

Why Punish Attempts at All? Yaffe on ‘The Transfer Principle’

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Abstract Gideon Yaffe 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.” I begin by expressing a few reservations about the transfer principle itself. But my main point is that we are justified in punishing attempts only when and for a different reason than Yaffe provides. I argue that attempts are legitimately punished only when they raise the risk that a harm will actually occur. To overcome the problems my explanation encounters with factually impossible attempts, I suggest an account of risk that relies on ordinary language and possible worlds.

Keywords Attempts · Risk · Possible worlds · Factual impossibility · Legal impossibility · Inherent impossibility · Yaffe · Double inchoate crimes

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” (Yaffe 2011, p. 21). 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

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