

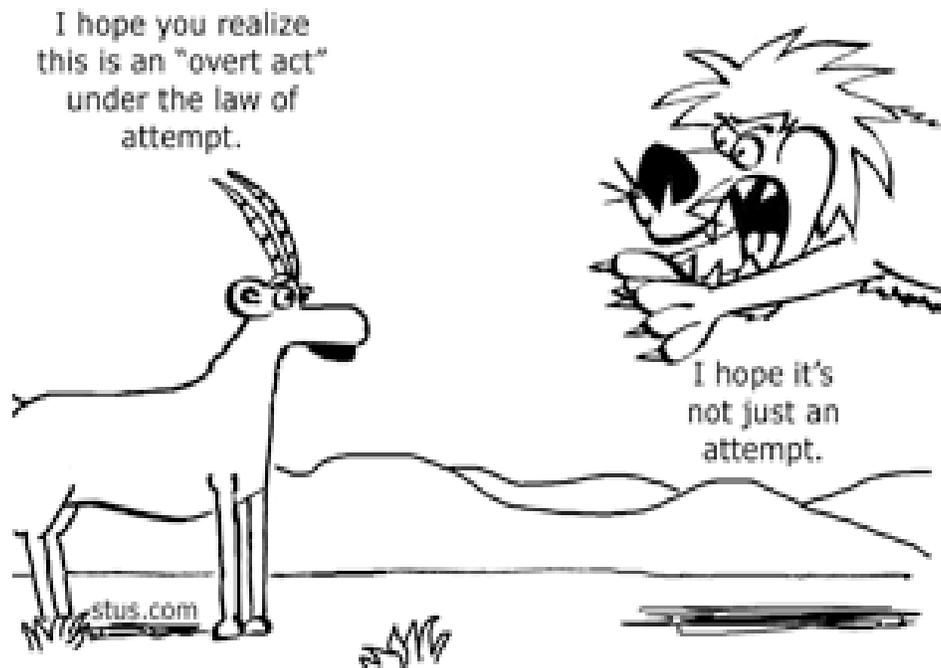
# Philosophy of Law

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## "The Crime That Never Was"

*The Justice of Criminal Attempt Law*

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# **“The Crime That Never Was”**

## *The Justice of Criminal Attempt Law*

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# Introduction

As no doubt you may not be surprised to learn (indeed this was something discussed briefly in the *Twenty-One Legal Puzzlers*) "knowledgeable legal theorists have long recognized that the law of attempts provides a bumpy route by which the deepest and most central issues in criminal law can be approached."

Less than two centuries ago the common law of England made it a criminal offense to attempt to commit a crime. As with most crimes, attempts have both a bad act (*actus reus*) and a guilty mind (*mens rea*) component.

Or at least so it would seem.

The *mens rea* requirement is fairly straightforward: one must have intended to commit the crime that one is charged with attempting.

In attempt cases the *actus reus* requirement seems to be more problematic. In many "attempt" cases, the actual harm that the defendant has caused is very small if existent at all.

## I. Why Punish Attempts More Severely Than Successfully Completed Crimes?

For this reason those cases of attempt which are called "impossible," that is, those cases where the defendant's attempt to commit the crime could not possibly have resulted in the commission of a crime or for that matter have resulted in anything bad happening are recognized as testing our intuitions about when and under what circumstances society is justified in punishing its citizens.

Not unrelated to the question "why punish?" is the one also raised by legal attempts on what grounds ought a defendant be punished for his or her commission of a crime. Should we punish a defendant who has broken the criminal law because the person has thereby shown that he or she is dangerous and a serious threat to our security or should we punish him or her because she caused harm. If the latter is our primary purpose in punishing defendants for violating criminal law, attempts make us wonder whether punishment in impossible attempt cases is justified at all.

John aims to kill Alice, say, as she is standing at the bow of their new yacht. She stands at the bow, John goes below deck, fetches his gun, loads it with ammunition, comes topside, walks up behind Alice and pulls the trigger, but his gun jams.

He intended to murder her but because his gun jams instead of the death of a human being, very little harm has been done. Alice is still very much alive and John is the proud owner of a jammed gun. Should John be punished for what he did?

Well, he attempted to murder her.

That's bad, no? Yet, his act imposed no harm. Perhaps we can say John imposed a risk of harm, but the act itself that John committed imposed no actual harm on Alice. John, however, is certainly dangerous as well as depraved, attempting to kill Alice in

such a cold-blooded fashion. No? And that, John's evil intent, his depravity, call it, "his wickedness" is bad. Indeed, in most jurisdictions throughout the world his depravity and dangerousness make him liable for punishment.

In every jurisdiction not to punish John, not to hold him criminally liable, defeats the purpose of the criminal law.

And yet many are not completely at home with this conclusion in part because John did not impose any actual harm on anyone. And then there is the related question, no small question at that: from a societal point of view it may be necessary to punish John, but is it fair, is it just?

Impossible attempts are interesting, perhaps I should say, "so interesting," is because they impose no risk of harm.

What should society do, what should we do, if and when there is no harm or risk of harm imposed and yet the depravity and dangerousness of the defendant is clearly evident? Impossible attempts focus our attention on the issue of criminal liability in an especially sharp fashion. And this focus of attention, leads one to wonder: "why punish successfully completed crimes more severely than attempts when the defendants in both cases were equally depraved and dangerous, equally bent on causing harm to their victims?" As H. L. A. Hart, Professor of Jurisprudence at Oxford University was fond of putting it:

"Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?"

This Brieflet explores this complex issue, but by no means exhausts its complexity. There will, as you will see, be more to think and more to say, by the time we come to the end of this, dare I say, first attempt at thinking about "attempts."

Another way to put the dilemma created by impossible attempts for our understanding of the nature of criminal law is the fact that in such cases there is no Exhibit A. Usually Exhibit A is the critical piece of evidence in the trial of a defendant who has been accused of committing murder. Think of any Agatha Christie novel. There on a table at the front of the courtroom, often wrapped in cellophane, is Exhibit A. If this is a murder trial and this is Agatha Christie, more often than not, it is a gun. In the game of CLUE, remember "Clue?" there were small replicas of such exhibits and part of the point of the game was to link up exhibit A with the person who "did it."

The cook did it in the kitchen with the candlestick (Exhibit A = Candlestick). Or the butler did it in the foyer with the revolver (Exhibit A = Revolver). The paradigm case of an Exhibit A is the murder weapon.

But in an attempted murder case, there is no Exhibit A. The full significance of this fact will emerge later on, but for now it serves to dramatize the fact about attempts that we are thrown back upon the guilty mind and evil intent of the defendant who has attempted to commit the crime and directs our attention away from the harm that the defendant caused or he imposed on the victim, on the harm done.

One reason to punish a defendant more harshly than another is one causes more harm than the other. It's worse to kill someone than, say, merely injure them, hence it may not seem unreasonable to think a defendant who kills his or her victim deserves to be punished more severely.

If two "hit" men aim to kill you. One misses by inches (you duck, say) and the other shoots and kills you. Both are equally determined to kill you and both act with equal

malice aforethought, i.e., with the same “wicked” intent. To the extent that we are eager to punish the wicked and deter the dangerous, both “hit” men would seem to deserve the same punishment. Why not punish them equally?

Again, H. L. A. Hart: “why should the accidental fact that an intended harmful outcome have not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?”

Reflections such as these have led some, the philosopher David Lewis for one, to propose that punishment for attempts be as “iffy,” that is, be as much a matter of chance or luck as if an attempt to commit a crime were likely to result in a bad act.

Why punish someone less, simply because one’s intended victim bent down at the very moment he was fired upon, to pick up, say, a penny? If the intended victim had not bent over at precisely that moment, he may well be dead, struck by the bullet from the defendant’s gun and the defendant may very well receive “25 years to life” in prison. But since the intended victim ducked or happened to bend over at precisely the moment he was fired upon, causing the defendant to miss, the defendant is likely to receive a much lighter sentence? And this is true in almost every jurisdiction in the world. But, is it fair?

Lewis thought it wasn’t and wrote an article, now widely anthologized and read in many law schools, called “The Punishment That Leaves Something to Chance” where he proposes that defendants convicted of criminal attempt be subjected to a lottery to determine how light or heavy a sentence they will get.

Lewis’s “solution” is a way of making things equal, that is, of leveling the playing field between attempts that do not meet with success and those that do.

Still, nearly every jurisdiction in the world punishes successfully completed attempts more harshly than mere attempts. If you shoot someone in Hong Kong or Mumbai or Soweto with the aim to kill them and they survive (the bullet simply grazes their heart rather than strikes it) you will be punished less severely than if your victim died. Why?

All crimes are, in a fairly straightforward sense, attempts. It’s just that some attempts succeed; some do not.

It’s puzzling and not easy to come up with a quick or easy answer. Once a person goes through all the steps a person would normally go through to bring about a certain result, the actual outcome is outside the actor’s control and whether it happens is merely a matter of chance or luck.

It should not come as a complete surprise that many think it cannot be fair to punish a person more severely for something that is outside of their control, for something that was merely dependent on luck.

After all, what does luck have to do with blameworthiness, with culpability?

But now we bump up against a new and, perhaps, even greater difficulty.

One advantage open to the prosecuting attorneys in criminal cases is they can point to the damage the defendant allegedly caused, imposed on the victim and thereby, on the community.

You may recall this is an opportunity available to prosecutors in the O. J. Simpson trial, remember? Prosecutors Christopher Darden and Marcia Clark showed photographs of the mutilated bodies of Ron Goldman and Nicole Simpson to the jury. In

the course of showing the photos, they repeated over and over again: "Someone did this. Someone is responsible for this. Someone should be made to pay for this."

If, however, this were merely an attempt case there would be no bodies to point to and no harm redress. The emphasis would have to shift and focus, almost exclusively, on what went on in the mind of the defendant prior to and at the moment of his committing the attempt. Being without a "bad act," we are left with a guilty mind and this raises another specter, a danger that we may end up convicting someone for merely having had bad thoughts and this, in turn, may violate something we also value, a citizen's liberty.

How far does someone have to go then in order to have made an attempt?

Where do we draw the line?

When, at what stage in the process of, say, someone's merely thinking of committing a crime, to preparing to commit it, to taking steps towards committing it, does one "cross the line" and commit a crime? If we arrest a person too early on in the process, we may prevent the possibility of their undergoing a change of heart, of changing their mind and reversing course. We will have interfered with their liberty.

## II. Factual v. Legal Impossibility

Permit me to backpedal a bit. "Impossibility" was a feature shared by all three "attempt" cases in the *Twenty-One Legal Puzzlers*. You may recall the answers you gave at the time.

Quickly, briefly, let me introduce the three cases again.. What was your immediate intuitive response to John or Alice's guilt or innocence in each case?

No matter how hard they tried - John or Alice - in all three cases, could not commit the crimes (the bad acts) they set out to commit. It is impossible to kill someone who is already dead. It is impossible to smuggle fine French lace into the country if all you have in hand is a cheap English imitation. It is impossible to steal one's own umbrella. But both Alice and John were bent on doing what they set out to do.

### **John (Finally) Tries to Do Something Nice for Alice**

John travels to Paris to purchase some fine French lace. On his return the inspector discovers it, and John, embarrassed, confesses his "crime," admitting that he knew that such fine lace was subject to an import duty. But upon closer examination it turns out it was John who had been cheated, not the customs authorities: the lace was not French, but a cheap imitation and not subject to duty. Surely John cannot be convicted for smuggling, but is he guilty of a smuggling attempt?

Yes No

### **The Attempted Murder of a Corpse**

At 4:00 p.m. John goes to his study for his afternoon nap, as is his wont, lies down, and dies in his sleep at 4:10 p.m. At precisely 4:30 p.m. Alice sneaks into John's study, thinks he is asleep on the couch and stabs him thirteen times in the chest. Clearly, Alice hasn't murdered John since he was already dead. But is she guilty of attempted murder?

Yes No

### Hot Property

Suppose Alice takes away an umbrella from an umbrella stand in a restaurant with the intent to steal it, believing it belongs to someone else, but it turns out to be her own. Surely Alice cannot be convicted of stealing, but can Alice be convicted of attempting to steal.

Yes No

One obvious reason for the "impossibility" in these three cases, of course, is the facts of the situation are not as John and Alice take them to be.

Another reason might be that there is no law against what John and Alice attempt to do and so it is "legally" impossible for either of them to commit a criminal no matter how hard they try.

Some courts will allow a defense of legal impossibility against charges of criminal attempt but do not allow defenses of factual impossibility. The grounds for these distinctions, however, are not always all that clear.

To choose but one example, it's not against the law to steal one's own umbrella. Then again, one might say that Alice simply misread the facts of the situation. She thought she was taking someone else's umbrella whereas, as a matter of fact, it was her own. Taking someone else's umbrella is against the law. She intended to do some bad thing. She hatched a plan and executed it.

But is her taking of the umbrella a case of factual or legal impossibility? What do you think?

One way, as I've suggested, that judges and legal theorists have thought it is fair, not unreasonable, to find someone guilty of an impossible criminal attempt in cases of factual impossibility but not in cases that are legally impossible. Thus the distinction becomes critical to adjudicating attempt cases and in the course of deciding when to punish someone for committing a criminal attempt.

So what's the difference? Really?

It is tempting to see each of three cases in the *Twenty-One Legal Puzzlers* as cases of factual impossibility. What might a typical case of legal impossibility look like?

Imagine, the following:

#### ***John Sells Fireworks to Henry***

John has some fireworks and would like to sell them. He lives in the State of New York where it is illegal to buy and sell fireworks. John finds a potential customer, Henry, who agrees to buy the fireworks. John and Henry arrange to meet and John sells Henry the fireworks. John believes he has done something wrong and hopes he does not get caught. He tells Alice who happens to be an undercover police officer. It turns out, however, that John met Henry just on the other side of the border in the State of Pennsylvania where consumers may buy and sell fireworks. Henry is a resident of Scranton and agreed to meet John at a spot just south of the border. John, however, thought he was still in the State of New York. Since he was in Pennsylvania where it is not against the law to sell fireworks, clearly John cannot be convicted of selling fireworks, but is he guilty of an attempt to sell fireworks.

Examples, such as these, where the person travels to a jurisdiction where an act they believe to be illegal is not illegal are thought to be classic cases of legal impossibility.

Most conclude that John should not be punished or fined for selling fireworks to Henry in the above scenario. He and Henry are in Pennsylvania and there's no law there. If the two of them had been in the State of New York, that would have been a different story. Then John should have been fined or punished.

There is a fundamental maxim of legal thought captured in the Latin principle "nullum crimen, nulla poena" or "nullum crimen, nulla poena sine praevia lege poenali." ("no crime, no punishment, without a previous law subjecting one to punishment" which would also seem to capture the intuition that we ought to punish those who commit a wrongdoing for which there is no law prohibiting it.

This point can be brought more explicitly to light by changing the original hypothetical of "John (Finally) tries To Do Something Nice for Alice":

***John (Once Again) Tries To Do Something Nice for Alice***

Suppose John had (indeed) purchased an item that was fine French lace and that it was, unbeknownst to him a cheap imitation worth next to nothing. The customs official discovers it and says "Lucky for you that you returned to United States today rather than yesterday. I just received word this morning that Congress has removed French lace from the duty list." Surely John cannot be guilty of smuggling fine French lace, but can he, under these circumstances, be convicted of a smuggling attempt? What difference does a day make?

But there may indeed be an important, if not absolutely critical difference in the time John chose to act. John tries to smuggle French lace into the United States on a day when it is no longer a crime to bring French lace undeclared into the country. Of course, in doing what he does she shows himself as a person who is predisposed to break the law. But what law? The law against smuggling French lace? But there is no longer such a law.

Fortunately, although this may turn ultimately on your overall legal perspective, our law has not gone so far to accept that any possibility for social protection is sufficient to justify criminal punishment. A mere disposition to engage in conduct thought to be criminal is much too speculative a basis for inferring that the actor will engage in conduct that actually is illegal. At least for criminal liability we are not prepared to generalize proclivities beyond the proclivity to commit the specific crime with which a defendant has been charged. As Glanville Williams has noted: "If the legislature has not seen to prohibit the consummated act, a mere approach to consummation should *a fortiori* be guiltless. Any other view would offend against the principle of law: in effect the laws of attempt would then be used to manufacture a new crime, when the legislature has left the situation outside the ambit of law." Glanville Williams, *Criminal Law*, Second Edition, 1961, pp. 633-34.

But consider the following.

Which ones do you think are factual, which are legal cases of impossibility?

**1. *The Bust of Sherlock Holmes***

In the Sherlock Holmes story *The Adventure of the Empty House*, Holmes is stalked by Colonel Sebastian Moran. In order to lure his opponent from the bush, Holmes commissions an eminent sculptor to create a wax likeness of his head. The "bait" is placed in the window of Holmes' Baker Street house and is periodically turned to create the impression of movement. In due course, Colonel Moran appears in an

alley across the street and takes aim at “Sherlock Holmes” with his high-powered rifle. He fires and the bullet strikes the sculpture “plumb in the middle of the back of the head and smack through the ‘brain.’” Moran is immediately captured and admits that his intent to murder Holmes has been foiled. As the arresting officer is leading Moran away, Holmes asks the Inspector, “What charge do you prefer?” Inspector Lestrade replies, “Why, of course, the attempted murder of Sherlock Holmes?” Can Moran be convicted of the attempted murder of Sherlock Holmes if he shoots at an object that he believes to be Holmes, but that turns out to be a dummy?

**2. *Commonwealth v. Dunaway*  
(1894 ed. of *The Digest of Criminal Law*)**

Dunaway was charged with attempting to engage in incestuous relations with his own daughter. His wife turned him into the police after she witnessed his advances. At the trial, however, it was revealed that the girl was actually Dunaway’s step-daughter. The law in the county of Wessex where he was charged requires that the parties be blood-related if they are to be found guilty of incest. Dunaway, however, did not know this; he believed that his attempts to have sexual relations with his stepdaughter were an effort to have incestuous relations. Is Dunaway guilty of attempting to commit incest?

**3. *The Case of the Stuffed Deer***

A Missouri hunter shoots a “deer” that turns out to be a stuffed carcass set up by park rangers to catch poachers. Clearly he is not guilty of poaching? Or is he? If not, can the hunter be convicted of attempting to take a deer out of season?

**4. *The Aborted Abortion Attempt***

A man agrees to perform an illegal abortion on a female undercover police officer who is not, in fact, pregnant. The man is convicted of attempting to perform an abortion. He appeals on the ground that it was impossible to perform an abortion on a woman who was not pregnant. If you were the appeals court judge, would you overturn this man’s conviction?

**5. *State v. Wilson (Mississippi, 1905)***

Wilson received a check for \$2.50. The upper right hand corner of the check read “2 50/100.” The body of the check read “Two dollars and fifty cents.” The top of the check read “Ten dollars or less.” Not thinking too clearly, Wilson put a “1” in front of the “2 50/100,” hoping to cash the check for “\$12.50.” When he went to the bank to cash the check, he was arrested. He was not, however, charged with committing check forgery since check forgery requires an alteration of a material part of the check. The number on a check itself is considered to be immaterial. Where there is a discrepancy between the words and the number on a check, the words control. He was therefore charged instead with attempting to commit check forgery. If you were the judge, would you find him guilty or not guilty?

Each of these cases are impossible, that is, each involves an act that could not possibly have resulted in the commission of a crime. No matter how deeply the bullet penetrates into a bust of Sherlock Holmes, the murder of Holmes cannot be accomplished by shooting into a bust of his head. No matter how deeply a bullet penetrates a stuffed deer, one cannot take a deer out of season by shooting one that’s stuffed. Or can one? If not, should one be convicted at least of an attempt?

Since a case can be made for prosecuting and convicting defendants who attempt crimes that are factually, but not legally impossible, it would appear to be useful to be able to make a clear distinction between what's factual and what's legally impossible, But it often seems to hinge on how a case is described. Described one way it appears to be a case of factual impossibility ; described another it appears to be one of legal impossibility. This is not good. It's not good for judging cases and not good for the law. It's also not good for defendants.

### III. Impossibility and a Reasonable Risk of Harm

If you were asked to draft a statute, a criminal attempt statute, for, let's say, the State of New York, how would you word it?

We will want a draft of a law that articulates a principle that captures our intuitions about when and under what circumstances it is just to convict and punish someone for attempting to commit a crime that under the circumstances was impossible to commit.

How about this?

Will this do the trick?

A person is guilty of attempting to commit a crime so long as the 'crime' attempted 'could have been committed had the attendant circumstances turned out as the defendant believed them to be,' that is, had a defendant's belief under the circumstances been correct and what the defendant set out to do would under current law constitute a crime."

This seems good, no? It would appear to capture our intuitions about when and under what circumstances someone should be found guilty of a criminal attempt. It's close if not exactly stated as the "New York State Statute" is written and as it was "Amended" a number of years ago.

As amended the statute would seem, however, to preclude (at least) some of the more obvious cases of legal impossibility. I say "would seem" to preclude because the distinction itself, between factual and legal impossibility in any given instance is often hopelessly unclear that even finding a bunch of "obvious" case of legal as distinguishable from factual impossibility cases is not without its problems.

Still or rather, in any event, the New York State Statute as Amended would appear to rule in John (1) in "John (Finally) Tries To Do Something Nice for Alice" and rule out John (2) in "John (Once Again) Tries To Do Something Nice for Alice" which may come as some small relief to some of you.

Does the New York State Statute also capture your intuitions?

But now consider the following hypothetical case drawn from the *Twenty-One Legal Puzzlers*:

#### ***Victor is Found Guilty of Attempting to Murder Esmerelda***

Victor is unhappily married to Esmerelda. Indeed, Victor so dislikes Esmerelda that he has on more than one occasion thought of killing her. Victor was raised on a small Caribbean Island and, as a young boy, was initiated into the black-magic cults of the native peoples. Victor still believes in the power of voodoo. One day, when he feels he can stand his wife no longer, he retires to

his basement workshop, where he has, over the years, collected the accoutrements of the black arts. Carefully he prepares a tiny doll-like replica of Esmerelda.

When the doll is finished, Victor takes a deep breath and, with shaking hands and a look of hatred and determination, viciously and repeatedly stabs the doll with a set of "magic" needles. Exhausted by his work, Victor collapses. When he wakes up, he is overcome with remorse. He is disgusted by what he has done. He leaves his workshop and rushes to the local police station, where he turns himself in, believing with all sincerity that he has murdered his wife.

The police send someone to the house where Esmerelda is discovered in bed eating Godiva chocolates and watching the "Grammys." The police arrest Victor for attempted murder. He is tried and convicted and his case has come before you on appeal

How would you decide this case, if you were the judge? Clearly Victor is not guilty of murder. Esmeralda lives! But is he guilty of attempted murder? How many say "yes?" How many think "no?"

Now apply the New York State Statute as Amended to the case.

Wouldn't you have to convict Victor under it?

Is there anyone who thinks Victor ought not to be convicted? If so, why? And if so, it suggests according to your lights there's something missing from the New York State Statute as Amended. It captures too much in its net.

How can the Statute be fixed? Can you fix it? Can you make a suggestion to amend it even further so that it would rule out defendants like Victor?

Here you might wish to take some time to puzzle about how the New York Statute might be rewritten to rule out cases like Victor's.

Several states have sought to adjust their criminal laws prohibiting attempts in a way that would fix the New York State Statute.

If you think there is something wrong or missing from the New York statute as amended because it simply states, perhaps too simply, that a defendant is guilty of committing an attempt "so long as the 'crime' that was attempted 'could have been committed had the attendant circumstances been as [the defendant] believed them to be" thereby making convictions too easy as well as capturing cases like Victor's much too quickly in its net, you may find what other states have done helpful to you in your redrafting the New York Statute.

The Model Penal Code which serves as a guide to legislators on how to drafting their statutes might also be helpful. The Code, for instance recommends that courts be given the power to dismiss a prosecution or decrease the penalty if "the particular conduct charged to constitute a criminal attempt . . . is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger." Section 5.05 (2).

This would (then) very likely save persons like Victor from conviction. But as some commentators have pointed out this "commends the matter to the discretion of a judge" and so may make the likelihood of conviction somewhat haphazard.

Put another way: "it is not a statement of a rule of law," even though it does provide an avenue for ruling out such cases as Victor's. A better approach may be the one that taken

by the Minnesota Criminal Code which states an exception to its rule where the “impossibility would have been clearly evident to a person of normal understanding.” Minn. Stat. Ann. 609.17.2 What do you think?

A similar solution might propose that a defendant be guilty of attempt only when “the defendant purposely does or omits to do anything that, under circumstances as a *reasonable* person would believe them to be, is a substantial step in a course of conduct planned to culminate in the commission of a crime.”

## IV. What Do an Attempted Murder of a Corpse and a Failed Drug Bust Have in Common?

Armed with these preliminaries, imagine that you have risen through the ranks of the law and were recently appointed to the United States Court of Appeals for the Fifth Circuit and the following case has come before you:

Oviedo arranged to sell a pound of heroin to a man he met in the street. They agreed to meet some time later to consummate the deal. When they met the second time, Oviedo gave the substance to this fellow and asked for his money. The man, however, said he would have to test it first. A field test was run with a positive result. The man turned out to be a narcotics agent. Oviedo was placed under arrest.

Shortly after his arrest, a search warrant was issued for Oviedo’s apartment. Oviedo’s apartment was turned upside down and two pounds of a similar substance was found stashed in a television set.

This substance and the substance sold to the narcotics agent on the street were sent to the crime lab for chemical analysis. The substances were not heroin, but procaine hydrochloride, an uncontrolled substance. Since the substance he tried to sell to the narcotics agent and the substance in his apartment were not heroin, Oviedo could not be charged with distributing heroin. He was, however, charged with attempting to do so.

At his trial, Oviedo took the stand and declared that he knew all along that the substance was not heroin. At the encouragement of several of his buddies, he said, he had decided to “put one over” on this fellow, to “rip him off.” A quick way, he said, to make a few thousand “bucks.” Clearly, Oviedo is not guilty of distributing heroin, but can he, should he, be found guilty of attempting to distribute heroin?

Recall Alice’s attempt to murder John while he was asleep in his study. She clearly has the requisite intent to be found guilty of murder, but John, if you recall, died in his sleep twenty minutes before Alice stabbed him thirteen times in the chest. As stated “clearly, [she] hasn’t murdered John since he was already dead. But is she guilty of attempted murder?”

Some of you were inclined to say “yes.”

Indeed, Alice is likely to be found guilty of attempted murder in most states in the country and certainly in New York even if we bring the New York State Statute more in line with the recommendations of the Model Penal Code or the Minnesota Statute.

In any case, whatever your reasoning in Alice's case, if you think Alice ought to be found guilty of attempt, shouldn't you also think Oviedo should be guilty of attempting to distribute heroin?

Indeed he was convicted at the trial court level of attempting to distribute heroin. The jury decided in his case that when he told the court that he knew all along that it was "procaine hydrochloride" that he sold to the undercover officer that he was lying.

Now that Oviedo's case has come to you this bit of information that Oviedo was lying is now an established fact of the case whatever reason you yourself may have to doubt it. The facts of a case are decided at the trial court level. When a case is appealed, it must be on the basis of some principle of law, it cannot be merely be a request for the higher court to reconsider the facts. The facts are settled at the trial court level.

This means that Oviedo is presumed to have believed that he was distributing heroin not an uncontrolled substance and so was attempting to do something that was illegal.

This would appear to make Oviedo's situation analogous to Alice's case in her attempt to murder John. Just as Alice believed John was still alive when she stabbed him and so believed she was murdering him, Oviedo believed the substance was heroin, and he was distributing it.

The only reason neither can be convicted of the actual crime they set out to commit is that in both cases the circumstances turn out to be other than Alice and Oviedo believed them to be. John was dead and the stuff Oviedo sold was procaine hydrochloride.

So what do you think?

Do you uphold Oviedo's conviction?

Yes or no?