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The kill zone theory is a legal doctrine that does not exist in statute but has been used in jury instructions to aid in securing convictions for attempted murder charges. As a result of the kill zone theory, individuals in California have received lengthier sentences and, in some cases, have been convicted of crimes that fail to meet the requisite specific intent for attempted murder cases. The kill zone theory has no purpose in California law but to make the path to conviction easier and to put defendants in jail for longer. The kill zone theory is an unnecessary tool because there are several alternatives that would serve the same purpose of ensuring individuals do not evade punishment for endangering the lives of others. This Note will discuss the kill zone theory and how it came to be, explain the problematic aspects of the doctrine that end up harming defendants, propose alternative solutions to the kill zone theory, and conclude that the kill zone theory should no longer be used in California.

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INTRODUCTION

On January 2, 2004, two teenagers named Dupree Glass and Juan Rayford went to a party where Glass got into an argument with another boy named Perry.[1] Perry then left the party with his cousins, Donisha and Shadonna Williams.[2] Still upset about the argument, Glass texted Donisha asking where Perry was, expressing that he wanted to fight Perry.[3] Donisha repeatedly told Glass that Perry was at their grandmother's house and eventually told Glass he could come to the house to see for himself that Perry was not there.[4] Glass and Rayford then drove to the Lair house, where Donisha, Shadonna, and their mother, Sheila Lair, lived to see if Perry was there.[5]

When Glass and Rayford arrived, Glass asked Donisha to tell Perry "to come outside and catch a fade" (meaning come outside and fight).[6] Sheila walked outside to find that a crowd had gathered on her lawn to witness the anticipated fight between Glass and Perry.[7] Sheila told Glass that Perry was not there and that there would be no fighting at the house.[8] As she was talking to Glass, two men began to fight Sheila's neighbor, Terry.[9] Soon after, eight shots were fired.[10] No one was killed or seriously injured; two people were grazed by bullets and treated with Band-Aids at the scene.[11]

According to Sheila's and Donisha's trial testimonies, Glass and Rayford were both shooters.[12] Sheila testified that someone called "Fat Man" fired the first gunshots, and then she saw Glass start shooting at the house.[13] She also "saw a flash and heard sounds coming from the area where Rayford was standing" and assumed that he too fired shots at the house.[14] Donisha testified that she saw Rayford fire the first shot straight up into the air, Fat Man shoot several times toward the front door, and Glass shoot at the front window of the house.[15]

At trial, the jury found that Glass and Rayford were guilty despite the lack of a primary target, the absence of evidence of the requisite specific intent to kill, and the fact that Sheila's and Donisha's testimonies were the only things connecting

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1. People v. Rayford (*Rayford I*), No. B179017, 2006 WL 1990962, at *2 (Cal. Ct. App. July 18, 2006).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at *2–3.
11. *Id.* at *3.
12. *Id.*
13. *Id.* at *2.
14. *Id.*
15. *Id.* at *3.

Glass and Rayford to the shootings.[16] Glass and Rayford were convicted of one count of shooting at an inhabited dwelling and eleven counts of attempted murder; each received eleven consecutive life sentences.[17] Glass and Rayford have maintained their innocence since the beginning of the case. After sixteen years in prison, Glass's and Rayford's writs of habeas corpus were granted.[18]

The prosecutor's use of the kill zone theory was the driving force that led to Glass's and Rayford's convictions. The idea behind the kill zone theory is that "the intent required for attempted murder can be satisfied not only by the intent to kill a particular person, but also by 'a generalized intent to kill someone.'"[19] In order for the kill zone theory to apply, the prosecutor must prove beyond a reasonable doubt that (1) "the perpetrator intended to create a zone of fatal harm around the primary target; that is, an area in which the perpetrator intended to kill *everyone* present to ensure the primary target's death," and (2) the alleged attempted murder victims were not the primary target and were located within the zone of fatal harm.[20] The perpetrator must have the specific intent and the means sufficient to kill the primary target and all others in the zone of fatal harm.[21] The fact that a person desired to kill a particular target does not preclude a finding that the person also, concurrently, intended to kill others within the kill zone.[22] As such, a defendant would be guilty of the attempted murder of victims who are not the defendant's primary targets if the defendant specifically intends that everyone in the kill zone die;[23] victims can include those not seen by the defendant.[24]

The kill zone theory "is not a legal doctrine requiring special jury instructions. . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others."[25] The kill zone theory exists in jury instructions[26] which have been heavily shaped by case law. The kill zone theory blurs the line between express and implied malice,[27] both making it easier for prosecutors to convince juries that

16. *In re* Rayford (*Rayford II*), 264 Cal. Rptr. 3d 401, 423–25 (Ct. App. 2020).

17. There were also gang enhancements on the eleven consecutive life sentences, but they were overturned in 2006 while this case was being heard on appeal. Evidence was insufficient to prove that Glass and Rayford belonged to a gang. *Rayford I*, 2006 WL 1990962, at *1.

18. *Rayford II*, 264 Cal. Rptr. 3d at 405.

19. People v. Ervine, 220 P.3d 820, 856 (Cal. 2009) (quoting People v. Stone, 205 P.3d 272, 275 (Cal. 2009)).

20. CALIFORNIA JURY INSTRUCTIONS CRIMINAL § 8.66.1 (2020) [hereinafter CALJIC] (emphasis added).

21. *See id.*

22. *See* People v. Bland, 48 P.3d 1107, 1118 (Cal. 2002).

23. People v. McCloud, 149 Cal. Rptr. 3d 902, 910 (Ct. App. 2012).

24. People v. Windfield, 176 Cal. Rptr. 3d 695, 708 (Ct. App.), *review pending*, 337 P.3d 494 (Cal. 2014).

25. *Bland*, 48 P.3d at 1119 n.6.

26. The kill zone jury instructions include JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS § 600 (2020) [hereinafter CALCRIM] and CALJIC 8.66.1.

27. Express malice requires a showing that the assailant either desires that death occur or knows, to a substantial certainty, that death will occur. 17A CAL. JUR. 3D *Criminal Law: Crimes Against the*

there is specific intent when there really may be none and giving prosecutors the ability to more easily secure convictions.[28]

In the Supreme Court of California's most recent kill zone case, *People v. Canizales*, the court acknowledged the danger in using the kill zone theory and noted "trial courts must exercise caution when determining whether to permit the jury to rely upon the kill zone theory."[29] This Note will discuss why exercising caution is not enough and will argue that the kill zone theory should no longer be used in California.

Part I of this Note will discuss the background of the kill zone theory and how it evolved into the doctrine we see today. Part I will demonstrate how the kill zone theory was created to be a gap filler for attempted murder charges not covered by transferred or conditional intent and has spiraled into a tool with few limitations and ample opportunity for prosecutorial misuse.

Part II of this Note will analyze the problematic use of the kill zone theory. Section II.A will discuss other literature that has been written on the kill zone theory, almost all of which praises the use of the kill zone theory rather than criticizing it. Section II.B will discuss the lack of limitations on the kill zone theory. Section II.C will discuss the redundancy of the kill zone theory, showing how other doctrines could be used to accomplish what the kill zone theory sets out to accomplish. Section II.D will discuss the risk of prosecutorial overreach enabled by the kill zone theory.

Part III will suggest alternatives to the kill zone theory that ensure defendants both do not escape punishment and are not subjected to unjustifiably long prison sentences. This Part will also apply the proposed solutions to the cases discussed in this Note to demonstrate their efficacy.

I. BACKGROUND

The kill zone theory is a complex doctrine that California courts have been shaping since 2002. That year, the kill zone theory was first introduced in dictum in *People v. Bland* and has since been used to hold defendants responsible for attempted murder charges, resulting in lengthy sentences.[30] This Part will articulate the doctrine that preceded the kill zone theory, how the kill zone theory began, and how it developed to what it is today.

Person § 33 (2020); People v. Smith, 124 P.3d 730, 734–35 (Cal. 2005). Malice is implied when "a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." 17A CAL. JUR. 3D, *supra*, § 34; Torres v. City of Los Angeles, 548 F.3d 1197, 1207 (9th Cir. 2008) (applying California law), *cert. denied sub nom.* Roberts v. Torres, 556 U.S. 1183 (2009); People v. Cook, 139 P.3d 492, 515 (Cal. 2006).

28. *See infra* Section II.D.

29. People v. Canizales, 442 P.3d 686, 698 (Cal. 2019).

30. 48 P.3d at 1117–19.

In order to fully understand the kill zone theory and its proper application, it is necessary to examine the elements of attempt law and the doctrines courts use to ensure defendants are adequately punished for murder and attempted murder. Attempted murder is distinct from murder in that it is *only* a specific intent crime; as such, a defendant cannot be guilty due to recklessness. The key to proving attempted murder is proving there was specific intent to kill. Because of the specific intent requirement, courts have to be a bit creative in finding ways to hold defendants responsible for attempted murder in certain scenarios. The kill zone theory is one of those creative solutions. As this discussion will show, the kill zone theory is meant to fill the gap between the doctrines of conditional intent and transferred intent to ensure that no one is able to escape punishment for attempted murder.

A. Attempt Law

The kill zone theory can only be applied to attempted murder crimes.[31] An attempt to commit a crime consists of a specific intent to commit the crime and a direct but ineffectual act done toward the commission of said crime.[32] As such, an attempt crime involves a mens rea and an actus reus requirement.[33] Proving attempt requires demonstrating the defendant's action was more than mere preparation and that the defendant acted with the impression that the crime would be successfully completed.[34] The specific intent required by attempt law does not require a showing that the intended act would be effective in completing the target crime but does require that the defendant intended to commit the target crime, even if that crime does not itself require specific intent.[35] The specific intent required for the attempted crime must have been actual, not merely presumed.[36] The jury should not convict the defendant of an attempted crime in the absence of specific intent.[37]

In California, specific intent may be shown by circumstantial evidence.[38] Before relying on circumstantial evidence to conclude the defendant had the specific intent necessary to be found guilty, the prosecution must convince the jury that it "[has] proved each fact essential to that conclusion beyond a reasonable

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31. If a victim other than the defendant's primary target is *actually killed*, then the doctrine of transferred intent would be applied, not the kill zone theory. *See id.* at 1117.

32. People v. Ceballos, 526 P.2d 241, 248 (Cal. 1974).

33. People v. Johnson, 303 P.3d 379, 384 (Cal. 2013).

34. People v. Carrington, 211 P.3d 617, 656 (Cal. 2009), *cert denied sub nom.* Carrington v. California, 559 U.S. 1094 (2010); People v. Medelez, 206 Cal. Rptr. 3d 402, 404–05 (Ct. App. 2016).

35. 19 CAL. JUR. 3D *Criminal Law: Miscellaneous Offenses* § 19 (2020) (first citing People v. Chandler, 332 P.3d 538, 543 (Cal. 2014); then citing People v. Beck, 24 Cal. Rptr. 3d 228, 230 (Ct. App. 2005)).

36. *See* People v. Fulton, 10 Cal. Rptr. 319, 322 (Ct. App. 1961) (using defendant's statements about getting money out of the bank to prove actual specific intent); People v. Franquelin, 241 P.2d 651, 655 (Cal. 1952) ("[M]ere preparation is not sufficient to constitute an 'attempt.'").

37. *See* People v. Collie, 634 P.2d 534, 534 (Cal. 1981).

38. People v. Neal, 218 P.2d 556, 559 (Cal. 1950).

doubt."[39] The jury must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent to commit the attempted crime.[40]

B. Proving Attempted Murder

In an attempted murder case, the prosecution must prove that (1) "a direct but ineffectual act was done by one person towards killing another human being," and (2) the person committing the act harbored express malice aforethought, namely, a specific intent to kill.[41] Express malice is "the deliberate intention to kill another person."[42] The acts of a person who intends to kill another must indicate a certain, unambiguous attempt to kill their target.[43] Put simply, attempted murder requires a specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.[44]

Express malice is required to support an attempted murder charge; implied malice is insufficient.[45] Implied malice is "the state of mind that exists when a person deliberately performs an act, the natural consequences of which are dangerous to life, with knowledge that his or her conduct endangers the life of another and with 'conscious disregard' for life."[46] Because implied malice cannot support an attempted murder charge, it is impossible for a defendant to be convicted of attempted murder under a theory of wanton recklessness.[47]

A single act can produce more than one count of attempted murder, but specific intent still must be judged separately as to each alleged victim, regardless of whether that victim was targeted or randomly chosen.[48] Ordinarily, a single act of shooting at a group would not support multiple counts of attempted murder.[49] However, courts have conjured up ways to ensure defendants do not evade responsibility for endangering the lives of others in such scenarios.[50]

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39. CALCRIM, *supra* note 26, § 225.

40. *Id.*

41. People v. Lee, 74 P.3d 176, 179 (Cal. 2003), *cert. denied sub nom.* Xiong v. California, 541 U.S. 947 (2004).

42. LAURIE L. LEVENSON & ALEX RICCIARDULLI, THE RUTTER GRP., CALIFORNIA CRIMINAL LAW § 5:8 (2019–2020 ed. 2019) (citing *In re* Thomas C., 228 Cal. Rptr. 430, 436 (Ct. App. 1986)); CAL. PENAL CODE § 188 (West 2019); CALJIC, *supra* note 20, § 8.11.

43. *See* CALCRIM, *supra* note 26, § 600.

44. People v. Cardona, 201 Cal. Rptr. 3d 189, 194 (Ct. App. 2016).

45. People v. Bland, 48 P.3d 1107, 1117 (Cal. 2002).

46. LEVENSON & RICCIARDULLI, *supra* note 42.

47. *See* 40 AM. JUR. 2D *Homicide* § 42 (2020) (discussing how "depraved-heart" second-degree murder requires "the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not," but without the intent for death to occur as a result of that indifference).

48. *See, e.g.*, People v. Stone, 205 P.3d 272, 278–79 (Cal. 2009); People v. Smith, 124 P.3d 730, 732 (Cal. 2005).

49. *See, e.g.*, People v. Garcia, 138 Cal. Rptr. 3d 855, 864 (Ct. App. 2012).

50. *See infra* Sections I.C.1, I.C.4.a, I.C.3.a.

The only way these single acts of shooting could theoretically constitute attempted murder is under a theory of conditional, transferred, or concurrent intent. Under the doctrine of conditional intent, the defendant has a deliberate plan to kill someone, if necessary, in the course of committing a crime. Under the doctrine of transferred intent, the specific intent to murder one person is transferred to the person who is killed. Transferred intent has been found inapplicable to attempted murder, but it is from transferred intent that concurrent intent was developed.[51] Under the doctrine of concurrent intent, one can specifically intend to kill one person and at the same time have specific intent to kill others nearby. Concurrent intent is the theory of intent captured by the kill zone theory.

Courts developed these doctrines to find ways to hold defendants responsible for their crimes—particularly murder and attempted murder—in order to ensure defendants do not escape punishment for crimes the courts consider reprehensible. The creation of these doctrines and the various ways they have been applied in pursuit of policy objectives and enhanced punishment has resulted in a blurred and malleable definition of specific intent.

1. Conditional Intent

According to the doctrine of conditional intent, "death is more than merely foreseeable: it is 'fully contemplated and planned for' and is part of a 'willful and deliberate plan.'"[52] Conditional intent is most often used to satisfy the specific intent requirement in carjacking cases.[53] The intent requirement of the federal carjacking statute is that "at the moment the defendant demanded or took control over the driver's vehicle, the defendant possessed the conditional intent to seriously harm or kill the driver if necessary to steal the car, or the unconditional intent to harm or kill in all events."[54]

In *Holloway v. United States*, Holloway was charged with carjacking.[55] At trial, his accomplice testified that although he and Holloway planned to steal cars without harming drivers, they would have used their guns if the victims gave them a hard time.[56] Section 2119 of the U.S. Code defines carjacking as taking or attempting to take "a motor vehicle . . . from . . . another by force and violence or by intimidation" "with the intent to cause death or serious bodily harm."[57] The Supreme Court held "proof of an intent to kill or harm if necessary to effect a carjacking" fulfills the mens rea component of the federal carjacking statute.[58]

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51. People v. Bland, 48 P.3d 1107, 1119 (Cal. 2002).
52. *The Supreme Court, 1998 Term–Leading Cases*, 113 HARV. L. REV. 326, 380 (1999).
53. *Id.* at 383.
54. LEVENSON & RICCIARDULLI, *supra* note 42, § 6:105; *accord* Holloway v. United States, 526 U.S. 1, 12 (1999).
55. *Holloway*, 526 U.S. at 1.
56. *Id.*
57. 18 U.S.C.A. § 2119 (West 1996), *quoted in Holloway*, 526 U.S. at 1.
58. *Holloway*, 526 U.S. at 1–2.

Conditional intent language could be applied to attempted murder cases and may refine and clarify proper use of the kill zone theory. In such a scenario, the defendant would contemplate and plan for the fact that people near their intended target could be killed in order to facilitate the killing of the intended target. For example, if the defendant were to throw a grenade at a group of people to kill his target, the defendant would recognize that the death of those around his target was more than merely foreseeable. The use of such a weapon would indicate a clear intent to kill both the target and anyone who was in close proximity to him at the time.

Conditional intent as applied to the federal carjacking statute in *Holloway* is used to prove the mens rea of this specific statute. Conditional intent has yet to be used to hold defendants responsible for charges other than federal carjacking. The kill zone theory could be seen as filling a gap left by conditional intent because conditional intent does not allow for the punishment deemed necessary by the court for these attempted murder crimes. But as evidenced by the grenade example, the language of conditional intent could apply to kill zone cases.

2. Transferred Intent

The doctrine of transferred intent applies when a defendant intends to kill one person but mistakenly kills another.[59] "When one intends to kill and does so, the killing is hardly an accident, even if the specific victim or victims are unintended."[60] The policy justification for transferred intent is "that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark."[61] As such, transferred intent applies only to murder and not to attempted murder.[62] Improperly applying the transferred intent doctrine can result in disproportionate punishment.[63] To avoid impermissibly harsh punishment, "where a single act is alleged to be an attempt on two persons' lives, the intent to kill should be evaluated independently as to each victim, and the jury should not be instructed to transfer intent from one to another."[64]

The fact that transferred intent cannot apply to attempted murder worried courts that individuals who intended to kill someone in a group but failed at their objective could not be guilty for the attempted murder of all the people in the group. The courts expressed an underlying fear that someone with bad aim would be rewarded with an attempted murder charge simply because that person missed their

59. CALJIC, *supra* note 20, § 8.65.
60. People v. Bland, 48 P.3d 1107, 1113 (Cal. 2002).
61. People v. Scott, 927 P.2d 288, 292 (Cal. 1996).
62. *Bland*, 48 P.3d at 1117.
63. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 127 (6th ed. 2012).
64. People v. Calderon, 283 Cal. Rptr. 833, 837 (Ct. App. 1991) (quoting People v. Czahara, 250 Cal. Rptr. 836, 840 (Ct. App. 1988)).

intended target.[65] To ensure that defendants would not benefit for their inability to complete their intended crimes, courts adopted the theory of concurrent intent.

3. Concurrent Intent: Kill Zone Theory

Concurrent intent applies when "a defendant intends to kill a particular target, and uses a mode of attack that, by its nature and scope, shows a concurrent intent to kill persons in the vicinity of the intended target."[66] The person's desire to "kill a particular target does not preclude a finding that the person, also, concurrently intended to kill others within the kill zone."[67] For example, if the defendant targeted a specific person by firing a flurry of bullets into a crowd, the defendant "may be convicted of attempted murder if the evidence shows they intended to kill everyone in the victim's vicinity in order to kill the intended victim."[68] Concurrent intent enables the use of the kill zone theory.

C. Development of Kill Zone Doctrine

Understanding how the kill zone theory functions in California courts requires an examination of its doctrinal history. The kill zone theory was first introduced in *People v. Bland* and has changed and developed with each subsequent case. This doctrinal history has heavily influenced California Jury Instructions—Criminal (CALJIC) 8.66.1 and matters greatly as to how juries understand when and how the kill zone theory should be applied.

1. The Beginning of the Kill Zone Theory in California: People v. Bland

The kill zone theory, as applied in California, was first mentioned as dictum in *Bland*, a transferred intent case. Jomo Bland, a member of the Insane Crips gang, was convicted of the first-degree murder of Kenneth Wilson, a member of the Rolling 20s Crips, and the premeditated attempted murders of Skylar Morgan and Leon Simon.[69] Intending to kill Wilson, Bland shot into the car that the three people were in.[70] Wilson tried to drive away as Bland continued to fire at the car, but eventually crashed into a pole.[71] Wilson died of a gunshot wound to the chest, Simon was shot in the liver, and Morgan was shot in the shoulder.[72] The *Bland* court addressed two issues in its decision: (1) whether an intent to kill transfers to an

65. This holding is the reason the kill zone theory was developed. *See Bland*, 48 P.3d at 1119.

66. 17A CAL. JUR. 3D, *supra* note 27, § 30.

67. People v. Bragg, 75 Cal. Rptr. 3d 200, 206 (Ct. App. 2008) (quoting *Bland*, 48 P.3d at 1118).

68. People v. Falaniko, 205 Cal. Rptr. 3d 623, 632 (Ct. App. 2016), *modified*, People v. Canizales, 442 P.3d 686 (Cal. 2019); *see also* 17A CAL. JUR. 3D, *supra* note 27, § 30.

69. *Bland*, 48 P.3d at 1110.

70. *Id.*

71. *Id.*

72. *Id.*

unintended victim when the intended target is killed, and (2) whether transferred intent applies to attempted murder.[73]

In addressing whether an intent to kill transfers to an unintended victim when the intended target is killed, *Bland* rejected the reasoning of *People v. Birreuta*, which held that when the intended victim is killed, there is no need for the doctrine of transferred intent because the purpose of the transferred intent doctrine is to "insure the adequate punishment of those who accidentally kill innocent bystanders" and fail to kill their intended victims.[74] The *Bland* court rejected this idea, stating "[i]t may not be *necessary* to find that intent to kill extends to all persons actually killed, but we believe it is *appropriate* to do so."[75] The court ultimately held "[i]ntent to kill transfers to an unintended homicide victim even if the intended target is killed," most likely to ensure the defendant is adequately punished for taking the equally valuable lives of the intended victim and accidental victim.[76]

In its discussion on whether transferred intent applies to attempted murder, the *Bland* court cited several cases which held that transferred intent does not apply to attempted murder.[77] Accordingly, the *Bland* court held that "acts with the intent to kill one person constitute murder of anyone actually killed, but not attempted murder of others."[78] The court distinguished between completed murder and attempted murder regarding transferred intent:

> Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder—due to transferred intent—if the person were killed. *To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim.* Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.[79]

The court then resurrected the concerns discussed in *Ford v. State*, a case decided by the Maryland Court of Appeals, to find a way to hold Bland guilty of attempted murder:

> Assuming an attempted murder scenario where the defendant fires a shot at an intended victim and no bystanders are physically injured, one sees that it is virtually impossible to decide to whom the defendant's intent

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73. *Id.*

74. *Id.* at 1112 (quoting People v. Birreuta, 208 Cal. Rptr. 635, 638 (Ct. App. 1984), *overruled by* People v. Flood, 957 P.2d 869 (Cal. 1998)).

75. *Id.* at 1113.

76. *Id.* at 1115.

77. *Id.* at 1116 (first citing People v. Czahara, 250 Cal. Rptr. 836, 837 (Ct. App. 1988); then citing People v. Calderon, 283 Cal. Rptr. 833, 836 (Ct. App. 1991); and then citing People v. Chinchilla, 60 Cal. Rptr. 2d 761, 764 (Ct. App. 1997); and then citing People v. Flores, 223 Cal. Rptr. 465, 468–69 (1986); and then citing People v. Neal, 218 P.2d 556, 559 (Cal. 1950)).

78. *Id.* at 1118.

79. *Id.* at 1117 (emphasis added).

> should be transferred. Is the intent to murder transferred to everyone in proximity to the path of the bullet? Is the intent transferred to everyone frightened and thereby assaulted by the shot? There is no rational method for deciding how the defendant's intent to murder should be transferred.[80]

The court was concerned that defendants who shot at an intended victim may evade punishment for endangering the lives of individuals nearby and sought a way for the intent to kill one person to be transferred to bystanders who theoretically could have also been killed.

In *Ford*, the defendant hurled large landscaping rocks at vehicles traveling along the Capital Beltway and, in the process, injured several people and damaged many vehicles.[81] The defendant was convicted of eight counts of assault with intent to murder, among other charges.[82] Drawing from California case law to support its conclusion, the *Ford* court determined transferred intent cannot apply to attempted murder.[83] The Maryland court held that in a case of transferred intent, the intended harm does not occur to the intended victim but rather to a second unintended victim; as such, the actual result is an unintended, unanticipated consequence of intended harm.[84]

In dictum, the *Ford* court then goes on to explain how the ideas behind transferred intent could apply to attempted murder cases:

> For example, consider a defendant who shoots a single bullet at the head of A, standing with B and C. If the defendant misses A and instead kills B, the defendant's intent to murder A will be transferred to allow his conviction for B's murder. *The intent is concurrent, on the other hand, when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity*. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. *The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim*. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently

80. *Id.* (citing Ford v. State, 625 A.2d 984, 1000 (Md. 1993), *overruled in part by* Henry v. State, 19 A.3d 944 (Md. 2011)).

81. *Ford*, 625 A.2d at 987.

82. *Id.*

83. *Id.* at 999–1000 (relying on People v. Calderon, 283 Cal. Rptr. 833, 836–37 (Ct. App. 1991)).

84. *Id.* at 1000.

> intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. *Where the means employed to commit the crime against a primary victim creates a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone. This situation is distinct from the "depraved heart" situation because the trier of fact may infer the actual intent to kill which is lacking in a "depraved heart" scenario.*[85]

This discussion in *Ford* is the basis for the kill zone theory as it continues to exist in California. Although all of the discussion of the kill zone theory in *Bland* and *Ford* was dicta, the court wanted to ensure there was some kind of protocol for situations like the bomb-on-a-plane example. Like *Ford*, *Bland* carved out doctrine to hold defendants guilty for attempted murder in cases where the court would have applied transferred intent had someone died.

The *Bland* court wanted to decide how to deal with the type of case left unaddressed by transferred intent to ensure that no defendant escapes punishment for firing into a crowd of people. *Bland* relied on *Ford*'s reasoning that concurrent intent can be used to fill the gap left by transferred intent: "[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.'"[86] The *Bland* court concluded that a person who shoots at a group of people may be punished for the actions towards everyone in that group even if the shooter primarily targeted only one of them.[87]

To support its decision to affirm the attempted murder convictions, the *Bland* court held that use of CALJIC 8.65, the transferred intent instruction, was not a prejudicial error because the jury likely understood that the transferred intent to kill could not apply if the person was merely injured.[88] Furthermore, the court found that "even if [the] defendant primarily wanted to kill Wilson, he also, concurrently, intended to kill the others in the car. At the least, he intended to create a kill zone."[89]

The purpose of *Bland* was to decide whether transferred intent can apply to attempted murder, which the court held is impossible, and the discussion of the kill zone theory was a venture into the land of "what if."[90] The court made it clear that it does not want people who are lousy shots to get away with endangering others. Essentially, the court sought to hold people accountable for wanton recklessness

85. *Id.* at 1000–01 (emphasis added).
86. People v. Bland, 48 P.3d 1107, 1118 (Cal. 2002).
87. *Id.*
88. *Id.* at 1120–21.
89. *Id.*
90. *See id.* at 1119.

although the attempted murder doctrine expressly forbade courts from doing so.[91] By using the kill zone theory, the court extended the idea of express malice to include implied malice.

Courts have demonstrated confusion about how exactly the kill zone theory applies. As a result, there has been significant change to the language of the kill zone jury instruction over the years. Case law after *Bland* demonstrates the ease with which prosecutors are able to apply the kill zone theory to the facts of their cases to secure longer sentences for defendants.[92]

2. The Jury Instructions

Since *Bland*'s official adoption of the kill zone theory into California law, the doctrine has been interpreted in several ways. The way case law has shaped the doctrine is reflected well in the language of the jury instructions. Because the kill zone jury instruction is all the jury gets to see, understanding the jury instruction is key to understanding the application of kill zone theory as a whole.

In 2003, the first official kill zone jury instruction, CALJIC 8.66.1, was released:[93]

> A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the "kill zone." The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.
>
> Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a "kill zone" is an issue to be decided by you.[94]

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91. 40 AM. JUR. 2D, *supra* note 47; *see also Bland*, 48 P.3d at 1117 ("But over a century ago, we made clear that implied malice cannot support a conviction of an *attempt* to commit murder.").

92. *Bland* also asserts that prior cases, including *People v. Vang*, 104 Cal. Rptr. 2d 704 (Ct. App. 2001), contained holdings which exhibited the kill zone theory described in *Ford* without actually using kill zone terminology. In *Vang*, there were two separate gang-related drive-by shootings committed within minutes of each other in which the defendants aimed at houses, killed a three-year-old child, and wounded three others. *Id.* at 706–07. Defendants were convicted of eleven counts of attempted murder. *Id.* at 710. Based on circumstantial evidence, the court in *Vang* found that the jury drew a reasonable inference in finding "that defendants harbored a specific intent to kill every living being within the residences they shot up." *Id.* at 710–11 (noting that the jury specifically examined the placement of shots, the number of shots, and the use of "high-powered, wall-piercing weapons"). The court held the express malice requirement was met "even though defendants could not see all their victims during the shooting rampage." *Id.* at 705.

93. The California Judicial Council Criminal Jury Instructions Advisory Committee "[r]egularly reviews case law and statutes affecting jury instructions and makes recommendations to the council for updating, amending, and adding topics to the council's criminal jury instructions." *Criminal Jury Instructions Resource Center*, CAL. JURY INSTRUCTIONS, https://www.courts.ca.gov/partners/312.htm [https://perma.cc/BAU4-WZ6S] (last visited Nov. 17, 2020).

94. CALJIC, *supra* note 20, § 8.66.1 (2003).

When comparing the language of the 2003 CALJIC kill zone jury instruction with the 2019 version, it is clear just how much the doctrine has changed. Present-day guidance on how to use the kill zone theory lies in CALJIC 8.66.1, which states:

> A person who primarily intends to kill one person, or persons, known as the primary target[s], may at the same time attempt to kill [all] [people] [persons] in the immediate vicinity of the primary target[s]. This area is known as the ["zone of fatal harm."] ["kill zone."] A [zone of fatal harm] [kill zone] is created when a perpetrator specifically intending to kill the primary target by lethal means also attempts to kill [everyone] present in the [zone of fatal harm.] [kill zone.] If the perpetrator has this specific intent, and employs the means sufficient to kill the primary target[s] and all others in the [*sic*] [zone of fatal harm] [kill zone], the perpetrator is guilty of the crime[s] of attempted murder of the [other person[s]] [anyone] in the [zone of fatal harm] [kill zone].
>
> In determining a perpetrator's intent to create a [zone of fatal harm] [kill zone] and the scope of any such zone, the jury should consider the circumstances of the offense, such as the type of weapon used, [the number of shots fired,] the distance between the perpetrator and the alleged victim[s], and the proximity of the alleged victim[s] to the primary target[s]. [Evidence that a perpetrator who intends to kill a primary target acted with only conscious disregard of the risk of serious injury or death for those around a primary target does not satisfy this theory of liability.]
>
> In order for the [zone of fatal harm][kill zone] to apply the evidence must show:
>
> 1. The perpetrator intended to create a [zone of fatal harm] [kill zone] around the primary target; that is, an area in which the perpetrator intended to kill everyone present to ensure the primary target's death, and
>
> 2. The alleged attempted murder victim[s] who [was] [were] not the primary target[s] [was] [were] located within the [zone of fatal harm.] [kill zone.]
>
> Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a [zone of fatal harm] [kill zone] is an issue to be decided by you.[95]

In 2006, California Criminal Jury Instructions (CALCRIM)[96] released its own version of the kill zone jury instruction:

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95. *Id.* § 8.66.1 (2019) (brackets in original). Interestingly, there is a use note which states "'Zone of fatal harm' and 'kill zone' have been bracketed in the instruction. The court should decide what phrase to use." *Id.* Jurors could find that these two phrases have very different connotations and definitions, adding to the potential for confusion or misapplication of the jury instruction.

96. The Judicial Council adopted the CALCRIM jury instructions on August 26, 2005, effective January 1, 2006. Any kill zone case prior to January 1, 2006 would have used CALJIC § 8.66.1. *Criminal Jury Instructions Resource Center*, *supra* note 93.

> A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of ____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>, the People must prove that the defendant not only intended to kill ____ <*insert name of primary target alleged*> but also either intended to kill ____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>, or intended to kill anyone within the kill zone.
>
> If you have a reasonable doubt whether the defendant intended to kill ____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*> or intended to kill ____ <*insert name of primary target alleged*> by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of ____ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>.[97]

Since 2006, the language of the CALCRIM 600 jury instruction has not changed despite the fact that the doctrine has evolved significantly. CALCRIM jury instructions are more frequently used because they are widely believed to be easier for jurors to understand.[98] While avoiding juror confusion is important, the language of the jury instruction should at least evolve for clarity as CALJIC 8.66.1 has.

Many of the cases mentioned in this Note used the CALCRIM 600 jury instruction, including *Stone*, *Campos*, *Adams*, and *Canizales*. Several others did not: *McCloud* and *Rayford* both used CALJIC 8.66.1, and *Smith*, *Perez, Bland*, *Ford*, and *Warner* used neither instruction. Regardless, all of these cases shaped CALJIC 8.66.1, which provides the most detailed evidence about how the kill zone jury doctrine has evolved. Because CALJIC 8.66.1 actually reflects the doctrine created by case law, this Note will focus its analysis on the kill zone theory through the lens of CALJIC 8.66.1 rather than CALCRIM 600.

Although CALJIC 8.66.1 tries to provide more safeguards than CALCRIM 600 based on the evolution of the doctrine, it cannot correct the defects of the vague language of kill zone jury instructions. CALCRIM 600 and CALJIC 8.66.1 suffer the same defects and negatively impact defendants, and neither should continue to be used in California courts.

The kill zone theory has been altered and extended to fit changing circumstances and apply to as many cases as possible. The cases mentioned in this Part will demonstrate how both prosecutors and courts have shaped the kill zone jury instruction, most notably (1) when a single shot is fired at a group, (2) when

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97. CALCRIM, *supra* note 26, § 600 (2006).

98. A study showed that CALCRIM instructions made it easier for jurors to understand reasonable doubt and evidence, but also that there were no significant differences found for juror understanding of intent or murder aforethought between the CALCRIM and CALJIC jury instructions. *See* John Coleman, Russ K.E. Espinoza & Jennifer V. Coons, *An Empirical Comparison of the Old and Revised Jury Instructions of California: Do Jurors Comprehend Legal Ease Better or Does Bias Still Exist?*, OPEN ACCESS LIBR. J., Feb. 17, 2017, at 1, 11.

determining the primary target, (3) by blurring the line between express and implied malice, and (4) when analyzing circumstantial evidence.[99]

3. Key Cases: Single Shot Fired

Several cases have expanded upon the kill zone theory and how concurrent intent could exist for attempted murder by allowing the theory to apply in cases where a single shot was fired at a group of people. In these cases, courts have upheld convictions for multiple counts of attempted murder under the idea that the single bullet *theoretically* could have hit more than one person.

a. People v. Smith

In *Smith*, the defendant fired a single shot at a moving car, whose passengers included a woman (Karen), a man, and a baby.[100] Based on the conversation that took place between Smith and Karen eight to nine months before the shooting, Karen was the intended victim.[101] Nobody in the car was seriously injured in the incident.[102] Smith was charged and convicted of the attempted murder of Karen and her baby.[103] The *Smith* court held evidence that Smith purposefully discharged a firearm at the individuals seated in the car, one behind the other, supported the inference that he intended to kill both Karen and her baby.[104]

The court stated that the kill zone theory "does not preclude a conclusion that defendant's act of firing a single bullet . . . can support two convictions of attempted murder under the totality of the circumstances shown by the evidence."[105] The court also concluded that attempted murder convictions could be sustained without reference to the kill zone theory in jury instructions.[106] The court held there was sufficient evidence of intent to kill the baby and affirmed both attempted murder convictions.

Judge Werdegar's dissent in *Smith* broke down the kill zone analysis into a two-factor test:

> A kill zone, or concurrent intent, analysis . . . focuses on (1) whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that the defendant intentionally created a *zone of fatal harm*, and (2) whether the nontargeted alleged attempted murder victim *inhabited that zone of harm*.[107]

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99. *See infra* Sections I.C.3, I.C.4, I.C.5, I.C.6.

100. People v. Smith, 124 P.3d 730, 733 (Cal. 2005).

101. *Id.*

102. *Id.*

103. *Id.* at 733–34 (listing some of the charges and convictions, although not all are listed in text).

104. *Id.* at 737–38.

105. *Id.* at 739.

106. *See id.*

107. *Id.* at 746 (Werdegar, J., dissenting) (emphasis added).

The dissent accused the majority of having lost sight of "the crucial difference between implied malice . . . and express malice" in its struggle to articulate grounds for upholding the attempted murder conviction for the baby.[108] According to Judge Werdegar, there was ample evidence that Smith acted with conscious disregard for the baby's life, but the evidence was insufficient "to permit the jury to infer beyond a reasonable doubt that defendant *intended to kill the baby*, with whom . . . defendant had no quarrel at all."[109] In doing so, the majority permitted "knowing endangerment, which establishes at most *implied* malice, to serve, by itself, as proof beyond a reasonable doubt of intent to kill."[110] Judge Werdegar warned that the kill zone theory could result in the "absurd conclusion that an assailant has tried to murder everyone his act endangers."[111] Importantly, the dissent noted that "the majority's expansion of attempted murder liability to cover mere endangerment is unnecessary in order to ensure assailants are appropriately punished for acts that place victims' lives in danger."[112] As this Note will discuss, the legislature created several other charges to ensure defendants would be appropriately punished for endangerment.[113]

b. People v. Perez

In *Perez*, the defendant fired a single bullet from a car at a group of seven peace officers and a civilian.[114] One of the officers was injured, but no one died.[115] The defendant was convicted of seven counts of premeditated attempted murder of a peace officer and one count of premeditated attempted murder for the civilian.[116] The court attempted to clarify *Bland*:

> *Bland* simply recognizes that a shooter may be convicted of multiple counts of attempted murder on a "kill zone" theory where the evidence establishes that the shooter used lethal force designed and intended to kill *everyone* in an area around the targeted victim as the means of accomplishing the killing of that victim.[117]

The California Supreme Court held that the facts in *Perez* do not establish that the defendant created a kill zone. Distinguishing the facts of this case from the scenarios described at length in *Bland*, the court held:

> The firing of a single bullet . . . is not the equivalent of using an explosive device with intent to kill everyone in the area of the blast, or spraying a crowd with automatic weapon fire, a means likewise calculated to kill

108. *Id.* at 741.
109. *Id.*
110. *Id.*
111. *Id.* at 744.
112. *Id.* at 747.
113. *See infra* Section II.C.
114. People v. Perez, 234 P.3d 557, 559 (Cal. 2010).
115. *See id.*
116. *Id.*
117. *Id.* at 564 (emphasis added).

> everyone fired upon. The indiscriminate firing of a single shot at a group of persons, without more, does not amount to attempted murder of everyone in the group.[118]

In his concurrence, Judge Werdegar noted if the defendant's marksmanship, choice of weapon, and ammunition were such that a single shot would ordinarily kill more than two victims, then "a single discharge of a firearm might, in some circumstances, support findings the defendant intended to kill multiple victims and committed a direct act toward doing so."[119] Even though the court correctly decided *Perez*, Judge Werdegar hinted that it is still possible that circumstantial evidence could be used to affirm a kill zone conviction in a case where a single shot was fired.

4. Key Case: Primary Target

One of the most important parts of determining whether a defendant created a kill zone is whether there was a primary target whom the defendant specifically intended to kill. Although it seems that the primary target should be known in order to convict on a kill zone case, the court in *People v. Stone* held otherwise.

a. People v. Stone

In *Stone*, the defendant was convicted of one count of attempted premeditated murder for firing a single shot at a group of ten people standing a few feet away from his car; no one was injured.[120] The information alleged that rival gang member Joel F. was the attempted murder victim.[121] The court ultimately held the kill zone theory did not fit the facts of the case because there was no evidence that Stone "used the means to kill the named victim, Joel F., that inevitably would result in the death of other victims within a zone of danger."[122]

In dictum, the court addressed whether attempted murder requires the intent to kill a *particular* person.[123] The court sought to determine if attempted murder and the kill zone theory addresses the question of "whether the intent must be to kill a particular person, or whether a generalized intent to kill someone, but not necessarily a specific target, is sufficient."[124] To answer this question, the court referenced Justice Mosk's concurring opinion in *People v. Scott*: "[T]here is no requirement of an unlawful intent to kill *an intended victim*. The law speaks in terms of an unlawful intent to kill *a* person, not *the* person *intended to be killed*."[125] Justice

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118. *Id.* at 564–65. Note that here the court is harkening back to the key language from *Ford*. *See* discussion *supra* Section I.C.1.

119. *Id.* at 567 (Werdegar, J., concurring).

120. *See* People v. Stone, 205 P.3d 272, 274–75 (Cal. 2009).

121. *Id.* at 275.

122. *Id.* at 277.

123. *Id.* (dictum).

124. *Id.* at 275.

125. *Id.* at 277 (quoting People v. Scott, 927 P.2d 288, 295 (Cal. 1996)); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 133 (4th ed. 2006) ("The social harm of murder is the

Mosk's opinion was also endorsed in *Bland*, where the court stated, "the intent to kill need not be directed at a specific person."[126]

The *Stone* court concluded that a person could be guilty of attempted murder even if that person had no specific target in mind.[127] The court cited *Bland* and *Vang* approvingly, holding "although a primary target often exists and can be identified, one is not required."[128] Whether there is a specific target or random target, attempted murder must still be judged separately as to each alleged victim.[129] The court revealed its true intention in coming to this conclusion by stating "[a]n indiscriminate would-be killer is just as culpable as one who targets a specific person."[130] This strong language illustrates that the *Stone* court adopted this holding to ensure anyone with any intention to kill would not escape culpability, regardless of whether or not the case would be more aptly characterized as recklessness.

While the court correctly upheld Stone's conviction of one count of attempted murder, it extended the parameters of the kill zone theory in holding that evidence of a specific target is unnecessary.

5. Key Cases: Confusing Express and Implied Malice

As mentioned in Judge Werdegar's dissent in *Smith* and concurrence in *Perez*, the kill zone theory presents ample opportunity for jurors, prosecutors, and courts to confuse express and implied malice. The following cases exemplify how this confusion led to developments in the law that have permitted this confusion to continue.

a. People v. Campos

In *Campos*, the defendant shot into a car, killing two people and injuring another person.[131] Campos's primary target was Madden, with whom he had an ongoing feud.[132] While a passenger in his friend's car, Campos leaned out the window and shot into the car Madden was in.[133] Madden was in the backseat, and his two friends were sitting in the front.[134] Both Madden and the driver were killed, and the third passenger was severely injured.[135] Campos was convicted of two counts of first-degree murder and one count of attempted murder.[136]

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killing of a human being by another human being. The requisite intent, therefore, is the intent to kill *a*, not a specific, human being." (citation omitted)).

126. *Id.* (citing People v. Bland, 48 P.3d 1107, 1114 (Cal. 2002)).
127. *Id.* at 278.
128. *Id.*
129. *Id.* (quoting *Bland*, 48 P.3d at 1119).
130. *Id.*
131. People v. Campos, 67 Cal. Rptr. 3d 904, 908 (Ct. App. 2007).
132. *See id.*
133. *Id.*
134. *Id.* at 907.
135. *Id.* at 908.
136. *Id.* at 906.

Here, the court noted that *Bland* did not suggest the kill zone "was the only way to establish concurrent intent to kill more than one person in a fired-upon group."[137] Again confusing implied and express malice, the court described specific intent and the kill zone theory by giving the following example:

> A defendant who shoots into a crowd of people with the *desire to kill anyone he happens to hit*, but not everyone, surely has *the specific intent to kill whomever he hits*, as each person in the group is at risk of death due to *the shooter's indifference as to who is his victim*.[138]

The court ultimately held that the kill zone jury instruction for attempted murder was not erroneous.[139]

b. People v. Adams

In *Adams*, Adams burned down the house of her neighbor, Soult, while Soult was inside because Adams was afraid of her.[140] Adams was charged and convicted of one count of murder, three counts of attempted murder because of the other people inside the home when it was set on fire, and one count of arson.[141]

Discussing the court's reasoning in *Bland* and *Smith*, the *Adams* court found the means used in a case "distinguishes attempted murder under a concurrent intent theory from a 'normal' attempted murder."[142] Relying on *Smith*, the court held that specific intent to kill coupled with the knowledge of the presence of other victims is generally sufficient to support a reasonable inference that the defendant intended to kill the attempted murder victims.[143] The court provided clarity about what the kill zone theory requires as a doctrine of concurrent intent:

> The concurrent intent theory recognizes that the defendant acted with the specific intent to kill anyone in the zone of harm with the objective of killing a specific person or persons. *The theory imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant's primary objective of killing a specific person or persons despite the recognition, or with acceptance of the fact, that a natural and probable consequence of that act would be that anyone within that zone could or would die*. Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm.[144]

Under these newly defined terms, the court held Adams had the necessary express malice for attempted murder under the kill zone theory.[145] However, the

137. *Id.* at 915.
138. *Id.* at 916 (emphasis added).
139. *See id.* at 917.
140. *See* People v. Adams, 86 Cal. Rptr. 3d 915, 919–20 (Ct. App. 2008).
141. *See id.* at 916.
142. *Id.* at 924.
143. *Id.*
144. *Id.* at 924–25 (emphasis added).
145. *Id.* at 925.

use of the language such as "natural and probable consequence" suggests that yet again the court convicted on attempted murder when there was implied malice rather than the necessary express malice.

c. People v. Warner

In *Warner*, the defendant took a semiautomatic handgun to a bar, shot it on the dance floor, and was subsequently charged with two counts of attempted murder and one count of assault with a semiautomatic firearm.[146] He emptied his clip of ten bullets and wounded, but did not kill, his primary target, Smith, and an innocent bystander, N.C.[147] When the jury was unable to reach a verdict on the attempted murder of Smith, the prosecution dismissed the count.[148] The jury then acquitted Warner on the attempted murder of N.C., which was charged under the kill zone theory, but found him guilty of the lesser included offense of attempted voluntary manslaughter.[149]

The California Court of Appeals held the kill zone theory was applicable because Warner's actions "provided facts from which a reasonable jury could infer he intended to kill all people on the dance floor, including N.C."[150] The court noted that "voluntary manslaughter requires either an intent to kill or a conscious disregard for life"[151] and that "attempted voluntary manslaughter cannot be premised on the theory that the defendant acted with conscious disregard for life because it would be based on the 'internally contradictory premise' that one can intend to commit a reckless killing."[152] The court incorrectly upheld Warner's conviction based on an implied malice theory that "the circumstances of the shooting were such that defendant must be charged with knowing that anyone in the path of the lethal bullets could die, and knowing that others *were* in the path of the bullets."[153]

Despite the court's comments about how such a use is prohibited and in favor of greater punishment, the court expanded the kill zone theory to apply to attempted voluntary manslaughter using what is essentially a theory of recklessness. The court noted that the kill zone theory "attempts to describe a level of culpability and risk that society is unwilling to tolerate. It describes a type of intent that is 'a kind of knowledge or realization.'"[154] As evidenced by this statement, courts recognize the gap-filling nature of the kill zone theory and acknowledge that it is meant to inflict greater punishment. The court here even uses words like

146. People v. Warner, 247 Cal. Rptr. 3d 809, 811 (Ct. App.), *vacated and transferred*, 449 P.3d 347 (Cal. 2019).
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 814 (quoting People v. Bryant, 301 P.3d 1136, 1142 (Cal. 2013)).
152. *Id.* (quoting People v. Gutierrez, 5 Cal. Rptr. 3d 256, 260–61 (Ct. App. 2003)).
153. *Id.* at 820.
154. *Id.* (quoting Glanville Williams, *Oblique Intention*, 46 CAMBRIDGE L.J. 417, 421 (1987)).

"knowledge" and "realization" to describe a doctrine that theoretically does not punish defendants for reckless behavior.[155] Even with the benefit of ample case law and the realization that implied malice is an unacceptable way to find specific intent, the court once again misapplied and dangerously expanded the kill zone theory.

6. Key Cases: Circumstantial Evidence

Circumstantial evidence is key to analyzing a kill zone case. The following cases exemplify how such an analysis should be conducted in order to ensure the correct outcome and provide key revisions to the CALJIC jury instruction to limit future misunderstandings.

a. People v. McCloud

In *McCloud*, two defendants, Stringer and McCloud, fired ten shots from a semiautomatic handgun at a party where over 400 people were present.[156] The bullets killed two people and injured a third.[157] Both defendants were convicted of two counts of second-degree murder, Stringer was convicted of forty-six counts of attempted murder, and McCloud was convicted of forty-six counts of assault with a firearm.[158] The appellate court found that the trial court prejudicially erred in providing the jury with a kill zone instruction.[159] The court narrowed the circumstances in which the kill zone theory can be applied, clarifying that it "does not operate as an exception to the mental state requirement for attempted murder":

> The kill zone theory thus does *not* apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury. Nor does the kill zone theory apply if the evidence merely shows, in addition, that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual. Rather, the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*. The defendant in a kill zone case chooses to kill *everyone* in a particular area as a means of killing a targeted individual within that area.

155. Words like "realization" and "knowledge" are words more commonly used to describe implied malice: "[I]mplied malice exists when that conduct is deliberately performed by a person who has *knowledge* that the conduct endangers the life of another and who acts with conscious disregard for life." 1 B.E. WITKIN & NORMAN L. EPSTEIN, WITKIN LEGAL INST., CALIFORNIA CRIMINAL LAW § 213 (4th ed. 2020) (emphasis added).

156. People v. McCloud, 149 Cal. Rptr. 3d 902, 904 (Ct. App. 2012).

157. *Id.*

158. *Id.*

159. *Id.*

> In effect, the defendant reasons that he cannot miss his intended target if he kills *everyone* in the area in which the target is located.[160]

The court correctly reversed the forty-six counts of attempted murder upon finding the record contained no evidence that the defendants intended to kill all forty-six people with ten bullets or that they had reason to believe killing so many people with ten bullets was even possible given the type of ammunition and firearm used.[161]

b. People v. Canizales

Canizales further clarified the understanding of when exactly the kill zone theory is appropriately applied. In *Canizales*, two defendants participated in a gang-related shooting and were each convicted of one count of first-degree murder and two counts of premeditated attempted murder.[162] The court concluded that a defendant may be convicted under the kill zone theory only when the jury finds that

> (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target; and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken together, such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the primary target and everyone within the zone of fatal harm.[163]

The court held that when determining the defendant's intent to create a zone of fatal harm, the jury should consider circumstances of the offense, such as "the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target."[164] Importantly, the court cautioned that "trial courts must be extremely careful in deciding when to permit the jury to rely upon the kill zone theory."[165] The court encouraged trial courts to "reserve the kill zone theory for instances in which there is sufficient evidence from which the jury could find that the *only* reasonable inference is that the defendant intended to kill (not merely endanger or harm) everyone in the zone of fatal harm."[166]

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160. *Id.* at 910.

161. *Id.* at 911 n.5 (distinguishing the case from *Vang*, where the court held "[t]he jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up," People v. Vang, 104 Cal. Rptr. 2d 704, 710 (Ct. App. 2001)).

162. People v. Canizales, 442 P.3d 686, 693 (Cal. 2019).

163. *Id.* at 697.

164. *Id.*

165. *Id.* at 690.

166. *Id.* at 690–91.

Here, the court correctly overturned the attempted murder charges because the prosecutor's definition of the kill zone theory was significantly broader than permitted and "essentially equated attempted murder with implied malice murder."[167] In its decision, the court sought to clarify when the use of the kill zone theory is permissible in order to avoid similar mistakes and juror confusion in future cases.[168]

Eighteen years of the development of the kill zone doctrine has hardly made its application clearer. Although strides have been made to help protect defendants, many still remain in prison due to confusion among juries, prosecutors, and courts.

II. CRITICISMS AND CONCERNS

The kill zone theory seeks to answer one key question: "Is the intent to murder transferred to everyone in proximity to the path of the bullet?"[169] In 2002, California implemented the kill zone theory to extend liability for attempted murder and to fill the doctrinal gap left open by this question.[170] Since then, courts have been unclear about when it is appropriate to apply the kill zone theory. In describing why defendants are guilty, several cases apply the kill zone theory in ways that confuse express and implied malice.[171] Although the court tried to clarify and refine the language of the kill zone jury instructions in cases including *McCloud* and *Canizales*, the kill zone theory remains ambiguous as to when *exactly* it can and should be applied. Courts contend that the type of weapon and the number of shots fired matter in determining the applicability of the kill zone theory yet repeatedly hold that a single gunshot is indicative of specific intent to kill multiple people.[172] Who counts as being within the kill zone is dangerously undefined. An absence of limits has resulted in confusion in California courts about which cases are kill zone cases, allowing prosecutors to apply the theory to more cases than should be permissible. The ambiguity of the kill zone theory as it stands today, despite attempts to clarify the doctrine, remains open to abuse and misapplication.

This Part will begin with a literature review of law review articles that discuss the kill zone theory, both on its own and in relation to other doctrines. Next, this Part will discuss the ways in which the wording of the kill zone jury instruction imposes little limitation on its use. There will then be a discussion about how the kill zone theory is redundant in light of other doctrines and potential charges.

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167. *Id.* at 702.

168. *Id.* at 690–91 ("As past cases reveal, there is a substantial potential that the kill zone theory may be improperly applied . . . . Accordingly, in future cases trial courts should reserve the kill zone theory for instances in which there is sufficient evidence from which the jury could find that the *only* reasonable inference is that the defendant intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm.").

169. People v. Bland, 48 P.3d 1107, 1117 (Cal. 2002) (quoting Ford v. State, 625 A.2d 984, 1000 (Md. 1993), *overruled in part by* Henry v. State, 19 A.3d 944 (Md. 2011)).

170. *See supra* Section I.C.1.

171. *See supra* Sections I.C.1, I.C.3.a, I.C.5.a.

172. *See supra* Sections I.C.3.a, I.C.4.a, I.C.3.b.

Finally, this Part will address how prosecutors have misused the kill zone theory to convict defendants and impose longer, harsher sentences.

A. Previous Literature Fails to Understand the Issues Inherent in the Kill Zone Theory

There has not been much written on the kill zone theory, which is likely because the doctrine only exists in a few states and is utilized most prominently in California and Maryland.[173] Most law review articles that mention the kill zone theory only do so in relation to the greater overall discussion on transferred intent.

As of now, the only law review publication entirely devoted to discussion about the application of the kill zone theory is Andrew Garza's "The Magic Bullet in *People v. Perez*: Charging Attempts Based on Culpability and Deterrence Regardless of Apparent Ability."[174] This comment discusses why the California Supreme Court's decision in *Perez* was incorrect and argues that the kill zone theory is necessary and yields proportionate punishment.[175] Garza argues that "where a defendant manifests the requisite intent as to each potential victim, and undertakes the ineffectual act necessary for an attempt charge, a count for each theoretical victim is proper irrespective of the practicalities of a single shot."[176] Furthermore, he argues that concerns about disproportionate punishments under the kill zone theory are mitigated by prosecutorial discretion in charging and judicial discretion in sentencing.[177] Garza maintains that application of the kill zone theory in cases where a single shot was fired is necessary because greater culpability will increase deterrence and will not lead to disproportionate punishment.[178]

Although only one law review comment discusses the kill zone theory at length, several articles discuss it in relation to transferred intent. In one such article, "With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law," the author focuses on several different forms of murder liability, analyzing how the dangerousness of the offense affects the culpability of the defendant.[179] In the article's discussion of transferred intent, the author addresses the kill zone theory, arguing that the doctrine of natural and probable consequences should be extended to attempted murder because "wanton disregard is the functional equivalent of intent to kill."[180] This article

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173. See *supra* Section I.C.1, for discussion on *Bland* and *Ford*, the seminal kill zone cases in California and Maryland, respectively.

174. Andrew P. Garza, Comment, *The Magic Bullet in* People v. Perez*: Charging Attempts Based on Culpability and Deterrence Regardless of Apparent Ability*, 46 NEW ENG. L. REV. 931 (2012).

175. *See id.* at 931–35.

176. *Id.* at 931.

177. *Id.*

178. *Id.* at 947–50.

179. Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. REV. 261, 261–62 (2004).

180. *Id.* at 282–83.

encourages courts to extend liability for attempted murder based on the idea that "purposeful actors are generally more dangerous than indifferent ones."[181]

"Criminal Liability: Transferred and Concurrent Intent" discusses the "legal fictions" of transferred and concurrent intent, which the authors argue "allow punishment for criminal culpability when an otherwise guilty party would escape punishment for his wrongful actions."[182] The authors describe concurrent intent as involving "*anticipated* results to an *intended* primary victim, with coexisting *anticipated* results to *secondary* victims."[183] The authors state that proving the secondary victims were in the "killing zone" established by "the wrongdoer's method of attacking the primary victim is circumstantial evidence of the wrongdoer's concurrent intent to harm all the victims."[184] The article ultimately concludes that transferred and concurrent intent help preserve equity and fairness and should continue to be used so wrongdoers may be properly prosecuted and punished proportionally to their intent.[185]

The common themes among these articles are that the kill zone theory serves two important purposes: holding wrongdoers accountable for their actions and ensuring they are punished appropriately. These articles advocate for the idea that the kill zone theory is filling a very important gap in criminal law and should continue to be used by prosecutors. None of these articles address the shortcomings of the kill zone theory or recognize how its use has resulted in prosecutorial overreach and unjustifiably long sentences for defendants.

B. Lack of Limitations

The doctrinal history of the kill zone theory is not given to the jury, so they are left to rely solely on the language of the jury instruction. Because they do not have access to the context which gave rise to all of the elements, jurors do not know that the kill zone theory was created with the bomb-on-a-plane example in mind. This leaves prosecutors with wiggle room to use the jury instruction to secure a conviction in cases very distinct from that example. The idea that the language of the jury instruction limits how prosecutors may use the kill zone theory is not true; rather, there is a severe lack of limitations which allows for the manipulation of circumstantial evidence to convict defendants of attempted murder.

This Section will discuss the role of circumstantial evidence, which allows courts to bypass what ought to be limits on other key terms. Terms such as "zone of fatal harm" and "primary target" have been manipulated by prosecutors using circumstantial evidence and have helped them secure convictions in cases that rely on theories of implied malice rather than express malice.

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181. *Id.* at 297.

182. LeEllen Coacher & Libby Gallo, Note, *Criminal Liability: Transferred and Concurrent Intent*, 44 A.F. L. REV. 227, 228 (1998).

183. *Id.* at 234.

184. *Id.*

185. *Id.* at 242.

1. Circumstantial Evidence

While the jury instructions do provide factors to look for to determine the scope of the zone of fatal harm, the factors actually used in kill zone cases vary so greatly that it is unclear what would not count as creating a kill zone. According to CALJIC 8.66.1, to determine a perpetrator's intent to create a zone of fatal harm and the scope of said zone, "the jury should consider the circumstances of the offense, such as the type of weapon used, [the number of shots fired,] the distance between the perpetrator and the alleged victim[s], and the proximity of the alleged victim[s] to the primary target[s]."[186]

When introducing the concept of the kill zone, *Ford* provides the examples of "an assailant who places a bomb on a commercial airplane," "automatic weapon fire," and "an explosive device devastating enough to kill everyone in the group."[187] These are examples of extremely dangerous weapons that were designed with the purpose of killing a large group of people. Since it is this language upon which the entire kill zone theory is based, one would reasonably infer that the doctrine is only meant to apply to cases where the defendant attempts to inflict mass destruction in order to ensure their target is killed.

However, the California courts made clear very early on with *Bland* and *Vang* that the use of a gun was sufficient to create a zone of fatal harm. In *Vang*, the defendants used an AK series assault rifle (automatic weapon) and a shotgun (semiautomatic weapon).[188] In *Bland*, the defendant used a .38-caliber handgun (semiautomatic weapon).[189] Given the variety of guns used in these cases, future courts have never questioned that the use of any type of gun could imply the defendant sought to create a kill zone.

While guns have generally been found to be weapons that can create a kill zone, courts have varied on how many shots fired it takes to create a zone of fatal harm.[190] *Ford* actually provides guidance on when the use of a gun would implicate the kill zone theory:

> When the defendant escalate[s] his mode of attack from a single bullet aimed at [the target]'s head to a hail of bullets or an explosive device the factfinder can infer that, whether or not the defendant succeeded in killing [the target], the defendant concurrently intended to kill everyone in [the target]'s immediate vicinity to ensure [the target]'s death.[191]

186. CALJIC, *supra* note 20, § 8.66.1 (2019) (brackets in original).

187. Ford v. State, 625 A.2d 984, 1000–01 (Md. 1993), *overruled in part by* Henry v. State, 19 A.3d 944 (Md. 2011).

188. People v. Vang, 104 Cal. Rptr. 2d 704, 706 (Ct. App. 2001).

189. People v. Bland, 48 P.3d 1107, 1110 (Cal. 2002).

190. *See* People v. Canizales, 442 P.3d 686, 669 (Cal. 2019) ("[T]he number of shots fired, although relevant to the inquiry, is not dispositive.").

191. *Ford*, 625 A.2d at 1001.

Given this explicit language, it is unclear why California courts have held that one bullet is enough when *Ford* noted that the mode of attack would have to be *escalated* from that single shot for the kill zone theory to apply.

The *Smith* court held firing a single shot into a car containing two people was enough to create a kill zone.[192] The holding in *Smith* suggests a single shot recklessly endangering multiple individuals is sufficient to uphold multiple attempted murder charges. However, in *Stone* and *Perez*, the court held a single shot fired at a group of people could only support one count of attempted murder.[193] These cases correctly apply the express malice standard in holding that a single shot is only indicative of a specific intent to kill one person.[194] Despite the fact that *Ford* is explicitly clear on this issue, disagreement in case law indicates that a single gunshot would be enough to convict someone under the kill zone theory so long as the argument was well made. As Judge Werdegar stated in his *Perez* concurrence, "prosecutors in future attempted murder cases can be expected to argue that multiple victims were positioned so that a single gunshot could have hit them all, even though evidence may be entirely lacking that the defendant's gunshot was objectively likely, or subjectively expected, to hit more than one person."[195]

The next step in the circumstantial evidence inquiry is to look at the proximity between the shooter and the potential victims, and the proximity between the alleged victims and the target. The standards for the appropriate distance vary widely. In creating the zone of fatal harm, courts have generally held that people occupying the same space as the primary target (such as a car or house) are considered to be within the zone; the exact physical distance between the alleged victims and the primary target seems to matter little in these scenarios.[196]

However, the distance between the shooter and the car or house does matter. In *Smith*, the court inferred that the defendant was one car length away from the car when he shot the gun.[197] The court found this distance coupled with the fact that the defendant shot into the vehicle directly in line with where the target and her baby were both seated were sufficient to support the attempted murder convictions.[198] In *Campos*, the defendant fired about a dozen bullets from his truck which was "only four or five feet" from the victims' car.[199] In *Canizales*, firing five shots was insufficient to justify two attempted murder charges because the shots

192. People v. Smith, 124 P.3d 730, 739 (Cal. 2005).

193. People v. Stone, 205 P.3d 272, 277 (Cal. 2009); People v. Perez, 234 P.3d 557, 559–60 (Cal. 2010).

194. But even so, others argue that when a defendant manifests the requisite intent as to each potential victim, "a count for each theoretical victim is proper irrespective of the practicalities of a single shot." Garza, *supra* note 174 at 931.

195. *Perez*, 234 P.3d at 567.

196. The exact distance between the shooters and alleged victims was never discussed. *See, e.g.*, *Smith*, 124 P.3d 730; People v. Bland, 48 P.3d 1107 (Cal. 2002); People v. Campos, 67 Cal. Rptr. 3d 904 (Ct. App. 2007); People v. Vang, 104 Cal. Rptr. 2d 704 (Ct. App. 2001).

197. *Smith*, 124 P.3d at 739.

198. *Id.* at 740.

199. *Campos*, 67 Cal. Rptr. 3d at 916.

were fired 100 to 160 feet away from Canizales's targets.[200] In *Perez*, firing a single bullet sixty feet from a car at a group of people who were standing less than fifteen feet apart was insufficient to sustain eight counts of attempted murder.[201] In *Rayford*, the court held that thirty-three feet is close enough to the potential victims to support a conviction under the kill zone theory.[202]

These cases leave us with a flawed range which allows a problematic amount of discretion to use in analyzing kill zone cases, and grey areas also exist because many cases don't discuss this factor at all. What is supposed to be a totality-of-the-circumstances analysis is rarely done fully in practice.[203]

2. "Primary Target"[204]

The primary target is the person whom the defendant specifically intends to kill.[205] However, courts have incorrectly found the primary target to be a victim who may have been injured by the shooting.[206] Even though it is clear that the primary target is supposed to be the person whom the defendant harbored specific intent to kill, prosecutors have assigned this role of primary target to whoever is most convenient so that their case fits within the definition of the kill zone theory.

The holding in *Stone* caused confusion as to when the kill zone theory could apply because it held that there does not need to be a specific target in mind. Although the court correctly held that the kill zone theory did not apply to the case, the discussion about needing only intent to kill *a* person rather than a *specific* person allowed future prosecutors significant leeway in using the kill zone theory. This has allowed prosecutors to use the theory of reckless endangerment, whereby shooting into a group of people could be construed as an intent to kill *a* person based on the idea that the shooter would know the action could cause *someone* to be killed. This is exactly what happened in *Rayford*.

Rayford and Glass were held responsible for eleven counts of attempted murder even though the person whom the evidence suggests was the primary target, Perry, was not present. The prosecution did not attempt to argue another person was the primary target, yet the decision was still affirmed.[207] In its decision, the appellate court guessed that in the absence of Perry, the primary target *could have*

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200. People v. Canizales, 442 P.3d 686, 700 (Cal. 2019).

201. People v. Perez, 234 P.3d 557, 559–60 (Cal. 2010).

202. *See Rayford I*, No. B179017, 2006 WL 1990962, at *6 (Cal. Ct. App. July 18, 2006) ("The manner in which the bullets were fired indicates an intent to harm everyone in the vicinity."); *see also Rayford II*, 264 Cal. Rptr. 3d 401 (Ct. App. 2020) (discussing how defendants were thirty-three feet from the house, a fact omitted in *Rayford I*).

203. *See, e.g.*, *Perez*, 234 P.3d 557; People v. Warner, 247 Cal. Rptr. 3d 809 (Ct. App.), *vacated and transferred*, 449 P.3d 347 (Cal. 2019); *Campos*, 67 Cal. Rptr. 3d 904; *Rayford I*, 2006 WL 1990962.

204. CALJIC, *supra* note 20, § 8.66.1 (2019).

205. *See Canizales*, 442 P.3d at 697–98.

206. *See, e.g.*, *Perez*, 234 P.3d 557; *Warner*, 247 Cal. Rptr. 3d 809; *Rayford I*, 2006 WL 1990962.

207. *Rayford I*, 2006 WL 1990962, at *7.

been Sheila, Terry, Donisha, or Shadonna.[208] By partaking in this guessing game, the court made clear that the prosecution failed to prove there was a primary target whom Rayford and Glass specifically intended to kill. The appellate court later corrected this error, reversing the attempted murder charges and holding that it was unclear from the evidence which of the group in front of the house were the primary targets.[209]

Unlike the trial court in *Rayford*, the court in *Adams* properly identified the primary target. In *Adams*, there was ample evidence that Soult was the primary target. The court addressed at length the history of the relationship between Soult and Adams and how Soult's concerning behavior led Adams to fear her.[210] Based off her testimony about the nature of their relationship and the testimony of people who knew them both, it was abundantly clear that Adams set fire to Soult's house to harm her. There was absolutely no question as to who the primary target was, and that the target was present.

The difference between the primary targets in *Rayford* and *Adams* highlights the confusion about how to determine if there was a kill zone. The intent to kill *a* person rather than a *specific* person as discussed in *Stone* could lead to mistakes like those made in *Rayford* where prosecutors are able to get away with designating someone as the primary target even though evidence supports that the primary target was in fact someone else. Although Glass's and Rayford's attempted murder charges were eventually overturned, there is no certainty that this outcome would occur in similar cases.

3. "Immediate Vicinity" and "Zone of Fatal Harm"[211]

"Immediate vicinity of the primary target" is vague, and courts have interpreted the term in several different ways over the doctrinal history of the kill zone theory. The most recent revision to CALJIC 8.66.1 attempted to narrow the meaning of immediate vicinity by calling it the zone of fatal harm, but even that wording lacks precision and leaves much to interpretation. It suggests that there must have been a real possibility that a person within the immediate vicinity of the primary target could have been killed as a result of the defendant trying to kill the primary target. Who is within the zone of fatal harm is entirely dependent on circumstantial evidence such as the type of weapon used and the physical distance between the perpetrators and potential victims.[212] The language of the jury instruction makes it clear that in order to create a zone fatal harm, the defendant must have used a lethal weapon.

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208. *Id.* at *6.
209. *Rayford II*, 264 Cal. Rptr. 3d 401, 424 (Ct. App. 2020).
210. People v. Adams, 86 Cal. Rptr. 3d 915, 919–21 (Ct. App. 2008).
211. CALJIC, *supra* note 20, § 8.66.1 (2019).
212. *Id.*

Cases such as *Bland*, *Smith*, *Vang*, and *Campos* have found that shooting at someone in a car means that everyone else within the car is in the immediate vicinity of the primary target.[213] Cases like *Adams* have found that if the defendant is trying to kill someone in a house by setting that house on fire, everyone within the house is within the immediate vicinity of the primary target.[214] *McCloud*, *Canizales*, *Stone*, and *Perez* all involved shootings at groups of people standing outside, neither in a car nor a building. Perhaps coincidentally, the court reversed the holdings in all of the shootings that did not take place in a car or building. *Stone* and *Perez* were reversed primarily because the defendant in each case only fired a single shot, and that single shot could not justify the use of the kill zone theory because it was indicative of attempt to murder only one person.[215] But the fact that shootings took place in a large area where several people were gathered was a substantial part of the totality-of-the-circumstances analysis in *McCloud* and *Canizales*.[216]

4. Express and Implied Malice[217]

Courts have confused express and implied malice since the inception of the kill zone theory. The inevitable conclusion of using implied malice to convict defendants of attempted murder is that reckless behavior gets punished like intentional misconduct. In particular, the courts in *Campos* and *Smith* both confused implied and express malice to come to their conclusions. In *Smith*, the court frequently used language indicating there was a *risk* that people within the zone of fatal harm would be killed but failed to make the important distinction that the defendant must have *intended* for it to be the case that everyone in the zone died in order to kill the primary target.[218] Misspeaking in this way permits defendants to be found guilty under a theory of implied malice and wanton recklessness despite the fact that this is prohibited for attempted murder charges and inconsistent with the rationale of kill zone law.

In *Campos*, the court's description of proper use of the kill zone theory provides a clear indication of the blurred line between express and implied malice:

> A defendant who shoots into a crowd of people with the *desire to kill anyone he happens to hit*, but not everyone, surely has *the specific intent to kill whomever he hits*, as each person in the group is at risk of death due to *the shooter's indifference as to who is his victim*.[219]

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213. *See supra* Sections I.C.1, I.C.2, I.C.3.a, I.C.5.a.

214. *See supra* Section I.C.5.b.

215. People v. Perez, 234 P.3d 557, 563–65 (Cal. 2010); People v. Stone, 205 P.3d 272, 276–77 (Cal. 2009).

216. People v. Canizales, 442 P.3d 686, 700 (Cal. 2019); People v. McCloud, 149 Cal. Rptr. 3d 902, 912–13 (Ct. App. 2012).

217. *See supra* Section II.B.

218. People v. Smith, 124 P.3d 730, 736 (Cal. 2005).

219. People v. Campos, 67 Cal. Rptr. 3d 904, 916 (Ct. App. 2007) (emphasis added).

The italicized phrases include language which mirrors implied malice; the court describes nothing more than a conscious disregard for human life. Because of this deeply flawed understanding, the court upheld the defendant's attempted murder conviction.

In *Warner*, the court took an extra step by extending the kill zone theory to voluntary manslaughter. Voluntary manslaughter is defined as "the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion."[220] While voluntary manslaughter does contain an element of specific intent to kill, it does not contain the same malice component that attempted murder does.[221] Furthermore, the provoker must be the target of an attempted murder charge for voluntary manslaughter to be appropriate. Here, the kill zone theory was used to charge attempted voluntary manslaughter when the target was not the person who provoked the defendant.[222] The prosecutor used the kill zone theory to convict Warner on an additional charge and ensure the defendant was punished for the reckless shooting.[223]

In cases like *Smith*, *Campos*, and *Warner*, the courts ignored the two-step test articulated in CALJIC 8.66.1[224] and upheld convictions based on reckless or dangerous behavior that did not indicate a desire to kill a specific target nor anyone near that target. While courts have tried to narrow the language to clarify what is necessary for a jury to find that the defendant indeed intended to and did create a kill zone, there remains a lack of limits regarding what the courts find to be permissible.

C. Redundancy

Although transferred intent and wanton recklessness cannot be substitutes for the kill zone theory, the doctrine of conditional intent, assessing specific attempt as to each victim, and adding charges other than attempted murder could fill the doctrinal gap articulated in *Bland*. Because these three suggested substitutes capture the spirit of the kill zone theory, there is no actual need for the kill zone theory.

Using the language of conditional intent could help clarify what jurors should look for in kill zone cases. Conditional intent lines up well with the bomb-on-a-plane example given in *Ford* and would likely result in less misapplication of the kill zone theory. The entire point of the kill zone theory is that

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220. 1 WITKIN & EPSTEIN, *supra* note 155, § 224.

221. "Murder generally requires an intent to kill; manslaughter does not. Manslaughter is, instead, 'the unlawful killing of a human being without malice.'" *Id.* § 226 (citing CAL. PENAL CODE § 192 (West 2015).

222. People v. Warner, 247 Cal. Rptr. 3d 809, 811 (Ct. App.), *vacated and transferred*, 449 P.3d 347 (Cal. 2019).

223. *Id.*

224. For the kill zone theory to apply, the evidence must show: "1. The perpetrator intended to create a [zone of fatal harm] [kill zone] around the primary target; . . . and 2. The alleged attempted murder victim[s] who [was] [were] not the primary target[s] [was] [were] located within the [zone of fatal harm.] [kill zone.]" CALJIC, *supra* note 20, § 8.66.1 (2019).

the defendant *specifically intended to kill everyone in proximity to the primary target in order to kill the primary target*. Like conditional intent, this indicates that "death is more than merely foreseeable" and is part of a deliberate plan to kill if necessary.[225] The standard for carjacking cases, if used to limit the kill zone theory, would aid to eliminate any confusion about the mental state for attempted murder under the kill zone theory. Adapting the federal carjacking statute language to the kill zone theory, the intent requirement would be that when the defendant attempted to kill the primary target, he or she possessed the conditional intent to seriously harm or kill the individuals around the primary target if necessary to ensure the death of the primary target. This line of thinking is much more in line with the purpose for the kill zone theory as outlined in *Ford*.[226] The language of conditional intent could be most applicable in cases where someone was actually killed. For example, if someone threw a grenade and four people were killed, a court might properly conclude there was an attempt to murder the twelve people in the surrounding area because death for those nearby was "more than merely foreseeable." Although conditional intent captures the spirit of the kill zone theory and would provide a clearer standard for assessing liability, proponents of the kill zone theory may be reluctant to adopt it because it would be more difficult to prove and could result in fewer attempted murder cases and thus less punishment.

Although the law review articles discussed above would lead one to believe that the kill zone theory is absolutely necessary to ensure defendants do not escape appropriate punishment, they fail to recognize that simply going through the steps of finding specific intent for each potential victim is the fairest way to determine whether the defendant should be charged with attempted murder. Since *Bland* brought the kill zone theory to California, courts have consistently reiterated that "[t]o be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim."[227] Because the kill zone theory fails to examine intent with regard to each victim, it appears to exist for no other reason than to increase punishments. It would be more effective if jurors simply examined whether the defendant specifically intended to kill each alleged victim.

Additionally, there are other charges prosecutors could add that would capture the endangerment that courts are concerned about more appropriately than attempted murder charges. In cases like *Bland*, *Campos*, *Canizales*, and *Smith* where the shooter either shot at a house or car, the prosecutor could have added a shooting at an inhabited dwelling or shooting at an occupied motor vehicle charge.[228] This charge is a wobbler, meaning it could either be charged as a misdemeanor or a felony. If charged as a felony, the punishment would be "imprisonment in the state

225. *The Supreme Court, 1998 Term–Leading Cases*, *supra* note 52, at 380.

226. *See* Ford v. State, 625 A.2d 984, 1000–01 (Md. 1993), *overruled in part by* Henry v. State, 19 A.3d 944 (Md. 2011).

227. People v. Bland, 48 P.3d 1107, 1117 (Cal. 2002).

228. CAL. PENAL CODE § 246 (West 1988).

prison for three, five, or seven years."[229] If the prosecutor did not have the evidence to secure an attempted murder conviction, there is still a possibility that the defendant could go to prison for an additional three to seven years, which is still a significant amount of time and more consistent with the legislative intent of such endangerment charges. If convicted of these other charges, there is no way a prosecutor could argue the defendants were evading punishment.

D. Prosecutorial Overreach

Prosecutors trying to lock away known gang members for as long as possible have the kill zone theory at their disposal whenever a shooting at a group is involved. In cases like *Canizales* and *McCloud*, use of the kill zone theory led to life sentences.[230] Many defendants suffer life-altering consequences from prosecutors using the kill zone theory merely to get harsher sentences.

Prosecutors can take advantage of the malleable language of the kill zone jury instruction and fit it to the facts of their case. Most often, prosecutors use the kill zone theory to add on more charges and secure longer sentences for defendants. Prosecutors tend to use the kill zone theory when their arguments for proving specific intent for the attempted murder of each alleged victim are weak. The kill zone theory allows prosecutors to assert that a much wider range of people were targeted by the defendant. Because the language of the kill zone theory jury instruction imposes few limitations, prosecutors have the freedom to make the kill zone theory work for them and can make facts in varying scenarios fit the definition.

The easiest way to get this point across is by arguing that there was some kind of gang warfare occurring. *Bland* and its discussion of *Vang* set a precedent for using the kill zone theory on gang-related shootings.[231] The kill zone theory lends itself well to gang cases based on the idea that gangs most often shoot at other gangs. If gang member *A* intends to kill rival gang member *B*, and rival gang members *C* and *D* are in the vicinity of gang member *B*, it is easy to make the assumption that gang member *A* would have been fine with killing rival gang members *C* and *D* if it meant they would successfully kill gang member *B*. Even jurors who know very little about the realities of gang violence likely know that the Bloods hate the Crips and could make the inference that animosity between gangs means gang member *A* is willing to kill rival gang members *B*, *C*, and *D*. Invoking gang membership makes the kill zone theory more plausible to a jury and draws on the belief that gang members are indiscriminate killers. As such, it is no coincidence that most kill zone

229. *Id.*

230. People v. Canizales, 168 Cal. Rptr. 3d 625, 626 (Ct. App.), *review pending*, 326 P.3d 977 (Cal. 2014); People v. McCloud, 149 Cal. Rptr. 3d 902, 905 (Ct. App. 2012)

231. *Bland*, 48 P.3d at 1118–19.

cases involve gang activity. Of the cases discussed in this Note alone, the majority focus on gang activity to some extent.[232]

Evidence of gang membership is highly prejudicial and "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged."[233] Even where gang membership is relevant (if gang evidence is relevant to intent, motive, or identity, for example), there is still a significant risk that any mention of gang involvement will prejudice the jury and increase the likelihood of a guilty verdict.[234] Because law enforcement officials are often called to testify as to who is in a gang, "[i]t is difficult to know to what extent gang affiliation results from police attribution and how much from actual individual behavior," particularly in cases where law enforcement officials use race as a defining characteristic of gang membership.[235] When race is used to profile a gang member, "it is hardly surprising that law enforcement focused on gang members results in the prosecution of disproportionately high numbers of those whose race is used to define the category."[236]

In *Rayford*, the prosecutor's argument conveyed to the jury that the argument between Glass and Perry was gang related.[237] The prosecution heavily relied on evidence that Glass and Rayford, two Black teenagers, were in a gang to secure their attempted murder convictions.[238] A detective testified that Glass and Rayford were in a gang simply upon his general knowledge of gangs, without any substantial evidence outside that of the charged offenses.[239] The appellate court reversed the gang enhancements, ruling there was insufficient evidence that Glass and Rayford were gang members.[240] Because the prosecutor's entire theory was that Rayford and Glass specifically intended to kill someone due to a gang-related dispute, the requisite intent falls apart when the court concludes that they were not gang members.[241] The prosecution wrongly relied on the idea that the two boys were

232. *See generally* People v. Canizales, 442 P.3d 686 (Cal. 2019); People v. Perez, 234 P.3d 557 (Cal. 2010); *Bland*, 48 P.3d 1107; People v. Stone, 205 P.3d 272 (Cal. 2009); *McCloud*, 149 Cal. Rptr. 3d 902; People v. Campos, 67 Cal. Rptr. 3d 904 (Ct. App. 2007); *Rayford I*, No. B179017, 2006 WL 1990962 (Cal. Ct. App. July 18, 2006).

233. 21 CAL. JUR. 3D *Criminal Law: Trial* § 525 (2020); *see also* People v. Williams, 940 P.2d 710 (Cal. 1997).

234. *See* Mitchell Eisen, Brenna Dotson & Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE 2, 14–15 (2014) (discussing the results of a study which found jurors are more likely to vote guilty in cases where gang evidence is presented).

235. Donna Coker, *Forward: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 854 (2003).

236. *Id.* at 855.

237. *See Rayford I*, No. B179017, 2006 WL 1990962, at *3–4, *9–11 (Cal. Ct. App. July 18, 2006).

238. *Id.* at *3.

239. *Id.* at *10.

240. *Id.* at *9.

241. *See id.* at *3–4, *9–11.

gang members and leaned on the detective's testimony to convince the jury that the kill zone theory applied in this case.

The prosecutor in *Canizales* also used gang-related evidence to secure convictions. Here, the prosecutor used the same argument that because the individuals were rival gang members, there was a motive for the shooting because the defendants were "trying to kill Hustla Squad."[242] The court found that the jury questions and prosecutor's closing argument suggested that in relying on the kill zone theory, "the jury found that defendants created a zone of fatal harm in which they intended all persons would be killed for the benefit of the gang."[243] Evidently, using the kill zone theory and relying on gang-related evidence communicates to the jury that specific intent to kill one gang member extends to specific intent to kill all members of that rival gang.

In relying on gang evidence to secure higher conviction rates and longer sentences, prosecutors exploit the confusing language of the kill zone jury instruction. It is easy to prey upon juror confusion and false assumptions about gang members in these cases to make it so the defendant can be convicted of attempted murder despite weak evidence of requisite specific intent. People of color face a particular danger in this practice, as they are more likely to be arbitrarily labeled as gang members.[244] Although the courts believe it to fill a doctrinal gap, the kill zone theory functions more as a tool to secure convictions when evidence is lacking.

III. SOLUTIONS

There is no reason for the kill zone theory to exist. Consider once again the bomb-on-a-plane example from *Ford*: if an assailant places a bomb on a commercial airplane, there is obvious intent to kill every person on board in order to kill the primary target. Even if the bomb did not go off, a reasonable jury could apply the attempted murder statute to find that specific intent existed to kill each person on the plane; the kill zone theory is not necessary for a jury to come to this conclusion. Likewise, the application of the attempted murder statute to the example in *Ford* where the assailant fired a hail of bullets at two people in order to kill the primary target would yield the same result. Neither scenario actually requires the use of the kill zone theory to get to the outcome desired by the court. The *Bland* court was wrong; there was no doctrinal gap the kill zone theory needed to fill. *Bland* simply eased the path to conviction.

To avoid the issues posed by the kill zone theory, I propose three solutions, all of which require the abolition of the kill zone theory jury instruction:

1. Analyze specific intent as to each person who was within the zone of fatal harm;

242. People v. Canizales, 442 P.3d 686, 704 (Cal. 2019).
243. *Id.* at 705.
244. Coker, *supra* note 235, at 854–55.

2. Apply the doctrine of conditional intent to attempted murder cases involving groups of people; and/or

3. Replace attempted murder with lesser charges to ensure that defendants do not completely escape liability for reckless behavior.

The formula for finding specific intent in an attempted murder case is so simple that surely a jury would see through any prosecutor's twisting of the narrative. Although slightly more time consuming, forcing a prosecutor to go through the steps of proving specific intent to kill each person would certainly result in fewer attempted murder charges, fewer attempted murder convictions on scant evidence, and fewer lengthy sentences for defendants.

Prosecuting attempted murder in a kill zone case using conditional intent would require a greater showing of evidence that there was a deliberate and willful plan to kill everyone in the vicinity of the primary target if doing so was necessary to ensure the primary target was killed. Prosecutors would certainly have a more difficult time proving their case under this theory. However, this is not a recommendation that the legislature incorporate the key language from the federal carjacking statute to the kill zone jury instruction. A new statute or another amendment to the language of the jury instruction would do no good because *Bland* fundamentally misunderstood the need for the kill zone theory in the first place. This is merely to say that using the language of the doctrine of conditional intent could heighten the burden of proof for attempted murder in a case where the kill zone theory would have previously applied.

Charging the defendant with lower-level crimes would solve the issue of avoiding culpability that *Bland* was so concerned about. By replacing attempted murder with charges that would still result in felony convictions and prison time, judges could ensure that defendants would not be getting away with dangerous and reckless behavior. A felony conviction of any sort has substantial consequences, and prison time of any length is still significant punishment. While convictions on such charges may fall short of the punishment prosecutors or courts would prefer, the charges would better reflect the culpability for recklessness that the legislature intended.

To demonstrate the efficacy of these proposed solutions, this Part will use tables to illustrate how each previously discussed case could have come out differently if the court had analyzed specific intent for attempted murder as to each person, analyzed whether there was a deliberate or willful plan to kill everyone in the vicinity of the primary target, and replaced attempted murder with lesser charges. This Part will then illustrate how such changes would have affected the number of years each defendant received. Overall, this analysis will demonstrate that the kill zone theory is not necessary and that there are more just options for courts to take advantage of.

A. Table 1: Different Methods of Analysis

The table below lists each case and how the outcomes would differ if the court (1) analyzed specific intent for each potential victim, (2) utilized the deliberate and willful plan language from the federal carjacking statute, and (3) replaced attempted murder with lesser charges.

Table 1. Different methods of analysis

Case	**Specific intent as to each potential victim**	**Deliberate and willful plan**	**Lesser charges**
Bland	Wilson: rival gang member. Bland said "[s]o you Kebo from 20's" before he started firing.[245] Morgan: not gang member, friend of Wilson.[246] Simon: not gang member, friend of Wilson.[247] Wilson was the intended target; there is no evidence presented which suggests Bland intended to kill Morgan or Simon.[248]	No evidence of a deliberate plan to kill anyone but Wilson. It was merely foreseeable that the other passengers in the car would be endangered by firing a gun into the car.	Cal. Penal Code § 245(a)(2): assault with a firearm (two counts).[249] Cal. Penal Code § 246: shooting into an occupied vehicle (one count).[250]

245. People v. Bland, 48 P.3d 1107, 1110 (Cal. 2002).

246. *Id.*

247. *Id.*

248. *Id.* at 1119.

249. CAL. PENAL CODE § 245(a)(2) (West 2012) ("Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year . . . .").

250. CAL. PENAL CODE § 246 (West 1988) ("Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, [or] occupied motor vehicle . . . is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year.").

Table 1 (continued)

Case	**Specific intent as to each potential victim**	**Deliberate and willful plan**	**Lesser charges**
Smith	Karen: conversation between defendant and Karen had rude/ threatening tone.[251] Last time they spoke, defendant said he would "slap the shit out of [her]."[252] Baby: unclear whether defendant knew baby was in the car. Karen was the intended target; lack of evidence indicating Smith specifically intended to kill the baby.	No evidence of a deliberate plan to kill anyone in the car aside from Karen. It was merely foreseeable that the other passengers in the car would be endangered by firing a gun into the car.	These charges were stayed pursuant to Cal. Penal Code § 645:[253] Cal. Penal Code § 245(a)(2): assault with a firearm (one count).[254] Cal. Penal Code § 246: shooting into an occupied vehicle (one count).[255] Cal. Penal Code § 273a subd. (a): child endangerment (one count).[256]

251. People v. Smith, 124 P.3d 730, 733 (Cal. 2005).
252. *Id.*
253. *Id.* at 747.
254. PENAL § 245.
255. PENAL § 246.
256. CAL. PENAL CODE § 273a(a) (West 1997) ("Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . . shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.").

Table 1 (continued)

Case	Specific intent as to each potential victim	Deliberate and willful plan	Lesser charges
Campos	Madden: had a prior dispute with Campos, was hit by six bullets, and was in the passenger side backseat of the car where Campos was aiming.[257] House: driver of car; shot in the head, lower back, and right arm.[258] Rodriguez: was in the front passenger seat of the car; shot in left arm, left side, and right ankle.[259] Madden was the intended target; lack of evidence indicating Campos specifically intended to kill House and Rodriguez.	No evidence of a deliberate plan to kill anyone but Madden. It was merely foreseeable that the other passengers in the car would be endangered by firing a gun into the car.	Cal. Penal Code § 245(a)(2): assault with a firearm (one count).[260] Cal. Penal Code § 246: shooting into an occupied vehicle (one count).[261] Cal. Penal Code § 26100(c): discharge of a firearm from a motor vehicle (one count).[262]
Adams	Soult: had been harassing Adams and saying rude things to her because Adams stole her boyfriend.[263] Other three people in the house: Adams claims she did not know anybody lived in that house except for Soult.[264] Soult was undoubtedly the intended target. Lack of evidence indicating Adams specifically intended to kill anyone but Soult.	No evidence of a deliberate plan to kill anyone but Soult. It was foreseeable that setting a house on fire would kill any other person inside of it.[265]	Nothing to add to what was charged.

257. People v. Campos, 67 Cal. Rptr. 3d 904, 907–08 (Ct. App. 2007).
258. *Id.*
259. *Id.*
260. CAL. PENAL CODE § 245 (West 2012).
261. CAL. PENAL CODE § 246 (West 1988).
262. CAL. PENAL CODE § 26100(c) (West 2012) ("Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five, or seven years.").
263. People v. Adams, 86 Cal. Rptr. 3d 915, 920–22 (Ct. App. 2008).
264. *Id.* at 922.
265. *Id.* at 924–25.

Table 1 (continued)

Case	Specific intent as to each potential victim	Deliberate and willful plan	Lesser charges
Stone	Joel F.: Norteno gang member; part of group of ten; testified he did not think the gun was aimed at anyone in particular.[266] Lack of evidence indicating Stone had a primary target.	No evidence of a deliberate plan to kill anyone in particular.	Cal. Penal Code § 245(a)(2): assault with a firearm (one count).[267] Cal. Penal Code § 26100(c): discharge of a firearm from a motor vehicle (one count).[268]
Perez	Civilian: evidence indicated that defendant believed he was shooting at rival gang members in dimly lit parking lot.[269] Seven police officers: one officer hit in the hand.[270] Lack of evidence indicating Perez specifically intended to kill any of the peace officers. Perez's primary target was vaguely rival gang members.	Because there was only one shot fired, there was no evidence of a deliberate and willful plan to kill more than one person in the group. It was merely foreseeable that anyone in the area where the shot was fired could have been killed.	Nothing to add to what was charged.
McCloud	At most, evidence might support inference that defendants targeted the individual who punched Stringer, but there is no evidence that the defendants intended to kill all forty-six people at the party.[271]	No evidence that defendants had a deliberate and willful plan to kill all forty-six people at the party, particularly because they fired ten bullets. It was merely foreseeable that firing a gun during a party would endanger others.	Cal. Penal Code § 246: shooting into an occupied building (one count).[272]

266. People v. Stone, 205 P.3d 272, 274 (Cal. 2009).
267. CAL. PENAL CODE § 245 (West 2012).
268. CAL. PENAL CODE § 26100 (West 2012).
269. People v. Perez, 234 P.3d 557, 559 (Cal. 2010).
270. *Id.*
271. People v. McCloud, 149 Cal. Rptr. 3d 902, 916 (Ct. App. 2012).
272. CAL. PENAL CODE § 246 (West 1988).

Table 1 (continued)

Case	Specific intent as to each potential victim	Deliberate and willful plan	Lesser charges
Canizales	Pride: rival gang member; argument between Pride and Canizales over Canizales's female companion.[273] Bolden heard Windfield point out Pride to Canizales before shots were fired.[274] Bolden: Canizales tried to challenge Bolden to fight, and Bolden felt disrespected by Canizales.[275] Evidence points to Pride being the primary target of the shooting. Lack of evidence indicating Canizales specifically intended to kill Bolden. Appellate court correctly recognized this.	No evidence that there was a deliberate and willful plan to kill Bolden, but there was evidence of a plan to kill Pride. Plan evidenced by fact that Canizales, Windfield, and three or four of their friends got out of a car and showed up near Pride's apartment.[276]	Cal. Penal Code § 245(a)(2): assault with a firearm (one count).[277]
Warner	N.C.: innocent bystander who Warner did not know.[278] Smith: Warner shot at Smith, who had attacked him a few weeks earlier.[279] N.C. testified that she saw Warner "standing at Smith's feet, shooting at Smith in the chest area as he lay on the ground."[280] Smith was the primary target. There is no evidence that Warner intended to kill N.C.; she was merely a bystander.	There is evidence of a deliberate plan to kill Smith, but no evidence of a plan to kill N.C. It was merely foreseeable that an innocent bystander (in this case, N.C.) could be injured as a result of shooting in a crowded bar.	Cal. Penal Code § 246: shooting into an occupied building (one count).

273. People v. Canizales, 442 P.3d 686, 691 (Cal. 2019).
274. *Id.* at 692.
275. *Id.* at 691.
276. *Id.* at 692.
277. CAL. PENAL CODE § 245 (West 2012).
278. People v. Warner, 247 Cal. Rptr. 3d 809, 811 (Ct. App.), *vacated and transferred*, 449 P.3d 347 (Cal. 2019).
279. *Id.*
280. *Id.* at 812.

Table 1 (continued)

Case	Specific intent as to each potential victim	Deliberate and willful plan	Lesser charges
Rayford	Perry: Glass had a fight with Perry earlier that day and indicated that he wanted to fight him.[281] Evidence points to Perry being the primary target. There is no evidence of specific intent to harm anyone else.	The evidence only pointed to a deliberate and willful plan for Glass to have a fistfight with Perry.[282] No evidence suggested there was any sort of plan to shoot Perry or anyone else at the Lair house. It was merely foreseeable that shooting a gun in a crowd of people would potentially cause death or injury.	Cal. Penal Code § 245(a)(2): assault with a firearm (two counts).[283] Cal. Penal Code § 246: shooting at an inhabited dwelling (one count).[284]

B. Table 2: Sentencing

The following table lists (1) the original sentence for each defendant in each case, (2) what the sentence would be without extra attempted murder charges, and (3) what the sentence would be without extra attempted murder charges and with the proposed lesser charges from Table 1.

Table 2. Sentencing

Case	Defendant	Original sentence	Sentence without extra attempted murder charges	Sentence without extra attempted murder charges & with proposed lesser charges
Bland	Bland	205 years to life[285]	95 years to life	107–115 years to life
Smith	Smith	27 years to life[286]	27 years to life	27 years to life
Smith†	Smith	54 years to life	27 years to life	34–44 years to life
Campos	Campos	Life without parole ("LWOP") + 32 years to life[287]	LWOP	LWOP + 11–25 years

281. *Rayford I*, No. B179017, 2006 WL 1990962, at *2 (Cal. Ct. App. July 18, 2006).

282. *See id.*

283. CAL. PENAL CODE § 245 (West 2012).

284. CAL. PENAL CODE § 246 (West 1988).

285. People v. Bland, No. B140775, 2002 WL 31769369, at *5 (Cal. Ct. App. Dec. 11, 2002).

286. Smith was sentenced to twenty-seven years in prison for the attempted murder of Karen to be served concurrently with an identical term for the attempted murder of the baby; the court stayed sentencing on shooting at an occupied vehicle, child endangerment, and assault with a firearm pursuant to section 654 of the California Penal Code. People v. Smith, 124 P.3d 730, 734 (Cal. 2005).

287. People v. Campos, 67 Cal. Rptr. 3d 904, 906 (Ct. App. 2007).

Table 2 (continued)

Case	Defendant	Original sentence	Sentence without extra attempted murder charges	Sentence without extra attempted murder charges & with proposed lesser charges
Adams	Adams	LWOP × 4[288]	LWOP × 1	LWOP × 1
Stone	Stone	46 years to life[289]	46 years to life	52–60 years to life[290]
Perez	Perez	40 years to life[291]	40 years to life[292]	40 years to life
Perez†	Perez	203–246 years to life[293]	73–116 years to life	73–116 years to life
McCloud	McCloud	202 years to life[294]	99 years to life	101–103 years to life
McCloud	Stringer	198 years to life[295]	80 years to life	82–84 years to life
Canizales	Canizales	55 years to life[296]	25 years to life	27–29 years to life

288. Adams was charged with one count of first-degree murder, one count of arson, and three counts of attempted murder. She was sentenced to four terms of life without the possibility of parole for the murder and the three attempted murder charges, to run concurrently. People v. Adams, 86 Cal. Rptr. 3d 915, 916–17 (Ct. App. 2008).

289. Stone was charged with one count of attempted murder with gang and firearm enhancements and sentenced to an indeterminate term of fifteen years to life; plus a determinate term of ten years on the attempted murder conviction, with gang and firearm enhancements; and three to seven consecutive years to life terms on convictions for attempting to dissuade witnesses, with a gang enhancement. People v. Stone, 73 Cal. Rptr. 3d 180, 181 (Ct. App. 2008), *rev'd*, 205 P.3d 272 (Cal. 2009).

290. The attempted murder charge in this case was proper. Additional charges are listed to demonstrate how much of a difference lesser recklessness charges can make in sentencing.

291. People v. Perez, 234 P.3d 557, 560 (Cal. 2010) ("Defendant was sentenced on one count of premeditated attempted murder . . . to [fifteen] years to life, plus an enhancement of [twenty-five] years to life for personal use of a firearm causing great bodily injury. Sentences on the remaining attempted murder convictions were imposed to run concurrently, and sentences on the convictions of assault with a semiautomatic firearm on a peace officer, as well as all remaining firearm use enhancements, were imposed but stayed pursuant to section 654, for an aggregate prison term of [forty] years to life.").

292. Because several charges were stayed, the sentence would have remained the same, but he would have been convicted of only one count of attempted murder instead of eight.

293. Sentences were calculated as if charges ran consecutively rather than concurrently.

294. McCloud was originally sentenced to 202 years to life in state prison: fifteen years to life for the first count of second-degree murder plus twenty-five to life for the firearm allegations, an identical sentence for the second count of second-degree murder, seventeen years for the attempted murder of Ryan Gaines, and "one-third of the midterm of three years, plus [sixteen] months for the personal use of a firearm allegation . . . as to each of the remaining [forty-five] counts, with all sentences to run consecutively." People v. McCloud, 149 Cal. Rptr. 3d 902, 905–06 (Ct. App. 2012).

295. Stringer was originally sentenced to 198 years to life in state prison: fifteen years to life for the first count of second-degree murder plus three years for the principal armed allegation; an identical sentence for the second count of second-degree murder; twelve years for the attempted murder of Ryan Gaines; and "[twenty-eight] months . . . plus [twelve] months for the principal armed allegation, for each of the remaining [forty-five] counts, with all sentences to run consecutively." *Id.*

296. Windfield and Canizales were found guilty of the first-degree murder of Cooksey, who was in the vicinity of Pride and Bolden during the shooting, and were also found guilty of the attempted murders of Bolden and Pride. All charges were found to be committed for the benefit of a criminal street gang. People v. Canizales, 442 P.3d 686, 693 (Cal. 2019). Originally, Canizales was sentenced to

Table 2 (continued)

Case	**Defendant**	**Original sentence**	**Sentence without extra attempted murder charges**	**Sentence without extra attempted murder charges & with proposed lesser charges**
Canizales	Windfield	105 years to life[297]	95 to life	97–99 years to life
Warner	Warner	22 years[298]	22 years	25–29 years
*Warner**	Warner	27.5 years	22 years	25–29 years
Rayford	Rayford	Life sentence × 11[299]	0 years	7–15 years
Rayford	Glass	Life sentence × 11[300]	0 years	7–15 years

* *Case analyzed as if some charges were not stayed.*

† *Case analyzed as if the lesser charges were not stayed and other attempted murder charges did not run concurrently.*

Tables 1 and 2 work together to show just how drastically defendants' sentences would change as a result of eliminating attempted murder charges that cannot stand alone without the kill zone theory. Analyzing specific intent to each individual and applying a "deliberate and willful plan" standard in Table 1 reveals that in most cases, there was only one person the defendant specifically intended to kill and others nearby were close enough to the primary target that death or injury would be merely foreseeable.[301] Although courts may be concerned that this proposed way of analyzing kill zone cases would not confer adequate punishment, the recalculated sentences with lesser charges in Table 2 demonstrate that defendants would not evade punishment for their reckless behavior.

twenty-five years to life and two terms of fifteen years to life. People v. Canizales, 168 Cal. Rptr. 3d 625, 626 (Ct. App.), *review pending*, 326 P.3d 977 (Cal. 2014).

297. "Windfield was sentenced to two terms of [twenty-five] years to life and two terms of [fifteen] years to life plus [forty] years." *Canizales*, 168 Cal. Rptr. 3d at 626.

298. Warner was originally sentenced to twenty-two years in prison, calculated as follows: "nine years (upper term) for the assault, plus [ten] years for personal use of a firearm pursuant to Penal Code section 12022.5 subdivision (a), plus three consecutive years for the personal infliction of great bodily injury[,] [and][t]he trial court stayed the attempted voluntary manslaughter sentence of five years six months pursuant to Penal Code section 654." People v. Warner, 247 Cal. Rptr. 3d 809, 811 (Ct. App.), *vacated and transferred*, 449 P.3d 347 (Cal. 2019).

299. Rayford and Glass were found guilty of eleven counts of attempted murder with gang and firearm enhancements, and one count of shooting at an inhabited building. Both were sentenced to eleven life sentences for the attempted murders plus 220 years on the enhancements. The enhancements were set aside on appeal and both defendants' sentences were reduced to eleven consecutive life sentences. *Rayford I*, No. B179017, 2006 WL 1990962, at *1, *12 (Cal. Ct. App. July 18, 2006).

300. *Id.*

301. *See generally supra* Table 1.

C. Counterarguments

Those who oppose abolishing the kill zone theory claim doing so would unfairly decrease punishment and deterrence. In his comment condemning the court's decision in *Perez*, Andrew Garza claims prosecutorial and judicial discretion mitigate any concerns about disproportionate punishment.[302] In their respective articles discussing the kill zone theory, Mitchell Keiter and Lt. Col. LeEllen Coacher and Captain Libby Gallo agree that the extension of liability in kill zone theory cases is warranted to deter crime and ensure that individuals are adequately punished.[303] However, reckless conduct of defendants has been misclassified as intent to kill using the kill zone theory. As previously demonstrated, the addition of lesser charges could mitigate escaping punishment. In many cases, these lesser charges were intended by the legislature to ensure people did not escape punishment for acting recklessly and endangering of others. These authors and those who share their opinions fail to recognize that punishment should fit the crime rather than allowing any one judge to create law based on their individual moral compass.

In some cases, the elimination of attempted murder charges based on the kill zone theory would result in no substantial difference in punishment. Because of other justifiable murder and attempted murder charges, and gang and firearm enhancements, the elimination of certain attempted murder charges in cases including *Bland*, *Campos*, *Adams*, *McCloud*, and *Canizales* (with respect to defendant Windfield) would have lessened the minimum sentence, but still would have resulted to life imprisonment for the defendants.[304] Even still, the fact that the minimum sentences in some of these cases would have been lessened is significant and reveals a deeper issue of oversentencing in kill zone cases. The sentences in *Bland*, *Adams*, and *McCloud* would have been lessened by over 100 years without superfluous kill zone charges. While it may not have mattered in these cases, such a drastic change could make a significant difference to other defendants and could mean the difference between life in prison and the opportunity to have a life after prison.[305]

Because of stayed and concurrent sentences in *Smith*, *Perez*, and *Warner*, any elimination of attempted murder charges would have resulted in no change in sentence.[306] However, when you look at how the sentences in these three cases would have changed when calculated without stayed charges and concurrent sentences, it is evident how much of a difference the elimination of additional attempted murder charges would make. Considering that not every court is going to run attempted murder charges concurrently or stay lesser charges in a kill zone

302. Garza, *supra* note 174, at 931.
303. Keiter, *supra* note 179, at 297; Coacher & Gallo, *supra* note 182, at 242.
304. *See generally supra* Table 2.
305. *Id.*
306. *Id.*

case, it is important to examine how these cases could have come out with a different judge.

In *Canizales* (with respect to defendant Canizales) and *Rayford*, the defendants would have received shorter sentences due to the elimination of superfluous attempted murder charges. When Canizales's attempted murder charges were reversed, he was resentenced to twenty-five years to life.[307] Adding time for the lesser charge of assault with a firearm would result in a sentence of twenty-seven to twenty-nine years to life. Similarly, if attempted murder charges were removed and replaced by lesser charges, Glass and Rayford would have been sentenced to seven to fifteen years in prison.[308] The argument that these defendants would escape punishment without the additional attempted murder charges is simply unfounded. While it is true that their sentences would be shorter, they would still serve substantial time for their reckless behavior. In fact, these shorter sentences better reflect the legislature's intent because these statutes were created for the purpose of punishing reckless and dangerous behavior. Lesser charges such as shooting at an occupied dwelling and assault with a firearm are intended to punish people for reckless behavior; attempted murder is a specific intent crime and is not intended to punish people for reckless behavior.[309]

The reality is that charging lesser offenses instead of attempted murder better reflects what the legislature considers to be adequate punishment. The kill zone theory is simply not needed to ensure that defendants are held culpable and punished fairly.

CONCLUSION

The kill zone theory is not necessary; it does nothing more than authorize conviction on attempted murder for situations which involved no more than wanton recklessness. The *Bland* court's desire to keep people who are lousy shots from escaping liability for endangering the lives of others makes it clear that the kill zone theory was not meant to fill a doctrinal gap but merely to increase punishment and secure convictions on weaker evidence. The use of the kill zone theory is

307. *Id.*

308. *Id.* On June 16, 2020, Glass's and Rayford's attempted murder sentences were vacated on appeal. *See Rayford II*, 264 Cal. Rptr. 3d 401, 424 n.22 (Ct. App. 2020). After months of waiting to be resentenced on the lesser included charge, Glass and Rayford were finally released from prison on October 30, 2020. On November 13, 2020, they were resentenced to seven years—the maximum felony sentence—for the shooting at an inhabited dwelling charge. They received time served for the remaining felony charge and do not have to do parole because of their prolonged imprisonment. Glass and Rayford continue to assert their innocence and seek complete exoneration on the remaining charge. For more information on Glass's and Rayford's innocence, see James Queally, *Two Black Men Sentenced to Life as Teens to be Freed. But Should L.A. County D.A. Have Reviewed Convictions Earlier?*, L.A. TIMES (Oct. 22, 2020, 5:00 AM), https://www.latimes.com/california/story/2020-10-22/rayford-glass-convictions-overturned [https://web.archive.org/web/20201107070600/https://www.latimes.com/california/story/2020-10-22/rayford-glass-convictions-overturned].

309. People v. Bland, 48 P.3d 1107, 1116 (Cal. 2002); LEVENSON & RICCIARDULLI, *supra* note 42; 40 AM. JUR. 2D, *supra* note 47.

particularly concerning because it allows substantial leeway for prosecutors to tailor their case to fit the theory. The kill zone theory encourages the jury to consider circumstantial evidence and make inferences about what the defendants did or did not specifically intend, allowing prosecutors the opportunity to twist the narrative to lead the jury to convict. Perhaps the court adopted the kill zone theory because they wanted prosecutors to have the ability to punish defendants for attempted murder under a lower burden of proof than attempted murder actually permits. But in easing prosecutors' path to conviction, courts have weakened protections against meritless attempted murder charges and endlessly long sentences.

In order to ensure defendants are held responsible for attempted murder, one only needs to assess specific intent as to each person and whether there was a deliberate and willful plan to kill several people in order to determine whether an attempted murder charge is truly necessary. If the attempted murder charge is not justified, lesser charges should be added to ensure that the defendant does not escape punishment for their reckless behavior.

The only just solution is to abolish the use of the kill zone theory in California and reevaluate the cases of those who have been convicted on the basis of this flawed doctrine.