The Liability For Criminal Attempts

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Introduction

The original body under the title “The Liability for Criminal Attempts” discusses victimless crimes, police surveillance, and illegal markets. Those subjects do not explain attempt liability. A criminal attempt is an inchoate offense: liability may arise even though the intended substantive crime was not completed. The law intervenes because a person has combined a culpable purpose with conduct that moves sufficiently close to the prohibited harm.

Attempt doctrine is difficult because punishment must not be imposed for thoughts alone, while waiting for completion can expose victims to preventable danger. The precise rules vary across jurisdictions. Common-law systems have used tests such as dangerous proximity, unequivocality, or the last-proximate-act approach, while jurisdictions influenced by the Model Penal Code commonly ask whether the defendant took a substantial step strongly corroborative of criminal purpose. This essay explains intent, conduct, impossibility, abandonment, merger, defenses, and policy without presenting one jurisdiction’s rule as universal legal advice.

Attempt as an Inchoate Offense

Inchoate offenses punish conduct directed toward another crime. Attempt, conspiracy, and solicitation are related but distinct. Attempt focuses on the actor’s purpose and movement toward completion. Conspiracy focuses on agreement, often with an overt act requirement. Solicitation focuses on asking or encouraging another person to commit an offense.

Attempt liability does not require that a victim suffer the completed harm. An attempted robbery can be punished even if no property is taken, and attempted murder can be punished even if the intended victim survives. The absence of completed injury affects grading, sentencing, and proof, but it does not make the conduct legally harmless.

Why the Law Punishes Attempts

One justification is prevention. A person who deliberately takes substantial steps toward a serious crime may present a danger that the state need not ignore until the final act. Intervention can protect potential victims.

A second justification is culpability. The actor has chosen a prohibited objective and demonstrated that choice through conduct. From a moral perspective, the difference between a completed and failed crime may depend on chance. A gun jams, a victim escapes, or police arrive early. The actor's purpose may be the same.

A third justification is deterrence. Punishing attempts communicates that failure, interruption, or factual mistake does not erase responsibility. At the same time, attempt law must preserve space for lawful preparation, fantasy, and voluntary change of mind. That boundary is the central problem.

The Mens Rea Requirement

Attempt generally requires a purpose or specific intent to commit the target offense. This can create a higher mental-state requirement than the completed crime. Some completed offenses can be committed recklessly, but one cannot ordinarily "intend to be reckless" in the same way one intends a purposeful killing or theft.

For attempted murder, courts generally require intent to kill rather than mere recklessness or intent to cause some injury. Evidence may come from statements, weapon use, planning, number and location of shots, or conduct before and after the event. Intent is rarely proved through direct confession alone; juries infer it from circumstances.

The prosecution must also prove the mental elements of the underlying offense. A person accused of attempted theft must intend to take property with the legally required purpose. Mere handling of property or suspicious presence is insufficient without the relevant criminal objective.

Thought Is Not Attempt

Criminal law does not punish a private wish or disturbing thought by itself. People imagine acts they never perform, speak carelessly, write fiction, or abandon anger. Punishing mental content alone would threaten freedom and create unreliable proof.

Attempt liability therefore requires conduct. The conduct need not cause injury, but it must move beyond internal decision. This requirement also creates evidentiary discipline: an observable act helps distinguish a genuine criminal purpose from fantasy, boasting, misunderstanding, or entrapment.

Preparation Versus Perpetration

Preparation includes obtaining information, acquiring ordinary items, traveling, or making plans. Some preparation can be innocent. Buying rope, a knife, a train ticket, or chemicals may have lawful explanations. The same act can become significant when combined with timing, secrecy, statements, target selection, and other evidence.

Perpetration begins when conduct crosses the jurisdiction's legal threshold. The line is not a physical location shared by all crimes. Preparing a complex cyber intrusion may require many steps before contact with a protected system, while an impulsive assault can move from decision to attempt within seconds. ("Legal Information Institute", n.d.)

Common-Law Tests

Courts historically developed several tests. The "last act" test required the defendant to perform nearly everything believed necessary, but it delayed intervention dangerously. The "dangerous proximity" test asks how close the conduct came to completion, considering seriousness and probability.

The "unequivocality" or res ipsa loquitur test asks whether the conduct, viewed without relying heavily on confession, clearly demonstrates criminal purpose. This protects ambiguous preparation but can make liability depend on how much the act visibly reveals.

No label eliminates judgment. Courts still evaluate distance, interruption, surrounding facts, and the nature of the planned offense.

The Substantial-Step Approach

The Model Penal Code influenced many jurisdictions by defining attempt through a substantial step in a course of conduct planned to culminate in the crime. The step must strongly corroborate criminal purpose. The approach allows earlier intervention than a last-act rule while requiring more than remote preparation.

Examples can include lying in wait, enticing a victim to a planned location, possessing specially designed materials near the contemplated crime, unlawfully entering a place where the crime is intended, or reconnoitering the target. These examples are not automatic. Context determines whether conduct strongly corroborates intent.

The U.S. Supreme Court has described federal attempt as requiring significant conduct beyond mere intent. In *United States v. Resendiz-Ponce*, the Court discussed the traditional requirement of an overt act or substantial step toward completion. ("United States v", 2007)

Factual Impossibility

Factual impossibility occurs when the crime cannot be completed because of a fact unknown to the actor. A person attempts to pick an empty pocket believing it contains a wallet, shoots into an empty bed believing the victim is there, or buys a harmless substance believing it is an illegal drug.

Modern law generally does not treat factual impossibility as a defense. The actor's purpose and conduct reveal the same danger and culpability that would exist if the facts were as believed. Police sting operations frequently rely on this principle.

Legal Impossibility

Traditional legal impossibility describes a situation in which the actor completes the intended conduct, but that conduct would not be criminal even if circumstances were exactly as believed. Pure legal impossibility has sometimes been recognized as a defense because no law prohibits the objective.

The distinction between factual and legal impossibility is notoriously difficult. Modern statutes and the Model Penal Code often focus on whether the conduct would constitute a crime under the circumstances as the actor believed them to be. Courts must still avoid creating offenses through mistake about law when the legislature has not prohibited the conduct. (American Law Institute, n.d.)

Abandonment or Renunciation

At common law and under some statutes, once an attempt is complete, later abandonment is not a defense. The actor cannot erase liability merely because police arrived or the plan became difficult.

The Model Penal Code recognizes voluntary and complete renunciation in defined circumstances. Abandonment is not voluntary when motivated by increased risk of detection, unexpected resistance, postponement to a better opportunity, or substitution of another victim. The policy encourages genuine withdrawal while preventing strategic retreat from becoming immunity.

Even where abandonment is not a full defense, efforts to prevent harm may affect charging or sentencing. The exact effect is jurisdiction specific.

Attempt and Completed Offenses

Attempt usually merges into the completed offense. A defendant is not ordinarily punished separately for attempting a robbery and completing the same robbery because the attempt is a lesser-included stage of that offense.

Separate liability may remain for conduct involving different victims, different criminal objectives, or distinct statutes. Merger rules require careful comparison of elements and legislative intent.

Grading and Punishment

Jurisdictions differ on penalties. Some punish attempt one grade below the completed offense; others impose the same maximum for certain serious attempts. Federal statutes often define attempt liability offense by offense rather than through one universal federal attempt statute.

Punishment debates reflect competing views. Equal punishment emphasizes culpability and chance. Reduced punishment recognizes that the completed offense caused greater harm and that legal incentives should encourage stopping. Sentencing can also consider planning, dangerousness, injury, voluntary prevention, and the defendant’s role.

Attempted Strict-Liability and Reckless Offenses

Attempt doctrine becomes complicated when the completed offense lacks a specific-intent requirement. Because attempt generally requires purpose regarding conduct and result, some offenses cannot logically be attempted in their ordinary form.

For example, attempt liability for an offense defined solely by reckless causation is difficult because a person does not purposefully cause a result recklessly. Legislatures may create separate endangerment offenses instead. Statutory language controls, and courts should not assume that every completed offense has an attempt version.

Accomplice Liability and Attempt

A person may aid another’s attempt or attempt to aid a completed crime depending on the jurisdiction’s statutes. Proof can involve association with the venture, purposeful assistance, and conduct intended to make the crime succeed.

Liability should not arise from mere presence or friendship. The prosecution must establish the required intent and assistance. This protects people who are nearby, know a person, or withdraw before providing meaningful aid.

Entrapment and Government Stings

Impossibility is common in sting operations because the property, drugs, or victim may be controlled or fictional. That does not automatically defeat attempt. A separate question is entrapment: whether government agents improperly induced a person who was not predisposed to commit the offense, under the applicable jurisdictional test.

Law enforcement may provide an opportunity, but coercive pressure, manufactured escalation, and targeting of vulnerable people raise fairness concerns. Courts distinguish legitimate investigation from creation of crime, though standards vary.

Constitutional and Evidentiary Safeguards

Attempt prosecutions often rely on messages, searches, informants, surveillance, and undercover recordings. Investigators must comply with constitutional and statutory rules. Strong suspicion does not eliminate warrant requirements, due process, disclosure duties, or the need to prove every element beyond a reasonable doubt.

Ambiguous speech should be interpreted with context. Jokes, fantasy role-play, political rhetoric, and artistic expression can resemble planning when isolated. Conduct, capability, target information, timing, and corroboration help distinguish protected expression from a substantial step.

Policy Criticism

If the attempt threshold is too late, police must allow danger to develop. If it is too early, people can be punished for equivocal preparation or unpopular thought. Broad attempt law may also amplify disparities because subjective assessments of dangerousness can be influenced by bias.

Clear jury instructions and conduct-based evidence reduce these risks. Courts should identify the intended offense, the required mental state, the exact substantial step, and why that step corroborates purpose. Labels such as “suspicious” or “extremist” cannot substitute for elements.

Conclusion

Criminal attempt liability arises when a person possesses the required intent and crosses the line from thought or preparation into legally sufficient conduct directed toward an offense. Modern substantial-step doctrine allows intervention before the last act while demanding behavior that strongly confirms criminal purpose.

Factual impossibility usually does not excuse an attempt, while legal impossibility and abandonment depend on statutory and jurisdictional rules. Attempts commonly merge into completed offenses, and penalties vary. The doctrine is justified by prevention and culpability but must be limited by proof, due process, and protection of lawful thought and preparation. Because criminal codes differ, a sound academic analysis should state the governing jurisdiction before reaching a conclusion about liability.

References

United States v. Resendiz-Ponce, 549 U.S. 102 (2007).

Braxton v. United States, 500 U.S. 344 (1991).

U.S. Department of Justice. Jury Instruction—Attempt.

Legal Information Institute. Attempt.

American Law Institute. *Model Penal Code* § 5.01.