchcraft is a social problem. In 2021, the United Nations Human Rights Council rightly passed a resolution condemning human rights violations associated with witchcraft accusations, urging states to take actions to deal with this matter.[11] To the extent that there is concern about beliefs in witchcraft today among those who do not believe in witchcraft, it tends to focus on this abuse and persecution of those who are accused of witchcraft.[12] This is understandable: abuse and persecution of those who are incorrectly believed to have tried to cause harm using supernatural powers is a significant ongoing problem, not just in non-Western countries but also increasingly in Western countries such as the United Kingdom. For example, in relation to the latter point, research by the Local Government Association in the United Kingdom 'has revealed that abuse of children based on faith or belief, which includes witchcraft, spirit possession and black magic, increased from 1,460 to 1,950 cases between 2016/17 and 2018/19'.[13] Some of this abuse occurs as a result of a child being perceived as a witch: for instance, in 2010, a London couple murdered a 15-year-old boy they accused of using witchcraft.[14] However, while this is an important issue, this article instead explores another important matter, how the criminal law in Western legal systems should deal with those who seek to use witchcraft to cause harm to others, because this area of criminal law scholarship has received little serious attention in Western legal scholarship and is thus under-developed.

One of the difficulties with discussing the matters at hand is that there is no commonly accepted definition of either witchcraft or witches. Given this lack of commonly accepted definitions,

[6] ibid.
[7] ibid.
[8] Witchcraft Act, Cap. 18 R.E. 2002.
[9] See e.g. Human Rights Watch, 'Saudi Arabia: Witchcraft and Sorcery Cases On The Rise' <https://www.hrw.org/news/2009/11/24/saudi-arabia-witchcraft-and-sorcery-cases-rise'> (accessed 10 August 2023).
[10] ibid.
[11] United Nations Human Rights Council, A/HRC/47/L.9.
[12] See e.g. HelpAge International, *Using the law to tackle accusations of witchcraft: HelpAge International's Position* (HelpAge International 2011) 10 and Sara Dehm and Jenni Milibank, 'Witchcraft Accusations as Gendered Persecution in Refugee Law' (2018) 28 Social and Legal Studies 202.
[13] William Eichler, 'Child abuse linked to faith rises by 'a third', council chiefs warn' <https://www.localgov.co.uk/Child-abuse-linked-to-faith-rises-by-a-third-council-chiefs-warn/48530> (accessed 10 August 2023).
[14] Press Association, 'Witchcraft Murder Couple Jailed for Life' *The Guardian* (London, 5 March 2012) <https://www.theguardian.com/uk/2012/mar/05/witchcraft-couple-jailed-for-life> (accessed 10 August 2023).

clarification is in order before proceeding further here. Pam Grossman, who lives in the United States and claims to be a witch, states: 'although people of all genders have been considered witches, it is a word that is now usually associated with women. Throughout most of history, she has been someone to fear, an uncanny Other who threatens our safety'.[15] However, for her, witches are not evil and the word 'witch' is a fluid term: 'I might use the word *witch* to signify my spiritual beliefs, my supernatural interests or my role as an unapologetically complex, dynamic female in a world that prefers its women to be smiling and still.'[16] In contrast to Grossman, this article adopts the following definitions used by the charity HelpAge International: witchcraft is 'the practice of causing harm by supernatural means'[17] and a witch is 'a person who is believed to cause harm by supernatural means.'[18] This article adopts these definitions as convenient terminology to discuss how criminal law should deal with those who try to cause harm by supernatural means.

Those who believe that witchcraft is scientifically impossible might be tempted to conclude that attempting to cause harm by supernatural means should not be criminalised because it is essentially harmless. As an English criminal law textbook puts it:

> [I]f D, who believed in voodoo, wished to kill V by sticking pins into an effigy of V, one may be inclined not to take the matter seriously – however convinced D may be of her diabolical powers. As a matter of principle, it might appear natural to dismiss any charge of attempted murder on the ground of impossibility. … As matters currently stand [in English criminal law], since impossibility is not a defence to attempt, one would have to rely on prosecutorial discretion.[19]

The authors of this textbook may be correct to state that, given the absence of reported English cases equivalent to the hypothetical one they cite involving voodoo, 'the employment of radically deficient means does not appear to attract prosecution, perhaps because it does not normally come to light or is not taken seriously when it does'.[20] As they point out,[21] in a study of lay perspectives conducted in the United States in the 1990s, the vast majority of participants thought that somebody who tried to use voodoo to commit murder should not be liable for attempted murder because there was 'no harm, no danger, or no criminal act'.[22] However, while witchcraft as it is defined in this article is scientifically impossible, some people try to cause harm by supernatural means and thus it is important to consider seriously whether such conduct should constitute a crime in Western legal systems and, if so, in what circumstances and what offences might be appropriate here. It is a mistake to state, as the aforementioned criminal law textbook does, that this is only important at a theoretical level because 'In practice this category [seeking an attainable end in a manner that will not attain success] is straightforward and

[15] Pam Grossman, 'Yes, Witches Are Real. I Know Because I Am One' *Time* May 30, 2019.
[16] ibid.
[17] HelpAge International (n 12) 4.
[18] ibid.
[19] John Child, Andrew Simester, John Spencer, Findley Stark, and Graham Virgo, *Simester and Sullivan's Criminal Law* (8th edn, Hart Publishing 2022) 368.
[20] ibid.
[21] ibid.
[22] Norman Finkel, Stephen Maloney, Monique Valbuena, and Jennifer Groscup, 'Lay Perspectives on Legal Conundrums: Impossible and Mistaken Act Cases' (1995) 19 Law and Human Behaviour 593, 601. See too Peter Westen, 'Impossibility Attempts: A Speculative Thesis' (2007-2008) 5 Ohio State Journal of Criminal Law 523, 536, reporting that his students think that 'the state would be abusing its power' if it declared that somebody who tried to kill using a voodoo doll were thereby convicted for attempted murder.

uncontroversial'.[23] As this article will demonstrate, it is not straightforward and, to the extent that there is a consensus about it in Western legal scholarship, it is based on a scientific misunderstanding.

Before going any further, it is necessary to explain that this is a live issue: that is, that people who try to harm others by supernatural means exist in contemporary Western jurisdictions and that this is more than a merely theoretical issue in such places. There is a common perception among those who do not believe in witchcraft that justice for the victims of those accused of witchcraft is a non-issue in the West either because nobody tries to practice witchcraft or because, if they do, they are harmless. As Adam Ashforth puts it:

> Is it possible to protect the rights of an accused witch while still securing justice for a community that sees itself at risk of occult assault? A reading of the recent literature on the subject of 'witchcraft violence' and human rights would suggest that the answer to these questions is a resounding No. From this perspective, the crimes of witches are imaginary, so the question of justice for their victims is moot.[24]

Contrary to the perspective adopted by many human rights activists, who take the position that those accused of witchcraft are invariably innocent victims who should not be put on trial, Ashforth argues in favour of fair trials for those accused of witchcraft in African countries where belief in the existence of witchcraft is common.[25] It is not clear that these trials would necessarily be criminal rather than civil.[26] Nonetheless, he believes that fair trials, with a commitment to appropriate evidence to support accusations of attempts to use witchcraft to cause harm, can allow 'all concerned to tell their stories in ways that facilitate the airing of grievances and dissipation of anger without causing serious harm to the accused, bringing about, in the process, a version of the restorative justice for which African jurisprudence is celebrated'.[27] He does not really explain why those who are accused of witchcraft might deserve any punishment, even if it does not cause serious harm to the accused, other than that they have sought to use witchcraft to harm others. However, importantly, he does acknowledge the reality that people who seek to use witchcraft exist.

It is important to understand that, in contemporary Western countries and elsewhere, some people try to harm others by using witchcraft because they believe in it, just as people try to use non-supernatural means to inflict harm. As George Conklin points out in discussing historical witchcraft accusations in England, miscarriages of justice did occur in this context but saying that nobody has ever tried to practice witchcraft because it does not work would be 'like saying that because alchemy is impossible there were no alchemists'.[28] In 2012, eBay banned the selling of 'the sale of curses, spells, hexes, magic, prayers, blessing services, magic potions, healing sessions and more'.[29] (It ostensibly did this because 'transactions in these

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[23] Child et al (n 19).
[24] Adam Ashforth, 'Witchcraft, Justice, and Human Rights in Africa: Cases from Malawi' (2015) 58 African Studies Review 5, 7.
[25] ibid 8-9,
[26] See ibid 20-24, discussing a civil defamation case.
[27] ibid 29.
[28] George Conklin, 'Witchcraft Trials in England: An Examination of Judicial Integrity' (1959) 45 American Bar Association Journal 938.
[29] Lyneka. Little, 'eBay Bans Magic Potions, Curses, Spells' <https://abcnews.go.com/blogs/business/2012/08/ebay-bans-magic-potions-curses-spells> (accessed 10 August 2023).

categories often result in issues that can be difficult to resolve'.[30]) Such as a ban would have been unnecessary if nobody had been purchasing and using these products and services. At the time of writing, there are numerous hexes, revenge spells and the like for sale elsewhere on English language websites and available for purchase in Western countries like the United Kingdom.[31] These include a product that will supposedly destroy an enemy's business, voodoo dolls, and a spell that will supposedly induce frog-like properties in its victim, such as a slimy appearance.[32] Some of the purchasers of physical products such as a voodoo doll may buy them as curios or stress relieving devices. However, it is impossible to imagine why people would buy services such as curses unless they genuinely wanted to use them to harm another person; they serve no other function. Further, since some people in Western countries and elsewhere believe in the power of voodoo and other forms of magic to cause harm, they may use it for this purpose. There is evidence that self-described 'white witch' Raquel Hutchinson, who attacked and killed her ex-husband with the help of her new partner in Australia in 2014, created a voodoo doll of her ex-husband and stuck pins in it and burned it before this attack.[33] Similarly, in 1989, two brothers pleaded guilty to conspiracy to murder in the United States, having plotted to use a voodoo practitioner to carry out the murder of a judge.[34] Likewise, Simon Dein, a lecturer in psychiatry and anthropology, reports of the contemporary case of Saleh, 'a 20-year-old Muslim man who was living in South London'[35] whose cousin one day reportedly cursed Saleh and 'told Saleh that he would die and there was little that he could do about it'.[36] According to Dein, 'Saleh rapidly lost interest in food and drink' and became so ill that he was compulsorily admitted to hospital.[37] Saleh rapidly recovered when his relatives provided him with the services of a practitioner of 'counter magic'. 'Through his knowledge of magic, he was able to remove the curse from him and Saleh rapidly improved'.[38] It is not necessarily clear precisely how widespread belief in witchcraft and witches is in Western countries. However, in 2012, the UK government perceived that such beliefs were widespread enough to merit a response to them and related beliefs in the form of a national action plan to stop child abuse in the name of faith or belief.[39] A related working group stated: 'there is sometimes a wider social or community consensus that witchcraft, for example, actually exists. Sometimes a faith leader or other influential figure is at the centre [where faith or belief is a factor in child abuse], promoting the belief and methods of resolving the supposed problem by harming children'.[40]

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[30] ibid.

[31] For instance, a search conducted on 26 July 2022 revealed dozens of such services and products on the website of a global online marketplace for independent creators that is better known for the sale of more mundane items, such as jewellery and handmade shelving.

[32] All available via the online marketplace mentioned in n 31 in a search conducted on 26 July 2022.

[33] See e.g. Lane Sainty, '"I Lost My Soulmate": The Family Of A Man Slain By His "White Witch" Ex-Wife Has Spoken Out' <https://www.buzzfeed.com/lanesainty/raquel-hutchison-sentence-white-witch-manslaughter> (accessed 10 August 2023).

[34] The Associated Press, 'Brothers Convicted of Plot To Kill Judge With Voodoo Ritual' <https://apnews.com/article/b40ef45f4220dd17a8840eecee80f2fb> (accessed 10 August 2023).

[35] Simon Dein, 'Psychogenic Death: Individual Effects of Sorcery and Taboo Violation' (2003) 6 Mental Health, Religion & Culture 195, 198.

[36] ibid. Dein states about this and another case state, ibid, 200: 'We can never be sure that anyone was actually performing sorcery, only that they believed it'. However, there would seem to be no reason to doubt Saleh's account that his cousin tried to harm him with a curse.

[37] ibid.

[38] ibid199.

[39] See the National Working Group on Child Abuse Linked to Faith or Belief, *National Action Plan to Tackle Child Abuse Linked to Faith or Abuse* (2012).

[40] ibid para 7.

In a book on the history of witchcraft in modern Britain, historian Thomas Waters seems to suggest that those casting spells or hexes in contemporary Britain and the United States are engaging in a private and harmless activity which should not lead to their criminal liability. He states: 'Like some of their counterparts in America, they might sometimes cast hexes or binding spells on politicians they dislike. But, not being a believer in the reality of magic, I don't think that sort of thing does much harm.'[41] As far as legal regulation is concerned, Waters' focus seems to be elsewhere:

> Outside the realm of private spell-casting, however, witchcraft belief often inspires unacceptably destructive behaviour. Egregiously expensive curse removal services and scam letters or emails promising vulnerable people protection from black magic are only its lesser harms. Across the world, in the name of combating witchcraft, innocent people are heckled, humiliated, assaulted, mistreated and murdered.[42]

Nonetheless, the matter is not this simple. As we will see, suggesting that those who seek to harm others by supernatural means should not be punished simply because magic does not work overlooks a lively theoretical debate about the effect of mistaken beliefs in relation to the criminal law on attempt. Further, it overlooks the possibility that attempting to harm others by supernatural means may cause harm by psychological means where the intended victim is aware of this attempt and believes in witchcraft. Waters acknowledges this possibility elsewhere, stating that 'witchcraft can kill'.[43] However, overlooking the possibility of genuine harm here seems to be the established position in relevant contemporary Western legal analysis. Antony Duff, a leading criminal law theorist, seemingly overlooks it in his generally meticulous study of the law on attempt, simply concluding that it is impossible to kill by sticking pins into a wax image.[44] In their 1980 report on certain inchoate offences, the English Law Commission likewise also proceeded on this basis and seemingly thought it best for the prosecution and jury to do whatever they thought appropriate in relation a defendant who tried to kill using voodoo: 'we think that discretion in bringing a prosecution will be sufficient answer to any problems raised by such unusual cases; but even if a prosecution ensued, it may be doubted whether a jury would regard the acts in question as sufficient to amount to an attempt.'[45] This conclusion that attempts to practice witchcraft cannot possibly cause harm is commonplace in Western scholarship[46] but inappropriate: as will be explained in more detail shortly, our beliefs have the power to harm us[47] and evidence indicates that voodoo and similar

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[41] Thomas Waters, 'The Trouble With Witchcraft Today' *Big Issue North* (Manchester, 2 September 2019).

[42] Thomas Waters, *Cursed Britain: A History of Witchcraft and Black Magic in Modern Times* (Yale University Press 2019) 264.

[43] Thomas Waters <https://twitter.com/drthomaswaters/status/1163374931192795136> (accessed 10 August 2023). He adds, ibid: 'The fear of being magically attacked causes an adrenaline surge, which can damage the heart, lungs & gut.'.

[44] Antony Duff, *Criminal Attempts* (Oxford University Press 1997) 380. 'Overlooks' is an appropriate word here, since a scientific explanation for 'voodoo death' was proposed by Walter Cannon decades beforehand, leading to debate in the scientific community: Walter Cannon, 'Voodoo Death' (1942) 44 American Anthropologist 169. However, it must be acknowledged that Duff's analysis of criminal attempts does not focus on witchcraft but rather mentions it in passing in dealing with a wide range of complex issues.

[45] Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com 102, 1980), para 2.97.

[46] For a further example, see Andrew Ashworth, ''Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law'(1988) 19 Rutgers Law Journal 725, 764, stating: 'although one may start from the proposition that the defendant has set out to violate a protected interest, his belief lies so remote from ordinary understanding that it is hard to regard it as wicked rather than foolish'.

[47] For a lay summary, see David Robson, 'The Contagious Thought that could Kill You' <https://www.bbc.com/future/article/20150210-can-you-think-yourself-to-death> (accessed 10 August 2023).

rituals can even kill those who believe in witchcraft.[48] Having said that, this does not necessarily mean that trying to use witchcraft to harm others should be criminalised.

The theoretical framework to determine whether a particular form of conduct should be criminalised

As in a chapter the author co-wrote with Claire de Than,[49] the starting point to determine whether the conduct in question should be criminalised is the methodology recommended by Paul Roberts. His view is that:

> In order to determine whether a particular form of conduct should be criminalized it is always necessary to pose two quite separate questions:
> (1) Is there a good (moral) reason to justify extending the criminal law to this particular conduct?
> (2)Should this conduct be criminalized all things considered (with particular reference to other moral principles and the pragmatics of law enforcement)?[50]

The first stage requires a justification 'not just for generalized state interference with the lives of individuals, but for that specific form of state regulation represented by criminal sanctions'.[51] The goal here is not just to consider any principles that support criminalisation but also to consider any that suggest otherwise; this first stage must consider any relevant conflicts between competing philosophical approaches.[52] If a proposed criminal prohibition 'passes muster at the level of principle it is necessary to consider whether there is a compelling case for criminalisation all things considered'.[53] This requires consideration of matters such as 'general principles of law-making, criminal procedure, and the ethics and practicalities of law enforcement'.[54] As this article will explain, the last matter is particularly relevant when considering how the law should deal with those who attempt to harm others by using witchcraft, since there is a danger here of the law reinforcing beliefs that some people have magical powers that they use to harm others and thereby encouraging the abuse of those who are perceived to be witches.

As argued elsewhere, Roberts' framework is useful in determining whether conduct should be criminalised.[55] However, it is necessary to adapt it when considering not just '*whether* conduct should be criminalised, but also … *how* the law should deal with cases where criminalisation

[48] See David Lester, 'Voodoo Death' (2009) 59 Omega 1, 14, concluding: 'it seems no longer meaningful to question the existence of voodoo deaths.'
[49] Jesse Elvin and Claire de Than, 'Consent to Death' in Alan Reed, Chris Ashford and Nicola Wake (eds), *Consent and Control: Legal Perspectives on State Power* (Cambridge Scholars Publishing 2016), 50.
[50] Law Commission, *Consent in the Criminal Law* (Law Com CP 139, 1995), C 18, reflecting the tenor of the advice that Roberts gave to the Commission about criminal law and consent. He advocates for this approach in Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 Oxford Journal of Legal Studies 389.
[51] Roberts 'The Philosophical Foundations of Consent in the Criminal Law' ibid 401.
[52] ibid.
[53] ibid.
[54] ibid. Appendix C of the Law Commission's 1995 consultation paper elaborates on these matters (n 50).
[55] Elvin and de Than (n 49) 54-55.

is appropriate'.[56] As the author has stated elsewhere with de Than, 'if criminalisation is merited, it is also important to choose between different possible offences in imposing liability'.[57] Thus, it is necessary to add a third question to Roberts' model 'if the answer to each of the first two is affirmative: How should this conduct be criminalised, all things considered?'[58] For the purposes of this article, this third question raises the issue of whether there is need for a specific crime or set of crimes to deal with those who try to harm others using witchcraft or whether general offences and forms of liability should simply be applied to this phenomenon.

Is there good moral reason in principle to extend the criminal law to those who try to harm others using witchcraft?

In considering the issue at hand, it is important to draw a distinction between cases where D has simply tried to cause harm by supernatural means and those where D has succeeded in causing harm, albeit through psychological means, having instead tried to inflict it via supernatural means such as a spell or voodoo. This is relevant because it is conventional for criminal law to take account of the result of D's conduct in determining issues of liability rather than simply look at what D intended and D's conduct. This article is premised on the assumption that the existence of such 'result' crimes is legitimate; whether they should exist is a complex matter of general relevance that cannot be examined here in an article focused on witchcraft.

Where D intentionally tried to cause harm to V without any justification or acceptable excuse and succeeded in causing harm, there is moral reason to criminalise their conduct where they have harmed interests that the law legitimately seeks to protect. Punishing such conduct may deter it. It may also prevent it by incapacitating or reforming the offender. As the Law Commission points out, it is a 'generally accepted proposition that one of the main aims of the criminal law is to punish, to deter and thus to prevent the unlawful causing of harm ("the harm principle")'.[59] The harm principle can be traced back to John Stuart Mill, who famously wrote: 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others'.[60] One does not need to accept that this is the only purpose for which criminal law can be used in order to accept that it is a potentially valid one. Moreover, where D intentionally harmed interests that the law legitimately seeks to protect without any justification or acceptable excuse, D was at fault and thereby morally deserves punishment: 'ie hard treatment which is peculiarly destructive of autonomy, administered through procedures specially designed to communicate the sting of blame or censure'.[61]

[56] ibid 55. As stated elsewhere, this is not a criticism of Roberts' theoretical model. 'His framework is not designed to deal with such matters but rather focused upon a single, albeit extremely complex, issue: whether conduct should be criminalised'(ibid).
[57] ibid.
[58] ibid 56.
[59] Law Commission, *Conspiracy and Attempts* (Law Com CP 183, 2007), para 1.5.
[60] John Mill, *On Liberty* (first published 1859, Cambridge University Press) 13.
[61] Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (n 50) 401.

At this point, it is important to look at what is meant by interests that the criminal law legitimately seeks to protect in this context and how those who try to use witchcraft can harm them. Attempting to harm others by supernatural means can produce genuine personal injury by non-supernatural means. The psychological and physical harm so produced can infringe interests that the criminal law should seek to protect i.e., physical and psychological wellbeing. Those who believe in witchcraft can suffer psychological illness and perhaps even death if they believe that somebody has directed it against them. People who believe that they have no control over the situation because they are the victim of witchcraft may give up hope and sometimes even die. They are examples of what the medical community sometimes calls the 'nocebo effect' because it is the opposite of a placebo effect. There is nothing supernatural about such deaths. On the contrary, there are various potential scientific explanations. As Dein puts it in relation to some cases of so-called 'voodoo death': 'Although the mechanisms for this are poorly understood, it seems that perfectly healthy people rapidly give up and stop eating and drinking and dehydration leads to death'.[62] Further, as Dein states, 'Evidence exists that severe hopelessness, helplessness and despair may increase morbidity and mortality'.[63] Dein also points out that those who believe that they are target of witchcraft may additionally suffer from psychiatric illness such as depression.[64] Criminal law rightly seeks to punish those who intentionally cause death or personal injury without justification or an acceptable excuse. It might be difficult if not impossible for the prosecution to establish causation in certain cases where D tried to injure or kill V using witchcraft. However, this will not always be so, as perhaps with the case involving Saleh discussed above.

As for cases where D failed to cause harm to V, the harm principle can also potentially justify criminalisation here. So much has been written about attempt, particularly in relation to impossibility,[65] that it cannot all be covered here. However, as the Law Commission puts it, 'It is now a theoretical commonplace that the harm principle extends the scope of justification for criminalisation to at least some kinds of acts that are aimed at causing harm or that pose serious risks of causing harm, even though those acts may not be harmful in themselves'.[66] Further, where D intentionally tried to cause harm to V without any justification or acceptable excuse, the mere attempt is morally blameworthy and potentially merits punishment. Having said that, it is also rightly generally accepted that '…as the form of criminal liability moves further away from the infliction of harm, so the grounds of liability should become more narrow'.[67] In addition, there is the issue of impossibility to consider here, since in many cases it will be impossible for D to harm V by the means they have selected and this arguably raises special considerations.

In turning to 'mere' attempts to cause harm, let us start by considering in more detail how the harm principle, in combination with ideas about moral blameworthiness, can potentially justify criminalisation here. It is a common view that the criminal law should contain a general form of inchoate liability dealing with attempt to both prevent harm and punish those who deserve it. As the Law Commission put it:

[62] Dein (n 35) 196.
[63] ibid 197.
[64] ibid 200.
[65] In *Anderton v Ryan* [1985] AC 560, 581 Lord Bridge stated that 'there is no more fertile field of legal controversy in the criminal law than that concerned with attempting the impossible'.
[66] Law Commission (n 59) para 1.5.
[67] Andrew Ashworth, *Principles of Criminal Law* (5th edn, Oxford University Press 2006) 423, quoted with approval by the Law Commission, ibid, para 1.6.

> The general inchoate offence of attempt may be justified not only by the desirability of imposing criminal liability commensurate with the moral culpability of D's conduct and the concomitant risk of harm associated with it, but also on two further grounds:
>
> (1) the desirability of affording the police the opportunity to intervene in good time so as to prevent harm; and
>
> (2) the deterrent effect criminal liability has on potential offenders.[68]

This view is held by many legal scholars. For instance, Duff states that the criminal law should seek to prevent such harm and that it 'would be a less effective deterrent [if it did not punish attempt]: people would be more likely to embark on criminal enterprises and to carry them through'.[69] Furthermore, Duff adds: 'in so far as punishment also aims at reform or incapacitation, such a system would fail to capture many who merited such coercive attention'.[70] There are two ways in which harm could occur following an attempt to use witchcraft, only one of which is commonly discussed in contemporary Western analysis considering how the law on inchoate offences should apply to such an attempt. First, the attempt to use witchcraft could succeed in producing personal injury by non-supernatural means in the manner described above and documented in medical literature. This is not a possibility that seems to be recognised in the contemporary Western English language legal scholarship on this subject, despite the wealth of relevant medical evidence. It was acknowledged in the South African case of *R v Davies*, where Schreiner J.A. said that 'an attempt to kill by incantations'[71] might 'be a real danger to life. Fears of the effect of the incantation might itself cause death to the victim …'[72] However, although the Law Commission noted this judicial observation in their 1980 report dealing with certain forms of inchoate liability,[73] they did not seem to take it seriously and instead discussed how the criminal justice system should deal with a case 'where a person in the erroneous belief that he can kill by witchcraft or magic takes action-such as sticking pins into a model of his enemy-intending thereby to bring about his enemy's death'.[74]

The possibility that an attempt to use witchcraft could succeed in producing personal injury by non-supernatural means can in principle justify criminalisation of such an attempt. Moreover, there is a strong moral argument for liability even where it would be factually impossible for D to succeed in completing their goal by their chosen means: in this context, that would be where V is unaware that D is trying to harm them by supernatural means and/or does not believe in witchcraft. In *Haughton v Smith*, the House of Lords mistakenly held that D 'could not be convicted of attempting to do that which it had not been possible for him to do'[75] because they thought that to take the alternative approach would be to 'punish people for their guilty intention'.[76] However, this would not be punishing people for their mere intentions; it would be punishment for their conduct as well as their commitment to a particular goal. As Duff asks, 'Why should an agent's stupidity, or cognitive incompetence, save him from conviction for a criminal attempt if he intended to commit a crime and did what he thought would achieve its

[68] Law Commission (n 59) para 14.8.
[69] Duff (n 44) 133.
[70] ibid 134.
[71] *R v Davies* 1956 (3) S.A. 52 (A.D.), 63.
[72] ibid.
[73] Law Commission (n 45) 52.
[74] ibid.
[75] [1975] AC 476, 502, per Lord Morris.
[76] ibid 500.

commission?'[77] Those who attempt to cause harm through witchcraft may turn to other, more efficacious methods if they are not stopped and they are as morally deserving of punishment as those who chose a method that could be effective.[78]

There are some related matters of principle that require consideration here. One issue that has received a significant amount of attention in legal scholarship is how criminal law should deal with attempts to commit what in law is not a crime. In English law, the current position here is that D will not be liable for such an attempt, as illustrated by *Taaffe*.[79] As Duff puts it, those who adopt what he calls a 'subjectivist' position in relation to attempts and focus on D's thought processes might say that D did not 'display a willingness to injure any … substantive interest which the law actually protects, or to do anything which the law otherwise actually prohibits'[80] and thus that D does not deserve punishment. However, Thomas Weigend argues that the law on attempt is needed to protect the 'public peace'.[81] For him, the harm that might be caused by an attempt 'is the apprehension and fear of the victim as well as the alarm of the community about the fact that someone has set out to do serious damage to a fellow citizen and to break the accepted rules of social life'.[82] This would make potentially causing 'fear' and 'alarm' in the average person a ground for criminalisation. Weigend's proposed approach in relation to attempting the impossible is: 'An attempt which cannot succeed is punishable if the offender's conduct, seen in the light of his statements accompanying the acts he deemed necessary for achieving his purpose, would cause alarm, or apprehension to an average observer'.[83]

This approach proposed by Weigend is not necessarily straightforward to apply in practice, as he acknowledges.[84] Further, its outcome would vary between societies. Adjudged in the context of contemporary United States society, he states that attempts to harm using witchcraft should not be criminalised because they 'would not impress the average, moderately enlightened observer as being a serious menace to his feeling of safety'.[85] Nonetheless, a fundamental flaw with Weigend's approach is that, at he acknowledges, matters are determined entirely by reference to the court's 'perception of the feelings of the community'.[86] He claims that this may be a virtue as much as a flaw on the grounds that it is what is necessary to restore the 'social peace' that may be harmed by an attempt.[87] However, it is not consistent with a commitment to human rights: for example, because it could criminalise an attempt to conduct a religious ceremony simply because those of another religion, constituting the vast majority of the community, would find manifestation of this other religion alarming.[88] It allows no

[77] Duff (n 44) 85.
[78] However, see Sarah Christie, 'The Relevance of Harm as the Criterion for the Punishment of Impossible Attempts' (2009) 73 Journal of Criminal Law 153, arguing for a distinction between cases where there is 'the potential to cause imminent harm, as opposed to future, speculative harm' and applying this distinction to two different kinds of attempt to cause harm by supernatural means. This is discussed in more detail below.
[79] *Taaffe* [1984] AC 539.
[80] Duff (n 44) 159.
[81] Thomas Weigend, 'Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible' (1977) 27 DePaul Law Review 231, 264.
[82] ibid.
[83] ibid 268-269.
[84] ibid 269.
[85] ibid 270.
[86] ibid 272.
[87] ibid.
[88] This would be contrary to Articles 9 and 14 of the European Convention on Human Rights in countries to which this Convention applies. The former protects freedom of thought, conscience and religion; the latter prohibits discrimination on any grounds in relation to other Convention rights. As the European Court of Human Rights

exceptions. Of course, it would be possible to modify this approach to allow for exceptions where criminalisation would be inappropriate, but this would seem to logically lead to an approach where an attempt would be criminalised only because D displayed a willingness to injure a substantive interest which the law legitimately protects. It is not legitimate to criminalise an attempt to do something where succeeding in doing so should not be a crime.

Not all interests are sufficiently important to justify intervention by the criminal justice system: for example, criminal law should not attempt to protect people from simply developing 'a sudden fascination with insects', an effect promised by the seller of a frog curse spell for sale on the internet,[89] even if it were possible to cause such a condition. Such a fascination could be a symptom of a psychiatric illness but it is not a form of personal injury in itself and thus inflicting it would be insufficiently serious to merit criminal sanction per se. In turn, attempting to inflict it should not be criminalised. It might seem that there is a strong argument for criminalising this kind of conduct if D acted in a particular way that they believed was criminal; this could be done by creating 'a new offence of "contempt of law", consisting in acting in a way that one believes to be criminal'.[90] In such a case, D's willingness to break the law arguably shows that D may be a future threat 'to interests that the law seeks to protects'.[91] Nonetheless, the problem with imposing liability on this basis is that it is too speculative and D's conduct too removed from a substantive offence. We cannot assume that those who are willing to act in a particular way that they mistakenly believe to be criminal will be willing to act against an interest legitimately protected by the law.[92]

Some theorists argue, or seem to argue, that an attempt should not be punished unless it was sufficiently likely to be successful or perceived as sufficiently likely to be successful by citizens of the relevant jurisdiction or by a hypothetical reasonable person. For instance, Peter Westen argues that D should 'not be punished unless citizens of the jurisdiction that enacted the criminal statute at issue regard the actor's conduct as a threat to interests that the statute seeks to prevent'.[93] He thinks that it is going too far to impose criminal law where this is not the case. 'It ought to require as a condition of criminal responsibility that an actor's conduct actually affect the people of the state by either infringing or threatening to infringe interests that they seek to protect by means of the statutes at hand. It ought to require that an actor's conduct matter to its citizens by "unnerving" them'.[94] He states that whether D's conduct is a threat to interests that the criminal law seeks to protect 'is a matter of citizen psychology';[95] i.e., that it depends upon the beliefs of citizens about factual matters. He claims:

> superstitious voodooists in the United States who stick pins in dolls with intent to kill are widely regarded within the United States as nonculpable because, despite possessing guilty minds and willingness to act on it, their conduct leaves citizens of the United States widely not convinced that they would have killed, except under counterfactual circumstances that

pointed out in *Şahin v Turkey* (2007) 44 EHRR 5, para. 109: 'Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position'.

[89] See n 31 and n 32.

[90] Duff (n 44) 157 (subsequently rejecting such an approach).

[91] Westen 'Impossibility Attempts: A Speculative Thesis' (n 22) 542.

[92] ibid 543.

[93] ibid 560.

[94] ibid 548, referring to George Fletcher, *Rethinking Criminal Law* (Little, Brown, 1978) 472.

[95] ibid 560.

> citizens of the United States do not fear could have obtained, i.e., voodoo pins being lethal.[96]

Importantly, however, Westen qualifies his reference to citizen psychology by indicating that triers of fact should represent informed opinion of citizens of the jurisdiction so that liability does not turn on uninformed beliefs; i.e. ignorance of factual matters.[97] This raises the possibility of the 'nocebo effect' justifying the imposition of liability in a case where D tried to use witchcraft to harm V: D could have caused a personal injury if the intended victim had been aware of D's conduct and believed in witchcraft. It also seems to render the reference to 'citizen psychology' a fiction where citizens generally are not informed about relevant factual matters, as may be the case with Western citizens and the 'nocebo effect' relating to attempts to use witchcraft. Moreover, it raises the difficult question of precisely what amounts to a sufficient threat to the interest that the criminal law to justify punishment. Westen states that we can punish D 'for what we believe they would have done under counterfactual circumstances that we know did not exist but that we fear could have occurred'.[98] However, it is unclear what is meant by counterfactual circumstances that we fear could have occurred here. Westen seems to think that the only relevant counterfactual circumstance in relation to an attempt to kill with voodoo is voodoo pins being lethal, but what about the possibility that, if the circumstances had been different, D might have lost their belief in voodoo and tried to kill using a conventional method?

Similarly to Westen, Duff argues that D should not necessarily be liable for attempt where D has not made a 'serious attempt'; i.e. where 'the actions through which the agent hopes to actualize an undoubtedly criminal intention might be such that they are (to any reasonable person) obviously and utterly unsuitable as means to that criminal end'.[99] His point here is that the conduct should not be criminal where there is no chance of it infringing an interest protected by the law. According to him, sticking pins into a wax image to kill is an example of an action that does not engage seriously with the world.[100] He claims that such radically misguided actions do not deserve punishment. 'We would not be alarmed by them; nor be concerned on behalf of their intended victims; nor see reason to intervene to foil the attempt; nor be relieved at its failure; nor think that, given what he did, it was lucky that he failed'.[101] There are two problems with Duff's approach here. First, as outlined above, it is factually incorrect to assume, as he does, that attempts to use witchcraft cannot cause personal injury and even death. Secondly, Duff's approach is based upon the idea that choosing a method that has no chance of succeeding renders conduct conceptually laughable rather than wicked.[102] However, as stated above, those who chose a method that has no chance of success might try again, choosing more effective methods if they are not stopped. In this sense, attempts to infringe legally protected interests can be serious even if they have no chance of succeeding.

On the face of it, a better approach might be to only impose liability for attempt where there 'is the presence of the potential to cause imminent harm, as opposed to future, speculative harm'.[103] Sarah Christie, who makes this argument, illustrates it by reference to a distinction

[96] ibid 560-561.
[97] ibid 564.
[98] ibid 549.
[99] Antony Duff (n 44) 380.
[100] ibid.
[101] ibid.
[102] ibid 383.
[103] Christie (n 78).

between two cases relating to voodoo, one where D managed to drive a pin into a wax image and a second where D could not accomplish this because the wax was too hard.[104] She asks: 'if the object of punishing failed attempts is to deter those attempters from becoming full-blown criminal actors, what harm is there in allowing … [the latter defendant] to continue with his misapprehension, and carry out a second attempt to kill …, having perfected his voodoo technique?'[105] Christie assumes that the answer to this question is 'none'. However, like other legal analysis considered above, this overlooks the 'nocebo effect'. Further, it assumes that somebody who assesses themselves as having failed to kill using voodoo because they are not very good at it will try to improve their technique with voodoo before adopting 'more conventional (and therefore potentially successful) means, which will have a real probability of causing harm'.[106] There is no reason to believe that, in reality, this is necessarily the case; for example, D may simply decide that it is easier to use a weapon such as a knife or a gun than it is to learn how to use voodoo effectively. Either way, those who seek to use witchcraft to cause harm to others are not necessarily as far removed from causing personal injury as analysis like Christie's would suggest. Their conduct, coupled with an intention to infringe an interest that the criminal law legitimately seeks to protect and the potential for them to cause such harm, in principle justifies criminalisation unless they have an excuse.

There are no philosophical arguments that can justify trying to harm others except in limited circumstances, such as self-defence. However, it is important to consider whether there might be a philosophical perspective that could excuse trying to cause unjustified harm through supernatural means. Duff suggests that 'Those who base liability on the culpable character of the agent's active choice'[107] can dispose of such cases simply by concluding that D's beliefs 'are so radically non-rational that we cannot treat him as a responsible agent'.[108] Nonetheless, a problem with this possible approach is that such a disposal would seem to be based on ignorance of the 'nocebo effect'. D is mistaken about the laws of nature but not as mistaken as Duff's account suggests here: it is impossible to cause harm by supernatural means but trying to use witchcraft to cause personal injury can succeed if the intended victim is aware of D's conduct and believes in witchcraft. Moreover, criminal responsibility requires that D has the capacity to control their conduct[109] and those who mistakenly believe that they can cause harm by supernatural means do not lack the capacity for rational thought. '[I]f I desire X and believe that action A will lead to X, then to A is rational, and not to A is irrational (assuming, of course, no other competing desires or beliefs that might interfere, and so on)'.[110]

Should trying to cause harm by supernatural means be criminalised, all things considered?

[104] ibid 160.
[105] ibid 163.
[106] ibid 161.
[107] Duff (n 44) 165.
[108] ibid.
[109] This is the conclusion reached by the Law Commission, *Criminal Liability: Insanity and Automatism* (Discussion Paper 2013), para A.60. It is adopted here over alternative conceptions of responsibility for the reasons outlined in Appendix A of this Law Commission discussion paper.
[110] Carl Elliott, *The Rules of Insanity* (State University of New York Press 1996) 117.

As Roberts argues, it is not necessarily appropriate to translate 'Even moral prohibitions with firm philosophical foundations' into criminal laws.[111] As he states, the issue needs to be considered in the round, taking account of matters such as 'the ethics and practicalities of law enforcement which might block the progress of a principled prima-facie case for criminalization into criminal laws on the statute book'.[112] There are various complications that need to be considered here.

First, there is the possibility that criminalisation could reinforce the misperception that witchcraft is real, particularly where D is charged with a 'result' crime rather than an inchoate offence. This could contribute to extra-legal violence and other abuse against those who are perceived as witches. This point about the possibility criminal law reinforcing undesirable beliefs about witchcraft has been made in relation to the Tanzanian Witchcraft Act. Simeon Mesaki states: 'In its 2008 human rights report, the Tanzania Legal and Human Rights Centre (2009) concludes that belief in witchcraft in the country is reinforced and legitimized by the existence of the Witchcraft Act which is a reflection of the societal perception that witchcraft is undesirable and it is necessary to punish those who practice witchcraft'.[113]

On the other hand, it can be argued that the criminal law has little effect on the prevalence of belief in witchcraft and, further, that punishing those who seek to use witchcraft to cause harm to others could reduce extra-legal violence against those perceived as witches. In relation to the former point, it needs to be noted that legal systems that take the position that witchcraft does not exist have not proved effective in preventing widespread belief in its reality. For instance, as John Cohan points out, 'a significant portion of Africans believe in the efficacy of witchcraft to produce harm and fear being targeted by its practitioner'[114] and this remains the case even in African countries where the statutory language of witchcraft related laws 'presumes that witchcraft does not exist, just as was the case in colonial days when administrators assumed that witchcraft was a falsehood'.[115] In relation to the idea that punishing those who seek to use witchcraft to cause harm to others could reduce extra-legal violence against those perceived as witches, it is important to bear in mind that, as Ashforth puts it, 'violence against and mistreatment of suspected witches reflect a failure of institutions of security and justice'.[116] The point here is that people are less likely to use violence against those they perceive to be witches if they believe that the legal system deals effectively with those who try to use supernatural means to cause harm. 'Conducting witchcraft trials could help reduce the amount of witchcraft violence, for anxiety may well be appeased if people know that their fears are no longer being ignored'.[117]

In conclusion, because it seems that criminal law has little effect on the prevalence of the belief in witchcraft and punishing those who seek to use witchcraft to cause harm to others could help to reduce the amount of witchcraft-related violence, the possibility that criminalisation could reinforce the misperception that witchcraft is real does not mean that trying to cause harm by supernatural means should not be criminalised.

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[111] Roberts (n 50) 402.
[112] ibid 401.
[113] Simeon Mesaki, 'Witchcraft and the Law in Tanzania' (2009) 1 International Journal of Sociology and Anthropology 132, 137. This report does not seem to be currently available on n the website of the Tanzania Legal and Human Rights Centre, which contains human rights reports from 2014 onwards.
[114] John Cohan, 'The Problem of Witchcraft Violence in Africa' 44 (2011) Suffolk University Law Review 803, 804.
[115] ibid 824.
[116] Ashforth (n 24) 9.
[117] Cohan (n 114) 870.

The second complication that needs to be examined here is whether criminal law is actually needed to prevent the unlawful causing of harm by the 'nocebo effect'. It might seem reasonable to conclude that this is the case: as noted above by the Law Commission,[118] it is generally accepted that deterrence and the prevention of unlawful harm is one of the main purposes of criminal law. However, it is important to consider whether civil law might be sufficient; i.e. whether it can act as an effective deterrent and whether there is a need for the 'hard treatment' associated with the criminal justice system.

Empirical evidence relating to tort law as a deterrent is lacking in relation not only to the specific conduct at hand but also in relation to the deterrence effect of intentional torts and tort law more generally. As Jonathan Klick and John MacDonald put it in a 2020 article, 'To the extent anyone has examined the empirical effect of civil liability on individual behavior, the focus has been entirely on unintentional or accidental harms'.[119] Peter Cane and James Goudkamp may be correct to conclude: 'other things being equal, it is easier to deter deliberate conduct by the threat of a tort action for damages than it is to deter merely negligent conduct'.[120] As they point out, negligent conduct may be 'caused by inadvertent failure of observation and perception, by faulty judgment, by lack of basic skills and other factors that the threat of liability may be unlikely to deter'.[121] However, this does not tell us that tort law is an adequate deterrent of intentional torts. Klick and MacDonald's research in contrast, conducted in the United States, 'provides evidence of deterrence and rational decision making among the group of individuals committing some subset of murders' there.[122] They tentatively conclude that there is 'evidence that reducing liability exposure through the passage of noneconomic damage caps increases the murder rate by more than 5 percent'.[123] This is an interesting finding because they report that it is contrary to conventional wisdom, stating: '[t]here is a belief among legal scholars that intentional torts do not generate much litigation; therefore, the story goes, no one will be deterred by liability for intentional torts'.[124]

Notwithstanding Klick and MacDonald's study, however, it seems that the possibility of having to pay compensation in tort law will be insufficient to deter people from trying to harm others in many cases; for instance, because it does not carry the stigma of a criminal record and the threat of potential imprisonment. Klick and MacDonald do not argue that criminal law is unneeded in relation to murders or attacks on the person more generally in the United States or anywhere else. On the contrary, they state that tort law 'appears to affect criminal decision-making on the margin'.[125] In other words, they conclude that it does not generally affect criminal decision-making. It is also important to bear in mind that Klick and MacDonald's research was conducted in a country that is widely perceived to have a 'compensation culture'[126] and to be a place where people live in fear of being sued.[127] While this perception

[118] Law Commission (n 59).
[119] Jonathan Klick and John McDonald, 'Deterrence and liability for Intentional Torts' 63 (2020) International Review of Law and Economics 1.
[120] Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 406.
[121] ibid 407.
[122] Klick and McDonald (n 119) 5.
[123] ibid.
[124] ibid 2.
[125] ibid 5.
[126] For critical analysis of this perception, see D. Rhode, 'Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution' 54 (2004) Duke Law Journal 447.
[127] See Rhode, ibid 462, stating: 'some concern is warranted but the extent of the problem often is overstated'.

that there is a 'compensation culture' currently exists in at least some other Western countries, such as the United Kingdom and Australia,[128] it not a universal constant in the West.[129] Thus, Klick and MacDonald's findings about a potential deterrent effect of tort law in relation to murder may not be applicable to other Western jurisdictions even if their research is revealing in the United States context.

While civil law is insufficient to deter people from trying to harm others in many cases, it is also important to consider to what extent criminal law affects decision-making and whether criminalising trying to harm others with witchcraft and causing harm through the 'nocebo effect' could damage the criminal justice system by morally discrediting it. To what extent criminal law affects decision-making is the subject of extensive debate. On this matter, Paul Robinson states:

> Potential offenders commonly do not know the legal rules, either directly or indirectly, even those rules that have been explicitly formulated to produce a behavioral effect. Even if they know the legal rules, potential offenders commonly cannot or will not use such knowledge to guide their conduct in their own best interests, such failure stemming from a variety of social, situational, or chemical influences.[130]

He concludes:

> Given the rarity of situations in which the prerequisites of deterrence are present and of nonnegligible effect, the standard use of deterrence analysis to formulate criminal law doctrine seems wildly misguided. At the very least, deterrence analysis ought to be considered in criminal law debate only after a showing that the deterrence-prerequisite conditions might actually exist.[131]

This is not the place to resolve the debate about the deterrence effect of criminal law or related debates about its ability to incapacitate and reform offenders. However, it is important to note that Robinson does not give up on the potential deterrent effect of criminal law. Rather, what he proposes is that criminal law should harness the power of normative social influence and develop rules generally 'derived from the shared intuitions of justice of the community that is to be governed by that law— empirical desert'.[132] Part of his argument is that community conceptions of justice focus on the blameworthiness of the offender rather than on matters such as incapacitation or deterrence.[133] He believes that focusing on community conceptions of justice will enable criminal law to gain 'access to the power and efficiency of stigmatization'[134] and avoid 'the resistance and subversion inspired by an unjust system'.[135] According to him, this approach 'gains compliance by prompting people to defer to it as a moral authority in new or grey areas (such as insider trading), and it earns the ability to help shape powerful societal

[128] See e.g. James Goudkamp, 'The Young Report: an Australian perspective on the Latest Response to Britain's "Compensation Culture"' (2012) 28 Professional Negligence 4.
[129] See e.g. Keith Patten, 'Compensation, Culture and the Mythologising of Justice' 39 (2020) Civil Justice Quarterly 163, stating in relation to the English legal system, 't is a quarter of a century or more since the issue of compensation culture began to enter mainstream discourse'.
[130] Paul Robinson, *Distributive Principles of Criminal Law: Who Should be Punished How Much* (Oxford University Press, 2008) 22.
[131] ibid 71.
[132] ibid 248.
[133] ibid ch 8,
[134] ibid 140.
[135] ibid.

norms'.[136] Notwithstanding Robinson's reference to new or grey areas, one might wonder what criminal law would add to societal norms if it largely just reflected community conceptions of justice. Robinson claims: 'Studies suggest that increasing the law's moral credibility can enhance its compliance power, but the studies are preliminary and many important questions remain unanswered'.[137] This is not entirely reassuring but Robinson makes the valid point that '[W]hile one cannot know with certainty the degree of importance of the criminal law's moral credibility, one can be reasonably sure that it has some'.[138] As he says, 'a corollary is that one ought not tolerate any deviation from empirical desert or any other practice that may undermine moral credibility, without a clear and significant benefit from such deviation'.[139]

What is the implication of all of this for the issue at hand? Robinson states that criminal law should generally reflect community standards as revealed by studies that seek to discover 'people's shared views about justice, which commonly are not the product [sic] reasoning but the result of intuition'.[140] According to him, these 'studies do not ask people about abstract factors but rather have them "sentence" a variety of carefully constructed cases to see what factors in fact influence people's punishment judgments'.[141] The study of lay attitudes conducted in the United States in the 1990s, discussed above, arguably reveals that punishing those who seek to harm others using witchcraft would not reflect community standards in Western legal systems (at least in the United States) and thus that such conduct should not be criminalised if Robinson is correct. However, there is an ambiguity in Robinson's proposal about community standards. As Robinson acknowledges, small factual changes among scenarios can produce significant differences in liability judgment.[142] How people respond to scenarios will depend to some extent on how the facts are presented in a scenario. When constructing a scenario relating to witchcraft to be used in a study of community attitudes about justice, should researchers make it clear that a negative outcome can occur because of the 'nocebo effect' or should the scenario be constructed to determine community ideas about whether trying to cause harm by supernatural means is dangerous and thus worthy of punishment? If the idea is to generally maximise criminal law's moral credibility, as Robinson argues, it seems that it must reflect a community's ideas about what behaviour is dangerous and what is harmless. Nonetheless, the obvious problem with this is that a community may think that conduct is harmless when it is not (or vice versa).

Robinson argues that deviation from 'empirical deserts' should be permitted only in three limited instances, the only one of which is potentially relevant here is inconspicuous deviations.[143] According to him, 'Liability and punishment may deviate from empirical desert in order to advance any important societal interest if the deviation is sufficiently small that it will go essentially unnoticed and therefore will have little or no effect on the criminal justice system's moral credibility'.[144] Any deviation would be likely to be noticed here, since the media would be likely to report convictions for the attempted use of witchcraft in Western legal

[136] ibid.
[137] ibid, 210.
[138] ibid.
[139] ibid.
[140] ibid 140.
[141] ibid.
[142] Paul Robinson and Robert. Kurzban, 'Concordance and Conflict in Intuitions of Justice' 91 (2007) Minnesota Law Review 1829, 1842.
[143] The other two are deviations to more effectively control crime and deviations to advance interests other than crime control: see P. Robinson, *Distributive Principles of Criminal Law: Who Should be Punished How Much* (n 130) ch. 12.
[144] ibid 248.

systems precisely because they would be unusual as matters currently stand. However, it could be argued that deviation could be avoided, and the criminal justice system's moral credibility enhanced, if the grounds for such convictions were made clear: i.e., that trying to cause harm via witchcraft sometimes produces real harm and that those who do not succeed in producing harm via witchcraft may turn to more conventional means, as may have happened with the so-called 'white witch' discussed above. Robinson argues that a community's view about the validity of a criminal justice system 'is likely to be governed by what they think the system is trying to do, by what they see as its motivation to do justice'.[145] This suggests that there might even be a danger of undermining the moral credibility of the criminal justice system if it does not punish those who try to harm others by supernatural means where they cause real harm via the 'nocebo effect' and this is reported in the media or becomes widely known via other means, such as social media.

All things considered, trying to cause harm by supernatural means should be criminalised. As explained above, there is good moral reason in principle to extend the criminal law to those who try to harm others using witchcraft. The strongest argument against criminalising trying to harm others with witchcraft and causing harm through the 'nocebo effect' might be that doing so could inadvertently morally discredit a Western criminal justice system. However, this problem can potentially be avoided by making the basis of convictions clear: for example, in England through appropriate press releases by the Crown Prosecution Service. If this proves unsuccessful in practice and there is evidence that such convictions are having a significant impact on the criminal justice system's moral credibility, then prosecution can, and arguably should, be discontinued in this context.

Conclusion

The last matter to consider is whether there is need for a specific crime or set of crimes to deal with those who try to harm others using witchcraft or whether general offences and forms of liability should simply be applied to this phenomenon. The latter approach is best, since there is no need for specific criminal offences dealing with those who try to practice witchcraft. The law on offences against the person requires substantial reform.[146] However, as Jeremy Horder states, the inclusion of unnecessary definitional detail should be avoided and offences should be drafted so that they identify 'the wrongdoing at a level of generality that exemplifies the principle of' "representative labelling" in the creation of crimes'.[147] As he explains, 'the principle of representative labelling seeks to ensure that the definition of an offence will itself give us an accurate moral grasp of what the defendant has done, in committing the offence'.[148] The criminal law should not draw distinctions based on how D sought to cause harm or achieved such harm because such distinctions are not morally important; for example, there is no moral distinction between trying to kill somebody with witchcraft and trying to kill them with more conventional means such as a knife that justifies the creation of two separate forms

[145] ibid 200.
[146] This is not the place to consider such reform. However, for an overview of concerns about this area of law, see e.g. Law Commission, *Reform of Offences Against the Person* (Law Com No 361, 2015) ch 3.
[147] Jeremy Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14 Oxford Journal of Legal Studies 335, 338.
[148] ibid 339.

of criminal liability here, one dealing with the supernatural attempt and one dealing with the more conventional attempt. Introducing specific forms of criminal liability in this context would introduce unnecessary complexity by creating laws that are overly particular. As the Law Commission puts it in relation to its review of the law on fatal offences, one of the problems with the Offences Against the Person Act 1861 is that 'The Act is drafted in such a way that the offences are overly particular in their description, and unnecessarily complex. This is undesirable in principle'.[149] Those who try to harm others by witchcraft, and those who succeed in causing harm via the 'nocebo effect', should be dealt with under appropriately drafted general forms of criminal liability that legitimately seek to protect interests: for example, the law on attempted murder if they try to kill V.

[149] Law Commission (n 146) para 1.11.