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Transferred Intent

Douglas N. Husak

TRANSFERRED INTENT

DOUGLAS N. HUSAK*

I. THE NEED FOR A THEORY OF TRANSFERRED INTENT

Suppose that Smith shoots at Black with the intention to kill him. But his aim is bad, and Smith's bullet hits and kills White, a clearly visible bystander, instead. Since the early days of the common law,[1] all Anglo-American jurisdictions[2] hold Smith guilty of murder by the *doctrine of transferred intent.*[3]

The application of the doctrine of transferred intent is thought to be necessary in order to avoid the result that most commentators regard as unjust.[4] Without this doctrine, it is widely believed,[5] Smith would be guilty of two offenses—the attempted murder of Black, and some lesser kind of homicide (presumably manslaughter) of White. The seriousness of these two offenses, even when combined, is not as great as murder. Those who think that Smith should be convicted of murder—and punished accordingly[6]—typically appeal to the doctrine of transferred intent to reach this result. A few theorists, however—who I will describe as purists—eschew the doctrine and contend

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* Professor of Philosophy and Law, Rutgers University.

1. "If A by malice forethought strikes at B and missing him strikes C whereof he dies, tho he never bore any malice to C yet it is murder, and the law transfers the malice to the party slain." 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, 466 (1736).

Perhaps the doctrine was first applied in Regina v. Saunders & Archer, 2 Plowd. 473, 75 Eng. Rep. 706 (1576). No such doctrine was invoked in earlier cases in which it might have been applied. *See* Mansell & Herbert's Case, 2 Dyer 128b (1558).

2. One leading treatise indicates that Smith "is uniformly held guilty of the murder" of White. WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW 399 (1986). But this generalization applies only to Anglo-American law. German law, for example, rejects the doctrine of transferred intent.

3. In English law, the doctrine is more frequently called "transferred malice."

4. "Transferred intent is . . . used to reach what is regarded with virtual unanimity as a just result." People v. Czahara, 250 Cal. Rptr. 836, 839 (Ct. App. 1988).

5. Some theorists believe that Smith is guilty of murder without the need for a special doctrine. For my discussion of the abolitionist position, *see infra* Part III.

6. Since the death penalty is available only for murderers, the doctrine of transferred intent is needed to make Smith eligible for capital punishment.

that the more defensible outcome is to convict Smith of the two lesser offenses for which he is undoubtedly liable.[7]

Why do most theorists suppose that Smith would be innocent of murder in the absence of the doctrine of transferred intent? My answer must be tentative, since the need for this doctrine is usually presupposed rather than defended. My reconstruction of what I will call *the argument for the necessity of transferred intent* is as follows:

(1) Murder is the intentional killing of a human being.
(2) Smith is guilty of murder only if there exists some human being who he has killed intentionally—in this case, either White or Black.
(3) Smith did not kill Black.
(4) Smith did not kill White intentionally.
Thus, (5) There exists no human being who Smith has killed intentionally.
Thus, (6) Smith is not guilty of murder.

Exactly how is the doctrine of transferred intent supposed to undermine this argument? Again, my answer must be speculative, since theorists who invoke the doctrine are neither explicit nor precise. Surprisingly, no canonical statement of the doctrine can be found in textbooks, law reviews or cases.[8] The doctrine has a name, but no general formulation. Typically, the doctrine is simply presented as the rationale used to convict Smith of murder. The doctrine itself is inextricably bound with a single case to which it is applied.

Is the argument for the necessity of transferred intent sound? Premise (1) of this argument is a definition,[9] and premise (3) is a matter of indisputable fact.[10] Our ordinary conception of intention supports (4).[11] Thus it seems that the only

7. *See infra* Part II.

8. The few general formulations of the doctrine that can be found in case law are clearly inadequate. Consider the principle invoked in People v. Matthews, 154 Cal. Rptr. 628, 631 (Ct. App. 1979): "[O]ne's criminal intent follows the corresponding criminal act to its unintended consequences." Or consider the principle invoked in State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936): "The intention follows the bullet." If applied consistently, these principles would seemingly render defendants liable for *anything* that happened in the course of an intended killing.

9. But see my brief discussion of felony-murder and depraved heart murder *infra* Part III.

10. Even indisputable facts might give way to fictions. For my discussion of the fiction of transferred death *see infra* Part V.

11. I assume that (without a doctrine of transferred intent) Smith has not killed White intentionally in the paradigm case. I make this assumption,

vulnerable premise in this argument is (2). Indeed, a number of theorists—who I will describe as *abolitionists*—reject (or ignore) (2), even though they favor convicting Smith of murder.[12] But the doctrine of transferred intent is clearly designed to oppose (4). If Smith's intention to kill Black somehow transfers to White, then (4) becomes false and White is killed intentionally after all.[13]

Little disagreement is generally expressed about this doctrine when it is first introduced to laypersons or to law students. In the foregoing example—which I will call the *paradigm case* of transferred intent—almost all persons concur that Smith *should* be punished for murder. Controversy arises in two areas. First, the overwhelming consensus in favor of punishing Smith for murder dissolves as examples diverge from the paradigm case. I will describe many such examples shortly.[14] Second, there is no agreement about the general rationale for this doctrine. *How* and *why* does Smith's intent transfer to White? Without an answer to these questions, the doctrine of transferred intent is nothing more than the name attached to an unexplained mystery.

My goal in this paper is to relate these two controversies. This endeavor presupposes the desirability of bringing theory and practice into "reflective equilibrium."[15] There may be little

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however, without relying on a conception of intention to support my judgment. Some theorists may believe that White was killed intentionally. Clearly, there is room for disagreement about how much of an outcome must proceed according to plan before that outcome should be described as having been brought about intentionally. After all, most theorists believe that a victim is killed intentionally in a case of mistaken identity. Why does a killing count as intentional when the defendant hits his target but is mistaken about its identity, but as unintentional when the defendant misses his target but hits someone else? Although I will not invoke a conception of intention to answer this question, I join most commentators in assuming that a satisfactory response can be provided. I will continue to assume, that is, that White is killed unintentionally according to our ordinary concept of intention—unless some special doctrine of the criminal law can be applied to alter this result. For a useful introduction to many of these issues, *see* Alfred Mele, *Recent Work on Intentional Action*, 29 AM. PHIL. Q. 199 (1992).

12. *See infra* Part III.

13. Some commentators seem to me to proceed backwards. Instead of attempting to identify who was killed intentionally, they are convinced that someone is guilty of an intentional killing. Then they invoke the doctrine of transferred intent to answer the question: "Someone, however, clearly did murder the victim, and if not the defendant, who?" *See* Kimberly Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2207 (1994).

14. *See infra* Part IV.

15. *See* JOHN RAWLS, A THEORY OF JUSTICE 120 (1972); JOHN RAWLS, POLITICAL LIBERALISM 8 (1993).

need for a general principle as long as persons agree about how particular cases should be resolved. But a rationale to justify convicting Smith of murder in the paradigm case might be useful in its application to examples that diverge from this paradigm. Or so I hope. I will present a principle that allows Smith to be punished as a murderer, and show how it helps to resolve some of the puzzles about transferred intent on which commentators tend to disagree. Although I will occasionally claim to have produced a theory of transferred intent, I do not really construe my project as a *defense* of the doctrine. Instead, my project is better conceptualized as providing an *alternative* to the doctrine of transferred intent, that is, a rationale that allows Smith to be punished as a murderer that does not allege that his intention somehow transfers from one person to another.

I am not always assured that commentators appreciate that such a rationale would be desirable. Even after coming to recognize their inability to defend their judgment in the paradigm case, few persons express serious reservations about the doctrine of transferred intent. Most persons simply shrug off their inability, and continue to support the doctrine as though no problem exists. This reaction is curious.[16] The willingness to live in a state of reflective disequilibrium should be tolerated with only the greatest reluctance.

In Part II of this paper, I will critique the purist position about transferred intent. Although the purist cannot be refuted, his rationale for failing to punish Smith as a murderer is not altogether unproblematic. In Part III, I will respond to those theorists who contend that Smith can be convicted of murder without the need for a special doctrine. In Part IV, I will describe various kinds of nonstandard examples of transferred intent, that is, hypotheticals that deviate from the paradigm case in specified respects. An adequate theory of transferred intent should help to decide whether and to what extent defendants in these examples should be punished. In Part V, I will establish what many theorists take for granted: the doctrine of transferred intent is a legal fiction that should not be construed literally. I will suggest

16. Curious, but not altogether unprecedented. On a wide range of matters, philosophers seem to be confident that their judgments *must* be correct, despite their inability to defend them—even to their own satisfaction. Punishment provides an example. Legal philosophers have struggled for centuries to justify this practice, and no purported justification has emerged as thoroughly convincing. Still, only a handful of philosophers have concluded from this failure that punishment may actually be *un*justified. On some such issues, perhaps we should have more confidence in our intuitive judgments than in our ability to support them with principled arguments.

that fictions are best avoided by supposing that the basis for punishing Smith as a murderer is a principle of sentencing theory rather than a doctrine of the substantive criminal law. In Part VI, I will argue against a popular rationale in favor of this doctrine—which I call the *compensation for luck* thesis. In Part VII, I will defend a preferable approach to the paradigm case, and will apply it to help resolve some of the nonstandard examples of transferred intent I have identified.

II. A CRITIQUE OF PURISM

In what I have described as the paradigm case of transferred intent, Smith shoots at Black with the intention to kill him, but misses because of a bad aim, and hits and kills White, a clearly visible bystander, instead. Most commentators believe that Smith should be punished as a murderer. I share this judgment. The ultimate challenge I undertake is to provide a general rationale to support this intuition. A few theorists, however—who I describe as *purists*—believe that the argument for the necessity of transferred intent is sound, yet infer that the more defensible outcome is to punish Smith for the attempted murder of Black and some lesser kind of homicide (presumably manslaughter) of White.[17] In this Part, I will present my reservations about the purist position.

The judgment of the purist about the paradigm case strikes most theorists as highly counterintuitive. Nonetheless, purism has a number of theoretical advantages. The purist can afford to be smug, as he confidently responds to unsuccessful attempts to support a rationale that allows Smith to be convicted of murder. The purist can claim to have integrity, as he steadfastly refuses to compromise his principles to reach results he cannot defend. And the purist can depict himself as the champion of the principle of legality, as he staunchly protests against punishing Smith for a crime he did not commit. For all these reasons, the purist occupies the moral high ground. His position must be taken respectfully and seriously. Indeed, I will concede that there are several matters about which the purist is correct—but his unwillingness to punish Smith as a murderer is not among them.

Purism has two distinct motivations.[18] The *theoretical purist* acknowledges the force of those intuitions that would punish

17. Some purists attack the doctrine of transferred intent as "an historical aberration" and argue that it "should be rejected." DON STUART, CANADIAN CRIMINAL LAW 196-97 (1982).

18. Sometimes it may be unclear on which ground purism is endorsed. When Glanville Williams, for example, describes the doctrine of transferred

Smith for murder. Still, he questions why these intuitions should be trusted when they are opposed by principles in which he has even greater confidence. This purist is not happy to live in a state of reflective disequilibrium, but has found no way to reconcile his principles with his intuitions. He understands why many commentators sympathize with the doctrine of transferred intent, but ultimately finds the doctrine dissatisfying—even after he is assured that it is only a legal fiction.[19] Fictions have no place in purist theory. The theoretical purist will not be persuaded unless a non-fictitious rationale to punish Smith as a murderer can be defended. Ultimately, I will attempt to provide such a rationale.[20]

Unlike his theoretical counterpart, the *intuitive purist* does not share the judgment of most commentators who believe that Smith should be punished for murder. He does not understand why commentators would go to such extraordinary lengths to try to find a rationale to convict Smith of a crime for which he is simply not liable. This kind of purist may be the most difficult to persuade. If he sincerely reports intuitions at odds with those of most persons, no viable strategy may convince him. Progress is nearly impossible in the face of a deep conflict of intuitions. Perhaps all that can be accomplished is to describe additional cases with seemingly counterintuitive implications that encourage him to reconsider his unusual judgments. I now attempt to describe such a "hard case" for the intuitive purist.

Suppose that Arthur intends to kill two victims. He is amazed at his good fortune when he sees both his intended victims in close proximity. He carefully aims at each, and quickly fires two bullets. Both victims drop dead. The subsequent autopsy reveals that the bullet he aimed at his first intended victim hit and killed the second intended victim instead, and the bullet he aimed at his second intended victim hit and killed the first intended victim instead. The argument for the necessity of transferred intent—defended as sound by the purist who would acquit Smith of murder in the paradigm case—seems equally applicable here. The difficulty is to identify a person who Arthur has killed intentionally. No such person exists. Just as in the paradigm case, the acts by which Arthur killed are not intentional killings. Unless the purist can find some ingenious way to distinguish this case from the paradigm, he must find Arthur innocent

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intent as "an arbitrary exception to normal principles," it is not apparent that he believes it leads to an unjust outcome. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 134 (2d ed. 1961).

19. *See infra* Part V.

20. *See infra* Part VII.

of both murders. On the level of intuition, I doubt that anyone is happy with this result.

Only purists will regard this case as difficult. If Smith should be punished for murder in the paradigm case, in which he had no intention to kill the person he actually killed, there is even more reason to punish Arthur for murder. After all, Arthur had an intention to kill the person he actually killed, even though the act by which he killed this person was intended to kill some other person who he also intended to kill.

If the intuitive purist refuses to budge here, he is unlikely to be persuaded by any other argument of which I am aware. The purist cannot be *refuted.* His position is coherent and plausible. The most that can be done is to provide a rationale to convince the theoretical purist—who should at least welcome the effort. But if no rationale suffices to persuade him to revise his principles—and if no example manages to convince him to reconsider his intuitions—all that remains to be said is that reasonable minds may differ in their judgments.

III. The Abolitionist Approach to Transferred Intent

Before looking at various nonstandard examples of transferred intent and examining rationales for the doctrine of transferred intent that can be applied to those examples, it is crucial to respond to a train of thought that a few theorists have found seductive. I will call this train of thought the *abolitionist* approach to the doctrine of transferred intent. Unlike purists, who deny that Smith should be punished for murder, abolitionists agree that Smith *is* guilty of murder—but *without* recourse to a special doctrine such as transferred intent.

At least three rationales other than the doctrine of transferred intent might be invoked to convict Smith of murder.[21] I will mention the first two such rationales briefly. These two rationales purport to convict Smith of murder even though he *lacked* the intention to kill Black. Each rationale rejects premise (1) of the argument for the necessity of transferred intent. In other words, they supplement the definition of murder as the intentional killing of a human being. Some murders do not involve intentional killings.

The first rationale convicts Smith of murder by applying the *felony-murder* rule. Although the details of this rule present a host of complexities I need not unravel here, the least qualified form

21. Yet another possible rationale is to claim that White *is* killed intentionally according to our ordinary conception of intention. *See supra* note 11.

of the rule holds defendants guilty of felony-murder if they kill someone during the commission of a felony.[22] Since Smith's attempted murder of Black is a felony, and White is killed in the commission of this felony, the felony-murder rule would hold Smith guilty of murder, even though he did not kill White intentionally.

The second rationale convicts Smith of murder by applying what is sometimes called *depraved-heart murder.* In most jurisdictions, a defendant need not actually intend to kill—or even to cause grievous bodily harm—in order to possess the degree of culpability required for murder. Gross recklessness, amounting to an extreme indifference to the value of human life, is sufficient to convict a defendant of depraved-heart murder.[23] Since Smith's attempt to kill someone while a bystander is clearly visible exhibits an extreme indifference to the value of human life, Smith is guilty of depraved-heart murder, even though he did not kill White intentionally.

Despite their clear relevance and significance, I pay little attention to these two rationales here. Both are in some respects broader in scope, and in other respects narrower in scope, than the doctrine of transferred intent. Moreover, these rationales—especially the felony-murder rule—are at least as controversial as the doctrine of transferred intent itself.[24] Because of this controversy, a few jurisdictions have eliminated the felony-murder rule.[25] But my most important reason for focusing on the doctrine of transferred intent is that these alternatives are not especially useful for the task at hand. However relevant these two rationales may be for convicting Smith, they are inapplicable to many of the nonstandard cases I have described. In several of these cases, the defendant neither commits a felony nor exhibits an extreme indifference to the value of human life. Thus the

22. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *200-01.

23. *See* MODEL PENAL CODE § 210.2(1)(b) (1962).

24. "The reason why the felony-murder rule is, and the transferred malice rule is not, objectionable, is that the one is unjust and the other just." Rupert Cross, *The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853, in* RESHAPING THE CRIMINAL LAW 5, 20 (P.R. Glazebrook ed., 1978). "Criticism of the [felony-murder] rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine." Nelson Roth & Scott Sunby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads,* 70 CORNELL L. REV. 446, 446 (1985).

25. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 479 n.110 (2d ed. 1995). The MODEL PENAL CODE § 210.2(1)(b) (1962), replaces the felony-murder rule with a rebuttable presumption of aggravated recklessness with respect to deaths caused in the commission of certain dangerous felonies.

doctrine of transferred intent continues to survive independently of these two rationales, and must be scrutinized on its own merits.

I will discuss the third rationale—the *abolitionist* approach—for convicting Smith of murder in somewhat more detail. Abolitionists do not invoke some *other* special rule (such as felony-murder or depraved-heart murder) to convict Smith. Instead, the abolitionist approach is unique in rejecting premise (2) of the argument for the necessity of transferred intent. In other words, abolitionists reject the conditional that a person is guilty of murder only if there exists some human being who he has killed intentionally.[26]

Joshua Dressler is among those theorists who endorse the abolitionist approach.[27] After presenting the paradigm case, he writes:

> The transferred intent doctrine is unnecessary and. . .potentially misleading. . . . In [the paradigm] case, there is no need to transfer [Smith's] intention to kill [Black] to [White]; [Smith] has the requisite intent *without* the doctrine. The social harm of murder is the "killing of a human being by another human being." The requisite intent, therefore, is the intent to kill *a*, not a specific, human being. In the [paradigm] case, [Smith] intended to kill *a* human being ([Black]), and he did in fact kill a human being ([White]). Thus, the *actus reus* and *mens rea* of murder are proved without invoking the legal fiction of transferred intent.[28]

According to abolitionists such as Dressler, the required *mens rea* of murder is simply the intent to kill *a* human being, that is, the intent to kill *some one or another.* Smith, like murderers who succeed in killing their intended victims, has this intent. Thus

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26. Sometimes the abolitionist approach is precluded by statute. Suppose, for example, that a statute proscribes "harming a person with the intent to cause *such* person . . . ." The identity of the intended and actual victims must coincide in applying this statute.

27. Previous theorists have provided more cryptic expressions of the abolitionist position. One leading treatise indicates that "while the 'transferred intent' theory does not reach erroneous conclusions [in the paradigm case], it is unnecessary even here. The true explanation is this: In every such case both components of the crime are present. The psychical element consists of a certain general mental pattern which is not varied by the particular person or piece of property which may be actually harmed." ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 923 (3d ed. 1982). In the same section, however, with no acknowledgment of the incongruity, this treatise defines murder as "homicide committed with malice aforethought against the deceased." *Id.* at 924.

28. DRESSLER, *supra* note 25, at 109.

Smith has the intent required for murder, even though he kills a person other than his intended victim.

Abolitionists sometimes bolster their analysis by presenting hypotheticals in which a conviction for murder is beyond dispute. Consider Tom the terrorist. He perches atop a tower and resolves to shoot at a crowd of students until he finally kills someone, although he is indifferent about the identity of his ultimate victim. After taking aim at several persons and firing several rounds, he eventually succeeds in killing Jill. No one would think that Tom lacks the intent to kill. Thus it seems that a person need not intend to kill someone in particular in order to possess the intent required for murder. An intent to kill some one or another will suffice. Why, then, is the doctrine of transferred intent needed in the paradigm case? Smith, like Tom, had the intent to kill some one or another.

I am skeptical of the abolitionist approach in its application to the paradigm case. If murder is the intentional killing of a human being, I find it hard to see how Smith is clearly guilty of murder unless there exists some human being who he has killed intentionally. Here is a classic scope problem.[29] The ambiguity is in the scope of the existential quantifier that symbolizes the indefinite article "a" in the statute that proscribes the intentional killing of a human being. The intent may be to kill anyone, or to kill someone in particular. As far as I can see, there is no clear basis for resolving this ambiguity one way or the other. Perhaps a "rule of lenity" or principle of "strict statutory construction"—if they exist at all[30]—apply to resolve this ambiguity in favor of the defendant. In any event, abolitionists encounter difficulty in drafting an indictment to charge Smith with murder. The doctrine of transferred intent allows Smith to be prosecuted for the murder of White. Without this doctrine, would the indictment simply specify that Smith had the abstract intent to kill some one or another, but had not intentionally killed anyone who could be named?[31] This difficulty provides one reason—I do not pretend it is decisive—to be dissatisfied with the abolitionist approach.

What about Tom the terrorist? It seems likely that there exists a human being who Tom has killed intentionally, and here lies the important difference between Smith and Tom. The use of the adverb "intentionally" is misplaced in describing Smith's

29. *See generally* WILLARD V.O. QUINE, WORD AND OBJECT 146-51 (1960) (discussing opacity and indefinite terms).

30. *See* DRESSLER, *supra* note 25, at 35.

31. *See* Ashworth, *Transferred Malice and Punishment for Unforeseen Consequences, in* RESHAPING THE CRIMINAL LAW, *supra* note 24, at 84-85.

act of killing; White was killed accidentally rather than intentionally. But Jill, unlike White, was probably killed intentionally rather than accidentally. Tom's hypothetical only demonstrates that a murderer need not care about the identity of his victim to kill her intentionally—not that a murderer need not have killed some human being intentionally.[32] Thus this hypothetical fails to show that Smith can be convicted of murder without invoking a special doctrine such as transferred intent.[33]

IV. TWELVE NONSTANDARD EXAMPLES OF TRANSFERRED INTENT

My goal in this Part is to generate what I call twelve nonstandard examples of transferred intent.[34] I do so by identifying twelve of the most important characteristics of the paradigm case.[35] Various kinds of nonstandard examples that deviate from this paradigm can be constructed by altering one or more of these characteristics.[36] The question is whether the defendant

32. Williams cryptically explains this result as follows: "In general intention, no particular victim is intended (e.g., firing into a crowd), but the intent may be laid as an intent to hurt the particular victim who was hurt." WILLIAMS, *supra* note 18, at 125.

33. Other hypotheticals designed to obviate the need for the doctrine of transferred intent fare even less well. No such doctrine is needed, for example, when the defendant aims at the heart of his intended victim, but kills by hitting him in the head. In this hypothetical, the victim is still killed intentionally. Some commentators apparently believe that this hypothetical helps to show that no doctrine of transferred intent is required to convict Smith of murder in the paradigm case. *See* J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 64 (5th ed. 1983).

34. More precisely, the twelve examples I generate simply diverge from the paradigm in specified respects; I do not mean to beg questions by describing them as cases of transferred intent.

35. An example I regard as nonstandard might conform to what some other theorist regards as a different paradigm of transferred intent. At least one commentator treats the clear visibility of the bystander as inessential to the paradigm. He writes: "The paradigm case [of transferred malice] is where D throws an object at O, intending to injure O, and the object injures P who walks through the door unexpectedly." Ashworth, *supra* note 31, at 77.

36. No importance attaches to the order in which I present these deviations. Moreover, nothing of special significance depends on my purporting to identify twelve distinct characteristics; greater or lesser numbers could be recognized. Perhaps I draw too many distinctions. For example, one might assimilate the fourth and fifth features, or the tenth and eleventh features.

Perhaps, however, I draw too few distinctions. Consider just three of the many additional possibilities I have neglected. First, the offense charged in the paradigm case is murder. I assume but do not discuss whether the doctrine of transferred intent is applicable to other offenses. Moreover, the paradigm case involves the firing of a gun. Before the popularity of firearms, most cases of transferred intent involved the administration of poisons or the shooting of arrows. I assume but do not discuss whether the same principles apply to all

still should be punished for murder (or murders) when given characteristics of this paradigm are modified.

This question could be answered much more easily if commentators agreed on a general formulation of the doctrine of transferred intent. A general principle could be applied to a specific set of facts to yield a definitive outcome. But as long as the doctrine is simply the name of the device used to convict Smith of murder in the paradigm case, rather than the implementation of a more general thesis, doubts about its application to nonstandard examples are inevitable. Theorists have little choice but to rely on their intuitions in deciding whether the doctrine continues to apply.

Intuitions about how these subsequent twelve examples should be resolved can be sorted into three categories. The alteration from the paradigm is irrelevant to the outcome in what I will call *type A deviations.* Intuitions about punishing Smith for murder are just as strong as in the paradigm case. The alteration from the paradigm is sufficient to change the outcome in what I will call *type B deviations.* Intuitions are strong that Smith should *not* be punished for murder. The effect of the alteration from the paradigm is doubtful and unclear in what I will call *type C deviations.* The need for a theory of transferred intent is most urgent in the context of these latter examples. Of course, I should not be dogmatic in categorizing given alterations from the paradigm as instances of type A, B, or C deviations. Although I will report my own intuitions, and hope that they are representative of most thoughtful persons, I am aware that reasonable minds may disagree about some of the particular intuitions I regard as clear. Nothing will depend on the accuracy of each of my intuitive judgments. What is crucial is that a satisfactory theory of transferred intent succeeds in sorting cases into whatever categories are believed to be appropriate.

The twelve salient characteristics of the paradigm case are as follows. First, Smith intended to kill. Second, Smith intended to kill a person. Third, Smith intended to kill a person other than himself. Fourth, Smith did not kill the person he attempted to kill. Fifth, Smith failed to hit and injure the person he attempted to kill. Sixth, Smith killed his unintended victim by accident rather than by mistake. Seventh, the act by which Smith

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manners of killings. Finally, the attempt to kill the intended victim in the paradigm case fails because of a shortcoming on the part of the defendant: his aim is bad. I assume but do not discuss whether the same results follow if the attempt to kill fails from some other kind of cause, such as an unexpected gust of wind.

attempted to kill his intended victim proximately caused the death of his unintended victim. Eighth, the unintended victim was clearly visible to Smith. Ninth, no statute augments the severity of the punishment for killing either the intended or the unintended victim. Tenth, the intended victim made no active contribution to the death of the unintended victim. Eleventh, the unintended victim made no active contribution to his own death. Twelfth, Smith had no justification for attempting to kill his intended victim. In the remainder of this Part, I will describe examples that deviate from the paradigm in each of these twelve respects.

The first characteristic of the paradigm is that Smith intended to kill. Suppose, however, that a defendant lacked the intention to kill. A defendant who kills may have had no culpable state at all, or may have had a culpable state less than intention. Such examples might be represented along a continuum, with the culpable state coming closer and closer to intention.[37] Suppose that a defendant is not even negligent; a reasonable person would have done what he did. Or suppose that he is merely negligent; a reasonable person would not have done what he did. Or suppose that he is reckless; he consciously disregarded a substantial and unjustifiable risk of death. All such examples are type B deviations; the defendant should not be punished for the murder of the bystander. If a defendant lacks the intention to kill, he should not be punished for an offense that requires this intention.[38] Perhaps the defendant should be liable for the kind of homicide (if any) that corresponds to his degree of culpability—when he is reckless with respect to one person, for example, he might be liable for the manslaughter of another person who he actually kills as a result of his reckless behavior[39]—but I need not discuss such questions here.

The second characteristic of the paradigm is that Smith intended to kill a person. Suppose, however, that a defendant intended to kill something other than a person. Suppose that he took aim at Blackie the duck, but killed a human bystander

37. Here I assume that culpable states can be sequentially ordered. For a discussion of this assumption, *see* Douglas Husak, *The Sequential Principle of Relative Culpability*, LEGAL THEORY (forthcoming).

38. I discuss two exceptions to this generalization *infra* Part IV. In many jurisdictions, extreme recklessness may be a sufficient degree of culpability to allow a conviction of murder. Moreover, a defendant may be liable for murder by an application of the felony murder rule.

39. "There is no reason why recklessness should not be capable of transfer as well as intention." WILLIAMS, *supra* note 18, at 127.

instead. Again, this example is clearly a type B deviation; the defendant should not be punished for murder.[40]

The third characteristic of the paradigm is that Smith intended to kill a person other than himself. Suppose, however, that a defendant managed to kill a bystander while attempting to kill himself.[41] Here the outcome is somewhat less clear than in the previous two examples. Still, I categorize this example as a type B deviation. This classification is bound to arouse controversy. Theorists should demand an explanation of why the intention to kill does not transfer in cases of attempted suicide.[42] Some generalizations invoked by commentators—such as the "intent follows the bullet"[43]—are falsified by this example.

The fourth characteristic of the paradigm is that Smith did not actually kill Black, the person he attempted to kill. Suppose, however, that a defendant *did* kill the person he attempted to kill. In almost all such cases, the defendant is clearly guilty of murder.[44] But difficulties arise if the defendant kills someone else in the course of killing the person he attempted to kill. Is the defendant then guilty of *two* murders?[45] If so, he is guilty of more than one crime that requires intent, even though he had only a single intention to kill. Many factual variations on this theme are possible. Suppose that a defendant fired a single bullet that passed through his intended victim, killing him and a bystander as well. Or suppose that a defendant fired several bullets in a drive-by shooting, killing both his intended victim and a dozen bystanders. Is he guilty of thirteen murders? Arguably, there are important distinctions to be drawn between these varia-

40. This result follows in the absence of a special rule to the contrary. *See* the exception in the case of depraved-heart murder discussed *supra* Part III.

41. A number of English cases are cited in WILLIAMS, *supra* note 18, at 126 n.5.

42. Perhaps intentions do not transfer in all cases in which persons intend to kill, but only in those cases in which persons perform the actus reus of homicide. Since homicide is defined as the killing of a human being *other than oneself*, the question of whether the intention transfers in cases of attempted suicide does not arise.

43. State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936).

44. An exception would arise if the defendant killed his intended victim by a deviant causal chain.

45. Courts have disagreed. *See* People v. Birreuta, 208 Cal. Rptr. 635 (Ct. App. 1984). The court concluded—correctly, I think—that the defendant murdered his intended victim, but was guilty only of manslaughter with respect to the unintended victim. *But see* State v. Rodrigues-Gonzalez, 790 P.2d 287, (Ariz. Ct. App. 1990). The court concluded—incorrectly, I think—that the defendant was guilty of multiple murders. It stated: "Intent to murder is transferable to each unintended victim once there is an attempt to kill someone." *Id.* at 288.

tions. If a single bullet is fired, the theorist might be forced to choose whether the intention that accompanies this act does or does not transfer; he cannot have it both ways. If the intention transfers, the first victim is killed unintentionally; if the intention does not transfer, the second victim is killed unintentionally.[46] A doctrine to hold the defendant guilty of multiple murders when his single bullet kills both an intended and an unintended victim might be named *reproduced* or *duplicated intent* rather than transferred intent.[47] Perhaps, however, the firing of several bullets should be regarded as many distinct criminal acts, and the question of whether intentions transfer can arise anew with respect to each successive act.[48] In any event, some or all of these examples seem to me to be type C deviations. A *theory* of transferred intent is required to resolve them.

The fifth characteristic of the paradigm is that Smith failed to hit and injure Black, the person he attempted to kill. Suppose, however, that a defendant actually succeeds in hitting and severely injuring, but not in killing his attempted victim. In almost all such cases, the defendant is clearly guilty of aggravated assault.[49] Once again, however, difficulties arise if the defendant kills someone else in the course of wounding the person he attempted to kill. Is the defendant then guilty of *two* intentional crimes? The factual variations on this theme are similar to those discussed in the previous example. If a defendant performs a single intentional act, his intention must be reproduced or duplicated rather than transferred in order to convict him of more than one intentional crime. At least some of these variations are type C deviations that demand a theoretical resolution.

The sixth characteristic of the paradigm is that Smith killed White, his unintended victim, by accident rather than by mistake. Suppose, however, that a defendant killed his victim by mistake

46. One commentator suggests that A's intention to kill B, the intended victim, cannot be transferred to C, the unintended victim, "because the 'intent' has been 'used up' against B." DRESSLER, *supra* note 25, at 108. Not all courts, however, have agreed with this analysis. Some hold the defendant guilty of two murders on the ground that "intent is not regarded as a limited commodity that, once satisfied, is totally expended." State v. Hinton, 630 A.2d 593, 596 n.8 (Conn. 1993).

47. I assume that the firing of a single bullet is a single intentional act. For an alternative principle of act-individuation, *see* Alvin Goldman, *Action and Crime: A Fine-Grained Approach*, 142 U. PA. L. REV. 1563 (1994).

48. Such a case may not require a single intent to be duplicated or reproduced; intent may be transferred to each victim who is killed by a successive bullet. According to one commentator, "there is enough intent to go around." DRESSLER, *supra* note 25, at 108 n.43.

49. *See* the qualification *supra* note 44.

rather than by accident. The distinction is straightforward. Mistakes occur in the realm of perception; they involve false beliefs. Accidents, by contrast, occur in the realm of causation; they need not involve false beliefs.[50] Suppose, then, that a defendant took aim at a person with the intention to kill him, but that he erroneously believed his target to be a different person. All jurisdictions treat such cases of mistaken identity as type A deviations; the defendant is guilty of murder.[51]

The seventh characteristic of the paradigm is that the act by which Smith attempted to kill Black proximately caused White's death.[52] Suppose, however, that the act by which a defendant attempted to kill was not the proximate cause of the victim's death. Instead, suppose that the unintended victim was killed through what might be called a deviant causal chain. Suppose, for example, that the unintended victim died from an infection when his minor wound was exposed to bacteria after he carelessly drove his car into a swamp on his way to a doctor. These examples are easily resolved. After all, a sufficiently deviant causal chain precludes liability for murder when the defendant's attempt to kill is a "but-for" cause of death of his *intended* victim. Examples that involve a comparably deviant causal chain between a defendant's attempt and the death of an *un*intended victim are even more readily classified as type B deviations.[53]

The eighth characteristic of the paradigm is that White was clearly visible to Smith. This feature helps to establish Smith's level of culpability with respect to his unintended victim. Smith must have been reckless with respect to White's death; he must have been aware that his act might kill White instead of (or in addition to) Black. Suppose, however, that the unintended vic-

50. *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 487 (1978).

51. For better or worse, most criminal codes address mistake and accident differently. The MODEL PENAL CODE treats mistake in § 2.04, and would hold the defendant liable for murder since he "would be guilty of another offense had the situation been as he supposed." MODEL PENAL CODE Sec. 2.04 (1962). For a brief critical discussion of the differential treatment of accident and mistake, *see* Paul Robinson, *Imputed Criminal Liability*, 93 YALE L. J. 609 (1984).

52. I do not invoke a theory of proximate causation to support this claim. Indeed, no commentator has produced an adequate theory of causation, proximate or otherwise. For a useful introduction, *see* CAUSATION, (Ernest Sosa & Michael Tooley, eds., 1993).

53. MODEL PENAL CODE § 2.03(2) (1962) treats cases of transferred intent as issues of causation. The defendant is liable for murder unless the harm "is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability." This treatment, I think, is insufficient to provide much guidance in helping to resolve many of the nonstandard examples of transferred intent.

tim was not clearly visible to the defendant at the time of the shooting. Suppose, then, that a defendant was not reckless or even negligent with respect to the death of the victim. Some theorists have contested whether such a defendant should be guilty of murder. According to Glanville Williams, the "plain man's view of justice" restricts the doctrine of transferred intent to "cases where the consequence was brought about by negligence in relation to the actual victim."[54] My intuitions are far more ambivalent. I am prepared to categorize this example as a type C deviation and await the application of a theory of transferred intent.

The ninth characteristic of the paradigm is that no statute augments the severity of the punishment for killing either Black or White. Some statutes increase the punishment that can be imposed for killing persons of a given status; killing a politician, a judge, or a law enforcement officer is frequently a more serious crime.[55] Suppose, however, that the intended and the unintended victims have a different legal status. Two distinct scenarios are possible. Suppose that the statute augments the punishment for killing the unintended victim. Suppose that Oswald intended to kill Jackie, but hit and killed President John instead.[56] Is Oswald eligible for the more severe punishment that applies to the assassination of the president? Or suppose that the statute augments the punishment for killing the intended victim. Suppose that Oswald intended to kill President John, but hit and killed Jackie instead.[57] Is he eligible for the more severe punishment?[58] At least the former, and perhaps both of these examples strike me as type C deviations.

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54. WILLIAMS, *supra* note 18, at 133.

55. Some statutes make killing such persons a variety of *capital* murder rather than ordinary murder. *See, e.g.*, TEX. PENAL CODE ANN. § 19.03(a)(1) (West 1994).

56. *See* U.S. v. Montoya, 739 F.2d 1437 (9th Cir. 1984). The court held that all that transferred was the intent to strike another person, not the intent to strike the federal officer. *But see* State v. Cantua-Ramirez, 718 P.2d 1030 (Ariz. Ct. App. 1986), where the court imposed the augmented punishment for abuse of a child when the defendant accidentally struck a baby while trying to hit its mother.

57. The augmented penalty would be imposed if one holds that "the severity of the offense predicated on the doctrine of transferred intent is that applicable had the intended victim been the one injured." Mordica v. State, 618 So. 2d. 301, 304 (Fla. Dist. Ct. App. 1993).

58. Again, I am supposing that the unintended victim is killed by accident rather than by mistake. Arguably, different issues arise when the defendant is mistaken about the status of the person he intends to kill. *See* U.S. v. Feola, 420 U.S. 671 (1975).

The tenth characteristic of the paradigm is that Black made no active contribution to the death of White. Suppose, however, that the intended victim actively contributed to the death of the unintended victim. The active contribution made by the intended victim can vary along a continuum. Perhaps the least significant contribution involves simply ducking the bullet. Slightly more troublesome are examples in which the intended victim somehow deflects the bullet onto another person.[59] Although most such cases are type A deviations, a few are type B deviations. The intuitive judgment that the defendant is guilty of murder dissolves if the intended victim could easily have prevented anyone from dying, but chose for his own malicious reasons to ensure that someone else would be harmed. Suppose, for example, that a defendant threw a bomb with a lit fuse toward his intended victim. Even though the intended victim knew he could easily extinguish the fuse, he instead tossed the bomb toward someone else, who was killed in the explosion.[60] Somewhere along the continuum between these type A and type B deviations lie type C deviations. Suppose, for example, that the intended victim escapes from an ambush by deliberately interposing a number of innocent persons as shields. Reasonable minds might differ about whether the defendant should be guilty of murder when the intended victim makes this degree of contribution to the death of the unintended victims.

The eleventh characteristic of the paradigm is that White made no active contribution to his own death. Suppose, however, that the unintended victim actively contributed to his own death. Again, the active contribution of the unintended victim can vary along a continuum. Suppose that Kevin was a bodyguard employed to protect Whitney, and that he jumped in front of the bullet to save the life of his employer. This deviation is type A. But suppose that a defendant threw a bomb with a lit fuse toward his intended victim. The unintended victim discovered the bomb, and knew she could easily extinguish the fuse. Instead, she chose to martyr herself by throwing her body on the bomb, dying in the subsequent explosion. Here is a clear type B

59. Many examples are discussed in Christopher Boorse & Roy Sorensen, *Ducking Harm*, 85 J. PHIL. 115 (1988).

60. These cases may break the causal connection between the act of attempted killing and the death of the victim by what H.L.A. Hart and Antony Honore describe as the *voluntary intervention principle* in H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW (2d ed. 1985). For a critical discussion of this principle, see Joel Feinberg, *Causing Voluntary Actions, in* DOING AND DESERVING 152 (Joel Feinberg, ed., 1970).

deviation. Somewhere along the continuum between these type A and type B deviations lie type C deviations.

The twelfth and final characteristic of the paradigm is that Smith had no justification for attempting to kill White. Suppose, however, that a defendant was justified in shooting at his intended victim. Suppose that he fired at his intended victim in self-defense, but killed an innocent bystander instead. Most such examples are type B deviations.[61] But intuitions may be less clear if the defendant killed several innocent persons in the course of justifiably shooting at his intended victim.

In reflecting on these twelve deviations from the paradigm case, the relative dearth of type A deviations merits special attention. In only a very few situations should the defendant be punished for murder when the facts of the paradigm are altered. Far more common are type B deviations, in which the modification of the facts suffices to change the outcome of the case. Of greatest interest, however, are the many type C deviations, about which our intuitions are unclear. The need for a theory of transferred intent becomes evident in light of the sheer number of these problematic examples.

V. THE DOCTRINE AS LEGAL FICTION

How might we obtain some guidance to resolve the many type C deviations? My hope is that a theory of transferred intent that helps to explain cases about which we are clear—the paradigm case as well as nonstandard type A and B deviations—can be brought to bear on those cases about which our intuitions are ambivalent or silent.

One possible approach to these questions is to refine our understanding of the precise circumstances under which intentions actually transfer. Suppose there were some fact of the matter about when intentions really transfer that could be discovered through careful philosophical analysis. If so, philosophical analysis would provide the very best method for resolving our uncertainty about type C deviations. Indeed, there would be little excuse to pursue any *other* means to dispel our confusion.

This approach, however, is altogether fanciful. I am unaware of any theorist who has taken or would take this possibility seriously. Most commentators are quick to label the doctrine of

61. "When the fault is transferred, any defence which D might have had is transferred with it." ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW (2d ed., forthcoming January 1996) (manuscript at 198, on file with author) (citations omitted).

transferred intent as a "fiction."[62] Thus theorists do not really believe that intentions actually transfer; clearly, there is no fact of the matter about transferred intent that can be discovered through philosophical analysis. The fictitious nature of this doctrine may be too obvious to belabor. I think, however, that this conclusion should be defended rather than assumed. In this Part, I will show why the rationale for holding Smith liable for murder in the paradigm case cannot be that his culpable state with respect to Black somehow actually "transfers" to White. I will conclude by suggesting how a fictitious rationale for punishing Smith as a murderer can be avoided.

Are intentions the kind of things that can transfer? Answering this question proves doubly difficult. First, there is doubt about exactly what is meant by *transfer*; second, the nature of *intention* is notoriously unclear. In what follows, I will comment briefly on each of these two difficulties. Despite my best efforts to provide a charitable and sympathetic interpretation of the doctrine, I am ultimately unable to make much sense of the claim that the culpable states required for murder are the kind of things that can or do transfer. This conclusion should help to pave the way toward consideration of non-fictitious rationales to explain our intuitive judgments.

The word "transfer" is used most frequently as a verb in property law, as when one person conveys to another possession or title.[63] This conveyance brings about a change or alteration in legal status; one person gains what another person loses. Perhaps the doctrine of transferred intent involves a similar transformation. By an application of this doctrine, Smith's intention to kill Black is somehow changed or altered into an intention to kill White. This transformation renders Smith guilty of an intentional killing—a murder—of White.

Can intentions be transformed in this way? Unfortunately, no widely-used conception of intention is available to answer this question.[64] The difficulties of locating the boundaries of intention are so formidable that many modern criminal codes, following the lead of the Model Penal Code, have all but abandoned the use of the concept. Uncertainty about whether a person intends the consequences he knows his action will bring about,

62. This doctrine is described as an "arrant, bare-faced fiction of the kind dear to the heart of the medieval pleader" in William Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967).

63. BLACK'S LAW DICTIONARY 1170 (4th ed. 1968).

64. "Despite . . . the central role which the concept of intention plays in the criminal law, we still lack a clear or agreed account of its meaning." R.A. DUFF, INTENTION, AGENCY, & CRIMINAL LIABILITY 15 (1990).

even when he does not desire them—that is, uncertainty about whether so-called "oblique intentions" are a kind of intention—has led many legislators to replace the vague concept of intention with the relatively clear concepts of purpose and knowledge. As a result, many codes now define murder as purposely or knowingly causing the death of another human being.[65] This replacement of intention with purpose and knowledge may well have broadened, but certainly has not narrowed the scope of murder. All intentional killings are performed either purposely or knowingly, even if the converse is open to debate.[66]

This change is important for the purpose at hand. Under the new definition, no issue of criminal liability depends on whether intentions can transfer. The controversy is no longer relevant to the rationale for holding Smith liable for murder. Instead, the crucial issue is whether purpose or knowledge—the culpable states that have replaced intention in the definition of murder—can transfer. Although the question of whether intentions can transfer may seem difficult, the parallel questions about knowledge and purpose are relatively easy. Neither purpose nor knowledge can be thought to transfer without doing grave violence to our understanding of these concepts.

Knowledge cannot literally transfer. Knowledge that *P* is not knowledge that *Q*, even when *P* entails or is identical to *Q*.[67] Undoubtedly, Smith did not kill White knowingly in the paradigm case; he was not "practically certain" that his bullet would miss Black and hit White.[68] Just as obviously, purpose cannot literally transfer.[69] No sleight-of-hand can transform a purpose to bring about a state of affairs *X* into a purpose to bring about a state of affairs *Y*, unless perhaps *X* is a means to *Y*. Clearly, Smith did not have the "conscious object" to kill White.[70] Thus neither

65. MODEL PENAL CODE § 210.2(1)(a) (1962). § 2.10.2(1)(b) creates liability for "depraved-heart" murder, when the defendant exhibits an extreme indifference to the value of human life.

66. According to one commentator, "courts are almost equally divided on the question" of whether knowledge "either is or should be a sufficient condition of intention." ALAN WHITE, MISLEADING CASES 50-51 (1991).

67. Such judgments are said to be referentially opaque. *See* QUINE, *supra* note 29, at 141-46.

68. Thus Smith fails to satisfy the statutory definition of knowledge of consequences in MODEL PENAL CODE § 2.02(2)(b)(ii) (1962).

69. Since purpose cannot transfer, then, if purpose is the *mens rea* of attempt, the doctrine of transferred intent is inapplicable to attempt. See the discussion in Elaine Devoe, Note, *Criminal Law—The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette*, 17 N.M. L. REV. 189 (1987).

70. Thus Smith fails to satisfy the statutory definition of purpose with respect to consequences in MODEL PENAL CODE § 2.02(2)(a)(i) (1962).

knowledge nor purpose—the culpable states that have replaced intention in the definition of murder in the Model Penal Code—can transfer. Since all intentional killings are performed either purposely or knowingly, and these latter culpable states cannot transfer, it seems highly unlikely that intentions can transfer.

Thus I reach the same conclusion that many commentators have taken for granted without argument: the doctrine of transferred intent is indeed a legal fiction. Henceforth I will use the word "deem" to remain mindful of the fictitious character of this doctrine.[71] Smith's intention to kill Black does not literally transfer to White; his original intention is not somehow transformed into a different intention. Instead, when his bullet hits and kills White, the criminal law *deems* his intention to kill Black to be an intention to kill White. Or, in the terminology of modern criminal codes, the criminal law *deems* Smith's purpose to kill Black to be a purpose to kill White. Smith is convicted of murder because the criminal law deems him to possess the requisite culpable state.

I do not insist that purists are correct to deny that fictions might have a viable place in legal theory. *Perhaps* there are good reasons for the criminal law to deem Smith to have an intention that he actually lacks.[72] Unfortunately, however, a fiction is unhelpful for the task at hand. The existence of type A and B deviations indicates that some intentions to kill are deemed to transfer, while others are not. Invoking a fictitious doctrine to "explain" why the defendant should be punished for murder in the paradigm case or in type A deviations provides no guidance about the remaining cases. Why not resort to this fiction in type B deviations as well? Well, intentions just do not transfer under

71. Commentators who denounce the doctrine of transferred intent as a legal fiction use similar (although not identical) terminology. LaFave and Scott write: "What is really meant, by this round-about method of explanation [that invokes transferred intent] is that when one person (A) acts (or omits to act) with intent to harm another person (B), but because of a bad aim he instead harms a third person (C) whom he did not intend to harm, the law *considers* him (as it ought) just as guilty as if he had actually harmed the intended victim." LAFAVE & SCOTT, *supra* note 2, at 399-400 (emphasis added).

72. One commentator protests against the tendency to regard this fiction as a "perfidious trick." Instead, he contends that this fiction merely indicates that the sense of intention in the criminal law diverges from that in ordinary language. *See* C. Hall, *A Defense of the Doctrine of Transferred Malice—Its Place in the Nigerian Criminal Code*, 34 INT'L. & COMP. L. Q. 805, 810 (1985). But if the sense of intention used in the criminal law is technical and divorced from everyday usage, commentators have no place to turn to resolve nonstandard examples about which courts have disagreed. For a sustained argument in favor of an ordinary language interpretation of legal concepts such as intention, see WHITE, *supra* note 66.

these circumstances. And here the story ends. In this context, the fiction operates as a substitute for careful thought; it is nothing more than a label to which persons appeal to reach judgments that they accept intuitively, while providing no assistance for those cases about which their intuitions are ambivalent or silent.

Moreover, if a fiction is indeed required, there seems to be no good reason to endorse *this* fiction rather than some alternative. After all, there are fictions other than transferred intent that could be created to convict Smith of murder. As long as we are clear that our doctrines are fictitious, why not reject premise (3) in the argument for the necessity of transferred intent instead of premise (4)? Smith could be convicted of murder just as surely by the simple expedient of deeming Black to be dead. Call this fiction the *doctrine of transferred death.* Why not say that the law "deems" Black to be dead when Smith shoots at him with the intention to kill, but misses and kills White instead? If the doctrine of transferred death is vulnerable to the objection that the living cannot be dead, one wonders why the doctrine of transferred intent is not equally vulnerable to the objection that the culpable states required for murder cannot be transferred. Silliness has no bounds once doctrines are conceded to be fictitious.

But how can a fiction be avoided if Smith is to be punished for murder? Purists probably win the debate against abolitionists in insisting that Smith has not killed White intentionally and therefore has not committed murder as defined in premise (1). No alchemy can transform an unintentional killing into an intentional killing. The key to punishing Smith as a murderer while avoiding fictions is to realize that the conclusion of the argument for the necessity of transferred intent—that Smith is not guilty of murder—does not preclude punishing him as severely *as* a murderer. Only a principle about deserved punishments can justify treating Smith as a murderer while avoiding fictions. In other words, a defensible rationale must specify the conditions under which the severity of punishment of a given defendant should be made equal to that of another defendant, even if they have committed different crimes. Such a principle purports to justify punishing Smith as severely as a murderer; that is, it endeavors to support the conclusion that Smith should be treated *as* a murderer—even though he has not actually committed murder. Thus I have tried to be careful to avoid the preposition "for" in describing my position; Smith should be treated *as* a murderer, although he is not literally punished *for* murder. Those whose

intuitions support the doctrine of transferred intent have no reason to ask for more.

My proposal to treat cases of transferred intent within sentencing theory rather than within the substantive criminal law is novel, but not radical. Some considerations that bear on the severity of the punishment that a defendant deserves are part of the substantive criminal law, while other such considerations are applied at the time of sentencing. No sound theory differentiates between the two kinds of considerations. Suppose, for example, that a defendant assaults a victim who is especially vulnerable due to age or physical condition. Under the Federal Sentencing Guidelines, the punishment of this defendant is made more severe than for ordinary assault.[73] This defendant is not guilty of committing the distinct crime of "assaulting an especially vulnerable victim." Cases of transferred intent could be treated within sentencing guidelines as well. The severity of Smith's punishment could be adjusted to whatever degree is necessary to make it equivalent to that imposed on the ordinary murderer. No special or fictitious doctrine of the substantive criminal law is required to reach this result.

In what follows, I will critically examine two non-fictitious rationales that might be incorporated within sentencing guidelines to justify our intuitions and help resolve nonstandard examples of transferred intent. Neither rationale purports to identify the conditions under which intentions really transfer; no theory can salvage the doctrine of transferred intent as literally construed. I have already dismissed the suggestion that the culpable states required for murder are the kind of things that can be transformed. These rationales *could* be understood as identifying the conditions under which intentions are deemed to transfer. But a theorist who subscribes to either rationale no longer *needs* the doctrine of transferred intent to explain why Smith should be punished as a murderer. Thus these rationales do not support the doctrine of transferred intent as much as they provide an alternative to it. Fictions should be created only if they are required to avoid injustice, and both the rationales I will examine render the doctrine of transferred intent superfluous. Smith should be punished as a murderer not because his intention to kill Black is deemed to be transferred to White, but because the severity of the punishment he deserves can be justified by a non-fictitious principle in sentencing theory.

73. SENTENCING GUIDELINES AND POLICY STATEMENTS § 3A1.1 (U.S. Government Printing Office, 1987).

An adequate theory of transferred intent must sort our intuitions in the appropriate way, that is, it must account for our judgments about the paradigm case as well as about type A and B deviations. But we derive little benefit from reinforcing what we already know. The real advantage of a theory—as opposed to a fiction—is that it offers some guidance for resolving those cases about which we are undecided.

VI. THE COMPENSATION FOR LUCK THESIS

Some courts[74] and commentators[75] apparently believe that the best non-fictitious rationale for punishing Smith as a murderer invokes what I will call the *compensation for luck* thesis. According to this thesis, two defendants D1 and D2 should be punished to the same extent if the only characteristics that differentiate them are due to luck. In this Part, I will critically examine this thesis, and argue that it fails to provide a suitable rationale for our judgments about many cases of transferred intent.

According to the rationale I will explore here, the fiction of transferred intent is a specific doctrine that implements a more general, non-fictitious thesis that compensates for luck in assessments of criminal liability. This thesis may seem to have the potential to explain the paradigm case. Consider Jones, who commits an undisputed case of murder after hitting and killing his intended victim. Surely it is simply a matter of luck that Smith, unlike Jones, missed his intended victim and killed someone else instead. If the luck that distinguishes Smith from Jones is removed from consideration, nothing of moral relevance is left to differentiate their respective degrees of blame and liability. Thus they deserve the same quantum of punishment.

Applications of the compensation for luck thesis require some understanding of the role that luck actually plays in human affairs. Here commentators have disagreed, and might even be said to have floundered. Whether something is or is not attributable to luck requires a baseline of comparison—an appraisal of what the world would have been like in the absence of luck—and no clear basis for making such judgments is available. Once the presence of luck is posited, theorists are likely to find it every-

74. In explaining the rationale for the doctrine of transferred intent, one judge remarked that "but for the transferred intent doctrine, [defendants who accidentally kill innocent bystanders, while failing to kill their intended victims] could escape punishment for murder . . . because of their "lucky" mistake. People v. Birreuta, 208 Cal. Rptr. 635, 638-39 (Ct. App. 1984).

75. "What the courts have essentially done in [cases of transferred intent] is to rule out the role of luck." Kessler, *supra* note 13, at 2207.

where—or nowhere. Why stop the search by conceding that luck explains why Smith, unlike Jones, missed his intended victim and hit someone else instead? It seems just as much a matter of luck that Smith hit anyone at all. For that matter, it seems just as much a matter of luck that Jones hit his intended victim. Why attribute Smith's bad aim to luck, but not Jones' good aim? From the standpoint of luck, their cases are hard to distinguish from that of Brown, who missed both his intended victim and the bystander. If we endeavor to compensate for the effects of luck in assessments of criminal liability, why should Smith, Jones or Brown receive different amounts of punishment?

If these defendants should be punished only for what is not a matter of luck, then perhaps they should be guilty only for what they share in common—their attempts to kill. The success of Smith and Jones in actually killing should not raise their degree of blame any more than Brown's lack of success in actually killing should lower it. Arguably, a defendant who attempts to kill should be liable for the same offense as a defendant who succeeds. A few commentators have reached this very conclusion. They hold that persons should be liable only for what they attempt, and not for the actual consequences of their actions.[76]

But the problem is not solved by holding defendants liable only for what they attempt. After all, it is just as much a matter of luck that Smith, Jones or Brown managed to commit an attempt. Luck seems to be involved in the fact that their cars did not stall on their way to the place of the shooting, making it difficult to convict them even of a criminal attempt. And I have only begun to scratch the surface in suggesting how assessments of criminal liability might be affected by a systematic endeavor to compensate for the effect of luck.[77] There is no good reason to disregard the role that luck plays in explaining how persons come to have their intentions, inclinations, capacities, and temperaments.[78]

No jurisdiction has systematically endeavored to compensate for luck in assessments of criminal liability. At most, the application of the compensation for luck thesis has been limited to situations in which Smith actually killed someone, albeit someone

76. For one of many such examples, see James Gobert, *The Fortuity of Consequences*, 4 CRIM. L. F. 1 (1993).

77. Ultimately, the attempt to compensate for luck in assessments of criminal liability is hard pressed to explain why anyone should ever be criminally liable for anything at all. For a thoughtful discussion of these matters, see Michael Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237 (1994).

78. This category is called *constitutive luck* in THOMAS NAGEL, MORTAL QUESTIONS 28 (1979).

other than his intended victim. As far as I can see, there is no principled basis for limiting the application of the compensation for luck thesis to this kind of situation. In other words, the compensation for luck thesis, if applied less selectively, would support far more sweeping and radical conclusions than the doctrine of transferred intent. If so, it is hard to see how this doctrine could be understood to implement the more general compensation for luck thesis.

I claim no originality on behalf of the foregoing difficulties with the compensation for luck thesis. These problems have long been familiar both to moral philosophers and to legal theorists. What may escape notice is that the compensation for luck thesis is unhelpful in effectively sorting our intuitions about the nonstandard cases of transferred intent. Arguably, this thesis renders *all* nonstandard examples amenable to the same solution. Consider just one of the type B deviations. In example seven, the act by which the defendant attempts to kill his intended victim is not the proximate cause of the death of his unintended victim; the killing takes place through a deviant causal chain. Surely luck is involved in the fact that the causal chain that led to the death of the unintended victim is deviant. Does the compensation for luck thesis thus require that this example should be reclassified as a type A deviation? Such a reclassification is counterintuitive.

If the compensation for luck thesis misfires when applied to cases about which we are relatively confident, it has even less potential to assist us with several type C deviations—those examples that motivated the search for a general rationale in the first place. This suspicion is confirmed by returning to just one of these examples. In the fifth deviation, the defendant hits and injures but fails to kill his intended victim. What are we to conclude about this case if we endeavor to compensate for luck? We can emphasize the victim's good luck in surviving his wound. Or we can emphasize the victim's bad luck in having been wounded at all. The compensation for luck thesis points in both directions—or in neither. As far as I can see, this thesis brings us no closer to a resolution of this example. The compensation for luck thesis fails to provide a general rationale to support our judgments about transferred intent.

VII. The Principle of Proportionate Sentences

Since the compensation for luck thesis does not account for our judgments about transferred intent, commentators should seek an alternative rationale. In this Part, I will apply what I call

the *principle of proportionate sentences.* According to this principle, the punishment a defendant deserves should be proportionate to the seriousness of his criminal conduct.[79] The principle of proportionate sentences requires *parity* in sentences when two defendants commit equally serious crimes. Here I assume that the seriousness of criminal conduct is a function of two variables—harm and culpability.[80] If D1 and D2 act with the same culpability, and proximately cause the same harm, then they must have committed equally serious crimes. If D1 is and ought to be punished for murder—the most serious crime—and D2 has committed a crime of equal seriousness, then D2 should be punished to the same extent as a murderer.

The principle of proportionate sentences is superior to the compensation for luck thesis. Recall that the latter thesis encountered difficulties even when applied to the paradigm case. But the principle of proportionate sentences has a straightforward application here. Smith has proximately caused the death of a human being, so he has produced the same harm as Jones, the undisputed murderer. In addition, Smith possesses the same level of culpability as Jones. Thus their criminal conduct is equally serious, and the principle of proportionate sentences requires parity in punishment. Smith and Jones could not be punished to different degrees without violating the principle of proportionate sentences.[81]

Consider next the application of the principle of proportionate sentences to some of the deviations about which our intuitions are clear. Most of these examples are easy. In example two, a defendant intended to kill Blackie the duck, but killed a human being instead. Since the consequence intended—if it is a harm at all—is far less grave than the harm of homicide, the principle of proportionate sentences requires disparity in punishment and precludes treating the defendant as a murderer. In

79. The principle of proportionate sentences is a cornerstone of desert-based theories of punishment. For a sustained defense, see ANDREW VON HIRSCH, DOING JUSTICE (1976); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES? (1985); and ANDREW VON HIRSCH, CENSURE AND SANCTION (1993).

80. Of course, any other variable that might differentiate the seriousness of the crime committed by D1 from the seriousness of the crime committed by D2 must be held constant in order to apply the principle of proportionate sentences. Motive is one such possible variable. See the discussion in Douglas Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3 (1989).

81. The principle of proportionate sentences is subject to a *ceteris paribus* clause. The precise scope of such a clause is open to dispute, but its main function is to hold constant those *offender characteristics*—such as prior criminal record—that might allow D1 to be punished more severely than D2, even when their criminal conduct is equally serious.

example six, a defendant killed by mistake rather than by accident. Since both the harm that is caused and the culpability of the defendant are equivalent to those of the murderer, the principle of proportionate sentences requires parity in punishment between the defendant and the murderer.

Thus far, the principle of proportionate sentences seems capable of sorting our intuitions into the appropriate categories. Does this principle also overcome some of the general problems I raised against the compensation for luck thesis? I believe so. The greatest difficulty with the former thesis is that it knew no bounds; without agreement about the role of luck in human affairs, a systematic attempt to compensate for luck has the potential to undermine much of the criminal law as we know it. What are the limits of the principle of proportionate sentences? Admittedly, these boundaries are not easy to define. Theorists lack a principled basis to decide difficult questions about either of the two variables that determine the seriousness of crime. Commentators might debate about whether one consequence is more or less harmful than another,[82] as well as about whether one state is more or less culpable than another.[83] Even a good theory cannot always make hard cases easy. We may seem to be in the same predicament as the theorist who endeavored to compensate for the role of luck.

Fortunately, however, our present prospects may not be quite so bleak. There is a surprising level of agreement among persons about whether one crime is more or less serious than another.[84] Moreover, there should be no dispute about whether two consequences are equally harmful, or two states are equally culpable, when they are the identical type.[85] This basis of agree-

82. See the approach taken in Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1 (1991).

83. Oftentimes two states are said to be equally culpable even though they are distinct. Willful ignorance, for example, is frequently said to be as culpable as the distinct state of knowledge. For a critical discussion of this supposed equivalence, see Douglas Husak & Craig Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29. A moral theory that holds distinct states to be equally culpable is inevitably controversial. *See* Michael Moore, *Intentions and Mens Rea*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 245 (Ruth Gavison ed., 1987).

84. *See* THORSTEN SELLIN & MARVIN WOLFGANG, THE MEASUREMENT OF DELINQUENCY (1964).

85. I do not mean to minimize the difficulties in determining when two mental states are of the identical type.

ment provides the best hope for applying the principle of proportionate sentences to resolve some of the type C deviations.

In example four, a defendant kills one or more bystanders in the course of killing his intended victim. Is he guilty of multiple murders? Theorists who apply the principle of proportionate sentences would approach this question by comparing the seriousness of the crime(s) committed by this defendant (D1) with those of another defendant (D2) who intentionally killed more than one person. Have D1 and D2 committed equally serious crimes? If not, it must be possible to differentiate D1 and D2 by either the amount of harm they have proximately caused or by their respective levels of culpability. D2, it seems clear, causes more harm and is more culpable than D1; to intend to kill several persons is more culpable than to intend to cause a single death.[86] Thus the principle of proportionate sentences requires D1 to be punished less severely than D2.

In example five, a defendant kills the bystander, but also inflicts a nonfatal wound on his intended victim. Again, the question is whether the defendant should be guilty of more than one intentional crime. No progress is made here by debating whether a single intent against the wounded victim is "used up," or whether there is "enough intent to go around."[87] Nor is the approach of the Model Penal Code especially helpful. It seems unproductive to limit the inquiry to whether the causal chain that led to the death of the bystander is "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability."[88] Instead, the principle of proportionate sentences should be applied. The analysis proceeds as in the foregoing example. A defendant (D2) who intends both to kill *and* to wound is more culpable than a defendant (D1) who intends only to kill. Thus D2 deserves to be punished more severely than D1.

Not all of the nonstandard examples are amenable to this solution. In example eight, the unintended victim was not clearly visible to the defendant. Thus the defendant was probably not reckless with respect to the death of his victim. Suppose that the defendant was not even negligent with respect to his victim. In this example, the principle of proportionate sentences requires parity in the amount of punishment imposed on D1 and D2. The defendant causes the same harm as the undisputed

86. See the rationale invoked in People v. Birreuta, 208 Cal. Rptr. at 639. For a challenge to the claim that an intention to kill many persons is more culpable than an intention to kill one, see John Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977).

87. *See* DRESSLER, *supra* note 25.

88. MODEL PENAL CODE, § 2.03(2)(b) (1962).

murderer, and possesses the same level of culpability. Since neither the amount of harm they proximately cause nor their level of culpability suffice to differentiate them, their criminal conduct is equally serious. Thus I am inclined to punish both with equal severity.

This example, more than any other, indicates the need for a theory of transferred intent. Despite Williams' admonition that the "plain man's view of justice" suggests that this defendant should not be punished as a murderer,[89] commentators report conflicting intuitions here. As far as I can see, the compensation for luck thesis provides absolutely no assistance in resolving this example. The principle of proportionate sentences, however, is easier to apply. Whether it produces an acceptable outcome is perhaps the most important test of the adequacy of my approach.

Some examples, however, are not so clearly resolved by an application of the principle of proportionate sentences. In example nine, a statute augments the punishment for killing either the intended or the unintended victim. Here the application of the principle of proportionate sentences is murky. The crux of the problem is that there is no clear justification for augmenting the punishment of a defendant who kills a person with a given legal status. If the killing of a police officer, for example, is judged to be a greater harm than the killing of an ordinary citizen, the principle of proportionate sentences might provide a basis to impose a more severe punishment on a defendant who causes the greater harm. But the augmented punishment might be justified by a supposed greater need to deter the killing of police officers, rather than by a judgment about the magnitude of the harm involved. Without an answer to the question of whether different consequences are equally harmful, no clear outcome is produced by applying the principle of proportionate sentences.

The principle of proportionate sentences can be hard to apply for additional reasons. A few examples cannot be resolved without a comprehensive theory about very different areas of the substantive criminal law. In example ten, for example, an intended victim deliberately interposed one or more innocent persons as shields. And in example twelve, a defendant killed many innocent persons in the course of defending himself. The principle of proportionate sentences offers an incomplete perspective in such situations. The resolution of these kinds of

89. WILLIAMS, *supra* note 18, at 133.

examples awaits a detailed theory about what persons are permitted to do in the course of exercising their right of self-defense.[90]

Does the principle of proportionate sentences have acceptable implications when applied to kinds of situations not yet considered? I am somewhat troubled by its application to examples typically treated under the rubric of concurrence. In one well-known such case,[91] the defendant wounded his victim with the intent to kill. Believing his victim to be dead, he disposed of what he thought to be a corpse. The cause of death was not the initial wound, but the subsequent act of disposal. The principle of proportionate sentences would allow this defendant to be punished as a murderer. Although some commentators have expressed reservations about this result, a contrary outcome strikes me as counterintuitive. I tentatively suggest that cases of concurrence might be resolved by reference to the same general rationale I have invoked in cases of transferred intent. Although I cannot pursue this suggestion here, it may provide an additional test of the general adequacy of my proposal to apply the principle of proportionate sentences to cases of transferred intent.

I suspect that the application of the principle of proportionate sentences will turn out to sort most (but not all) of the type C deviations into the type B category. This result should not be surprising. Since few of the deviations about which our intuitions are clear were classified as type A, one might anticipate that few of the deviations about which our intuitions are *un*clear would ultimately fall into this category. The doctrine of transferred intent does not apply *only* to the paradigm case, but it applies somewhat sparingly to the deviations from the paradigm that I have constructed.

VIII. CONCLUSION

I began by presenting the paradigm case of transferred intent. I reconstructed the argument for the necessity of the doctrine of transferred intent, and critically discussed the various reasons that commentators might advance for believing it to be unsound. The purist alternative gains plausibility if this argument is accepted. But the purist approach is subject to difficulties of its own. I generated various kinds of nonstandard examples of transferred intent, that is, examples with specified characteristics that deviate from the paradigm. Unless the aboli-

90. For one such theory, *see* SUZANNE UNIACKE, PERMISSIBLE KILLING (1994).

91. Thabo Meli v. Regina, 1 W.L.R. 228, 1 All E.R. 393 (1954).

tionist approach is endorsed, a rationale to punish any of these defendants as murderers must be found within sentencing theory rather than within the substantive criminal law. I have argued that the principle of proportionate sentences is preferable to the compensation for luck thesis in providing a non-fictitious basis to resolve both paradigm and nonstandard cases of transferred intent. This principle provides the basis for a *theory* of transferred intent. At the very least, I hope to have established the need for such a theory, as the intuitions of many commentators are silent or ambivalent when examples diverge from the familiar paradigm case of transferred intent with which I began.