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## ATTEMPTS, IN LANGUAGE AND IN LAW

Mitchell N. Berman\*

### INTRODUCTION

Let us start with the particular. *A* shoots at *V*, intending to kill. Were the bullet to strike *V*, killing her, *A* would be guilty of murder. That is to say, *A* would satisfy the statutory definition of murder and could not plausibly invoke any of the available defenses to criminal liability. In the event, however, the bullet misses *V*, landing harmlessly in a field. Call this case *Target Missed*. Should *A* be convicted of some offense and criminally punished? If so, why?

All criminal law regimes of which I am familiar answer that first question in the affirmative, and criminal law theorists (or Anglophone theorists at the least) are in possibly unanimous agreement. Indeed, few questions in the philosophy of criminal law elicit such widespread assent. There is far less agreement regarding the best answer to the second question—the question of what justifies punishment in *Target Missed*. The answer matters, of course, even if not for *Target Missed* itself or for the narrow class of cases it exemplifies. If two or more accounts can justify *A*'s punishment equally well but yield different conclusions regarding how the law should treat cases that are similar to *Target Missed* on one or another dimension, a choice need be made among them.

Here, in the smallest of nutshells, is one answer to the question of justification: *A* should be punished *because he attempted murder*. Call this the Attempt Theory. Though it might appear circular or uninformative, properly understood it is not. The view under consideration is not that *A* should be punished because he committed *what the law calls an "attempt,"* but that he should be punished because he *in fact* attempted to commit murder and, generally speaking, if one should not  $\phi$ , one should not attempt to  $\phi$ .

If the Attempt Theory is not vacuous as a justification for punishing *A* in *Target Missed*, nor is it obviously correct. A second answer runs like this: We should punish *A* because the good reasons we would have had to punish him had he succeeded in killing *V* remain good reasons to punish him though he didn't, and there are no compelling reasons, of policy or justice, not to. Call this the Underlying Reasons Theory. This account does recognize that there are things in the world that are attempts and that *A* did attempt to murder *V*. It just maintains that *A*'s having attempted to kill *V* is not, strictly speaking, what justifies our punishing him.

Gideon Yaffe's recent book, *Attempts*,<sup>1</sup> is a deeply penetrating and philosophically sophisticated elaboration of the Attempt Theory. Its core idea is that what we call "attempts" in ordinary extra-legal

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<sup>1</sup> GIDEON YAFFE, *ATTEMPTS* (Oxford 2010).

language are particular types of actions that he denominates “tryings.” So to understand the proper shape of the law, we need to know what constitutes a trying. And this, Yaffe says, is to lead us to the philosophy of action. Our best philosophical analysis of tryings will determine (subject to refinements driven by institutional constraints and demands) the proper contours of the legal prohibition under which *Target Missed* falls.

I learned much from Yaffe’s extraordinarily rich analysis of tryings, even though I doubt some claims and am uncertain of others. Fortunately for me, however, I need not wade deeply into the details of Yaffe’s analysis for purposes of this essay, for I part ways with him at the get go. In my view, the Attempts Theory is not the best justification for punishment in cases like *Target Missed*; the Underlying Reasons Theory is superior. If this is right, then Yaffe’s analysis of the criminal law of attempts—what I will call, in order to minimize the sense of circularity that might otherwise attach to what I am dubbing the Attempt Theory, the criminal law of “imperfect offenses”—goes awry not in its particulars, but at its foundation.

This essay elaborates on this claim in two parts. Part I puts some flesh on the bones of these two competing accounts. Part II draws forth implications of the Underlying Reasons Theory for three questions about the proper scope of the law of imperfect offenses and shows how they differ from the conclusions that Yaffe reaches.

## I. COMPETING THEORIES OF IMPERFECT OFFENSES

### A. Preliminaries

Every criminal offense is a unique combination of specified elements of varied types—types that Anglophone criminal law classes as actus reus or mens rea; as conduct, circumstance, or result; and so on. The unique combinations of elements that constitute offenses do not represent islands of human behavior far removed in all respects from instances of noncriminal behavior. To the contrary, every offense describes behavior that is similar to other types of behavior in some or many respects though not in all. For any offense, there are countless ways in which somebody might find herself in its vicinity, so to speak, without having satisfied all its requirements.

It is intuitively plausible that some conduct (understood broadly as some way in which a human being relates to the world) that does not constitute some given offense but comes close (by reference to one or another standard of closeness) should be criminalized in consequence of the decision to criminalize the conduct to which it bears resemblance. Of course, it will frequently be the case that, if some conduct is criminalized as offense  $\phi$ , some nearby or roughly similar conduct will be specifically criminalized as well, say as offense  $\psi$ . But my thought here is different. It concerns the general part of the criminal law, not the special part. It is that the decision to criminalize offense  $\phi$  might imply that other conduct that falls outside its terms should also be criminalized and punished by the application, to offense  $\phi$ , of general rules or principles (if very possibly defeasible). Criminalization of this other conduct should not, then, depend upon a legislative decision to enact a separate offense. To coin a

term, let us call conduct whose criminalization follows from the creation of some offense—or, to employ language familiar to American constitutional lawyers, conduct that falls within the penumbra of an offense but not within its terms—an “imperfect offense.”<sup>2</sup> For every “perfect” offense  $\phi$ , that is, other conduct might constitute the imperfect commission of  $\phi$ , or the imperfect  $\phi$ .

The reason to introduce the notion of imperfect offenses is to allow us to reformulate the question with which theorists of attempt liability have grappled. The philosophical literature engaged with cases like *Target Missed* frequently addresses itself to some close variant of the compound question: what is an attempt and what should be the scope of attempt liability? Posing the question that way, however, biases the likely answers in predictable directions. Despite the fact that commentators at least since Holmes have cautioned against “attach[ing] more importance to the etymological meaning of the word attempt than to the general principles of punishment,”<sup>3</sup> jurists routinely oppose some particular proposal to reshape the legal contours of what the law has been calling “attempts” on the ground that it would “make[] nonsense of the English language.”<sup>4</sup> With this more neutral terminology on the table, we can ask the important questions without referencing “attempts.” We can ask: *what principles or considerations should determine the scope of imperfect offenses?*

#### *B. Yaffe and the Attempt Theory.*

The Attempt Theory is at least a partial answer to this question. It asserts as a general principle (if possibly a defeasible one) that if  $\phi$  is properly criminalized and punished, then other conduct is also properly criminalized and punished if, and on the grounds that, it constitutes an attempted  $\phi$ . On the Attempt Theory, *Target Missed* is properly criminalized, and A properly punished, precisely because A’s conduct constituted an attempted murder of V.

I have stated the Attempt Theory quite generally. For it to be useful, we need an account of what is an attempt—not, to reiterate, as a matter of law, but as a matter of ontology. It is Yaffe’s analysis of this question that constitutes his distinctive contribution to the philosophical analysis of

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<sup>2</sup> The law already recognizes a category of “inchoate offense” consisting of conspiracy, solicitation, and attempt. These first two classes concern prohibited ways of interacting with others toward the commission of an offense. I am conceiving of “imperfect offenses” as prohibitions on individual conduct that follow from enactment of an offense.

<sup>3</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 66 (1881), *quoted in* YAFFE, *supra* note 1, at 48-49. Continuing, Holmes observes that “there is at least color of authority for the proposition that an act is punishable as an attempt, if, supposing it to have produced its natural and probable effect, it would have amounted to a substantive crime.” This language suggests that imperfect offenses should be criminalized when they risk completion. To anticipate, that is not what the Underlying Reasons Theory maintains.

<sup>4</sup> John E. Stannard, *Making up for the missing element—a sideways look at attempts*, 7 *LEGAL STUD.* 194, 197 (1987). In a footnote, Stannard recognizes that others have responded to this objection by arguing “that ‘attempt’ in the criminal law is a term of art and should not be affected by the natural meaning of the world.” *Id.* at 197 n.21. (Compare, e.g., “malice,” one might add.) Strikingly, he offers no counterargument. Stannard’s own proposal, incidentally, is that the law “makes up, as it were, for” the absence of an element of the *actus reus* of an offense “by insisting on a greater degree of *mens rea*,” namely purpose or intent. *Id.* at 194.

imperfect offenses. Because that analysis is extraordinarily complex and nuanced, the summary of it that I provide here, and flesh out just a little more in the next Part, is, necessarily, brutally simplified.

Yaffe starts by positing that “If a particular form of conduct is legitimately criminalized, then the attempt to engage in that form of conduct is also legitimately criminalized.”<sup>5</sup> Calling this “the Transfer Principle,” Yaffe demonstrates his embrace of the Attempt Theory by observing that, “[g]enerally, it is through the transfer principle that attempts become crimes.”<sup>6</sup> The challenge, he observes, is to explain precisely what justifies it.

After critically assessing several possible justifications for the Transfer Principle, Yaffe develops his own view. It starts with a proposal regarding the conditions that justify criminalization: “Criminalization of a type of conduct is legitimate,” Yaffe says, “if (1) Censure by the state of every unexcused and unjustified token of that type of conduct is deserved, and (2) Some of the unexcused and unjustified tokens of that type of conduct are legitimately sanctioned by the state in some way or other.”<sup>7</sup>

Armed with this principle, Yaffe argues that “the root of the censurability, or blameworthiness of conduct are facts about the modes of recognition of reasons employed by the person in reaching a conception of the reasons on the basis of which he acts, and the modes of response to reasons that he employs in acting on that conception.”<sup>8</sup> And trying to  $\phi$  and  $\phi$ ing involve the same recognition and response to reasons for action. At least this is true, says Yaffe, when tryings are construed in accord with what he labels “the Guiding Commitment View,” a formalization of the idea that “to try to do something is to be committed to each of the components of success and to be moved by those commitments.”<sup>9</sup> Therefore, all else equal, if all unexcused and unjustified tokens of  $\phi$ ing deserve censure, so too do all unexcused and unjustified tokens of trying to  $\phi$ . Second, Yaffe thinks it implausible that “although sanction admits of degree, and although attempts can differ from completions by a very small amount, they differ entirely from completions in the justifiability of sanction.”<sup>10</sup> Therefore, if some token  $\phi$ ings are legitimately sanctionable, so too are some token attempts to  $\phi$ .

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<sup>5</sup> YAFFE, *supra* note 1, at 21.

<sup>6</sup> *Id.* It is not clear to me what work the modifier “generally” does for Yaffe. One natural interpretation would be that some actions that truly are attempts are legitimately criminalized on grounds extrinsic to the Transfer Principle. But I’m not sure how that could be, and I doubt that Yaffe would endorse that claim were it coherent.

<sup>7</sup> *Id.* at 32. Two things to note about this proposal, which Yaffe designates “(\*).” First, Yaffe concedes that he has no argument for (\*), and that he accepts it because “it seems . . . true.” Fair enough: it seems true to me too. But—and this is the second point—it seems true only when understood as setting forth a *sufficient* condition for punishment. That, indeed, is the literal meaning of the statement. I worry, however, that Yaffe might be tempted, either when defending his particular elaboration of the Attempt Theory or in opposing some implications of the Underlying Reasons Theory, to construe (\*) as setting forth a necessary condition for punishment too. This worry might be misplaced. Nonetheless, it’s worth cautioning that (\*) would require supporting argumentation, in my view, were “if” to become “if and only if.”

<sup>8</sup> *Id.* at 38.

<sup>9</sup> *Id.* at 73.

<sup>10</sup> *Id.* at 36.

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All of this explains why an actor is properly punished in paradigmatic cases of attempt liability for result offenses—cases like *Target Missed*—in which he intends to produce a proscribed result and does all that he believes necessary to achieve it. The actor is properly held to be trying to commit murder because he is committed to all the elements of the offense of murder and is moved by those commitments.

I said earlier that the Attempt Theory is at least a partial account of the law of imperfect offenses. Whether it is partial or total depends upon whether it is conceived as exhausting the field. Yaffe himself observes that the fact that some conduct does not constitute an attempt to commit an offense does not entail that the conduct should not be criminalized.<sup>11</sup> Put in our vocabulary, he leaves open whether the Attempt Theory is a full account of the law of imperfect offenses. The Transfer Principle, in his view, is one principle governing the law of imperfect offenses. Perhaps there are others, perhaps not.

### *C. The Underlying Reasons Theory.*

Here is an alternative approach to imperfect offenses: if  $\phi$  is properly criminalized and punished, then conduct not within  $\phi$  is also properly punished if, and on the grounds that, the reasons that justify criminalizing  $\phi$  are also reasons to punish this other conduct and so long as there are no compelling countervailing reasons not to punish it that are not also reasons (or not also reasons of similar strength) not to punish  $\phi$ . I call this the Underlying Reasons Theory because it evaluates whether some conduct properly constitutes an imperfect offense by direct reference to the general reasons that govern our criminalization decisions.

Just as the Attempt Theory demands an account of *attempts*, the Underlying Reasons Theory depends upon an account of the reasons that generally justify the infliction of criminal punishment. This is notoriously controversial.<sup>12</sup> But to illustrate the Underlying Reasons Theory, I will provisionally adopt what I take to be the dominant view—a desert-constrained pluralistic instrumentalism. I emphasize that this is an illustration: the Underlying Reasons Theory is independent of, and consistent with, any particular approach to the justification of punishment, though what recommendations it yields regarding the scope of imperfect offenses will vary with the justificatory theory to which it is attached.

Assume that, on the best theory of criminalization, we are justified in criminalizing some conduct  $\phi$ . Instrumentalism about punishment—more commonly called consequentialism<sup>13</sup>—dictates that we are justified in punishing an actor for  $\phi$ ing if our doing so would produce (or is reasonably expected to produce) net good consequences, as (for example, and also most saliently) by deterring

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<sup>11</sup> See, e.g., *id.* at 45.

<sup>12</sup> For an overview of justifications of punishment, see Mitchell N. Berman, *The Justification of Punishment*, in ANDREI MARMOR, ED., *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 141-56 (2012).

<sup>13</sup> For reasons to prefer “instrumentalism” to “consequentialism” in this context, see VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* Ch. 2 (2011); Mitchell N. Berman, *Two Kinds of Retributivism*, in R.A. DUFF & STUART P. GREEN, EDs., *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 433-57 (2011).

future  $\phi$ ing, by the actor himself or by others.<sup>14</sup> A desert-based constraint adds that any such instrumentally warranted punishment must also be deserved, or not disproportionate to what is deserved, or something along these lines.

With these principles in hand, we can analyze whether some class of behavior described by reference to some offense  $\phi$  should be criminalized in four steps. (1) For any class of behavior, C, first determine whether the reasons that best justify criminalizing and punishing  $\phi$  also warrant punishing conduct in C. (2) If so, assess whether there are particular instrumental reasons not to punish agents who engage in C that are not also reasons (or not also reasons of comparable magnitude) not to punish commission of  $\phi$  itself. (3) If that expanded instrumental analysis still supports punishment, assess whether punishing actors for C would run afoul of desert-based constraints on punishment (assuming that the actors do not satisfy the requirements of any generally available defenses). If it would not, then we can conclude that punishing persons who engage in C would be justified in principle. But for punishment to be justified in practice it must also be authorized by rules that comport with principles of legality. Accordingly, it remains (4) to determine whether we can describe C by means of legal rules that satisfy the desiderata that properly govern the drafting of rules of criminal law—for example, that would not be so vague as to overdeter lawful and desirable conduct adjacent to C or to excessively risk false positives in adjudication.

We can illustrate this analysis by considering the class represented by *Target Missed*: result offenses in which an actor intends to achieve the proscribed result but fails, and otherwise satisfies all elements of the offense.

First: Elementary deterrence analysis dictates that, generally speaking, we will augment deterrence of offenses by threatening and imposing punishment in this class of conduct too because doing so increases the expected probability of being punished for persons contemplating engaging in conduct that would constitute the offense if all goes well. Second: There are no obvious negative consequences of doing so, and some strong positive consequences—like incapacitating people who have demonstrated dangerousness. Third: an actor who engages in this class of conduct has the same (or nearly the same) blameworthiness or desert as does an actor who engages in  $\phi$ , all else equal, precisely for the reason that Yaffe gives: blameworthiness is (largely) a function of an actor's modes of recognizing and responding to reasons, and actors in this class display the same reasoning as do actors who commit  $\phi$ .<sup>15</sup> Fourth: we can craft a rule that reaches this class of conduct and satisfies all reasonable good-drafting desiderata. For example: "A person is guilty of an imperfect crime if, acting with the kind of culpability otherwise required for commission of the crime, he does or omits to do

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<sup>14</sup> Of course, punishment can bring about net good consequences by means other than deterrence, such as by reinforcing valuable social norms and by incapacitating dangerous persons (although, strictly speaking, I believe that incapacitation does not justify *punishment* but can justify doing the things that we do when we punish). Also, the types of goods whose realization can contribute to the justification of punishment on an instrumentalist account can be diverse, hence the modifier "pluralistic." It is open to a pluralistic instrumentalist to include among the goods that punishment produces the good of realizing retributivist desert.

<sup>15</sup> The parentheticals in this sentence are intended to accommodate those who believe in moral outcome luck. Persons who deny moral outcome luck can read those parentheticals out of the claim.

anything with the purpose of causing a result that is an element of the crime without further conduct on his part.”<sup>16</sup>

*D. Summary.*

*Target Missed* exemplifies a very familiar class of conduct that is a candidate for an imperfect offense—the class defined by the following attributes: the offense includes a result element; the actor intended to produce that result but failed; and the actor satisfied all other elements of the offense, including by having engaged in all the conduct that he thought necessary to produce the result in question. On the Attempt Theory as glossed by Yaffe, actors in such cases are properly punished because they tried to commit the offense. Such actors are properly punished on the Underlying Reasons Theory too, but for different reasons. A is properly punished because the best reasons we would have for punishing him if the bullet had hit V are good reasons as well to punish him notwithstanding that the bullet missed V, and no compelling countervailing considerations direct that we should not.

Yaffe endorses the Attempts Theory on the grounds that “efforts to pin crimes on those who attempt crimes . . . without using the word ‘attempt’, is simply dishonest. It is the *attempt* that we take to be criminal. Why not tell the moral truth in the construction of criminal law?”<sup>17</sup> Putting the same point somewhat differently, he asserts that “[w]hen attempts are justifiably criminalized, they are so in virtue of the fact that the Transfer Principle applies.”<sup>18</sup> The Underlying Reasons Theory denies precisely this. Even when an imperfect offense is an *attempt* or a *trying*, that is not why we rightly criminalize it. Of course, the Underlying Reasons Theory need not deny that, as an historical matter, imperfect offenses that *are* attempts were initially criminalized *because* they are attempts. The Underlying Reasons Theory is a philosophical thesis, not an historical one.<sup>19</sup>

On the Underlying Reasons Theory, accordingly, failing to *describe* as an “attempt” an imperfect offense that happens to *be* an *attempt* is not dishonest. Furthermore, it has the virtue of substantially reducing the likelihood that jurists will misunderstand the rationale for imposing liability for genuine attempts and thus draw conclusions about the proper contours of imperfect offenses that do not best comport with sound criminal justice policy. I have noted that Yaffe allows that the Transfer Principle might be supplemented by other principles that would collectively govern imperfect offenses. On the Underlying Reasons Theory, in contrast, the Transfer Principle does not need to be supplemented; it is gratuitous.<sup>20</sup>

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<sup>16</sup> This is a slight variation on Model Penal Code § 5.01(1)(b).

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 45.

<sup>19</sup> Yaffe makes the same point about his own analysis of attempts. YAFFE, *supra* note 1, at 3.

<sup>20</sup> Compare Michael Moore’s analysis of causation in the law. Against those who treat causation in the law as a question of legal policy, broadly construed, Moore treats it as a problem of metaphysics. See MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS (2009). But given his agreement that some relationships that the law currently treats (wrongly, in his view) as causal should continue to be punished to the same degree, Moore’s analysis has a two-step quality: first, he reduces legal causation to metaphysical causation; second, he supplements metaphysical causation for legal purposes with counterfactual dependence. To some

## II. SELECT IMPLICATIONS

We started with *Target Missed* because it represents the paradigm of what the law presently criminalizes as an attempt: situations in which an actor intends to cause a forbidden result and completes the conduct that he believes sufficient to produce it. As noted in the introduction, just about everybody appears to agree that this conduct is properly punished. And as we have just seen, both the Attempt Theory (at least as developed by Yaffe) and the Underlying Reasons Theory (at least when conjoined to a desert-constrained pluralistic instrumentalism) yield the same conclusion. As we move outward from the core case, however, a great many questions arise regarding the scope of imperfect offenses.<sup>21</sup> Given space constraints, this essay cannot address them all. Analysis of three of the most commonly discussed will provide a flavor of the difference between the Underlying Reasons Theory and Yaffe's take on the Attempt Theory.

### A. Culpability as to Results.

Here's one obvious question concerning the law of imperfect offenses: when an actor, reckless as to the prospect of causing a particular result, would be guilty of an offense were he to cause the result in question, should he be guilty of an imperfect offense if the result does not occur? Suppose that *A*, in *Target Missed*, had not intended to hit *V*, but only to scare her. On the plausible assumption that *A* is aware of a risk that his shot will hit and kill *V* despite his contrary intention, he would be guilty of manslaughter were that result to obtain. In the variation under consideration, the bullet misses. Call this case *Shooting to Scare*. Should *A* be guilty of imperfect manslaughter? Following the lead of the Model Penal Code, many jurisdictions criminalize such conduct under the separate and relative minor offense of reckless endangerment. Colorado is unusual, perhaps unique, in criminalizing this conduct under the same rubric as it criminalizes imperfect result offenses in which the actor intends the result, as in *Target Missed*.

Yaffe agrees with the orthodox position on the grounds that attempts are tryings and tryings require intention. But not, he emphasizes, just any sort of intention. It is not

merely, for instance, that one cannot try to kill without, say, intending to pull a trigger (or swing a knife, or drop poison in a coffee cup, etc.). Rather, the claim is that one cannot try to kill unless one's intention commits one to killing, as when one intends *to kill*. Trying to commit a crime requires an intention that commits one to *completing the crime* . . . . [I]f attempts are to be criminalized through appeal to the Transfer Principle, then intent must be an element of every crime of attempt, even when the crime can be completed without intent.<sup>22</sup>

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critics, Moore's felt need for the second step casts doubt on the merit of the first. See, e.g., John Gardner, Response, *Moore on Complicity and Causation*, 136 U. PA. L. REV. PENNUMBRA 432, 442-43 (2008).

<sup>21</sup> For Yaffe's excellent inventory of issues, see *id.* at 2-3.

<sup>22</sup> *Id.* at 49.

Because someone who is merely reckless with regard to a particular result does not intend that result, conduct in the class exemplified by *Shooting to Scare* cannot be criminalized and punished on the same rationale that warrants punishing actors in the class of imperfect offenses exemplified by *Target Missed*.<sup>23</sup>

On the Underlying Reasons Theory, in contrast, Colorado has it right. As a matter of positive criminal law, many result offenses cannot be committed with a level of culpability with respect to the proscribed results less than knowledge. Others can be. With regard to the latter offenses (homicide is the quintessential example), the law has determined that it wishes to deter and to punish the causing of some results recklessly or even negligently, as the case may be. In such cases, deterrence of conduct that does in fact cause the specified harm will be undermined, perhaps substantially, by the failure to punish persons who act with the specified culpability but do not cause the foreseen or foreseeable result. Put more affirmatively (and putting aside negligence, for which the analysis is more complicated), the law would reduce the incidence of recklessly caused harm by threatening to punish actors who risk bad results even if the foreseen results don't materialize. Especially given the prevalence of optimism bias, the deterrence effect of punishing imperfect offenses of this class is likely to be pronounced. Furthermore, punishment in such cases would not run afoul of an appropriate desert constraint for the reason already given: blameworthiness and desert are determined (at least principally) by an actor's reasoning or attitude<sup>24</sup> and not by how things turn out.

If punishment would be justified in such cases when in accord with a properly drafted statute, the final question is whether a properly drafted statute is within our grasp. I suspect so. Here's a first stab: "A person is guilty of an imperfect crime if, acting with the kind of culpability otherwise required for commission of the crime, he does or omits to do anything while reckless as to the possibility that, without further conduct on his part, he will cause a result that is an element of the crime."

#### *B. Culpability as to Attendant Circumstances.*

A second important question concerns conduct that falls short of an offense because an attendant circumstance is missing. As an illustration, consider an actor's receipt of property he confidently but mistakenly believes to be stolen in a jurisdiction that criminalizes the receipt of stolen property known to be stolen. Should he be punished?

The Model Penal Code answers in the affirmative, famously providing that "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he purposes engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be."<sup>25</sup> Yaffe disagrees. His Guiding Commitment View, recall, maintains that "to try to do something is to be committed to each of the components of success and to be moved by those commitments." So what matters, for purposes of this class of cases, is

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<sup>23</sup> Yaffe does argue, *id.* at ch. 6, that it is possible to intend to bring about a result recklessly or negligently. But this is true only in unusual cases that we can put aside.

<sup>24</sup> See, e.g., Peter Westen, *An Attitudinal Theory of Excuse*, 25 L. & PHIL. 289 (2006); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88. CAL. L. REV. 931 (2000).

<sup>25</sup> MPC § 5.01(1)(a).

whether the actor is committed to the attendant circumstance of the offense being actualized. This can happen—the pedophile, for example, may be committed to his sexual partner’s being underage—but it is uncommon. The consumer who infers from an especially good deal that the article on offer is probably hot is not committed to its being stolen; the college student who suspects, during intercourse, that his date might be unwilling is not committed to her not consenting. Reasoning that “the relevant place to look for principles to resolve cases of absent circumstantial elements is in principles governing the impact of their absence on the commitments constituted by the agent’s psychology, rather than on the impact of their absence on the possibility or impossibility of completion,” Yaffe concludes that “sometimes what a person is committed to by his intentions depends on what is actually so.”<sup>26</sup> So an agent who merely believes that an offense circumstance exists, or is reckless or negligent as to its existence, is not trying to commit the offense and should not be punished for an attempt.

The Underlying Reasons Theory aligns with the Model Penal Code and against Yaffe. The reasoning is essentially the same as for missing result elements and therefore need not be belabored. The law will deter more offenses by also punishing imperfect offenses in which the actor has the culpability required for the missing actus reus element,<sup>27</sup> while such actors have no compelling desert-based complaint. And the Model Penal Code provision already demonstrates that a law criminalizing such imperfect offenses is eminently craftable.

### *C. Abandonment.*

In Sections A and B of this Part, I have been assuming cases in which the actor engages in conduct that would be sufficient to constitute a perfect offense if result or circumstance elements of that offense already are, or turn out to be, as the actor intends, believes, or foresees. Under the rubric of “incomplete attempts,” the law also criminalizes some conduct that falls some distance short of the complete attempt. Where the law should draw the line between “mere preparation” (not punishable) and “incomplete attempt” or “imperfect offense” requires a complicated analysis that is beyond the scope of this short essay. Instead, I’ll close by analyzing a question that arises from the fact that the law does punish some incomplete attempts. On occasion, an actor proceeds far enough down a path that would or might culminate in his commission of an offense to be guilty of an attempt to commit that offense but then voluntarily abandons the attempt because of a change of heart (and not because, say, he foresees that he will be better able to commit the offense successfully at some later date). The

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<sup>26</sup> YAFFE, *supra* note 1, at 165-66.

<sup>27</sup> While this is robustly true for some offenses, it is likely only marginally true for others. Take a case frequently discussed in the literature and also mentioned above: *M* engages in sexual intercourse with *W*, reckless as to the possibility that *W* is not consenting. Whether the state does or does not threaten punishment for the imperfect offense in which *W* is consenting might not affect the calculation of a rational *M*, for he might reasonably assume that if *W* is consenting then she would not press charges if she learns that he was uncertain. So criminalizing such imperfect offenses might buy very little in the coin of deterrence. By the very same token, however, it is also likely to incur little or no cost. Furthermore, that punishing such imperfect sexual assaults buys little deterrence of perfect sexual assaults need not entail that it buys nothing of value. For example, most culpability-retributivists (that is, retributivists who believe that desert is solely or substantially a function of culpability and not of objective wrongdoing or of “how things turn out”) would see retributivist value in punishing *M* for the imperfect sexual assault.

dominant modern approach is to provide either a complete defense or substantial mitigation in at least some subset of voluntary abandonments. Any adequate approach to criminal liability for imperfect offenses should explain why this practice is or is not justifiable.

Yaffe believes that voluntary abandonment does warrant mitigation. His analysis is complex. Somewhat simplified, it runs like this:<sup>28</sup>

- (1) The Principle of Prospective Reasons (PRP): There is reason, R, to issue sanction S, rather than a lower sanction S<sub>1</sub>, to defendant D for offense  $\phi$  at time t, if (a) If D had anticipated S, then D would have recognized at t sufficient reason not to commit  $\phi$ , and (b) if D had anticipated S<sub>1</sub>, then it is not the case that D would have recognized at t sufficient reason not to commit  $\phi$ .
- (2) If D had abandoned  $\phi$  after completion,<sup>29</sup> then condition (b) in the Principle of Prospective Reasons is not true. Therefore, R is not a reason to impose S on D for the abandoned complete offense  $\phi$ .
- (3) “To negate a reason for issuing a particular sanction, rather than a lower sanction[,] for completion is to negate a reason for issuing that sanction for attempt.” Therefore, R is not a reason to impose S on D for the abandoned attempt.
- (4) “[T]here can be no reasons for punishing attempt that are not also just as powerful reasons for punishing completion.”<sup>30</sup>
- (5) Because reason R is not a reason to impose S rather than S<sub>1</sub> for attempted  $\phi$ , “abandonment mitigates the sanction for attempt.”

I believe that this analysis is fatally flawed because premise (4) is mistaken.<sup>31</sup> If there can be additional or stronger reasons to punish an actor for an attempted  $\phi$  than for the perfect  $\phi$ , all else

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<sup>28</sup> See YAFFE, *supra* note 1, at 291-98. I have slightly reworked Yaffe’s Principle of Prospective Reasons, in part to maintain greater conformity with the notation employed in this essay.

<sup>29</sup> “Some might wonder, and not without reason, how abandoned completions—completed crimes abandoned before completion—are even possible. But they are. D intends to blow up a building. He sets a bomb and lights a long fuse. Moments later, he sees the error of his ways and rushes to stamp out the fuse. If not interfered with, he will stamp it out. But before he can get to the crucial spot, he is apprehended. The police, however, do not manage to stamp out the fuse, and since they detain D, neither does he. The building explodes. D has completed the destruction of the building, but abandoned his efforts before completion.” *Id.* at 293.

<sup>30</sup> *Id.* at 297. See also *id.* at 291 (deeming it an “undeniable fact” that “the sanction for completion sets the ceiling for the sanction for attempt; it would never be appropriate to give a greater sanction to the attempter than would have been appropriately given to him if he had completed the crime”). As we will see, I will deny the undeniable. (Or will I just attempt to do so?)

<sup>31</sup> I also have some doubts about premise (1), the PRP. As formulated, the PRP seems, at least to my ears, to run afoul of the fundamental principle that deterrence analysis is resolutely forward-looking. Whether a particular sanction would have been enough to deter a wrongdoer from having committed an offense, had he known it was coming, is never the right question to ask for purposes of deterrence. The right question always concerns the deterrent effects that the imposition of a sanction now is likely to have on the future incidence of offending, by this particular offender and by others. To be sure, what magnitude of sanction would have deterred commission

equal, then it would not follow that abandonment mitigates the sanction for an attempt even if premises (1) through (3) were true. To understand why premise (4) is false, we have to complicate the deterrence analysis.

As is well appreciated, the critical concept for purposes of deterrence analysis is not the sanction itself but the *expected* sanction, which is a function of two variables: a potential wrongdoer's estimation of the disutility or cost to him of a threatened sanction were it to be imposed ( $S$ ) and his estimation of the probability of its imposition ( $p$ ). In the most rudimentary formulation, a potential offender will offend only if the benefit he expects exceeds  $p \cdot S$ . As economically minded commentators have explained, however, this formulation is too rudimentary.

Suppose some actor,  $A$ , is contemplating engaging in conduct that, he realizes, might actualize into a perfect offense,  $\phi$ . For example, it could be that  $A$  is trying to produce some result that is an element of  $\phi$  or is reckless with regard to the possibility of causing that result. The deterrent force of threatened sanctions will be the sum of  $A$ 's estimation of the expected sanction if he does end up committing the offense and his estimation of the expected sanction if he does not, *i.e.*, if he ends up committing only some imperfect form of  $\phi$ . In simplified algebraic form,<sup>32</sup> deterrence analysis predicts that  $A$  will engage in the contemplated conduct if:

$$\text{Expected benefit} > L(P\phi \cdot S\phi) + (1-L)(P\phi_i \cdot S\phi_i)$$

where  $L$  =  $A$ 's anticipated probability that he commits the perfect offense  $\phi$ ;  $1-L$  =  $A$ 's anticipated probability that he fails to commit the perfect offense;  $P\phi$  =  $A$ 's anticipated probability of being punished conditional on his committing  $\phi$ ;  $P\phi_i$  =  $A$ 's anticipated probability of being punished conditional on his committing only an imperfect form of  $\phi$ ;  $S\phi$  =  $A$ 's expected magnitude of the sanction that will be imposed if convicted for  $\phi$ ; and  $S\phi_i$  =  $A$ 's expected magnitude of the sanction that will be imposed if convicted for the imperfect  $\phi$ .

What this equation reveals is that, where  $L$  or  $P\phi$  is very low, *the law buys almost all of its deterrence of the perfect offense through the expected sanction that will be imposed for the imperfect offense*. This is a nontrivial conclusion because there are many offenses in which  $L$  or  $P\phi$  will be extremely small.

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of the particular token of the offense that is now being sanctioned might be relevant evidentiarily. But it is never relative operatively. Yaffe imagines a sentencing judge, implicitly relying upon PRP, reasoning "By issuing  $S$ , I make it true that committing  $C$  was not, from  $D$ 's point of view, in his interests." *Id.* at 294. A consequentialist concerned with optimizing consequences by motivating compliance should never reason in quite this way.

I do not press this objection, however, because I suspect that the PRP could be reformulated in a way that meets my concerns. The reformulation I have in mind would have to make clear that the reason for  $S$  rather than  $S_i$  is part of an announced forward-looking practice of imposing whatever sentence the state determines would have been sufficient to deter  $D$  from  $\phi$ ing at  $t$  had  $D$  at  $t$  expected  $S$  to be imposed while holding constant the probability that  $D$  in fact assigned to his being apprehended, convicted and punished. Possibly, this is what Yaffe already had in mind; he and I might simply disagree regarding how clearly PRP expresses this point.

<sup>32</sup> See Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEG. STUD. 435 (1990), for a mathematically more precise expression.

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For an example of the latter situation, consider suicide bombing. The would-be suicide bomber knows that if he succeeds in killing his victims, the probability that he will be punished for his aimed-at offenses of murder or terrorism will be essentially zero. If threatened penal sanctions are to have any value at all in deterring suicide bombers, that value will derive entirely from the expected sanction that attaches to imperfect forms of the offense—i.e., for attempted murder or attempted terroristic bombing. There are more prosaic examples of the same phenomenon. Suppose that *A*, contemplating killing *V*, has strong reason to believe that *V* herself is the only person who knows of *A*'s motive for the murder. *A* might therefore conclude that he faces a non-negligible risk of being caught and punished only if he fails. The same would be true for any theft offense in which *A* anticipates that he is most likely to be caught, if at all, before he secures possession of the property that is his target.

Those are examples when the addressee of the threat of punishment foresees a much higher value for  $P\phi_i$  than for  $P\phi$ . Perhaps the most common cases when the addressee foresees a much higher value for 1-L than for L are those in which he does not intend some given element but is reckless with respect to it.<sup>33</sup> Frequently, we engage in risky behavior precisely because we have persuaded ourselves that the risk we foresee will not materialize. We drive too fast or while impaired, we handle firearms carelessly, we have sex with people we think just might be too young, or unconscious, or nonconsenting—all because we allow ourselves to believe that L is very small indeed. If the law is to deter such conduct by threat of penal sanction, it will be due to the sanction we anticipate being imposed on non-commission of the perfect offense. Because the attempt or “imperfect offense” portion of the right-hand side of the deterrence equation can have much greater deterrent value than the “perfect offense” portion, and because the actual imposition of sanctions can be wasteful when they don't purchase deterrence commensurate with their cost, deterrence theory can provide reason to impose a greater sanction for the imperfect offense than for the perfect offense, for the attempt than for the complete crime. Premise (4) is therefore false.

Although I think I have already said more than enough to establish the falsity of premise (4), there is yet another consideration that might speak in favor of punishing certain imperfect offenses more severely than the perfect form of the same offense. The analysis to this point has invoked *general* deterrence, the idea that punishing one offender can deter others. I'd like now to consider consequentialist (or “instrumentalist”) justifications for punishment that focus on the effects of punishment on the offender himself. Consider two: *specific* deterrence and rehabilitation. The present counter-argument to premise (4) rests on two simple propositions: first, the strength of either of these particular rationales for punishment varies inversely with the likelihood that the offender would avoid reoffending even without being punished; and second, some offenders are much more likely not to reoffend after committing a perfect offense than after committing an imperfect form of that same offense, including some that Yaffe would himself recognize as attempts to commit the offense.

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<sup>33</sup> I acknowledge that Yaffe would not deem such cases attempted  $\phi$ s when the element at issue, be it a result or an attendant circumstance, does not materialize. But I have argued that they *are* imperfect forms of  $\phi$ . And it is hard to fathom the argument Yaffe might have for insisting upon (4) for attempted  $\phi$ s were (4) not true for imperfect  $\phi$ s that are not attempted  $\phi$ s. So I think the argument in text, if sound, is yet more ammunition against (4) notwithstanding the narrower ambit Yaffe recognizes for attempt liability (or for “attempt” liability) than do I.

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The first point is, I think, both obvious and incontrovertible. What about the second? A simple example is the generally law-abiding agent, *A*, with a single nemesis, *N*. If *A* succeeds in killing *N*, then *A* might never again attempt any criminal offense, let alone a serious one. But if *A* fails then he might keep trying until he succeeds. I think it likely that many spousal homicides are like this, as are many assaults and murders that arise from vendettas. So insofar as specific deterrence can provide a reason to punish, that is a reason that might weigh with far greater force for some attempts to commit an offense than for the perfect offense.

The possibility that commission of a perfect offense might specifically deter all by itself is especially pronounced with respect to actors who do not intend or desire particular elements of the offense. I suspect that many people who repeatedly impose risks on others do so because they fail to internalize, in an affectively meaningful way, the gravity of their conduct when the harms that they risk do not materialize. Reckless drivers, including those who repeatedly drive under the influence, illustrate the problem. Very possibly, the horror of killing somebody is enough, by itself, to ensure that one will not drive recklessly again. So from a specific deterrence perspective we might be over-punishing reckless (including drunk) drivers who end up causing fatal accidents and under-punishing those who don't.

In honor of the venue, I should point out that this insight is not original to me: it appears in the Talmud. All sinners who descend to hell will eventually ascend, teaches Tractate Bava Metzia, except for those who commit three sins: cohabitation with a married woman, shaming another person in public, and calling somebody a derogatory name.<sup>34</sup> These three offenses are singled out, it is said, "because people who commit them generally do not realize that what they did is wrong, and hence do not repent." There is an additional suggestion, moreover, that it is worse "to cohabit with a woman whose marital status is unclear" than with one who is definitely married. Why? Because "it is easier to atone for a sin which one has definitely committed than for an uncertain sin, since people tend to rationalize uncertain sins away, claiming that they never sinned in the first place."<sup>35</sup> Given this psychological truth, there can be reason to punish an imperfect offense that is not a reason of equal weight—and may not be any reason at all—to punish the perfect offense.

If Yaffe's analysis of the mitigation due abandonment is infirm,<sup>36</sup> can I do better? I think I can. Indeed, I admit sheepishly that I don't quite grasp the supposed difficulty. For any class of imperfect

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<sup>34</sup> BAVA METZIA, CHAPTER 4, 58B, STEINSALTZ EDITION, VOL. 3, PART 3, at 227 (1990).

<sup>35</sup> *Id.* at 228.

<sup>36</sup> In his oral reply to these comments, Yaffe proclaimed himself unscathed on the grounds that all my purported counterexamples to premise (4) could be accommodated by a *ceteris paribus* clause. I believe he is mistaken. The best (not sole) way to understand correct application of *ceteris paribus* is to imagine two different offenders. If *A1* and *A2* both attempt  $\phi$ , and *A1* abandons whereas *A2* does not, then to hold, as Yaffe and I both do, that abandonment mitigates means that *A1* should be punished less severely than *A2* if there are no sentence-relevant differences between them. If for example, *A1* is a recidivist and *A2* a first-time offender, then it is consistent with mitigation for abandonment to punish *A1* more severely than *A2*. That is the force of *ceteris paribus*. See YAFFE, *supra* note 1, at 292. My arguments, however, are that, *without altering anything about the actor or his conduct*, the fact that some given actor has perfected an offense *can* provide reason to punish him less severely than if he had committed only an imperfect form of the same offense, including imperfect forms that are genuine attempts.

offenses it criminalizes, the state must also decide how much punishment to threaten and impose, relative to counterpart perfect offenses. On the Underlying Reasons Theory, the structure of the analysis is straightforward, even if undertaking the analysis is not. Assuming embrace of a desert-constrained pluralistic instrumentalism, the law should establish a sentencing range that would maximize good consequences while taking precautions to guard against the infliction of punishment, in individual cases, that would run afoul of the applicable desert constraint, as by exceeding an offender's desert or being disproportionate to his blameworthiness, or whatever the particular desert constraint provides.

Applied to abandonment, I would reason that offering mitigation or even complete exculpation potentially maximizes good consequences by maximizing abandonment before harm is realized. It does this not exactly by providing an affirmative reason to abandon but by removing a disincentive that one who is disposed to abandon would otherwise face.<sup>37</sup> At the same time, abandonment plausibly reduces an actor's blameworthiness or negative desert, on the assumption that blameworthiness or desert is not simply a function of intention, but of something like *commitment* to wrong values. One who abandons is less committed to wrong values, all else equal, than is one who does not abandon. I do not believe that either of these thinly sketched observations is at all novel. I have thought that they are closer to contemporary orthodoxy regarding abandonment. My point is that they are claims wholly congenial to the Underlying Reasons Theory.

#### CONCLUSION

Gideon Yaffe's new book, *Attempts*, is a masterful philosophical analysis of the proper scope of criminal liability for . . . well, for attempts. But "attempts" in what sense, you might ask? And there, I think, is the rub. "Attempt" is ambiguous. It has both legal and extra-legal (or pre-legal) meanings. There are things that the law criminalizes under the designation "attempts to commit an offense" and there are things that really are *attempts to commit an offense*.

Of course, these two categories are very far from disjoint. Because many of the things that the law calls "attempts" are—in nature, as it were—*attempts*, one might infer that the legal category of "attempts" is supposed to track the natural category, that the law's aim is to criminalize *attempts to commit an offense*, that what comes to be called an "attempt" for purposes of legal liability achieves that status in virtue of its being an *attempt*. Yaffe's analysis is predicated on just this assumption.

I have tried, in this short space, to cause trouble for that assumption. I have suggested that what the law is really up to when working out the proper contours of what it calls "attempt liability," is trying to identify those "imperfect offenses" that are properly criminalized and punished in accord with

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I think that no legitimate deployment of *ceteris paribus* would permit Yaffe to accommodate these claims while still maintaining that "it would never be appropriate to give a greater sanction to the attempter than would have been appropriately given to him if he had completed the crime." *Id.* at 291.

<sup>37</sup> It is modestly complicated to specify the circumstances in which this is true. Space constraints do not permit the elaboration.

our best normative theory of the penal sanction. Because genuine attempts to commit an offense comprise the most salient subclass of this larger class, the larger class comes to be known as “criminal attempts.” But that is just a synecdoche: the law has come to use the term “attempts” for a category of conduct that includes *attempts*, but is not limited to them, and that is criminalized and punished for reasons that do not run through or depend upon what really is an *attempt*, or what is an *attempt*’s true nature, or anything of this sort. If all this is right, then philosophers interested in the proper scope of “criminal liability for attempts” would be better served by turning to ethics and political theory than to philosophy of action.