WHY PUNISH ATTEMPTS AT ALL?

YAFFE ON ‘THE TRANSFER PRINCIPLE’

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Gideon Yaffe’s masterful Attempts wastes no time posing the most basic normative problem that a philosophical account must solve. He is to be commended for beginning his exhaustive treatment by asking a surprisingly difficult question: Why punish attempts at all? He addresses this inquiry in the context of defending (what he calls) the transfer principle: “If a particular form of conduct is legitimately criminalized, then the attempt to engage in that form of conduct is also legitimately criminalized.”

Three preliminary observations about this principle are important before moving to a critical discussion of Yaffe’s novel defense of it. In combination, these preliminary observations raise doubts about the status of the transfer principle itself. Notwithstanding these doubts, however, the question Yaffe poses--why punish attempts at all?--is central to any philosophical examination of attempts and demands an answer.

I begin with three observations about the transfer principle itself. First, I assume that this principle should be construed both descriptively and prescriptively. The first function of this principle is to provide a rough description of existing criminal law. As Yaffe points out, once the decision to criminalize a type of conduct has been made, legislators do not generally engage in a separate debate about whether to criminalize the attempt to perform it. Yet, as Yaffe must be aware, existing criminal law recognizes a number of exceptions to the transfer principle. Some offenses should not allow attempt liability; to do so would produce an objectionable form of what is sometimes called double (or even triple) inchoate liability.\(^1\) Presumably, some modes of double-inchoate liability are justifiable while others are not, although no one seems to have made a concerted effort to probe the rational basis of

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\(^2\) Existing law on double inchoate liability is obscure, inconsistent, and unprincipled. For an attempt to rationalize this area of the law, see Law Commission: Conspiracy and Attempts: Consultation Paper No. 183. [Link](http://books.google.com/books?id=ao8S9YBcPogC&pg=PA109&dq=%22double+inchoate+liability%22&hl=en&ei=DJhmTY7qEcH58Abx_bXsCw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBMQ6AEwAA#v=onepage&q=%22double%20inchoate%20liability%22&f=false), Part 7.
the normative contrast. But surely a regress is reached at some point; an attempt to attempt, for example, is and ought to be disallowed. In any event, no single principle can begin to capture the complexity of criminal law throughout the whole of the United States. Fifty-one jurisdictions have their own set of rules governing attempts, and these rules sometimes differ substantially. Thus the transfer principle is not intended to be solely descriptive; it is also designed to function prescriptively. It expresses a principle to which Yaffe believes the criminal law should adhere, subject to a handful of carefully delineated exceptions.

Let me illustrate this problem by a new offense we might decide to add to our penal code. Consider a promising proposal to identify the culpability of a defendant who commits a crime under the influence of intoxicants. Rebecca Williams argues that the least objectionable solution to this nearly intractable difficulty is to enact a new offense of “committing [the actus reus of offence X] while intoxicated.” Suppose her proposal is adopted. Should we uncritically suppose that this new offense should (via the transfer principle) justify the enactment of an offense of “attempting to commit [the actus reus of offence X] while intoxicated? Although it would be coherent to enact this latter offense, the intuitive case for so doing seems weak. Williams herself believes that her new offense would be “so far removed from the full offence” that attempt liability should be resisted. My point is that we should not automatically assume that an offense, even if legitimate, should allow for attempt liability.

A second related point notes that the transfer principle explicitly allows attempt liability only when conduct is legitimately criminalized. On the one hand, this qualification seems obvious. No one should believe that an attempt to X should be punished unless X-ing itself should be punished. Few commentators have a kind word for proscribing so-called legally impossible attempts—-attempts to commit what are not crimes, even when the defendant mistakenly believes otherwise. Yet this qualification is not entirely innocent. Of course, it is not surprising that Yaffe does not offer a substantive theory of criminalization. But depending on the details of his theory—-on the conditions

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3 See Ira P. Robbins: “Double Inchoate Crimes,” 26 Harvard Journal on Legislation 1 (1989). Robbins himself eschews a conceptual analysis or focus on legislative intent in favor of deciding whether “the defendant’s acts are sufficiently dangerous to society to warrant judicial intervention and punishment.”
4 Yaffe himself has entered the fray. See his “Intoxication, Recklessness and Negligence,” Ohio State Journal of Criminal Law (forthcoming).
6 Id., p.x.
7 Of course, a purely subjectivist account of culpability and punishment must struggle to show why legally impossible attempts should not give rise to liability. See Larry Alexander and Kim Ferzan with Stephen Morse: Crime and Culpability (Cambridge: Cambridge University Press, 2009).
that must be satisfied before a type of conduct is legitimately prohibited---the transfer principle becomes more or less plausible. Legislatures have increasingly enacted a number of ancillary offenses---conduct that is punished to facilitate the enforcement of other, “target” crimes. The transfer principle becomes less attractive---or is subject to greater numbers of exceptions---to the extent that our theory of criminalization allows such ancillary offenses to be enacted. Although any particular example will be contentious, let me provide a single illustration of the problem I believe these laws create for the transfer principle. New Jersey makes it a crime to distribute a substance which is not a drug under circumstances which would lead a reasonable person to believe that the substance is a drug. The justifiability of punishing an attempt to distribute a substance known not to be a drug is even more problematic than the justifiability of punishing the target crime this offense is designed to prevent. As given ancillary offenses become more and more distant or remote from the target crime, they are more likely to fail whatever substantive criteria of criminalization Yaffe (or anyone else) would defend. I would think there almost certainly is some point at which the distance (or degree of proximity) between the ancillary offense and the target crime is just close enough to satisfy our test of criminalization, but the attempt to commit that ancillary offense, which increases this distance (or lessen this proximity) is not. If we allow such offenses into our penal code and also accept the transfer principle, we extend the range of liability beyond the boundaries that are clearly acceptable. My point is that the intuitive force of the transfer principle is partly dependent on our theory of criminalization---since it applies only to conduct that is legitimately criminalized.

On my initial reading of this qualification, I supposed it to apply only to offenses that we already believe to be legitimately criminalized. But a second concern might motivate limiting the transfer principle to conduct that is legitimately criminalized. Perhaps this qualification should be construed to function as an independent constraint in a theory of criminalization. Such a constraint might operate in the following way. Suppose we are undecided about whether to allow a given (hypothetical or existing) offense---such as the foregoing example---into our penal code. We might overcome this ambivalence by asking whether we would be willing to punish persons who attempt this crime. Perhaps our intuitions about the criminalization of the attempt are more firm than our intuitions about the criminalization of the completed crime. If so, we might use these intuitions to decide whether to allow the candidate offense into our penal code. I am unsure whether Yaffe himself intends this qualification on the

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8 New Jersey Criminal Code 2C:35-11(3). The legislature is not too worried that drug buyers will be duped. Instead, the point is to prevent unsavory characters from distributing what they know is not a drug to buyers they know to be undercover policemen and thus to avoid liability when the lab reveals that the substance is not illicit.
application of the transfer principle to function as an independent constraint in a theory of

criminalization. The important point is that this restriction is not trivial; it may be capable of doing some

important normative work.

A third and final problem with the transfer principle is that it is not altogether clear how some

offenses can be attempted.9 Again, no example is beyond controversy, since it is always open to

respond that the particular statute used to illustrate this difficulty amounts to an illegitimate imposition

of the penal sanction. But let me use polygamy as an example. According to the Model Penal Code, a

material element of the crime of polygamy is that a defendant must marry or cohabit with more than

one spouse at a time “in purported exercise of the right of plural marriage.”10 How might someone

attempt but fail to commit this crime? If a defendant tries but fails to marry more than one partner

without alleging a right to do so, he is an attempted bigamist, not an attempted polygamist. To be guilty

of attempted polygamy, a person must try but fail to purport a right of plural marriage. Is it possible to

do so? My powers of imagination run out when I consider what this might mean. Does our defendant

become tongue-tied whenever he begins to make his claim of right? How could one try to make a claim

of right without actually doing so?

Despite these preliminary observations and the complications they produce for the transfer

principle, I wholly agree that legal philosophers must explain why attempts to commit crimes are

typically punished. As I have indicated, this basic question is remarkably difficult.11 I now begin my

critical examination of Yaffe’s answer. As we have seen, his answer consists in a defense of the transfer

principle—a defense I will challenge by supporting a refinement of the more familiar rationale he

rejects. Yaffe’s most original contribution involves his argument about how not to defend the transfer

principle. Consider (what I call) crimes of risk-prevention.12 Along with ancillary offenses, the

enactment of increasing numbers of crimes of risk-prevention is a major factor in contributing to the

phenomenon of overcriminalization from which I have argued that we presently suffer.13 Of course,

many crimes of risk-prevention have a secure normative rationale. For example, I assume that we

9 For a discussion of the possibility of attempting a crime of negligence, see Alfred Milne (this volume).
10 §230.1(2).
11 Difficult questions yield novel answers. One commentator believes that the rationale for punishing attempts is
analagous to the rationale for punishing treason: both involve “a breach of the duty of loyalty that each citizen
Among other difficulties, this account fails to explain why the attempt to murder is a different crime, breaches a
different duty, and qualifies for a more severe punishment than the attempt to shoplift.
13 Id.
punish (and ought to punish) drunk drivers because they substantially and unjustifiably increase the probability of a harmful result the law seeks to prevent. Specifically, drunk drivers are more likely than similarly situated sober drivers to cause a crash, thereby increasing the likelihood of both property damage and personal injury.¹⁴ Let us call this the increased probability of harm rationale. This rationale justifies many crimes of risk-prevention. One might believe that the rationale for punishing persons who attempt to commit (legitimate) crimes is comparable: we punish attempted murder, for example, because persons who attempt to kill substantially and unjustifiably increase the probability of a result the law seeks to prevent. In general, it must be true that persons who attempt to cause a harmful result thereby increase the probability of its occurrence. The world would be a fantastic and bizarre place if our intentions to X were so inefficacious that they did not typically increase the probability that X would occur. Indeed, as Yaffe is aware, the increased probability of harm rationale figures prominently in the handful of scholarly endeavors to justify the transfer principle and our willingness to punish attempts at all.¹⁵

Still, Yaffe believes it is clear that the increased probability of harm rationale does not adequately explain our commitment to the transfer principle. In other words, the basis for punishing attempts is fundamentally unlike the basis for punishing (legitimately criminalized) offenses of risk-prevention. More generally, attempts should not be assimilated to crimes of risk-prevention; their rationales are importantly different. Before evaluating the arguments Yaffe offers for this claim, I want to express a hope that he is mistaken---a hope that has nothing to do with the considerations he actually provides. I suspect that progress in retarding the pernicious trend toward overcriminalization is more easily achieved if we emphasize the similarities rather than the differences between attempts and crimes of risk-prevention.¹⁶ Yaffe’s effort to rationalize the law of attempts is part of a long and distinguished tradition in which penal theorists have struggled to ensure that the considerations governing inchoate liability preserve the normative principles we philosophers hold dear. For example, most legal theorists join Yaffe in contending that defendants do not commit an attempt unless they have the mens rea of purpose (or intention) with respect to the result attempted.¹⁷ Clearly, this requirement imposes drastic limits on the scope of attempt liability; a driver who merely knows that his

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¹⁵ As Yaffe points out, the increased probability of harms rationale is defended by Holmes and expressed in the Model Penal Code.
conduct will cause an injury, for example, cannot be said to have attempted to cause an injury.\textsuperscript{18} It is noteworthy, however, that few of the scholarly efforts to narrow the scope of liability for attempts have analogues in the literature about crimes of risk-prevention. For example, a majority of states have enacted an offense of engaging in sexual relations while known to be HIV-positive with a partner who is unaware of the defendant’s infection. Obviously, this offense is designed to proscribe risk; sex with an infected partner does not \textit{always} or \textit{usually} transmit the virus. The conduct is proscribed because it is thought to unacceptably increase the probability of the result to be prevented.\textsuperscript{19} But few commentators suggest that infected persons need have \textit{any} culpability with respect to transmission---and certainly not purpose---to be guilty of this offense. It is only a slight exaggeration to say that these offenses impose a kind of \textit{strict liability} with respect to the result risked.\textsuperscript{20} Criminal theorists tend to be highly critical of strict liability elsewhere in the criminal law, but are relatively silent about the absence of a culpability requirement when assessing crimes of risk-prevention. Curiously, the several normative principles theorists endeavor to preserve in the domain of inchoate liability are held not to apply to crimes of risk-prevention. If we draw parallels between these two categories of offense, however, we would be more likely to hold that persons who are aware of their HIV-positive status should not be guilty of an offense unless they have some degree of culpability---probably recklessness---with respect to the result of transmission.\textsuperscript{21} If Yaffe is correct and crimes of risk-prevention cannot be assimilated to attempts, I fear we are less likely to appreciate that the normative difficulties that must be overcome in justifying the former category of crime must also be surmounted in justifying the latter.

But a hope is not an argument, and it is to arguments that I now turn. Why \textit{should} we accept the transfer principle and punish attempts if the increased probability of harm rationale is defective? Yaffe answers that completed crimes and attempts share deep features that warrant the criminalization of each.\textsuperscript{22} Roughly, “both reflect corruption in the modes of recognition and response to legal reasons employed by the actor, and... these modes of recognition and response to reasons play a role in guiding

\textsuperscript{20} The only reason this statement is an exaggeration is because the result to be prevented is not an explicit element of the statute at all. In deleting this element, states reduce the impact of the presumption of innocence. See Andrew Ashworth: “Four Threats to the Presumption of Innocence,” 123 \textit{South African Law Journal} 63 (2006).
\textsuperscript{22} Actually, Yaffe produces two arguments in favor of the transfer principle, the second of which appears on pp.31ff. I do not discuss this second argument, partly because, on its own terms, it purports to identify “the commonality between legitimately sanctioned completions and \textit{some} attempts.” \textit{Id.}, p.33 (italics added).
Call this the corrupt reasons view of why we should accept the transfer principle and criminalize attempts. According to Yaffe, the corrupt reasons view is the “root of censurability” or of the “blameworthiness” that lies at the bottom of deserved penal sanctions more generally.

Yaffe may be correct that the corrupt reasons view is applicable to all penal offenses the state is justified in enacting. If so, it must also be applicable to crimes of risk-prevention, the very category of crime Yaffe proposes to distinguish from attempts. Surely drunk drivers, for example, exhibit spectacular defects in reason and judgment. Like persons who attempt or commit completed crimes, they attach too much weight to their own preferences and/or too little weight to the safety and welfare of others. If Yaffe is right, he has not found a basis to contrast attempts from any other crime, including crimes of risk-prevention. Instead, he has found a common basis underlying all crimes: completed offenses, attempts, and crimes of risk-prevention.

Yaffe’s corrupt reasons view is a plausible candidate to account for the blameworthiness in all crimes. Notice, however, that it is too broad to explain what is peculiar to crime. After all, corrupt reasoning plausibly lies at the foundation of morality as well as law. Persons who decide to engage in immoral conduct that neither is nor ought to be criminal also exhibit defects in reasoning. Of course, Yaffe is aware of this fact, and thus seeks to confine the application of his rationale by stipulating that persons who are blameworthy for committing (legitimately criminalized) offenses are guilty of corrupt legal reasoning. This stipulation, of course, presupposes a means to identify the particular reasons supplied by law and the criteria by which they differ from those supplied by that part of morality that should not be enacted into law. This task is exceedingly difficult, and it is (again) no surprise that Yaffe makes no systematic effort to undertake it. I assume that the hard work in identifying legal reasons from those that govern other normative domains is done by a theory of criminalization—which (again) I do not fault Yaffe for failing to produce.

In any event, a feature common to all crimes cannot show that the increased probability of harm rationale should not be applied to crimes of attempt. After all, the corrupt reasons view is not an alternative to the increased probability of harm rationale. In the case of crimes of risk-prevention, it may be true that both Yaffe’s explanation and the rationale he seeks to discredit must be satisfied before a given offense is justified. That is, we should not enact a crime of drunk driving unless (at least) two conditions are met. First, it must be true empirically that drunk drivers increase the probability of a

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23 Id., p.24.
24 Id., p.38.
crash relative to the risks imposed by sober drivers who are similarly situated. Second, it must be true normatively that drunk drivers (like persons who commit any crime whatever) exhibit some defect of practical reasoning. If both of these conditions must be satisfied before a given crime of risk-prevention may be enacted, one wonders whether the contrast Yaffe proposed to draw---between the rationale in favor of crimes of risk prevention and that in favor of liability for attempts---can be preserved. Why not impose the same two requirements on liability for attempts? Consider the following thought-experiment. Suppose we made a remarkable discovery: we found a given type of activity for which trying to cause a result did not increase the probability that that result would occur. In the case of this type of activity, X-ing would be harmful, but attempting to X would not increase the probability of harm one whit. Would we still be confident about applying the transfer principle to this activity? No matter how defective the practical reasoning of the defendant happened to be, it is not obvious that we would recommend criminalizing attempts to X unless such attempts substantially and unjustifiably increase the probability that the harm offense X is designed to prevent would actually occur.

Thus an argument for the corrupt reasons view does not amount to an argument against the increased probability of harm view in the law of attempts (or anywhere else). Why, then, does Yaffe reject the increased probability of harm rationale for the transfer principle? He offers at least two independent reasons, that is, reasons that make no reference to the explanation he prefers. I have less sympathy for the first of his arguments, even though Yaffe himself seems to take it quite seriously. In brief, he thinks the increased probability of harm rationale would make the transfer principle too accidental or contingent. He writes:

“[I]f the relevant question from the point of view of criminalization is the increased probability of completion, then the fact that the defendant tried to act criminally is of no direct relevance, but only of indirect relevance, to the justification of the Transfer Principle... The problem is that the Transfer Principle is not justified by a view according to which attempts only sometimes bear the right relation to completions to justify criminalizing them. There is great variety among attempts in how much, if at all, they increase the probability of completion, and the degree to which they do has little to do with any of their normatively relevant properties... But the thought that drives the Transfer Principle is that attempts themselves, because they are tryings to act, bear the right relation to the completed crimes to warrant criminalization, quite

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25 Whether such a case actually exists depends in part on what is to be regarded as a type of activity.
26 Or so it seems to me. One trouble with thought-experiments is that intuitive reactions may not be widely shared.
independently of the further accidental property that some of them possess of significantly raising the probability of completion."\textsuperscript{27}

In response, I suspect that the connection between criminalizing X and criminalizing the attempt to X is contingent. Contrary to Yaffe, variations in the probability of success do seem to be normatively relevant to criminalization—and clearly are relevant at the extremes. As I have indicated, the transfer principle both is and ought to be subject to exceptions. The foremost such exceptions, however, are yet to be discussed, and involve situations in which the defendant chooses a peculiar means of attaining his objective for which the probability of success is zero. At the very least, I do not believe that the contingency of a rationale for the transfer principle entails its deficiency.

To my mind, Yaffe’s second reason for rejecting the increased probability of harm rationale is better than his first, ultimately requiring a major refinement in the increased probability of harm rationale. He believes many cases that actually exist conform to my earlier thought-experiment. In these cases, we do and should prohibit the attempt to X even though the type of attempt does not increase the probability of harm. He writes: “[T]he occurrence of many a legitimately criminalized attempt fails to raise the probability that the attempt will blossom into a completed crime. Under the [increased probability of harm] approach, there appears to be no good reason to criminalize such attempts.”\textsuperscript{28} So-called factually impossible attempts, as the name implies, could not have succeeded. Yet we do and should punish them anyway.

\textit{Should} we accept the transfer principle in a case in which we agree that the attempt did not increase the probability of success at all? Many of us are extremely reluctant to punish in cases of \textit{inherent factual impossibility}. The notorious “voodoo” or “raindance” cases are familiar illustrations. Try as one might, he cannot possibly kill by constructing and sticking pins in an effigy of an intended victim. Nor can he destroy property by doing a magical raindance to cause a flood. Even though the defendant is trying to kill or to cause property damage in these cases, many of us have grave reservations about the justifiability of imposing criminal liability.\textsuperscript{29} As a card-carrying criminal law minimalist, I reject punishment altogether in cases of inherent impossibility. Yaffe himself is officially

\textsuperscript{27} \textit{Id.}, p.29.
\textsuperscript{28} \textit{Id.}, p.28.
\textsuperscript{29} But not Ferzan and Alexander. Then again, their overall approach has lost all touch with intuitive plausibility in the pursuit of ideological consistency.
agnostic about whether to acquit or to mitigate punishment in such examples, even though I think that the rationale he ultimately provides commits him to the former rather than to the latter position. Admittedly, existing criminal law does not speak with a single voice on such matters. The Model Penal Code, for example, allows but does not require courts to dismiss a prosecution or to mitigate the severity of a sentence in a case of inherent factual impossibility. The sensible exercise of police and prosecutorial discretion helps to assure that few such cases will ever come to trial. Nonetheless, inherent factual impossibility continues to fascinate law professors and to baffle students. The increased probability of harm rationale that Yaffe rejects provides an appealing perspective on the voodoo and raindance cases: we refuse to punish because the conduct simply does not increase the probability of harm. Of course, Yaffe cannot accept this explanation as the reason not to punish. Instead, he is forced to find a more convoluted rationale to preserve his intuition that these defendants should be treated differently (either by being acquitted or by having their sentences mitigated) from those who fail after employing more efficacious means to try to attain their criminal objectives.

Discussions of inherent factual impossibility typically begin by rehearsing the familiar difficulties of distinguishing such cases from those of garden-variety factual impossibility. After all, the would-be assassin who aims and fires but misses his intended victim is just as destined to fail as the voodoo practitioner. The laws of physics dictate that he will not succeed given such variables as his particular aim, the wind velocity, the distance and movement of his target, and the like. Indeed, in many cases it is difficult to decide whether a given attempt qualifies as an instance of inherent factual impossibility. Yaffe’s own examples involve cases in which HIV-positive defendants spit on their purported victims, intending to kill them by infecting them with the virus and falsely believing that the virus can be transmitted through saliva. Does this case involve inherent factual impossibility or mere factual impossibility that is not inherent? Perhaps the answer depends, as Yaffe’s intriguing suggestion indicates, on the state of general knowledge about HIV at the time the action was performed. I have no wisdom to offer about such matters. Many judgments in criminal law (such as those involving reasonableness or whether a defendant has created a substantial or unjustifiable risk) admit of intractable borderline cases, and judgments in the law of attempts are not exceptions.

30 “The practice of acquitting or mitigating where attempts are inherently impossible seems right.” Id., p.239.
31 If Yaffe is correct that defendants who perpetrate inherently impossible attempts may have committed an attempt without being guilty of an attempt, it is hard to see how he could favor mitigation to an outright acquittal.
32 MPC Sec. 5.05(2).
33 Id., pp.252-253.
Borderline cases aside, however, Yaffe ultimately admits that a defendant who fires a gun but misses and fails to kill is different in kind a defendant who performs a raindance but fails to cause a flood that damages property. Why is the basis for convicting (or for punishing severely) the former so much more compelling than for the latter? In his efforts to answer this question, Yaffe deploys a distinction between commission and guilt: the defendant who perpetrates a crime that is an instance of inherent factual impossibility has committed a crime even though he is not guilty of one. More specifically, Yaffe’s ground for acquitting the perpetrator of an inherently impossible attempt is analogous to his rationale for requiring criminal attempts to include an act. In the absence of an act, Yaffe concludes, we lack reliable evidence that the defendant is indeed committing an attempt.\textsuperscript{34} It may be possible to commit an attempt without acting, but persons who succeed in doing so should not be held guilty of attempting. Analogously, when persons resort to inherently impossible means to attain their criminal objective, we lack reliable evidence that they are really trying. Our defendant who performs a magical raindance is making an attempt to kill, but he is not guilty of an attempt because we lack the evidence we need in order to convict him.

I have no knock-down argument that Yaffe’s explanation is unsatisfactory. It is notoriously hard to decide whether a given quantum of evidence amounts to proof beyond a reasonable doubt. It seems to me, however, that it is perfectly possible for us to possess reliable evidence of a criminal intent even though the defendant chooses a means to achieve his objective that is hopelessly doomed to fail.\textsuperscript{35} Suppose I believe in the power of voodoo and publicly vow to kill my neighbor. In September I poison her soup, but she manages to avoid drinking it. In October I construct a doll of her likeness and decapitate it. In November I conceal a bomb under the accelerator of her car, but she detects it and I am finally arrested. Yaffe and I agree that I have committed three counts of attempted murder, but (unlike me) he contends that I am guilty of only two. This judgment strikes me as implausible; the evidence that I intend to kill in October seems sufficiently reliable to allow me to be convicted of three rather than of only two counts of attempted murder.\textsuperscript{36}

\textsuperscript{34} \textit{Id.}, Chapter 8.

\textsuperscript{35} I also question Yaffe’s rationale for requiring an act before a defendant can be liable for an attempt. In many cases we possess reliable evidence that a defendant is committing an attempt notwithstanding the fact that he has failed to act.

\textsuperscript{36} I will not comment on the apparent oddity of describing Yaffe’s solution as convoluted when he charitably credits me for developing the distinction between guilt and commission on which his solution rests. See \textit{Id.}, p.110n1.
What about more ordinary cases of factual impossibility—cases that do not involve inherent impossibility? Consider an example in which the means chosen by the defendant to achieve his criminal objective is not inherently destined to fail, but nonetheless does not increase the probability of harm one iota. Yaffe has these cases in mind in rejecting the increased probability of harm rationale as an adequate defense of the transfer principle. In the movies, a potential victim is alerted to the arrival of his would-be assassin, and cleverly proposes to catch the villain red-handed by hiding behind a bedroom curtain and substituting a life-like dummy under the covers of his bed. The defendant arrives and reveals his intention to kill by firing several bullets into the mannequin. We should not say that firing a gun is an inherently impossible means of killing. Yet the defendant’s act of firing bullets into a dummy does not appear to increase the probability of death to any greater degree than that of the voodoo practitioner. If one cannot kill by sticking pins into a doll, he cannot kill by firing bullets into a dummy. Why, then, should we convict the defendant of a criminal attempt if our rationale for the transfer principle depends on an increased probability of harm? Yaffe concludes that we should not, and thus is motivated to find an alternative rationale both for the transfer principle as well as for acquitting the defendant who commits an inherently impossible attempt.

The problems with which Yaffe wrestles are formidable. They have puzzled commentators for centuries, and I admit to having reservations about how to solve them. It is worthwhile to pause and point out that inherent factually impossible attempts pose greater difficulties for the harm principle than the alleged counterexamples more typically found in the literature. The harm principle has several distinct formulations. I construe it as a constraint, disallowing particular penal statutes that do not prevent harm or the unacceptable risk of harm. Criminal theorists who reject the harm principle are not always clear about the content of the principle they reject. Nonetheless, they frequently raise two kinds of objections. First, they describe “hard cases for the harm principle.” Cruelty to animals, species extinction, and desecration of corpses are the most familiar of the troublesome examples. I believe that statutes proscribing at least the first two of these behaviors can probably be defended; we should be willing to extend the protections of the harm constraint beyond human beings. The third example is more worrisome. If no psychological trauma is caused by desecrating a corpse, however, I am

37 Alternative versions of the harm principle are available. Joel Feinberg, for example, formulates this principle so that the prevention of harm functions as a good reason for intervention by the criminal law. See his Harm to Others (New York: Oxford University Press, 1984).

38 This phrase comes from Feinberg: Id., Chapter 2.


prepared to regard the conduct as a taboo that should not be enforced by punitive sanctions. The second basis for rejecting the harm principle describes cases in which a type of conduct is paradigmatically harmful but a token is not. Defendants should be punished, for example, when they perpetrate an act of “harmless rape.”\textsuperscript{41} I agree that liability should not be spared because a defendant takes great pains to ensure that his victim will never learn she has been penetrated. Nonetheless, this potential counterexample need not give pause to theorists who accept the harm constraint. I simply cannot imagine a realistic scenario in which a defendant takes precautions to ensure that his victim will not discover that she has been raped without imposing a substantial and unjustifiable risk upon her. Even if the defendant succeeds in his plan, the \textit{ex ante} risk of failure is unacceptable. Neither of these potential counterexamples should lead theorists to reject the harm constraint.

I also point out that the problems Yaffe describes infects not only my purported solution to the problem of why we punish attempts, but also the rationale I believe nearly all commentators accept for enacting crimes of risk-prevention. Although any number of such crimes could be used to illustrate the point I intend to make, consider a case of reckless endangerment. Suppose that a construction worker evades safety precautions by tossing cinder blocks from the roof of a building, consciously disregarding the risk he poses to pedestrians on the pavement below. No commentator should believe that the criminal law should permit his act. As I have said, we punish such behavior because it impermissibly increases the risk of harm, and not only when harm actually results. Suppose, however, that it turns out to be factually impossible (although not inherently impossible) for the reckless construction worker to harm anyone. No one happens to be in the vicinity of the building from which the bricks or tossed. I take it that a defendant is no more able to harm a person a good distance away by tossing bricks from a building than by firing a bullet into a mannequin. Are we really prepared to say that the reckless construction worker should not be punished according to the increased probability of harm rationale for enacting crimes of risk-prevention?

These concerns, however, do not solve the problem as much as show that the need for a solution extends beyond the law of attempts to crimes of risk-prevention more generally. Factually (but not inherently) impossible scenarios remain problematic for theorists who (like me) include a harm constraint in their theory of criminalization. Still, we need to know how we should respond to the problem Yaffe identifies? How can we defend the judgment that our construction worker and would-be assassin unacceptably raise the risk of harm? At the very least, the difficulties Yaffe describes require a

major refinement of the increased probability of harm rationale. My inspiration for a solution comes from a suggestion by Peter Westen,\textsuperscript{42} whose views Yaffe discusses, partially borrows, but ultimately rejects.\textsuperscript{43} It is easier to begin by describing my train of thought intuitively than to dress it in respectable philosophical jargon. I claim that the villain who fires at the dummy while his intended target hides behind the curtain has done something dangerous. To avoid misunderstanding, I do not mean to suggest (although it may well be true) that he is a dangerous person who indicates by his behavior that he is likely to try again when he realizes he has failed to kill his intended victim. Like Yaffe, I tend to resist the view that the criminal law should punish dangerous persons. Instead, the person who fires and misses has performed an act that most of us would recognize as dangerous. The voodoo practitioner or rain-dancer, by contrast, has not performed a dangerous act. I hope and believe that the intuitions that lie behind these claims are widely shared. Some of these intuitions draw from ordinary locutions we express, would be warranted to express, and understand when others express. If you learn that I aimed my gun at you and fired but miss, it seems appropriate for you to complain “you could have killed me!” If a philosopher responds that I could not possibly have killed you in light of my aim, the wind velocity, and the other physical variables that obtained, you would not be inclined to recant your statement and admit that I could not have killed you after all. But upon becoming aware that I had made a voodoo doll of you and plunged pins into its “heart”, you would not react similarly and exclaim “you could have killed me!” I assume that this statement would be false in the latter case but true in the former. It is very difficult to provide a philosophically respectable account of why the truth value of this statement differs in the two contexts, but I do not think we should despair and abandon the endeavor as misguided and confused. I suspect that even philosophers who profess not to understand such statements could be overheard to utter them at the appropriate times and places. As I have indicated, consistent pessimism about the intelligibility of these locutions would make problematic all offenses of risk-prevention, and not merely criminal attempts.

But can the details of these claims be defended? How do we decide whether conduct creates a risk and could have succeeded? An answer to this question provides the key to differentiating inherent factual impossibility from garden-variety factual impossibility. I would not measure the existence of a risk either from the viewpoint of an omniscient observer or from the perspective of the defendant himself. Instead, perhaps the question whether the defendant creates an unacceptable risk should be assessed from the perspective of the reasonable person or the idealized observer. Larry Crocker argues


\textsuperscript{43} Yaffe, pp. 252-253.
that the measure of a risk in cases of factually impossible attempts is the *ex ante* viewpoint of a hypothetical agent. He maintains that persons should lack a defense of impossibility when an idealized observer would evaluate the defendant’s conduct as unacceptably risky.44 Larry Alexander counters, however, that all such approaches are objectionable in requiring idealized observers to be invested with a certain quantum of knowledge. Of course, it is hard to identify a non-arbitrary standard for affixing this quantum of knowledge. This problem infects *all* uses of reasonable persons or idealized observers in moral and political theory. But Alexander’s verdict about this problem is overly pessimistic. He concludes that “[this] approach ...is indeterminate through and through. Its application will perforce be completely arbitrary and manipulable.”45

If Alexander’s verdict could be supported, we would be at a loss to explain why we say “I almost made a hole in one!” when my initial shot hits the pin and balances precariously on the cup, but would not utter the same statement when I miss the ball altogether on the tee. After all, we were destined to fail in both cases in a deterministic universe, and an omniscient observer could have correctly predicted the result that actually came about. Thus the greatest challenge in defending the increased probability of harm rationale is to identify a non-arbitrary and non-manipulable sense in which (some) factually mistaken attempts are risky because they *could* have succeeded.46 Here is where Westen’s solution becomes promising. When we punish for factually impossible attempts, Westen contends that we punish not only for what persons *did*, that is, for their willingness to act on their guilty minds, but also for something they did *not do*. We hold them liable for what we believe they *would have done* under counterfactual circumstances that did not exist but that we fear could have occurred. According to this train of thought, the would-be assassin who shoots into the dummy *does* create an unacceptable risk of death. He might have succeeded in a possible world very close to our own---in a world in which others thwart our plans through clever ruses. The same might be said of our construction worker who commits an act of reckless endangerment. Clearly, however, the same judgment cannot be made about our raid-dancer. He would succeed only in a possible world incredibly distant from our own---a world in which chants have magical powers to alter the weather. If chants had these powers, the fundamental laws of meteorology itself would have to be altered.

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46 I explore some of these issues in Douglas Husak: “Repaying the Scholar’s Compliment,” 1 *Jerusalem Review of Legal Studies* 48 (2010).
If we accept Westen’s solution, we are forced to rephrase the harm constraint that is central to my theory of criminalization. This constraint is satisfied not only when persons cause an unacceptable (that is, a substantial and unjustifiable) risk of harm—but also when defendants satisfy the counterfactual test he proposes. That is, the harm constraint is satisfied when conduct would have caused harm in a sufficiently close possible world. I admit to considerable unease with the possible worlds semantics on which Westen and I rely. Judgments about the relative proximity of possible worlds are notoriously problematic, and I cannot begin to solve the familiar difficulties here. Unfortunately, I cannot improve on Westen’s account. If he is correct—as I tentatively believe him to be—a plausible description of the conduct in a (non-inherent) factually impossible attempt reveals it to pose an unacceptable risk of harm after all.

I conclude by repeating my doubts about whether the transfer principle should be accepted at all. Some acts that are justifiably criminalized should not give rise to attempt liability. Still, I concede that the transfer principle is a useful approximation, both descriptively and prescriptively. It provides a vehicle for raising the surprisingly difficult question of why we punish attempts at all. When suitably refined, I believe that the substantial risk of harm rationale for the transfer principle can be salvaged, and we do not need an alternative explanation of why the criminal law should punish attempts.

47 It is noteworthy that Yaffe himself invokes counterfactual tests resting on a possible worlds semantics elsewhere in his writings on criminal law. See...